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**Economic refugees: an analysis of persecution  
and cross-border displacement in the new global era**

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Gorret Kugonza and Shepherd Mutsvara, 'Psychosocial Support and Protection for Refugee and Host Communities in Uganda: A Needs Assessment' (2022) 35 *Afrika Focus* 5.

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## Contents

OŚWIADCZENIE/ DECLARATION .....	iii
OŚWIADCZENIE/ DECLARATION .....	iv
Dedication .....	x
Acknowledgements .....	xi
List of Figures and Tables .....	xii
List of Statutes.....	xiii
List of case-law .....	xv
List of Treaties and Other International Instruments .....	xvii
List of Abbreviations.....	xx
Abstract .....	1
Introduction .....	3
Setting the scene: A reflexive narrative .....	3
Barbarian societies and broken tools? .....	11
Delineating the scope of the research problem .....	13
Aim and research question .....	17
Methodology and Structure .....	22
PART 1.....	25
Sub-Saharan fiscal landscape: An appraisal of the effects of economic liberalization on refugee movement .....	25
Introduction to Part 1.....	25
<b>Chapter 1.....</b>	<b>33</b>
<b>Economic Liberalization and the impact on refugee movements in Africa.....</b>	<b>33</b>
1.1. Economic liberalisation: War by any other means?.....	33
1.2. Deregulation .....	44
1.3. Monopolies and restrictive trade practices.....	50
1.4. Devaluation, Disinvestment and Privatisation .....	55
1.5. Globalization .....	59
1.6. Agricultural reforms .....	65
1.6.1. Land tenure and rights.....	67
1.6.2. Conditionalties imposed by multilateral institutions (IMF and the World Bank) .....	69
1.6.3. The role of the African Continental Free Trade (AfCFTA).....	71
Conclusion.....	72
<b>Chapter 2.....</b>	<b>74</b>
<b>Research methodology, theoretical framework, process and production.....</b>	<b>74</b>
2.1. Introduction .....	74
2.2. Framing The Hypotheses: Applying The Hypothetical Deductive Method (H-D).....	75

<i>Step 1: Identifying the broad problem area in which main problem is occurring to do a research project.....</i>	<i>75</i>
<i>Step 2: Defining the problem statement. It can be the scientific research with definite aim and general objective of the research.....</i>	<i>76</i>
<i>Step 3: Development of hypothesis which should be testable and falsifiable.....</i>	<i>77</i>
<i>Step 4: Measuring the theoretical framework and if it is not measurable then it should be qualitative. ....</i>	<i>77</i>
<i>Step 5: Collection of data is based on quantitative and qualitative data. ....</i>	<i>77</i>
<i>Step 6: Analysis of data is done to check if the hypotheses generated were supported. ....</i>	<i>78</i>
<i>Step 7: Interpreting data for finding out the meaning of the results. ....</i>	<i>78</i>
2.3. Theoretical framework .....	79
2.3.1. Neo-classical theory of migration: macro and micro perspective.....	82
2.3.2. Historical structuralists theory .....	90
2.4. The research process: Data generating methods .....	98
2.4.1. Gaining field access .....	100
2.4.2. Ethical considerations .....	106
2.5. Data analysis .....	108
2.6. Conclusion.....	110
PART 2.....	112
The legal framework: Economic hardship as persecution in a contemporary world .....	112
Introduction .....	112
<b>Chapter 3.....</b>	<b>114</b>
<b>Current protection for economic refugees under international refugee and human rights law .....</b>	<b>114</b>
3.1. Who is a refugee? .....	114
3.1.1. What is “well-founded fear” of persecution? .....	115
3.1.2. Challenges of interpretation .....	117
3.1.3. What is persecution? .....	120
3.2. People on the move: understanding the blurred categories .....	123
3.3. Towards a new understanding of the plight of economic refugees .....	126
3.4. Economic refugees: the challenge we refuse to face.....	129
3.5. Scope of protection for economic refugees under human rights law .....	136
3.5.1. The principle of non-refoulement .....	137
3.5.2. Article 3 ECHR - the prohibition of torture and inhuman or degrading treatment....	139
(a) Possibility of inhumane treatment .....	141
(b) Objective updated sources on country of origin.....	142
(c) The absolute nature of art 3 ECHR prohibition .....	143
(d) Hardship and Discrimination .....	143

(e) Criterion for possible vulnerability to medical care.....	144
(f) Severe humanitarian conditions .....	146
3.6. Evaluation of regional systems and scope of protection .....	148
3.6.1. The African Union: the dynamics of the expanded OAU refugee definition .....	150
(a) Analysis of the 1969 OAU Convention's Refugee Definition .....	151
(i) Every person.....	151
(ii) External aggression.....	152
(iii) Occupation .....	152
(iv) Foreign domination .....	153
(v) Events seriously disturbing public order .....	153
(vi) Either a part or the whole country.....	153
(vii) Compelled to.....	154
(viii) In order to seek refuge in another place outside his country of origin or nationality.....	154
(b) The OAU Convention and socio-economic circumstances .....	154
(c) Conclusion .....	160
3.6.2. The European Union .....	160
(a) An overview of the Common European Asylum System and proposed reforms .....	160
(b) The Qualification Directive (QD recast) .....	165
3.7. Conclusion.....	168
<b>Chapter 4.....</b>	<b>170</b>
<b>Re-interpreting the refugee definition: the efficacy of a Framework Convention.....</b>	<b>170</b>
4.1. Introduction .....	170
4.2. What is a Framework Convention/Protocol? .....	173
4.2.1. Defining the concept .....	173
4.2.2. Elements of a Framework Convention.....	179
4.2.3. Legal Effect .....	180
4.3. The first proposal: <i>normR</i> (expanded refugee definition).....	187
4.4. Possible decisive and supportive reasons for accepting <i>normR</i> .....	188
4.5. Possible decisive and supportive reasons for rejecting <i>normR</i> .....	189
4.6. Refining the <i>normR</i> .....	192
4.7. The proposal: Framework Convention on an Expanded Refugee Definition .....	195
4.8. Concluding remarks .....	197
PART 3.....	198
Analysing Specific Challenges in Focus Countries .....	198
Introduction .....	198
<b>Chapter 5.....</b>	<b>201</b>
<b>Factors impacting on cross-border displacement: the case of Eritrea .....</b>	<b>201</b>

5.1. Eritrea: the land of the sea.....	201
5.2. Historical background .....	203
5.3. Eritrea: a State of Exception?.....	212
5.4. Eritrean economy: the eye of the storm .....	216
5.4.1. Macroeconomic Policy of 1994 .....	219
5.4.2. Impact of Autarky Policy .....	222
5.4.3. Impact of sanctions.....	226
5.5. To be or not to be a soldier.....	229
5.6. Conclusion.....	232
<b>Chapter 6.....</b>	<b>234</b>
<b>Refugee burden sharing mechanisms: the case of Uganda .....</b>	<b>234</b>
6.1. Introduction .....	234
6.2. Literature Review .....	238
6.2.1. The economic overview of Uganda .....	238
6.2.2. Uganda's refugee response plan.....	243
(a) <i>The Constitution</i> .....	243
(b) <i>The Refugees Act of 2006</i> .....	246
6.2.3. The Refugee Status Determination (RSD) process .....	248
(a) RSD for prima facie refugees .....	248
(b) Regular RSD determination.....	249
6.3. Research design and Methodology .....	250
6.4. Ethical Considerations.....	253
6.5. Limitations .....	253
6.6. Findings and discussion .....	254
6.6.1. Economic challenges.....	254
6.6.2. Secondary movements of refugees.....	259
6.6.3. Sharing the refugee burden .....	262
6.7. Conclusion.....	265
<b>Chapter 7.....</b>	<b>267</b>
<b>Conclusion: towards an inclusive refugee policy and protection.....</b>	<b>267</b>
7.1. Introduction .....	267
7.2. Summary of findings.....	268
7.2.1. Economic liberalization as a latent form of displacement .....	268
(a) Economic liberalization as war by any other means.....	268
(b) Economic liberalization as a bilateral consensual act.....	270
(c) Economic liberalization and the nexus to border security .....	271
7.2.2. Exclusion of economic refugees in international refugee law .....	272



Integrated Proposition 4 .....	274
7.2.3. The efficacy of the Framework Convention in broadening the refugee definition .....	276
a) Possible decisive and supportive reasons for accepting <i>normR</i> .....	278
b) Possible decisive and supportive reasons for rejecting <i>normR</i> .....	278
c) Redefining the proposed <i>normR</i> .....	279
7.2.4. Refugee Burden Sharing.....	281
7.3. Theoretical contributions.....	282
7.4. Considerations for future research .....	285
OŚWIADCZENIE / DECLARATION .....	287
OŚWIADCZENIE / DECLARATION .....	288
APPENDICES.....	289
Appendix 1: Interview Participation Form.....	289
Appendix 2: Interview Participation Form In Tigrinya language .....	290
Appendix 3: Interview Guide for Eritrean refugees .....	291
Appendix 4: Expert Interview Guide for Eritrea.....	293
Appendix 5: Expert Interview Guide for Uganda .....	295
Appendix 6: Focus Group Discussion Guide .....	296
Appendix 7: Online survey .....	297
Bibliography.....	300

## **Dedication**

To Julia, and our beautiful children: Anesu, Panashe & Tadiwa.

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## **List of Figures and Tables**

Figure 1: Writer's ZEP permit

Figure 2: GDP (current US\$) - Sub-Saharan Africa, European Union

Figure 3: Development of asylum applications from citizens from Eritrea 2000 to 2020

Figure 4: Uganda Immigration Statistics 1960-2015

Figure 5: Deregulation of the Energy Sector in Sub-Saharan Africa

Figure 6: Access to electricity in Africa

Figure 7: Refugee population by country or territory of asylum - European Union, Sub-Saharan Africa, United States, Australia, East Asia & Pacific

Figure 8: The H-D Model in the context of international refugee law

Figure 9: Google Ngram viewer of the term 'economic refugee'

Figure 10: Systematic literature review structure.

Figure 11: Top 20 refugee hosting countries

Figure 12: Map of Africa

Figure 13: Eritrea regional map

Figure 14: Eritrea's historical background (1890-2020)

Figure 15: Funnel analysis of the Eritrean economy

Figure 16: GDP for Uganda in comparison to Belgium, Poland, UK and Germany

Figure 17: Refugee houses in Rwamwanja settlement

Figure 18: Refugees in Buguta section cultivating land

Figure 19: Primary school in Rwamwanja refugee settlement

## **Tables**

Table 1: Focus Group Discussion Demographic Data Chart

Table 2: Organisations supporting refugees and their roles

Table 3: Elements of a Framework Convention

Table 4: Refugee population by location in Uganda

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## **List of Abbreviations**

ACODE- Advocates Coalition for Development and Environment

ADF- African Development Fund

ADRA- Adventist Development and Relief Agency

AfCFTA- African Continental Free Trade

AfDB- African Development Bank

APR- Asylum Procedure Regulation

ASEAN- Association of Southeast Asian Nations

AU- African Union

BMA- The British Military Administration

CARA- Control of Alien Refugees Act

CEAS- Common Asylum System

CeMIS, Antwerp - Centre for Migration and Intercultural Studies

DRC- Democratic Republic of Congo

ECF- Extended Credit Facility

ECHR- European Convention of Human Rights

ECOSOC- Economic and Social Council

ECRE- European Council on Refugees and Exiles

ECtHR- European Court of Human Rights

EFMP- Economic and Financial Management Program

ELF- The Eritrean Liberation Front

ENDF- Ethiopian National Defence Force

EPLF- Eritrean People's Liberation Front

FCPNM- Framework Convention for the Protection of National Minorities

FDI- Foreign Direct Investment

FGD- Focus Group Discussion

GDP- Gross Domestic Product

GoE- Government of Eritrea

HDI- Human Development Index

HIPCI- Heavily Indebted Poor Countries

ICCPR- International Covenant on Civil and Political Rights

IDA- International Development Association

IDPs- Internally Displaced Persons

IFAD- International Fund for Agricultural Development

IMF- International Monetary Fund

LDCs- Least Developed Countries

NEPAD- New Partnership for Africa's Development

NGOs- Non-Governmental Organisations

NRA- National Resistance Army

NRM- National Resistance Movement

MigrLaw- Migration Law Research Group

OAU- Organization of African Unity

OPM- Office of the Prime Minister

PFDJ- People's Front for Democracy and Justice

PPP- Purchasing Power Parity

QD- Qualification Directive

RCD- Conditions Directive

RRP- Ugandan Refugee Response Plan

RRPE- Economic Recovery and Rehabilitation Project

RSD- Refugee Status Determination

RSDO- Refugee Status Determination Officer

SAPs- Structural Adjustment Programmes

SDR- Special Drawing Rights

SLR- Systematic Literature Review

SSA- Sub-Saharan Africa

TPLF- Tigray People's Liberation Front

UN DESA- United Nations Department of Economic and Social Affairs

UN- United Nations

UNCTAD- United Nations Conference on Trade and Development

UNDP- United Nations Development Programme

UNHCR- United Nations High Commissioner for Refugees

UNRWA- United Nations Relief and Works Agency for Palestine Refugees in the Near East

UNSC- United Nations' Security Council

UPC- Uganda People's Congress

UPM- Ugandan Patriotic Movement

VCLT- Vienna Convention on the Law of Treaties

WFP- World Food Programme

WTO- World Bank, the World Trade Organization

WWII- World War II

ZEP- Zimbabwean Exemption Permit

ZSDP- Zimbabwe Special Dispensation Pe

## **Abstract**

This thesis draws on different disciplinary and methodological perspectives in order to tackle the complex and topical issue of persons fleeing their country of origin because of economic hardship. Considering the predicament of such persons has not been adequately addressed by the *Convention Relating to the Status of Refugees* of 1951 and its *Protocol* of 31 January 1967, whose definition of a refugee has been included in European Union asylum law, the main question for determination is: ‘how does/should international refugee law consider the situation of persons fleeing their country of origin due to economic hardship?’ This is situated in the context of increasing numbers of people moving within and beyond Africa as a result of economic deprivation that is systemic and the product of a coercive world order.

The question is answered by examining the latent effects of economic liberalization programmes on persecution and cross-border displacement in Sub-Saharan Africa. Using Eritrea (refugee sending country) and Uganda (refugee reception country) as prime case studies, the empirical claim is that economic liberalization has become a serious form of economic persecution which Refugee Status Determination Officers (RSDO’s) should consider when assessing asylum claims. ‘Economic refugees’ are not only labelled as undeserving, but also not entitled to legal protection as refugees and yet most refugees and asylum seekers hail from countries where economic failure, political instability, poverty, and persecution are indissolubly linked. The hesitancy in international refugee law and practice to consider other forms of harm is further complicated by the blurred lines between the categories of migrants, asylum seekers and refugees. The study thus employs a multivariate approach in coming up with guidelines for the United Nations High Commissioner for Refugees (UNHCR) on refugees fleeing economic hardship. Further guidance is provided as to how the principles of burden sharing can be explored as a way of determining an economic policy which makes refugee camps economically viable.

## Abstrakt

Niniejsza rozprawa opiera się na różnych perspektywach dyscyplinarnych i metodologicznych w celu rozwiązania złożonej i aktualnej kwestii osób uciekających z kraju pochodzenia z powodu trudności ekonomicznych. Biorąc pod uwagę, że trudna sytuacja takich osób nie została odpowiednio uwzględniona w Konwencji dotyczącej statusu uchodźców z 1951 r. i Protokole do niej z dnia 31 stycznia 1967 r., których definicja uchodźcy została włączona do prawa azylowego Unii Europejskiej, głównym pytaniem do ustalenia jest: "w jaki sposób międzynarodowe prawo uchodźcze uwzględnia / powinno uwzględniać sytuację osób uciekających z kraju pochodzenia z powodu trudności ekonomicznych?". Jest to umiejscowione w kontekście rosnącej liczby osób przemieszczających się w Afryce i poza nią w wyniku deprivacji ekonomicznej, która ma charakter systemowy i jest produktem wymuszonego porządku światowego.

Odpowiedzi na to pytanie udzielono poprzez zbadanie ukrytego wpływu programów liberalizacji gospodarczej na prześladowania i transgraniczne przesiedlenia w Afryce Subsaharyjskiej. Sytuując Erytreę (kraj wysyłający uchodźców) i Ugandę (kraj przyjmujący uchodźców) jako główne studia przypadków, kreowane jest empiryczne stwierdzenie, że liberalizacja gospodarcza stała się poważną formą prześladowań ekonomicznych, które urzędnicy ds. ustalania statusu uchodźców (RSDO) powinni wziąć pod uwagę przy ocenie wniosków o azyl. "Uchodźcy ekonomiczni" są nie tylko określani jako niezasługujący na ochronę, ale także nie są uprawnieni do ochrony prawnej jako uchodźcy, a jednak większość uchodźców i osób ubiegających się o azyl pochodzi z krajów, w których niepowodzenia gospodarcze, niestabilność polityczna, ubóstwo i prześladowania są ze sobą nierozdzielnie związane. Niechęć międzynarodowego prawa i praktyki uchodźczej do uwzględniania innych form krzywdy jest dodatkowo komplikowana przez nieostre granice między kategoriami migrantów, osób ubiegających się o azyl i uchodźców. W badaniu zastosowano zatem podejście wielowymiarowe w celu opracowania wytycznych dla Wysokiego Komisarza Narodów Zjednoczonych ds. Uchodźców (UNHCR) dotyczących uchodźców uciekających przed trudnościami ekonomicznymi. Przedstawiono dalsze wytyczne dotyczące tego, w jaki sposób można badać zasady podziału obciążeń jako sposób na określenie polityki gospodarczej, która sprawi, że obozy dla uchodźców będą rentowne ekonomicznie.



*...no one puts their children in a boat unless the water is safer than the land... - Warsan Shire<sup>1</sup>*

## Introduction

### Setting the scene: A reflexive narrative

At the age of 30, and a father of two, I fled my home country, Zimbabwe, in September 2007 and sought asylum in South Africa. This was at the height of a political crisis<sup>2</sup> that led to dire economic woes and flagrant human right abuses from the ZANU PF -led government.<sup>3</sup> The interconnectedness of the political and economic crises made life unbearable and curtailed my ability to provide for my family even though I was employed as a teacher. The economic crisis and the stale political environment were seriously disturbing the public order in Zimbabwe.<sup>4</sup> At the same time, the escape to South Africa was an inherent human instinct of self-preservation driven by the lure of what de Villiers and Weda aptly call “a transient greener pasture”.<sup>5</sup>

Upon arrival, I applied for asylum in terms of section 22 of the Refugees Act No. 30 of 1998. Due to high numbers of Zimbabweans claiming asylum during this time, the provisional permit was continuously extended until my case was determined by the Refugee Status Determination Officer (RSDO) in February of 2009. The RSDO ruled that my case was manifestly unfounded on the grounds that there was no war in Zimbabwe and the fear of persecution was not supported by objective facts present in the country of origin.

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<sup>1</sup> Warsan Shire, ‘Home’ (*Facing History and Ourselves*, September 2015) <<https://www.facinghistory.org/standing-up-hatred-intolerance/warsan-shire-home>> accessed 3 July 2021.

<sup>2</sup> Neil H Thomas, ‘Land Reform in Zimbabwe’ (2003) 24 Third World Quarterly 691.

<sup>3</sup> Alexander Betts, ‘Survival Migration’, *Survival Migration* (Cornell University Press 2013) <<https://www.jstor.org/stable/10.7591/j.ctt32b5cd.6>> accessed 23 July 2020; Richard Bourne, *Catastrophe: What Went Wrong in Zimbabwe?* (1st edn, Zed Books 2011) <<http://gen.lib.rus.ec/book/index.php?md5=b516e5d90aaf185742e6ffbe16cbc15e>> accessed 26 August 2020.

<sup>4</sup> Convention Governing the Specific Aspects of Refugee Problems in Africa 1969 (1001 UNTS 45, No 14691) (entered into force on 20 June 1974). Part of the problem in refugee protection and policy, as shall be discussed later in the paper, is the fact that at regional level the definition of a refugee is expansive and is inclusive of other forms of persecution that are not in the Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) (189 UNTS 137). In terms of Article 1(2) of the 1969 OAU Convention, the term “The term ‘refugee’ shall also apply to every person who, owing to external aggression, occupation, foreign domination or *events seriously disturbing public order* in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality. The question for determination is what is it that is equal to “events seriously disturbing public order?””.

<sup>5</sup> Rian de Villiers and Zenzele Weda, ‘Zimbabwean Teachers in South Africa: A Transient Greener Pasture’ (2017) 37 South African Journal of Education 1.

Like many Zimbabweans whose asylum applications were rejected, I stayed “illegally” in the Republic of South Africa and faced numerous deportation threats. Going back to Zimbabwe would mean a bleak future for myself, my wife and children who had also joined me in South Africa. My fear was premised on the fact that my country had taken a downward trajectory due to its economic policies which were attracting punitive economic sanctions thus threatening livelihoods and the fundamental rights to life, liberty, and dignity. I could not see any future for myself, wife, and children in Zimbabwe.

The South African government then promulgated Regulation 7 to amend Act No. 13 of 2002 as a way to “regularize Zimbabweans residing [illegally] in South Africa” and “reduce pressure on the asylum seeker and refugee regime”.<sup>6</sup> The issuance of the Zimbabwean Special Dispensation Permit (DZP), later to be known as the Zimbabwean Exemption Permit (ZEP), regularized my stay in South Africa. The permit came with the following four conditions; 1) The ZEP permit entitles the holder to conduct work/employment, 2) The ZEP permit does not entitle the holder the right to apply for permanent residence irrespective of the period of stay in the Republic of South Africa, 3) The ZEP permit will not be renewable/extendable, and 4) The ZEP permit holders cannot change conditions of their permit in [South Africa].



Figure 1: Writer’s ZEP permit

These conditions have been welcomed differently by Zimbabweans, non-governmental organizations, humanitarians, lawyers, politicians, and academicians as a compromise in

<sup>6</sup> Intergate Immigration, ‘New Zimbabwean Special Dispensation Permit Announced’ (*Immigration South Africa Blog*, 12 August 2014) <<https://www.intergate-immigration.com/blog/new-zimbabwean-special-dispensation-permit-announced/>> accessed 10 June 2021.

dealing with contemporary forms of persecution and displacement in the new global era.<sup>7</sup> The permit has since mutated into different titles from its inception as the Zimbabwean Dispensation Permit (ZDP) in 2009 to the Zimbabwe Special Dispensation Permit (ZSDP) in 2014 and now the Zimbabwean Exemption Permit (ZEP). For the purpose of this study, the ZEP permit only allowed the writer's spouse to join him from Zimbabwe but could not cater for his son whose study visa had to be applied for at the South African embassy in Zimbabwe. Even when his second son was born in South Africa seven years later, his birth had to be registered in Zimbabwe as was the application process for his "Visitors Visa". It has been observed that the ZEP permit did not only place Zimbabweans in South Africa in a state of liminality but still remains an overt act of exclusion "couched in the language of humanitarianism and African and global solidarity".<sup>8</sup> The permits, despite offering a slight ease on the South African Home Affairs Department, continue to carry the stamp of exclusion and constantly remind Zimbabwean parents and their children of how they have overstayed their welcome in South Africa.<sup>9</sup> I then left South Africa, and my wife and children, for Poland in December 2019 to undertake studies as a doctoral researcher at the Pedagogical University of Krakow.

Coming to Europe was another exercise in immigration law for beginners.<sup>10</sup> My visa application at the Polish Embassy in South Africa stretched from August to the last day of November 2019. I was the last to join class as my fellow colleagues had begun classes in October. Before arriving in Krakow in early December of 2019, I had to give guarantees at the Polish Embassy that I was not going to be a burden to the State, and that I had enough money for subsistence and medical insurance. This was even though my studies were all paid for, including a generous doctoral stipend that would cover my accommodation and subsistence expenses. I also later learned that by applying for a National Visa at the Polish Embassy, I had sworn that my

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<sup>7</sup> Inocent Moyo, 'Zimbabwean Dispensation, Special and Exemption Permits in South Africa: On Humanitarian Logic, Depoliticisation and Invisibilisation of Migrants' (2018) 53 *Journal of Asian and African Studies* 1141; Vusilizwe Thebe, "'Two Steps Forward, One Step Back': Zimbabwean Migration and South Africa's Regularising Programme (the ZDP)" (2017) 18 *Journal of International Migration and Integration* 613.

<sup>8</sup> Moyo, 'Zimbabwean Dispensation, Special and Exemption Permits in South Africa' (n 7).

<sup>9</sup> David Mario Matsinhe, 'Africa's Fear of Itself: The Ideology of Makwerekwere in South Africa' (2011) 32 *Third World Quarterly* 295.

<sup>10</sup> Thomas Spijkerboer, 'The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control' (2018) 20 *European Journal of Migration and Law* 452. The argument here is that the visa regime and institutional...is strict and immobilizes migrants. In that way as been argued by Milena Belloni, *The Big Gamble: The Migration of Eritreans to Europe* (University of California Press 2019)., migrants tend to embark on unconventional journeys which are not only fatal but also raises concerns with regards to fundamental human rights.

residence will be in Poland and any travel in the Schengen area will come with certain obligations.

This summarized experience as a migrant, asylum seeker, “illegal foreigner” and “refugee” has greatly impacted my understanding of displacement and persecution in the new global era. While my flight to South Africa may be conveniently be reduced in a phrase or sentence as lure of a “transient greener pasture”<sup>11</sup> or in the words of Alex Betts “survival migration... [which is a result of] an existential threat”,<sup>12</sup> what is ignored by these phrases is the fact that cross-border displacement is instinctive and made from necessity.<sup>13</sup> The decision to leave one’s home is one never taken lightly. It is predicated on the inherent right to live and leave one’s country. When people seek asylum, they are not even aware of the legal categorization of the terms; migrants, asylum seekers, refugees or internally persons. The forms of persecution giving rise to cross-border displacement in the new global era have become dynamic and multifaceted. This has regenerated debate on the need to reconsider the refugee definition as defined in the Convention Relating to the Status of Refugees of 1951<sup>14</sup> and its Protocol of 31 January 1967.<sup>15</sup>

In June 2021, the University of London held remotely<sup>16</sup> the fifth annual conference for the Refugee Law Initiative aptly named ‘*Ageing Gracefully? The 1951 Refugee Convention at 70*’. This was an opportunity for the academic community to reflect on the efficacy of the Geneva Convention and its Protocol on refugee protection seven decades after its adoption. The discordant voices<sup>17</sup> in the academia, judiciary, political and social circles have called out conservative voices within these circles to concede to the fact that the Geneva Convention has

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<sup>11</sup> de Villiers and Weda (n 5).

<sup>12</sup> Betts (n 3).

<sup>13</sup> David James Cantor, ‘Cross-Border Displacement, Climate Change And Disasters: Latin America And The Caribbean’ (Federal Department of Foreign Affairs FDFA 2018) <[https://caribbeanmigration.org/sites/default/files/cross-border\\_displacement\\_climate\\_change\\_and\\_disasters\\_lac\\_david\\_cantor\\_2018.pdf](https://caribbeanmigration.org/sites/default/files/cross-border_displacement_climate_change_and_disasters_lac_david_cantor_2018.pdf)> accessed 17 August 2021.

<sup>14</sup> Geneva Convention.

<sup>15</sup> Protocol Relating to the Status of Refugees (adopted 1 January 1967, entered into force 4 October 1967) (606 UNTS 267).

<sup>16</sup> This thesis was written during the height of the severe acute respiratory syndrome coronavirus 2 (SARS-Cov-2) the virus that causes COVID-19. The pandemic drastically changed all aspect of lives. In the case of academic engagements, most of the work was done online and it will be an understatement to say the research work was also negatively affected as the lockdowns and travel restrictions limited the researcher in reaching out research participants.

<sup>17</sup> ‘Ageing Gracefully? The 1951 Refugee Convention at 70’ 5th Annual Conference, Refugee Law Initiative (RLI) Session 1A - “Injecting New Life into International Refugee Law” Moderator: Jean-François Durieux, Refugee Law Initiative, France “Soft Law and Hard Questions: The Role of Soft Law in Developing International Refugee Law” - Gillian Triggs and Dr Madeline Garlick, UNHCR, Switzerland • “The 1951 Convention Needs Fresh Optional Protocols” - Jean-François Durieux, Refugee Law Initiative, France • “The UNHCR Handbook: White Elephant or Eternal Flame?” – Dr Hugo Storey, UK

not adequately shielded a *new class of refugees* who are arguably a direct result of globalization. On the face of it, the profile of a refugee as one fleeing persecution from the State or from a non-state actor, has not been matched by the disturbing images of migrants of all ages drowning at sea in an attempt to seek better economic opportunities. What then needs to be determined is whether these migrants have a well-grounded fear of being ‘persecuted’ upon return by the forces of economic liberalization in their country of origin.

This has heightened calls<sup>18</sup> among the academia, humanitarian organisations, political circles and policy makers for an expanded definition of the term refugee in the new global era. The adoption of the United Nations Global Compact on Refugees (hereinafter Global Compact) of 2018 is a plausible solution to this problem. Although not legally binding to states<sup>19</sup>, the Global Compact is further evidence of a commitment by countries to “embrace all aspects of forcible displacement across international borders in the 21st century”.<sup>20</sup> As shall be discussed later on in this study, the Global Compact is an acknowledgment of the need to equally share the refugee burden and provide durable protection mechanisms that are well aligned with the human rights framework and the rule of law.<sup>21</sup>

The numbers of migrants dying at sea and also those being pushed back at the frontiers of the European Union’s (EU) external borders alludes to the fact that the European Union Member States probably do not want to be held culpable. As from 2014, it is reported that 24, 414 migrants drowned in the Mediterranean Sea trying to reach the European shores.<sup>22</sup> This number remains highly conservative given the nature of the irregular migration that is clandestinely

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<sup>18</sup> Tamara Wood, ‘Who Is a Refugee in Africa? A Principled Framework for Interpreting and Applying Africa’s Expanded Refugee Definition’ (2019) 31 *International Journal of Refugee Law* 290; Seyla Benhabib, ‘The End of the 1951 Refugee Convention? Dilemmas of Sovereignty, Territoriality, and Human Rights’ (2020) 2 *Jus Cogens* 75; Krzysztof Jaskulowski and Marek Pawlak, ‘Middling Migrants, Neoliberalism and Racism’ (2020) 0 *Journal of Ethnic and Migration Studies* 1; Leila Nasr, ‘International Refugee Law: Definitions and Limitations of the 1951 Refugee Convention’ (*LSE Human Rights*, 8 February 2016) <<https://blogs.lse.ac.uk/humanrights/2016/02/08/international-refugee-law-definitions-and-limitations-of-the-1951-refugee-convention/>> accessed 2 April 2021; Austin T Jr Fragomen, ‘The Refugee: A Problem of Definition’ (1970) 3 *Case Western Reserve Journal of International Law* 45; Jane McAdam, ‘From Economic Refugees to Climate Refugees: Review Essay on International Refugee Law And Socio-Economic Rights: Refuge From Deprivation By Michelle Foster’ (2009) 10 *Melbourne Journal of International Law* 579.

<sup>19</sup> Geoff Gilbert, ‘Not Bound but Committed: Operationalizing the Global Compact on Refugees’ (2019) 57 *International Migration* 27.

<sup>20</sup> Geoff Gilbert, ‘The New EU Pact on Migration and Asylum and the Global Compact on Refugees and Solutions’ (*Asile*, 28 September 2020) <[https://www.asileproject.eu/df\\_new-eu-pact-and-solutions-gilbert/](https://www.asileproject.eu/df_new-eu-pact-and-solutions-gilbert/)> accessed 1 June 2022.

<sup>21</sup> *ibid*

<sup>22</sup> Statista, ‘Deaths of Migrants in the Mediterranean Sea 2014-2022’ (*Statista*, 2023) <<https://www.statista.com/statistics/1082077/deaths-of-migrants-in-the-mediterranean-sea/>> accessed 21 July 2023.

undertaken.<sup>23</sup> The death toll does not include the number of migrants who have died in immigration detention centres upon arrival in the new country, nor deaths that occurred after deportation to the country of origin.<sup>24</sup> These deaths, which are a result of irregular migration and unconventional migration modes, have raised questions as to the label that can be attached to those who die at sea in pursuit of a better life. Are they mere migrants venturing on economic opportunities in Europe, or can/should they be defined as (Convention) refugees? And if they cannot fit the legalistic definitions of the above two categories, can they be seen as a new class of refugees running away from contemporary forms of persecution not included in the Geneva Convention?

Article 1A(2) of the Geneva Convention provides that the term ‘refugee’ shall apply to any person who:

[...] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country [...]<sup>25</sup>

This definition of a refugee has been included in the EU’s asylum law<sup>26</sup> and remains the global standard used in determining the refugee status for asylum seekers. For the purpose of this

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<sup>23</sup> *ibid.*

<sup>24</sup> *ibid.*

<sup>25</sup> Geneva Convention Article 1A(2).

<sup>26</sup> The refugee definition as provided for in the Geneva Convention is reflected as such in the following European Union asylum acquis: European Union: Council of the European Union, *Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving such Persons and Bearing the Consequences Thereof*, 7 August 2001, OJ L. 212/12-212/23; 7.8.2001, 2001/55/EC, **Article 2(e)**, available at: <https://www.refworld.org/docid/3ddcee2e4.html> [accessed 28 June 2021]; European Union: Council of the European Union, *Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers in Member States*, 6 February 2003, OJ L. 31/18-31/25; 6.2.2003, 2003/9/EC, **Article 2(e)**, available at: <https://www.refworld.org/docid/3ddcfda14.html> [accessed 28 June 2021]; European Union: Council of the European Union, *Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national*, 18 February 2003, OJ L. 50 / 1-50 / 10; 25.2.2003, (EC) No 343/2003, **Article 2(g)**, available at: <https://www.refworld.org/docid/3e5cf1c24.html> [accessed 28 June 2021]; European Union: Council of the European Union, *Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification*, 3 October 2003, OJ L. 251/12-251/18; 3.10.2003, 2003/86/EC, **Article 2(b)**, available at: <https://www.refworld.org/docid/3f8bb4a10.html> [accessed 28 June 2021]; European Union: Council of the European Union, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, 20 December 2011, OJ L. 337/9-337/26; 20.12.2011, 2011/95/EU, **Article 2(d)**, available at: <https://www.refworld.org/docid/4f197df02.html> [accessed 28 June 2021]. The 2011 Qualification Directive supersedes the 2004 Qualification Directive: Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless

study, it should be noted that the Qualification Directive of 2011 is the most relevant EU asylum law with regards to the refugee definition. In terms of Article 2d of the Qualification Directive, a refugee means a third-country national and this definition is not the same as laid out in the Geneva Convention. It suggests that refugees are people coming from the external borders of the EU and this categorization suggests that refugees are different and come from certain geographical locations. As for the EU citizens there is a very limited possibility for them to be recognized as refugees under the Aznar Protocol (see full discussion in chapter 3 and 4).

The Geneva Protocol of 1967 lifted the temporal and geographical limitations and gave the Geneva Convention the status of universal applicability to states that adopted the Protocol.<sup>27</sup> In terms of the Geneva Protocol, Member States that are not party to the Geneva Convention but have ratified the Geneva Protocol automatically agree to be bound by the Geneva Convention even if they have not ratified it.<sup>28</sup> The effect of this provision in the Geneva Protocol is that non-member states to the Geneva Convention will have to commit to treat refugees in a fair and humane way and guarantee them their fundamental rights against penalization for irregular entry and stay (Article 31) and non-refoulement (Article 33). The customary international law obligation not to send refugees to places where they are likely to face not only persecution but also degrading and inhumane conditions<sup>29</sup>, has become a peremptory norm. This also broadly

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Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted; European Union: Council of the European Union, *Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status*, 2 January 2006, OJ L 326; 13 December 2005, pp. 13-34, **Article 2(f)**, available at: <https://www.refworld.org/docid/4394203c4.html> [accessed 28 June 2021]; European Union: Council of the European Union, *Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast)*, June 29, 2013, OJ L 180 / 1-180 / 30; 29.6.2013, (EU) 2003/86, available at: <https://www.refworld.org/docid/51d296724.html> [accessed 28 June 2021]

<sup>27</sup> The only exceptions are in Turkey, which expressly maintains the geographical restriction; Madagascar, which maintains the geographical restriction and has not adopted the Protocol; and Saint Kitts and Nevis, which has not adopted the Protocol.

<sup>28</sup> For example, the United States of America is not a signatory of the Geneva Convention but has ratified the 1967 Protocol.

<sup>29</sup> In terms of Article 33(1) of the *Geneva Convention*: No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. Article 7 of the International Covenant on Civil and Political Rights (ICCPR) has also been interpreted as such by the Human Rights Committee in relation to torture and inhuman degradation. See, UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, < <https://www.refworld.org/docid/3ae6b3aa0.html> > accessed 4 July 2020 provides that: "No one shall be

binds non-member states to the Geneva Convention not to send any person back to a country where they risk persecution, torture, inhuman or degrading treatment. The same is true for those who do not seek international protection. They are equally inherently protected from non-refoulement too. The prohibition of any interception measures at sea by receiving countries when asylum seekers use unconventional means to enter their territories is also implied thereto.<sup>30</sup>

The Geneva Convention requires the feared persecution to be on the grounds of “race, religion, nationality, membership of a particular social group or political opinion”. On the other hand, cross-border displacement in the new global era is potentially a result of a combination of debilitating political, social and economic crises that threatens one’s freedom. The interconnectedness of these push factors has thus blurred the distinction between a refugee and a migrant. Arguably, economic refugees are a potential consequence of globalisation and policies that are a result of economic deprivation that is systemic and the product of a coercive world order.<sup>31</sup>

Scholarship on contemporary cross-border displacement in Sub-Saharan Africa also links the emergence of a new class of refugees to the country of origin’s economic policies.<sup>32</sup> These policies have failed to provide a stable socio-economic environment<sup>33</sup> for the citizenry leaving them in utter destitution even in a politically stable environment. The legacy of colonialism has also resulted in most African states to feed on aggressive neo-liberal policies aimed at restructuring their economies in line with the Industrialised North.<sup>34</sup> As Nicolas van de Wall noted, almost all African states have been engaged in some kind of economic reform

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subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.” See, Article 3 of the *UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: <https://www.refworld.org/docid/3ae6b3a94.html> [accessed 31 May 2022]

<sup>30</sup> Executive Committee of the High Commissioner’s Programme, *Conclusion on Protection Safeguards in Interception Measures No. 97 (LIV) - 2003*, 10 October 2003, No. 97 (LIV), paragraph (a) (iv) <<https://www.refworld.org/docid/3f93b2894.html> > accessed 2 March 2020.

<sup>31</sup> Tendayi E Achiume, ‘Migration as Decolonization’ (2019) 71 Stanford Law Review 1509.

<sup>32</sup> Bahlbi Y Malk, ‘State-Induced Famine in Eritrea: Persecution and Crime against Humanity’ (2017) 10 Journal of Politics and Law 1.

<sup>33</sup> Jane McAdam, ‘From Economic Refugees to Climate Refugees: Review Essay on International Refugee Law And Socio-Economic Rights: Refuge From Deprivation By Michelle Foster’ (2009) 10 Melbourne Journal of International Law 579.

<sup>34</sup> Thandika Mkandawire and Chukwuma Charles Soludo, *Our Continent, Our Future: African Perspectives on Structural Adjustment* (Africa World 1999) <<https://idl-bnc-idrc.dspacedirect.org/bitstream/handle/10625/25742/IDL-25742.pdf>> accessed 14 January 2021.



programme with funding from the West.<sup>35</sup> Whilst these economic packages have helped establish markets, they have also caused abject poverty and impacted negatively on human development. Such economic adjustments accompanied with economic sanctions have been war by any other means which has contributed to more deaths during the post-Cold War era than all weapons of mass destruction throughout history.<sup>36</sup> It is thus argued that the reasons for persecution listed in the Geneva Convention do not offer protection to those who have been displaced by systemic economic factors leading to utter destitution.

### **Barbarian societies and broken tools?**

The erroneous image of Africa as a backward continent<sup>37</sup> and one arguably responsible for large influxes of migrants in Europe and other industrialised countries<sup>38</sup> has shaped refugee policy and protection in the modern era.<sup>39</sup> This misleading historic image of Africa<sup>40</sup> has led to observers bemoan the fact that the continent is “never seen as possessing things and attributes properly part of human nature”.<sup>41</sup> It can further be argued that this mangled image has also been projected on African leaders when they negotiate economic policies with the leaders in the West.<sup>42</sup> As a result thereof, some African leaders have shown their political ineptitude by adopting economic policies that are unsustainable and are much in favour of the erstwhile colonisers. This ineptitude has led to the question: “So how did we arrive at this, that the best leader is the one that knows how to beg for a share of what he has already given away at the price of a broken tool?”.<sup>43</sup>

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<sup>35</sup> Nicolas Van de Walle, N Ball and V Ramachandran (eds), *Beyond Structural Adjustment: The Institutional Context of African Development* (Palgrave Macmillan US 2003) <<https://www.palgrave.com/gp/book/9781403963161>> accessed 29 June 2021.

<sup>36</sup> John Mueller and Karl Mueller, ‘Sanctions of Mass Destruction’ (1999) 78 *Foreign Affairs* 43.

<sup>37</sup> Achille Mbembe, *On the Postcolony* (University of California Press 2001).

<sup>38</sup> Phillip Connor, ‘Migration: At Least a Million Sub-Saharan Africans Moved to Europe since 2010’ (Pew Research Center 2018) <<https://www.pewresearch.org/global/2018/03/22/at-least-a-million-sub-saharan-africans-moved-to-europe-since-2010/>> accessed 17 August 2021.

<sup>39</sup> Cristiano d’Orsi, *Asylum-Seeker and Refugee Protection in Sub-Saharan Africa: The Peregrination of a Persecuted Human Being in Search of a Safe Haven* (Routledge 2015).

<sup>40</sup> Japhace Poncian, ‘The Persistence of Western Negative Perceptions about Africa: Factoring in the Role of Africans’ (2015) 7 *Journal of African Studies and Development* 72.

<sup>41</sup> Mbembe (n 37).

<sup>42</sup> Remi Adekoya, ‘Is It Racist to Say Africa Has “Civilizational” Problems?’ (*Foreign Policy*) <<https://foreignpolicy.com/2017/07/17/is-it-racist-to-say-africa-has-civilizational-problems/>> accessed 29 June 2021.

<sup>43</sup> Ngũgĩ WaThiong’o, *Wizard of the Crow* (Pantheon Books 2006) <<https://www.penguinrandomhouse.com/books/184472/wizard-of-the-crow-by-ngugi-wathiongo/>> accessed 14 January 2021.

This is because the economic policies have not aptly fit the African landscape thus resulting in more dependence upon the West.<sup>44</sup> In the context of the Global South, it probably explains the subservient relationship with the Industrialised North which in Mutua's view calls for emancipatory change.<sup>45</sup> It further highlights how the neoliberal agenda has weakened the spine of developing states to the point of revitalising the Marxist perspective of "barbarian and semi-barbarian countries" becoming "dependent on the civilised ones, nations of peasants on nations of bourgeois, the East on the West".<sup>46</sup>

In this context, forced migration from Africa to Europe or other 'developed' countries has thus become an indicator of development failure.<sup>47</sup> Migrant sending countries are seen to be at an asymmetrical level with 'Western evolutionary progress' and thus backward in terms of development. Europe then becomes the 'standard of civilisation' and in the process migrants from Sub-Saharan Africa are thus seen as a pestilence and problematic. The subtle point is that the image of Africa as being backward and dependent on the Industrialised West is projected unto its citizenry who in turn are seen as a burden.

Research on migration trends from Sub-Saharan Africa to Europe shows that Africa is one of the major sources of forced migration.<sup>48</sup> At the centre of these movements is the coalescence of political, social, environmental and economic reasons that have left many lives in limbo. The theoretical claim here is that government policies may result in economic persecution. Jane McAdam reiterates that general poverty does not constitute a claim of persecution. Refugee claimants have to demonstrate that they have been made poor 'because [of] government policy, inaction or discrimination...'<sup>49</sup> Persecution in this regard becomes multifaceted and should not only be assigned to the five grounds of persecution in the Geneva Convention.<sup>50</sup> Using the Eritrean government policies as an example, Bahlbi Y. Malk, remarks that:

[...]a government that deprives its citizens of the basic necessity of life such as food is as dangerous as the one that persecutes its citizens on the grounds of race, religion, political opinion, nationality and social affiliation. In fact, politically induced deprivation of one of the most fundamental needs in Africa is a persecution

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<sup>44</sup> Walle, Ball and Ramachandran (n 35).

<sup>45</sup> Makau Mutua, 'What Is TWAIL?' (2000) 94 Proceedings of the ASIL Annual Meeting 31.

<sup>46</sup> Karl Marx, 'Manifesto of the Communist Party' (February 1848) <<https://www.marxists.org/archive/marx/works/download/pdf/Manifesto.pdf>> accessed 17 August 2021.

<sup>47</sup> Gery Nijenhuis and Maggi Leung, 'Rethinking Migration in the 2030 Agenda: Towards a De-Territorialized Conceptualization of Development' (2017) 44 Forum for Development Studies 51.

<sup>48</sup> Kieran Uchegara, 'Sub-Saharan African Countries And Migration To Europe: Exploring The Motivations, Effects And Solutions' (2016) 49 Informatologia 79; Connor (n 34).

<sup>49</sup> McAdam (n 33) 591.

<sup>50</sup> Geneva Convention. Article 1A(2)

far more likely to pose a significant existential threat to humanity than some Convention-based persecutions.<sup>51</sup>

Policy failure and government's inaction in this regard should thus be regarded as equal to the Geneva Convention's grounds for persecution. Like Eritrea, Zimbabwe has also been blamed for man-made famine that has resulted in massive cross-border displacement.<sup>52</sup> In this regard, leaders have embraced broken economic tools for political expediency and use systemic deprivation as a way to control masses.<sup>53</sup> Research suggests that even when the citizenry is assured of government assistance in such cases, many '*plan to move to another country in the next five years*',<sup>54</sup> *in search of better livelihoods and have lost faith in their leaders in providing a sustainable economic framework.*

### **Delineating the scope of the research problem**

According to the United Nations High Commissioner for Refugees (UNHCR), at least 108.4 million people around the world have been forcibly displaced from their homes.<sup>55</sup> Of that number, the UNHCR estimates that 62.5 million have been internally displaced, whereas 35.3 million are designated as refugees and 5.4 million are asylum seekers.<sup>56</sup> It is further estimated that in Africa, over 18 million people are categorised as "people of concern" by the UNHCR.<sup>57</sup> The term "people of concern" includes refugees, migrants returned or deported to their country of origin, internally displaced persons and asylum seekers.<sup>58</sup> It therefore becomes imperative to explain the terms migrants, asylum seekers and refugees as these will be used in this study.

In generic terms, the word "refugee" refers to a person fleeing hardship. It has its historic roots in the revocation of the Edict of Nantes in 1685 which forced about 300,000 Huguenot *réfugiés* to flee France to other countries in fear of their lives.<sup>59</sup> While today, according to the Geneva Convention, the term refugee applies to a person:

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<sup>51</sup> Malk (n 32) 2.

<sup>52</sup> Malk (n 32); Betts (n 3); Bourne (n 3).

<sup>53</sup> Malk (n 32).

<sup>54</sup> Connor (n 38).

<sup>55</sup> UN High Commissioner for Refugees (UNHCR), 'Figures at a Glance' (UNHCR) <<https://www.unhcr.org/refugee-statistics/>> accessed 22 July 2023.

<sup>56</sup> *ibid.*

<sup>57</sup> United Nations High Commissioner for Refugees, 'Africa' (UNHCR) <<https://www.unhcr.org/us/about-unhcr/where-we-work/africa/>> accessed 22 July 2023.

<sup>58</sup> *ibid.*

<sup>59</sup> d'Orsi (n 39); Alan Dowty and Gil Loescher, 'Refugee Flows as Grounds for International Action' (1996) 21 International Security 43.

[...] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country [...]<sup>60</sup>

The Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention") of 1969, applies the same definition as above. However, the OAU Convention goes further to add that the term refugee also applies to those who have been compelled to leave their own country of origin due to "external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality".<sup>61</sup> This study uses the term "Convention refugees" to denote all those who have been determined as such after undergoing a Refugee Status Determination (RSD) procedure based on the Geneva or OAU Convention. The UNHCR describes RSD as:

the legal or administrative process by which governments or UNHCR determine whether a person seeking international protection is considered a refugee under international, regional or national law.<sup>62</sup>

Even though RSD is generally the responsibility of individual states, UNHCR may also play a role in this determination (as illustrated by this definition). While on the other hand, asylum seekers are migrants awaiting to have their refugee claims validated by Refugee Status Determination Officers (RSDO's) in terms of the Geneva and the OAU Convention. At this stage, asylum seekers' lives are in limbo as they wait for their status to be determined, and it is thus remains difficult to discern their legal status.

Third, migrants are described by the UNHCR as those persons who have made a conscious, and voluntary choice to leave their country of origin and have a choice to return home in safety.<sup>63</sup> The International Organization for Migration defines a migrant as:

a person who moves away from his or her place of usual residence, whether within a country or across an international border, temporarily or permanently, and for a variety of reasons. The term includes a number of well-defined legal categories of people, such as migrant workers; persons whose particular types of movements are legally defined, such as smuggled migrants; as well as those whose status or means

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<sup>60</sup> Geneva Convention Article 1A(2).

<sup>61</sup> Organization of African Unity (OAU), *Convention Governing the Specific Aspects of Refugee Problems in Africa* ("OAU Convention"), 10 September 1969, 1001 U.N.T.S. 45, available at: <https://www.refworld.org/docid/3ae6b36018.html> [accessed 1 June 2022]

<sup>62</sup> 'Procedural Standards for Refugee Status Determination Under UNHCR's Mandate' (UNHCR, 2003).

<sup>63</sup> Margaret Reeves and others, 'Access to Health Care for People Seeking Asylum in the UK' (2006) 56 The British Journal of General Practice 306.

of movement are not specifically defined under international law, such as international students.<sup>64</sup>

The definition of who is a “migrant” is considered to be inclusivist and broadly labels refugees as migrants. Wolff argues that a residualist view should be applied as refugees are more vulnerable and should not be bandied together under the category of migrants.<sup>65</sup>

Therefore, the scope of the research problem for this study is the term “economic refugees”. The term is regarded as a misnomer and inappropriate<sup>66</sup>, and yet events and discourse on migration in the 21st century underscore the fact that oppressive regimes, mismanaged economies, insecurity, environmental change and acute shortage of resources have recently led to an implosion of cross-border forcibly displaced persons.<sup>67</sup> The interconnectedness of these push factors has thus blurred the distinction between a ‘refugee’ and a ‘migrant’. A change in one of these factors has a direct knock-on effect on the other and triggers people to flee. Endemic unemployment and underemployment in war and insecure conflict zones have limited the abilities of people to cater for basic needs thus threatening their lives and freedom.<sup>68</sup> Therefore, there is need for international refugee law to engage with economic refugees as political agents whose rights are at par with that of *Convention refugees*.<sup>69</sup> There is need for a “new legal and conceptual categorization” of economic refugees which considers economic factors which lead to their persecution and displacement so as to extend the arc of protection to people in need.<sup>70</sup>

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<sup>64</sup> International Organization for Migration (IOM), *Glossary on Migration* (IML Series, International Organization for Migration 2019) <[https://publications.iom.int/system/files/pdf/iml\\_34\\_glossary.pdf](https://publications.iom.int/system/files/pdf/iml_34_glossary.pdf)> accessed 22 July 2023.

<sup>65</sup> Sarah Wolff, *The Security Sector Governance–Migration Nexus: Rethinking How Security Sector Governance Matters for Migrants’ Rights* (Ubiquity Press 2021) 5 <<https://www.jstor.org/stable/j.ctv1v3gqt4>> accessed 27 April 2022.

<sup>66</sup> Atle Grahl-Madsen, ‘Identifying the World’s Refugees’ (1983) 467 *The Annals of the American Academy of Political and Social Science* 11.

<sup>67</sup> Roger Zetter, ‘Protection in Crisis: Forced Migration and Protection in a Global Era’ (Migration Policy Institute (MPI) 2015) <<https://www.migrationpolicy.org/research/protection-crisis-forced-migration-and-protection-global-era>> accessed 3 April 2021; Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge University Press 2007) <<https://www.cambridge.org/core/books/international-refugee-law-and-socioeconomic-rights/A00F40A5652917B0CE12F5DA0CD98F77>> accessed 3 April 2021; Aderanti Adepoju, ‘Migrants and Refugees in Africa’ in Aderanti Adepoju, *Oxford Research Encyclopedia of Politics* (Oxford University Press 2019) 08 <<https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-723>> accessed 22 March 2021; Goodwin-Gill and McAdam (n 25) 15.

<sup>68</sup> *MSS v Belgium and Greece [GC]*, Application No 30696/09 [2011] European Database of Asylum Law (EDAL) (European Court of Human Rights Grand Chamber).

<sup>69</sup> Achiume (n 31).

<sup>70</sup> Katie Kuschminder and Anna Triandafyllidou, ‘Smuggling, Trafficking, and Extortion: New Conceptual and Policy Challenges on the Libyan Route to Europe’ (2020) 52 *Antipode* 206.

It is also settled case law that the European Court of Human Rights (ECtHR) has come to the defence of migrants fleeing their countries of origin due to severe socio-economic destitution by applying Article 3 of the European Convention on Human Rights (ECHR).<sup>71</sup> The ECtHR, has interpreted Article 3 as only applicable to precarious and extreme poverty caused by the actions or negligence of state or non-state actors resulting in persons being unable to meet their basic necessities such as food, hygiene, and housing. Perhaps the point of contestation is what entails “precarious and extreme poverty”. If one is able to fund one’s trip to a country of asylum will that person be seen as one living in abject poverty? In the context of Africa, what actions by State actors or non-state actors can be seen as contributing to the precarious and extreme poverty? Can Structural Adjustment Programs adopted by African states after gaining political independence and which have arguably led to endemic poverty in some states be categorised as such negligent actions?

The second aspect of the problem is that the subtle economic destabilisation in Sub-Saharan Africa has had a differentiated impact on refugee protection. This is because, as indicated above, the OAU Convention defines a refugee in broader terms and is seemingly contradictory to the Geneva Convention.<sup>72</sup> While the OAU Convention has been celebrated for its novelty of including such forms of harm as *external aggression, occupation, foreign domination or events seriously disturbing public order*, the treaty presents interpretation and application challenges in Africa.<sup>73</sup> The OAU Convention was formulated when African States were fighting colonialism and foreign domination.<sup>74</sup> However, as shall be argued in chapters 5 and 6, current developments in the continent have given rise to several contextualised interpretations of

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<sup>71</sup> Council of Europe, ‘European Convention for the Protection of Human Rights and Fundamental Freedoms, as Amended by Protocols Nos. 11 and 14 (Entry into Force: 3 September 1953)’ (*Refworld*) <<https://www.refworld.org/docid/3ae6b3b04.html>> accessed 29 June 2021. Article 3 provides that: No one shall be subjected to torture or to inhuman or degrading treatment or punishment. *MSS v Belgium and Greece [GC]*, Application No 30696/09 [2011] European Database of Asylum Law (EDAL) (European Court of Human Rights Grand Chamber). For a detailed analysis of Article 3 see further; Flegar, Veronika (2016), “Vulnerability and the Principle of Non-refoulement in the European Court of Human Rights: Towards an Increased Scope of Protection for Persons Fleeing from Extreme Poverty?,” *Contemporary Readings in Law and Social Justice* 8(2): 148–169.

<sup>72</sup> Adrienne Millbank, ‘The Problem with the 1951 Refugee Convention’ (Social Policy Group 2000) <[https://www.aph.gov.au/about\\_parliament/parliamentary\\_departments/parliamentary\\_library/pubs/rp/rp0001/01rp05](https://www.aph.gov.au/about_parliament/parliamentary_departments/parliamentary_library/pubs/rp/rp0001/01rp05)> accessed 8 March 2021.

<sup>73</sup> Alice Edwards, ‘Refugee Status Determination in Africa’ (2006) 14 *Journal of International & Comparative Law* 204; Marina Sharpe, ‘The Supervision (or Not) of the 1969 OAU Refugee Convention’ (2019) 31 *International Journal of Refugee Law* 261.

<sup>74</sup> Tsion Tadesse Abebe, Allehone Abebe and Marina Sharpe, ‘The 1969 OAU Refugee Convention at 50’ (*Africa Portal*, 22 October 2019) <<https://www.africaportal.org/publications/1969-oau-refugee-convention-50/>> accessed 18 March 2021.

refugee policy and protection. This has affected burden sharing within the region and further fomented exclusion of persons fleeing economic persecution.<sup>75</sup>

For example, the phrase ‘foreign domination’ on the face of it suggests colonial domination, occupation, or foreign intervention. Is it thus plausible to interpret this form of harm as meaning neo-colonialism? Alternatively, it can be suggested that this form of harm might include the invasive level of control exercised by such multilateral institutions as the International Monetary Fund (IMF) or the World Bank on African countries which arguably has caused impoverishment on the continent through high interest loans, conditional aid and economic sanctions.<sup>76</sup> What then requires to be determined is whether the refugee definition has evolved to suit contemporary factors of displacement. Such an evaluation and interpretation<sup>77</sup> might possibly guide in the discourse on the plight of economic refugees, so as to guard against an ambiguity which suggests that only *Convention refugees* are worthy of international protection.

### **Aim and research question**

This study is built upon two hypotheses that help to outline the aims and the research question. The first hypothesis is that the advent of neo-liberalism has subverted the economic structure of Sub-Saharan Africa. The second hypothesis is that international refugee law and international economic law perpetuate a coercive world order. With regards to the first hypothesis, as highlighted in the above paragraphs, neoliberal economic packages have helped establish markets while at the same time they have caused abject poverty and impacted negatively on human development to the extent of becoming war by any other means.<sup>78</sup> Recent studies further show that neoliberal policies in the form of Structural Adjustment Programs (SAPs) have

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<sup>75</sup> *ibid*; Eduardo Arboleda, ‘Refugee Definition in Africa and Latin America: The Lessons of Pragmatism’ (1991) 3 International Journal of Refugee Law 185; JO Moses Okello, ‘The 1969 OAU Convention and the Continuing Challenge for the African Union’ (2014) 48 Forced Migration Review 70; George Okoth-Obbo, ‘Thirty Years On: A Legal Review Of The 1969 OAU Refugee Convention Governing The Specific Aspects Of Refugee Problems In Africa’ (Refugee Survey Quarterly 2001) <<https://www.uio.no/studier/emner/jus/jus/JUR5530/v07/undervisningsmateriale/OAU%20Convention%20Okoth.pdf>> accessed 18 March 2021; Abebe, Abebe and Sharpe (n 74); Wood (n 18).

<sup>76</sup> Edwards (n 73); Mkandawire and Soludo (n 34).

<sup>77</sup> *ADVISORY OPINION OC-16/99 ‘The Right to Information On Consular Assistance In The Framework Of The Guarantees Of The Due Process of Law’* [1999] Inter-American Court of Human Rights Requested by The United Mexican States, 154 248. pp. 256-7, paras. 114-115.

<sup>78</sup> Raúl Delgado Wise and Humberto Márquez, ‘Neoliberal Globalization and Migration’, *The Encyclopedia of Global Human Migration* (American Cancer Society 2013) <<https://onlinelibrary.wiley.com/doi/abs/10.1002/9781444351071.wbeghm389>> accessed 3 April 2021; Silvia Federici, ‘War, Globalization, and Reproduction’ (2000) 25 Peace & Change 153; Lanre Kassim, ‘The Impact of Trade Liberalization on Export Growth and Import Growth in Sub-Saharan Africa’ in Mthuli Ncube, Issa Faye and Audrey Verdier-Chouchane (eds), *Regional Integration and Trade in Africa* (Palgrave Macmillan UK 2015) <[https://doi.org/10.1057/9781137462053\\_4](https://doi.org/10.1057/9781137462053_4)> accessed 3 April 2021.

negatively impacted on health determinants and slanted economic growth thus threatening peoples' lives and liberty in countries that adopted such policies.<sup>79</sup> The study will thus investigate the impact of these economic liberalization programmes on cross-border displacement from Sub-Saharan Africa. Focus will be on two divergent case studies, of Eritrea and Uganda, to analyse and evaluate the impact of economic persecution resulting in precarious and extreme poverty which is inhumane and degrading.

Eritrea is a refugee producing country which is politically unstable. This study claims that Eritrean refugees have been displaced by latent effects of economic liberalization. It is argued that economic SAPs in Eritrea have given rise to the drivers of persecution and displacement. Of note here is to trace how Eritrea adopted Macroeconomics Policies and Programmes in 1994 which were in favour of trade liberalization.<sup>80</sup> Although these policies were not influenced by the World Bank nor the International Monetary Fund, evidence suggests that this led to high economic deficits, heavy public burden and foreign currency vulnerability. Is it possible that such economic programmes had a causal effect on the refugee movement in Eritrea?

Uganda is a refugee reception country whose economy is fraught with many economic challenges and yet it provides refuge to over 1,400,000 refugees.<sup>81</sup> Is it possible that life in the Ugandan camps does not sustain refugee livelihoods because of the refugee burden? At the same time Uganda has been lauded for promoting self-dependency by including refugees in its national development programme so as to improve livelihoods and peaceful co-existence.<sup>82</sup> Although questions have been raised on the sustainability of the Ugandan approach because of its weak economy<sup>83</sup>, the study seeks to explore the impact of economic policies in both countries

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<sup>79</sup> Kathomi Gatwiri, Julians Amboko and Darius Okolla, 'The Implications of Neoliberalism on African Economies, Health Outcomes and Wellbeing: A Conceptual Argument' (2020) 18 *Social Theory & Health* 86; LM Garnham, 'Public Health Implications of 4 Decades of Neoliberal Policy: A Qualitative Case Study from Post-Industrial West Central Scotland' (2017) 39 *Journal of Public Health (Oxford, England)* 668.

<sup>80</sup> Tekle Mariam Woldemikael (ed), *Postliberation Eritrea* (Indiana University Press 2018) <<https://iu.pressbooks.pub/postliberationeritrea/>> accessed 9 July 2020; Bahlbi Malk, 'Eritrea: From Oppression to Development' (*Africa at LSE*, 29 April 2019) <<https://blogs.lse.ac.uk/africaatlse/2019/04/29/eritrea-from-war-and-oppression-to-peace-and-development/>> accessed 28 February 2021.

<sup>81</sup> Frank Ahimbisibwe, 'Uganda and the Refugee Problem: Challenges and Opportunities' (2018) 13 *African Journal of Political Science and International Relations* 62; Naohiko Omata, 'Refugees' Engagement with Host Economies in Uganda' (2018) 58 *Forced Migration Review* 19.

<sup>82</sup> Sergio Carciotto and Filippo Ferraro, 'Building Blocks and Challenges for the Implementation of the Global Compact on Refugees in Africa' (2020) 8 *Journal on Migration and Human Security* 83.

<sup>83</sup> Ingunn Bjørkhaug, 'Revisiting the Refugee–Host Relationship in Nakivale Refugee Settlement: A Dialogue with the Oxford Refugee Studies Centre' (2020) 8 *Journal on Migration and Human Security* 266; Winnie Watera and others, 'Uganda's Refugee Management Approach Within the EAC Policy Framework' (Konrad Adenauer Stiftung 2017) <<https://www.kas.de/en/web/uganda/single-title/-/content/uganda-s-refugee-management-approach-within-the-eac-policy-framework.>> accessed 30 November 2018; Tigranna Zakaryan and Lina Antara,



to understand the sustainability of refugee camps in terms of livelihoods and economic opportunities (employment).

The second hypothesis is that international refugee law and international economic law perpetuate a coercive world order. The Geneva Convention and the OAU Convention reinforce each other in *not* protecting persons who are forcibly displaced due to economic globalization. International economic law perpetuates rather than opposes the neoliberal agenda of economic liberalization which has caused displacement in the new global era, while international refugee law has created indeterminacy by creating unequal structures and institutions which do not consider the fate of the people they regulate.<sup>84</sup>

Therefore, the first scientific research objective of this study is to propose a Framework Convention with an expanded refugee definition.<sup>85</sup> The definition should move away from the current definitions in international refugee law because they exclude other new refugee categories that are a result of cross-border displacement. Therefore, what requires to be evaluated is the efficacy of a Framework Protocol in realigning the refugee definition in the contemporary world.

A protocol is an international agreement that supplements, clarifies, amends or qualifies an existing convention or treaty.<sup>86</sup> In terms of the United Nations' Treaty Handbook, the convention may be amended in accordance with the amendment provisions in the treaty itself or in accordance with rules set in Part IV of the Vienna Convention.<sup>87</sup> If this is not mentioned in the treaty, State Parties may negotiate a new treaty or agreement amending the existing treaty.

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*Political Participation of Refugees: The Case of South Sudanese and Congolese Refugees in Uganda* (International Institute for Democracy and Electoral Assistance (International IDEA) 2018) <<https://www.idea.int/publications/catalogue/political-participation-refugees-case-south-sudanese-and-congolese-refugees>> accessed 3 November 2020.

<sup>84</sup> Honor Brabazon (ed), *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project* (1st edn, Routledge 2016) <<https://www.taylorfrancis.com/books/neoliberal-legality-honor-brabazon/10.4324/9781315544106>> accessed 26 December 2020; BS Chimni, 'Capitalism, Imperialism, and International Law in the Twenty-First Century' (2012) 14 *Oregon Review of International Law* 17; Martti Koskenniemi, 'Epilogue (2005)', *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2006) <<https://www.cambridge.org/core/books/from-apology-to-utopia/epilogue-2005/C22266F20688CC2D6CD1A0850B87BC65>> accessed 26 December 2020; Spijkerboer (n 10).

<sup>85</sup> Daniel Bodansky, 'Framework Convention/Protocol Approach' (World Health Organisation 1999) WHO/NCD/TFI/99.1 <<https://apps.who.int/iris/handle/10665/65355>> accessed 25 March 2021; Koen De Feyter, 'Towards a Framework Convention on the Right to Development' (Friedrich-Ebert-Stiftung: Global Policy and Development 2013) <<http://library.fes.de/pdf-files/bueros/genf/09892.pdf>> accessed 11 April 2021; Nele Matz-Lück, 'Framework Conventions as Regulatory Tools' (2009) 3 *Goettingen Journal of International Law* 439.

<sup>86</sup> Bodansky (n 85); United Nations, *Treaty Handbook*, vol E.12.V.1 (United Nations 2012) <<https://treaties.un.org/doc/source/publications/thb/english.pdf>> accessed 25 March 2021.

<sup>87</sup> United Nations, *Treaty Handbook*. (n 86) 25.

In terms of Article 45 of the Geneva Convention, State parties may request revision of the treaty at any time through a notification to the Secretary of the United Nations. The General Assembly of the United Nations would then recommend the steps to be taken of such a request.

The adoption of a framework convention/protocol approach does not only allow for the formulation of a conceptual protocol but is also a useful treaty making model when there is lack of scientific understanding and/or political consensus in addressing an international problem.<sup>88</sup> As outlined above, the situations giving rise to cross-border displacement are not only confined to a specific location but have grown to be global and continue to evolve. It is thus argued that contemporary developments in refugee policy and protection point to the fact that the refugee definition in Article 1A(2) of the Geneva Convention has not evolved, adapted, and responded to socio-economic induced persecution and displacement.<sup>89</sup> The researcher is aware that calls to amend the Geneva Convention, on the face of it, are much like a cliché and not feasible considering the differing interests between the Global North and Global South.<sup>90</sup> This does not however preclude the fact that the refugee definition in the Geneva Convention does not cover all current forms of cross-border displacement and persecution, such as those caused by economic hardship and other new forms of harm. The aim of the envisaged protocol will thus be to amend the refugee definition (Article 1A (2)), so as to reconcile it current realities on forced displacement.

The second research aim of the study is to identify sustainable refugee sharing mechanisms.<sup>91</sup> The aim of this scientific objective is to provide sustainable refugee policies that make refugee

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<sup>88</sup> Bodansky (n 85) 35.

<sup>89</sup> Achiume (n 31); Seyla Benhabib, 'The End of the 1951 Refugee Convention? Dilemmas of Sovereignty, Territoriality, and Human Rights' (2020) 2 *Jus Cogens* 75.

<sup>90</sup> This is another source of antagonism between the North and South. At regional level, the refugee definition is broad and encompasses the current global conditions that have given rise to the refugee crisis. Jeff Crisp, the former Head of Policy Development and Advocacy at the UNHCR once said: "*The [Organisation of African Unity] definition makes sense in Africa, but not in industrialised states taking the pragmatic line, you need public opinion on your side and the European context is not ready for an OAU Refugee definition. Pragmatically no new definition will be accepted and agreed upon.*" See Jeff Crisp., in Laura Barnett, 'Global Governance and the Evolution of the International Refugee Regime' (2002) 14 *International Journal of Refugee Law* 238.

<sup>91</sup> United Nations, 'Global Compact on Refugees, UN Doc. A/73/12 (2018)' (*UNHCR*) <<https://www.unhcr.org/the-global-compact-on-refugees.html>> accessed 1 July 2021. The New York Declaration for Refugees and Migrants was adopted on 19 September 2016 by 193 United Nations (UN) Member States as a reaffirmation of the importance of the international protection of people on the move. Annex II of the New York Declaration initiated intergovernmental consultations and negotiations on the development of a Global Compact for Refugees and a Global Compact on Safe, Orderly and Regular Migration. The two compacts were then formally adopted by the UN General Assembly in December 2018 and 152 states voted in favour of the adoption of the Migration Compact, while 12 countries abstained from voting (Algeria, Australia, Austria, Bulgaria, Chile, Italy, Latvia, Libya, Liechtenstein, Romania, Singapore, and Switzerland), and five countries voted against the compact (Czech Republic, Hungary, Israel, Poland, and the United States).

camps economically viable and improve the self-reliance of refugees. This is linked to the case study on Uganda based on the previous needs assessment study carried out in Rwamwanja refugee camp.<sup>92</sup> The Global Compact on Refugees acknowledges the reality of an uneven economic playing field for host asylum countries which counter against the achievement of its objectives; which are: (i) reduce pressures on host countries; (ii) enhance refugee self-reliance; (iii) expand access to third country solutions, and (iv) support conditions in countries of origin for return in safety and dignity.<sup>93</sup>

However, the fact that the Compact is non-binding and falls in the category of soft law does not mean that efforts cannot be mooted to help in the sharing of the refugee burden.<sup>94</sup> One of the avenues is through promoting self-dependency in refugee camps. Uganda has been lauded for promoting self-dependency by including refugees in its national development programme so as to improve livelihoods and peaceful co-existence.<sup>95</sup>

In order to realise these two aims of the research, the following central research question will be answered: *How does/should international refugee law consider the situation of persons fleeing their country of origin due to economic hardship?* This main research question will be split into the following sub questions.

- a. How do economic liberalization programmes impact on cross-border displacement?
- b. In which circumstances are persons fleeing economic hardship currently protected under international refugee law and human rights law?
- c. How should the refugee definition be reformed, in order to adequately consider other new categories of forcibly displaced persons?
- d. What are the causal links in Eritrea between the economic policies and cross-border displacement?
- e. How can the refugee burden be shared equitably to improve refugee protection?

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<sup>92</sup> Kugonza Gorret and Mutsvara Shepherd, Psychosocial Support and Protection for Refugee and Host Communities in Uganda: A Needs Assessment (2022) *Afrika Focus* 35(2) <https://doi.org/10.1163/2031356X-35020001>

<sup>93</sup> *ibid.*

<sup>94</sup> Jane McAdam, 'Global Compact for Safe, Orderly and Regular Migration' (2019) 58 *International Legal Materials* 160.

<sup>95</sup> Carciotto and Ferraro (n 82).

## Methodology and Structure

This research project employs a number of methodological perspectives to evaluate the situation of persons fleeing their countries of origin due to economic hardship. The qualitative study employs interviews, focus groups, online surveys, observations, case-law analysis and analysis of documents to appraise the situation of economic destitution and its links to cross-border displacement. It embraces an interdisciplinary approach which considers the social, political and economic factors causing human displacement.<sup>96</sup>

The study is structured into seven chapters bound in three parts. After this introduction, the study begins with Part 1 which is made up of two chapters (1 and 2). The first chapter is an appraisal of the sub-Saharan economic landscape. The chapter evaluates the general impact of neoliberal policies on the economic structure of Sub-Saharan Africa. It summarises the main objectives of the economic liberalization programmes as aimed at fiscal discipline, streamlining public expenditure, tax reform, financial liberalisation, adoption of a single and competitive exchange rate, trade liberalisation, elimination of barriers to foreign direct investment, privatisation of state entities, market deregulation and secure property rights.<sup>97</sup> However, the view from critics is that these economic packages have been war by any other means and have caused “brutal impoverishment” which has led to social unrest and destabilised family life as “millions of people have been forced to leave their villages and go abroad in search of new sources of livelihood”.<sup>98</sup> It then becomes pertinent to evaluate the impact of ‘good’ financial economic programmes and try to understand how they lead to latent human displacement.

Chapter 2 explains the research methodology, theoretical framework, the process and production of the study. It shows how data was generated through interviews, focus groups, online surveys, observations, case-law analysis and analysis of documents .. In this section, I make a statement with regards to my personal experiences as a Black African Male studying Migration in Europe. My position as such impacted (and continues to do so) on how I

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<sup>96</sup> Tobias Heidenreich and others, ‘Political Migration Discourses on Social Media: A Comparative Perspective on Visibility and Sentiment across Political Facebook Accounts in Europe’ (2020) 46 *Journal of Ethnic and Migration Studies* 1261; Justyna Salamońska and Olga Czeranowska, ‘How to Research Multiple Migrants? Introducing Web-Based Respondent-Driven Sampling Survey.’ (Centre of Migration Research 2018) 110/168; Sara Vannini and others, ‘Interdisciplinary Approaches to Refugee and Migration Studies: Lessons from Collaborative Research on Sanctuary in the Changing Times of Trump’ (2018) 1 *Migration and Society* 164.

<sup>97</sup> John Williamson, ‘The Washington Consensus as Policy Prescription for Development’ (Institute for International Economics 2004) <<https://www.piie.com/publications/papers/williamson0204.pdf>> accessed 22 August 2021; John Williamson, ‘The Strange History of the Washington Consensus’ (2004) 27 *Journal of Post Keynesian Economics* 195.

<sup>98</sup> Federici (n 78) 155.

established personal and formal contacts for this study. My immigration background tends to be viewed through a prejudicial lens that might lead to data misinterpretation, misinformation and institutional bias. Chapter 2 also shows the seven steps taken in developing the hypotheses for the study through the use of the Hypothetical Deductive Method (H-D). These steps are (i) identifying a broad problem area for the research, (ii) defining the problem statement, (iii) developing hypotheses, (iv) determining how to measure the theoretical framework, (v) collecting data, (vi) analysing data, and (vii) interpreting the data. The steps mentioned above were also crucial in understanding the two theoretical frameworks for the study: the neoclassical theory and the historical structuralist theory. Briefly, the neoclassical theory explains migration in economic terms and suggests that human mobility is a result of the supply and demand created by the labour markets, while the historical structuralists are of the view that migration impacts negatively on the economies of the developing countries and is the root cause of underdevelopment. Therefore, the study seeks to evaluate the migration theories that best explain human mobility in both voluntary and involuntary modes.

Chapters 3 and 4 makes up Part 2 of this study. These chapters deal at length with the legal framework that helps in evaluating economic hardship as persecution or harm in the contemporary world. Chapter 3 attempts to answer the question: in which circumstances are persons fleeing economic hardship currently protected under international refugee law and human rights? The term ‘economic refugee’ is defined and an evaluation is made about the scope of protection currently available for such persons under international refugee law and human rights law. The chapter argues for the recognition of economic refugees as arguably a new class of refugees who have been impacted by economic liberalization and its attendant policies. Three definitional proposals are suggested for the term ‘economic refugee’ as a way to extend the arc of protection to a category of people in dire need but that does not fit the ‘Conventional’ refugee definition.

Chapter 4 is guided by the question: how should the refugee definition be *reformed*, in order to adequately consider ‘economic refugees’? Having proposed a definition for the term ‘economic refugee’, this chapter argues for the reformation of the current refugee definition. The chapter acknowledges that the legal venture to amend the Geneva Convention requires more than political will and consensus. Reforming the refugee definition has always been the difficult question to tackle in the field of international refugee law. However, as stated in the introduction of this study, the convergence of thought is pointing to the need to broaden the enclaves of

international refugee law so that it is inclusive of all that deserve international protection by looking at their unique circumstances. Chapter 4 ends by adopting a Framework convention/protocol approach in expanding the refugee definition. It is argued that a reformed and inclusive refugee definition is an acknowledgement of how new forms of persecution/conditions have coalesced indissolubly with the reasons for persecution stated in the Geneva Convention.

Part 3 of this study analyses the specific challenges faced in focus countries before ending the study with concluding remarks. Chapter 5 is a case study on Eritrea, while chapter 6 focuses on Uganda. In chapter 5 the study evaluates the impact of economic liberalization programmes on cross-border displacement. While Eritrea has adopted a self-reliance stance in term of the fiscal policy, evidence points to a history of imposed economic policies during its transitional arrangements with Ethiopia after gaining statehood. Therefore, what needs to be appraised is how these policies, together with United Nations imposed sanctions have led Eritrea to become a country of origin of mixed migration that is constantly swamped by threats of war, youth despondency, militarization and chronic poverty.

On the other hand, chapter 6 reveals that Uganda is among the top five countries in the world (and first in Africa) to host so many refugees despite a sluggish economy on economic liberalization prescription. Therefore, the case study on Uganda is crucial in two ways. First, it helps in appraising the impact of economic liberalization programmes on refugee protection and policy in Uganda. Second, it helps in evaluating the mechanisms of refugee burden sharing and how such countries as Uganda should be assisted. Sharing the refugee burden also enables refugee hosting countries to adequately receive, register and regulate asylum seekers.

Chapter 7 provides the concluding summary for the study. It discusses the main findings of the study, theoretical contributions, and considerations for future research in the realm of the asylum-migration nexus and the mechanisms of refugee burden sharing.

## PART 1

*A major irony of African development history is that the theories and models employed have largely come from outside the continent. No other region of the world has been so dominated by external ideas and models.*<sup>99</sup> Thandika Mkandawire and Chukwuma Charles Soludo

### **Sub-Saharan fiscal landscape: An appraisal of the effects of economic liberalization on refugee movement**

#### **Introduction to Part 1**

In broader historical terms, Africa has been a victim of unfair trade.<sup>100</sup> Whilst industrialised countries continue to help in the form of bailouts and economic adjustment programmes, African leaders have fallen into traps of golden handshakes that go beyond the elbow. Such handshakes have only been warm to a few up the power rungs and have led to serious abject poverty in most African states. The situation in the Sub-Saharan Africa (SSA) has further been made dire by the political instability embedded in a wide variety of destabilizing economic, socio-political, cultural and religious factors. Economic performance in the 49 countries of the SSA has further been dented by recurring civil wars, climate change and cross-border displacement.<sup>101</sup> In some countries in the SSA the democratic space has been stifled by autocratic leaders who refuse to cede power thus dampening the hopes of a largely young and fastest growing population. With the advent of neoliberalism and its adverse effects on the region's economy, the question for determination becomes: why despite evident disastrous results, do African States continue seeking choking aid?

This chapter seeks to evaluate the impact of neoliberal policies on the economic structure of Sub-Saharan Africa. These policies have been dubbed the “Washington Consensus” on the following grounds.<sup>102</sup> First, this phrase was coined in 1990 by John Williamson who was

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<sup>99</sup> Mkandawire and Soludo (n 34) vii.

<sup>100</sup> Jomo Kwame Sundaram and Rudiger von Arnim, ‘Economic Liberalization and Constraints to Development in Sub-Saharan Africa’ (United Nations Department of Economic and Social Affairs 2008) Working Paper ST/ESA/2008/DWP/67 <[https://www.un.org/esa/desa/papers/2008/wp67\\_2008.pdf](https://www.un.org/esa/desa/papers/2008/wp67_2008.pdf)> accessed 20 August 2021.

<sup>101</sup> Djibouti is not included in Sub-Saharan Africa, as it is handled administratively as part of the Middle East and North Africa. Also see discussion on SSA countries : Amsalu K Addis and Zuping Zhu, ‘The Political Situation, Trends and Geopolitical Implications of Sub-Saharan and North African Countries: Comparative Study’ (2018) 8 Open Journal of Political Science 108.

<sup>102</sup> Williamson, ‘The Washington Consensus as Policy Prescription for Development’ (n 97).

referring to a list of ten specific policies that were aimed at reforming the economies of Latin America.<sup>103</sup> For the purpose of this study, it is prudent to run the list of these policies which have mutated into prescribed economic liberalisation programmes for most African countries.<sup>104</sup> John Williamson categorised them as: fiscal discipline, streamlining public expenditure, tax reform, financial liberalisation, adoption of a single and competitive exchange rate, trade liberalisation, elimination of barriers to foreign direct investment, privatisation of state entities, market deregulation and secure property rights.<sup>105</sup>

The second aspect of the Washington Consensus is rooted in the intervention of the World Bank and the IMF in prescribing SAPs. These institutions, popularly referred to as the Bretton Woods institutions, were set up in 1944 at a meeting of 43 countries in Bretton Woods, New Hampshire in the United States of America.<sup>106</sup> Of note is how economic liberalisation programmes have contributed to the subversion of African economies and triggered unprecedented human flight because of precarious and extreme poverty that is inhumane and degrading.<sup>107</sup> Focussing on Uganda and Eritrea, the chapter will trace the historical origins of the concept of neoliberalism and attempt to enumerate the different economic policies that have been used in enhancing the role of the private sector.

Neoliberalism is multifaceted and thus impossible to confine to a lexical definition.<sup>108</sup> The concept is derived from the eighteenth-century liberal political theory and political economy. The first book-length considered to have used the term *neoliberalism* in its title, is Jacques Cros' doctoral thesis, "*Le néo-libéralisme et la révision du libéralisme*".<sup>109</sup> Cros regarded neoliberalism as a political ideology revived before and during the second World War so as to resuscitate classical liberalism.<sup>110</sup> At the heart of neoliberalism, is the relation between private property and individuals.<sup>111</sup> The argument is that if people are in control of their own resources

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<sup>103</sup> *ibid.*

<sup>104</sup> Sundaram and Arnim (n 100).

<sup>105</sup> Williamson, 'The Washington Consensus as Policy Prescription for Development' (n 97); John Williamson, 'The Strange History of the Washington Consensus' (2004) 27 *Journal of Post Keynesian Economics* 195.

<sup>106</sup> Sandra Kollen Ghizoni, 'Creation of the Bretton Woods System' (*Federal Reserve History*, 22 November 2013) <<https://www.federalreservehistory.org/essays/bretton-woods-created>> accessed 22 August 2021; John W Pehle, 'The Bretton Woods Institutions' (1946) 55 *The Yale Law Journal* 1127.

<sup>107</sup> Federici (n 78).

<sup>108</sup> Alfredo Saad-Filho and Deborah Johnston (eds), *Neoliberalism: A Critical Reader* (Pluto Press 2005) <<https://www.jstor.org/stable/j.ctt18fs4hp>> accessed 22 August 2021.

<sup>109</sup> Jacques Cros, Université de Toulouse, and Faculté de droit et des sciences économiques, '*Le "néo-libéralisme" et la révision du libéralisme*' (Imprimerie moderne 1951) <<https://www.worldcat.org/title/neo-liberalisme-et-la-revision-du-liberalisme/oclc/490506090>> accessed 21 August 2021.

<sup>110</sup> *ibid.*

<sup>111</sup> John F Henry, 'The Historic Roots of the Neoliberal Program' (2010) 44 *Journal of Economic Issues* 543.



and there is no despotic interference from the State, then individuals can decide their own interests and advance their life prospects. It is further added that for these life prospects to be achieved there must be a contest between individuals who scrutinise each other at the 'market' where the winners are adjudged on the basis of their 'intelligence, a better work effort and greater efficiency'.<sup>112</sup>

This makes neoliberalism a theory of political economic practices that are premised on the fact that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets and free trade.<sup>113</sup> In this view it then becomes a project to expand and universalize free-market social relations<sup>114</sup>, thus making it a political ideology which is 'favourable to constitutional changes and legal or administrative reforms tending in the direction of freedom or democracy'.<sup>115</sup>

However, not all observers allude to neoliberalism in positive embellishments. Even Joseph Stiglitz, who played a critical role in President Bill Clinton's government as Counsel of Economic Advisors and having been the Chief Economist of the World Bank, agrees that the Washington Consensus remains political and shrouded in secrecy.<sup>116</sup> This has made other distinguished scholars view neoliberalism and its attendant economic packages as 'colonialism' and financial imperialism that aims at controlling policies and resources rather than gaining territorial possession.<sup>117</sup> In political terms, Silvia Federici further views the concept as a 'philanthropic', 'humanitarian', 'footloose' colonialism that aims at 'governance' rather than 'government'.<sup>118</sup> Thabo Mbeki, former South African president, during the World Summit on Sustainable Development in Johannesburg in August-September 2002, labelled neoliberalism and its attendant economic structural programmes, as "global apartheid".<sup>119</sup> He is of the view

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<sup>112</sup> *ibid* 543.

<sup>113</sup> David Harvey, 'Neoliberalism as Creative Destruction' (2007) 610 *The Annals of the American Academy of Political and Social Science* 22, 2.

<sup>114</sup> Graham Harrison, 'Economic Faith, Social Project and a Misreading of African Society: The Travails of Neoliberalism in Africa' (2005) 26 *Third World Quarterly* 1303, 1306.

<sup>115</sup> Oxford English Dictionary, 'Neoliberalism Noun - Definition' <<http://www.oed.com/&sa>> accessed 22 August 2021.

<sup>116</sup> Joseph Stiglitz, 'Distinguished Lecture on Economics in Government: The Private Uses of Public Interests: Incentives and Institutions' (1998) 12 *Journal of Economic Perspectives* 3.

<sup>117</sup> Federici (n 78).

<sup>118</sup> *ibid*.

<sup>119</sup> Patrick Bond, 'South Africa Tackles Global Apartheid: Is the Reform Strategy Working?' (2004) 103 *The South Atlantic Quarterly* 817.

that the Bretton Woods institutions and other bilateral donors have a master plan to ostracise and rip off African economies of its resources: natural and human.<sup>120</sup>

Neoliberalism is framed around three basic tenets. First, the government should consent to a low level of domestic saving, both private and public.<sup>121</sup> Such consent is given to the Bretton Woods Institutions for a corresponding reliance upon foreign capital to finance national development. Second, neoliberalism does away with the welfare state.<sup>122</sup> The government should renounce any affirmative strategy and adhere to the world economic order. This calls upon emphasis on tradable goods, withdrawal of restrictions on competition from abroad and the removal of food, import and input subsidies.<sup>123</sup> Third, monetary stabilization is a requirement that calls for devaluation of overvalued currencies. These principles, espoused in the “Washington Consensus” are aimed at what other observers call “getting prices right”, “getting institutions right” and “good governance”.<sup>124</sup> This ‘advice’ has been viewed as imposed and comes with conditionalities which subvert African economies. The reality is that:

...there is strong evidence that some of the economic policy advice given to and the conditionalities imposed on [Sub-Saharan African] governments have reflected vested interests and prejudices.<sup>125</sup>

Therefore, the question for determination is whether neoliberalism, in its different forms, can be applied in the SSA economies? Ogbimi suggests that the neoliberal policies will not produce the desired results in Africa because they wrongly presume that African economies are equal and that the countries are experiencing similar problems.<sup>126</sup> This ‘one size fits all’ approach negates the level of economic development in the former colonies and in a way perpetuates the legacy of colonialism.<sup>127</sup> It is further argued that imposing such economic packages as the SAPs has unintended consequences which subverts the economic structures of the poor and developing countries. In fact, the neoliberal hegemony has cut foreign direct investment and has returned African countries to colonial economies where they only depended mostly on

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<sup>120</sup> *ibid.*

<sup>121</sup> Christina H Gladwin, ‘Fertilizer Subsidy Removal Programs and Their Potential Impacts on Women Farmers in Malawi and Cameroon’ in Christina H Gladwin (ed), *Structural Adjustment and African Women Farmers* (University of Florida Press: Center for African Studies 1991) <<https://genderandsecurity.org/projects-resources/research/structural-adjustment-and-african-women-farmers>> accessed 22 August 2021.

<sup>122</sup> Gatwiri, Amboko and Okolla (n 79).

<sup>123</sup> Williamson, ‘The Washington Consensus as Policy Prescription for Development’ (n 97).

<sup>124</sup> Sundaram and Arnim (n 100) 2.

<sup>125</sup> *ibid* 26.

<sup>126</sup> FE Ogbimi, ‘Structural Adjustment Is the Wrong Policy’ (1998) 8 African Technology Forum (MIT) <<http://web.mit.edu/africantech/www/articles/PlanningAdjust.htm>> accessed 22 August 2021.

<sup>127</sup> *ibid.*

mineral extraction and export-oriented agriculture. Such an economy has again contributed to the wealth of the Global North countries as they get raw materials cheaply from Africa.<sup>128</sup>

The intended objectives of these economic restructuring programmes were to boost productivity, eliminate inefficiency and increase Africa's competitive edge<sup>129</sup>. However, economies have collapsed and in the true words of Karl Marx "barbarian and semi-barbarian countries", have become, "dependent on the civilised ones, nations of peasants on nations of bourgeois, the East on the West."<sup>130</sup> The World Bank is of the view that African countries that have undertaken some reforms have achieved some increase in growth and have benefited from agricultural, trade, exchange rate reforms and from the demonopolisation of important commercial activities.<sup>131</sup> In recent years the World Bank further insisted that 'Incomes have risen, productivity has gone up—particularly in developing countries—and poverty has fallen'.<sup>132</sup> To that list the Bretton Wood Institution adds favourable business climate which demands low tax regimes, limited state interference and free access to markets and vital resources.<sup>133</sup>

However, evidence on the ground points to the fact that the economic structural programmes have had adverse effects on health determinants and slanted economic growth thus threatening peoples' lives and liberty in developing countries that adopted such policies.<sup>134</sup> By doing away with the welfare state and imposing user fees for health and educational services, the policy has drastically reduced human capital development, with women the hardest hit. This led to dramatic rises in the costs of urban services and products, as state subsidies to urban areas and state support of the urban middle class were withdrawn.<sup>135</sup> The shrinkage of government services and reduction in social spending has offloaded responsibilities on women, who are forced to look for alternatives to take care of their families when their spouses are out of work. While the social outlook was grim, Bond and Dor also note with dismay how in three southern African countries (Malawi, Zambia and Zimbabwe), daily protein consumption (per capita) fell

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<sup>128</sup> Mkandawire and Soludo (n 34).

<sup>129</sup> Federici (n 78).

<sup>130</sup> Marx (n 46).

<sup>131</sup> World Bank, 'World Development Report 1994 : Infrastructure for Development' (*World Bank Group*, 1994) <<https://openknowledge.worldbank.org/handle/10986/5977>> accessed 22 August 2021.

<sup>132</sup> World Bank, 'World Development Report 2020: Trading for Development in the Age of Global Value Chains' (World Bank 2020) Text/HTML <<https://www.worldbank.org/en/publication/wdr2020>> accessed 22 August 2021.

<sup>133</sup> *ibid*.

<sup>134</sup> Gatwiri, Amboko and Okolla (n 79); Mkandawire and Soludo (n 34); Garnham (n 79).

<sup>135</sup> Gladwin (n 121).

20-25% during the 1970-95 period.<sup>136</sup> This led to serious malnutrition in children and also contributed to high infant mortality rate and seriously slanted the life expectancy rate to 52 years before hitting the lowest of 37 years for Zimbabweans in 2006.<sup>137</sup>

The devaluation of currencies and high interest rates had a far greater impact on all African countries which embraced global free-market capitalism. Devaluation led to an inflationary environment that extinguished the entrepreneurial flame of the small businesses. Uncontrolled inflation led to the curtailment of state investment in the public sphere, and the replacement of public sector jobs by jobs in export agriculture and manufacturing. As Mohan, Brown, Milward & Zack-Williams reckon, these jobs have tended to lack the security or benefits that accompany employment in the public sector.<sup>138</sup> They are not only seasonal but also depend on a number of factors like the unpredictable climate. With an over-supply of university graduates mostly primed to work in the public sector, unemployment becomes a chronic problem in Africa. For Zimbabwe, its people have become the largest export emigrating to other African and international destinations because of a coalescence of political and economic chaos.<sup>139</sup>

Certainly, it will be unfair to heap all the blame on the Bretton Woods Institutions. The corruption of some African leaders is public knowledge.<sup>140</sup> International loans have been diverted into personal funds and into political parties' coffers so as to have a stranglehold on power. The Executive Secretary & National Coordinator of Nigeria Extractive Industries Transparency Initiative, Dr Orji Ogbonnaya Orji cited a remark by a Citibank Vice Chairman before a large audience during a meeting of the African Development Bank (AfDB), in 1998, that six individuals in Anglophone African Countries (between 1986 and 1993) owned about \$30 billion in deposits in European and American banks.<sup>141</sup> The so called home-grown policies to counter neoliberalism, like 'New Partnership for Africa's Development' (NEPAD, launched in 2001), are also seen as, "a cloth to polish the chains of global apartheid".<sup>142</sup> Viewed as one

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<sup>136</sup> Patrick Bond and George Dor, 'Uneven Health Outcomes And Political Resistance Under Residual Neoliberalism In Africa' (2003) 33 International Journal of Health Services 607.

<sup>137</sup> Genius Murwirapachena and Courage Mlambo, 'Life Expectancy In Zimbabwe: An Analysis Of Five Decades' (2015) 14 International Business & Economics Research Journal (IBER) 417.

<sup>138</sup> Giles Mohan and others, *Structural Adjustment: Theory, Practice and Impacts* (Routledge 2000) <<http://www.routledge.com/books/Structural-Adjustment-isbn9780415125222>> accessed 22 August 2021.

<sup>139</sup> Solidarity Peace Trust, 'No War in Zimbabwe: An Account of the Exodus of a Nation's People' (Solidarity Peace Trust 2004) <<http://solidaritypeacetrust.org/198/no-war-in-zimbabwe/>> accessed 22 August 2021.

<sup>140</sup> MH Khalil Timamy, 'African Leaders and Corruption' (2005) 32 Review of African Political Economy 383; Barney Warf, 'Geographies of African Corruption' (2017) 1 PSU Research Review 20; Nimi Hoffmann and Fred Hendricks, 'African Perspectives on Corruption' (2018) 36 Journal of Contemporary African Studies 425.

<sup>141</sup> Ogbimi (n 126).

<sup>142</sup> Bond and Dor (n 136).

last hope for Africa to reverse its slide into irrelevance, NEPAD has been seen as hypocritical. It preaches good governance and the rule of law, yet spectacularly folds hands and watches serious human rights abuse under its unwatchful eye. Despite publicly promoting the ideals of good governance, it failed to raise its voice on recent electoral violence in Congo-Brazzaville, Madagascar, Zambia and Zimbabwe.<sup>143</sup>

In the field of migration neoliberal policies are couched in the language of border security, internal security and national interest. It has led to neoliberal friendly countries including those in the Global South, to craft their national laws in line with the neo-liberal project of *non-entrée* and border security. Whilst this is a cornerstone of sovereignty the harsh measures taken are a show of a violent authority that uses the principle of national sovereignty in maintaining colonial sovereignty at home and in enabling neoliberalising missions abroad.<sup>144</sup> This is arguably a veiled attack on the role of international law in perpetuating the neoliberal agenda which restricts human mobility. The argument by Giannacopoulos is that the preoccupation by sovereign states to securitise the borders in the name of security, efficiency and national interest presupposes that certain human mobility requires a legal infrastructure to curtail it. In doing so, categories of migrants emerge as either desirable or undesirable and thus sanitise the violence of war and exclusion.<sup>145</sup> In the ultimate end, the neoliberal agenda (border security, internal security and national interest) condemns migratory movements as ‘irregular’ only when the ‘periphery seeks to come to the centre’.<sup>146</sup> It fails to acknowledge that economic refugees are driven away from their countries by a coalescence of factors resulting from neoliberal policies and agendas that create disparate socio-economic conditions between countries. In this context, the neoliberal agenda has arguably created a sense of entitlement that may be buttressed by some national judgments<sup>147</sup> that may condemn lives in limbo when they try to ‘convert the unhappy position [of their lives] into points of law’. This sense of entitlement, couched in veiled

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<sup>143</sup> Hennie Kotzé, Carly Steyn, and Konrad-Adenauer-Stiftung, *African Elite Perspectives: AU and NEPAD; a Comparative Study across Seven African Countries* (Konrad-Adenauer-Stiftung 2004).

<sup>144</sup> Maria Giannacopoulos, ‘Offshore Hospitality: Law, Asylum and Colonisation’ (2014) 17 *Law Text Culture* 163.

<sup>145</sup> *ibid* 172.

<sup>146</sup> Sally Davison and George Shire, ‘Race, Migration and Neoliberalism: How Neoliberalism Benefits from Discourses of Exclusion’ (2015) 59 *Soundings: A journal of politics and culture* 81.

<sup>147</sup> *Teitiota v The Chief Executive of the Ministry of Business Innovation and Employment* (NZHC 3125). This case relates to an applicant who was seeking refugee status in New Zealand on the grounds of environmental disaster. Priestley J held that: ‘The attempt to expand dramatically the scope of the Refugee Convention and particularly Article 1A (2) is impermissible. The optimism and novelty of the applicant’s claim does not, in the context of well settled law and the current concerns of the international community, convert the unhappy position of the applicant and other inhabitants of Kiribati into points of law’ [63]

language of national security has created unequal mobility structures. Davison and Shire, in their attack of this neoliberal agenda reveal that:

The way migration is discussed fits into a hierarchy of entitlement. It is assumed that people from the rich west can go wherever they want, but the poor will by and large stay where they are. The supreme example of this one-way view of migration is the invisibility in much contemporary discussion of the mass European/white settler migrations of the nineteenth century, especially to North and South America, the Antipodes and Southern Africa, which led to the dispossession, subordination and sometimes eradication of whole populations, with all the consequent inequality and violence that this has brought to the world.<sup>148</sup>

This has emboldened other critics to call for a change of narrative that sees migration as a decolonization process.<sup>149</sup> Colonisation resulted in dispossession and unequal economic structures. Countries that were subjugated by colonialism ended up with subverted economies that benefited the “migrant from the West”, as a result therefore there is need to equalise the scales of equity by allowing migration to the West in reverse order.<sup>150</sup> Such migration, however, should be orderly and one that is regulated by a ‘different conceptualization that engages economic [refugees] as political agents exercising equality rights when they engage in “de-colonial” migration’.<sup>151</sup>

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<sup>148</sup> Davison and Shire (n 146).

<sup>149</sup> Achiume (n 31).

<sup>150</sup> *ibid.*

<sup>151</sup> *ibid* 1510.

## Chapter 1

### Economic Liberalization and the impact on refugee movements in Africa

#### 1.1. Economic liberalisation: War by any other means?

The preoccupation of economic liberalisation is based on the noninterventionist approach by the government into matters of the political economy.<sup>152</sup> This non-intervention, in the name of efficiency and effective governance in a free market, is seen as a catalyst for the process of development. The economic development is not only hinged on the political economy but also on how it positively impacts on the social sphere. To that end, studies on neoliberal reforms identify that public intervention in the political economy as being pivotal in improving the rule of law, government size, regulatory efficiency and market efficiency. The pro-market spirit creates a competitive business environment in which entrepreneurial vitality is unlocked.<sup>153</sup>

Economic liberalisation can thus be defined as a pro-market policy in which the government provides policies and an enabling business environment that promote free trade, deregulation, subsidy elimination, downsizing the public service and setting price controls.<sup>154</sup> In this regard, the government should adopt a noninterventionist approach and let market forces dictate the business environment. The merit in this approach is that market forces will thus stimulate growth and reduce poverty. It is further argued that if the government intervenes with the market forces, this will glut the market and give rise to blockages and market distortions.<sup>155</sup> There are also instances in which the State may act in good faith to streamline the economy, but even in such cases, still the government is considered incompetent and lacking the technical know-how in resource allocation.<sup>156</sup> Amongst the reasons given for this analogy is the fact that some politicians may exude rent-seeking behaviour, self-interest and grasp political expediency thus affecting resource allocation. Such behaviour does not only dampen the entrepreneurial spirit but also disincentivises private investments.

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<sup>152</sup> Oliver E Williamson, 'Markets and Hierarchies: Analysis and Antitrust Implications: A Study in the Economics of Internal Organization' (Social Science Research Network 1975) SSRN Scholarly Paper ID 1496220 <<https://papers.ssrn.com/abstract=1496220>> accessed 23 August 2021; Williamson, 'The Strange History of the Washington Consensus' (n 94); Stiglitz (n 116).

<sup>153</sup> Kalim Siddiqui, 'Developing Countries' Experience with Neoliberalism and Globalisation' (2012) 4 Research in Applied Economics 12.

<sup>154</sup> Sundaram and Arnim (n 100).

<sup>155</sup> Siddiqui (n 153).

<sup>156</sup> William Dyer Grampp, *Economic Liberalism: The Classical View*, vol 2 (Random House 1965) <[https://oll.libertyfund.org/title/grampp-economic-liberalism-vol-2-the-classical-view#lf1444-02\\_head\\_002](https://oll.libertyfund.org/title/grampp-economic-liberalism-vol-2-the-classical-view#lf1444-02_head_002)> accessed 23 August 2021.

Economic liberalisation reforms are thus effective when they rely on the general equilibrium theory.<sup>157</sup> This refers to a situation in which every buyer and seller in the market place is driven by self-interest which makes the market produce unique prices and quantities which are a perfect match of the demand and supply of the goods and services.<sup>158</sup> However, this is overly based on mathematical computation and the assumption that, human beings are rational and make rational decisions in regard to goods and services.<sup>159</sup> Another criticism levelled against economic liberalisation reforms is the fact that ‘markets are seldom competitive’ as suggested by the neoliberal model.<sup>160</sup>

This neoliberal policy has been used as a model in most developing countries as a way to prop their economies and promote not only efficiency but also self-dependence. However, studies suggest that economic liberalisation has not produced its intended results.<sup>161</sup> In the words of Stiglitz, ‘the prescriptions of the Washington consensus were evidently not enough’,<sup>162</sup> because ‘free people may do what they will do and are able to do’.<sup>163</sup>

William Dyer Grampp explains this by providing three key tenets to economic liberalism. He is of the view that, first, there has to be an *economic problem* which the people believe should be solved. Second, the envisaged measure should be *workable or feasible* to solve the economic problem at hand. Third, the methods to be used to solve the problem should be *approved by the people*.<sup>164</sup> The ‘people’ relates to “persons who are represented in government, whose opinion the government must take for its guide, and who in the end control the government”.<sup>165</sup> This qualification creates a fissure in the policy in that the government technocrats rely on economic advice from those who wish to assist in solving the problem. In the case of the SSA, the “assistance” comes from erstwhile colonisers who happen to have vested economic interests in their former colonies.<sup>166</sup> Mkandawire and Soludo label these advisors as the proverbial ‘too many cooks’ in the kitchen and go on to say that some ministries in some countries have been

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<sup>157</sup> Siddiqui (n 153).

<sup>158</sup> Williamson, ‘Markets and Hierarchies’ (n 152).

<sup>159</sup> *ibid.*

<sup>160</sup> *ibid.*

<sup>161</sup> Mkandawire and Soludo (n 34); Siddiqui (n 153); Garnham (n 79); Gatwiri, Amboko and Okolla (n 79).

<sup>162</sup> J Stiglitz, ‘Towards a New Paradigm for Development: Strategies, Policies and Processes’ [2002] Applied Econometrics and International Development <file:///C:/Users/BLAKA/Dropbox/My%20PC%20(DESKTOP-VEGSD8P)/Downloads/devparadigm.pdf> accessed 22 August 2021.

<sup>163</sup> Grampp (n 156).

<sup>164</sup> *ibid.*

<sup>165</sup> *ibid.*

<sup>166</sup> Mkandawire and Soludo (n 34) 1.



“partitioned among different donors”<sup>167</sup>. To that end, this has created inefficient bureaucracies in the continent, thus making the learning process for the SSA policymakers slow, and with it leads to the inevitable transfer of economic planning to the multilateral institutions. The end product is an economic policy that leads to the exclusion of the people it aims to protect. This is because the adoption of the so-called efficient economic policies that lead to the privatisation of such policy triggers as education, healthcare, water, electricity and housing will only mean that the rich have access to them while the poor are marginalised due to costly user fees.<sup>168</sup>

Critics are of the view that economic liberalisation is an exclusionary and detrimental policy for developing countries.<sup>169</sup> The SAPs programmes adopted in most post-colonial African countries have subverted their economies and in the words of Silvia Federici:

...the implementation of the structural adjustment programmes (SAPs) introduced in the 1980s by the World Bank and the International Monetary Fund (IMF) to facilitate the advance of multinational capital in the region, and the development of a state of constant warfare...shows that structural adjustment generates war, and war, in turn, completes the work of structural adjustment, as it makes the countries affected dependent on international capital, and the powers that represent it, beginning with the USA, the European Union (EU) and the UN. In other words, to paraphrase Clausewitz, 'structural adjustment is war by other means'.<sup>170</sup>

First, the above quote suggests that economic liberalisation is a source of conflict as it engenders a climate of constant warfare within a society. The state of constant warfare in this case possibly refers to deep seated inequalities that are entrenched by the new economic system. The gap between the poor and the rich widens as the social welfare net is removed.

The second aspect is that this generates ‘war’ within the society. The ‘war’ is a result of the adversarial spirit of the competition that is created which emphasises more on getting profits at the expense of widening the social safety net. As alluded by Mkandawire and Soludo, in Africa, where the economies are a replica of their erstwhile colonisers, the risk is that the former masters entrench a form of control in which resource allocation is externally managed<sup>171</sup> while the leaders are handicapped by conditionalities and economic threats to deliver the reforms.

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<sup>167</sup> *ibid* 36.

<sup>168</sup> Gatwiri, Amboko and Okolla (n 79) 90.

<sup>169</sup> Wise and Márquez (n 78); Federici (n 78); Kassim (n 78); Mkandawire and Soludo (n 34); Garnham (n 79); Gatwiri, Amboko and Okolla (n 79); Sundaram and Arnim (n 100); Siddiqui (n 153).

<sup>170</sup> Federici (n 78).

<sup>171</sup> Mkandawire and Soludo (n 34) vii. The writers argue that: “A major irony of African development history is that the theories and models employed have largely come from outside the continent. No other region of the world has been so dominated by external ideas and models”.

In this context it can be argued that the multilateral organisations maintains and perpetuates the status quo of the inequalities between the rich and the poor nations. This is probably done through the orchestration of “international law” as a weapon of regulation. Martti Koskenniemi provides an analogy of how international law is used as a weapon of exclusion and maintaining the status quo between the developed and the developing countries.<sup>172</sup> He is of the view that international law is indeterminate, and this is “deliberate and justified” as a political process that is aimed at regulating an uncertain future. The irony of this is that the ‘uncertain future’ in the political world is premised on issues that affect the common man in the streets. In the end, international law leads to unequal structures and institutions that do not cater for the destinies of the masses it regulates.

The SSA countries have as a result of this subtle coercion adopted different forms of SAPs. The list includes, but is not limited to land privatisation, industry deregulation, trade liberalisation, currency devaluation and disinvestment. These forms of economic liberalisation, on paper, aim to unlock economic blockages, increase efficiency and sharpen the competitive edge. Yet the adoption of these economic reforms has led to emaciated economies and has left most Africans rely on extraction and export-oriented agriculture.

While it is not always reliable to base economic performance on gross domestic product (GDP), because of different methods and reporting standards, the GDP curve can still be a valuable indicator of economic growth.<sup>173</sup> Figure 1 below shows a comparison of the GDP between SSA and that of the EU in the period 1960-2020. In a period of 60 years, Sub-Saharan Africa has failed to break the mean with the EU despite a cocktail of economic policy reforms from the West. The difference between the two regions keeps widening and seems to accede to the opinion that the stunted economic growth in the SSA region is based on policy and exogenous destiny.<sup>174</sup> The external economic interference has not improved the economic landscape of the SSA, rather it has caused abject poverty which in turn “may have increased the incidence of Africa’s numerous civil wars, as well as being a consequence of them”.<sup>175</sup>

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<sup>172</sup> Koskenniemi (n 84).

<sup>173</sup> World Bank, ‘World Development Report 2020’ (n 132).

<sup>174</sup> Paul Collier and Jan Willem Gunning, ‘Why Has Africa Grown Slowly?’ (1999) 13 *The Journal of Economic Perspectives* 3.

<sup>175</sup> *ibid* 6.

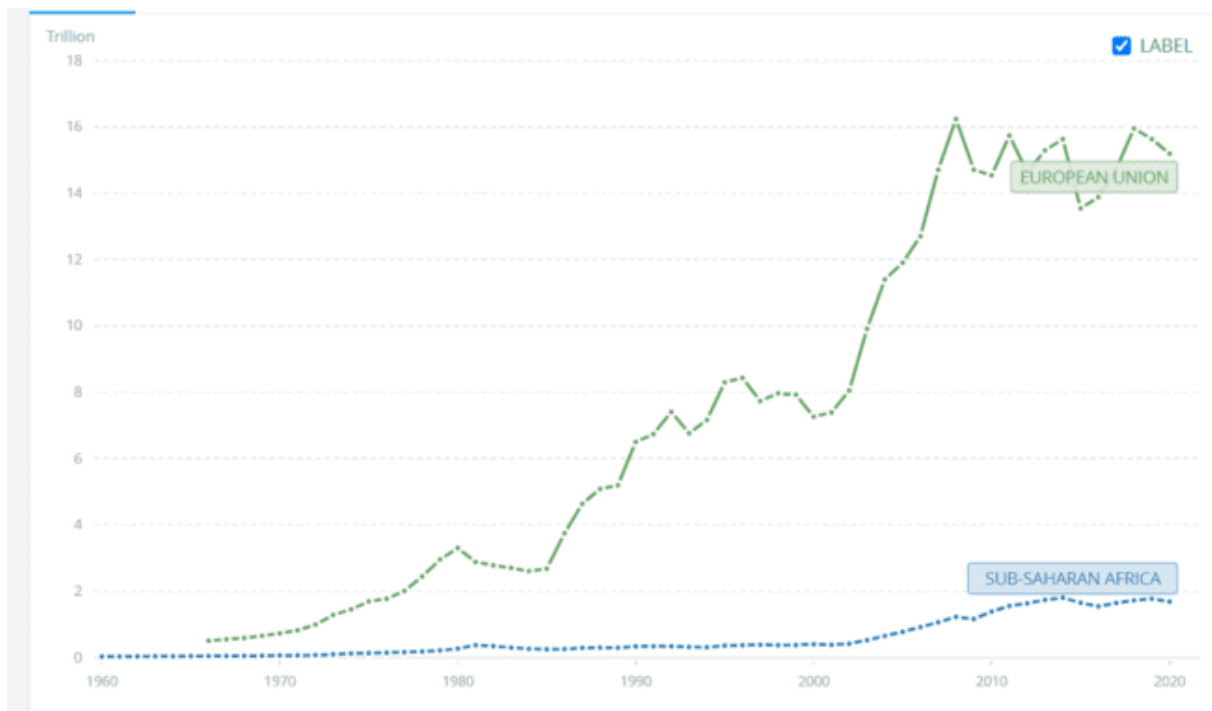


Figure 2: GDP (current US\$) - Sub-Saharan Africa, European Union<sup>176</sup>

As argued by Federici earlier on, economic liberalisation has caused “brutal impoverishment” which has led to social unrest and destabilised family life as “millions of people have been forced to leave their villages and go abroad in search of new sources of livelihood”.<sup>177</sup> This struggle for a livelihood has in turn led to the recruitment of the unemployed youth into warring ethnic factions thus resulting in flares of civil war bent on controlling such resources as minerals and the land. Federici further argues that these warring groups need “State power” as a means of possessing land, gold, diamonds, oil and timber.<sup>178</sup> These resources are then used to plunder the economy through underhand deals with foreign companies and international agencies for foreign currency which unfortunately is stacked in foreign bank accounts and not used to alleviate poverty in Africa. This collusion, through various economic reform programs, then becomes a “new war to conquer territories” and subjugate the common man.<sup>179</sup> In fact, the existence of these economic liberalisation policies entrenches the “absolutism of financial capital” with dire outcomes of grim poverty, unemployment and job insecurity.<sup>180</sup> It can thus

<sup>176</sup> World Bank, ‘GDP (Current US\$) - Sub-Saharan Africa, European Union’ (*The World Bank*, 2021) <<https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=ZG-EU>> accessed 25 August 2021.

<sup>177</sup> Federici (n 78) 155.

<sup>178</sup> Federici (n 78).

<sup>179</sup> Subcomandante Marcos, ‘The Fourth World War Has Begun’ [1997] *Nepantla: Views from South* 2.3 559, 559.

<sup>180</sup> *ibid* 563.

not be argued that economic growth of any country is equal to better and equal distribution of wealth and unemployment. The effect of the neoliberal paradigm is to subvert the economic structures of the less developed countries and create an optimum climate for pillaging the human and natural resources to those who already have amassed wealth through subjugation.

One may be persuaded to argue that Africa is endowed with land and agriculture is its mainstay. This argument in face of the neoliberal agenda can be exposed on the following grounds. First, Africa's geographic and demographic structure predisposes the continent to slow growth in that there are hostile natural elements which are not suitable for livestock and agriculture.<sup>181</sup> Many agree that the Achilles heel for Africa's development is ironically its presumed strength: agriculture.<sup>182</sup> The soil quality in Africa requires a lot of mechanisation and application of artificial supplements like fertilizer, which in the face of the economic reforms is expensive for ordinary subsistence farmers. This also comes with the vagaries of the weather in that rainfall is quite unpredictable in that it may come in the form of floods or in showers enough to leave the land dry, arid and parched. Droughts in Africa have condemned many to lives of miseries as it comes with job insecurity and unemployment.

The second factor that coalescences with the neoliberal paradigm in the agricultural sector is that households become trapped in low-income and high liquidity equilibria.<sup>183</sup> This results in a situation where the price of the assets increases as cheap money chases fewer and fewer profitable investments and thus pricing the assets out of range for the common man in the streets.<sup>184</sup> For it has been proven that socio-economic instability may be generated during such chaotic time paths when too much money chase few investments and provide wrong signals in the market.<sup>185</sup> In the SSA, this has resulted in massive job losses, job insecurity and a state of endemic unemployment.

In the field of migration, it can also be argued that the neoliberal policies have had a consequential impact on migration. The neoliberal agenda has affected refugee sending countries by creating a strong need to emigrate to developed countries due to lack of jobs. This

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<sup>181</sup> Collier and Gunning (n 174).

<sup>182</sup> Mkandawire and Soludo (n 34); Grasian Mkodzongi and Peter Lawrence, 'The Fast-Track Land Reform and Agrarian Change in Zimbabwe' (2019) 46 *Review of African Political Economy* 1.

<sup>183</sup> Collier and Gunning (n 174).

<sup>184</sup> Giorgio Calcagnini and others, 'Does Too Much Liquidity Generate Instability? | SpringerLink' [2020] *Journal of Economic Interaction and Coordination* <<https://link.springer.com/article/10.1007/s11403-020-00296-0>> accessed 26 August 2021.

<sup>185</sup> *ibid.*

has been further exacerbated by the increasing vulnerability of those on the move not only in their countries of origin but also when they transit through other countries to their destinations. The ethnographic study on Eritrean refugees by Belloni has highlighted this dilemma by showing how migrants can go to lengths to risk their lives by undertaking unconventional journeys just to escape the debilitating economic conditions in their country.<sup>186</sup>

The United Nations recently reported that over 270 million people have been categorised as international migrants, that is, persons who have changed their usual country of origin either intentionally or involuntarily.<sup>187</sup> The international migrant stock helps in estimating the “total number of international migrants present in a given country at a particular point in time”. The figures from the UN shows that out of 270 million international migrants, Europe hosts the largest number of migrants (86,7 million).<sup>188</sup> This number is projected to grow as the economic growth of sub-Saharan Africa slumps further.<sup>189</sup> In view of this trend, the most persuasive argument to explain this is that “migration has become an essential component of the process of capitalist restructuring”.<sup>190</sup>

This new economic regiment has thus arguably given rise to forced displacement. While this term is not applicable to all international migrants, save for refugees, asylum seekers and other forcibly displaced persons outside their country of origin, the common narrative in the current migration flows is the dynamics of uneven development in the new global world.<sup>191</sup> The United Nations acknowledges the link between migration and development and suggests that most migrants are from the least developed countries.<sup>192</sup> At the same time, studies on the link between development and international migration show that most migrants are from middle income countries and the poorest migrants do not have financial means to migrate.<sup>193</sup> However, in the new neoliberal world, the irony is that the more developed countries pursue wealth and preach

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<sup>186</sup> Belloni (n 10).

<sup>187</sup> United Nations, ‘Number of Migrants Now Growing Faster than World Population, New UN Figures Show’ (*UN News*, 17 September 2019) <<https://news.un.org/en/story/2019/09/1046562>> accessed 27 August 2021.

<sup>188</sup> IOM, ‘International Migrant Stocks’ (*Migration data portal*) <<https://www.migrationdataportal.org/themes/international-migrant-stocks>> accessed 5 June 2022. Europe hosts 86,7 million, Asia has 85,6 million and North America has 58,7 million international migrants.

<sup>189</sup> *ibid.*

<sup>190</sup> Wise and Márquez (n 78) 2.

<sup>191</sup> Wise and Márquez (n 78); Federici (n 78).

<sup>192</sup> United Nations (n 187)

<sup>193</sup> Hein de Haas, ‘Paradoxes of Migration and Development’ (2019) 157 IMI Working Paper Series 1. See also; Hein de Haas and others, ‘International Migration: Trends, Determinants, and Policy Effects’ (2019) 45 *Population and Development Review* 885.

the market efficiency and profitability, the more regional wars and internal conflicts are generated in pursuit for scarce resources. In the end, this gives rise to:

...a great wheel of millions of migrants across the planet. "Foreigners" in a world "without borders" (according to the promise made by the victors of the Cold War) who suffer xenophobic persecution, job insecurity, the loss of their cultural identity, police repression, and hunger- that is, when they aren't thrown into prison or murdered.<sup>194</sup>

To that end, the suggestion that in the new global era there is free movement of both goods and people is not true to the latter.<sup>195</sup> In any case, the preoccupation of the United Nations in pushing for safe, orderly and regular migration in the new global era has actually given rise to *non-entrée* policies which leads to the tightening of borders only when the periphery seeks to come to the centre.<sup>196</sup> This periphery is made up of citizens whose economies have been subverted due to interventionist economic policies. The concept of forced migration has thus shown itself in the following four categories: a) migration due to violence, conflict, and catastrophe, b) climate change and environmental degradation, c) human trafficking and smuggling, d) migration due to dispossession, exclusion, and unemployment.<sup>197</sup>

According to Wise and Márquez<sup>198</sup>, the first category results from indissolubly linked social, political and communitarian conflicts. This is made worse by existence of natural disasters in the second category and such human activities aimed towards major infrastructural developments. With the current number of refugees and asylum seekers being over 80 million<sup>199</sup>, it is easy to deduce how forced migration has had an impact on communities, social groups, families and individuals in Sub-Saharan Africa. While the second category of climate change and environment falls outside the purview of asylum and refugee seeking categories<sup>200</sup>,

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<sup>194</sup> Marcos (n 179) 565.

<sup>195</sup> *ibid* 562. He argues that "The unification that neoliberalism produces is economic; in the gigantic planetary superstore only merchandise circulates freely, not people".

<sup>196</sup> Spijkerboer (n 10).

<sup>197</sup> Wise and Márquez (n 78)

<sup>198</sup> *ibid*.

<sup>199</sup> UN High Commissioner for Refugees (UNHCR) (n 55).

<sup>200</sup> United Nations High Commissioner for Refugees, 'Climate Change and Disaster Displacement' (*UNHCR*) <<https://www.unhcr.org/climate-change-and-disasters.html>> accessed 19 March 2021; According to the United Nations persons may have a refugee claim on the grounds of climate displacement if there is nexus with the five Convention reasons. The United Nations is of the view that the term "climate refugees" is a misnomer and the correct and accurate description should be "persons displaced in the context of disasters and climate change". However, this stance has been constantly questioned, critics are of the view that ignoring the existence of "climate refugees" will leave many lives (especially from sub-Saharan Africa in limbo, *see*, Michael Addaney, Ademola Oluborode Jegede and Miriam Matinda, 'The Protection of Climate Refugees under the African Human Rights System: Proposing a Value-Driven Approach' (2019) 3 African Human Rights Yearbook 241.

the effect of neoliberal policies that result in unequal development makes the poorest countries “most vulnerable to environmental and anthropogenic contingencies.”<sup>201</sup>

The third category on *human trafficking and smuggling* typifies the migration trends in Eritrea.<sup>202</sup> Human trafficking and smuggling have become a lucrative business and is increasing at an alarming rate. This is because of the restrictive entry policies in countries of destination which arguably has heightened hardship in the least developed countries. Milena Belloni’s multi-sited ethnography on the perilous journeys by Eritrean migrants is a good insight at how people try to find a way out of a country with limited economic opportunities. While it true that most Eritreans leave their country out of fear of forced military service, analysts are of the view that “massive problems in education, health care and supply of food” further compels a younger generation to leave Eritrea.<sup>203</sup> As shall be shown in chapter 5, statistics from over 40 countries hosting Eritrean refugees shows that forced conscription is interconnected to worse economic conditions and sometimes leads to receiving countries in rejecting their asylum claims on the basis that such applications are motivated by economic reasons.<sup>204</sup> As shown in *Figure 3* below, over a period of two decades, the acceptance rate for Eritrean asylum seekers has been on an upward trend. However, the red line on rejected applications triggers an evaluation of the reasons provided by RSDOs for rejecting such asylum applications when the majority of Eritreans are generally affected by the same displacement factors. If the assessment is done on a case-by-case basis, the question for determination would be on the nexus between Convention persecution factors and economic displacement factors.<sup>205</sup>

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<sup>201</sup> Wise and Márquez (n 78).

<sup>202</sup> Belloni (n 10); Milena Belloni, ‘Cosmologies and Migration: On Worldviews and Their Influence on Mobility and Immobility’ (2020) 0 *Identities* 1; Woldemikael (n 80); Malk (n 32); Joseph Whittle and Georgios A Antonopoulos, ‘How Eritreans Plan, Fund and Manage Irregular Migration, and the Extent of Involvement of “Organised Crime”’ (2020) 22 *Crime Prevention and Community Safety* 173.

<sup>203</sup> Worlddata.info, ‘Refugees from Eritrea: Figures and Development’ (*Worlddata.info*, 2021) <<https://www.worlddata.info/africa/eritrea/asylum.php>> accessed 4 June 2022.

<sup>204</sup> *ibid*.

<sup>205</sup> Katie Kuschminder, ‘Before Disembarkation: Eritrean and Nigerian Migrants Journeys within Africa’ (2021) 47 *Journal of Ethnic and Migration Studies* 3260.

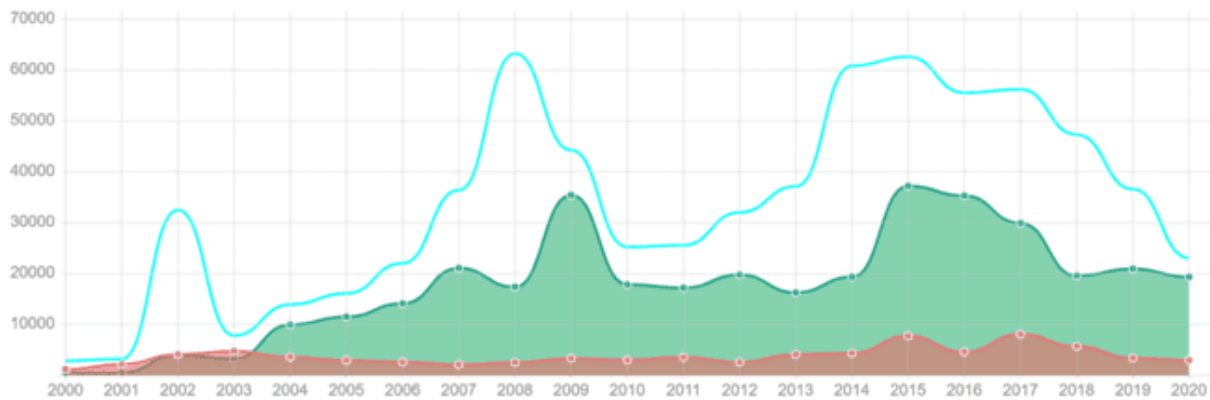


Figure 3: Development of asylum applications from citizens from Eritrea 2000 to 2020<sup>206</sup>

On the other hand, the trendline for Uganda's international migrant stock shows a different story in comparison to that of Eritrea. The term international migrant stock refers to “the number of people born in a country other than in which they live.”<sup>207</sup> However, the reliability of such data might be questionable as much of it is provided through population censuses which might reflect conservative statistics due to governmental interference. At the present moment, Uganda hosts over 1,400,000 refugees mainly from South Sudan, the Democratic Republic of Congo (DRC) and Burundi.<sup>208</sup> The numbers are on a steady rise, arguably because of Uganda's most favourable and progressive refugee assistance programmes which allow freedom of movement, work rights, and allocation of land for subsistence farming.<sup>209</sup> However, questions have been raised about Uganda's weak economic framework which gives the migrant stock graph a zig-zag trend.<sup>210</sup>

<sup>206</sup> Worlddata.info, 'Refugees from Eritrea: Figures and Development' (Worlddata.info, 2021) <<https://www.worlddata.info/africa/eritrea/asylum.php>> accessed 4 June 2022.

<sup>207</sup> Macrotrends, 'Eritrea Immigration Statistics 1960-2015' (<https://www.macrotrends.net>, 2021) <<https://www.macrotrends.net/countries/ERI/eritrea/immigration-statistics>> accessed 30 August 2021.

<sup>208</sup> Macrotrends, 'Uganda Refugee Statistics 1990-2020' (<https://www.macrotrends.net>, 2020) <<https://www.macrotrends.net/countries/UGA/uganda/refugee-statistics>> accessed 15 October 2020.

<sup>209</sup> Ahimbisibwe (n 81); Lucy Hovil, 'Uganda's Refugee Policies: The History, the Politics, the Way Forward' (International Refugee Rights Initiative 2018) Rights in Exile Policy Paper <<http://refugee-rights.org/uganda-refugee-policies-the-history-the-politics-the-way-forward/>> accessed 15 October 2020; Lucy Hovil, 'Self-Settled Refugees in Uganda: An Alternative Approach to Displacement?' (2007) 20 Journal of Refugee Studies 599; Watera and others (n 83); Heng Zhu and others, 'Economic Impact of Refugee Settlements in Uganda' (United Nations World Food Programme 2016) Policy Report.

<sup>210</sup> Bjørkhaug (n 83); Zakaryan and Antara (n 83); Watera and others (n 83).



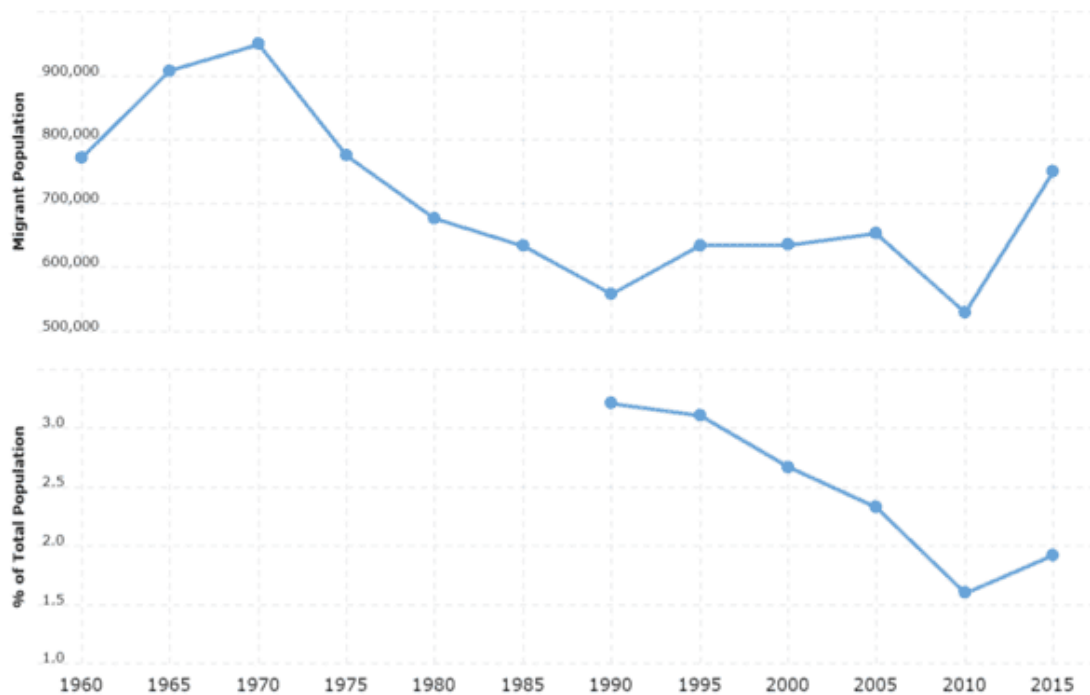


Figure 4: Uganda Immigration Statistics 1960-2015<sup>211</sup>

According to *Figure 4* above, it can be discerned that asylum seekers and refugees come and go and thus make a Uganda a transit country. The reason for this zig-zag trend may be attributed to the poor infrastructure and uneven development that is associated with least developed countries.<sup>212</sup> Also, the economic burden that comes with hosting refugees cannot be overlooked. Statistics show that emigration out of Uganda has been on the rise in the recent past. Due to inefficiencies in capturing demographic data of the emigrants, it is assumed that the figures are inclusive of refugees and asylum seekers who would have settled in Uganda over the years. Unemployment and limited economic conditions are listed as main reasons for migrating outside Uganda.<sup>213</sup> For example, in 2010, it is estimated that over 730,000 ‘Ugandan emigrants’ left the country and the figure rose to 786,200 by 2015 before slightly dropping to 781,400 in 2020.<sup>214</sup> The report goes further to identify their main destinations as Kenya, South Sudan, the United Kingdom, Europe, North America, and the Middle East.<sup>215</sup> Is it possible that with a weak economy and dire refugee camp conditions, asylum seekers and refugees may find Uganda as

<sup>211</sup> Macrotrends, ‘Uganda Immigration Statistics 1960-2015’ (<https://www.macrotrends.net>, 2021) <<https://www.macrotrends.net/countries/UGA/uganda/immigration-statistics>> accessed 30 August 2021.

<sup>212</sup> Migrants-Refugees, ‘Migration Profile: Uganda’ (Migrants-Refugees 2021) <<https://migrants-refugees.va/country-profile/uganda/>> accessed 4 June 2022.

<sup>213</sup> *ibid*

<sup>214</sup> *ibid* 4

<sup>215</sup> *ibid*

a transit country in their endeavour to find better countries of destination that gives them hope to live? The other line of inquiry, without blowing the scope of the study out of proportion, will be to analyse the immigration status of the emigrants who are not Ugandan. This helps in understanding the form of journeys they will undertake to new destinations for it may include the third category discussed above: *human trafficking and smuggling*. The fourth category of forced migration is *migration due to dispossession, exclusion, and unemployment* and this has been linked to neoliberal globalisation.<sup>216</sup> The starting point is how the youth have been academically exterminated from higher education due to high fees and absence of subsidies to help the poor attain education.<sup>217</sup> This has led to “permanent social tensions” which have forced the youth and the unemployed to “emigrate (through either regular or irregular migration) in search of better livelihoods, both for themselves and for their families”.<sup>218</sup> This inevitably lead to labour migration which is heavily skewed in favour of the developed countries and leaves the migrants extremely vulnerable and exploited. International law further complicates the situation of the migrants by categorising them “economic migrants” who do not deserve international protection as they are just seeking a transient greener pasture.<sup>219</sup> There is a danger of lumping up current contemporary movements as just an exercise in social mobility and economic freedom. Doing so will negate the consequential effects of the neoliberal economic policies that have resulted in spreading starvation, war, plague and death which in turn spur cross-border displacement.<sup>220</sup> The next section will discuss deregulation as a subtle form of control that effectively handicaps leaders in the SSA region to effectively control the economy to suit the contextual needs of the country.

## 1.2. Deregulation

Economic interventionist policies for African economies from the developed countries, years after colonialism, is a subject given much weight in post-colonial studies.<sup>221</sup> It is argued that most European countries and multilateral organisations continue to have “subtle forms” of

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<sup>216</sup> Wise and Márquez (n 78) 3–4; Marcos (n 179); Federici (n 78); Harvey (n 102); G Caffentzis, ‘Neoliberalism in Africa, Apocalyptic Failures and Business as Usual Practices’ (2002) 1 *Alternatives: Turkish Journal of International Relations* 89.

<sup>217</sup> Caffentzis (n 216) 97.

<sup>218</sup> Wise and Márquez (n 78) 3.

<sup>219</sup> Olivia Taylor, ‘Constructing the “Economic Migrant” Narrative during the Refugee Crisis: The Neoliberal State of Exception and Political-Economic “Bare Life”’ (2017) 6 *Oxford Monitor of Forced Migration*.

<sup>220</sup> Caffentzis (n 216) 95.

<sup>221</sup> Cathrine Gegout, *Why Europe Intervenes in Africa: Security Prestige and the Legacy of Colonialism* (: Oxford University Press 2018); Benedikt Erforth, ‘Reviewed Work: Why Europe Intervenes in Africa: Security, Prestige, and the Legacy of Colonialism’ (2018) 5 *European Review of International Studies* 106.

control over African economies.<sup>222</sup> Part of the reason is to maintain colonial links with their erstwhile colonies while at the same time reinforcing control as to how the economies are run to their benefit. While it is clear that military intervention has been slightly reduced, it can be argued that a new form of colonialism has emerged in the industrial sector through the deregulation of specific industries. The question for determination is therefore to gauge the extent to which the deregulation of industries has contributed to migratory inflows or outflows in Africa.

Deregulation can be defined as the reduction or removal of State power or control in a specific industry.<sup>223</sup> This is done as a way to create more competition within the industrial sector. The aim is to create efficiency by unbundling bureaucratic modes so that the sector makes unfettered financial decisions. It is argued that deregulation ultimately removes barriers to competition and allows the sector to thrive in a competitive market.<sup>224</sup> Deregulation is therefore a by-product of legislative action or comes into question when the Head of State issues an executive order to that effect. Therefore, for deregulation to take place, there is a concerted political will from the government to let go strategic business sectors to private ownership as opposed to public ownership.<sup>225</sup> In many instances, deregulation has become a common practice in the banking, transport and energy sectors. In the context of economic liberalisation, it is here argued that deregulation is a subtle form of control by external organisations to achieve the objectives of neoliberalism

Proponents of deregulation have argued for this intervention citing the following benefits. Firstly, deregulation stimulates economic activity by eliminating restrictions for the specific business entity to enter the market. Removal of such barriers as capitalization costs frees up the space for entrepreneurial spirit for new entrants into the sector. Secondly, deregulation improves innovation and expands the market as businesses compete with each other. Innovation leads to better product development which aligns with the tastes of the consumers. It is also argued that market growth with competing entrants is beneficial to the consumers as this leads to cheaper products.<sup>226</sup> The third benefit of deregulation is that it opens up space for research and development. Instead of investing more money into business capitalization and attendant

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<sup>222</sup> I William Zartman, 'Europe and Africa: Decolonization or Dependency?' (1976) 54 *Foreign Affairs* 325.

<sup>223</sup> Martha Derthick and Paul J Quirk, *The Politics of Deregulation* (Brookings Institution Press 1985).

<sup>224</sup> *ibid.*

<sup>225</sup> *ibid.*; Jeremy Green, 'Anglo-American Development, the Euromarkets, and the Deeper Origins of Neoliberal Deregulation' (2016) 42 *Review of International Studies* 425.

<sup>226</sup> Paul Heidhues and Botond Köszegi, 'Competition and Price Variation When Consumers Are Loss Averse' (2008) 98 *The American Economic Review* 1245.

entry costs, more capital is harnessed for product development and such research does not only benefit the consumers but also boosts the specific deregulated industry by opening up more opportunities for service providers to align with the arising needs in the sector.

At its peak, deregulation is the best conduit for foreign direct investment. When companies in the specific business sector have entered the domestic market without restrictive barriers, they then try to establish markets outside their country to expand their consumer base. This then allows them to be innovative in their production of new affordable products and purchase of new machinery.

The following consequences of deregulation have been viewed as detrimental to the SSA region. According to Semaan and Peterson-Drake<sup>227</sup>, deregulation puts small businesses at high risk of being pushed out of the market. This makes successful business sectors create monopolies and take over the market.<sup>228</sup> The consumers are then at risk of paying higher prices as the monopolies take over. The second consequence of deregulation is that it does not necessarily work to the best interests of the consumers. Once deregulation has taken place, a specific industrial sector may impose certain user fees for consumers that may make the service out of their reach or expensive. At the same time, there will be minimal government intervention in this as this will be entirely falling in the private sector. The consumers will thus have no option but to endure ceiling prices for the services and products.

The third consequence of deregulation is about accountability and transparency. Once companies are thriving in a deregulated industry, empirical evidence suggests that such companies do not disclose financial statements and how they are linking up with foreign markets. This makes it difficult to regulate the deregulated sector and creates the paradox of control in which the government still requires to know how the deregulated industries are operating. In other ways, “deregulation seem to lead to overregulation” as the government will have to exercise oversight control so as to audit the activities of the deregulated industry or business.<sup>229</sup>

In the end, this creates tension and might result with the government taking over if there is no transparency with regard to the interference of external elements. This also goes to the core of

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<sup>227</sup> Semaan Elias and Pamela Peterson Drake, ‘Deregulation and Risk’ (2011) 40 Financial Management 295.

<sup>228</sup> *ibid.*

<sup>229</sup> Kristine Størkersen and others, ‘How Deregulation Can Become Overregulation: An Empirical Study into the Growth of Internal Bureaucracy When Governments Take a Step Back’ (2020) 128 Safety Science.

political governance as this might determine the political fate of government officials. This then leads the discussion to the fourth consequence of deregulation. It is argued that once deregulated businesses have established market roots, they are bound to engage in fraudulent activities which put consumers at risk. This prompts the government to intervene and take over the industry since the consumers always call back on the government to protect their vested interests.

In the context of Africa, deregulation appears to be a forced consensus which does not suit the economic profile of the continent.<sup>230</sup> Arguably, economic intervention by the developed countries appears to ignore that the backbone of the African economies is the annual rainfall.<sup>231</sup> Agriculture sustains Africa and the transition to industrial economy should be tied with the level of mechanization existing in the agriculture sector. To that end, the “merchant capital” from foreign investors will change the dynamics of domestic competition and thus push interest rates inflation to the ceiling.<sup>232</sup>

The other factor for consideration is the fact that deregulation policies and attendant economic liberalisation packages were implemented at a more accelerated pace than scheduled.<sup>233</sup> This did not consider the weak administrative capacities of the transition governments who were still being mentored by their erstwhile colonisers.<sup>234</sup> Also the mechanism of transitory politics could not reconcile with the practical reality of implementing austere budgetary measures called for by external donors and their “curious brand of toothless conditionality and micromanagement.”<sup>235</sup>

Deregulation has further shown that Africa is being compelled to be part of the world economy when there is an “absence of policy instruments necessary to ensure national norms”.<sup>236</sup> The failure by most African countries to replicate the economic framework of developed nations

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<sup>230</sup> Bonnie Campbell, ‘Liberalisation, Deregulation, State Promoted Investment - Canadian Mining Interests in Africa’ (1998) 13 Minerals and Energy - Raw Materials Report 14; Nicolas Van De Walle, ‘Economic Reform in a Democratizing Africa’ (1999) 32 Comparative Politics 21; Charles Chukwuma Soludo, Michael Osita Ogbu and Ha-Joon Chang (eds), *The Politics of Trade and Industrial Policy in Africa : Forced Consensus?* (Africa World Press 2004); John K Dadzie and Alessandra Ferrari, ‘Deregulation, Efficiency and Competition in Developing Banking Markets: Do Reforms Really Work? A Case Study for Ghana’ (2019) 20 Journal of Banking Regulation 328.

<sup>231</sup> Van De Walle (n 230) 37.

<sup>232</sup> Soludo, Ogbu and Chang (n 230).

<sup>233</sup> Van De Walle (n 230).

<sup>234</sup> Soludo, Ogbu and Chang (n 230).

<sup>235</sup> Van De Walle (n 230) 30.

<sup>236</sup> Campbell (n 230) 14.

has then been blamed on poor governance and systemic patronage of autocrats.<sup>237</sup> However, empirical studies show that in the mining sector, deregulation has led to “delegitimization and fragilization” of African States compelled to adopt economic liberal packages.<sup>238</sup> The deregulation of the mining sector in Africa, at the advice of the Brenton Wood Institutions, has led to African governments withdrawing their role as a regulator in the management and protection of natural resources. The deregulated mining industry has thus encroached on the human settlements leading to subtle displacement of the natives. Development induced displacement then takes place and people are forced to move out of their settlements.

A survey of the deregulation of the energy sector in Africa reveals that deregulation can only be effective in Africa if the energy sector is privately owned.<sup>239</sup> Most entities are state owned, incapacitated and do not provide the much-needed service to all citizens.<sup>240</sup> Over 70 per cent of the sub-Saharan countries depend on vertically integrated utility structures.<sup>241</sup> This means that the government is responsible for electricity generation, transmission and distribution.<sup>242</sup>

Experts view this as unsustainable as the energy sector requires high capitalization and mechanization costs which calls for the decentralisation of the grid. Deregulation is then viewed as the best option that will improve operational efficiency, minimize price distortions and increase access to electricity to the poor.<sup>243</sup> As shown in the figure below, the general pattern is that countries that rely on vertically integrated utility structures in the energy sector are also lowly ranked in the Human Development Index (HDI).<sup>244</sup> Countries like Burundi, the Democratic Republic of Congo, Sudan, South Sudan and Eritrea have also been blighted with civil strife and have also struggled in containing cross-border displacement as its citizenry flee a combination of social, political and economic displacement factors.

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<sup>237</sup> Erforth (n 221); Van De Walle (n 230).

<sup>238</sup> Campbell (n 230).

<sup>239</sup> Pablo David Necoechea-Porras, Asunción López and Juan Carlos Salazar-Elena, ‘Deregulation in the Energy Sector and Its Economic Effects on the Power Sector: A Literature Review’ (2021) 13 Sustainability 2021, Vol. 13, Page 3429 3429.

<sup>240</sup> *ibid.*

<sup>241</sup> Benjamin Attia and Rebekah Shirley, ‘How Deregulation Could Improve Reliability for Cash-Strapped African Utilities’ [2017] *Greentech Media (GTM): Research Spotlight*.

<sup>242</sup> Necoechea-Porras, López and Salazar-Elena (n 239).

<sup>243</sup> Campbell (n 230); Necoechea-Porras, López and Salazar-Elena (n 239); Attia and Shirley (n 241).

<sup>244</sup> UNDP, ‘Latest Human Development Index Ranking: Human Development Reports’ (2020) <<http://hdr.undp.org/en/content/latest-human-development-index-ranking>> accessed 20 November 2021.

Markets	Generation	Transmission	Distribution
Benin, Burkina Faso, Burundi, CAR, Chad, Congo, DR Congo, Eritrea, Ethiopia, Lesotho, Liberia, Malawi, Mozambique, Namibia, Rwanda, Somalia, South Africa, South Sudan, Sudan, Swaziland, Tanzania, Zambia	Public Ownership	Public Ownership	Public Ownership
Angola, Botswana, Djibouti, Gambia, Ghana, Guinea-Bissau, Madagascar, Mauritania, Niger, Senegal, Sierra Leone, Togo, Uganda, Zimbabwe	Mixed Public and Private Ownership	Public Ownership	Public Ownership
Equatorial Guinea, Guinea, Kenya, Mali, Sao Tome and Principe	Mixed Public and Private Ownership	Mixed Public and Private Ownership	Mixed Public and Private Ownership
Cameroon	Private Ownership	Public Ownership	Private Ownership
Nigeria	Private Ownership	Mixed Public and Private Ownership	Private Ownership
Côte d'Ivoire, Gabon	Private Ownership	Private Ownership	Private Ownership

Figure 5: Deregulation of the Energy Sector in Sub-Saharan Africa<sup>245</sup>

It might then be true that attempts to achieve deregulation in Africa did not take into cognisance transitory power dynamics and the volatile political environment.<sup>246</sup> To that end, the deregulation of the energy sector and/or any other State-owned entity will arguably have negative consequences in Africa. Empirical studies reveal that deregulation is only effective if markets are “competitive, adequate and effective”.<sup>247</sup> In the context of Africa, deregulation as an attendant element of economic liberalization has contributed to:

declining per capita income and real wages; rising unemployment and underemployment; deterioration in the level of social services as a result of cuts on social public expenditures; falling educational and training standards; rising malnutrition and health problems; and rising poverty levels and income inequalities.<sup>248</sup>

The picture emerging here is that Africa has not fully embraced deregulation. A piece-meal approach to deregulation has subverted the already weak fiscal structures and has not been in sync with national norms.<sup>249</sup> Deregulation has led to the mass dismissal of factory and mine workers with labour migrants being the hardest hit. This has been followed up by recruitment freeze in line with “efficiency” and “reducing operational costs” mantra. In some countries,

<sup>245</sup> Attia and Shirley (n 241).

<sup>246</sup> Campbell (n 230).

<sup>247</sup> Babalwa Bungane, ‘Electricity Deregulation: Where Are We?’ [2017] *ESI Africa*.

<sup>248</sup> Patrick Bond and George Dor, ‘Neoliberalism and Poverty Reduction Strategies in Africa’ (2003) 10.

<sup>249</sup> Campbell (n 230).

such mass unemployment in an inflationary environment has led to unprecedented cross-border displacement and created socio-economic crisis.<sup>250</sup> In the case of unskilled labour migrants, deregulation meant that companies had to employ skilled and qualified personnel. While this is a result of mechanisation and need for expertise in such technical areas as discussed above, deregulation renders the unskilled worker redundant. This is compounded by the fact that the chances of the unskilled workers to scale up to the level of qualified expertise are limited by the available economic opportunities available. This then pushes unskilled workers to the fringes of the labour market as they will not be employed due to the increased demand for highly skilled migrant workers.<sup>251</sup>

### **1.3. Monopolies and restrictive trade practices**

For a clear understanding of the impact of deregulation discussed above, it is pertinent to outline how deregulation of industries slowly lead up to monopolies and restrictive trade practices. This is even more acute in the SSA region where some countries are not democratic enough. In that regard, the autocratic government ends up monopolizing State entities at the disadvantage of the general population. Africa is in dire need for social and economic infrastructure to improve the lives of its people. To achieve this, the African leaders with assistance from the developed world have adopted aggressive trade agreements which thrive on monopolies. These business ties actually harness the resources out of the continent in most subtle and delicate terms shrouded in development assistance. This has given rise to transnational companies being engaged in four key areas: energy, water, transportation and internet technology, which all benefit the developed countries. This is because the infrastructural development plans are prepared by outsiders and do not encourage intra Africa development.<sup>252</sup> The irony is that multilateral institutions like the World Bank, the World Trade Organization (WTO), and the United Nations Conference on Trade and Development (UNCTAD) have spoken for the ‘simplification and harmonization of trade procedures’ when evidence on the ground points to high trade costs which are largely due to financial conditionalities that are tied to Least Developed Countries (LDC’s) by the same institutions.<sup>253</sup> Experts are of the view that restrictive

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<sup>250</sup> Heinz B Bachmann, ‘Implementing Deregulation and Promoting Foreign Direct Investment in Africa : A Report on Six Workshops’ (World Bank 1996).

<sup>251</sup> Hein de Haas and others, ‘European Migrations : Dynamics, Drivers, and the Role of Policies’ (2018) JRC109783.

<sup>252</sup> Nancy Alexander, ‘Monopoly in Africa? Reality Check’, *Perspectives Africa* (Heinrich-Böll-Stiftung 2017).

<sup>253</sup> Daniel Sakyi, Isaac Bonuedi and Eric Evans Osei Opoku, ‘Trade Facilitation and Social Welfare in Africa’ (2018) 5 *Journal of African Trade* 35; Ann E Harrison, Justin Yifu Lin and Lixin Colin Xu, ‘Explaining Africa’s (Dis)Advantage’ (2014) 63 *World Development* 59.



trade practices do not allow for trade facilitation due to the imposition of high tariffs, monopolies in key areas like transport and energy, and lack of trade transparency through convoluted '*terms and conditions*'.<sup>254</sup>

Empirical evidence shows that Africa's capability to manage its own affairs has arguably come with some sort of interference from the West. This is because most firms are hindered by diminished productivity levels which negatively inhibit most African entities to produce for exports. As a result, transnational corporations take advantage of the lack of equity, infrastructure and competitive edge by mulling up monopolies that end up creating restrictive trade practices much to the detriment of not only the African entities, but its citizenry that has to pay user fees to prop up the exploitative and asymmetrical economic relationship with the industrialised world.<sup>255</sup>

A monopoly allows a business to sell or provide a service to the exclusion of others.<sup>256</sup> This gives the entity a competitive advantage over companies selling the same product or providing the same service. Monopoly power over a service or product effectively bars other business entrants from entering the same market. This is because monopolies are characterised with huge capital overlay that allows it to have control over available resources to offer a product without any substitute. In the words of James Taylor, this practice "covers a multitude of sins" that lead to dire economic consequences.<sup>257</sup> To that end, monopolies and their attendant restrictive practices do not only stifle a competitive market space but also impact negatively on the growth of the nation if the government fails to intervene.<sup>258</sup> For example, the agriculture and mining sectors in the SSA were previously controlled by the colonial administrators. Critics are of the view that, despite gaining political independence, erstwhile colonizers continue to monopolize the exportation of crops and minerals for the benefit of their countries. As a result of this control "resource and wealth extraction continue to inhibit economic development for Africans in Africa".<sup>259</sup>

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<sup>254</sup> Sakyi, Bonuedi and Opoku (n 253) 36. See the discussion by the authors on what entails trade facilitation rather than trade restrictions.

<sup>255</sup> Harrison, Lin and Xu (n 253).

<sup>256</sup> AP Lerner, 'The Concept of Monopoly and the Measurement of Monopoly Power' (1934) 1 Review of Economic Studies 157.

<sup>257</sup> James Taylor, 'Monopolies And Restrictive Practices' (1967) 115 Journal of the Royal Society of Arts 938, 938.

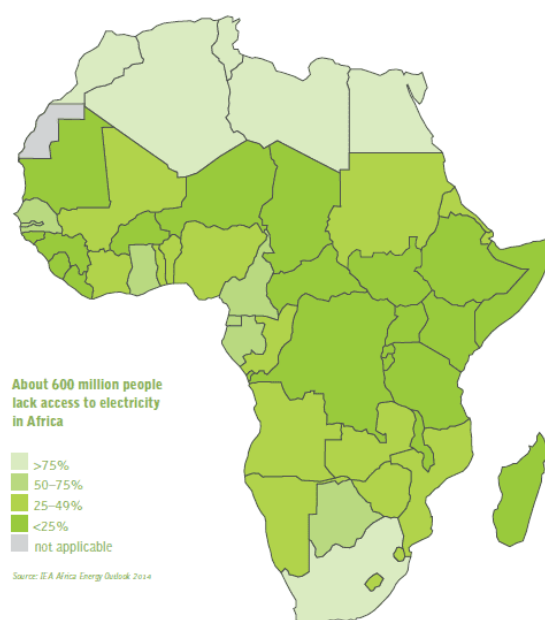
<sup>258</sup> Taylor (n 257).

<sup>259</sup> Vibeke Bjornlund, Henning Bjornlund and Andre F Van Rooyen, 'Why Agricultural Production in Sub-Saharan Africa Remains Low Compared to the Rest of the World – a Historical Perspective' (2020) 36 International Journal of Water Resources Development S20.

It is argued that non-restrictive trade policies are therefore a panacea to poverty alleviation, integrating economies around the world, and promoting efficiency by creating competitive markets that help in generating foreign direct investment.<sup>260</sup>

One of the troubling issues in Africa has always been about the role of the government in establishing monopolies. If the government is responsible for giving a mandate to a monopoly how is this interpreted as interference by the developed countries in the West?<sup>261</sup> Alternatively, as discussed above, can this be viewed as subtle control by the developed countries so as to gain an added advantage over former colonies? Tied to these questions is the reality that monopolies require huge capital outlay and sophisticated mechanization. In the scope of infrastructural development, African countries end up cutting deals with huge transnational companies who come to the negotiating table with a lot of conditionalities attached thereon.

According to the World Bank, Sub-Saharan Africa requires US\$ 93 billion per year for infrastructure investment. Even with the existence of the African Development Bank, the region has a financing gap of US\$ 45 billion, and this calls in the donors or developmental assistance aid. This ‘aid’ then comes in the form of transnational companies that end up staking up monopolies with the government in strategic infrastructural projects. When the private sector comes in as a financier in such infrastructural projects it comes at a cost to the user



<sup>260</sup> Sakyi, Bonuedi and Opoku (n 253) 36.

<sup>261</sup> Alexander (n 252).

Figure 6: Access to electricity in Africa<sup>262</sup>

As stated before, the energy sector in Africa is not deregulated and is publicly owned by the government. This sector requires huge capitalization schemes and most of the capital is provided by transnational companies and multilateral organisations. The problem with the monopoly held over the energy sector is actually about the role of transnational capital in setting up the power grid. While the monopoly might seem to be a creation of the government in power, it does not show the subtle intervention of transnational capital which comes with stringent user fees being imposed by the power utilities on the majority of the poor African citizenry. In setting up this monopoly, it effectively means that the continent owes a debt to donors which has to be borne by the poor in Africa.<sup>263</sup>

Access to electricity is critical to human development.<sup>264</sup> In the context of Africa, electricity is a policy trigger and is required in all aspects of human life. Lack of access to electricity will mean inadequate sanitation systems, stunted industrial growth and will negatively impact on health and education. It must further be noted that in terms of the eighth Sustainable Development Goal (SDG8) of the United Nations, member states should “promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all”.<sup>265</sup>

The implication here is that the energy sector in Africa is not only financially burdened but ill-equipped to deliver electricity to almost two-thirds of the continent. This is largely because it operates as a constrained monopoly heavily financed by external donors and transnational companies. This then implies that “cheap electricity” is an illusion, because when the transnational companies have completed power grid projects the costs for the project will be compensated by an increase in tariffs as investors recoup their costs. These costs are directly borne by the citizens in a subverted economic landscape.<sup>266</sup>

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<sup>262</sup> Tasneem Essop, ‘The African Renewable Energy Initiative: Promoting People-Centred Energy Solutions’ [2017] *Perspectives: Putting People Back Into Infrastructure* 11.

<sup>263</sup> Bjornlund and others (n 259)

<sup>264</sup> Rudo A Sanyanga, ‘Large Hydropower Dams Are Not the Answer: Time to Rethink Africa’s Energy Infrastructure’ [2017] *Perspectives: Putting People Back Into Infrastructure* 39.

<sup>265</sup> United Nations, ‘The 17 Goals: Sustainable Development’ (UN:Department of Economic and Social Affairs, 2021) <<https://sdgs.un.org/goals>> accessed 29 November 2021.

<sup>266</sup> Sanyanga (n 264) 38.

The Sub-Saharan African economy is largely premised on agriculture and the extractive industry.<sup>267</sup> In that regard, exportation of primary goods is mainly framed on high price volatility, and this hampers trade. High trade cost is in itself an obstacle to human development in Africa.<sup>268</sup> Critics are of the view that restrictive practices are obstacles to progress and curtail economic development.<sup>269</sup> Therefore low productivity growth at the back of high price volatility when resources are exported leads to “transfer of income from developing to developed countries”.<sup>270</sup>

Further, empirical studies show that there is a correlation between trade facilitation and social welfare in the SSA countries.<sup>271</sup> If trade restrictions are applied this will negatively impact on the key elements of human development which are: basic primary education, infant mortality rate, life expectancy.<sup>272</sup> There is a correlation between human development and migration. Studies show that migration is not only spurred by economic factors like income and employment, but also the presence of infrastructure that improves the quality of life.<sup>273</sup> In the context of the SSA, where there is repression and limited life opportunities, trade restrictions potentially affect human development and thereby compels people to leave their country and migrate to countries with better incidence of human development.<sup>274</sup> Therefore, trade facilitation rather than restriction will harness capital for infrastructural investment. In turn, infrastructural development will then stimulate the economic environment by creating employment and increasing incomes.<sup>275</sup>

Empirical studies in 40 SSA countries show that if trade restrictions are lifted on the flow of capital for transportation infrastructure there will be significant changes in social welfare. Also, if people are employed and have higher disposable incomes there are high chances of them investing in good education at primary level and are also able to pay required user fees to access health centres. In turn the government will be in a position to train more teachers and health practitioners to work in the new built centres. In terms of human development, access to health

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<sup>267</sup> Patrick N Osakwe, Amelia U Santos-Paulino and Berna Dogan, ‘Trade Dependence, Liberalization, and Exports Diversification in Developing Countries’ (2018) 5 *Journal of African Trade* 19.

<sup>268</sup> Sakyi, Bonuedi and Opoku (n 253).

<sup>269</sup> Taylor (n 257) 940.

<sup>270</sup> Osakwe, Santos-Paulino and Dogan (n 267) 21.

<sup>271</sup> Sakyi, Bonuedi and Opoku (n 253).

<sup>272</sup> *ibid.*

<sup>273</sup> Orhan Kandemir, ‘Human Development and International Migration’ (2012) 62 *Procedia - Social and Behavioral Sciences* 446, 448.

<sup>274</sup> *ibid* 449.

<sup>275</sup> Andrew F Haughwout, ‘Infrastructure and Social Welfare in Metropolitan America’ [2001] *Economic Policy Review* 1.

centres is important in reducing mortality rates (infants) and this arguably lengthens life expectancy and is an indicator of better life.<sup>276</sup>

#### 1.4. Devaluation, Disinvestment and Privatisation

The history on the implementation of devaluation, disinvestment and privatisation in the SSA can be linked to the influence of colonialism. European countries that partitioned Africa, used their corporations as an extended hand to control and pillage resources.<sup>277</sup> Companies like the British East India Company and Hudson Bay Company were used to leverage colonial policies on behalf of the colonial countries.<sup>278</sup> Upon gaining political independence, former colonies inherited most of the colonial entities and turned them into state entities. As a way to maintain their colonial lustre, the former colonies engaged (and continue to engage) with their erstwhile colonisers to get private foreign funding.<sup>279</sup> This has revived the colonial policies and has allowed dual economies that are built on neoliberal policies like devaluation, disinvestment, privatisation among others already discussed above. The International Monetary Fund has implemented the devaluation policy on developing countries as a way of amplifying their competitiveness in the export market.<sup>280</sup> In this regard, the IMF's main mandate is not only to promote global financial stability but also to help in reducing the global poverty between the geopolitical North and South.<sup>281</sup> The multilateral organisation is thus accountable to its 190 member countries when it issues such policies aimed at sustainable economic growth.

However, the relationship between the IMF and its North-South lenders and borrowers has been “governed by a carrot-and-stick policy” on the provision of loans in exchange for significant changes and adaptation of economic policies for borrowing countries in the South.<sup>282</sup> Critics are of the view that the financial conditionalities imposed on the global south countries by the multilateral organisation has the negative effect of “promoting hegemonic norms” which

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<sup>276</sup> Sakyi, Bonuedi and Opoku (n 253) 46–47.

<sup>277</sup> Yacob Haile-Mariam and Berhanu Mengistu, ‘Public Enterprises and the Privatisation Thesis in the Third World’ (1988) 10 *Third World Quarterly* 1565, 1567.

<sup>278</sup> *ibid.*

<sup>279</sup> *ibid.*

<sup>280</sup> Julie L Mueller, ‘The IMF, Neoliberalism and Hegemony’ (2011) 25 <http://dx.doi.org/10.1080/13600826.2011.577032> 377; Zelealem Yiheyis, ‘The Effects of Devaluation on Aggregate Output: Empirical Evidence from Africa’ (2006) 20 <http://dx.doi.org/10.1080/02692170500362264> 21; Kalonga Stambuli, *Africa: Inside the Triangle of Devaluation, Inflation and Stagnation (Article)* (2002); Mohameden Ould-Mey, ‘Currency Devaluation and Resource Transfer from the South to the North’ (2003) 93 *Annals of the Association of American Geographers* 463.

<sup>281</sup> John W Pehle, ‘The Bretton Woods Institutions’ (1946) 55 *The Yale Law Journal* 1127; Sandra Kollen Ghizoni, ‘Creation of the Bretton Woods System’ [2013] *Federal Reserve History*.

<sup>282</sup> Ould-Mey (n 280) 469.

subvert the economic structure of the Least Developed Countries (LDCs).<sup>283</sup> This section seeks to evaluate the extent to which the IMF policies of devaluation, disinvestment and privatisation have subverted the economic landscape of SSA countries and contributed to cross-border displacement.

Currency devaluation is an official act by the State to reduce the value of its currency in relation to other major currencies in particular the US dollar.<sup>284</sup> Devaluation can thus be taken in one of the following three phases: wholesome devaluation, mini devaluation or gradual exchange-rate depreciations.<sup>285</sup> According to the IMF, the wisdom to deliberately devalue a currency is to make national exports competitive in the global market. In the case of SSA it then means that all-natural resources exported to the industrialised world are bought at lower rate and this has been slated as “invisible financial haemorrhage” in the form of resource transfer.<sup>286</sup>

Be that as it may be, countries pursue the devaluation policy on the following three grounds. First, devaluation of currency boosts exports. It is argued that a more valuable currency steepens the market price and makes it more expensive to purchase in the forex market. Therefore, a devalued currency encourages the purchase of exports while dampening imports. However, economists warn that caution should be exercised as this may lead to currency wars and hyperinflationary environment as countries deliberately devalue their currencies to incentives exports.<sup>287</sup>

Second, the incentive to devalue a national currency might be motivated by the need to reduce the trade deficits. When exports increase in comparison to imports, countries improve on balance of payments. In a competitive global market, high levels of trade deficits can run aground the economy and as such devaluing the currency will correct the balance of payment. The rationale is not all that true for most developing countries whose trade deficits are dollar or euro terms. These countries find it difficult to service the debts and in the long term sustain huge trade deficits which might imply imposing new economic policies to correct the defect.<sup>288</sup> The empirical evidence in most African countries further show that while countries adopt

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<sup>283</sup> Mueller (n 280).

<sup>284</sup> Ould-Mey (n 280) 470.

<sup>285</sup> *ibid.*

<sup>286</sup> *ibid.*

<sup>287</sup> Yiheyis (n 280); Serap Durusoy and Zeynep Beyhan, ‘Recent Problem of Global Capitalism: Rate of Exchange Wars’ (2015) 23 *Procedia Economics and Finance* 992.

<sup>288</sup> Adam Hayes, ‘3 Reasons Why Countries Devalue Their Currency’ *Investopedia* (6 July 2019).

devaluation as a corrective policy, they further find themselves sinking in more foreign debt which has more negative consequences for the country.<sup>289</sup>

The third reason for currency devaluation is rooted on the premise of shrinking the sovereign debt. A state with numerous government-issued bonds can arrange for fixed debt payments on the back of a devalued currency so as to catch up on its sovereign debt.<sup>290</sup> As a result, devaluing the national currency by half its nominal value will mean that only half of the original debt will be due for payment. The consideration that most of the countries, if not all, owe a sovereign debt one way or the other, suggests that there might be a “race to the bottom” as countries devalue their currency just to pay off their sovereign debt.

The devaluation of currencies in the SSA countries has been critically appraised as a deterrent to human development.<sup>291</sup> Some critics are of the view that the “lender’s attitude” towards the LDC’s is to label African currencies as illiquid, high risk and volatile.<sup>292</sup> This, together with conditionalities attached to government bonds, has in turn resulted in SSA countries being pushed into a gridlock of “unworkable [fiscal] policies” which only facilitates resource transfer from the global south.<sup>293</sup> In Mueller’s words this is equivalent to “promoting hegemonic norms and co-opting elites” into the economic planning of the LDC.<sup>294</sup> The African perspective of the devaluation policy and privatisation of strategic firms is systematic disenfranchisement of the African economies to the betterment of the developed nations.

On the contrary, the policy of devaluation in Africa has benefited developed countries. This is on account of privatisation facilitating foreign acquisition of Africa’s prized state assets so cheaply. Declining prices of imports from Africa also aids inflation policies in developed nations. In addition, the fact that deteriorating industry and trade liberalisation opens African markets to global enterprise also works to the advantage of their industrial nations.<sup>295</sup>

This scenario perhaps explains the effect of the devaluation policy on cross-border displacement. A devalued currency means that the exchange-rate depreciation of the host country “makes migration less valuable for existing and potential migrants.”<sup>296</sup> While by

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<sup>289</sup> Yiheyis (n 280) 25.

<sup>290</sup> Hayes (n 288).

<sup>291</sup> David Bee, ‘Solving Africa’s Currency Illiquidity Problem’ [2018] *World Bank Blogs*.

<sup>292</sup> *ibid*.

<sup>293</sup> Kalonga P Stambuli, ‘Africa: Inside the Triangle of Devaluation, Inflation and Stagnation’ [2002] *EconBiz*; Ould-Mey (n 280).

<sup>294</sup> Mueller (n 280).

<sup>295</sup> Stambuli (n 280) 5.

<sup>296</sup> Adrian J Shin, ‘Exchange Rates and Immigration Policy’ (2021) 9 *Comparative Migration Studies* 1.

contrast, an exchange-rate appreciation will spike the immigrant pressure on the host country as more immigrants seek jobs in the country so that they can send remittances back home. Migrants will thus prefer to work in countries with stronger currencies so as to increase the real value of their remittances. In other words, living in a hyperinflationary environment with a devalued currency and slim job prospects is equivalent to live in a ‘no war, no peace’ country and “waiting for death”.<sup>297</sup>

The underlying argument is thus that the IMF policy of devaluation has a latent and knock-on effect on SSA countries and leads to a coalescence of displacement factors leading to cross-border displacement.<sup>298</sup> Studies show that the devaluation of a currency is interconnected with forced displacement factors like political persecution and increased public violence. Devaluation of currencies should thus not be seen in isolation of the impact of disinvestment and privatisation. The coalescent effect of these policies triggers cross-border displacement. This then makes it difficult to categorise fleeing migrants as either migrants or refugees.<sup>299</sup> Further afield, the case of the Mexican *peso* devaluation in 1982 led to a spike of both regular and irregular migration of Mexicans to the United States of America.<sup>300</sup> In Venezuela, the devaluation of the *bolivar* currency since 1983 has over the years triggered “unprecedented migratory crisis” as Venezuelans seek a better life in neighbouring countries and abroad.<sup>301</sup>

In the case of devaluation in SSA countries, experts are of the view that it has made rural life more difficult and has motivated rural-urban migration. This is because the declining quality of the land overtime requires use of imported products like fertiliser and pesticides.<sup>302</sup> These products come with a heavy price tag which is beyond that of poor farmers. As a result, thereof, internal migration is triggered as farmers try to bolster their income by finding seasonal jobs in the city. It can further be argued that if the combined effects of privatisation, disinvestment and devaluation are factored in, there is a possibility of cross-border migration as is the case in Venezuela and Mexico.<sup>303</sup>

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<sup>297</sup> Makeda Saba, ‘No War, No Peace: Life and Death in Eritrea’ [2020] *The Elephant*; Solidarity Peace Trust, ‘No War in Zimbabwe: An Account of the Exodus of a Nation’s People’ (2004).

<sup>298</sup> Shin (n 296).

<sup>299</sup> Enrique Gómez Ramírez, ‘The Venezuelan Migrant Crisis: A Growing Emergency for the Region’ (2018).

<sup>300</sup> Migration News, ‘Devaluation and Mexico to US Migration’ [1995] *Migration News*.

<sup>301</sup> Gómez Ramírez (n 299).

<sup>302</sup> Stambuli (n 293).

<sup>303</sup> Gómez Ramírez (n 299).



In conclusion, the devaluation of currencies and high interest rates continues to have a far greater impact on all African countries which embraced global free-market capitalism. Devaluation has led to an inflationary environment that has extinguished the entrepreneurial flame of the small businesses. Uncontrolled inflation led to the curtailment of state investment in the public sphere, and the replacement of public sector jobs by jobs in export agriculture and manufacturing. These jobs have tended to lack the security or benefits that accompany employment in the public sector.<sup>304</sup> They are not only seasonal but also depend on a number of factors like the unpredictable climate. With an over-supply of university graduates mostly primed to work in the public sector, unemployment becomes a chronic problem in Africa and has led to unprecedented cross-border displacement.<sup>305</sup>

## 1.5. Globalization

The neoliberal policies discussed above have become a global practice initiated by countries in the Global North for the ‘benefit’ of countries in the Global South. The connecting thread is the practical reality of the world being interconnected into one large coherent entity through the process of globalization. Globalization is a multidimensional concept which cuts across a range of disciplines. The starting point may be the impact caused by the proliferation of multinational corporations and how they have taken a stranglehold on economic issues and the expansion of capitalism. This is then linked to the different approaches taken in international relations, political theories, matters to do with the environment, cultural issues, linguistics and for the purpose of this section: migration issues. This is not a closed list and many concepts can be conjured in mapping globalization and its impact on human development. In that multifaceted lens, globalization is the eyes of the beholder and can be viewed as either beneficial or destructive.<sup>306</sup>

Globalization can thus be described as old as humanity and literature on the concept divides the history of the multifaceted concept to three distinct stages.<sup>307</sup> Arguably, the first stage of globalization is believed to be the period between (1492-1800), followed by (1800-2000) as the second period, with the third stage being (2000-present). The first period is believed to be the stage when there was the globalization of countries. It then becomes questionable, as an aside,

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<sup>304</sup> Giles Mohan and others, *Structural Adjustment: Theory, Practice and Impacts* (Taylor and Francis 2013).

<sup>305</sup> *ibid.*

<sup>306</sup> Annabelle Mooney and Betsy (Betsy Erin) Evans, *Globalization : The Key Concepts* (Routledge 2007).

<sup>307</sup> Okechukwu Ethelbert Amah, *Globalisation and Leadership in Africa: Developments and Challenges for the Future* (Springer International Publishing 2018).

if colonization was the best mode of the process. The second stage relates to the globalization of companies while the present stage is viewed as the globalisation of individuals.<sup>308</sup> This then makes the term ‘globalization’ a buzzword much of a cliché without any defined parameters. It suggests that globalization is a concept synonymous with the *past, present and the future!*

The World Economic Forum (WEF) defines the concept as a “process by which people and goods move easily across borders.”<sup>309</sup> This makes globalization an economic concept aimed at integrating the global markets to eliminate hindrances in trade and investment. What is also embedded in the definition is the assimilation of different cultures on a global scale towards the objective of human development. This broad definition is in line with what some experts have viewed as the amalgamation of the world into a single global society tied by socio-economic, political, cultural and legal factors.<sup>310</sup> The pivotal cog in this scheme is the role played by technology in connecting the global society. Technology allows for the free flow of resources, services and goods across borders as a way to enhance economic and human development. In the present day, the role played by internet connections has been lauded as one of the most enterprising elements of globalization. Internet connection has facilitated communication at the tip of the finger and has helped in modernising transport which allows faster connections around the world and effective communication. As a result of this interconnectivity the WEF is of the considered view that globalization, viewed in this positive dimension, has helped in alleviating poverty. The organization goes further to give an example of how Starbucks has improved livelihoods of Rwandese farmers by buying coffee from them and investing in social programmes to benefit the Rwandese farmers.<sup>311</sup>

However, as alluded to earlier “globalization concerns a field of inquiry defined more by the questions it asks and its object of study” in relation to the “world as a whole” and/or “parts of it”.<sup>312</sup> The above example from WEF might implore one to then ask the following questions: at what price did Starbucks purchase the coffee? What was the exchange rate of the Rwandan franc to the US dollar? Are the farmers able to sustain the farming activities in relation to importation of fertilizers and pesticides? Rwanda is a landlocked country, so what is the cost of transportation of its exports to the USA? What effect is caused by cyclic inflation in Rwanda? Has the political environment stabilised in Rwanda and suitable for business? These and many

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<sup>308</sup> *ibid* 12.

<sup>309</sup> Alex Gray, ‘What Is Globalization Anyway?’ [2017] *World Economic Forum*.

<sup>310</sup> Amah (n 307).

<sup>311</sup> Gray (n 309).

<sup>312</sup> Mooney and Evans (n 306) ix.

other questions flip the concept of globalization on its head and make people begin to question if globalization has connected the global society into one symmetrical shape.

Critical thought from the geopolitical south appraise globalization and its maze of interconnectivity as a world war aimed at annihilating the poor countries.<sup>313</sup> Marcos is critical of the following four attributes of globalization when a bidirectional<sup>314</sup> lens is used.

First, Marcos is of the view that globalization perpetuates poverty and entrenches deep socio-economic divide between the rich and the poor.<sup>315</sup> This argument is premised on the idea that economic globalization has “increased the wealth inequalities” around the globe enriching the rich and depriving the poor.<sup>316</sup> The view that globalisation will help in sharing the wealth equally is judged as absurd and tenuous because the “progress of transnational corporations does not necessarily imply progress in the developed nations”.<sup>317</sup> The gap between the poor and the rich is wide because just a few have the resources which are subtly transferred from LDC’s to the developed countries. The power relations between the North and the South are thus asymmetrical with the global North using its mechanization advantage to tap out resources (both human and natural) out of the LDC’s under the guise of ‘progressive neoliberal packages’.<sup>318</sup>

The second negative piece attached to globalization is that it is judged as a process of exploitation.<sup>319</sup> This criticism is aimed at the oft-quoted fact that globalization enhances better wealth distribution and job creation. In fact, critics are of the view that the structural component of globalization is “poverty, unemployment, and job insecurity”.<sup>320</sup> It destroys local and regional markets as small local companies fail to keep up with the financial muscle of transnational companies who end up creating monopolies which extinguish the entrepreneurial spirit of small local firms. The result is unprecedented unemployment levels because the “absolutism of financial capital” creates an asymmetrical world in which the majority are

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<sup>313</sup> Marcos (n 179)

<sup>314</sup> See Mooney and Evans (n 306) 117. The authors are of the view that globalization can be viewed as a bidirectional process in which the concept of “globalization from below” would mean how marginalized communities resist the contention of globalization as an interconnecting concept but rather the notion that it should be resisted by those who are having to deal with imposition of globalization. In short “global power begets global resistance” and as such globalization should be viewed as divisive and entrenches inequality.

<sup>315</sup> Marcos (n 179) 563.

<sup>316</sup> Ernesto Castañeda and Amber Shemesh, ‘Overselling Globalization: The Misleading Conflation of Economic Globalization and Immigration, and the Subsequent Backlash’ (2020) 9 Social Sciences 61.

<sup>317</sup> Marcos (n 179) 563.

<sup>318</sup> Castañeda and Shemesh (n 316) 21.

<sup>319</sup> Marcos (n 179) 563–564.

<sup>320</sup> *ibid* 564.

exploited for the enrichment of the few rich individuals and entities.<sup>321</sup> According to the International Labour Organization, a low unemployment rate can “disguise substantial poverty” in a country. In the scheme of Globalization, it can thus be alluded that for countries with high levels of unemployment and without social welfare benefits the situation becomes dire because of job insecurity. As a result, thereof, chronic unemployment in a world of inequalities impacts negatively on both national and human development.<sup>322</sup>

The third negative facet about Globalization is the notion that financial globalization facilitates global crime.<sup>323</sup> Syndicates are formed as if they have well intentioned objectives when they are primarily established to break the spirit of co-operation and assistance. To that end, transnational firms with credible ties to the multilateral organizations participate in high-rent real estate, tourism sector, banking and media (social and mainstream) to perpetuate the “programs of structural adjustment [programs]”.<sup>324</sup> These programs, as has been argued in the previous sections, further entrench socio-economic disparities between the global north and the south. This has been further described as “violence of globalization” which is systemic and a product of a coercive world order.<sup>325</sup> In the global south, this violence has created three distinct regions: *integrated, exploited and ostracised*.<sup>326</sup>

The last two groups are on the fringes of the global market on a number of grounds. It can be because of the democratic process, or failure to abide and keeping up with conditionalities imposed upon them by the IMF or the World Bank. For Africa, experts are of the view that this has led to new form of colonialism in which the continent has been carved up again in terms of resources it can provide to the developed West. Poverty is thus created by the level of integration required for assimilation into the free world. Africa contributes more than what it gets in return and this negatively impact human development.<sup>327</sup>

The last element for discussion is the link between migration and globalization. Marcos aptly terms this as the “errant nightmare” which has created “a great wheel of millions of migrants

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<sup>321</sup> *ibid* 563.

<sup>322</sup> International Labour Organization, ‘Unemployment, Total (% of Total Labor Force) (Modeled ILO Estimate) - World Data’ (2021).

<sup>323</sup> Marcos (n 179) 566.

<sup>324</sup> Marcos (n 179).

<sup>325</sup> Michael Mann, ‘Globalization and September 11’ [2001] *New Left Review*; Edward Demenchonok and Richard Peterson, ‘Globalization and Violence: The Challenge to Ethics on JST’ (2009) 68 *The American Journal of Economics and Sociology*; Yash Tandon, ‘The Violence of Globalisation’ *Transnational Institute* [2000] *Echoes*.

<sup>326</sup> Mann (n 325).

<sup>327</sup> Tandon (n 325).

across the planet”.<sup>328</sup> The irony of globalization in the field of migration is that it creates an uneasy paradox. At first instance, globalization is supposed to allow goods, services and people to interconnect without any barriers, and yet countries have a sovereign right to choose who they want to enter their territories. At the end of it, Marcos notes that the utopian world of globalization as a world without borders is actually one in which “foreigners’ have to deal with the nightmare of migration. A movement of certain groups to other regions, albeit in a connected global world, has thus resulted in xenophobic sentiments, repression and secondary persecution.”<sup>329</sup>

Using the second stage of globalization (1800-2000) this point can be illustrated as follows. In the early 1800’s migration was largely from the North to the South divide. It is argued that most emigrants left Europe to settle in new countries thus reducing the population of the sending countries. This demographic extraction took place in the context of colonialism as Europe expanded its territories in other continents. Between 1860 and 1913 the annual mean gross emigration, per 1000 inhabitants, for Germany was 1.5, with the Great Britain standing at 4.61 while Italy was 9.25.<sup>330</sup> However, the (2000-present) stage of globalization presents a different picture. Most of the migration is taking place from developing to developed countries. This is because of interconnected factors of displacement ranging from socio-economic to those spelt out in both the Geneva Convention and the OAU Convention. The free movement mantra that comes with the globalized and borderless world is challenged by the fact that as more South to North migration increases, restrictive immigration policies are crafted that go against the positive tenets of globalization. In fact, the reality is that developed countries create a dichotomy between desirable and undesirable migrants by creating policies that select “particular kinds of migrants based on employability, financial means, language skills and cultural capital.”<sup>331</sup>

In the space of refugee protection this has affected refugee burden sharing. The figure below illustrates that the SSA region has the highest refugee population. This does not correspond with the idea of globalization as a concept that connects the world. What is clear is that the world is in an asymmetrical shape and lack of a multilateral approach in solving international

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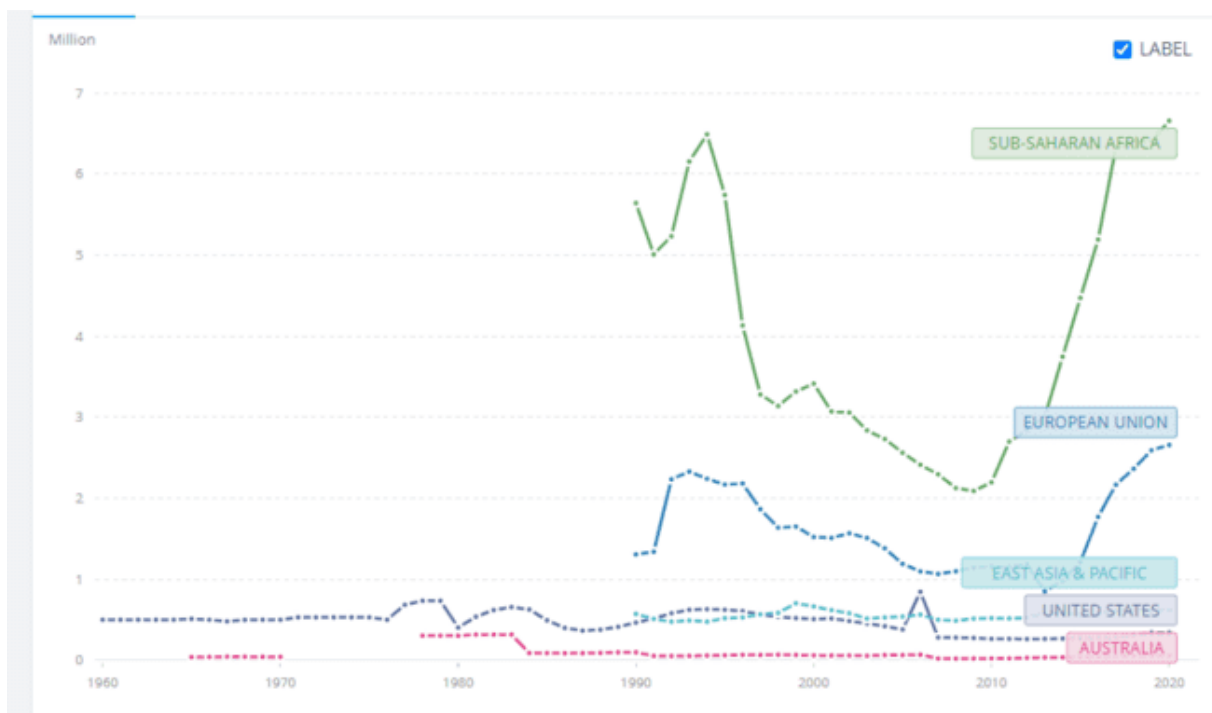
<sup>328</sup> Marcos (n 179) 565.

<sup>329</sup> Kasia Narkowicz, “Refugees Not Welcome Here”: State, Church and Civil Society Responses to the Refugee Crisis in Poland’ (2018) 31 *International Journal of Politics, Culture and Society* 357.

<sup>330</sup> Hillel Rapoport, ‘Migration and Globalization: What’s in It for Developing Countries?’ (2016) 10109 3.

<sup>331</sup> Mooney and Evans (n 306) 166.

migration will affect human development.<sup>332</sup> An argument about high *refugees' numbers* can never be sustained in the face of global statistics. Take for example, in 2018 about 6.7 million refugees fled Syria due to the civil war in that country. While any form of displacement is tragic, it is erroneous to suggest that a ‘wave’ of migrants left Syria when this then just represented 0.1 percent of the global population which then stood at 7.53 billion.<sup>333</sup> Statistically, it is therefore a misnomer to suggest that international migration is out of control. It can thus be suggested that globalization has not helped in bringing the world together but rather has been a divisive process which has led to fragmentation of the world.



Source: <sup>334</sup>

Figure 7: Refugee population by country or territory of asylum - European Union, Sub-Saharan Africa, United States, Australia, East Asia & Pacific

Arguably, globalization has led to more restrictive immigration policies. This is aimed at curbing increasing volumes of migrants especially from the developing countries. As stated above, the EU and the United States seem to facilitate movement of migrants after a thorough check of their “national origin, occupation, and wealth”.<sup>335</sup> To that end the link between regular

<sup>332</sup> Susan F Martin, ‘Heavy Traffic: International Migration in an Era of Globalization’ [2001] *Brookings*.

<sup>333</sup> Castañeda and Shemesh (n 316) 3.

<sup>334</sup> UNHCR, ‘Refugee Population by Country or Territory of Asylum - European Union, Sub-Saharan Africa, United States, Australia, East Asia & Pacific | Data’ (2021).

<sup>335</sup> Mathias Czaika and Hein De Haas, ‘The Globalization of Migration Has the World Really Become More Migratory?’ (2015) 48 *International Migration Review* 283, 316.

and irregular migration has precipitated as result of various globalization forces which have entrenched socio-economic disparities in the world.<sup>336</sup> For African leaders there might be a need to evaluate the IMF and World Bank economic policy dictates in order to regain total economic planning suitable for the African landscape in light with the ‘violence’ of globalization.

## **1.6. Agricultural reforms**

Africa is endowed with 60 per cent of the world’s arable land, and agricultural activities are the backbone of the continent’s economy.<sup>337</sup> The agriculture sector employs the majority of the population and contributes 14 percent of the continent’s GDP. It is also a given fact that most of the farming activities are largely for subsistence in comparison to commercial. However, recent observations allude to the fact that Africa *was* once a net exporter of agricultural produce up until the early 1980s. The downward trend has been attributed to high economic growth, falling raw commodity prices, weak agricultural infrastructure, low investment levels and reduced exports.<sup>338</sup> While the vagaries of weather continue to be a constant threat, there is a growing concern that the neoliberal agenda, through agricultural reforms, has subtly undermined the major source of livelihood in Africa which at the same time is the mainstay of the international market.<sup>339</sup>

In the early 1990s experts began to unravel the causes for the intractable food crisis in the SSA region.<sup>340</sup> The observations pointed out to two main issues: natural causes and artificial/human interventions. The first category relates to the ever-increasing population on the continent. As of 2021, the total population of Africa was 1.3 billion which is equivalent to 16.72 per cent of the world population.<sup>341</sup> This ever-increasing population figure has not matched up with food production on the ground. Taken together with periodic famine and floods, Africa has not been fully capable of feeding the population given that subsistence agriculture takes precedence over commercial farming and is done on small and segmented farm holdings.

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<sup>336</sup> Alfred C Jr Aman, ‘Introduction: Migration and Globalization’ (1994) 2 Indiana Journal of Global Legal Studies 1.

<sup>337</sup> Oxford Business Group, ‘Agriculture in Africa 2021: Focus Report’ (2021).

<sup>338</sup> *ibid.*

<sup>339</sup> Harrison (n 114)

<sup>340</sup> William B Morgan and Jerzy A Solarz, ‘Agricultural Crisis in Sub-Saharan Africa: Development Constraints and Policy Problems’ (1994) 160 The Geographical Journal 57.

<sup>341</sup> Worldometer, ‘Population of Africa (2021)’ (2021) <<https://www.worldometers.info/world-population/africa-population/>> accessed 5 December 2021. According to the United Nations estimates, the population of Africa 1,435,555,755 as of Sunday, June 18, 2023,

While irrigation is a panacea to periodic droughts, Africa has further failed to mechanise and equip farmers with high tech irrigation equipment to make up for the vagaries of the weather.<sup>342</sup> The second category relate to policies and laws crafted in the effort to improve agriculture. A notable concern is the high number of peasant farmers with no access to land. This has prompted the rhetoric: Who owns the land in Africa?<sup>343</sup> The trend has shown that land ownership has revolved from communal ownership to land tenure regime with stringent property rights which makes the natives seemingly landless in their own country. Land ownership has been thus modelled around colonial laws which still gives unfettered access to land for erstwhile colonisers. As a result, the majority of Africans still find themselves excluded from the arable land and are on the periphery of arable land in their continent. Observers are of the view that land ownership in Africa requires a new focal shift that is more aligned in empowering the peasant farmers. This should perhaps be accompanied with deliberate policies that empower the small-scale holder farmers to access financial support, mechanization and field support which is critical for the success of agriculture.<sup>344</sup>

Recent reports on the state of the agriculture sector in Africa seem to agree on the need to tackle the above cited challenges.<sup>345</sup> These reports acknowledge that the agricultural activities in Africa should be carried out in both urban and rural settings with the aim of providing for the continent before the race to export. The underlying argument is that African countries should acknowledge the strained economic climate in which African farmers operate. To that end, the consensus is to review the following issues which continue to hamper the performance of the agriculture sector.

- 1) Land tenure and rights
- 2) Conditionalities imposed by multilateral institutions (IMF and the World Bank)
- 3) The role of the African Continental Free Trade (AfCFTA) see full discussion in section 1.6.3

These aspects will be further developed in the next sections (1.6.1 to 1.6.2)

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<sup>342</sup> Morgan and Solarz (n 340).

<sup>343</sup> CTA, 'Who Owns Land in Africa?' (1993) Spore 48. CTA, Wageningen, The Netherlands.

<sup>344</sup> *ibid.*

<sup>345</sup> AGRA, 'Africa Agriculture Status Report. Feeding Africa's Cities: Opportunities, Challenges, and Policies for Linking African Farmers with Growing Urban Food Markets' (2020); Oxford Business Group (n 337).



Structural Adjustment Programmes (SAP's) have been lauded for promoting agricultural exports, while at the same time neglecting the long-term impact of monoculture. The emphasis on more agriculture exports to the industrialised world has not given attention to the need to tend the land and sustains its yield. However, critics are of the considered view that such an analysis should not only be skewed against the role of multilateral institutions but effect should also be given to the political atmosphere of the continent. Blaming negative human development on the legacy of colonialism might therefore not help in assessing how African leadership have adopted own policies after gaining political independence so as to boost the agriculture sector.

### **1.6.1. Land tenure and rights**

The legacy of colonialism led to unequal land access in Africa.<sup>346</sup> Studies on agriculture in Africa reveal that the following land tenure systems are in operation in Africa: common law, customary law, and Islamic law.<sup>347</sup> It is thus estimated that between 90-95 per cent of the land in the SSA region is owned under common law which makes it communal and unregistered. While in North Africa (Algeria, Egypt, Libya, Morocco, Sudan, Tunisia, Western Sahara) the majority of the land in the margins of 50-75 percent is owned by individuals and legally registered, in Southern Africa (Angola, Botswana, Lesotho, Malawi, Mozambique, Namibia, South Africa, Swaziland, Zambia, and Zimbabwe), land ownership is largely shaped by the neo-liberal policies which have encouraged foreign ownership of arable land.<sup>348</sup> As for Ethiopia, a country never colonised, the feudal power structures and the radical tenure reforms of 1975 subverted Ethiopia's ability to feed its own people.<sup>349</sup> This was also at a time when Ethiopia was part of a forced federation with Eritrea. The consequences of the federation, which ended on 24 May 1991, influenced land tenure systems in Eritrea.<sup>350</sup> Upon gaining formal independence in 1993, the Eritrean government battled with sustaining the livelihoods of Eritreans, the majority of whom solely depends on agriculture.<sup>351</sup> Therefore, unequal access to

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<sup>346</sup> Stein T Holden and Keijiro Otsuka, 'The Roles of Land Tenure Reforms and Land Markets in the Context of Population Growth and Land Use Intensification in Africa' (2014) 48 Food Policy 88.

<sup>347</sup> Holden and Otsuka (n 346); CTA (n 343); Sam Moyo, 'Three Decades of Agrarian Reform in Zimbabwe' (2011) 38 Journal of Peasant Studies 493.

<sup>348</sup> Oxford Business Group (n 337).

<sup>349</sup> Morgan and Solarz (n 340).

<sup>350</sup> Habtemicae Weldegiorgis, 'Cadastral and Land Administration Activities in Eritrea', *studylib.net* (2010) <<https://studylib.net/doc/7316626/cadastral-and-land-administration-activities-in-eritrea>> accessed 5 June 2022.

<sup>351</sup> *ibid.*

land in Eritrea continues to perpetuate low food production as there is no security of tenure; this will be critically analysed in Chapter 5.

As for Uganda, the land tenure system is mainly the customary land tenure. This system is “owned and disposed of according to the customary regulations”.<sup>352</sup> The people own the land and with it comes the difficulty of solving land disputes as there are no proper records that come with title to the land.<sup>353</sup> In our study on the Rwamwanja refugee camp in Uganda, we observed that this is also a source of conflict between refugees and host communities especially when government officials allocate land to refugees and asylum seekers for self-sufficiency.<sup>354</sup> As a result a refugee or asylum seeker may be forced to seek employment in the urban areas if there is no access to the land for sustenance. Alternatively, the refugee or asylum seeker may emigrate out of Uganda to another country out of the need for better economic opportunities and sustenance. This and more aspects on Uganda and its land tenure system will be discussed in Chapter 6.

From the above, it can thus be deduced that there is no clear land ownership framework in Africa. This has resulted in costly judicial contestations over land, and impacted on food production.<sup>355</sup> Failure to take a decisive stance as to who owns the land in Africa will continue to negatively impact on food production. The struggle with dealing with the chequered colonial past is that some of the colonial laws are still active in Africa and are recognised by financial institutions when financial assistance is sought for. This is because of the confusion of who owns the land. Could it be land *belonging to a community* under the leadership of a village headman? Or can one claim the land on the grounds that his or her ancestors *used to own* the land and are buried thereon? Or someone with a prospectus licence claiming he *discovered* the land having come to Africa as an explorer? The maze and complexity of land ownership with such titles as freehold, private landholding, customary tenure or leaseholds has thus brought so much uncertainty as to who owns the land and to what specific century. In Europe this maze is quite in the clear as 95 per cent of land is registered. However, in Africa the problem is at whose standard may the land be registered? Historical inequities bordering on colonial dispossession

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<sup>352</sup> Brian Makabayi and Moses Musinguzi, ‘To What Extent Have the Existing Land Tenure Systems Affected Urban Land Development?’ (2015) 2 International Journal of Technoscience and Development 8, 77.

<sup>353</sup> *ibid.*

<sup>354</sup> Kugonza and Mutsvara (n 92).

<sup>355</sup> Oxford Business Group (n 337) 6.

has thus led to political manoeuvres to “politically dispossess” the land and redistribute it to the “people”.

So, the question for determination could be: If African countries have taken measures to reform the land ownership issue, why is it that food production is on the decline? Despite accepting the impact of the vagaries of the weather on food production, one clear reason could be partial endorsement of neoliberal investment policies. Critics laud the efforts to redistribute land in Zimbabwe and Ethiopia but say that the missing piece is failure by these countries to “link land redistribution with provision of the necessary infrastructure, services and inputs...”<sup>356</sup>

In the scheme of neoliberal policy, financial assistance is given to farmers if they are able to show that they title deeds to the land and are in a position to return back the money borrowed. The problem here is that the farmers find themselves nestled between the political power of the state to redistribute land and the financial power of the private sector to provide assistance following legal codes. These legal codes are embedded with neoliberal policies aimed at efficiency, rule of law and legal certainty. Therefore, the problem is that SSA countries are not phasing out, in totality, the neoliberal investment policies, to match their political goals. This arguably becomes the field of knee-jerk political reactions aimed much at political survival and expediency. It thus leaves the small-scale holder farmer confronted by legal contradictions and this is made worse with variations in weather which then impact on agricultural activities.

#### **1.6.2. Conditionalities imposed by multilateral institutions (IMF and the World Bank)**

The role of the multilateral institutions in the African agricultural sector can be traced to the world trade crisis triggered by the oil price during the 1970's.<sup>357</sup> Then few African countries had gained political independence and most of them were fighting in solidarity to dismantle the shackles of colonialism. The oil price severely handicapped the agriculture sector since Africa then and now heavily depends on oil imports not only for agriculture but for most aspects of life. The recession in Europe and the United States of America further dashed hopes of recovery because of the overdependence on exportation of raw materials. This led African countries to fall short on their payments thus severely affecting the balance of payment as sovereign bonds went unpaid for a considerable length of time.<sup>358</sup>

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<sup>356</sup> Kjell Havnevik and others, ‘African Agriculture and the World Bank : Development or Impoverishment?’ (Nordiska Afrikainstitutet 2007) 33.

<sup>357</sup> Morgan and Solarz (n 340).

<sup>358</sup> *ibid.*

The IMF and the World Bank began to engage with the African countries in the early 1980s by intervening through neoliberal packages aimed at reviving both the agriculture sector and the overall economy.<sup>359</sup> The multilateral institutions began with short term measures whose aim was to bring stability to the balance of payment. Countries had to participate in the exportation of raw materials at a devalued currency rate so as to keep up with their credit obligations. After these short term measures the IMF and the World Bank advised the countries to adopt macroeconomic reforms which will lead to deregulation of industries, privatization of public entities and intensive liberalization of the economy.<sup>360</sup>

This meant that agricultural trade was liberalized and emphasis was placed on the exportation of agricultural produce. These macroeconomies were on debt-ridden economies on the continent and critics are of the view that the intervention was and is still in direct inverse proportion to the ability of the countries' economic strength.<sup>361</sup> This probably explains why the SSA countries continue to have stunted growth in the agricultural sector even after decades of neoliberal intervention by the IMF and the World Bank. The organisations presumed a "one size fits all" mechanism for African countries and did not take into consideration the ever-changing political environment and how the neoliberal agenda has rather perpetuated rural poverty and possibly explains the various factors of human displacement in the continent.

Part of the problem is also attributed to the language of efficiency by the multilateral organisation. The slogan "getting the prices right" categorises the African farmers into two categories: small scale and large scale. It is the latter group which seems to have more financial backing in comparison to the former. One of the reasons is that the large-scale farmers are largely commercial farmers from European descent and these farmers are protected by land concessions and title deeds backing back to colonial times. In the scheme of the neoliberal agenda, it can thus be argued that there is no level playing ground for the local farmers. Small scale holders sell "at the right price" to the large-scale farmers who later export "at the right price" to the international market.<sup>362</sup>

Whatever is the right price, critics are of the view that the neoliberal policies by the IMF and its attendant institutions marginalize the small-scale holder farmers. This contradicts the

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<sup>359</sup> Kerstin Bertow, 'Impact of IMF and World Bank Policies and EPAs on and EPAs on Smallholder Farmers in Uganda, Zambia, and Ghana', *Impact of EU's agricultural trade policy on smallholders in Africa* (Germany Watch 2007).

<sup>360</sup> Morgan and Solarz (n 340); Bertow (n 359).

<sup>361</sup> Havnevik and others (n 356) 9–10.

<sup>362</sup> Havnevik and others (n 356).

objectives of the neoliberal intervention and its stated outcomes. Peasant farmers are thus not able to compete in the market when they are also main participants in food production. However, this contradictory state goes unchallenged because the governments are at the same time too dependent on conditional aid and as such cannot criticize how the conditionalities imposed by multilateral institutions (IMF and the World Bank have perpetuated poverty in Africa.<sup>363</sup> The end result is that the liberalization of the agriculture sector has had ‘unintended’ consequences. In Uganda the IMF advice to reform the financial sector to fit the scope of most developed countries, led to the exclusion of communal farmers whose land was not registered. They could not access agricultural loans and the neoliberal policy excluded them from the main thus impacting on food production. Uganda was further advised to replace food crop production with cash crop production. The negative impact of this policy prescript is that it led to replacement rather than enlargement of land. More smallholder farmers were forced to dispose two hectares of land to facilitate production of export agricultural goods which are seen by critics as the mainstay of industrialised countries.<sup>364</sup>

### **1.6.3. The role of the African Continental Free Trade (AfCFTA)**

The African Continental Free Trade (AfCFTA) treaty came into force after ratification from 22 African countries at the 10<sup>th</sup> Extraordinary Summit of the African Union on 30 May 2019.<sup>365</sup> In terms of Article 3(g) of the AfCFTA, one of its general objectives is to promote agricultural development and food security on the continent.<sup>366</sup> The treaty acknowledges that the continent is in a state of fragmentation after a history of implementing economic policies not at the wavelength of the continent’s development.<sup>367</sup> One major hindrance for intra-continental trade has been identified by the treaty as high tariffs which have curtailed the development of the agricultural sector.<sup>368</sup>

Agricultural reports predict that, if well implemented, the AfCFTA will result in the elimination of tariffs for close to 90 per cent of products coming from member states by the end of 2021.<sup>369</sup> This is projected to be the ascendancy to 97 per cent by 2030 thus generating close to \$20 billion worth of revenue. Key to this success is to improve transportation and custom clearance in

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<sup>363</sup> Moyo, ‘Three Decades of Agrarian Reform in Zimbabwe’ (n 347).

<sup>364</sup> Harrison, Lin and Xu (n 253); Harrison (n 114).

<sup>365</sup> Agreement Establishing The African Continental Free Trade Area 2018.

<sup>366</sup> *ibid.*

<sup>367</sup> World Bank, ‘The African Continental Free Trade Area: Economic and Distributional Effects’ (2020).

<sup>368</sup> Oxford Business Group (n 337).

<sup>369</sup> AGRA (n 345); Oxford Business Group (n 337).

relation to perishable agricultural products. A responsive custom clearance framework will thus be the cog to intra-trade before exporting to other continents. The acknowledgement that not all African countries are at the same level of development is addressed in AfCFTA. The treaty provides for small and medium enterprises to enter the market and supply to larger entities at regional level who then export overseas.<sup>370</sup>

Perhaps a word of caution on the efficacy of the AfCFTA comes from the World Bank. The multilateral financial institution acknowledges and applauds the AfCFTA as a novel treaty to bridge the socio-economic inequalities in the continent. The treaty has the potential of lifting “30 million people from extreme poverty....and 68 million people from moderate poverty”. According to the World Bank, Africa still has “a long road ahead” to achieve the full potential of the AfCFTA if it adopts the partial liberalization reforms of the treaty.<sup>371</sup> This then livens the debate on migration within and out of the continent if the World Bank is of the view that 30 million people are in extreme poverty. Falling household incomes, rising consumer prices, weak currencies can inflate poverty and stir political violence which might be a cause for displacement. Taking this together with punitive government policies on food aid and distribution, life may become unbearable and cause one to flee the country seeking international protection.

## **Conclusion**

This chapter aimed at evaluating the impact of neoliberal policies on the African continent. The general survey shows that the neoliberal agenda has fragmented the continent and entrenched socio-economic disparities thus heightening poverty. This has had a knock-on effect on many aspects of life triggering political instability and large-scale cross-border displacement within and out of Africa. All facets of economic liberalization have been viewed as ‘war by any other means’ and their implementation in Africa has not taken the economic capabilities of the countries and has led to skewed human development. Arguably, the neoliberal packages might have spurred cross-border movements in an overt way. However, it must be noted that the overall goal of neoliberal projects is to improve lives and create efficient ways to manage and allocate resources. It may be argued that it is the role of governments to see to it that they have efficiently implemented the economic packages within the efficiency range of their countries. For example, in the area of land use and ownership, the economic liberalization programmes

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<sup>370</sup> Oxford Business Group (n 337) 6.

<sup>371</sup> World Bank, ‘The African Continental Free Trade Area: Economic and Distributional Effects’ (n 367) 5–6.

might lessen poverty if the government adopting such measures put in place mechanisms to efficiently distribute farm inputs and implements. This way, the government would have eased the pressure on the peasantry and also avoid land concessions that have a tendency of pushing the poor on the periphery of arable land. Such measures results might have latent effects on human displacement that might result in cross-border displacement as a way to escape the ‘circumstances’ at home. This discussion will further be illuminated by the case study on Eritrea in chapter 5.

## Chapter 2

### Research methodology, theoretical framework, process and production

#### 2.1. Introduction

This thesis draws on different disciplinary and methodological perspectives in order to analyse the situation of persons fleeing their country of origin because of economic hardship. While the focus may be on Eritrea and Uganda, the research process spanned over two continents (Africa and Europe) and was informed by an interdisciplinary approach that took into account the social, political and economic factors causing human displacement in a global space further impacted by the COVID-19 pandemic. This chapter begins with a section outlining the steps taken to formulate the hypotheses using the Hypothetical Deductive Method (H-D). This is tied in together with a critical reflection of the theoretical framework upon which the study is built on. The discussion and analysis of the two divergent theoretical paradigms in migration studies, neo-classical theory (migration optimists) against historical structuralists (migration pessimists), is critical in understanding the formulation of international refugee law and its impact on cross-border displacement. As shall be discussed below, the neo-classical theory postulates that migration is a form of optimal resource allocation embedded in free movement, while the historical structuralist theory views migration as disastrous since it leads to depletion of already strained resources. The next sections deal with the research process and production of the study. Data was gathered through field research interviews, observations, secondary sources, field research and espouses the reflexive narrative stemming from the researcher's personal experiences. In this section, I make a bold statement with regards to my positionality as a Black African Male studying migration in Europe. I agree with observations by scholars on ethnic and racial studies that researchers coming from an immigration background tend to be viewed through a prejudicial lens that results in data misinterpretations, misinformation, and misrepresentations of individuals, communities, and institutions.<sup>1</sup> In that realm, ethical considerations will be taken into will be crucial in data analysis. The data analysis will then be

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<sup>1</sup> Valentine Ibeka, 'Race, Emotionalized Bodies and Migration Research: Doing Fieldwork in the West as a Black African Male' (2022) 48 *Journal of Ethnic and Migration Studies* 2559 <<https://doi.org/10.1080/1369183X.2021.1894914>>; Nancy Foner, 'Race in an Era of Mass Migration: Black Migrants in Europe and the United States' (2018) 41 *Ethnic and Racial Studies* 1113 <<https://doi.org/10.1080/01419870.2018.1411600>>; Richard H IV Milner, 'Race, Culture, and Researcher Positionality: Working through Dangers Seen, Unseen, and Unforeseen' (2007) 36 *Educational Researcher* 388.



an evaluation of how international refugee law is analysed, interpreted and implemented in relation to persons fleeing economic hardship.

## 2.2. Framing The Hypotheses: Applying The Hypothetical Deductive Method (H-D)

As stated in the first chapter, this study is premised on the following two key research objectives, (i) to provide guidelines for the UNHCR (and national asylum authorities) on how to provide international protection to persons fleeing economic hardship from their countries of origin by proposing a Framework Convention to the Geneva Convention, and (ii) to identify sustainable refugee sharing mechanisms. To achieve this, the study employs the Hypothetical Deductive Method (H-D) because it helps in validating theories through hypotheses formulation to derive and test research findings.<sup>2</sup> The H-D method is an accepted epistemological approach that is built on seven key steps in constructing a scientific theory whose results are obtained through observation and experimentation.<sup>3</sup> The empirical evidence gathered from this observation and experimentation can then be used to verify or disprove the hypotheses formulated. The key seven steps in this scientific method can thus be summarised as (i) identifying a broad problem area for the research, (ii) defining the problem statement, (iii) developing hypotheses, (iv) determining how to measure the theoretical framework, (v) collecting data (vi) analysing data, (vii) and interpretation of data.<sup>4</sup> In the field of migration studies, the H-D method enables researchers to test migration conceptual frameworks based on a *a priori* outlined hypothesis, and in the process confirm or refute migration theories by making assumptions from the gathered and analysed data.<sup>5</sup> Following the H-D model template, this study therefore frames the hypotheses (*H1* and *H2*) in the following seven steps:

*Step 1: Identifying the broad problem area in which main problem is occurring to do a research project.*

As stated in the first chapter, the *Convention Relating to the Status of Refugees* and the *Protocol thereto* of 31 January 1967 whose definition of a refugee has been included in the European

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<sup>2</sup> Alan Musgrave, 'Popper and Hypothetico-Deductivism' in Dov M Gabbay, Stephan Hartmann and John Woods (eds), *Handbook of The History of Logic Volume 10 Inductive Logic* (Vol 10, Elsevier 2011).

<sup>3</sup> Jan Sprenger, 'Hypothetico-Deductive Confirmation' (2011) 6 *Philosophy Compass* 497 <<https://onlinelibrary.wiley.com/doi/full/10.1111/j.1747-9991.2011.00409.x>> accessed 14 November 2022; Deborah J Bennett, *Logic Made Easy: How to Know When Language Deceives You* (WW Norton & Company 2004); Musgrave (n 2); Karl Popper, *The Logic of Scientific Discovery* (Routledge 1935); Carlo Martini, 'Hypothetico-Deductive Method' [2017] *The Wiley-Blackwell Encyclopedia of Social Theory* 1 <<https://onlinelibrary.wiley.com/doi/full/10.1002/9781118430873.est0669>> accessed 12 November 2022.

<sup>4</sup> Musgrave (n 2).

<sup>5</sup> Chinedu Obi and others, 'Understanding Integration Experience and Wellbeing of Economic-Asylum Seekers in Italy: The Case of Nigerian Immigrants' [2022] *Journal of International Migration and Integration* 1 <<https://link.springer.com/article/10.1007/s12134-022-00938-1>> accessed 12 November 2022.

Union asylum law, but limited to third country nationals, does not accord protection to a new class of refugees who are a direct result of globalisation. Current experience has shown that other socio-economic factors of displacement are indissolubly linked to the five grounds of persecution included in the 1951 Geneva Convention. While one can be recognised as a refugee despite entering the country irregularly, some State practice now treat asylum seekers differently on the grounds that they have entered their territories “unlawfully”. This may result in asylum seekers being labelled “illegal”, “irregular” and perhaps subject to removal or return.<sup>6</sup> Such punitive determination of asylum seekers based on “how” they have arrived in the country of asylum is inconsistent with the Refugee Convention and also other treaties on human rights.<sup>7</sup> The focus of the study will be on how international refugee law is interpreted in relation to persons fleeing economic destitution. This analysis will be done in relation to Article 33 of the Geneva Convention, as well as article 3 of the European Convention on Human Rights prohibits refoulement of asylum seekers/refugees to a place they would face torture or inhuman or degrading treatment.<sup>8</sup> These provisions apply *mutatis mutandis* to both the country of origin and a third country. This discussion shall be well elaborated in chapter 3.

*Step 2: Defining the problem statement. It can be the scientific research with definite aim and general objective of the research.*

The study confronts two novel issues in international refugee law. The first aspect of the problem is that the term “*economic refugees*” is regarded as a misnomer.<sup>9</sup> Economic refugees are deemed non-existent in the literature on refugee studies. In fact, all those who have fled their countries on the grounds of economic hardship are seen as “economic migrants” who seize on an economic opportunity to better their lives.<sup>10</sup> The question for determination therefore becomes who really is in need of international protection where factors of refugee displacement are indissolubly linked to socio-economic factors. The study attempts to answer this question in the next chapter by defining the term “*economic refugees*” in the realm of contemporary migration movements.

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<sup>6</sup> Heaven Crawley and Dimitris Skleparis, ‘Refugees, Migrants, Neither, Both: Categorical Fetishism and the Politics of Bounding in Europe’s “Migration Crisis”’ (2018) 44 Journal of Ethnic and Migration Studies 48.

<sup>7</sup> Guy S Goodwin-Gill, ‘Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection’ in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge University Press 2003).

<sup>8</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 1950; UN General Assembly (n 8).

<sup>9</sup> Atle Grahl-Madsen, ‘Identifying the World’s Refugees’ (1983) 467 The ANNALS of the American Academy of Political and Social Science 11 <<http://journals.sagepub.com/doi/10.1177/0002716283467001002>> accessed 18 May 2020.

<sup>10</sup> Crawley and Skleparis (n 6).

The second aspect of the problem is that the subtle economic destabilisation in Sub-Saharan Africa has had a differentiated impact on refugee protection. As shall be shown in chapter 5, the case study of Eritrea shows that economic destabilisation causes human displacement. At the same time, the Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention") defines a refugee in broad terms and is not in sync with that of the Refugee Convention and European Union asylum acquis.<sup>11</sup> The argument is that the OAU Convention is probably of no use in Africa and cannot change the "true definition" of who is a refugee as read in the Geneva Convention. Yet, reading between the lines, as alluded in the first chapter of this study, the OAU Convention inadvertently gives impetus to the term "*economic refugees*" since it arguably outlines what can be alluded to as economic factors of displacement.

*Step 3: Development of hypothesis which should be testable and falsifiable.*

To that end, this study is premised on the following two hypotheses:

*H1:* The advent of neo-liberalism has subverted the economic structure of Sub-Saharan Africa.

*H2:* International refugee law and international economic law perpetuate a coercive world order

*Step 4: Measuring the theoretical framework and if it is not measurable then it should be qualitative.*

The research will link the following opposing theoretical frameworks: (a) Migration Optimists (Neo-classical) and, (b) Migration Pessimists (Historical Structuralists) to the case-studies of Eritrea (chapter 5) and Uganda (chapter 6).

*Step 5: Collection of data is based on quantitative and qualitative data.*

This study acknowledges that migration studies are translocal, transregional and transnational, and probably require an interdisciplinary approach.<sup>12</sup> As alluded in chapter 1, the study research largely employs a qualitative approach to analyze gathered data (see also discussion in the next section).

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<sup>11</sup> Marina Sharpe, 'The 1969 OAU Refugee Convention in the Context of Individual Refugee Status Determination' in Volker Türk, Alice Edwards and Cornelis Wouters (eds), *In Flight from Conflict and Violence :UNHCR's Consultations on Refugee Status and Other Forms of International Protection* (Cambridge University Press 2017); George Okoth-Obbo, 'Thirty Years On: A Legal Review Of The 1969 Oau Refugee Convention Governing The Specific Aspects Of Refugee Problems In Africa' (2001) 20 Refugee Survey Quarterly 79 <<https://www.jstor.org/stable/45053353>>.

<sup>12</sup> Dirk Hoerder, 'Transnational – Transregional – Translocal: Transcultural' in Carlos Vargas-Silva (ed), *Handbook of Research Methods in Migration* (Edward Elgar Publishing Limited 2012).

*Step 6: Analysis of data is done to check if the hypotheses generated were supported.*

The study acknowledges that the testing of H1 and H2 cannot take place in isolation of other peripheral information. As alluded by scholars on logic, H1 and H2 will be well tested and analyzed if there is sufficient information on the *system (S)* of international refugee law, *initial conditions (I)* that led to the crafting of key international refugee law treaties, detailed analysis of *background theories (T)* of international refugee law, and assumptions (SIS) that are used in international refugee law.<sup>13</sup> Such assumptions tend to isolate the functioning elements of the international refugee law system.

*Step 7: Interpreting data for finding out the meaning of the results.*

This study employs two divergent case studies (Eritrea and Uganda) to analyze H1 and H2 stated above. Take for example the H1 premise on neo-liberalism. The H1 will have to be tested in conjunction with the system (S) on international economic law, together with initial conditions (I) that led to establishment of key institutions that regulate world financial markets. Combined with background theories (T) and assumptions (SIS) the H1/H2 will then be tested on the basis of the case studies, interviews and observations carried out to see if there are latent effects on migration movements. This schema is well illustrated in the diagram below and the next section will clarify the adaption of the H-D model in coming up with solutions to the study on cross-border displacement in the new global world.

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<sup>13</sup> Anton E Lawson, 'The Generality of Hypothetico-Deductive Reasoning: Making Scientific Thinking Explicit' (2000) 62 American Biology Teacher 482; Musgrave (n 2).

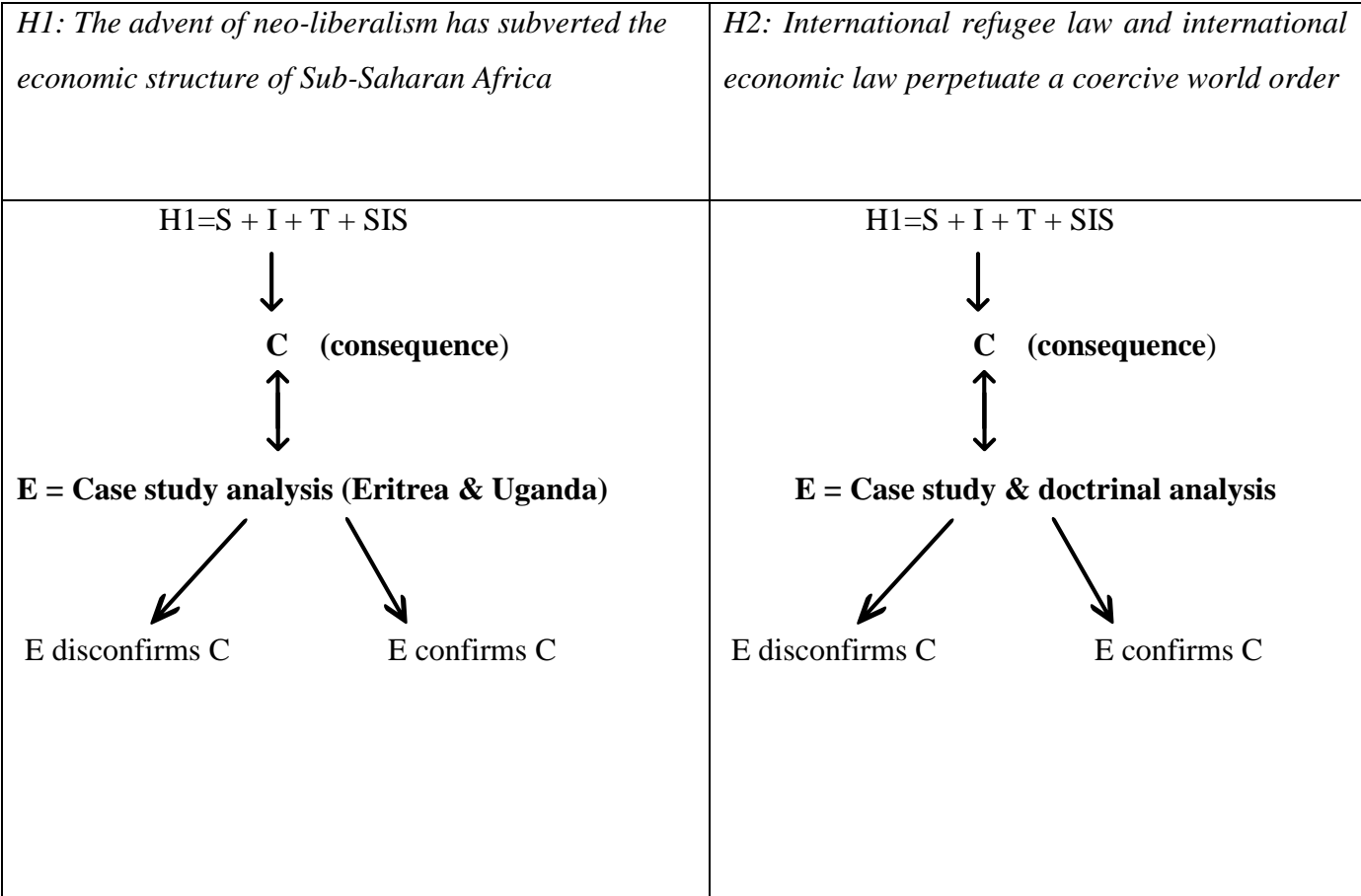


Figure 8: The H-D Model in the context of international refugee law

2.3. Theoretical framework

The historical overview of migration trends in Africa can be divided into the following three stages: pre-colonial, colonial and post-colonial.<sup>14</sup> In the first stage, Africa is metaphorically viewed as the cradle of humanity in which the human species began to move within and outside the continent as part of human evolution.<sup>15</sup> The colonial stage saw systematic forced human displacement in the form of the Transatlantic slave trade. The incursion into Africa by European countries during this stage was motivated by the desire to control human movement so as to direct it towards accessing cheap labour for their industries.<sup>16</sup> The post-colonial stage brings in what Abebe Shimeles describes as the complexities of state formation and migratory

<sup>14</sup> Aderanti Adepoju, ‘Linkages between Internal and International Migration: The African Situation’ (1984) XXXVI International Social Science Journal 387 <<https://anthkb.sitohost.iu.edu/a104/kenya/african/migration.htm>> accessed 22 July 2022; Benedetta Rossi, ‘Migration History and Historiography’ [2018] Oxford Research Encyclopedia of African History 1 <<https://doi.org/10.1093/acrefore/9780190277734.013.325>> accessed 22 July 2022; Oliver Bakewell, “‘Keeping Them in Their Place’: The Ambivalent Relationship between Development and Migration in Africa” (2008) 29 Third World Quarterly 1341.

<sup>15</sup> Rossi (n 14).

<sup>16</sup> Bakewell (n 14).

trends in Africa.<sup>17</sup> This is because at this stage most African countries had gained political independence while at the same time maintained economic ties with their erstwhile colonizers.<sup>18</sup> Arguably, this stage international migration from the continent is largely directed towards Europe with the migrants having mixed motivations to cross European borders.<sup>19</sup>

While some argue that migration trends during the post-colonial era are a result of incessant political conflicts and economic crises<sup>20</sup>; others warn against such a view that reduces African migratory patterns to misery and conflict.<sup>21</sup> In fact, the debate covers a number of contemporary issues that are a result of globalization, colonialism and capitalist development.<sup>22</sup> This then brings in the question: what are the migration theories that explains cross-border displacement in Africa? Put differently, how should cross-border displacement in Africa be explained in terms of push and pull factors, and aspirations and capabilities? Can these questions be answered by the sweeping assertion by Ernest George Ravenstein in the late 19<sup>th</sup> century that “migration appeared to go on without definite law”<sup>23</sup> and in that vein can it also be argued that *no definite theory of migration can explain today’s cross-border displacement?*

The early contributions on the migration theory by Ravenstein were mooted on the premise of the industrial revolution that changed the working patterns and lifestyle of many people in Europe and North America. While Ravenstein’s study was based on the surveys taken within the United Kingdom the following seven Ravenstein’s “laws of migration” have remained foundational in migration studies:<sup>24</sup>

1. Most migrants only proceed a short distance, and toward centres of absorption.

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<sup>17</sup> Abebe Shimeles, ‘Migration Patterns, Trends and Policy Issues in Africa’ (2010) 119 <[www.afdb.org/](http://www.afdb.org/)> accessed 22 July 2022.

<sup>18</sup> *ibid.*

<sup>19</sup> Schoumaker Bruno and others, ‘Changing Patterns of African Migration: A Comparative Analysis’ (2013) 18 <<http://www.mafeproject.com/>> accessed 22 July 2022. Also see Africa Center for Strategic Studies, ‘African Migration Trends to Watch in 2022’ (2021) <<https://africacenter.org/spotlight/african-migration-trends-to-watch-in-2022/>> accessed 22 July 2022. They project that in the year 2000, just over 3 million Africans were living in Europe. This number has now dramatically rose to 11 million as of December 2021.

<sup>20</sup> Erhabor Idemudia and Klaus Boehnke, ‘Psychosocial Experiences of African Migrants in Six European Countries’ (2020) 81 Social Indicators Research Series 15 <[https://link.springer.com/chapter/10.1007/978-3-030-48347-0\\_2](https://link.springer.com/chapter/10.1007/978-3-030-48347-0_2)> accessed 22 July 2022.

<sup>21</sup> Gunvor Jonsson, ‘Comparative Report: African Migration Trends’ (2009) <<http://www.irinnews.org/Report.aspx?ReportId=86567>> accessed 22 July 2022; Marie Laurence Flahaux and Hein De Haas, ‘African Migration: Trends, Patterns, Drivers’ (2016) 4 Comparative Migration Studies 1 <<https://comparativemigrationstudies.springeropen.com/articles/10.1186/s40878-015-0015-6>> accessed 22 July 2022.

<sup>22</sup> Bakewell (n 14); Jonsson (n 21); Bruno and others (n 19); Rossi (n 14).

<sup>23</sup> Ernest George Ravenstein, ‘The Laws of Migration’ (1885) 48 Journal of the Statistical Society of London 167, 167 <<https://doi.org/10.2307/2979181>>.

<sup>24</sup> *ibid* 199.

2. As migrants move toward absorption centres, they leave "gaps" that are filled up by migrants from more remote districts, creating migration flows that reach to "the most remote corner of the kingdom."
3. The process of dispersion is inverse to that of absorption.
4. Each main current of migration produces a compensating counter current.
5. Migrants proceeding long distances generally go by preference to one of the great centres of commerce or industry.
6. The natives of towns are less migratory than those of the rural parts of the country.
7. Females are more migratory than males.

Applying Ravenstein laws in the current modern world has rendered some of the migration "laws" obsolete. The advancement in both transport and technology since 1885 has also challenged Ravenstein's assumptions on dispersion and absorption. In his model, he defines absorption as a situation in which a county has a "population more or less in excess of the number of its natives enumerated throughout the kingdom".<sup>25</sup> On the other hand, dispersion will be seen as the inverse of absorption in which the population [of the county] falls short of the number of [its] natives enumerated throughout the place of the census.<sup>26</sup> To that end, the determination of "laws of migration" solely based on data collected in counties in the late 19<sup>th</sup> century will not fit the scope and scale of the current levels of migration between countries. In fact, recent global migration trends have shown that immigrants getting into another country are not replaced by the same number of emigrants from the country in question.<sup>27</sup>

However, this does not mean that Ravenstein theory has not had an impact on recent migration theories. Ravenstein's second law of migration has been formalised by George Zipf into what is now called the 'Zipf' law :  $M = (P_1 \times P_2) / D$ .<sup>28</sup> This means that migration movements (M) between any given places are proportional to the product of their populations ( $P_1 \times P_2$ ) divided by the distance (D) between them.<sup>29</sup> The implication here is that there is a concentrated distribution of immigrants in few large cities.<sup>30</sup> To that end, the Ravenstein model has evolved

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<sup>25</sup> Ravenstein (n 23).

<sup>26</sup> *ibid.*

<sup>27</sup> Matteo Podrecca, Marco Sartor and Guido Nassimbeni, 'United Nations Global Compact: Where Are We Going?' (2022) 18 Social Responsibility Journal 984.

<sup>28</sup> Xavier Gabaix, 'Zipf's Law and the Growth of Cities' (1999) 89 Source: The American Economic Review 129 <<https://www.jstor.org/stable/117093>> accessed 13 February 2023.

<sup>29</sup> *ibid.*

<sup>30</sup> Çağlar Özden and Christopher Parsons, 'Zipf's Law, Gibrat's Law and International Migration' (2014) 101 <<https://ferdi.fr/dl/df-5rbxkfny9Z4qWvpJtP4rAbPx/ferdi-b101-zipf-s-law-gibrat-s-law-and-international-migration.pdf>> accessed 16 November 2022.

over time. Human mobility has become a multifaceted *migration chain* that thrives on interpersonal human communication and the *network* that is created by migrants as they converge in certain centres of absorption.<sup>31</sup> This section, will therefore aim to explore the best theoretical framework that explains current migration movements. Focus will be on the efficacy of the neo-classical theory in relation to historical structuralists theory of migration.

### **2.3.1. Neo-classical theory of migration: macro and micro perspective**

After the Ravenstein categorisation of migration into seven laws of migration, many theories have been formulated to explain the concept of human migration. These theories are largely categorised according to their impact on the social, geographical, economic and integrative dimensions. This then allows critical analysis of human movement at the macro- (national level or across nations), micro- (individual experiences), and meso-levels (group interactions). The discussion will begin with an evaluation of the neo-classical theory of migration in the context of international migration. Neo-classical theories are focussed on the economic dimension and suggest that international labour migration is a product of supply and demand created by global labour markets. The analysis below, will analyse international migration with relation to economic development as put forward by Hicks, Lewis, Ranis and Fei, Harris and Todaro, and Todaro.<sup>32</sup>

In the realm of neo-classical theory of migration, rural-urban migration is a key component of the development process as surplus labour in the rural market replenishes the workforce in the urban sector.<sup>33</sup> Therefore at the macro level (national and international) the neo-classical theory of migration defines and describes migration in terms of geographical differences in the supply and demand for labour. This means that the difference in wages in the two settings (rural and urban) makes workers migrate from low-wage market to high-wage regions with high demand for workforce. At the micro-level (local) the theory views migrants as rational individual

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<sup>31</sup> Mathias Czaika and Hein De Haas, 'The Globalization of Migration: Has the World Become More Migratory?' (2014) 48 *International Migration Review* 283 <<https://onlinelibrary.wiley.com/doi/full/10.1111/imre.12095>> accessed 18 November 2021.

<sup>32</sup> John Richard Hicks, *The Theory of Wages* (2nd edn, Palgrave Macmillan Ltd 1963); Gustav Ranis and John CH Fei, 'A Theory of Economic Development' (1961) 51 *The American Economic Review* 533 <<https://www.jstor.org/stable/1812785>>; John R Harris and Michael P Todaro, 'Migration, Unemployment and Development: A Two-Sector Analysis' (1970) 60 *The American Economic Review* 126 <<https://www.jstor.org/stable/1807860>>; Michael P Todaro, *Migration and Economic Development: A Review of Theory, Evidence, Methodology and Research Priorities* (International Labour Office 1976).

<sup>33</sup> Hein de Haas, 'Migration and Development: A Theoretical Perspective' (2018) 44 *International Migration Review* 227 <<https://doi.org/10.1111/j.1747-7379.2009.00804.x>>.



persons, who decide to move on the basis of a cost-benefit calculation.<sup>34</sup> The ability to migrate in this case is determined by migrant skills, and the structure of the labour market. The assumption here is that the migrant has free will to move and has full access to the information on the requirements to enter the high-wage labour market. As shall be discussed below, this is not always the case for migrants at both the micro or macro levels.

In essence, neo-classical theories of migration view migration as the effect of geographical differences in the distribution factors of product (labour, land, natural resources, and capital) in relation to the supply of and demand for workforce.<sup>35</sup> In the context of labour migration, it can be concluded that workers tend to move from locations where capital is scarce and where labour is in surplus to places where there is high capital and scarce workforce with relatively high wages.<sup>36</sup> Arguably, the present day immigration trends where workers from *less developed*<sup>37</sup> countries migrate to developed countries in search of high paying jobs can thus be better explained by the neo-classical theory.<sup>38</sup> As shall be argued below, what constitutes ‘high paying jobs’ is viewed differently by the natives as compared to the incoming migrants who take the *available* jobs on the basis of wage differentials from their countries of origin. Therefore, the immigrants, in terms of the neo-classical theory, go to locations where they “expect the highest net gain”.<sup>39</sup> This notion is well defined by Bueno and Prieto-Rosas, as the movement of young rather than old labour migrants whose migration aspirations are a combination of “...an individual decision motivated by income maximization (microlevel) with country-level structural determinants such as wages and employment conditions (macrolevel).”<sup>40</sup>

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<sup>34</sup> *ibid.*

<sup>35</sup> Aldona Zawojcka and Tomasz Siudek, ‘A Theoretical And Empirical Approach To Foreign Labour Migration And Employment: The Case Of Agri-Food Migrant Workers In Developed Economies’ (2021) 20 *Acta Sci. Pol. Oeconomia* 63.

<sup>36</sup> *ibid.*

<sup>37</sup> I am at pains at using this phrase ‘developing world’ because it assumes a hierarchy between countries. From an Afrocentric point of view, it thus paint the Western societies as ideal, but there are many social problems besetting the social fabric just as in the so-called developing countries. As a black male researcher, I am also of the considered view that it perpetuates stereotypes about people coming from the so-called developing countries as backward, ignorant, irresponsible and lazy.

<sup>38</sup> Zawojcka and Siudek (n 35); Todaro, *Migration and Economic Development: A Review of Theory, Evidence, Methodology and Research Priorities* (n 33).

<sup>39</sup> DS Massey and others, ‘An Evaluation of International Migration Theory: The North American Case’ (1994) 20 *Population & Development Review* 699, 701.

<sup>40</sup> Xiana Bueno and Victoria Prieto-Rosas, ‘Migration Theories’ [2019] *Encyclopedia of Gerontology and Population Aging* 1, 1–2 <[https://link.springer.com/referenceworkentry/10.1007/978-3-319-69892-2\\_633-1](https://link.springer.com/referenceworkentry/10.1007/978-3-319-69892-2_633-1)> accessed 13 February 2023.

As indicated above, the core of the neo-classical theory, as expounded by Hicks (1932), Lewis (1954) and Harris and Todaro (1970), is that international migration is a result of the variations in wages and employment opportunities.<sup>41</sup> As a result, thereof, demand and supply are created by fluctuations in wage differentials that attract the migrant to immigrate (*to*) or emigrate (*from*) the country in question. The assumption is that if there is full employment, a linear relationship pattern is created in line with wage differentials and migration flows. If this model is further extended, migration flows into country X are thus determined by expected rather than actual earnings and the main variable will be earnings weighted by the probability of getting employed in country X. Therefore, the neo-classical theory explains the dynamics of labour migration in the process of economic development of both sending and receiving countries at both macro- and microeconomic levels.<sup>42</sup> In the field of migration, the purpose of the neo-classical theory can thus be summarised as follows:

...to maximize [behaviour] of agents and a flexible wage, which, using the supply and demand forces, cleans the market and leads to an equilibrium. A person continues to look for work if the expected income is less than or equal to the search costs. When a person finds a job with a higher salary, migration begins. Since the alternative is cheaper, then it is not optimal to accept the first job offer.<sup>43</sup>

John Richard Hicks pioneered the classical labour migration theory premised on wages and labour allocation. His main argument is that the labour market is never perfect and thus the “...the differences in net economic advantages, chiefly differences in wages, are the main causes of migration.”<sup>44</sup> This suggests that migrants move from low-to high-wage countries. In the practical sense, this makes labour migration a form of human capital investment.

It can thus be argued that migrants weigh the value of the work opportunities available in the alternative labour market in relation to the cost of moving to the country in question and the likelihood of getting employed thereafter.<sup>45</sup> Hicks is of the view that the “Gospel of High Wages” plays a crucial part in attracting immigrants in a country and at the same time leads to the lowering of wages. He argues that when a labour market is attractive it “draws immigrants to it, and the presence of these immigrants retards the rise in wages”.<sup>46</sup> This results in

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<sup>41</sup> Alexandr A Tarasyev and Jeenat B Jabbar, ‘Dynamic Modeling of Labor Migration Impact on the Economic System Development’ (2018) 51 IFAC-PapersOnLine 407.

<sup>42</sup> *ibid.*

<sup>43</sup> *ibid* 408.

<sup>44</sup> Hicks (n 32) 76.

<sup>45</sup> Massey and others (n 39) 701.

<sup>46</sup> Hicks (n 32) 166.

established and local citizens to be aggrieved and in the process leads to the “limitation of [immigrants] with certain defined qualifications”.<sup>47</sup>

The underlying argument in Hicks theory is therefore that economic development of both the migrant-sending country and the migrant-receiving country largely determine migrant movements. However, in the matrix of current migratory developments, critics note that the Hicks model assumes a perfect set of conditions that do not account for “enormous obstacles [immigrants] would face in moving” to the country in question.<sup>48</sup> In the essence of Hicks’ *Theory of Wages* labour migration is therefore a “rational individual decision, based on a complete and reliable information on the [labour] market situation, but does not take into account the problems of unemployment and relocation costs”.<sup>49</sup>

In 1954, Arthur Lewis further enhanced the neo-classical theory by exploring migratory movements in terms of trade between industrialised and developing countries. In the words of Ranis and Fei, the theory by Lewis is premised on a “two-sector model and investigates the expansion of the capitalistic or industrial sector as it is nourished by supplies of cheap labour from the subsistence or agricultural sector”.<sup>50</sup> He envisioned a developing country with a dual economy in which the modern “*capitalist*” and traditional “*subsistence*” sectors co-existed. He did not clearly define the *traditional sector*, but suggested that it consisted of people who earn a living or subsistence wage. In such a presumed country, internal migration then becomes a desirable process which is a result of surplus rural labour being drawn from traditional agriculture as a way to provide cheap labour for the modern industrial sector of the country. Gollin observes that the Lewis model was premised on underdeveloped and overpopulated countries with “...underemployment and low [labour] force participation”.<sup>51</sup> In the context of migration, the assumed dual economy in Lewis model implies differential wage levels between the ‘modern’ and ‘traditional’ sectors that will trigger workers in the traditional sector to migrate to the modern sector for better wages. Therefore, spatial migratory movements in the Lewis model are spurred by wage differential and anticipated returns.

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<sup>47</sup> *ibid.*

<sup>48</sup> Gary S Becker, ‘Investment in Human Capital: A Theoretical Analysis’ (1962) 70 *Journal of Political Economy* 9, 24 <<https://www.jstor.org/stable/1829103>> accessed 20 July 2022.

<sup>49</sup> Tarasyev and Jabbar (n 41) 408.

<sup>50</sup> Ranis and Fei (n 32) 533–534.

<sup>51</sup> Douglas Gollin, ‘The Lewis Model: A 60-Year Retrospective’ (2014) 28 *Journal of Economic Perspectives* 71, 73.

Drawing from Lewis, Gustav Ranis and John Fei (1961) reaffirmed the Lewis model by acknowledging that development is defined in terms of “re-allocation of surplus agricultural labour”.<sup>52</sup> This surplus may have a zero or negligible effect to the industry where the workers are productive members at a wage equal to the institutional wage in the agricultural sector. The emphasis here is on “labour-surplus, resource-poor” countries that have an agrarian economy with “unemployment and high rates of population growth”.<sup>53</sup> An analysis of Ranis and Fei’s argument is the incorporation of the impact of the *subsistence* sector into the Lewis model. This incorporation of the *subsistence* sector acknowledges the existence of an institutional wage that is naturally set by the lack of competitive forces in the labour market.

However, as the labour absorption continues by the *modern/capitalist* sector the marginal productivity of labour in the subsistence sector will be equal to or greater than the institutional wage. This then leads to the “full commercialisation of the agricultural sector” and ultimately self-sustaining growth of the economy. In this sense, it can thus be argued that rapid internal migration can be viewed as a “desirable process by which surplus rural labour [is] withdrawn from traditional agriculture to provide cheap manpower to fuel a growing modern industrial complex”.<sup>54</sup>

While Lewis’ and Ranis and Fei’s views were premised on models of development, Todaro and Harris are lauded for their model of rural-urban migration as the benchmark for the neoclassical theory of migration.<sup>55</sup> Their formulation of the “behavioural model of rural-urban labour migration” is descriptive and analyses the mechanism through which economic variables influence migration in the following two ways. Firstly, the unskilled rural worker migrates to an urban area in search of work. In the second stage, the rural labourer secures a more permanent job in the urban sector. In both these stages, the fundamental variables that trigger the decision to move are premised on “the proportionate size of the urban traditional sector, and the implications of accelerated industrial growth and/or alternative rural-urban real income differentials on labour participation in the modern economy”.<sup>56</sup>

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<sup>52</sup> Ranis and Fei (n 32).

<sup>53</sup> *ibid* 531.

<sup>54</sup> Michael P Todaro, ‘Internal Migration in Developing Countries: A Survey’ in Richard A Easterlin (ed), : *Population and Economic Change in Developing Countries* (University of Chicago Press 1980) 361.

<sup>55</sup> Massey and others (n 39); Michael P Todaro, ‘A Model for Labor Migration and Urban Unemployment in Less Developed Countries’ (1969) 59 *American Economy Review* 138 <<https://ideas.repec.org/a/aea/aecrev/v59y1969i1p138-48.html>> accessed 28 July 2022.

<sup>56</sup> Todaro, ‘A Model for Labor Migration and Urban Unemployment in Less Developed Countries’ (n 55) 139.

In the context of international migration is thus “determined by lifetime net income (earnings) maximisation choice made by individuals”.<sup>57</sup> In short, migrants cross international borders for the sole purpose of improving their economic and financial prospects. So, migrants go to destination countries where they expect the highest gain. In the scheme of irregular migration, undocumented migrants are motivated to move to their country of destination after assessing the highest net gain that can be derived after the negative costs of movements. In that vein, Castelli offers an interesting insight as to who moves from ‘poor’ countries.<sup>58</sup> The assumption in the realm of neo-classical theory is that the rural labour migrant will move to the city and if to another country. Although micro-factors like education, religion, marital status and personal attitude are key in the decision for individuals to embark on cross-border migration, Castelli is of the view that “the poorest people simply do not have the means to escape war and poverty”.<sup>59</sup> These people, in dire need of improving their lives, remain trapped in their own country or in the neighbouring countries.

Critics further add that the negative costs of movement entail the probability of successfully entering the destination country, the chances of deportation, and immigration detention.<sup>60</sup> The migrants should thus “balance the probabilities and risks of being unemployed or underemployed” the moment they arrive in the destination country.<sup>61</sup> In the ultimate end, the neo-classical theory of migration as modelled by Todaro and Harris, is premised on the rational individual calculated risk to migrate. According to this line of thought, the decision to migrate is taken when the migrant has weighed in the expected present value of migration in relation to the perceived value of migration. If there is a positive return after incorporating the cost of migration in the form of (i) cost of living, (ii) opportunity cost, (iii) transport cost, and (vi) psychic costs (risks, social adjustment) the migrant is likely to move to the country of destination. In this context, the decision to migrate is taken after a comparison of the urban real income against the probability of employment. However, Todaro points out that the sum total of the decision to migrate in developing countries is cantered not only around economic policies and motivations but also around a number of policy triggers such as:

...alterations in the system of land tenure, commodity pricing, rural credit allocation, taxation, export promotion, import substitution, commercial and exchange rate policies, the geographic distribution of social services, the nature of

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<sup>57</sup> Zawojnska and Siudek (n 35) 65.

<sup>58</sup> Francesco Castelli, ‘Drivers of Migration: Why Do People Move?’ (2018) 25 *Journal of Travel Medicine* 1.

<sup>59</sup> *ibid* 6.

<sup>60</sup> Massey and others (n 39) 701.

<sup>61</sup> Todaro, ‘Internal Migration in Developing Countries: A Survey’ (n 54) 365.

public investment programs, attitudes toward private foreign investors, the organization of population and family planning programs, the structure, content, and orientation of the educational system, the structure and functioning of urban labour markets, and the nature of public policies toward international technological transfer and the spatial allocation of new industries.<sup>62</sup>

As argued in the previous chapter, some of the policy triggers cited above are at the core of internal migration in developing countries. In the context of international refugee law, cognisance should thus be given to the interconnectedness of displacement factors and policy prescripts leading to involuntary displacement. To that end, the Todaro and Harris' model represents a "behavioural model of migration" that explains the 'macro' outcomes optimising an individual's decision to migrate. This makes it an individualist neoclassical model that best explains how labour is transferred from labour-abundant to labour-scarce regions. In the context of "micro" outcomes the model further looks at the interconnected effects of industrial expansion, expected earnings and the capacity of both urban and rural activities on the rate of labour migration.<sup>63</sup> This helps policy makers to re-look at the list of factors cited in the previous paragraph so as to optimise extreme internal migration in an effort not to neglect the rural sector.

While the focus in the Todaro-Harris model is to "relate rates of migration to income differentials",<sup>64</sup> critics are of the view that emphasis should rather be on the determination of the "return to investment in migration."<sup>65</sup> This view "places migration in a resource allocation framework because it treats migration as a means in promoting efficient resource allocation", for the process of migration requires resources.<sup>66</sup> According to Sjaastad's 'investment model', migration becomes an investment that increases the productivity of human resources in that workers incur monetary and non-monetary costs associated with the migration process. In doing so, they will be expecting lifetime returns (money and non-money) for their provision of labour and choice of location.<sup>67</sup> It must be noted that Sjaastad's argument relies extensively on Everett Lees' model of push and pull factors.<sup>68</sup> Lee is of the view that an individual migrates based on the calculation of favourable factors (pull) at the location of destination in relation to the negative factors (push) at the point of origin. Lee puts forward the concept of intervening

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<sup>62</sup> *ibid* 363.

<sup>63</sup> Todaro, 'A Model for Labor Migration and Urban Unemployment in Less Developed Countries' (n 55).

<sup>64</sup> Larry A Sjaastad, 'The Costs and Returns of Human Migration' (2015) 70 *Journal of Political Economy* 80, 80 <<https://www.journals.uchicago.edu/doi/10.1086/258726>> accessed 28 July 2022.

<sup>65</sup> *ibid*.

<sup>66</sup> *ibid*.

<sup>67</sup> Sjaastad (n 64).

<sup>68</sup> Everett S Lee, 'A Theory of Migration' (1966) 3 *Demography* 47.

opportunities between the location of origin and destination. He argues that the decision to migrate is not only pinned down to the actual pull and push factors at origin or destination, but also the existence of personal contacts and sources of information about the situation and context of the place of destination.<sup>69</sup>

This configures the idea of migration networks and how they have become key in discussing migration theories in the modern global era.<sup>70</sup> Other than pull and push factors, intervening obstacles and opportunities, Lee alludes to the Ravensteins' laws of migration and adds the following factors: skills specialization, and "diversity among people".<sup>71</sup> The latter factor has become the foundations of multicultural societies in the modern era. The other precursor to the current debate on migration that was affirmed by Lee relates to growing economic disparities between the developed and developing countries and the impact of technological advances in communications and transport. In his view then, Lee noted the increase in migration to be a result of cumulative causation that comes when the first group of migrants are able to overcome intervening obstacles which then makes it easier for the subsequent group of migrants to follow their path. The notion of cumulative causation was developed by Douglas Massey who argues that when people begin to gain migratory experience, they become a source of 'migratory social capital' for other people from the same country of origin.<sup>72</sup> The concept of cumulative causation will be discussed at length in chapter 5 in relation to the migration of Eritreans into Europe.

However, since it is difficult to estimate and value costs of migration and existence of barriers to free labour movement, Sjaastad is circumspect to come up with 'macro' implications of migration through simple aggregation. Instead, he aligns his model to that of Lee in an effort to create a more realistic approach to methodologically explain the individualistic and rational choice that spurs migration.<sup>73</sup> This is because the reality behind the decision to migrate is not only linked to wage differentials as mentioned by neo-classical theorists above, but also "additional investments" which cause a rational choice to migrate.<sup>74</sup>

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<sup>69</sup> *ibid.*

<sup>70</sup> Fekadu Adugna, Markus Rudolf and Mulu Getachew, 'A Matter of Time and Contacts: Trans-Local Networks Andlong-Term Mobility of Eritrean Refugees' (2022) 48 *Journal of Ethnic and Migration Studies* 4328.

<sup>71</sup> Lee (n 68) 53.

<sup>72</sup> Massey and others (n 39) 448.

<sup>73</sup> Sjaastad (n 64).

<sup>74</sup> *ibid* 93.

This then questions the efficacy of the Todaro-Harris model as the true benchmark of the neo-classical theory, for it arguably oversimplifies the decision to migrate. It fails to factor in the importance of human capital in the migration process. According to Sjaastad, it is “useful to employ the human capital concept and to view migration, training, and experience as investments in the human agent”.<sup>75</sup> Another angle of criticism of the neo-classical theory lies in the fact that it is a “historical and Eurocentric” model. Its main assumption of the transfer of labour from *agricultural rural* to *industrial urban* sectors is a filtered image of how migration led to the ‘modernization’ of the developed countries in Europe. This model negates the impact of structural constraints in developing countries that impact on contemporary migration.<sup>76</sup> As shall be discussed in the next section, the historical structuralists have also weighed on this oversimplification and generalisation of the migrant’s choice to move.

### 2.3.2. Historical structuralists theory

The historical structural theory of migration presents a radical interpretation of population movement as a “flight from misery”.<sup>77</sup> This misery is arguably caused by a “global capitalist expansion” that makes human mobility more of a macrosocial rather than atomistic and individual process as explained by neo-classical theorists above.<sup>78</sup> It then becomes difficult to summarise the key tenets of the historical-structural theory mainly because its features are found in a variety of migration models. As indicated in the introduction of this chapter, there are various migration models that affect human mobility. The historical structuralist model has some elements from the “Dependency theory” put forward by Andre Gunder Frank.<sup>79</sup> In the context of migration, the main idea of the dependency theory may be deduced as a manifestation of global capitalism that leads to the “development of underdevelopment”.<sup>80</sup> This theme has also been tackled at length by Baran who is of the view that political and administrative policies for advanced countries are not necessarily recommendable for countries in the periphery.<sup>81</sup> As a result, thereof, monetary policies, budgeting, government borrowing and taxation practices for the developed world cannot fit the mantra of the less developed

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<sup>75</sup> *ibid* 87.

<sup>76</sup> de Haas (n 33).

<sup>77</sup> *ibid* 233.

<sup>78</sup> *ibid* 233–234.

<sup>79</sup> Andre Gunder Frank, ‘The Development of Underdevelopment’ from *Capitalism and Underdevelopment in Latin America*, *The Sustainable Urban Development Reader* (4th edn, Routledge 1967).

<sup>80</sup> *ibid*.

<sup>81</sup> Paul A Baran, *The Political Economy of Growth* (1st edn, Penguin Books 1962) <<http://digamo.free.fr/baran57.pdf>> accessed 15 December 2022.



countries which may result in massive human migration from such countries.<sup>82</sup> The historical structuralist school of thought argues that migration is inimical to the economies of underdeveloped countries and the root cause for such underdevelopment. This view echoes the tenets propounded in the “World-Systems” theory by Immanuel Wallerstein.<sup>83</sup> In Wallerstein’s lens, migration destabilises poor societies, undermines economic growth and displaces populations. Wallerstein has thus classified countries to their degree of dependency and categorised them as capitalist “core” nations, followed by the “semi-peripheral”, “peripheral”, and isolated nations in the “external” area, which were not (yet) included in the capitalist system.<sup>84</sup> In that sense, incorporating the peripheral countries into the global and capitalist economy is viewed as putting a [migration] drain on them. In the context of international migration this then creates unequal access to the mobility infrastructure that results in citizens from the periphery having to put up with a lot of obstacles in the migration process.<sup>85</sup>

To understand the historical structuralist perspective, one has to consider the influence of Marx’s historical materialism.<sup>86</sup> A close reading on historical materialism by Georgi Plekhanov defines the concept in terms of class structure and social relations.<sup>87</sup> It argues that the economic framework of a country is correlated to its social structure, and thus this determines its political and religious structures. Marx’s fundamental idea on historical materialism is that the production relations of a country affect and determine all other relations existing in the social life web of that country.<sup>88</sup> The second aspect is that the production relations are in turn determined by the state of the productive forces in existence.<sup>89</sup> This then creates a class structure on the basis of an exploitative relationship that leads to the unequal appropriation of natural resources and the value produced by human labour. To that end, capital accumulation

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<sup>82</sup> Martin Bronfenbrenner, ‘The Political Economy of Growth. Paul A. Baran’ (1958) 66 *Journal of Political Economy* 85 <<https://www.journals.uchicago.edu/doi/epdf/10.1086/258014>> accessed 10 August 2022.

<sup>83</sup> Immanuel Wallerstein, ‘The Rise and Future Demise of the World Capitalist System: Concepts for Comparative Analysis’ (1974) 16 *Comparative Studies in Society and History* 387 <<https://www.jstor.org/stable/178015>> accessed 15 December 2022.

<sup>84</sup> *ibid.*

<sup>85</sup> Thomas Spijkerboer, ‘The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control’ (2018) 20 *European Journal of Migration and Law* 452.

<sup>86</sup> Georgi Plekhanov, *Georgi Plekhanov: Selected Philosophical Works In Five Volumes* (Volume II, Progress Publishers Moscow 1976) <<https://www.marxists.org/archive/plekhanov/sw/index.htm>> accessed 15 February 2023.

<sup>87</sup> *ibid.*

<sup>88</sup> *ibid.*

<sup>89</sup> *ibid* 617.

and expansion leads to social development that is brought out by the antagonism between productive forces and social relations.<sup>90</sup>

In that vein, historical-structuralists argue that migration is a process motivated by the unequal political power structures that separates the developed and undeveloped countries. These asymmetrical power structures lead to unequal access to resources and capitalist intervention reinforces and perpetuates these inequalities. As a result, thereof, developing countries are trapped in a geopolitical structure that puts them in a disadvantaged position. In this context, migration becomes a manifestation of existing disruptions and dislocations in the process of capital accumulation. Human movement is thus triggered by capital penetration and the skewed terms of trade between developed and undeveloped countries.<sup>91</sup> Capital penetration is defined as the “extent to which the productive capacities of a national economy are asymmetrically integrated into the global economy”.<sup>92</sup> To measure the level of capitalist penetration, cognisance must be given to (i) the level of integration of the global economy, (ii) asymmetric integration of a peripheral economy (iii) the extent to which the effective capital stock of a given peripheral economy has been supplied without reciprocation by the core global economy.<sup>93</sup> In the context of social class structure, as rooted in the Marxist tradition discussed above, the structuralist theory further explains patterns of migration in relation to how production is structured and how it affects the fortune of different classes.<sup>94</sup> As shall be discussed below, this is perceived as a weakness of the historical structuralist perspective.

The main tenet of the historical structural theory is that human movement is a result of “pressure and counterpressure” exerted internally and externally onto the national economy.<sup>95</sup> This leads to changes in the organization of production and in turn affects labour mobility, recruitment and remuneration. The priority concern then becomes “aggregate population movements” as opposed to “individual motives” to migrate.<sup>96</sup> In this mould, migration is then viewed in a holistic manner as opposed to being the outcome of individual choices. According

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<sup>90</sup> Plekhanov (n 86).

<sup>91</sup> Adrian J Bailey, ‘Reviewed Work(s): Worlds in Motion: Understanding International Migration at the End of the Millennium by Douglas S. Massey, Joaquín Arango, Graeme Hugo, Ali Kouaouci, Adela Pellegrino and J. Edward Taylor’ (2001) 77 *Economic Geography* 312.

<sup>92</sup> Steven I Jackson, ‘Capitalist Penetration: Concept and Measurement’ (1979) 16 *Source: Journal of Peace Research* 41, 41.

<sup>93</sup> Jackson (n 92).

<sup>94</sup> de Haas (n 33).

<sup>95</sup> Charles H Wood, ‘Equilibrium and Historical-Structural Perspectives on Migration’ (1982) 16 *The International Migration Review* 298, 302 <<https://about.jstor.org/terms>> accessed 15 February 2023.

<sup>96</sup> *ibid* 302–303.

to Wood, the historical-structuralist perspective places much premium on “aggregate population movements” because it takes into account the impact of the following factors: emergence and expansion of the capitalist mode of production, development style adopted by the country, the role of the country in the division of international labour, asymmetrical development within and between countries, distribution of factors of production in capitalist and non-capitalist structures, and the cost-lowering anticyclical functions of a migrant labour force.<sup>97</sup>

Since the historical-structural theory puts emphasis on different factors affecting aggregate population movement, there is need to integrate the different factors into one-whole. Critics are of the view that the starting point should be the analysis of the processes leading to “migrant-attracting’ areas and to those viewed as “migrant-producing’. In the first chapter this has been alluded to as ‘receiving countries’ and ‘refugee producing’. In the former, there is capitalist accumulation built on advanced industries in constant need of labour inflows that creates a structural incentive that spurs immigration, while in the latter, emigration is historically associated with development and capitalist penetration and its impact on commodity penetration in the industries. This distinction of countries as migrant ‘receiving’ or ‘producing’ is still far from a clear-cut distinction, and critics are of the added view that there is need to include other structural migration features that characterise labour markets in the scheme of capital circulation in global cities.<sup>98</sup>

In Wood’s words, the historical-structural perspective only focuses on macrostructural factors that determine the “spatial imbalances in wages, employment and amenities” and is therefore scant on explaining “factors that motivate individual actors” to migrate.<sup>99</sup> The fact that the structural paradigm presumes that an individual’s decision to move is tied down to the “individual’s location within the larger system” negates the role played by other migration variables like social networks, propensity to migrate, impact of specific costs and benefits, and the migratory trendline.<sup>100</sup> The argument here is that the historical structuralist fails to include and trace the myriad of migratory forces originating at local, regional, national and international levels. In this scheme of causal forces, especially at local level, there is no fixed

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<sup>97</sup> *ibid* 303.

<sup>98</sup> Wood (n 95).

<sup>99</sup> *ibid* 306.

<sup>100</sup> Wood (n 95). Migratory trendline refers to the direction of the migratory stream. In this regard, proximity plays an important role. For example, most Ukrainians would first migrate to Poland because they share borders. Polish citizens are most likely, in turn, to migrate to Germany and Germans would (arguably) go to the UK.

correlation between the destiny of a particular social class and the propensity to migrate. This is because an individual at the local level may occupy multiple positions within the structure of production and thus adjust the allocation of labour power at any level of employment levels. As a way of illustration, as provided by Wood, a family owning a small plot of land for subsistence purposes may from time to time supply their labour to the nearby commercial farmer.<sup>101</sup> The same family may rent or sharecrop land owned by their neighbour for financial reasons. That same family may be linked to the mining sector or some form of wage labour through the employment of its close family members. Similarly, the head of the household may get some income through producing and/or selling handicrafts for the local market presumably set in a tourist town.<sup>102</sup>

This then defies the Marxist logic of class confinement and social structure and in a way explains how the structuralists ignore the impact of individual agency in migration decisions. This failure to include individual agency thus makes the historical structuralist theory deterministic and rigid for it views individuals as pawns to macro-forces. At international level, the structuralist model fails to acknowledge that developing countries, if economically well-managed, can be incorporated into and connected to global capitalism. This has been true for some southern European countries, the Middle East and Asian countries firmly connected to global capitalism.<sup>103</sup>

The next question for determination then becomes: In the context of historical structuralist theory, is capitalism to blame for the migratory flows emerging from the underdeveloped countries? The answer, arguably, lies in how these countries are incorporated into the wider global institutional structures. To begin with, the incorporation into global capitalism of the underdeveloped countries impacts both positively and negatively on development and societal class structures. While the migration of labourers in underdeveloped countries to industrialised countries is viewed as a desperate flight from misery, one still has to acknowledge the positive impact of *return migration* that facilitates the development of the underdeveloped countries through remittances and knowledge transfer. To understand this dual relationship, one has to factor in the Marxist perspectives on “the structure of employment opportunities [as] governed

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<sup>101</sup> *ibid* 307–308.

<sup>102</sup> Wood (n 95).

<sup>103</sup> Demetrios G Papademetriou, ‘Illusions and Reality in International Migration: Migration and Development in Post World War II Greece’ (1985) 23 *International Migration* 211 <[https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1468-2435.1985.tb00316.x?saml\\_referrer](https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1468-2435.1985.tb00316.x?saml_referrer)> accessed 15 February 2023.

by social and historical processes...”.<sup>104</sup> The main idea here is that industrialised countries are inherently dualist and premised on the “primary” sector that is characterised by skilled, stable and well-paid jobs and a “secondary” sector made up of unstable, unskilled and poorly remunerated jobs.<sup>105</sup>

In this dualism, capital is essentially ‘fixed’ while labour is seen as ‘variable’ in that capitalists respond to the variations in the factors of production by rather laying off workers than capital. This then creates structural demand for migrants to be employed in the secondary sector by manipulating not only their bargaining power, but also capitalising on their differential legal immigration rights. As for strategic jobs (for example the health sector) efforts are made by the receiving country that the migrant workers have secure employment and have better wages and working conditions and thus they command a higher social status in the structure. In this set up, immigrants then ensure that labour costs are kept low and this in turn maximizes the profit.<sup>106</sup> In Marxist lexical terms, immigrants then become an industrial reserve army in which foreign labour becomes essential for the bourgeoisie interests. Industrial reserve army is a reference to what Marx termed the disadvantaged section of the proletariat whose goal is to (i) regulate wages by the implicit threat posed by available labour, and (ii) supply labour for sudden expansion in production. In this scheme, as the industrial army decreases, the wages increase and when the industrial reserve army increases, the wages decrease.<sup>107</sup> In a way this can be viewed as a systematic way to counter any kind of revolt and to undermine workers’ unity. Castles and Kosack argue that this split between immigrant and local workers on the grounds of race, ethnicity, nationality and differential working conditions is aimed at giving “large sections of the working class the consciousness of a labour aristocracy”.<sup>108</sup> The impact of this dual labour market explains the structural demand for immigrant labour in industrialised countries and how international mass migration is inherently determined by the demands of the industrialised centre.

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<sup>104</sup> Michael J Piore, *Birds of Passage: Migrant Labor and Industrial Societies* (Cambridge University Press 1979) 9.

<sup>105</sup> Piore (n 104).

<sup>106</sup> Stephen Castles and Godula Kosack, *Immigrant Workers and Class Structure in Western Europe* (Oxford University Press 1973).

<sup>107</sup> *ibid*; Marios Nikolinakos, ‘Notes towards a General Theory of Migration in Late Capitalism’ (1975) 17 *Race & Class* 5.

<sup>108</sup> Castles and Kosack (n 106) 6.

Another dimension of the historical structural theory that is worth evaluating relates to the processes that give rise to internal migration.<sup>109</sup> The key question for determination is explaining *how it is*, and *where it is*, that “a mobile population that is prone to migrate” tends to arise.<sup>110</sup> In doing so, Massey refutes the neo-classical premise which affirms that emigration is a result of lack of economic development. Rather, Massey implies that “migration prone” populations emerge more as a consequence of development. This is because the following three core processes – “the substitution of capital for labour, the privatization and consolidation of land-holding, and the creation of markets”, inevitably displace a large number of people from their daily life routine.<sup>111</sup> It is this displaced people who in Massey words “constitute the source for the massive population movements that inevitably accompany development”.<sup>112</sup> It must be noted that most of these people whose lives have been uprooted from the daily normal routine tend to move to near urban areas that are an epicentre of capital and the reason why economic development is inextricably linked with urbanisation. In the context of international migration, movement of people is therefore a function of capitalist development of the countries in the peripheral “South”. Historically this can be equated to the ‘escape valve’ that characterised migration up to the 20<sup>th</sup> century in Europe when there was excess rural-urban migration in particular during times of recession. What is therefore key in Massey’s premise is the fact that the causes of migration are closely hinged to development as a process rather than existing conditions as outlined above by neo-classical theorists.<sup>113</sup> The result of the historical structuralist view as argued by Massey is therefore that emigration is determined by the level of the capitalist and commodity relations. While Castles and Kosack (1973) and Massey (1988) are not the only key voices in the literature concerning historical-structural migration, their premises are representative of the varied shades of the historical structuralist perspectives and key to the complementarity of the structuralist arguments.

Other writers like Saskia Sassen and Elizabeth Petras have sought to emphasise the broader framework of globalization governing the historical structuralist theory.<sup>114</sup> For example, “The

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<sup>109</sup> Douglas S Massey, ‘Economic Development and International Migration in Comparative Perspective’ (1988) 14 383 <<https://about.jstor.org/terms>> accessed 15 February 2023.

<sup>110</sup> Douglas S Massey and others, ‘Theories of International Migration: A Review and Appraisal’ (1993) 19 431, 444 <<https://about.jstor.org/terms>> accessed 15 February 2023.

<sup>111</sup> Massey (n 109) 391.

<sup>112</sup> *ibid* 384.

<sup>113</sup> Massey and others (n 110); Massey (n 109).

<sup>114</sup> Saskia Sassen, *The Mobility of Labor and Capital: A Study in International Investment and Labor Flow* (Cambridge University Press 1988); Saskia Sassen, *The Global City – New York, London, Tokyo* (Princeton University Press 1991); Elizabeth McLean Petras, ‘3: The Global Labor Market in the Modern World-Economy’

Mobility of Labour and Capital” model by Sassen can be viewed as a detailed attempt to intersect the demand and supply-centered elements of the historical-structural perspective.<sup>115</sup> The aim is to show that international migration is generally affected by the globalization of the labour supply system. On the *supply side* of international migration, foreign direct investment is the catalyst that “...operates indirectly...both ideologically and structurally (...) to create various kinds of linkages with the capital-sending countries”.<sup>116</sup> To that end, export-oriented industrialization theoretically supports long-distance migration flows. While on the *demand side* Sassen’s innovative contribution comes in the form of reframing the “dual labour market” and “class polarization” debate under the scope of the historical “rise of global cities”.<sup>117</sup> This view is further bolstered in her arguments on how international migration is analysed in a hierarchical network perspective in which certain global cities (nodes) are not only prime destinations for migrants but also control and are concentrated with an immensely disproportionate share of capital.<sup>118</sup> The reasons for this is that labour tends to flow in direct correlation to capital flows and the need for cheap labour to capitalise on profits. This approach can thus be viewed as a reformulation of the historical structuralist argument embedded in methodological nationalism that places the idea in the transnational ‘network’ perspective.

On the other hand, Petras’ approach is influenced by the theoretical perspective of world systems analysis by Wallerstein cited above. Petras is motivated by the historical migration flows stemming from the following four major types of migration: (i) migration from lower wage to higher wage zones (ii) impact of colonial settler migration (iii) labour streams among the markets with relatively similar wage bands and (iv) the mobility of “the small number of highly paid and trained technicians who accompany capital investments to locations of production in low-wage zones”.<sup>119</sup> With this formulation, labour migration from the periphery to the core is thus deemed to be a result of two factors. First, it is spurred by the interests of both peripheral labourers who thereby access “sites where prior contests over the labour-capital balance have already been won by labour”.<sup>120</sup> The second factor is that the mobility of labour is influenced by the core’s capital which “needs to have this labour surplus to use, at its

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(1981) 15 <https://doi.org/10.1177/019791838101501s05> 44  
 <<https://journals.sagepub.com/doi/10.1177/019791838101501s05>> accessed 16 February 2023.

<sup>115</sup> Sassen, *The Mobility of Labor and Capital: A Study in International Investment and Labor Flow* (n 114).

<sup>116</sup> *ibid* 119.

<sup>117</sup> *ibid* 126–170.

<sup>118</sup> Sassen, *The Global City – New York, London, Tokyo* (n 114).

<sup>119</sup> Petras (n 114) 48.

<sup>120</sup> *ibid* 49.

disposal, only to discard it when it is not required for production”.<sup>121</sup> In this context, Petras uses the idea of “secular trends” and “cyclical rhythms” as a way to explain the impact of fluctuations in demand and supply of the labour markets.<sup>122</sup> These geographical patterns and contractions then helps in explaining labour migration from the peripheral world to the industrialised core as formulated by the historical structuralist theorists.

In conclusion, it is clear that migration can be explained from different viewpoints. As shall be discussed in chapter 7, the theoretical contributions of this study cannot be pinned on one migration theory. The divergent case studies of Eritrea and Uganda relate to this varied view point. People moving out of Eritrea is probably a result of multifaceted factors, just as the case of migrants seeking refuge in Uganda.

## **2.4. The research process: Data generating methods**

The main methods for data generation for this study are qualitative in-depth interviews, participant observations and focus groups. As shall be discussed below, methods for data generation should not be mistaken as data sources. According to Mason, data sources are “places or phenomena” from or through which data can be generated, while data generation methods are viewed as strategies and techniques employed to do this.<sup>123</sup> This research employed the following data sources: people (as individuals or groups: organisations and institutions), texts (published and unpublished), events, extant data, settings and the environment.

In Uganda, data was generated through key informant interviews (KIIs) and Focus Group Discussions (FGDs). In the full spirit of FGDs, the participants were allowed to respectfully discuss the challenges they were facing in the settlement.<sup>124</sup> As indicated in *Appendix 6*, the discussions centred on their life experiences in Rwamwanja settlement, the economic challenges they faced, prospects of leaving the settlement and go to another country and prospects of them returning to their country of origin. Each FGD ran for about an hour so as to allow the participants to go about with daily lives (see chapter 6).

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<sup>121</sup> *ibid* 50.

<sup>122</sup> *ibid* 54.

<sup>123</sup> Jennifer Mason, *Qualitative Researching* (2nd edn, SAGE Publications Inc 2002) 51 <[http://www.sxf.uevora.pt/wp-content/uploads/2013/03/Mason\\_2002.pdf](http://www.sxf.uevora.pt/wp-content/uploads/2013/03/Mason_2002.pdf)> accessed 10 February 2023.

<sup>124</sup> Jenny Kitzinger, ‘Qualitative Research: Introducing Focus Groups’ (1995) 311 *BMJ* 299 <<https://www.bmj.com/content/311/7000/299>> accessed 16 February 2023.



Given difficulties in gaining access to the research field (*see section 2.4.1*), KIIs were done with purposively selected experts. In Belgium, expertise was sought from an ethnographer who has extensively written on Eritrean refugees and *Appendix 4* was used for guidance during the wide-ranging interview. An online survey was also employed to generate data on the proposed expanded refugee definition (*see Appendix 7*). The survey was sent to Migration Scholars affiliated to the same group as the author: the Zolberg Institute on Migration and Mobility PhD Writing Group (N=10), the Migration Law Research Group at Ghent University (MigrLaw)-Migration Law (N=5), and the University of Ottawa’s Forced Displacement Workshop for Junior Scholars (N=10). In Uganda, an interview guide was prepared for experts living and working in Uganda in the area of refugee protection (*see Appendix 5*). The experts were selected from the five institutions dealing with livelihoods for Rwamwanja refugees and also registration as shown in the *Table* below.

<b>Name of organisation</b>	<b>Kind of support offered</b>
The United Nations High Commissioner for Refugees (UNHCR)	Protection, regulation, registration of refugees and coordination of other support organisation
SSS Children’s Village Uganda (Fort Portal)	Livelihood support and psychosocial
Advocates Coalition for Development and Environment (ACODE)	Supporting regional peacebuilding initiatives
Adventist Development and Relief Agency (ADRA)	Food distribution and livelihood
Office of the Prime Minister (OPM)	Registration and regulation of asylum seekers and refugees

Table 2: Organisations supporting refugees and their roles

On a political level, the researcher was able to interview the former Ambassador Extraordinary & Plenipotentiary of the Republic of Uganda to the United States of America, Belgium and Tanzania, His Excellency (HE) Stephen Kapimpina Katenta-Apuli. The interview provided invaluable information covering four decades. The study focussed much on his time as the Assistant Director for Refugees between 1968-1971.

Another important note is on the impact of COVID -19 in getting access to data sources and how this affected the methods of data generation. In that context, the use of extant data was pivotal in addressing the research question. Reliance was thus also given to generalist data portals during times of permanent lock down. Generalist data portals have a wealth of migration-related information; this category is dominated by international and inter-

governmental organizations who have the capacity to leverage vast statistical data provided by their respective member states. In that essence, data platforms of the European Union, the African Union and intergovernmental organizations like The Organization for Economic Co-operation and Development (OECD) and the UN Department of Economic and Social Affairs (UN DESA) have been important data sources in the light of a crippling pandemic.<sup>125</sup>

As shall be shown in section (2.4.1) on “field access”, the participant observation was mainly motivated by my positionality as a black researcher in a field widely dominated by ‘white researchers’. Participant observation is defined as “a conscious and systematic sharing” of information with a group of persons in the life activities, occasions, and interests.<sup>126</sup> This process involves three distinct phases: participant observation (describing incidents), informant interviewing (to learn institutionalised norms and statuses) and enumeration or sampling (to document frequency data).<sup>127</sup> The time spent in Hamburg, Berlin and Bremen (Germany), Gent, Antwerp (Belgium), Kraków, Warsaw (Poland), Kampala, Fort Portal (Uganda), and Edinburgh (UK) was pivotal in shaping the observation for this research. Field notes were kept on institutional response to migrant related issues, interactions with fellow migrants, interactions with host communities, and observation of how migration policies are implemented in routine daily practices.

#### **2.4.1. Gaining field access**

Gaining field access for this study was influenced by two key dynamic factors: (i) my positionality as a Black African Male studying migration studies in Europe, (ii) and the impact of COVID-19. Positionality refers to the disclosure of the researcher’s racial, gender, class, or other self-identifications, experiences and privileges.<sup>128</sup> Positionality thus describes an individual’s world view and the position they adopt about the research task and its socio-

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<sup>125</sup> Sebastian Rinken and José Luis Ortega, ‘Leveraging the Web for Migration Studies: Data Sources and Data Extraction’ [2022] IMISCOE Research Series 129, 137 <[https://link.springer.com/chapter/10.1007/978-3-031-01319-5\\_7](https://link.springer.com/chapter/10.1007/978-3-031-01319-5_7)> accessed 16 February 2023.

<sup>126</sup> Peter Jackson, ‘Principles and Problems of Participant Observation’ (1983) 65 Source: Geografiska Annaler. Series B, Human Geography 39.

<sup>127</sup> *ibid.*

<sup>128</sup> Andrew Gary and Darwin Holmes, ‘Researcher Positionality - A Consideration of Its Influence and Place in Qualitative Research - A New Researcher Guide’ (2020) 8 International Journal of Education 1 <<http://www.shanlaxjournals.comhttps://orcid.org/0000-0002-5147-0761>> accessed 16 February 2023.

political context.<sup>129</sup> A statement on positionality can thus enhance (either positively or negatively) the validity of the empirical data collected for the research.<sup>130</sup>

A pertinent point on race is raised by Valentine Ibeka who argues that in the context of European settings that are predominantly “white”, being a Black African scholar working in migration-related fields creates “multiple subject positions and identities” leading to “awkward moments in fieldwork engendered by stereotypes of race...”.<sup>131</sup> Often times in quest to carry out my research tasks I have been mistaken as an asylum seeker or student whose study visa has expired and would like to seek assistance in renewing it.<sup>132</sup> In the event that I presented myself as a researcher seeking further information on a particular migration related issue, this has been greeted with shock. This can aptly be labelled “epistemological shock” which in the words of Kracke is more grounded in the “personality of the individual(s) in question” and it draws shock in the other person presented to.<sup>133</sup>

As an early career researcher, as was the situation for senior researchers too, the question remained on how to access the field especially in light of the COVID restrictions. As noted by other scholars, the pandemic requires one to consider the health risks and assess whether the gains of entering the field outweigh possible exposure to family and friends, colleagues and research contacts.<sup>134</sup> With the fear of cascading consequences, the institutions have also further built a firewall against unannounced appointments. To that end, as a researcher I had to use personal access as opposed to formal access to gain access to the research field. Personal access refers to informal ways of communicating by having personal access and knowledge of relevant executives, managers and individuals in an organisation.<sup>135</sup> By contrast, formal access requires

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<sup>129</sup> H Richard Milner, ‘Race, Culture, and Researcher Positionality: Working through Dangers Seen, Unseen, and Unforeseen’ (2007) 36 Educational Researcher, 388.

<sup>130</sup> Gary and Holmes (n 128).

<sup>131</sup> Ibeka (n 1) 2560.

<sup>132</sup> While waiting to interview the Head of the educational institution called BBQ Hamburg: *Niederlassung Wendenstraße*, a Syrian refugee woman remarked that “Black people don’t do that” after I had disclosed to her that I was a researcher on migration studies and was here to ask for further information on Eritrean refugees. And while awaiting to speak to the Secretary at The Rule of Law Institute Foundation (*Instytut na rzecz Państwa Prawa*) in Lublin, Poland...I was mistaken for “another student” whose *Karta pobytu* (temporary residence card) had expired and was deemed to be at the institution seeking assistance on extending my temporary residence permit.

<sup>133</sup> Waud Kracke, ‘Encounter with Other Cultures: Psychological and Epistemological Aspects’ (1987) 15 Source: Ethos 58, 60.

<sup>134</sup> Kenya Amano and others, ‘Field Research When There Is Limited Access to the Field: Lessons from Japan’ (2023) 56 PS: Political Science & Politics 99, 100.

<sup>135</sup> Satirejit Kaur Johl and Sumathi Renganathan, ‘View of Strategies for Gaining Access in Doing Fieldwork: Reflection of Two Researchers’ (2010) 8 The Electronic Journal of Business Research Methods 42, 42 <<https://academic-publishing.org/index.php/ejbrm/article/view/1251/1214>> accessed 16 February 2023.

one to achieve an agreement between the organization and the researcher on specific condition in terms of *what*, *when* and *how* empirical data are collected and what might be the return.<sup>136</sup>

My first attempt to obtain formal access, during the height of the COVID-19 pandemic, had disappointing results. I wrote to the Commissioner of the Berlin Senate for Integration and Migration in Potsdamer (*Senatsverwaltung für Integration, Arbeit und Soziales*) asking for an appointment. In response, the Commissioner acknowledged my email, and asked if I could write down my “concrete questions” for the appointment. I proceeded as requested but the email line went cold and I never got a response from the Commissioner’s office.<sup>137</sup> I had to leave Berlin without knowing if there would be any follow up on my request. With the pandemic in its ravaging state, it may be concluded that the office had more pressing issues than to deal with academic issues.

After this, I had to devise a new strategy and returned to Germany as a Visiting PhD Fellow at the Bremen International Graduate School of Social Sciences (BIGSSS). This time I was able to establish contacts through the BIGSSS PhD fellows of Thematic Field B: “*Welfare State, Inequality and Quality of Life*”. Through the assistance of my academic sponsor at BIGSSS, I was able to reach out to institutions dealing with migration related issues in Bremen. The first institutional contact was a transitional housing facility for refugees called *ÜWH Gröpelinger Heerstr.* This organisation provided information on how it liaises with the government in providing support to Eritrean refugees living at the shelter. I was also given access to come in at any time and write down observational notes. The head of the facility helped with policy prescripts on how Eritrean refugees are supported in Germany. Although the object of my study is how international refugee law should be regulated to provide protection to persons fleeing economic hardship, there was a need to also have an understanding of the point of view of asylum seekers. In Germany the Integration Officer at *ÜWH Gröpelinger Heerstr* assisted me to reach out to Eritrean refugees by writing out interview requests in English and Tigrinya (see *Appendix 1* and *2*). The anonymous contact at *Verein für Innere Mission Bremen* (Association for Inner Mission in Bremen) then helped with organising for those willing to participate in the research to reach me.

The second contact was Ms. Virginie Kamche who is the Specialist promoter for migration, diaspora and development at *Promotor\*innen für Eine Welt*. She is also the founder of *Afrika*

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<sup>136</sup> *ibid.*

<sup>137</sup> Email on file with the author

*Netzwerk Bremen* (Africa Network Bremen), an association of various (not only) African associations that deal with Africa and with topics that are of interest to Africans in Bremen and their friends, with and without an African migration background. Over time, we have managed to have an informal personal relationship in which we discuss long ranging issues affecting African migrants in Europe and her personal journey as a Cameroonian migrant who has found new roots in Germany.

The anonymous contact at *Verein für Innere Mission Bremen* (Association for Inner Mission in Bremen) has been pivotal in assisting with varied information on refugee policy and law in Germany. She has stayed on as a contact and we have established continuous working relations. The organisation's programme on "*escape and migration*" has provided invaluable information on the contradictory policies and laws on immigration in the European Union. As shall be shown in subsequent chapters, this has exposed asylum seekers and has left them in limbo. Besides these personal contacts, I was also able to do participant observations in Germany through informal links. Most of the times I would hang out with colleagues and other African migrants and discuss *over a drink* about ways in which international refugee law has impacted on lives of immigrants from Africa.

Gaining access in Belgium was also based on both formal and personal access. My membership at the *Migration Law Research Group (MigrLaw)* at Ghent University, where my co-promotor is the head, opened up a number of innovative strategies to gain access to the research field. She was able to help me in establishing contact with an expert (then also a member of *MigrLaw*) whose ethnographical work on Eritrean refugees has received global attention.<sup>138</sup> My brief stay at the *Centre for Migration and Intercultural Studies (CeMIS)* in Antwerp opened up a number of critical discussions on what the expert continuously referred to as "*the object of your study is international refugee law*". This discussion helped me in streamlining the core components of my research question. At the core of the discussion was whether my research was labelling Eritreans as "economic refugees" or "refugees with an economic problem". As shall be discussed in the next chapter, the categorisation of refugees or asylum seekers by nationality or geographical location has contributed to the erosion of the possible international protection they may receive as they are labelled as either deserving or undeserving refugees. The expert interview revealed this challenge and I was guided towards concentrating on the "object of study". This was helpful in analysing how international refugee law has impacted on the

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<sup>138</sup> The expert has requested anonymity and 'their' personal details are on file with the author.

protection of persons fleeing their countries of origin due to economic hardship. While in Antwerp, a colleague at the *European Council on Refugees and Exiles* (ECRE),<sup>139</sup> assisted me in establishing contact with Ms. Haiyet Benabid of the Antwerp Centre for General Welfare-Migration Advice Centre. The visit at the centre culminated in field and observation notes that adds an invaluable angle to the research question.

In Poland, the language barrier made it difficult to get easy access to institutions and organisations dealing with international refugee law. Much reliance was sought from qualitative extant data consolidated by expert interviews. The first step was an online policy briefing held by the European Council on Refugees and Exiles (ECRE) on 25 February 2022, which was attended by organizations offering humanitarian assistance to migrants at the Polish-Belarusian border and the general public. I was invited as an expert on African migration policy and law. The online event was crucial in identifying the key challenges faced by the migrants, humanitarian organizations, Poland and Belarus with regards to irregular migration into Poland from Belarus.

In the context of my research this was crucial in answering the question on the refugee definition and the extent to which states can offer international protection to migrants seen as “undeserving” of the refugee status. Desk research was then employed in reviewing the state of affairs at the border with expert opinions being sought from a total of five representatives drawn from the following organizations: *Helsinki Fundacja Praw Człowieka* (Helsinki Foundation for Human Rights), *Fundacja Ocalenie - Pomagamy uchodźcom w Polsce*, *Grupa Granica* (GG), and the European Council on Refugees and Exiles (ECRE). The organizations were selected on the following basis: the Helsinki Foundation for Human Rights has a consultative status with the United Nations Economic and Social Council (ECOSOC) and was founded in 1989 by the members of the Helsinki Committee in Poland. The *Fundacja Ocalenie* assists migrants in settling in Poland and operates in Warsaw and Łomża and has recently gained a national character after the invasion of Ukraine by Russia. *Grupa Granica* is made up of different non-governmental organizations that oppose the Polish government’s securitarian

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<sup>139</sup> With the help of ECRE I also participated in a number of online briefings on the situation at the border between Belarus and Poland. This culminated in two news items and a peer reviewed article. See: Shepherd Mutsvara, ‘Afghan Refugees Trapped Between Poland and Belarus’ *Guardian Liberty Voice* (Las Vegas, 3 September 2021) <<https://guardianlv.com/2021/09/afghan-refugees-trapped-between-poland-and-belarus/>> accessed 16 February 2023; Shepherd Mutsvara, ‘Was Zapad 2021 a Convenient Excuse for Poland? [Video]’ *Guardian Liberty Voice* (Las Vegas, 19 September 2021) <<https://guardianlv.com/2021/09/was-zapad-2021-a-convenient-excuse-for-poland-video/>> accessed 16 February 2023; Shepherd Mutsvara, ‘When the Periphery Comes to the Centre: Mapping Out The Securitarian Approach to Migration in Poland’ [2022] 152 *Annales Universitatis Paedagogicae Cracoviensis Studia de Securitate* DOI: 10.24917/26578549.12.2.11.

response on the Polish-Belarusian border, while ECRE is a coalition of 105 non-governmental organisations in 39 European countries and its main objective is to protect and advocate refugees, asylum seekers and migrants' rights in Europe. Ethical considerations were taken into account in relation to the authenticity of the online data gathered. As advised by communications and media experts there is a need to "identify fake news, disinformation and misinformation, and sharing intentions", when using extant online data.<sup>140</sup>

The process of gaining access to the Rwamwanja refugee settlement in Uganda was bureaucratic. Permission to conduct research in refugee settings should first be sought from the Uganda National Council for Science and Technology (UNCST) which is a semi-autonomous government agency established by the *Uganda National Council for Science and Technology Act 1990* Chapter 209. According to UNCST all persons intending to carry out research in Uganda are required to register their research protocols with the UNCST, and obtain UNCST approval of the protocol.<sup>141</sup> At the minimum the research protocol should, among other things, have a title, names of the investigators and their institutions of affiliation, objective, methodology, significance/justification for the study, ethical considerations, work plan, budget and references. In the field of migration, the permission should further be granted by the government through the Office of the Prime Minister (OPM) who plays a significant role in refugee management as provisioned by article 189 (1) and sixth schedule item 5, of the 1995 Constitution.<sup>142</sup> The OPM then grants the permission to carry out the research after payment of 50 US dollars. The researcher is then assigned to one of the many organisations that provides support to refugees in the settlement so as to have access to research participants. In my case the bureaucratic process was avoided because of the prior research at Rwamwanja refugee

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<sup>140</sup> Theodora Dame Adjin-Tettey, 'Combating Fake News, Disinformation, and Misinformation: Experimental Evidence for Media Literacy Education' (2022) 9 Cogent Arts & Humanities 1, 1 <<https://doi.org/10.1080/23311983.2022.2037229>> accessed 16 February 2023.

<sup>141</sup> Section 6 of the Research Registration and Clearance Policy and Guidelines

<sup>142</sup> According to this provision : Government through the Office of the Prime Minister (OPM), plays a lead role in refugee management. In accordance with article 189 (1) and sixth schedule item 5, of the 1995 constitution of Uganda, the Office of the Prime Minister (OPM) should: (i) processes asylum applications ,registration and documentation of refugees and asylum seekers, (ii) settle refugees and ensure their welfare and protection through coordinated services delivery structure and mechanisms, (iii) provide technical advice to government of refugee matters, develop policies ,guidelines and standards on service delivery to refugee and host communities, (iii) enter MOUs with partner to provide support to refugees and host communities ,monitor and supervise service provision to refugees and host communities and mobilise resources for refugees and host communities, (iv) undertakes planning and budgeting for refugee management ,promote durable solutions for refugee and develop and enforce guidelines for better coordination, and (v) build and support local response capacity including risk management and strategies.

settlement.<sup>143</sup> Contacts at SOS Children's Villages Uganda and colleagues at the Mountains of the Moon University further facilitated smooth access to the settlement.

On a political level, I was able to have both formal and personal access to the former Ambassador Extraordinary & Plenipotentiary of the Republic of Uganda to the United States of America (1988-1996), Belgium (2006-2013) and was the High Commissioner for Uganda in Tanzania between 1996 and 2005. While serving as the Ambassador for Uganda in the United States of America, he came back in Uganda from April 1994 to October 1995 as a Member of the Constituent Assembly which drafted the 1995 Ugandan Constitution. My interaction with His Excellency Stephen Kapimpina Katenta-Apuli provided invaluable information covering four decades. As shall be shown in chapter 6, refugee policy and law has evolved in Uganda from the leadership of Dr Milton Obote to the incumbent president Yoweri Museveni. The Ambassador provided insight on how provided leadership on migration related matters as Commissioner for Migration under Obote's leadership. Prior to his ambassadorial role from 1988 that took him to the USA, Belgium and Tanzania, HE Katenta-Apuli was a member of the Ministry of Public Service and Cabinet Affairs, Ministry of Culture and Community Development between 1973-1982. My informal interaction with him at his avocado pear farm and numerous road trips in Fort Portal gave me an insight of Uganda and how refugees are provided support in the country. Our conversations together with my observational notes point to the importance of economic stability in controlling refugee movements. I continue to have conversations with the contacts in Uganda and they update me on current developments with regards to refugee policy and law in Uganda.

#### **2.4.2. Ethical considerations**

One of the challenging aspects in carrying out research in the field of migration is the strict observance of ethical considerations.<sup>144</sup> The responsibility for migration researchers to “do no harm” is an acknowledgment that research may expose the participants, informants and as well as the researchers to various forms of risk.<sup>145</sup> As a result, conducting qualitative research in that fold requires strict adherence to rules on informed consent, anonymity, confidentiality and

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<sup>143</sup> Gorret Kugonza and Shepherd Mutsvara, 'Psychosocial Support and Protection for Refugee and Host Communities in Uganda: A Needs Assessment' (2022) 35 *Afrika Focus* 5.

<sup>144</sup> Christina Clark-Kazak, 'Ethical Considerations: Research with People in Situations of Forced Migration' (2017) 33 *Refuge* 11.

<sup>145</sup> Denisa Kostovicova and Eleanor Knott, 'Harm, Change and Unpredictability: The Ethics of Interviews in Conflict Research' (2020) 22 *Qualitative Research* 56 <<https://doi.org/10.1177/1468794120975657>> accessed 16 February 2023.



data security, ethical boards and ethical guidelines.<sup>146</sup> In the field of migration, as well as other fields, when a researcher has to give a statement of positionality and where personal access is used to gain entry to the research field it becomes difficult to follow some ethical considerations by the book.

For example, I have obtained credible information through informal conversations with people in and outside my research scope. Twice on my way to a “formal” interview in Germany I have had unplanned interview encounters while I am using public transport.<sup>147</sup> This has made me battle with whether I should include such information in the research as part of ‘observational notes’ or ‘formal interview’. The role of informal conversations in qualitative research then becomes crucial in this context. According to some scholars, informal conversations or chance encounters with experts in the corridor have been slated as “informal interviewing” or “unstructured interviewing” and yet these “informal conversations” are crucial in that they help researchers “gain trust, establish a rapport, and form an empathetic, non-hierarchical, set of relationships” that allows them to put themselves in the position of the other and view a matter from one’s perspective.<sup>148</sup> In that sense, informal conversations then help in producing more authentic data with less performativity from both interviewer and interviewee. Moreover, the participants are more naturally set and do not battle with distractions and the comfortability that comes with switching on or off the recording device.<sup>149</sup> However, in all such situations it is still important to let the “participant” know as to how, where and when the information given will be used.

In the context of Uganda, my ongoing research ethics are guided by attention to conflict, maintaining impartiality, and being considerate to possible tensions and power structures in the Rwamwanja refugee settlement. This is important because it enhances protection of people and

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<sup>146</sup> Clark-Kazak (n 144); Kostovicova and Knott (n 145).

<sup>147</sup> I met Prince (not his real name) from Niger on the Flixbus from Hamburg to Berlin (Germany) in August of 2020. In our three-hour journey we discussed a range of migration related issues and his life experience as a migrant who has lived in Germany for 14 years. I told him about my research and what I was doing but we never signed formal consent forms. However, we clearly understood the extent to which one could probe about each other. In the second encounter, just after the invasion of Ukraine by Russia, I met a Lebanese fleeing war from Ukraine on a Flixbus from Krakow, Poland to Bremen in Germany. At first, he did mistake me for a refugee or asylum seeker and wanted to know if I had the “papers”. When I told him of my research credentials there was again that moment of epistemological shock for him. We then discussed a number of migration related issues on our way to Bremen and exchanged contacts. We have been in contact ever since: he has now regularised his stay in Germany and is now pursuing his medical career as a doctor.

<sup>148</sup> Jon Michael Swain and Zachery Daniel Spire, ‘The Role of Informal Conversations in Generating Data, and the Ethical and Methodological Issues’ (2020) 21 *Forum Qualitative Sozialforschung / Forum: Qualitative Social Research* <<https://www.qualitative-research.net/index.php/fqs/article/view/3344/4511>> accessed 16 February 2023.

<sup>149</sup> *ibid.*

groups providing data. Rwamwanja refugee settlement is culturally diverse as it shelters refugees and asylum seekers from the Democratic Republic of Congo, Rwanda, Burundi, and South Sudan. Therefore, it was important to consider cultural appropriateness of the assessment methodology, terminology and the behaviour and attitudes of assessment team members. As we argued in our prior study of Rwamwanja refugee settlement, the main ethical challenge remains that of respecting the language of the refugees.<sup>150</sup> The host community and the researchers speak Rukiga, Rutoro and English, while the refugees speak Lingala, Kinyabwishi, Kiswahili, Kinyarwanda and French. This inhibited participation, as the refugees could not eloquently explain themselves in English. We bridged the gap by finding an interpreter of Kinyabwishi into English and also in some instances established KiSwahili as the lingua franca among the refugees.

In all settings, more attention was given to the protection threats and risks caused by asking questions that result sharing and storage of personal data. The ethical approval workshop at my institution further bolstered my understanding of core ethical principles guiding this study respecting privacy, confidentiality, voluntary participation, informed consent, and the best interest of the interviewee. Attention was also given to the impact of cultural bias that inhibited research participants from divulging details of personal nature. This cultural bias created mistrust between the researcher and the participants, as some respondents were not forthcoming with personal information out of fear about their security and the possibility of deportation. This remains a challenge in many global refugee settings; as most refugees or asylum seekers are in a state of liminality facing the likelihood of being returned or deported due to insufficient immigration papers.

## **2.5. Data analysis**

As stated earlier, this study draws on different disciplinary and methodological perspectives tackle the complex and topical issue of persons fleeing their country of origin because of economic hardship. The research took me to different countries with different approaches to migration. There is a sense of incoherence in all settings. From Poland, Belgium and Germany it was clear that the European Union does not have a coherent and united voice on laws and policies governing migration. The continued research in Uganda reveals a fragmented approach to migration policies and laws by the African Union region. A brief stay in Scotland further

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<sup>150</sup> Kugonza and Mutsvara (n 143).

revealed the impact of Brexit and the continued strain of irregular migration in the UK largely stemming (ironically) from the European Union.

As a result, these multi-sited approaches required the researcher to adopt multiple methods of gathering data and also multiple approaches to data analysis. Moving from one research site to another required producing not only analytical and observational notes, but also site reports so as to come up with a thematic approach to the research question. Migration research scholars agree with other social science researchers that, some migration related problems are connected to perceptions rather than objective value-free understanding.<sup>151</sup> Consequently, migration research is mostly about interpretations rather than facts. This research begins from the premise of facts that are then interpreted after an analytic induction and grounded theory. In the context of the H-D method mentioned earlier on, data analysis is therefore integral in analysing how people, institutions, and governments interpret the impact of international refugee law on human mobility. According to Bryman, the general strategies of qualitative data analysis are analytic induction and grounded theory.<sup>152</sup> In analytic induction, the researcher seeks universal explanations of phenomena by pursuing the collection of data that can be tested against the hypothesis until no cases that are inconsistent with the hypothesis are found.<sup>153</sup> On the other hand, Glaser and Strauss note that grounded theory is a methodology of generating theory from the data gathered and analysed.<sup>154</sup> Grounded theory aims at developing concepts, categories, hypotheses and substantive theory through theoretical sampling and coding. The researcher utilised QDA Miner , a qualitative and mixed methods software, to come up with computer aided coding, analysis and report writing. However, it must be noted that computer-assisted coding, segmenting and categorization sometimes tend to decontextualise and fragment the data. As a result, data analysis and interpretation should be contextualised to suit the background setting. For this reason, the researcher also adopted the narrative approach as a method of data analysis. Narratives and stories from the FGs and participant observations are valuable ways of studying lives and lived experiences. From these experiences one can then discern the impact of policies, laws and treaties on human mobility.

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<sup>151</sup> Ricard Zapata-Barrero and Evren Yalaz, 'Qualitative Methods in Migration Research' [2022] IMISCOE Research Series 411 <[https://link.springer.com/chapter/10.1007/978-3-030-92377-8\\_25](https://link.springer.com/chapter/10.1007/978-3-030-92377-8_25)> accessed 16 February 2023.

<sup>152</sup> Alan Bryman, *Social Research Methods* (Oxford University Press 2004) 100.

<sup>153</sup> Bryman (n 152).

<sup>154</sup> Barney Glaser and Anselm Strauss, *The Discovery of Grounded Theory for Qualitative Research* (Aldine de Gruyter 1967).

Scholars have identified four models of narrative analysis as thematic analysis, structural analysis, interactional analysis, and performative analysis.<sup>155</sup> This study is premised on a thematic analysis with more emphasis on the interpretation of what has been said rather than how it has been said. As for in-depth interviews the main task of data analysis was to identify stable features and patterns of international refugee law and how these features deviate from the real-life reality faced by asylum seekers and refugees in all settings for the study. These deviations from the data formulated emerging patterns that helped in probing as to why persons were fleeing their countries of origin as a result of economic hardship that is interconnected to the five Convention persecution grounds stated in the first chapter.

## **2.6. Conclusion**

This chapter had a dual purpose. First it aimed at fragmenting the process of getting to the research hypotheses in seven steps using the Hypothetical Deductive Method (H-D). This is crucial in that it reflects the fact that a hypothesis has to be tested after taking into consideration other peripheral issues to the research question. As shall be shown in the next chapter, sufficient information from the *system or field* of international refugee law must be analyzed and evaluated before confirming or disconfirming the stated hypotheses for this study. The analysis of the theoretical framework on which this study is built is also critical in understanding the research question. An evaluation of the neo-classical theory and the historical structuralist paradigm confirms the Raveinstein's *obiter dicta* that "migration appeared to go on without definite law" and arguably "without definite model". The neo-classical theory seems to oversimplify the reasons why people migrate. From the above analysis of the theory, it can be argued that the neo-classical theory fails to acknowledge human capital and historical factors, and that the model is steeped in Eurocentric overtures. This is important when a critical lens is applied to current migration trends that seem to be more from the Global South to the Global North. On the other hand, this does not mean that the historical structuralist perspective better explains current migration trends. The historical perspective, on the face of it, discredits individual agency and categorises migrants as all fleeing misery from the periphery to the core. In the current scope of cross-border migration this failure to understand individual human agency has arguably resulted in States failing to deal decisively with situations of migrant influxes. The study therefore aims at finding a balance between these two antagonistic theoretical frameworks in the face of the current migration reality where migrants fleeing their

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<sup>155</sup> Zapata-Barrero and Yalaz (n 151); Bryman (n 152).

countries of origin because of economic hardship seem to be affected by other social and political factors.

The second part of the chapter dealt with the research process. Gaining field access was a major challenge and the researcher had to rely on both formal and informal methods to generate data. Also, the complexities of carrying out research in different settings have an impact on the positionality of the researcher. To confront both personal and cultural biases it is important to make a statement of positionality so that data is analysed in a contextualised frame.

## PART 2

### **The legal framework: Economic hardship as persecution in a contemporary world** **Introduction**

Persons fleeing economic hardship from their countries of origin have been labelled ‘economic refugees’.<sup>1</sup> The label and the categorisation, albeit wrong, is synonymous with being an undeserving refugee. It suggests that such a person is abusing the asylum system and is undeserving of international protection. In that realm, Part 2 of this study is divided in two chapters. The question for determination in Chapter 3 is : *In which circumstances are persons fleeing economic hardship currently protected under international refugee law and human rights?* To fully answer this question the term ‘economic refugee’ is defined and contextualized. The chapter analyses the current protection for economic refugees under international refugee law, and explores how this scope of protection can be enhanced through international human rights law. As shown in the first chapter, the impact of globalization and its attendant economic policies have latently caused cross-border displacement in Africa. This has resulted in a fractured approach in receiving countries as most people have been categorised as economic refugees merely fleeing poverty and not having a well-founded fear of persecution. To clear this conundrum the starting point will be to evaluate the refugee definition as stated in the Geneva Convention of 1951. This evaluation will be done through the lens of current international refugee law and international human rights law. Although the OAU Convention’s definition represents an attempt towards the expansion of the refugee definition, scrutiny will focus on how the OAU Convention is interpreted in relation to persons fleeing economic destitution. What is pertinent in this inquiry is to understand socio-economic factors causing human displacement, and the extent to which they are indissolubly linked to

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<sup>1</sup> Peter Gray, “‘Shovelling out Your Paupers’: The British State and Irish Famine Migration 1846-50’ (2017) 1 Ireland and Anglo-Irish Relations Since 1800: Critical Essays 157; Patrick F Kotzur, Nora Forsbach and Ulrich Wagner, ‘Choose Your Words Wisely: Stereotypes, Emotions, and Action Tendencies toward Fled People as a Function of the Group Label’ (2017) 48 Social Psychology 226; Elizabeth Kay Harris, ‘Economic Refugees: Unprotected in the United States by Virtue of an Inaccurate Label’ (1993) 9 American University Journal of International Law and Policy 269; Agnieszka Piekutowska and Elżbieta Kuźelewska, ‘Economic Refugees: An Analysis of the Phenomenon in the Context of the EU Migration Crisis’ [2018] Irregular Migration as a Challenge for Democracy 125 <<https://www.cambridge.org/core/books/irregular-migration-as-a-challenge-for-democracy/economic-refugees-an-analysis-of-the-phenomenon-in-the-context-of-the-eu-migration-crisis/A0E06E283FEADCECF11D18CAD883CF544>> accessed 21 February 2023; RJ Vincent, ‘Political and Economic Refugees: Problems of Migration, Asylum and Re-Settlement. Report of Ditchley Conference, Ditchley Park, Oxfordshire, 13-15 October 1989’ (1989) 2 Journal of Refugee Studies 504 <<https://heinonline.org/HOL/Page?handle=hein.journals/jrefst2&id=516&div=66&collection=journals>> accessed 12 March 2023.

persecution as stated in the 1951 Geneva Convention. It is this blurry categorisation that has led to the labelling of refugees as either deserving or undeserving with economic refugees falling in the latter category.

Chapter 4 is guided by the question: *How should the refugee definition be reformed, in order to adequately consider 'economic refugees' and other 'new' categories of forcibly displaced persons?* Reforming the refugee definition has always been the difficult question to tackle in the field of international refugee law. However, as stated in the first chapter, the convergence of thought is pointing to the need to “inject new life into international refugee law”. Jean-François Durieux rightly bemoans the accumulation of soft law [in regulating international refugee law] instead of binding legal obligations fomented into hard law.<sup>2</sup> This study therefore adopts a Framework convention/protocol approach in reformulating the refugee definition as a model of international treaty making. While Patrick Wall has argued for the same Framework Convention as an operative tool that can be employed in the scheme of refugee burden sharing,<sup>3</sup> this study argues that an inclusive refugee definition should first be agreed on before operationalizing burden sharing. A reformed and inclusive refugee definition should arguably acknowledge that some new forms of persecution/conditions stemming from socio-economic destitution are indissolubly linked to the conditions stated in the Geneva Convention. Therefore, chapter 4 will evaluate the feasibility of a conceptual Framework Convention in a field lacking political consensus on the generic question: *who deserves international protection?* This lack of consensus has led to differentiated gaps in protection and continues to exacerbate the vulnerability of people in real need of international protection.

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<sup>2</sup> ‘Ageing Gracefully? The 1951 Refugee Convention at 70’ 5th Annual Conference, Refugee Law Initiative (RLI) Session 1A - “Injecting New Life into International Refugee Law” Moderator: Jean-François Durieux, Refugee Law Initiative, France

<sup>3</sup> Patrick Wall, ‘A New Link in the Chain: Could a Framework Convention for Refugee Responsibility Sharing Fulfil the Promise of the 1967 Protocol?’ (2017) 00 International Journal of Refugee Law 1.

## Chapter 3

### Current protection for economic refugees under international refugee and human rights law

#### 3.1. Who is a refugee?

This chapter will assess the probable scope of protection that is currently available for persons fleeing economic destitution in terms of international human rights and refugee law. It argues that the blurry distinction between migrants, asylum seekers, convention refugees and ‘economic refugees’ should not lead to the arbitrary exclusion of ‘economic refugees’ if they are able to show a ‘well-founded-fear’ of persecution based on the circumstances from their country of origin. This line of argument leads to an attempt to re-define the term ‘economic refugee’ so as to show that this excluded group of persons requires some form of protection under current international refugee law and human rights law. The chapter ends with an evaluation of two regional systems (the African Union and the European Union). This evaluation attempts to assess the current protection available to economic refugees as contained in the OAU Convention of 1969 and Article 2(d) of the Qualification Directive (QD).<sup>4</sup>

In terms of the Geneva Convention as supplemented and amended by the 1967 Protocol, an individual is declared a refugee by the contracting state to the Convention if the following four conditions are met.<sup>5</sup> The individual must be outside the country of origin; must have a well-founded fear of persecution, and such fear should be based on either race, religion, nationality, membership of a particular social group or political opinion; and the individual must be unable or unwilling to avail *themselves*<sup>6</sup> of the protection of that country. If stateless, the individual must be outside the former country of habitual residence owing to the fear of the stated grounds, and be unwilling to return to it.

As put emphatically by Grahl-Madsen, if an individual flees or stays away from the country of origin because of a “well-founded fear of persecution” this fact “overrides all other

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<sup>4</sup> Directive 2011/95/Eu Of The European Parliament and of The Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)

<sup>5</sup> The Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 (*United Nations Treaty Series*, Vol. 189, p. 150, No 2545 (1954)), entered into force on 22 April 1954. It was supplemented and amended by the Protocol Relating to the Status of Refugees, concluded in New York on 31 January 1967, which entered into force on 4 October 1967 (‘the Geneva Convention’)

<sup>6</sup> Gender neutral



considerations, and that person is a refugee, full stop.”<sup>7</sup> In that vein, when a person is recognised as a refugee by the contracting state to the Geneva Convention, such a person will, among others, have the following advantages: (i) the right not to be sent back to the country of origin, (ii) the right to enjoy specific rights stated in the Geneva Convention. As for countries that are not party to the Geneva Convention, assistance in one of the durable solutions like voluntary repatriation, local integration or resettlement should be provided.<sup>8</sup> In both categories, for states party to the Geneva Convention and those not party to it, the following two critical questions are important for consideration. First, what is the standard measure of the phrase “well-founded fear”, and secondly, do we have other categories of refugees, beyond those falling under the definition of the Geneva Convention?

This is because in all these different scenarios, and as shall also be argued for the “economic refugees”, the key commonality is the interpretation and evaluation of what entails the phrase “well-founded fear” of persecution. It is thus important to first critically analyse this constitutive element of the refugee definition before attempting a working definition of the term ‘economic refugee’.

### **3.1.1. What is “*well-founded fear*” of persecution?**

The criterion of the ‘well-founded fear’ of persecution is the constitutive element for the determination of refugee status. It embeds two key components: fear and persecution. This section dwells on the assessment and interpretation of the ‘well-founded fear’ and section 3.1.3 will provide a critique of the term ‘persecution’ in the context of economic refugees. Convention refugees are granted refugee status on the premise of their unwillingness to return to their country of origin because of a “well-founded fear of persecution”.<sup>9</sup>

There must be a genuine risk or real chance of being persecuted for “reasons of race, religion, nationality, membership of a particular social group or political opinion,” as stated in the

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<sup>7</sup> Atle Grahl-Madsen, ‘Identifying the World’s Refugees’ (1983) 467 The ANNALS of the American Academy of Political and Social Science 11, 30 <<http://journals.sagepub.com/doi/10.1177/0002716283467001002>> accessed 18 May 2020.

<sup>8</sup> UN High Commissioner for Refugees, *RLD2 - Determination of Refugee Status* (1989) <<https://www.refworld.org/docid/3ae6b35c0.html>> accessed 08 March 2023.

<sup>9</sup> *ibid*; James C Hathaway and Michelle Foster, ‘Well-Founded Fear’, *The Law of Refugee Status* (Cambridge University Press 2014) <<https://www.cambridge.org/core/books/law-of-refugee-status/wellfounded-fear/A8F9EABA0607546D9C67051FE65EDF65>> accessed 9 March 2023; John Vrachnas and others, ‘Well-Founded Fear of Persecution’, *Migration and Refugee Law: Principles and Practice in Australia* (3rd edn, Cambridge University Press 2011) <<https://doi.org/10.1017/CBO9781139137188.017>> accessed 9 March 2023.

Geneva Convention.<sup>10</sup> The real chance for persecution is not gauged in any statistical measure but alludes to a “substantial risk of persecution as opposed to a hypothetical or remote chance”.<sup>11</sup> To that end, an applicant for refugee status can establish a genuine risk of being shot, tortured or persecuted even if the odds are below 10 per cent.<sup>12</sup> What matters in the evaluation of what constitutes a “well-founded fear” then depends on a case by case analysis. In that regard, cognisance is given to the profile of the applicant in terms of life’s experiences and up-dated information about the country of origin.<sup>13</sup> Within this framework, the concept of ‘well-founded fear’ can thus be synthesised into *subjective* and *objective* elements.

According to the UNHCR Handbook, the subjective element of fear is related to the fear felt by the applicant. While the fear of returning to the country of origin is necessary for the recognition of convention refugees, this study argues that, in the context of economic refugees, such fear should not necessarily be interconnected to persecution as stated in the Geneva Convention. This is because the fear of returning to the country of origin largely stems from a variety of causes. This further means that the applicant is not obligated to establish that the well-founded fear (so stated) is the predominant reason resulting in the unwillingness to return to the country of origin. Since the fear is subjective, psychological reactions vary from one person to another and in some instances, what constitutes fear is intrinsically embedded in one’s personality, age, prior life experiences, social and cultural background. In some cases, some individuals do not express fear despite the fact that the facts on the ground indicate otherwise. Therefore, the two questions for determination in this regard, as stated in the aforementioned Handbook will be formulated as follows:

What would be the predicament [consequence(s)] for the applicant if returned?  
Does that predicament [or consequence(s)] meet the threshold of persecution?

The above questions then require an objective analysis of the expressed ‘well-founded fear’. This means that an applicant’s subjective fear should be objectively evaluated in order to establish the existence of a well-founded fear.<sup>14</sup> In the words of an Australian Chief Justice there must be a “...state of mind – fear of being persecuted – and a basis – well-founded – for

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<sup>10</sup> Article 1(A)(2) of the Geneva Convention

<sup>11</sup> *Vrachnas and others* (n 9) 258.

<sup>12</sup> *Immigration and Naturalization Service v. Cardoza-Fonseca* 480 U.S. 421 (1987)

<sup>13</sup> United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (HCR/1P/4/E, UNHCR 2019) <<https://www.unhcr.org/uk/publications/legal/5ddfc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html>> accessed on 09 March 2023.

<sup>14</sup> *Hathaway and Foster* (n 9).

that fear”.<sup>15</sup> The Canadian Supreme Court laid the inquiry as a two-limb test in which the applicant “...must subjectively fear persecution; and [such] fear must be well-founded in an objective sense”.<sup>16</sup> Therefore, both the subjective and objective element of what entails ‘well-founded fear’ must be met. In that realm, fear is objectively analysed in the following two ways.

First, the inquiry evaluates whether the expressed fear is well-founded at the time when the decision on the application for refugee status *is* made, *and not* at the time the claimant fled the country of origin.<sup>17</sup> The emphasis here is on the fact that the assessment of the well-founded fear has to be current. Secondly, the assessment of the real chance or genuine risk of the ‘well-found fear’ is forward-looking and takes into consideration what is likely to occur in the reasonably foreseeable future.<sup>18</sup> The main emphasis here is to adopt a pragmatic approach in assessing the risk and also avoiding speculation. The legal analysis objectively looks at “the laws of the country of origin, particularly the manner in which they are applied,” to gauge the risk of persecution for the claimant.<sup>19</sup> In cases where past persecution has manifested in brutal form, Refugee Status Determination Officers (RSDO) may be compelled to consider harm as continuous and thus traumatic to return the claimant to a place where varied forms of persecution might recur.<sup>20</sup>

### 3.1.2. Challenges of interpretation

The Convention refugee definition has been critically assessed on the basis of what constitutes ‘well-founded fear’.<sup>21</sup> Tied to this are the challenges that come up with interpreting ‘fear’ and the term ‘persecution’ (see discussion in section 3.1.3). As a result, the definition of who is a Convention refugee as stated in the Geneva Convention is said to be couched in exclusionary terms, for it excludes:

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<sup>15</sup> *Chan V. Minister For Immigration And Ethnic Affairs* [1989] HCA 62; (1989) 169 CLR 379 [16]

<sup>16</sup> *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, pg.6

<sup>17</sup> Vrachnas and others (n 9); Hathaway and Foster (n 9).

<sup>18</sup> Vrachnas and others (n 9); Hathaway and Foster (n 9).

<sup>19</sup> United Nations High Commissioner for Refugees (n 13) 20.

<sup>20</sup> *ibid*

<sup>21</sup> Cristina Maria Zamora Gomez, ‘Well-Founded Fear In International Refugee Law: A Feminist Approach’ [2022] *The Age of Human Rights Journal* <<https://revistaselectronicas.ujaen.es/index.php/TAHRJ/article/view/7216/7359#toc>> accessed 09 March 2023; Chandran Kukathas, ‘Are Refugees Special?’, *Migration in political theory: The ethics of movement and membership* (Oxford University Press 2016) <[https://ink.library.smu.edu.sg/soas\\_research/2984](https://ink.library.smu.edu.sg/soas_research/2984)> accessed 20 February 2022; Hathaway and Foster (n 9).

“...those fleeing their circumstances for reasons other than persecution; those who have fled but not crossed an international boundary; and those whose flight from persecution has taken them across borders but who have been persecuted for reasons other than race, religion, nationality, or social or political membership...”<sup>22</sup>

This then suggests that the current Convention refugee definition has not included all compelling cases and situations in which international protection *should* be provided for persons in real need. There has to be a broader ambit of protection to cater for the new refugee categories. People fleeing “war, or famine, or environmental disaster” are also possible candidates for refugee status and have a well-founded fear that can be fairly assessed subjectively and objectively. In Gibney’s eyes, the “staple of the daily news” in the modern era has become the “...sight of desperate people from conflict-ravaged countries attempting to reach the safety of Europe by boarding unseaworthy vessels, scaling barbed-wire fences, and secreting themselves in the backs of lorries or underneath buses and cars...”<sup>23</sup> The common denominator here is that “both the persecuted and those fleeing random or generalised violence may each face death if they stay”.<sup>24</sup> The well-founded fear of those excluded by the Convention refugee definition is on the same level as that of Convention refugees and their fear can be subjectively and objectively assessed.

Critics have questioned this level of double standards in which the constitutive element of ‘well-founded fear’ is assessed based on one’s nationality and geopolitical location.<sup>25</sup> This classification of certain refugee claimants as undeserving will be dealt with in the next section and reveal that the ‘well-founded fear’ concept may require to be broadened.

As for Spain, the ECRE report shows that refugee claimants coming from Morocco are prohibited to enter Spain.<sup>26</sup> This was even made prominent by the El Tarajal case, in which 200 people attempted to reach the Spanish enclave of Ceuta bordering Morocco and Spain but were shot at with rubber bullets. It is further reported that 15 of those who tried to swim to Ceuta drowned and died while 23 who made it to Ceuta were immediately deported to Morocco in what is termed as hot return (*devolución en caliente*).<sup>27</sup> The case of ND and NT further highlights how Spain has used violent pushbacks as a way to deter irregular migration into its

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<sup>22</sup> Kukathas (n 21) 255.

<sup>23</sup> Matthew J Gibney, ‘The Ethics of Refugees’ (2018) e12521 *Philosophy Compass* 1, 3.

<sup>24</sup> *ibid*

<sup>25</sup> Näre, Abdelhady and Irastorza (n 36) 256.

<sup>26</sup> European Council on Refugees and Exiles (n 32) 7.

<sup>27</sup> European Center for Constitutional and Human Rights, ‘CASE REPORT Justice for Survivors of Violent Ceuta Push-Backs’ (2020) <<https://www.ecchr.eu/en/case/europes-treacherous-borders-seeking-justice-for-ceuta-victims/>> accessed 10 March 2023.

territory.<sup>28</sup> The collective expulsion to Morocco of two nationals of Mali and Cote d'Ivoire on the grounds that they had unlawfully entered Spain gives impetus to some EU states to implement violent pushbacks along the EU external borders and in the process erodes the scope of protection for persons seeking international protection. Such state practice, in which the 'well-founded fear' is assessed based on nationality and geopolitical location, is "neither desirable as a matter of principle, nor defensible as a matter of international law".<sup>29</sup> Hathaway and Foster argue that the framework of assessment is "inherently objective" because a refugee claimant may fail to show to the RSDO that there is a real chance of current or prospective persecution (subjective) and yet such assessment can be dispensed with using the objective test.<sup>30</sup>

According to Hathaway and Foster, failure to demonstrate the subjective element should not stand in the way of granting refugee status when the receiving state has evidentiary proof of a genuine objective risk in the country of origin.<sup>31</sup> As stated earlier on, unaccompanied children or persons with mental health issues may fail to demonstrate the subjective element of fear when that can be objectively assessed. Their failure to demonstrate the subjective element should not impact negatively on their assessment for international protection. On the other hand, some people from different cultural backgrounds perceive fear in a different way and as such cannot subjectively show this element to the satisfaction of the RSDO who at the same time has appropriate tools to objectively assess the genuine risk of persecution using updated information about the country of origin.<sup>32</sup>

Also, from a feminist critical discourse, the evaluation of the subjective and objective elements of 'well-founded fear' is viewed as Eurocentric and patriarchal.<sup>33</sup> It is argued that the concept of a refugee emanates from the Geneva Convention and as such results in institutional bias towards certain refugees coming from the Global South.<sup>34</sup> This perhaps suggests that in the regulation of immigration the physical boundaries migrants cross and those mentally

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<sup>28</sup> *CASE OF N.D. AND N.T. v. SPAIN* (Applications nos. 8675/15 and 8697/15) (*Grand Chamber*), ECLI:CE:ECHR:2020:0213JUD000867515, Council of Europe: European Court of Human Rights, 13 February 2020, available at: <https://www.refworld.org/cases,ECHR,5e4691d54.html> [accessed 19 August 2023]

<sup>29</sup> Hathaway and Foster (n 9) 92

<sup>30</sup> *ibid.*

<sup>31</sup> Hathaway and Foster (n 9) 93.

<sup>32</sup> Vrachnas and others (n 9).

<sup>33</sup> Gomez (n 21).

<sup>34</sup> *ibid.*

constructed are arguably a matter of convention.<sup>35</sup> The feminist lens is further critical of the assessment of ‘well-founded fear’ in the gaze of a male paradigm. It is argued that male bias may hinder evaluations of the subjective element and affects the female claimant in presenting her testimony (in cases of gender-based violence) if the interviewing staff or interpreter is male. The woman may fail to demonstrate current and future (fear for) persecution and then be denied international protection.

From all the discussion above on the ‘well-founded fear’ criterion, it can arguably be discerned that the failure to demonstrate past persecution heavily handicaps refugee claimants. There is need to take into account ‘subjective’ factors in relation to the ‘objective’ factors to determine if a reasonable person would have a well-founded fear based on past persecution.<sup>36</sup> Then secondly, the requirement to demonstrate a risk of future persecution is inherently flawed if the RSDO makes a determination based only on country reports and national recognition rates. That information is arguably pre-determined and may result in the rejection of individual asylum applications or collective expulsions, if credence is only given to nationality or geographical factors.

Perhaps what makes the ‘well-founded fear’ criterion to have so many levels of interpretation is the relationship it has with the term ‘persecution’. To understand this relationship the next section below will critically assess ‘persecution’ and how it is given wide and varied interpretations.

### **3.1.3. What is persecution?**

The term ‘persecution’ is not defined in the 1951 Geneva Convention and other international treaties.<sup>37</sup> The term is derived from the Latin word ‘*persequi*’ which means ‘to follow with hostile intent, or pursue’.<sup>38</sup> Scholars are of the view that the 1951 Convention drafters deliberately left the term undefined so as to ensure that “the concept could be applied to new situations”.<sup>39</sup> The consensus towards defining the term is arguably embodied in the Hathaway

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<sup>35</sup> Ypi (n 26).

<sup>36</sup> Hathaway and Foster (n 9) 107

<sup>37</sup> Hugo Storey, ‘What Constitutes Persecution? Towards a Working Definition’ (2014) 26 International Journal of Refugee Law 272 <<https://academic.oup.com/ijrl/article/26/2/272/1513048>> accessed 20 March 2023.

<sup>38</sup> John Vrachnas and others, ‘Persecution’, *Migration and Refugee Law: Principles and Practice in Australia* (Cambridge University Press 2005).

<sup>39</sup> *ibid* 220.

classic formulation that defines persecution as the “sustained or systemic violation of basic human rights demonstrative of a failure of State protection”.<sup>40</sup>

Using this definition, persecution should be viewed through the prism of international human rights law. In this context, the interpretation of the term ‘persecution’ may be done through, amongst others, the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The above-mentioned treaties set a hierarchy of obligations for states to secure the following basic human rights: (i) non-derogable human rights as spelled out in the ICCPR, (ii) derogable human rights that are also set in the ICCPR, (iii) economic, social and cultural rights that are progressively implemented as spelt out in the ICESCR, and (iv) other human rights that are set in the UDHR.<sup>41</sup>

From this hierarchy of obligations, it is argued that acts of persecution can then manifest through ‘single harm’ that includes ‘death or severe torture’. The violation of human rights can further be through cruel, inhuman or degrading treatment or punishment. In the context of the 1951 Geneva Convention, notwithstanding failure to define the term, persecution is tied to a closed list (on the account of): *race, religion, nationality, membership of a particular social group or political opinion*.<sup>42</sup> As observed by Hugo Storey, in his analysis of the term ‘persecution’, there should be a move away from providing a closed list of what causes persecution.<sup>43</sup> The fact that the term ‘persecution’ can be defined from the following perspectives: national law, dictionary, hermeneutical, enumerative and human rights probably suggests that not all types of persecution have been identified or codified into international law.<sup>44</sup>

It has been argued that Article 9 of the Qualification Directive (QD) recast might serve as a template for defining persecution.<sup>45</sup> At the same time, it is debatable to use a template of a

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<sup>40</sup> James C Hathaway, ‘The Law of Refugee Status’ in M Symes and P Jorro (eds), *Asylum Law and Practice* (LexisNexis UK 2003 1991)

<sup>41</sup> Seline Trevisanut, ‘The Principle of Non-Refoulement And the De-Territorialization of Border Control at Sea’, (2014) 27(3) 661 *Leiden Journal of International Law*, doi:10.1017/S0922156514000259

<sup>42</sup> Kukathas (n 21).

<sup>43</sup> Storey (n 52).

<sup>44</sup> *ibid* 277.

<sup>45</sup> European Union: Council of the European Union, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, 20 December 2011, OJ L. 337/9-337/26;

regional instrument as a global definitive standard for the term ‘persecution’. According to the provisions of Article 9, an act of persecution ought to be “sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights”.<sup>46</sup> Persecution is also further viewed as an “accumulation of various measures” severely violating one’s human rights.<sup>47</sup>

What is clear from the above art 9 definition is the fact that such a definition opens up a number of interpretations. However, the fact that it is premised on the five grounds of persecution outlined in the Geneva Convention (*race, religion, nationality, membership of a particular social group or political opinion*) opens up the argument of the closed list that does not embrace other forms of persecution. Perhaps the best option is to leave the term undefined, for as noted by observers “persecution is self-identifying” and cannot be reduced to an item list.<sup>48</sup>

Therefore, the danger of identifying art 9 of the QD (recast) as a workable standard definition of persecution, makes that proposition fall into the trap of politics of jurisdiction. The definition is likely to be slated as Eurocentric and exclusionary especially in the face of the expanded definition of the term refugee in the regional instruments like the OAU Convention and the non-binding Cartagena Declaration. While these two regional instruments do not mention ‘persecution’, the concept of the ‘well-founded fear of persecution’ is tied to other compelling circumstances like generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed the public order.

From the above, albeit brief, assessment of the term ‘persecution’, this study has laid a basis for understanding the plight of economic refugees. As shall be discussed in section 3.3, defining economic refugees is largely on the ground that the term ‘persecution’ has a broad meaning and cannot be reduced to a closed list. This then widens the possibilities of extending the arc of protection to other groups of people not covered by the ambit of persecution as listed in the

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20.12.2011, 2011/95/EU, available at: <https://www.refworld.org/docid/4f197df02.html> [accessed 20 April 2023] Acts of persecution as qualified in paragraph 1 can, inter alia, take the form of: (a) acts of physical or mental violence, including acts of sexual violence; (b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner; (c) prosecution or punishment which is disproportionate or discriminatory; (d) denial of judicial redress resulting in a disproportionate or discriminatory punishment; (e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling within the scope of the grounds for exclusion as set out in Article 12(2); (f) acts of a gender-specific or child-specific nature.

<sup>46</sup> *ibid.* Article 9(1)a

<sup>47</sup> *ibid.* Article 9(1)b

<sup>48</sup> Storey (n 52) 273.



1951 Geneva Convention. This basis will also be crucial in chapter 4, when the study explores the efficacy of a Framework Convention in expanding the refugee definition.

### **3.2. People on the move: understanding the blurred categories**

This study makes a case for the recognition of ‘economic refugees’ if it can be established that like Convention refugees or mandate refugees, such asylum seekers hail from countries where economic failure, political instability, poverty and Convention grounds for persecution are indissolubly linked. Therefore, it is relevant for the purpose of this study to first define key concepts related to the term ‘refugee’. For these definitions, reliance is sought from international refugee law instruments in the form of the UNHCR Handbook, the updated generalist data portal for the UNHCR containing a master glossary list, and the Handbook on European law relating to asylum, borders and immigration.<sup>49</sup> The definitions below are summarised and any discussion relating to their legal definitions as provided in the Conventions, EU asylum acquis and national legislations will be discussed in the sections on European Union and the African Union.

*Migrants:* The term migrant(s) is not universally defined. In common parlance, the term is used in reference to persons who have voluntarily moved across international borders for reasons of improving their personal conditions by seeking work, education opportunities or reunite with family members. On the second level, the word migrant is used as an umbrella term in reference to any person who has moved within a country or across a border, either temporarily or permanently for a variety of reasons. While the United Nations Department of Economic and Social Affairs (UN DESA) recommends the usage of the term ‘International migrant’ as “any person who changes their country of usual residence (excluding short-term movement for purposes of recreation, holiday, visits to friends and relatives, business, medical treatment or religious pilgrimage)”.<sup>50</sup> This study aligns itself with the IOM definition provided earlier on in the introduction. The International Organization for Migration defines a migrant as: “a person who moves away from his or her place of usual residence, whether within a country or across an

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<sup>49</sup> European Union Agency for Fundamental Rights and Council of Europe, Handbook on European Law Relating to Asylum, Borders and Immigration (Edition 20, Publications Office of the European Union 2020) 81 <[http://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2020-handbook-law-asylum-migration-borders-2020-ed\\_en.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-handbook-law-asylum-migration-borders-2020-ed_en.pdf)> accessed 11 March 2023

<sup>50</sup> UN High Commissioner for Refugees (UNHCR), ‘UNHCR - Master Glossary of Terms’ (*The UN Refugee Agency: Online Library*, 2023) <<https://www.unhcr.org/uk/master-glossary.html>> accessed 11 March 2023.

international border, temporarily or permanently, and for a variety of reasons. The term includes a number of well-defined legal categories of people, such as migrant workers; persons whose particular types of movements are legally defined, such as smuggled migrants; as well as those whose status or means of movement are not specifically defined under international law, such as international students”.<sup>51</sup> The UNHCR further recommends that the word migrant should thus not be used as an umbrella term to refer to refugees or asylum seekers as this impacts on their chances of getting international protection.<sup>52</sup>

- *Asylum Seekers*: The term ‘asylum seekers’ refers to persons who have applied for international protection in a safe third country. International protection is requested on the basis that they are not willing to return or be returned to their country of origin because of a well-founded fear of persecution or real chance of being subjected to harm.<sup>53</sup>
- *Convention refugees*: The term Convention refugee is a person who meets the criteria set out in Article 1A(2) of the Geneva Convention as supplemented and amended by the 1967 Protocol relating to the Status of Refugees (see discussion in section 3.1 above).<sup>54</sup>

<sup>51</sup> International Organization for Migration (IOM), *Glossary on Migration* (IML Series, International Organization for Migration 2019) <[https://publications.iom.int/system/files/pdf/iml\\_34\\_glossary.pdf](https://publications.iom.int/system/files/pdf/iml_34_glossary.pdf)> accessed 22 July 2023.

<sup>52</sup> UN High Commissioner for Refugees (UNHCR), ‘UNHCR - Master Glossary of Terms’ (n 65)

<sup>53</sup> European Union Agency for Fundamental Rights and Council of Europe (n 64). In terms of the EU Asylum acquis, member states are prohibited to remove an asylum seeker whose claim is pending until a decision on their asylum application is given. In terms of Article 9 (1) of the Asylum Procedures Directive (2013/32/EU) provides that asylum seekers’ presence in the territory of an EU Member State should not be criminalised. *See*: European Union: Council of the European Union, *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)*, 29 June 2013, OJ L 180/60 -180/95; 29.6.2013, 2013/32/EU, available at: <https://www.refworld.org/docid/51d29b224.html> [accessed 11 March 2023]. Also, Article 6 of the of the Reception Conditions Directive (2013/33/EU) that asylum seekers who have applied for international protection should be given within three days a certified document acknowledging their status as asylum applicants. *See*: European Union: Council of the European Union, *Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, 29 June 2013, OJ L 180/96 -105/32; 29.6.2013, 2013/33/EU, available at: <https://www.refworld.org/docid/51d29db54.html> [accessed 11 March 2023]

<sup>54</sup> United Nations High Commissioner for Refugees (n 13) 108. *See also*; *Ali v. Minister of Citizenship and Immigration*, IMM-3404-95, Canada: Immigration and Refugee Board of Canada, 23 September 1996, available at: <https://www.refworld.org/cases,IRBC,4b18e21b2.html> [accessed 11 March 2023]. The case concerned a nine-year-old Afghan female, Hossay Ali, who was seeking judicial review of a decision of the Canadian Immigration and refugee Board that had ruled that she was not a Convention refugee. The main issue in contention was whether Hossay was entitled to refugee status on the same basis as her mother, Bilqis Ali, who had been granted refugee status as part of “educated women”. The *court a quo* had held that Hossay was a minor claimant and uneducated as opposed to an educated woman. The Court held that Hossay could not be returned to Afghanistan because that will mean the only way she can avoid to be persecuted was to refuse to go to school. To that end, Hossay was recognised as a Convention refugee because “education is a basic human right. In *In re Fauziya Kasinga*, 3278, United States Board of Immigration Appeals, 13 June 1996, available at: [https://www.refworld.org/cases,USA\\_BIA,47bb00782.html](https://www.refworld.org/cases,USA_BIA,47bb00782.html) [accessed 11 March 2023], it held that “young women” may constitute a particular social group and can be recognised as Convention refugees.

- *Mandate refugees*: These are people who have been recognised to be refugees by the UNHCR acting under the authority of its Statute and relevant resolutions of the UN General Assembly and the Economic and Social Council (ECOSOC). Mandate refugee status is especially significant in States that are not parties to the 1951 Convention or its 1967 Protocol.
- Persons under the protection of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), are “persons whose normal place of residence was Palestine during the period 1 June 1946 to 15 May 1948, and who lost both home and means of livelihood as a result of the 1948 conflict.” When UNRWA began its operations in 1950, it was responding to the needs of 750,000 Palestine refugees as of 2023 the figure for UNRWA refugees stands at about 5,9 million.<sup>55</sup>
- *Economic migrants*: According to the UNHCR Handbook, the term economic migrants should be distinguished from the term refugees. However, the guide acknowledges that the difference between economic migrants and refugees is blurred because the “distinction between economic and political measures in an applicant’s country of origin is not always clear”.<sup>56</sup> This is because economic policies affecting a person’s livelihood may be framed on “racial, religious or political aims or intentions [that] are directed against a particular group”.<sup>57</sup> The Handbook further acknowledges that economic measures may amount to persecution if they are aimed at a particular section of the population, thus resulting in the victims to flee their country of origin and become refugees.<sup>58</sup> This is where the problem lies in the adjudication of refugee claims: when grounds for persecution are indissolubly linked to socio-economic factors that are outside the purvey of the Geneva Convention. To avoid this conundrum, the UNHCR has merged the term “economic migrant” to “migrant worker”.<sup>59</sup> The latter is defined as “a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national”.<sup>60</sup> For the purpose of this study, an economic migrant will be defined as a person

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<sup>55</sup> UNRWA, ‘UNRWA in Numbers’ (*eUNRWA*, 2023) <<https://www.unrwa.org/>> accessed 28 August 2023.

<sup>56</sup> United Nations High Commissioner for Refugees (n 13)

<sup>57</sup> *ibid* 22.

<sup>58</sup> United Nations High Commissioner for Refugees (n 13).

<sup>59</sup> UN General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 18 December 1990, A/RES/45/158, available at: <https://www.refworld.org/docid/3ae6b3980.html> [accessed 11 March 2023], in terms of Article 3 of this Convention, refugees and stateless persons are excluded as ‘migrant workers’.

<sup>60</sup> UN High Commissioner for Refugees (UNHCR), ‘UNHCR - Master Glossary of Terms’ (n 65).

who has crossed an international border in pursuit of work, education opportunities and other reasons aimed at improving *their* current livelihoods.

- *Economic refugee*: The term is not included in the literature of the UNHCR cited in this section.

### 3.3. Towards a new understanding of the plight of economic refugees

Grahl-Madsen, an eminent authority on international refugee law, labels the term ‘economic refugee’ a misnomer.<sup>61</sup> The term is steeped in negativity and is used in reference to asylum seekers who leave their countries of origin purely for economic reasons so as to improve their livelihoods.<sup>62</sup> As noted by some scholars, the term has been “wrongly and incorrectly applied both in the political discourse and media as a synonym of economic migration”.<sup>63</sup> Literature on the term converge to the following definition:

[an economic refugee] is a person who treats migration as an escape from economic oppression. They are persons who escape from their country because the immense poverty they live in prevents them from satisfying their basic human needs. This situation concerns people who leave their countries due to threats that can be assimilated to those encountered by political refugees. [Political refugees] may flee due to terror, whereas economic refugees flee due to hunger. Toilsome conditions that frequently imply mental and physical suffering make economic refugees leave.<sup>64</sup>

Observers are of the view that this assessment is limited and does not take a holistic approach in evaluating the *nexus* between the convention grounds of displacement and other factors outside the Geneva Convention.<sup>65</sup> In the words of Elizabeth Kay Harris, economic refugees and political refugees “face the same possibility of death” due to State’s mass terror campaigns and economic policies resulting in starvation.<sup>66</sup> The key question for determination then becomes: What is the threshold required for international refugee law to accept economic destitution as a reason for a well-founded fear of persecution? As shown in *Figure 10 below*, the term ‘economic refugee’ may be absent in the UNHCR literature cited above, but the usage

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<sup>61</sup> Grahl-Madsen (n 7).

<sup>62</sup> Animesh Ghoshal and Thomas M Crowley, ‘Political versus Economic Refugees’ (1983) 41 Source: Review of Social Economy 124; Grahl-Madsen (n 7); Piekutowska and Kuzelewska (n 1); Jane McAdam, ‘Review Essay: From Economic Refugees to Climate Refugees’ (2009) 10 Melbourne Journal of International Law 575 <<https://heinonline.org/HOL/Page?handle=hein.journals/meljil10&div=34&id=&page=&collection=journals>> accessed 12 March 2023.

<sup>63</sup> Piekutowska and Kuzelewska (n 1) 125.

<sup>64</sup> *ibid* 126.

<sup>65</sup> Eric Neumayer, ‘Bogus Refugees? The Determinants of Asylum Migration to Western Europe’; Ghoshal and Crowley (n 77); Piekutowska and Kuzelewska (n 1).

<sup>66</sup> Harris (n 1) 269.

of the term has been in existence long before the Geneva Convention. This perhaps justifies a longitudinal assessment on how the boundaries of international refugee law can be pushed in expanding the Convention refugee definition.

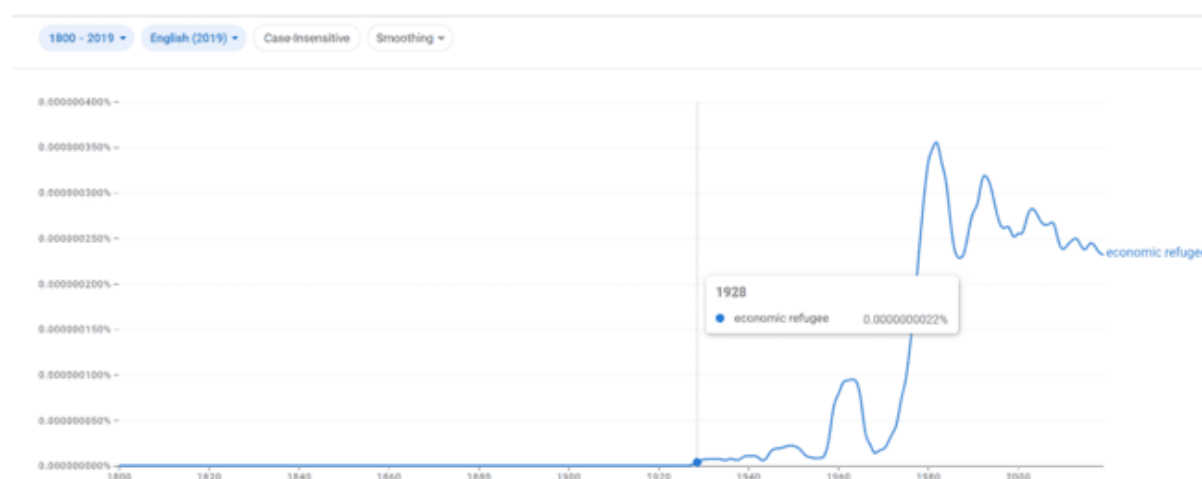


Figure 9: Google Ngram viewer of the term ‘economic refugee’.

Therefore, to conceptualise the term ‘economic refugee’ the study conducted a systematic literature review (SLR). This review had four basic steps modelled around the SALSA literature review framework: *search* (define searching string and types of databases), *appraisal* (pre-defined literature inclusion and exclusion, and quality assessment criteria), *synthesis* (extract and categorize the data), and *analysis* (narrate the result and finally reach a conclusion) (SALSA).<sup>67</sup> This method was adapted to find and analyse the gap in international refugee law literature on the term ‘economic refugee’. Media discourse has also recently become a data source in which the legitimacy of refugee claims by asylum seekers for economic motives are negatively scrutinised as bogus.<sup>68</sup> Therefore, using the SALSA literature review framework, the aim of this section is to redefine the term economic refugee and the blurry boundaries of the Convention refugee definition so as to critically consider the circumstances of ‘economic refugees’. It seeks to explore if economic refugees can be positively assessed for international protection if they come from countries where economic failure, political instability, poverty, and persecution are indissolubly linked.

<sup>67</sup> Wondimagegn Mengist, Teshome Soromessa and Gudina Legese, ‘Method for Conducting Systematic Literature Review and Meta-Analysis for Environmental Science Research’ (2020) 7 MethodsX 100777.

<sup>68</sup> Andrea Lawlor and Erin Tolley, ‘Deciding Who’s Legitimate: News Media Framing of Immigrants and Refugees’ (2017) 11 International Journal of Communication 967 <<https://ijoc.org/index.php/ijoc/article/view/6273/1946>> accessed 10 March 2023.

The SALSA model as shown in *Figure 10 below*, was used to evaluate the following databases: *Scopus, Heinonline and Newspapers.com*. The first stage of the process was a thematic approach that included a full text search (title, abstract, keywords) on the term economic refugee. This was then followed by a screening process in which articles were removed for analysis on the grounds of duplication, grey literature, conference proceedings, book chapters, and editorial letters. Book chapters available on the selected databases had scattered keywords largely on ‘economic migration’ rather than the subject in question: ‘economic refugees’. However, for the newspapers a purposeful selection was employed with the aim of capturing the history of how the term has been used in public discourse. As a result, thereof, 40 articles were selected from the period of 1900 to 2022 apportioned as follows: 10 newspaper articles each from the United States, Canada, the United Kingdom and Australia. As shall be argued in section 3. 4, the selection of the above-mentioned countries is arguably on the grounds that the term ‘economic refugee’ is a creation of industrialised states aimed at labelling migrants coming from the Global South as undeserving.

For the journal articles the eligibility process consisted of the three key stages. First, abstract reading helped in identifying relevant articles. As shown in *Figure 10 below*, the eligibility process aimed at non-fee articles. The second stage was skim reading and articles that mentioned the term ‘economic refugee’ in *obiter dicta* fashion were excluded. The last stage consisted of body reading and full analysis of the term ‘economic refugee’. For the close reading of the newspapers great care was taken in considering inflammatory articles pushing for an extreme immigration process and the possibilities of the trap of unsubstantiated facts.<sup>69</sup>

The figure below graphically depicts the SLR methodology used in analysing the term ‘economic refugee’. In a nutshell, the outcome of this SLR methodology shows that the term economic refugee has probably been misunderstood as meaning a class of poor people trying to abuse the asylum procedure. This categorisation fails to acknowledge interconnected socio-economic and political factors that make it difficult to differentiate between convention and economic refugees. The analysis further showed that media discourse and state practice are couched in selective exclusion that is both legalistic and exclusionary. Economic refugees are seen as synonymous of poverty, starvation, and a hyperinflationary environment. To that end, the analysis ends with three propositions of what may be ‘acceptable’ definitions of the term

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<sup>69</sup> Theodora Dame Adjin-Tettey, ‘Combating Fake News, Disinformation, and Misinformation: Experimental Evidence for Media Literacy Education’ (2022) 9 *Cogent Arts & Humanities* 1 <<https://doi.org/10.1080/23311983.2022.2037229>> accessed 16 February 2023.

‘economic refugees’ so as to reflect the current reality of inextricably interconnected socio-economic factors giving rise to cross-border displacement in the new global era.

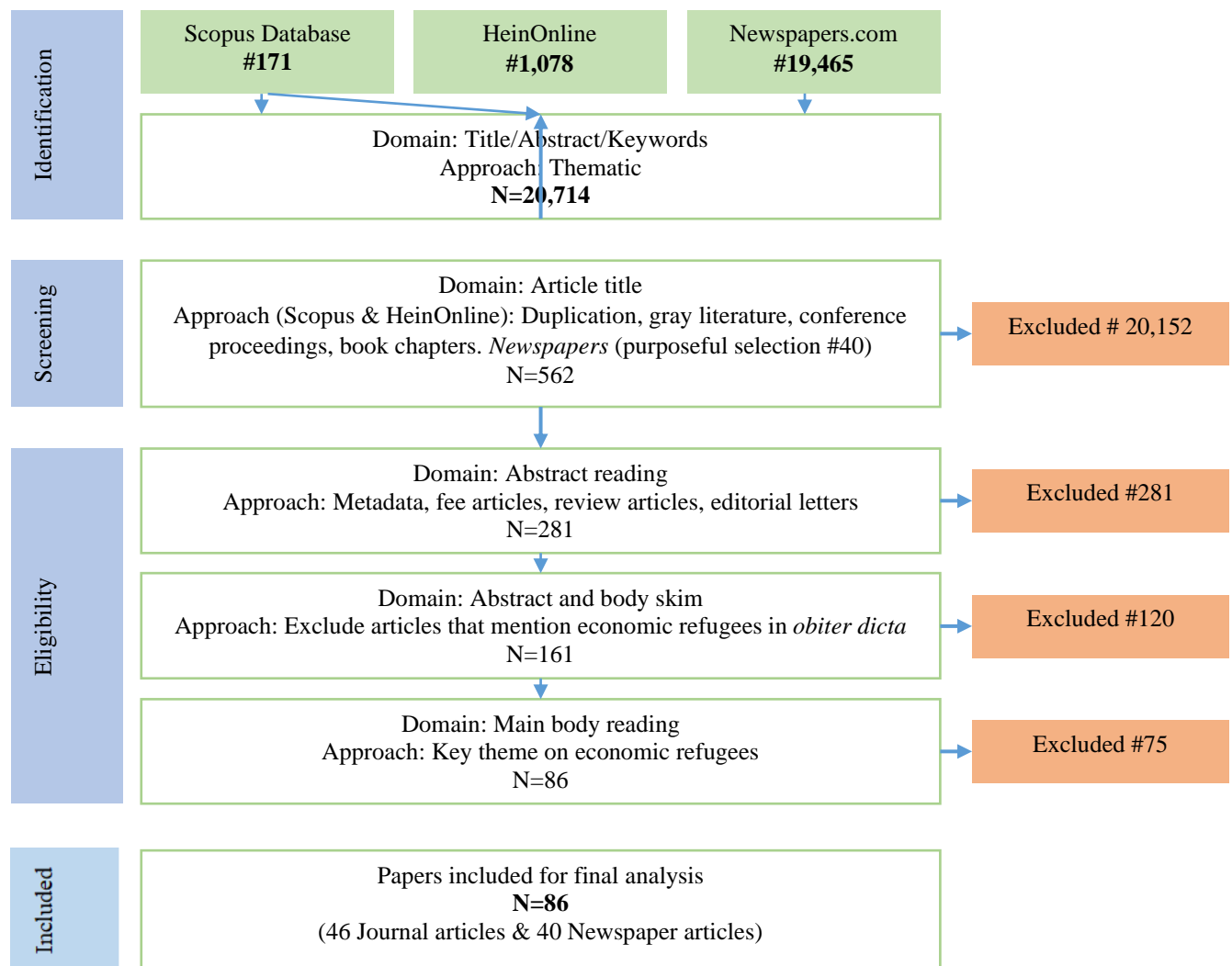


Figure 10: Systematic literature review structure. Adapted from Wondimagegn Mengist, Teshome Soromessa and Gudina Legese, ‘Method for Conducting Systematic Literature Review and Meta-Analysis for Environmental Science Research’ (2020) 7 MethodsX 100777.

### 3.4. Economic refugees: the challenge we refuse to face

In his seminal piece written at the height of the influx of immigrants coming to the United States from Cuba, Indochina, and Afghanistan, Michael Teitelbaum, predicted that migration will become “the most important and troubling world problem of the next decade.”<sup>70</sup> Perhaps at the heart of this ‘problem’ is the reluctance to acknowledge that the matrix of human mobility is “inextricably intertwined” to a coalescence of socio-economic and political factors that

<sup>70</sup> Michael S Teitelbaum, ‘Right Versus Right: Immigration and Refugee Policy in the United States’ (1980) 59 Foreign Affairs 21 to 59, 21 <<https://www.jstor.org/stable/20040652>> accessed 14 March 2023.

makes it difficult to categorise people in need as genuine or undeserving.<sup>71</sup> In the words of one critic: “to differentiate between ‘political’ and ‘economic’ refugees is a near impossible task”.<sup>72</sup> To that end, observers are of the view that the challenge we refuse to face is arguably the reality that economic refugees and Convention refugees all want to escape a country:

“...in which a few can get education, in which only a handful can get the most basic health care, where there is virtually no work without a criminal edge, and where the currency is so short that the money changers have to haul their notes to the bazaar by donkey, each carrying about four sacks into which have been packed about eight cinder-block sized wads of notes”<sup>73</sup>

The above description of life in Afghanistan in the year 2001 is probably still the same today, and typifies life in most countries where there is an intersection of political and socio-economic factors. Media discourse on economic refugees further portrays economic refugees as persons coming from safe but poor countries with mismanaged economies. These countries and their citizenry have thus become synonymous of poverty, starvation, and hyperinflationary environment.<sup>74</sup> These economic refugees have had to live in the host countries with such negative stereotypical tropes as: ‘boat people’, ‘black-boat people’, ‘wet-backs’, ‘illegals’, ‘queue-jumpers’, ‘*makwerekwere*’ (derogatory term for African migrants in South Africa likened to lice or cockroaches), and ‘forest-people’ amongst others.<sup>75</sup> In the court of public opinion, economic refugees continue to draw resentment and much blame is heaped on criminal gangs of people smugglers who facilitate their irregular entry into the host country.<sup>76</sup> In fact

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<sup>71</sup> *ibid* 31.

<sup>72</sup> The Age, ‘A Challenge We Refuse to Face’ *The Age* (Melbourne, Victoria, Australia, 12 November 1977) 19 <[https://www.newspapers.com/image/828650612/?terms=%22economic refugees%22 &match=1](https://www.newspapers.com/image/828650612/?terms=%22economic%20refugees%22&match=1)> accessed 14 March 2023.

<sup>73</sup> Paul McGeough, ‘The Price of Passage: Journey of Desperation Part 2’ *The Sydney Morning Herald* (New South Wales, Australia, 4 September 2001) 11 <[https://www.newspapers.com/image/122371101/?terms=%22economic refugees%22&match=1](https://www.newspapers.com/image/122371101/?terms=%22economic%20refugees%22&match=1)> accessed 14 March 2023. This is a description of life in Afghanistan.

<sup>74</sup> Enrique Gómez Ramírez, ‘The Venezuelan Migrant Crisis: A Growing Emergency for the Region’ (2018) <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/630343/EPRS\\_BRI\(2018\)630343\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/630343/EPRS_BRI(2018)630343_EN.pdf)> accessed 3 December 2021; DG Hohl, ‘The Haitian Boat People: Political or Economic Refugees?’ (1982) 31 *Migration news* 29; Jackson Nyamuya Maogoto, ‘Queue Jumpers or Refugees: Fudging Domestic Policy with International Obligations in the Reception of Spontaneous Arrivals’ (2016) 7 *Journal of the Philosophy of International Law* 45; Milena Belloni, *The Big Gamble: The Migration of Eritreans to Europe* (University of California Press 2019).

<sup>75</sup> Maogoto (n 73); The Sydney Morning Herald, ‘Editorial’ *The Sydney Morning Herald* (New South Wales, Australia, 22 September 2001) <[https://www.newspapers.com/image/121673368/?terms=%22economic refugees%22 &match=1](https://www.newspapers.com/image/121673368/?terms=%22economic%20refugees%22&match=1)> accessed 14 March 2023; Calvin Zon, ‘Black Poles to Make Policy a Campaign Test’ *Hawaii Tribune-Herald* (28 January 1980) 6 <[https://www.newspapers.com/image/556099930/?terms=%22economic refugees%22&match=1](https://www.newspapers.com/image/556099930/?terms=%22economic%20refugees%22&match=1)> accessed 14 March 2023.

<sup>76</sup> Nick Squires, ‘Italian Right Attacks Pope over Immigrants’ *The Daily Telegraph* (London, Greater London, England, 11 July 2013) 15 <[https://www.newspapers.com/image/754538076/?terms=%22economic refugees%22&match=1](https://www.newspapers.com/image/754538076/?terms=%22economic%20refugees%22&match=1)> accessed 14 March 2023.



their refugee claims are further questioned on the grounds that if they are able to finance smugglers for long and hazardous trips to Europe, Australia, Canada or the United States, then they could as well stay in their countries of origin and improve their lives with the money. The reasoning here being that those who are in real need and at the same time impoverished, seldomly leave their countries of origin because of lack of financial means.<sup>77</sup> This line of argument, perhaps, fails to take into account two factors in relation to all refugees of whatever label.

First, the motivations for cross-border displacement are multifaceted and intertwined by structural global forces.<sup>78</sup> Economic refugees might lose their jobs due to “market dislocations” caused by global forces, thereby “depriving them of their sole means of subsistence”.<sup>79</sup> If this happens in a country with political repression and skewed economic policies, economic refugees just like Convention refugees will both face “life-threatening violations (or threatened violations) of [their] basic human rights”.<sup>80</sup> This then drowns the slogan “*Being Poor Alone Does Not Entitle You Asylum*”, in that economic refugees are probably poor because of the political system they find themselves in, and thus one can become a political refugee in the act of being an economic refugee.<sup>81</sup>

The second factor relates to the language of law and order in the face of a humanitarian disaster.<sup>82</sup> The language used to categorise who is in need of international protection is legalistic and exclusionary. As has been observed in the Australian media, it pits the refugee against the public and alienates asylum seekers from the public discourse.<sup>83</sup> The effect of this alienation is to sow seeds of aversion and fear in the public domain so that asylum seekers are seen as a burden and pestilence. As observed by Gwynne Dyer, refugees have never been popular in the public discourse as they are portrayed in the media as people who come “without warning and never go home again”.<sup>84</sup> I have argued before that such a positivist approach

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<sup>77</sup> Francesco Castelli, ‘Drivers of Migration: Why Do People Move?’ (2018) 25 *Journal of Travel Medicine* 1 <<https://academic.oup.com/jtm/article/25/1/tay040/5056445>> accessed 14 February 2023.

<sup>78</sup> David Ingram, ‘The Structural Injustice of Forced Migration and the Failings of Normative Theory’ (2012) 11 *Perspectives on Global Development and Technology* 50.

<sup>79</sup> *ibid* 53.

<sup>80</sup> *ibid*.

<sup>81</sup> Zon (n 90) 6.

<sup>82</sup> See the next section on the possible scope of protection where the EU asylum law will be discussed in detail.

<sup>83</sup> *The Sydney Morning Herald* (n 90).

<sup>84</sup> Gwyne Dyer, ‘Closing the Door on Economic Refugees’ *The San Francisco Examiner* (San Francisco, California, 6 July 1980) 23 23 <<https://www.newspapers.com/image/460726733/?terms=%22economic%22&match=1>> accessed 14 March 2023; Gwyne Dyer, ‘Rejecting Economic Refugees’ *Red Deer Advocate* (Red Deer, Alberta, Canada, 30 June 1980) 4 4

creates a continuum of exclusion/inclusion in which refugees (of any kind) are accepted or excluded through the rigid lens of legitimacy.<sup>85</sup> If perhaps countries are constrained financially to help every refugee claimant, political will and solidarity might be a viable solution in the face of a near impossible task to differentiate between ‘political’ and ‘economic’ refugees.<sup>86</sup> A compelling example on El Salvadorian refugees in the United States shows that the motivations for individuals to flee their countries of origin are complex.<sup>87</sup> Refugees are forced out of their countries because of an interplay of factors in which economic conditions interact with violence. Observations show that refugees are subject to political violence which disrupts economic activities and results in endemic unemployment and substantial wage cuts.<sup>88</sup> This example and many more in countries in the periphery require a definitive analysis to identify connections between violence and economic conditions.

The other challenge we might refuse to face is that the categorisation of refugees is an act of selective exclusion. The concept of selective exclusion relates to banning orders and policing of public space.<sup>89</sup> This is done in order to choose who gets to enjoy the public space after manifesting certain desirable behaviour.<sup>90</sup> Failing to do so, one is threatened with expulsion or some form of banishment. In the security studies realm, selective exclusion results in:

...an increasing number of people...being denied access to certain places and the corresponding facilities by banning orders [occurring] in several countries, such as Germany, Australia, the United Kingdom and the United States.<sup>91</sup>

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<[https://www.newspapers.com/image/557835594/?terms=%22economic refugees%22&match=1](https://www.newspapers.com/image/557835594/?terms=%22economic%20refugees%22&match=1)> accessed 14 March 2023.

<sup>85</sup> Shepherd Mutsvara, ‘Reflexive Narrative on Identity and Exclusion of the Zimbabwean Child in the Diaspora: “The Odd-Looking Fellow”’ in Shoba Arun and others (eds), *Global Migration and Diversity of Educational Experiences in the Global South and North* (Routledge 2023) <<https://www.taylorfrancis.com/chapters/edit/10.4324/9781003343141-4/reflexive-narrative-identity-exclusion-zimbabwean-child-diaspora-shepherd-mutsvara>>.

<sup>86</sup> Dorota Bartyzel and Konrad Krasuski, ‘Welcoming Refugees Start to Take Its Toll on Poland’ *The Independent* (London, Greater London, England, 27 March 2022) 50 <[https://www.newspapers.com/image/828171268/?terms=%22economic refugees%22&match=1](https://www.newspapers.com/image/828171268/?terms=%22economic%20refugees%22&match=1)> accessed 14 March 2023.

<sup>87</sup> William Deane Stanley, ‘Economic Migrants Or Refugees From Violence? A Time-Series Analysis of Salvadoran Migration to The United States’ (1987) 22 *Latin American Research Review* 132 <<https://doi.org/10.1017/S0023879100016459>> accessed 8 March 2023.

<sup>88</sup> *ibid.*

<sup>89</sup> Marc Schuilenburg, ‘Behave or Be Banned? Banning Orders and Selective Exclusion from Public Space’ (2015) 64 *Crime, Law and Social Change* 277 <<https://link.springer.com/article/10.1007/s10611-015-9593-3>> accessed 15 March 2023.

<sup>90</sup> *ibid.*

<sup>91</sup> *ibid.* 284.

The justification behind this is to improve the “quality of the location in question” and to encourage people to “desist from any deviant behaviours”.<sup>92</sup> In the field of migration law and policy it is arguably a way to select the ‘desirable’ migrant. It can be argued that, the current restrictive criterion of ‘sufficient means’ which for migrants applying for a visa has always been an act of state practice and an act of selective exclusion. By way of example, when The Hon. Charles A. Stewart was the Canadian Minister of Interior in 1922, a number of regulations were promulgated aimed at “preventing Canada [from] being the dumping ground for the hundreds of thousands of economic refugees from Central and Eastern Europe”.<sup>93</sup> The regulations provided that Canada would allow “*bonafide* agriculturalists” with “sufficient means to begin farming”, and as for farm labourers and female domestic servants, they had to offer proof of “reasonable assurance of employment” to gain entry into Canada.<sup>94</sup> These regulations were welcomed in the media as way of “shutting out the millions of Europe who would flood [Canada]”, and by extension the objective element of this selective exclusion practice was to admit the “class of British settler [Canada] need”.<sup>95</sup>

From a historical analysis, selective exclusion is possibly a hallmark of hypocrisy. It can be argued that developed countries were built by immigrants who could not be separated as ‘genuine’ or ‘undeserving’ migrants. Critics argue that countries like Australia, the United States, Canada and most countries in Europe were built by immigrants who were either political or economic refugees fleeing their ‘homelands because they were in bad with the powers and were slowly starving to death’.<sup>96</sup> Thus labelling people in need of international protection as ‘infiltrators’<sup>97</sup> or ‘invaders’ when they are fleeing economic destitution spurred by political tyranny negates the fact that economic destitution is a by-product of failed political policies or

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<sup>92</sup> *ibid.*

<sup>93</sup> Clifford Baker, ‘The Immigration Problem’ *Times and Guide* (Weston, Ontario, Canada, 31 May 1922) 2 <[https://www.newspapers.com/image/775513071/?terms=%22economic refugees%22 &match=1](https://www.newspapers.com/image/775513071/?terms=%22economic%20refugees%22&match=1)> accessed 14 March 2023.

<sup>94</sup> *ibid.*

<sup>95</sup> *ibid.*

<sup>96</sup> Damon Runyon, ‘Declares Many Fine Old Families of Nation Were Political or Economic Refugees From Homeland’ *The Miami Herald* (Miami, Florida, 6 April 1938) 24 <[https://www.newspapers.com/image/617121441/?terms=%22economic refugees%22&match=1](https://www.newspapers.com/image/617121441/?terms=%22economic%20refugees%22&match=1)> accessed 14 March 2023.

<sup>97</sup> Reuven (Ruv) Ziegler, ‘No Asylum for “Infiltrators”: The Legal Predicament of Eritrean and Sudanese Nationals in Israel’ (2015) 29 *Journal of Immigration, Asylum and Nationality Law* 172 <<https://papers.ssrn.com/abstract=2632503>> accessed 15 March 2023.

political repression.<sup>98</sup> Therefore, simplistic distinctions between ‘deserving’ and ‘underserving’ refugees do nothing to help the vulnerable.<sup>99</sup>

Gwynne Dyer, is therefore of the view that instead of condemning a certain class of refugees for their “materialistic motives” there is need, at the basic level, to acknowledge that “the mobility of the poor has outflanked the old barrier of distance”.<sup>100</sup> The term economic refugee has probably been misunderstood as meaning a class of poor people trying to abuse the asylum procedure and such categorisation has left in legal limbo.<sup>101</sup> To that end, the systematic literature review on the concept ‘economic refugee’ yielded a number of solutions or policy positions to evaluate. These considerations are not a closed list and will be synthesised with the section on the scope of protection under International Human Rights Law, EU asylum law and regional treaties (OAU Convention). The following observations are important:

- the term economic refugee is a negative slur and is exclusionary
- the role of developed countries in displacement leading to economic refugees e.g., US sanctions in Haiti and Venezuela, US occupation and invasion of Afghanistan, Vietnam, Iraq, Libya
- states are constrained financially by the refugee burden
- economic reforms result in substantial unemployment
- the role of developed countries in closing the destitution gap
- role of developmental aid in the Global South requires re-evaluation
- open trade is beneficial if terms are fair
- debt cancellation for countries in the Global South eases migratory pressures
- technology transfer bridge the gap between the Global South and the North
- cutting agricultural subsidies eases cross-border migration
- job creation for developing countries at home e.g., Japanese assembly plants in Thailand

The ultimate observation with regards to the category ‘economic refugees’, is that state practice has fomented their exclusion from international protection. Perhaps what is

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<sup>98</sup> John Best, ‘Refugees Flow into Austria’ *The Sun Times* (Owen Sound, Ontario, Canada, 9 July 1966) 6 <[https://www.newspapers.com/image/727074177/?terms=%22economic refugees%22&match=1](https://www.newspapers.com/image/727074177/?terms=%22economic%20refugees%22&match=1)> accessed 14 March 2023; Greg Ebersole, ‘In Search of Refuge: Fleeing War and Economic Strife , Central Americans Continue to Cross the Border’ *Longview Daily News* (Longview, Washington, 1990) 13 <[https://www.newspapers.com/image/575655385/?terms=%22economic refugees%22&match=1](https://www.newspapers.com/image/575655385/?terms=%22economic%20refugees%22&match=1)> accessed 14 March 2023; George R Hunter, ‘We’re All Invaders’ *The Age* (Melbourne, Victoria, 24 December 2000) 10 <[https://www.newspapers.com/image/126894673/?terms=%22economic refugees%22&match=1](https://www.newspapers.com/image/126894673/?terms=%22economic%20refugees%22&match=1)> accessed 14 March 2023.

<sup>99</sup> Ypi (n 26).

<sup>100</sup> Dyer, ‘Closing the Door on Economic Refugees’ (n 99).

<sup>101</sup> Harris (n 1); Veronika Flegar, ‘Vulnerability and the Principle of Nonrefoulement in the European Court of Human Rights: Towards an Increased Scope of Protection for Persons Fleeing from Extreme Poverty?’ (2016) 8 *Contemporary Readings in Law and Social Justice* 148.

required is a deliberate and accommodating policy by host countries that pushes the boundaries of international refugee law and expands the ambit of protection to ‘other refugees’. The United States was able to provide (for six decades) what Lizette Alvarez surmised as “unparalleled largesse – via laws, orders, regulations and accommodations” in order to provide protection to Cubans fleeing Communism and a life of despondency.<sup>102</sup> Since the granting of international protection for ‘economic refugees’ requires more than political will, it is herein proposed that there must be an acceptable definition of the term ‘economic refugee’. This study proposes the following three propositions as possible acceptable working definitions for the term ‘economic refugee’:

*Proposition 1*

An economic refugee is any person who is outside their country of origin because of a **well-founded fear of political tyranny or repression** that has led to economic failure, political instability, and extreme economic destitution that threatens their life and freedom.

*Proposition 2*

An economic refugee is any person who is outside their country of origin because of **compelling political repression and economic policies** that have led to economic failure, political instability, and extreme economic destitution that threatens their life and freedom.

*Proposition 3*

An economic refugee is any person who is outside their country of origin because of **indissolubly linked socio-economic factors and political tyranny or repression** that has led to economic failure, political instability, **and exceptional economic destitution** that cause them to live in inhuman or degrading conditions threatening their life and freedom.

These propositions are an attempt to move away from the 1951 Geneva Convention refugee definition so as to include those fleeing economic destitution. All the above three proposed working definitions show the following characteristics: (i) an economic refugee can be ‘any person’, (ii) who is outside their country of origin, (iii) as a result of economic destitution, (iv) caused by interconnected socio-economic factors, (v) that are inimical to basic human rights. The three propositions acknowledge that an ‘economic

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<sup>102</sup> Lizette Alvarez, ‘All U.S. Immigrants Deserve What We Cubans Have Gotten’ *Newsday* (New York, New York, USA, 8 January 2023) A21 <<https://www.newspapers.com/image/914076736/?terms=%22economic%22&match=1>> accessed 14 March 2023.

refugee' is any person outside their country of origin on the account of fear of economic destitution that arise due to a number of compelling factors that are not necessarily linked to the Convention grounds (*race, religion, nationality, membership of a particular social group or political opinion*).

Proposition 1 stresses the “well-founded fear of political tyranny or repression”, that results in economic failure, political instability and extreme economic destitution. As shall be discussed in Chapter 5, the case of Eritrea seems to have elements of political tyranny that have filtered into the socio-economic space of that country causing unprecedented cross-border displacement.

Proposition 2 highlights that the test for economic destitution should only be one where there are “compelling” political and socio-economic factors causing cross-border displacement. Perhaps the difficulty with this proposition will be the question: what entails compelling political and socio-economic factors? Guidance in this regard may be inferred from the 1969 OAU Convention’s ground of ‘events seriously disturbing public order’. As shall be discussed in *section 3.6.1.*, Proposition 2 is open to a positivist reading on what may entail ‘compelling’ political and socio-economic factors.

Proposition 3 brings in the phrase ‘exceptional economic destitution’. In light of what has been discussed above about how the United States made deliberate legal steps to offer international protection to Cubans fleeing Communism and its attendant economic policies, Proposition 3 allows receiving states to make their own determinations as to the degree of economic destitution and its impact on life and freedom. In conclusion, the above three propositions will be merged in chapter 4 into a holistic refugee definition that encompasses contemporary displacement factors causing cross border displacement in the new global era.

### **3.5. Scope of protection for economic refugees under human rights law**

This section is divided into two sections. Section 3.5.1 will discuss the principle of non-*refoulement* in relation to ‘economic refugees’ and the probable scope of protection they might have considering that international refugee law does not give them protection. In the next section, the discussion will focus on the scope of protection that may be available for ‘economic refugees’ in terms of the Article 3 of the European Convention on Human Rights (ECHR).

### 3.5.1. The principle of non-refoulement

The principle of non-*refoulement* or prohibition of *refoulement* entails that no-one should be returned to a country where they would likely face torture, cruel, inhuman or degrading treatment or punishment or irreparable harm.<sup>103</sup> The principle applies to any migrant irrespective of their migration status. It also applies to any interception measures at sea which directly or indirectly deny refugees and asylum seekers access to international protection.<sup>104</sup> The principle of non-refoulement is enshrined in binding treaties<sup>105</sup> giving it a status of a *jus cogens* as it has “crystallised into a rule of customary international law”.<sup>106</sup>

Article 7 of the International Covenant on Civil and Political Rights (ICCPR) has also been interpreted as such by the Human Rights Committee in relation to torture and inhuman treatment.<sup>107</sup> The Note on International Protection by the UNHCR further alludes to the fact that the principle is a “cardinal protection” for refugee claimants’ rights “to which no reservations are permitted”.<sup>108</sup> The prohibition to *refoule* applies to all refugee claimants “irrespective of their formal recognition” and this includes asylum seekers whose status has not yet been determined.<sup>109</sup> Therefore the obligation means that States may not do the following to refugee claimants:

rejection at the frontier, interception and indirect *refoulement*, whether of an individual seeking asylum or in situations of mass influx.<sup>110</sup>

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<sup>103</sup> Trevisanut (n 56)

<sup>104</sup> Executive Committee of the High Commissioner’s Programme, *Conclusion on Protection Safeguards in Interception Measures No. 97 (LIV) - 2003*, 10 October 2003, No. 97 (LIV), paragraph (a) (iv) <<https://www.refworld.org/docid/3f93b2894.html>> accessed 2 March 2020.

<sup>105</sup> See the following treaties for the purpose of this discussion: Article 3 of the UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85 <<https://www.refworld.org/docid/3ae6b3a94.html>> accessed 5 April 2020; Article II(3) of the Organization of African Unity (OAU), *Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention")*, 10 September 1969, 1001 U.N.T.S. 45, <<https://www.refworld.org/docid/3ae6b36018.html>> accessed 5 April 2020.

<sup>106</sup> Goodwin-Gill, G. S, and McAdam, J, *The refugee in International law* (3rd end, Oxford 2007) 248.

<sup>107</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, < <https://www.refworld.org/docid/3ae6b3aa0.html>> accessed 4 July 2020 provides that: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”

<sup>108</sup> UN High Commissioner for Refugees (UNHCR), *Note on international protection*, 13 September 2001, A/AC.96/951, available at: <https://www.refworld.org/docid/3bb1c6cc4.html> 6 at [16][accessed 17 March 2023]

<sup>109</sup> *ibid*

<sup>110</sup> *ibid*

The principle of non-refoulement thus allows refugee claimants to have fair and effective procedures to assess their refugee status claims. However, recent State practice also shows that host countries have adopted border externalization as a way of returning refugee claimants to the frontiers or other countries that they deem safe for the claimants. Border externalization refers to a migration strategy in which host countries (mainly in the Global North) “...obstruct or deter the arrival of foreign nationals lacking permission to enter their intended destination country” by sending them back to other countries they have signed a bilateral agreement with. The UNHCR’s Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations in terms of the Geneva Convention, stipulates that such practices are a violation of the principle of non-refoulement.<sup>111</sup> However, this is not necessarily the case when such a country is considered as safe.<sup>112</sup> According to the Advisory Opinion the phrase “in any manner whatsoever” as in Article 33(1) of the Geneva Convention applies not only to the country of origin but any other country where the refugee claimant has reason to fear for their life and freedom.<sup>113</sup> The main emphasis here is that the principle of non-refoulement is not subject to territorial restrictions but actually applies wherever the safe third country has jurisdiction over the refugee claimants.<sup>114</sup>

Having laid the basis of the principle of *non-refoulement*, the next section now looks into the provision of art 3 of the European Convention on Human Rights in light of the ‘economic refugees’. This analysis will incorporate the principle of *non-refoulement* and gauge the probable scope of protection available for ‘economic refugees’.

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<sup>111</sup> UN High Commissioner for Refugees (UNHCR), *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, available at: <https://www.refworld.org/docid/45f17a1a4.html> [accessed 17 March 2023]

<sup>112</sup> In terms of Article 38 of the DIRECTIVE 2013/32/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), provides that Member States may apply the safe third country concept only where the competent authorities are satisfied that a person seeking international protection will be treated in accordance with the following principles in the third country concerned: (a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion; (b) there is no risk of serious harm as defined in Directive 2011/95/EU; (c) the principle of non-refoulement in accordance with the Geneva Convention is respected; (d) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and (e) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention

<sup>113</sup> UN High Commissioner for Refugees (UNHCR) (n 126)

<sup>114</sup> The Geneva Convention does not exclude removal of asylum-seekers to safe third countries. Asylum-seekers unlawfully present in a state can be required to seek protection in another country, but those lawfully present cannot be expelled from its territory (Article 32).



### 3.5.2. Article 3 ECHR - the prohibition of torture and inhuman or degrading treatment

The question for determination in this section is whether economic destitution can amount to “torture or inhuman or degrading treatment or punishment”. Article 3 of the European Convention on Human Rights (ECHR) provides that no one should be “subjected to torture or to inhuman or degrading treatment or punishment”.<sup>115</sup> This has been interpreted as including a “prohibition of refoulement”, and in the context of economic refugees this relates to dire socio-economic circumstances. According to the General Assembly resolution on human rights and extreme poverty, widespread poverty “inhibits the full and effective enjoyment of human rights” and in some instances may “constitute a threat to the right to life.”<sup>116</sup>

Although the type of protection offered by art 3 ECHR is only protection against deportation and not accompanied with residence rights for the claimants, scholars argue that the obligations of art 3 ECHR are absolute and may afford some form of protection in situations of dire economic destitution.<sup>117</sup> It is also trite law that art 3 ECHR guarantees apply irrespective of the inexcusable behaviour of the applicant<sup>118</sup>. At the same time, the art 3 ECHR guarantee is not an entitlement for medical benefits or socio-economic assistance from the host country. For the refugee claimant to call for such exception the “circumstances must be exceptional”.<sup>119</sup> This point will be illuminated in the sub-section on *criterion for possible vulnerability: basic necessities such as food, hygiene and housing* below.

However, it must be noted that the threshold required is high, but this possibly suggests that economic refugees are wrongly stereotyped and there are circumstances that may make their claims be at par with that of Convention refugees. Perhaps the seminal case

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<sup>115</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: <https://www.refworld.org/docid/3ae6b3b04.html> [accessed 19 March 2023]

<sup>116</sup> General Assembly resolution 67/164, *Human rights and extreme poverty*, A/67/164 (20 December 2012), available from <[https://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/RES/67/164](https://ap.ohchr.org/documents/dpage_e.aspx?si=A/RES/67/164)> accessed 28 August 2023

<sup>117</sup> Flegar (n 116); Piekutowska and Kuźewska (n 1).

<sup>118</sup> ECtHR - D. v. The United Kingdom, Application No. 30240/96, 2 May 1997. In *casu*, a drug trafficking conviction was deemed immaterial to the probability of the risk of treatment contrary to art 3 ECHR.

<sup>119</sup> *N. v. The United Kingdom*, Appl. No. 26565/05, Council of Europe: European Court of Human Rights, 27 May 2008, available at: <https://www.refworld.org/cases,ECHR,483d0d542.html>, at para 17 [accessed 19 March 2023]

in the area of socio-economic violations amounting to degrading treatment is that of *M.S.S. v. Belgium and Greece*.<sup>120</sup>

In the case, an Afghan national (M.S.S) entered the EU through Greece, having paid smugglers 12,000 dollars to flee his country of origin. Upon arrival in Greece, he moved on to Belgium after registering in the Eurodac fingerprint database. While in Belgium, the Eurodac system confirmed a hit showing that the applicant had already submitted an application for international protection in Greece, and as such was now in breach of the EU's Dublin II Regulation (Regulation 2003/343/EC).<sup>121</sup> Belgium expelled M.S.S to Greece after his request for interim measures under Rule 39 of the ECtHR's Rules of Court was rejected.<sup>122</sup> In Greece, M.S.S was subjected to degrading treatment and endured conditions of "most extreme poverty" giving rise to a violation of art 3 ECHR. The Court observed that:

He allegedly spent months living in a state of the most extreme poverty, unable to cater for his most basic needs: food, hygiene and a place to live. [...] Such living conditions [...] have attained the level of severity required to fall within the scope of Article 3 of the Convention.<sup>123</sup>

Scholars are of the view that the ECtHR was able to establish that certain living conditions can amount to inhuman or degrading treatment in the context of art 3 ECHR.<sup>124</sup> In *casu*, there were two violations of art 3 ECHR by Greece. The first violation was one for inhuman conditions on the street, that is, inhumane living conditions. The second violation was for inhuman conditions in detention centre. Moreover, Belgium was found liable for sending a person to Greece where such person would be exposed to such inhuman conditions. The fact that the applicant had to endure a life of homelessness in Greece living in the streets searching for food and without sanitation was to the level of severity that is required to trigger the protection of art 3 ECHR.

The Court further distinguished and defined inhuman as compared to degrading and concluded that the conditions in the Greek detention camp to which M.S.S was exposed were of "humiliating nature within the ambit of Article 3 ECHR". The criterion in *M.S.S*

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<sup>120</sup> ECtHR, *M.S.S. v. Belgium and Greece (Judgment)*, (2011) Application No.30696/09 (n 168).

<sup>121</sup> Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national

<sup>122</sup> The ECHR Rule 39 Site < <https://echr.coe.int/Pages/home.aspx?p=rule39> > accessed 22 March 2023.

<sup>123</sup> ECtHR, *M.S.S. v. Belgium and Greece (Judgment)*, (2011) Application No.30696/09 (n 168) para 254 and 263.

<sup>124</sup> Flegar (n 116).

is one of the levels of vulnerability an applicant can use as testimony to the degrading and inhumane treatment. However, we must note that the criterion for poverty in this case was on the basis of life within the European Union's 'detention centre', and this poses the question: When do socioeconomic conditions in the country-of-origin amount to a violation of the principle of non-refoulement? This is important in that in the case of 'economic refugees' most of them will be coming from countries outside the European Union and their status determination is largely done on the account of available country reports. To answer this question, the following sub-section will provide a doctrinal analysis of available jurisprudence on the question.

*(a) Possibility of inhumane treatment*

A mere possibility of inhumane treatment as a result of the uncertain situation in the country of origin, is not in itself a cause to obtain protection of art 3 ECHR. In *Vilvarajah and others v. The United Kingdom*<sup>125</sup>, the Court rejected the argument of five asylum applicants from Sri Lanka of Tamil ethnicity who argued that a return to Sri Lanka will amount to inhumane treatment. The Court acknowledged that the volatile situation in Sri Lanka might not have changed, but this:

“.. does not establish that their personal position was any worse than the generality of other members of the Tamil community or other young male Tamils who were returning to their country.[...] A mere possibility of ill-treatment, however, in such circumstances, is not in itself sufficient to give rise to a breach of Article 3 [ECHR]”<sup>126</sup>

This line of reasoning was also adopted in *Fatgan Katani and Others v. Germany*<sup>127</sup> and this goes to show that the Court takes a holistic approach that goes beyond the personal circumstances of an individual. The circumstances should be such that they are affecting 'everyone' and the government is not in a position to provide protection. In the event that the government has caused destruction of one's business (as in *Vilvarajah and others v. The United Kingdom*) while in pursuit of the extremists or terrorists, this is viewed as normal army's general activities aimed at establishing law and order.

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<sup>125</sup> European Court of Human Rights, *Vilvarajah and others v. The United Kingdom*, Application Nos. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, 30 October 1991

<sup>126</sup> *ibid* para 111

<sup>127</sup> *Fatgan Katani and Others v. Germany* (dec.), no. 67679/01, 31 May 2001)

*(b) Objective updated sources on country of origin*

The objective facts relating to the country of origin are determined by the ECtHR. If the sources of information available to the ECtHR describe only a general situation, the concrete allegations made by the applicant must then be supported by other evidence. In *Y. v. Russia*, the ECtHR observed that for information on the “general situation” in a particular country, credence is given to “reports from independent international human-rights-protection associations such as Amnesty International, or governmental sources, including the US State Department.”<sup>128</sup> Further, in *Mamatkulov and Askarov v. Turkey*, the ECtHR asked for corroboration by other evidence to prove stated allegations describing a general situation in the country of origin. Reports from Amnesty International on the ill-treatment and torture of the banned Islamist opposition parties by the Uzbekistan’s officials were deemed insufficient to corroborate the applicant’s allegations.<sup>129</sup>

The problem here is that there may be cases of institutional bias from the institution handling the application and this may disadvantage the applicant. It must be noted that methodological nationalism impacts information dissemination and analysis in the field of migration. Methodological nationalism “assumes that the nation-state provides the relevant unit of analysis and the categories for understanding social phenomena”.<sup>130</sup> It might be difficult to accept a unit of analysis coming from a country that has directly or indirectly contributed to the displacement. Critical scholarship suggests that some countries in the West are equally responsible for the displacement in countries like Afghanistan, Iraq and Libya.<sup>131</sup> It then questions the RSD procedures when the ECtHR has made a pronouncement on the risk of art 3 ECHR. Alternatively, the applicant may submit evidence to the contrary of that provided by the RSDOs and in the light of methodological nationalism one may still have a negative decision on the submitted application.

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<sup>128</sup> *Y v. Russia*, Appl. no. 20113/07, Council of Europe: European Court of Human Rights, 4 December 2008, available at: <https://www.refworld.org/cases,ECHR,493e39922.html> , para 79 [accessed 19 March 2023]. See also: *Mamatkulov and Askarov v. Turkey*, 46827/99 and 46951/99, Council of Europe: European Court of Human Rights, 4 February 2005, available at: <https://www.refworld.org/cases,ECHR,42d3ef174.html> , at para 73 [accessed 19 March 2023]

<sup>129</sup> *Mamatkulov and Askarov* (n 143)

<sup>130</sup> Speranta Dumitru, ‘The Ethics of Immigration: How Biased Is the Field?’ (2023) 11 *Migration Studies* 1, 1 <<https://academic.oup.com/migration/article/11/1/1/6967439>> accessed 19 March 2023.

<sup>131</sup> leoni Connah, ‘US Intervention In Afghanistan: Justifying The Unjustifiable?’ (2021) 41 *South Asia Research* 70 <<https://journals.sagepub.com/doi/pdf/10.1177/0262728020964609>> accessed 19 March 2023.

*(c) The absolute nature of art 3 ECHR prohibition*

As for cases where the behaviour of the applicant is reprehensible and unreliable, the Court gives credence to the absolute nature of *art 3 ECHR*.<sup>132</sup> In *Saadi v Italy*, the Court took into consideration all the objective facts in relation to the allegations against the applicant. *In casu*, the applicant had served a sentence in Italy on the charge of criminal conspiracy and faced deportation to Tunisia. Having regard with all the objective facts on the ground the Court found that deportation of the applicant would constitute a violation of *art 3 ECHR*.

The same approach was adopted in *N. v. Finland*. The applicant from the Democratic Republic of Congo, had given questionable facts about his role in perpetuating atrocities while serving for the then President Mobutu Sese Seko Kuku Ngbendu Wa Za Banga, (Mobutu Sese Seko). In both cases, the prospects that the applicants (despite questionable unlawful behaviour) posed serious threat to the host community did not diminish in any way the probable risk they would face if deported to Tunisia or the DRC. Therefore, protection against the country of origin cannot be weighed against the interests of the community as whole, because the (bad) behaviour of the person is irrelevant.<sup>133</sup>

*(d) Hardship and Discrimination*

A claim based on hardship and discrimination, according to the Court, should surpass or match the threshold in *Cyprus v. Turkey*.<sup>134</sup> The Court observed that the discriminatory treatment should be one that results in loss of ownership rights, loss of property, severe restriction of movement, eradication of language, censorship, and intrusion into family and private life as experienced by the Greek-Cypriots and the Turkish Cypriot Gypsies when Turkey conducted a military operation and occupied the northern part of Cyprus in 1974.<sup>135</sup>

The case of *Tomic v. The United Kingdom*, is illustrative of what is not sufficient to prove hardship and discrimination.<sup>136</sup> The applicant irregularly entered the United Kingdom.

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<sup>132</sup> *Saadi v Italy*, Application No. 37201/06 [2008] ECtHR; *N. v. Finland*, 38885/02, Council of Europe: European Court of Human Rights, 26 July 2005, available at: <https://www.refworld.org/cases,ECHR,437dcf4ea.html> [accessed 19 March 2023]

<sup>133</sup> *Saadi v Italy paras 137-149*

<sup>134</sup> ECtHR - *Cyprus v. Turkey*, Application no. 25781/94, 10 May 2001

<sup>135</sup> *ibid*

<sup>136</sup> *Tomic v. The United Kingdom*, 17837/03, Council of Europe: European Court of Human Rights, 14 October 2003, available at: <https://www.refworld.org/cases,ECHR,402b53f04.html> [accessed 19 March 2023]

The asylum application was rejected on the grounds that there was no longer a risk for the applicant to return to Croatia. Among others, the applicant claimed that he will face hardship, discrimination and retributive action since he was once military officer with the Serb paramilitary. The Court rejected his argument and stated that for the applicant to prove entitlement to art 3 ECHR, general hardship is not sufficient for granting the application.<sup>137</sup>

*(e) Criterion for possible vulnerability to medical care*

In this section, focus will be on the application of art 3 ECHR in cases concerning the medical situation of the applicant. The case of *D. v. UK* is illustrative of dire economic circumstances affecting both the country of origin and the applicant.<sup>138</sup> The case concerned a convicted drug dealer dying of HIV-AIDS and facing deportation to St Kitts from the UK. Deportation meant that the applicant will not have access to proper medical treatment, financial resources, accommodation, family and provision of basic necessities in St Kitts. The Court acknowledged that the general poverty in St Kitts is in itself not a breach of art 3 ECHR, but the possibility of the applicant dying in destitution and squalor is. The Court argued that:

[...] any medical treatment which he might hope to receive there could not contend with the infections which he may possibly contract on account of his lack of shelter and of a proper diet as well as exposure to the health and sanitation problems which beset the population of St Kitts.<sup>139</sup>

The “very exceptional circumstances” in this case were held to be the applicant’s critical stage of his fatal illness. This according to the Court would hasten his death and cause mental anguish. However, in *N. v. The United Kingdom*, the Court took a different approach.<sup>140</sup> The case concerned the deportation of a Ugandan HIV-positive asylum applicant who claimed that removal from the UK to Uganda will reduce her lifespan because of limited treatment facilities and poverty in country of origin. The Court held that the alleged future harm will not be resulting from the intention or omission of state authorities in Uganda, but from a naturally occurring illness and a lack of sufficient resources in Uganda. Therefore, neither the applicant’s illness nor the inferior medical

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<sup>137</sup> *ibid* pg. 10, para 1

<sup>138</sup> ECtHR - *D. v. The United Kingdom*, Application No. 30240/96, 2 May 1997

<sup>139</sup> *ibid* para 52

<sup>140</sup> *N. v. The United Kingdom*, Appl. No. 26565/05, Council of Europe: European Court of Human Rights, 27 May 2008, available at: <https://www.refworld.org/cases,ECHR,483d0d542.html> [accessed 19 March 2023]

facilities were caused by any act or omission by the Ugandan public officials or rebel groups.<sup>141</sup> In the eyes of the Court, humanitarian conditions would only reach the Article 3 ECHR threshold if they are “very exceptional” and “compelling”.<sup>142</sup>

This line of reasoning has been questioned and viewed as exclusionary.<sup>143</sup> The dissenting opinion questions the validity of the argument that finding a breach of Article 3, “would open up the floodgates to medical immigration” thus making Europe “vulnerable to becoming the “sickbay” of the world.”<sup>144</sup> This puts to test the “very exceptional circumstances” laid in *D. v. UK*. It can be argued that the Ugandan applicant and the one for St. Kitts all shared the same fate. Perhaps the question for determination should have centred on the living conditions in both countries. However, as has been observed by critics, when it comes to non-conventional refugees, the key issue is always of numbers and the sovereign right of States to control who comes into their territories.<sup>145</sup>

This line of case law was a bit “softened” in *Paposhvili v Belgium*.<sup>146</sup> The ECtHR unanimously found that an inhuman situation emanating from illness and destitution (resource shortages) from the country of origin, can constitute grounds to find a violation of art 3 ECHR.<sup>147</sup> In *casu*, the applicant was a Georgian national living in Belgium where he committed crimes and had received a prison sentence. The Belgian authorities wanted to deport him to Georgia. However, in the year 2006, he was diagnosed with life-threatening cancer that required bone marrow transplant. He claimed that deportation to Georgia would put him to the risk of inhuman treatment and reduced life expectancy due to the withdrawal of medication he was receiving in Belgium. Mr. Paposhvili died in 2016 before the case could be heard by the Grand Chamber. The Court did not strike the case off the roll, and held that Belgium would have violated *art 3* ECHR had it expelled the applicant to Georgia without full assessment of the risk he would face in the country of origin. The importance of *Paposhvili* is that it softens the standards set in *N v UK* and *D v UK*. *Paposhvili* establishes that “other very exceptional cases” which might

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<sup>141</sup> *ibid*

<sup>142</sup> *ibid*

<sup>143</sup> Virginia Mantouvalou, ‘N v UK: No Duty to Rescue the Nearby Needy?’ (2009) 72 *The Modern Law Review* 815 <<https://www.jstor.org/stable/27755206>> accessed 19 March 2023.

<sup>144</sup> *N. v. The United Kingdom* as per joint dissenting opinion of Judges Tulkens, Bonello and Spielmann, para 8.

<sup>145</sup> Dyer, ‘Rejecting Economic Refugees’ (n 83); Lawlor and Tolley (n 67).

<sup>146</sup> *Paposhvili v. Belgium*, Application no. 41738/10, Council of Europe: European Court of Human Rights, 13 December 2016, available at: <https://www.refworld.org/cases,ECHR,5859459b4.html> [accessed 20 August 2023]

<sup>147</sup> Lourdes Peroni, ‘*Paposhvili v. Belgium*: Memorable Grand Chamber Judgment Reshapes Article 3 Case Law on Expulsion of Seriously Ill Persons’, (15 December 2016) Strasbourg Observers <<https://strasbourgobservers.com/2016/12/15/paposhvili-v-belgium-memorable-grand-chamber-judgment-reshapes-article-3-case-law-on-expulsion-of-seriously-ill-persons/>> accessed 20 August 2023

raise an issue under art 3 ECHR should be understood to refer to situations involving the removal of a seriously ill person in which substantial grounds had been shown for believing that such a person, although not at imminent risk of dying, would face a real risk violating art 3 ECHR. The real risk is determined on the account of the absence of appropriate treatment in the country of origin or receiving country. The lack of access to such treatment will expose the applicant to a serious, rapid and irreversible decline in *their* state of health resulting in intense suffering or to a significant reduction in life expectancy. These situations corresponded to a high threshold for the application of Article 3 of the Convention in cases concerning the removal of aliens suffering from serious illness. So *Paposhvili* grants protection not only when there is imminent risk of dying, but also if there is "rapid and irreversible decline in health".<sup>148</sup>

(f) *Severe humanitarian conditions*

The *Sufi and Elmi v. United Kingdom* case perhaps provides a new direction that may help non-conventional refugee claimants on the grounds of severe humanitarian conditions.<sup>149</sup> The case considered whether the applicants would be at risk of ill-treatment on account of severe humanitarian conditions in refugee camps in southern and central Somalia. The court adopted the approach in *M.S.S. v. Belgium and Greece*, that considered the following criterion: ability to cater for basic needs such as food, hygiene and shelter, the threshold vulnerability to ill-treatment, and the chances of improving one's situation within a reasonable time-frame.<sup>150</sup> The Court considered both the political and socio-economic factors and noted that the conditions were "sufficiently dire to amount to treatment reaching the threshold of Article 3 of the Convention."<sup>151</sup> The Court summarised the situation as follows:

[..] Internally Displaced Persons 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. Finally, the

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<sup>148</sup> *Paposhvili* (n 161) para 183

<sup>149</sup> *Sufi and Elmi v. United Kingdom*, Applications nos. 8319/07 and 11449/07, Council of Europe: European Court of Human Rights, 28 June 2011, available at: <https://www.refworld.org/cases,ECHR,4e09d29d2.html> [accessed 19 March 2023]

<sup>150</sup> *M.S.S. v. Belgium and Greece* at para 282-283.

<sup>151</sup> *Sufi and Elmi v. the United Kingdom* at para 291



Court notes that the inhabitants of *both camps have very little prospect of their situation improving within a reasonable timeframe*.<sup>152</sup> (*My emphasis*)

In coming to a unanimous decision barring deportation of the applicants, the Court took a balanced approach that took into cognisance both political and socio-economic conditions as in *M.S.S.* It considered whether the warring parties to the conflict were using warfare tactics aimed at increasing civilian casualties. It also took into account the impact of localised or widespread conflict and took a body count of the civilian casualties. It is herein argued that the above approach should also have been adopted in *S.H.H. v. The United Kingdom*.<sup>153</sup>

In this case, a disabled person claimed that the living conditions in Afghanistan will constitute a violation of Article 3 ECHR. However, the court took the approach in *N. v. UK* and gave the following reasons for refusing to grant an order against deportation. First, the applicant's disability was considered as not "naturally" occurring illness. Secondly, the living conditions in Afghanistan (a non-Contracting State) cannot be questioned using the ECHR as this will amount to imposition of the ECHR on non-Contracting States. Thirdly, Afghanistan has a central government despite ongoing conflict, and lastly the applicant has family members who can assist him. While the second reason on imposing the ECHR is arguably valid, despite *Sufi and Elmi's* assessment of living conditions in a non-contracting state, the objective facts about Afghanistan seem to fall into the category of methodological nationalism.<sup>154</sup> Comparing Somalia and Afghanistan using the approach in *Sufi and Elmi v. the United Kingdom*, might possibly result in the same grim conclusion that the living conditions in Afghanistan might be dire despite a central government and a few "safe cities". This arguably questions the benchmark of what constitute 'exceptional circumstances' and the definition of 'extreme poverty'. These issues will be revisited in chapter 5 of this study when specific challenges in Eritrea and Uganda will be analysed in relation to this doctrinal analysis.

In conclusion, human rights law provides some protection for persons fleeing economic destitution. In section 3.5. 1., the principle of non-*refoulement* was shown to entail prohibition of returning any migrant (irrespective of their migration status) to a country where they would likely face torture, cruel, inhuman or degrading treatment or punishment or irreparable harm.<sup>155</sup>

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<sup>152</sup> *ibid*

<sup>153</sup> *S.H.H. v. The United Kingdom*, Application no. 60367/10, Council of Europe: European Court of Human Rights, 29 January 2013, available at: <https://www.refworld.org/cases,ECHR,5113bb4f2.html> [accessed 19 March 2023]

<sup>154</sup> Dumitru (n 145).

<sup>155</sup> Trevisanut (n 56)

This principle is also read into art 3 ECHR, and through the ECtHR body of case-law this provision has become a “strong safeguard against any kind of forced removal of persons who fear that they will be tortured or ill-treated if returned to their home countries”.<sup>156</sup> While art 3 ECHR only provides protection against deportation and not a right to residence, the reasoning in *Paposhvili* provides two key standpoints. The first one relates to the previous cases of *N v UK*, and *D v UK* about seeking medical care. In this first instance, focus has largely been on the assessment of the risk of sending ‘seriously ill persons’ to their countries of origin. Emphasis had been on the fact that the illness is naturally occurring and has nothing to do with a lack of resources in the country of origin.

However, *Paposhvili*, brings in the second standpoint of lack of resources in the country of origin. To understand the lack of resources in the country of origin, a holistic approach has to be taken that evaluates the country’s political, social and economic space. *Paposhvili* was also about the access by the specific applicant to “sufficient” and “appropriate” care. Such care may depend (amongst others) on the applicant’s family network, and distance to the medical treatment. Such an analysis, as discussed in *section 3.4.*, will lead to a determination of the availability of resources in the said country and be compared with the risk of violating art 3 ECHR. Perhaps the sticking challenge remains on the interpretation of what entails ‘compelling’ circumstances for every country. This is when methodological nationalism is factored in and how this may lead to a different interpretation of what entails ‘compelling’ political and socio-economic factors.

### 3.6. Evaluation of regional systems and scope of protection

Proposals to revise the 1951 Geneva Convention’s refugee definition stem from the observation that it arguably excludes, among others, people fleeing war, famine, environmental disasters and those displaced by inextricably interconnected political and socio-economic factors.<sup>157</sup> The

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<sup>156</sup> David Weissbrodt and Isabel Hortreiter, ‘The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties’, 5 BUFF. HUM. RTS. L. REV. 1 (1999), available at <[https://scholarship.law.umn.edu/faculty\\_articles/362](https://scholarship.law.umn.edu/faculty_articles/362)> accessed 29 August 2023.

<sup>157</sup> Kukathas (n 21); Tamara Wood, ‘Who Is a Refugee in Africa? A Principled Framework for Interpreting and Applying Africa’s Expanded Refugee Definition’ (2019) 31 International Journal of Refugee Law 290 <<https://academic.oup.com/ijrl/article/31/2-3/290/5575967>> accessed 8 March 2021; Thomas Alexander Aleinikoff and Leah Zamore, ‘The Arc of Protection: Toward a New International Refugee Regime’ (*Public Seminar Books*, 2019) 1 <<https://www.publicseminar.org/wp-content/uploads/2018/06/Click-here-to-download-the-Arc-of-Protection.pdf>> accessed 20 May 2020; Tiyanjana Maluwa and Anton SC Katz, ‘Who Is a Refugee?: Twenty-Five Years of Domestic Implementation and Judicial Interpretation of the 1969 OAU and 1951 UN Refugee Conventions in Post-Apartheid South Africa’ (2020) 27 Indiana Journal Of Global Legal Studies 129 <[https://elibrary.law.psu.edu/fac\\_works](https://elibrary.law.psu.edu/fac_works)> accessed 12 March 2023.

Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention)<sup>158</sup> is thus viewed as an innovative and pragmatic refugee protection framework offering protection to those fleeing multi-faceted persecution.<sup>159</sup> Ratified by 46 of the 55 member states of the African Union, and incorporated in national law of 35 countries, the ‘progressive’ treaty has interpretation and implementation challenges.<sup>160</sup> Although it is stated that the OAU Convention introduces a progressive approach, its impact on the regional practice has been limited.<sup>161</sup> On the other hand, the evolution of the Common European Asylum System (CEAS) in the European Union is a manifestation of the dynamic nature of the global migration flows.

During a training seminar on the *European Union Advocacy on Asylum and Migration* organised by ECRE and the UNHCR in Brussels, in early November of 2021, we grappled with the discussion on how the EU bloc has constantly realigned the Common European Asylum System (CEAS) through directives, and regulations in response to the ever-growing human mobility. The discussion also centred on how some EU Member States have wilfully gone against the legislative instruments by insisting on exercising their sovereign right as to who should enter their territories. One constant feature in these changes is the acknowledgment that the EU has become an area of protection for people fleeing all forms of harms and persecution.

The discussion on the evaluation of regional systems (AU and the EU) will proceed as follows. Section 3.6.1., on the African Union is divided into two parts, *viz*, theoretical background and the practical implications. The first part will examine the refugee definition as provided in the 1969 OAU Convention.<sup>162</sup> Afterwards, the refugee definition of the 1969 OAU Convention will be analysed in detail with a particular focus on its novelty in expanding the 1951 Refugee Convention's refugee definition. This section will then end with an appraisal of the practical implications of the OAU definition on the protection of economic refugees. Section 3.6.2., will

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<sup>158</sup> Convention Governing the Specific Aspects of Refugee Problems in Africa 1969 (1001 UNTS 45, No 14691) (entered into force on 20 June 1974).

<sup>159</sup> Wood (n 172); Marina Sharpe, ‘The 1969 African Refugee Convention: Innovations, Misconceptions, and Omissions’ (2013) 58 McGill Law Journal 95.

<sup>160</sup> Kukathas (n 21) 255; African Union, ‘Status List: OAU Convention Governing The Specific Aspects of Refugee Problems in Africa’ (*African Union*, 2023) <<https://au.int/en/treaties/1162>> accessed 20 March 2023. As of 16 May 2019, the following countries have neither accede nor ratify the OAU Convention: Sao Tome Principe, Somalia, Sahrawi Arab Democratic Republic, Namibia, Mauritius, Morocco, Madagascar, Eritrea and Djibouti.

<sup>161</sup> Adrienne Millbank, ‘The Problem with the 1951 Refugee Convention – Parliament of Australia’ (*Social Policy Group*, 2000).

<sup>162</sup> Marina Sharpe, *The Regional Law of Refugee Protection in Africa*, vol 1 (Oxford University Press 2018) 33.

discuss the EU asylum acquis (without delving into the historical analysis thereof). This section will give an overview of the CEAS and critically examine Article 2(d) of the Qualification Directive (QD), so as to examine the scope of protection available for would-be-labelled 'economic refugees'.<sup>163</sup> Article 2(d) provides the definition for the term refugee.

### **3.6.1. The African Union: the dynamics of the expanded OAU refugee definition**

As discussed in the introduction and the beginning of chapter 3, the 1951 Refugee Convention defines a refugee as a person who is outside the country of their nationality due to a "...well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion..." and because of this fear, the person is unable or unwilling to avail *themselves* of the protection of that country. This definition has also been adopted by the 1969 OAU Convention and the Cartagena Declaration.<sup>164</sup> For the purpose of the study, the Cartagena Declaration will not be discussed.

However, the 1951 Convention is seen as insufficient for refugee crises specific to Africa.<sup>165</sup> As argued earlier on, it is exclusionary of people who arguably are in need of international protection just like the Convention refugees. The exclusion of protection to refugees emanating from specific political instabilities in Africa required the African Union to address these issues through the OAU Convention.<sup>166</sup> While the 1951 Convention had its origins in the Second World War, the drafting of the OAU Convention in 1964 was against the backdrop of colonialism and minority rule.<sup>167</sup> Most Africans were fleeing conflict associated with the liberation struggle and were heading to countries that had just gained independence.<sup>168</sup> So, the OAU Convention was enacted on the premise that there would be no refugees after independence or internally displaced persons (IDPs), therefore, the OAU Convention was embraced as an act of solidarity and humanitarian approach to those fleeing war.<sup>169</sup> This led to

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<sup>163</sup> Directive 2011/95/Eu Of The European Parliament and of The Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)

<sup>164</sup> Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama para III (3).

<sup>165</sup> Sharpe (n 177).

<sup>166</sup> George Okoth-Obbo, 'Thirty Years On: A Legal Review Of The 1969 Oau Refugee Convention Governing The Specific Aspects Of Refugee Problems In Africa' (2001) 20 Refugee Survey Quarterly 79 <<https://www.jstor.org/stable/45053353>>.

<sup>167</sup> JOM Okello, 'The 1969 OAU Convention and the Continuing Challenge for the African Union' (2014) 48 Forced Migration Review 70, 70; TT Abebe, A Abebe and M Sharpe, 'The 1969 OAU Refugee Convention at 50' (*Institute for Security Studies*, 2019).

<sup>168</sup> Okello (n 182).

<sup>169</sup> Kukathas (n 21) 255–56; Okello (n 182) 70–71.

the expanded definition of the term refugee. In addition to ‘Convention refugees’, a person is also a refugee when :

[...] owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.<sup>170</sup>

The expanded definition is viewed pragmatic for its extension of the arc of protection to those fleeing widespread and indiscriminate forms of harm.<sup>171</sup> After the formulation of the definition, it is observed that large influxes of refugees and asylum seekers were witnessed on the African continent.<sup>172</sup> The persecution and displacement of these refugees and asylum seekers were premised mainly on other grounds than those stated in the definition in the Geneva Convention.<sup>173</sup> Arguably, the refugee claimants were fleeing interconnected factors of displacement ranging from economic hardships, grim poverty, political instabilities, and natural disasters.<sup>174</sup> They may arguably fall under the scope of the definition of the OAU Convention; however, due to its vagueness, this is not certain. The OAU Convention status as a regional complement, requires a full examination of the scope of protection it offers to the displaced persons.

### **(a) Analysis of the 1969 OAU Convention’s Refugee Definition**

#### *(i) Every person*

A person can only receive protection from the OAU Convention (and thus fall under the scope of the definition) so long as *they* remain under the jurisdiction of a member state.<sup>175</sup> Some states take the view that the definition only applies to Africans due to the fact that the OAU Convention's objective is to meet the specific needs of African refugees.<sup>176</sup> Rankin argues, on

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<sup>170</sup> The OAU Convention Article 1(2).

<sup>171</sup> Wood (n 172).

<sup>172</sup> UNHCR, ‘Persons Covered by the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and by the Cartagena Declaration on Refugees (Submitted by the African Group and the Latin American Group)’ (1992).

<sup>173</sup> M Addaney, AO Jegede and M Matinda, ‘The Protection of Climate Refugees under the African Human Rights System: Proposing a Value-Driven Approach’ (2019) 3 African Human Rights Yearbook 242, 242; UNHCR, ‘Persons Covered by the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and by the Cartagena Declaration on Refugees (Submitted by the African Group and the Latin American Group)’.

<sup>174</sup> Addaney, Jegede and Matinda (n 188).

<sup>175</sup> UNHCR, ‘Persons Covered by the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and by the Cartagena Declaration on Refugees (Submitted by the African Group and the Latin American Group)’.

<sup>176</sup> Micah Bond Rankin, *Extending the Limits or Narrowing the Scope? Deconstructing the OAU Refugee Definition Thirty Years On* (UNHCR 2005) 12.

the other hand, that from the meaning of "every person", one cannot suggest that it should be read as "every African".<sup>177</sup> Furthermore, the draft history does not indicate this intention.<sup>178</sup>

The extended definition is said to have been drafted with an intention to create a *prima facie* group definition.<sup>179</sup> *Prima facie* determinations are done in situations that covers large scale movements of people, meaning that the group approach is often quite reasonable as all the claims are similar.<sup>180</sup> Nevertheless, the fact that the definition is well suited to group situations does not mean that it was intended to be applied to groups.<sup>181</sup> Furthermore, there is no mention of group status determination in the OAU Convention's draft history.<sup>182</sup>

### *(ii) External aggression*

There is no universally accepted definition of "aggression" in international law.<sup>183</sup> The most widely agreed definition is given by the UN General Assembly.<sup>184</sup> Others state that the definition can be derived from, amongst others, the 1998 Statute of the International Criminal Court or the resolutions of the UN Security Council.<sup>185</sup> The latter does, however, not provide a clear definition of aggression.<sup>186</sup>

### *(iii) Occupation*

The term "occupation" can, *inter alia*, be interpreted by two sources of international humanitarian law.<sup>187</sup> The definition of the Hague Convention provides a much higher threshold of the authority of the occupying State, and this authority must be enforceable in the total territory.<sup>188</sup> The four Geneva Conventions<sup>189</sup> definitions are less strict than the Hague

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<sup>177</sup> Rankin (n 191).

<sup>178</sup> *ibid.*

<sup>179</sup> *ibid.*

<sup>180</sup> *ibid.*

<sup>181</sup> *ibid.*

<sup>182</sup> *ibid.*

<sup>183</sup> Alice Edwards, 'Refugee Status Determination in Africa' (2006) 14 African Journal of International and Comparative Law 204, 213.

<sup>184</sup> "The use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this definition" GA Res. 3314 (XXIX) Definition of Aggression; Rankin (n 191).

<sup>185</sup> Rankin (n 191) 14; Edwards, (n 198) 213; Article 8bis of the Rome Statute.

<sup>186</sup> Edwards (n 198).

<sup>187</sup> Rankin (n 191).

<sup>188</sup> Rankin (n 191) 15; Article 42 (1-2) of the 1907 Hague Regulations concerning the Laws and Customs of War on Land.

<sup>189</sup> Pictet Jean, and International Committee Of The Red Cross, 'The Geneva Conventions of 12 August/commentary', Geneva: International Committee of the Red Cross, to 1960, 1952 <<https://www.loc.gov/item/2011525351/>> accessed 20 August 2023.

Convention since they constitutes a lower level of authority within a part or in the entire territory.<sup>190</sup>

*(iv) Foreign domination*

"Foreign domination" does not have a legal explanation. However, the literature states that it refers to a factual situation in which a foreign power dominates or controls the territory of another State.<sup>191</sup> It is assumed to be included as a reference to colonialism because the events "occupation" and "aggression" would not capture it.<sup>192</sup>

*(v) Events seriously disturbing public order*

There is a debate on whether the "events" should come from within the State or outside the State. Edwards argues that the interpretative rule, in which the meaning of words in law are to be interpreted in the context of surrounding words (namely external aggression, occupation or foreign domination), may apply.<sup>193</sup> The shared characteristic of these three grounds is their international character, so only international events could constitute a disturbance.<sup>194</sup> However, Edwards also states that there is no explicit language in Article 1(2) of the OAU Convention to suggest that the disruption needs to arise from outside the territory.<sup>195</sup> The word "seriously" indicates that the event must cause severe harm.<sup>196</sup> The use of the plural term "events" further indicates the drafters intended more than one event which causes this harm.<sup>197</sup>

*(vi) Either a part or the whole country*

Asylum seekers are not required to seek protection elsewhere in their country of origin before fleeing to another country due to this clause.<sup>198</sup> In other words, there is no requirement to seek an internal flight alternative in their own country.<sup>199</sup> This is quite an important difference with the EU asylum acquis to be discussed in section 3.6.2. In fact, the concept of internal flight

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<sup>190</sup> *ibid.*

<sup>191</sup> Edwards (n 198).

<sup>192</sup> Rankin (n 191) 15–16; In a colonial state, the colonial government has the sovereignty, whereas in a situation of occupation the occupied territory still enjoys its sovereignty. There is neither a situation of aggression if the territory is conquered and under the sovereignty of another country.

<sup>193</sup> Edwards (n 198).

<sup>194</sup> *ibid.*

<sup>195</sup> *ibid.*

<sup>196</sup> Rankin (n 191).

<sup>197</sup> Edwards (n 198).

<sup>198</sup> *ibid.*

<sup>199</sup> Wood (n 172).

alternative is borne out of State practice and is also not explicitly stated in the Geneva Convention and its Protocol.<sup>200</sup>

*(vii) Compelled to*

The afore-mentioned events require a person to leave their place of habitual residence. An objective nexus between the event and the request for international protection is obligated.<sup>201</sup>

*(viii) In order to seek refuge in another place outside his country of origin or nationality*

The person must leave their country and seek international protection in a member state of the OAU Convention. As a result, there is a need for crossing borders, and so internally displaced people will not fall under the definition.<sup>202</sup>

**(b) The OAU Convention and socio-economic circumstances**

The analysis of the above eight elements of the OAU Convention's refugee definition begs the question: to what extent are dire socio-economic circumstances protected by the OAU Convention? As stated in the previous section, the OAU Convention is ratified by 46 member states of the African Union<sup>203</sup>, making it one of the continent's most widely ratified regional instruments.<sup>204</sup> However, 'refugee-producing countries' countries like Eritrea and Somalia are not part of the Convention.<sup>205</sup> This lack of a unified approach of African States in ratifying the 1969 OAU Convention has been attributed to the lack of political will to address the displacement of refugees in the region, and perhaps by extension, an acknowledgement that the Convention does not guarantee refugee rights in Africa.<sup>206</sup> This has negatively impacted on refugee protection, and in the case of new refugee categories like 'economic refugees', it can be argued that there are no guarantees that the expanded refugee definition may offer some

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<sup>200</sup> UN High Commissioner for Refugees (UNHCR), 'Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees' (2003) <<https://www.refworld.org/docid/3f2791a44.html>> accessed 9 March 2021.

<sup>201</sup> Sharpe (n 177).

<sup>202</sup> Internal displaced people can fall under the scope of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa of 2009.

<sup>203</sup> As of 16 May 2019, the following nine countries have not ratified the OAU Convention: Djibouti, Eritrea, Madagascar, Morocco, Mauritius, Namibia, Sahrawi Arab Democratic Republic, Somalia and Sao-Tome Principe.

<sup>204</sup> Abebe, Abebe and Sharpe (n 182).

<sup>205</sup> Tekle Mariam Woldemikael and others, *Postliberation Eritrea* (Tekle Mariam Woldemikael ed, Indiana University Press 2018).

<sup>206</sup> Phillip Apuuli Kasaija, 'The African Union (AU), the Libya Crisis and the Notion of "African Solutions to African Problems"' (2013) 31 *Journal of Contemporary African Studies* 117 <<https://www.tandfonline.com/doi/abs/10.1080/02589001.2012.761463>> accessed 11 July 2020.



form of protection. The lack of a unified approach in ratification is possibly tied to the RSD procedures that are carried out in light of large-scale cross-border displacement.

The hallmark of the OAU Convention is the *prima facie* determinations. Rankin argues that while the aspect of *prima facie* determination seems to be effective in large scale displacement, in the context of the OAU Convention this does not guarantee durable protection.<sup>207</sup> He is of the view that the OAU Convention arguably gives “fewer rights to more refugees”, in comparison to the 1951 Convention that has broad guarantees to the individually recognised refugee claimants.<sup>208</sup> Probably this explains why asylum seekers from Africa seek international protection in the European Union. In the context of economic refugees in Africa, their cross-border movements may then be explained in terms of lack of resources in both the country of origin and the host country. This dimension is explored further in chapter 6 through the Rwamwanja refugee settlement case study.

Furthermore, the extended definition has only been incorporated into domestic legislation of 35 of 46 African states, and it only has a direct effect in six more states.<sup>209</sup> While it may seem that the Convention is not applicable in just 5 of the 46 countries, the implication is that there is no consensus in the region. According to Marcia Schenck, the implementation challenges are stacked up on the gap regarding the supervision of the treaty among member states and the adoption of the treaty into its national laws entirely.<sup>210</sup> The failure to codify refugee protection, spurred by lack of political will, across the continent has thus led to the rudimentary implementation of the OAU Convention across the region. Thus, the Convention has less impact on the continent than the 1951 Refugee Convention.<sup>211</sup> In the context of economic refugees this undermines the scope of protection that can be granted to such new categories. This is because if the 1951 Convention is deemed to have better impact than the OAU Convention that has an expanded refugee definition, then the RSD determinations will be done on the template of the 1951 Convention grounds. This limits the scope of protection for economic refugees and constricts chances of international protection.

Perhaps the protection against dire socio-economic circumstances can be analysed from the perspective of the phrase “disturbing public order”. The OAU Convention is lauded for

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<sup>207</sup> *ibid*

<sup>208</sup> *ibid* 13

<sup>209</sup> Wood (n 172).

<sup>210</sup> Marcia C Schenck, ‘Africa’s Forgotten Refugee Convention’ [2020] *Africa Is a Country* <<https://africasacountry.com/2020/11/africas-forgotten-refugee-convention>> accessed 20 March 2023.

<sup>211</sup> *ibid*.

expanding the 1951 refugee definition by including other forms of harm such as “external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality”.<sup>212</sup> I have indicated in the introduction of this study that this opens wide the discussion of what entails ‘events seriously disturbing public order’. What could be an event that can disturb public order within Africa, certainly the list is endless. Rankin, for instance, argues that public order can be disturbed if the core set of human rights (from which no derogation is permitted) are violated on a sufficiently broad scale.<sup>213</sup> Rwaleimera argues that only “*man-made* conditions” can cause this disturbance, while others maintain the view that climate change can also cause such a disturbance.<sup>214</sup> The legal basis for either of the interpretations remains nevertheless unclear.<sup>215</sup>

Furthermore, there is a debate as to whether the clause “in part or the whole of the territory” applies to each of the refugee generating events or only to the last one (disturbing public order).<sup>216</sup> If one takes a literal interpretation of the provision, the omission of a comma between this phrase and the last ground indicates that it should attach only to the latter.<sup>217</sup> In that realm, the protection of ‘economic refugees’ will thus largely be an act of interpretation. The other interpretation of ‘an event’ can also be seen as administrative events carried out by state officials on behalf of the country. As shall be discussed in chapters 5 and 6, state officials have signed financial agreements with the World Bank and the IMF that, in the long run, have caused abject poverty and destitution. Perhaps, interpreting such events as affecting the public order may be on the extreme end, but such an administrative act remains an ‘event’ in the context of interpreting what entails an ‘event’ in the context of the OAU Convention.

At the elementary level, the term “disturbing public order” is a concept that looks to the governing of the State in its relation to the community and its individual members.<sup>218</sup> In determining what disturbs the public order, there is a need for an assessment whereby the previously mentioned harm is balanced by what can generally be expected from the public order.<sup>219</sup> However, there is no clarity on what constitutes a minimum standard of “public order”

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<sup>212</sup> Organization of African Unity (OAU), *Convention Governing the Specific Aspects of Refugee Problems in Africa* (“OAU Convention”), 10 September 1969, 1001 U.N.T.S. 45, available at: <https://www.refworld.org/docid/3ae6b36018.html> [accessed 1 June 2022]

<sup>213</sup> *ibid.*

<sup>214</sup> MR Rwelamira, ‘Two Decades of the 1969 OAU Convention Governing the Specific Aspects of the Refugee Problem in Africa’ (1989) 1 *International Journal of Refugee Law* 557, 558.

<sup>215</sup> Rankin (n 191).

<sup>216</sup> Edwards (n 198).

<sup>217</sup> *ibid.*

<sup>218</sup> Rankin (n 191).

<sup>219</sup> *ibid.*

and which events can disturb this order.<sup>220</sup> It is my submission that the phrase “events seriously disturbing public order” should be broadly interpreted so as to align with the objective of the OAU Convention to go beyond the protected categories of race, religion, nationality, social group or political opinion. On that basis, economic refugees, who are not only a result of indissolubly interconnected 1951 ‘Convention’ factors, but also ill-advised economic policies, should at least be covered by the OAU Convention if a broad interpretation is employed.

Furthermore, the International Court of Justice stated that a convention should be interpreted in an evolutionary manner when it includes “generic terms” and is “of continuing duration”.<sup>221</sup> The OAU Convention includes generic terms and is of continuing duration.<sup>222</sup> As a result, the OAU Convention extends its refugee protection not only to those who are already refugees at the time of its adoption but also to those displaced in the future.<sup>223</sup> If one argues that ‘economic refugees’ are perhaps a result of ‘*external aggression, occupation, foreign domination*’, then can this interpretation be viewed as too generous, broad and one that makes everyone in Africa a refugee? How much currency should be put on ‘*external aggression, occupation, foreign domination*’? Or should a hard and fast line be drawn to protect the integrity of the refugee protection regime?<sup>224</sup> In *section 3.4* of this chapter, I argued that ‘economic refugees’ are a challenge the world refuses to face if we discount the impact of ‘*external aggression, occupation, foreign domination*’ in the new global era. External aggression, occupation, and foreign domination by countries like the United States in Iraq and Afghanistan have caused much human displacement that is not covered by the 1951 Geneva Convention.<sup>225</sup> To that end, such political, military and economic policies can take the form of ‘*external aggression, occupation, foreign domination*’. Abou El Fadl makes a pertinent argument in this regard as follows:

[...] ideally, if a country, through its military policies or otherwise, causes forced migrations and displacements, then such a country at a minimum should be held financially accountable for compensating the displaced populations, and should be responsible for providing a safe haven and the safe resettlement of the populations

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<sup>220</sup> *ibid.*

<sup>221</sup> *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)*, Judgment [2009] ICJ Reports 2009 213 (International Court of Justice (ICJ)) 243, para 66. Also *Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment, I.C.J. Reports 1978, p. 32, para. 77.)

<sup>222</sup> Sharpe (n 177).

<sup>223</sup> *ibid.*

<sup>224</sup> L Barnett, ‘Global Governance and the Evolution of the International Refugee Regime’ (2002) 14 International Journal of Refugee Law 238 <[https://academic.oup.com/ijrl/article-lookup/doi/10.1093/ijrl/14.2\\_and\\_3.238](https://academic.oup.com/ijrl/article-lookup/doi/10.1093/ijrl/14.2_and_3.238)> accessed 8 March 2021.

<sup>225</sup> Abou El Fadl, ‘Islamic Ethics, Human Rights and Migration’ in Ray Jureidini and Said Fares Hassan (eds), *Migration and Islamic Ethics* (Brill 2020) <<https://www.jstor.org/stable/10.1163/j.ctv2gix01g.6>> accessed 21 August 2023.

it displaced. Otherwise, powerful countries and governments through aggressive military, political, or economic policies will continue to exacerbate the ongoing refugee crisis in the world.<sup>226</sup>

In the introduction of this study, I did put forward the argument that such phrases as ‘foreign domination’ or ‘occupation’ may be interpreted differently as meaning neo-colonialism. The invasive level of control exercised by such multilateral institutions as the International Monetary Fund (IMF) or the World Bank on African countries which arguably has caused impoverishment on the continent through high interest loans, conditional aid and economic sanctions should not be ignored.<sup>227</sup> At the very basic when such views are expressed the OAU Convention is then slated on the basis that there are limited number of empirical studies concerning the application of its refugee definition and the ignorance of RSDOs in both understanding and implementing its provisions.<sup>228</sup>

In the light of this, the study argues that if the OAU Convention’s refugee definition is not self-evident, then it requires interpretation.<sup>229</sup> Notwithstanding the following limitations of the OAU Convention: (i) lack of information on original meaning, (ii) lack of domestic incorporation by most African countries, and (iii) amongst others, lack of political will, the main purpose of the OAU Convention is to provide humanitarian protection to refugees.<sup>230</sup> As a result, the interpretation of this definition must be as inclusive as possible.<sup>231</sup> For example, it can be stated that if the meaning of the definition was limited to the colonial context (in which it was drafted), its capacity to achieve its aims of being "humanitarian" would be limited to a specific timeline and thus not be able to provide adequate protection to people in need.<sup>232</sup> In the modern global era, where other categories have evolved, the OAU Convention should thus give meaning to socio-economic displacement.

However, it must be noted that the OAU Convention’s definition has not been entirely forgotten.<sup>233</sup> Countries such as Chad, the Democratic Republic of Congo, Ethiopia, Rwanda, South Sudan, Sudan, Tanzania and Uganda remain leading refugee-hosting countries that apply

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<sup>226</sup> *ibid* 19

<sup>227</sup> Edwards (n196); Sharpe (174). Thandika Mkandawire and Chukwuma Charles Soludo, *Our Continent, Our Future: African Perspectives on Structural Adjustment* (Africa World 1999) <<https://idl-bnc-idrc.dspacedirect.org/bitstream/handle/10625/25742/IDL-25742.pdf>> accessed 14 January 2021.

<sup>228</sup> Wood (n 172).

<sup>229</sup> *ibid*.

<sup>230</sup> The 1969 OAU Convention, Preamble, para 2.

<sup>231</sup> Odile Ammann, *Domestic Courts and the Interpretation of International Law* (Brill Nijhoff 2020); Wood (n 172).

<sup>232</sup> Wood (n 172); Sharpe (n 174).

<sup>233</sup> *ibid*.

the OAU Convention's definition, despite their relatively poor economies.<sup>234</sup> Furthermore, the application of the broad definition is highly related to the RSD processes of countries. As discussed in the introduction of this study, the UNHCR describes RSD as:

the legal or administrative process by which governments or UNHCR determine whether a person seeking international protection is considered a refugee under international, regional or national law.<sup>235</sup>

Even though RSD is generally the responsibility of individual states, UNHCR may also play a role in this determination (as illustrated by this definition). In particular, UNHCR has the authority to conduct RSD in countries and territories which are not a party to the Geneva Convention or have not yet defined the legal and institutional structure required to support an RSD operation.<sup>236</sup> This group of refugees has earlier on been defined as 'mandate refugees' in *section 3.2* above. Countries such as Kenya and Burundi, for example, rely on this aid from UNHCR. Furthermore, UNHCR helps to accelerate the RSD framework in countries lacking institutional capacity. The assistance given to, for example, Kenya and Uganda is thus primarily to (a) enhance protection, (b) ensure efficient case management and processing with limited delays for asylum-seekers; and (c) be sustainable in the longer term, including after handover when Kenya independently takes charge of the RSD.<sup>237</sup>

Recently there have been some initiatives to remedying this gap of understanding the broad refugee definition.<sup>238</sup> However, it is stated that these initiatives are not sufficient for policymakers in their attempts to understand the broad refugee definition.<sup>239</sup> The African Union herself announced 2019 to be the "Year of the Refugees, Returnees and IDPs". In that spirit, it called for "an authoritative legal commentary on the Convention".<sup>240</sup> These initiatives would offer some clarity and insight into the scope of the definition, which in turn could lead to a

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<sup>234</sup> Abebe, Abebe and Sharpe (n 182).

<sup>235</sup> 'Procedural Standards for Refugee Status Determination Under UNHCR's Mandate' (UNHCR, 2003).

<sup>236</sup> *ibid.*

<sup>237</sup> Madeline Garlick, Elspeth Guild and Machiel Salomons, 'Formative Evaluation of RSD Transition Process in Kenya' (UNHCR, 2014).

<sup>238</sup> G Okoth-Obbo, 'Conference Papers. Thirty Years on: A Legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa' (2001) 20 Refugee Survey Quarterly 79; Abebe, Abebe and Sharpe (n 182); Okello (n 182).

<sup>239</sup> Abebe, Abebe and Sharpe (n 182); Okoth-Obbo (n 253); Okello (n 182).

<sup>240</sup> United Nations, 'Africa Dialogue Series 2019 - Towards Durable Solutions for Forcibly Displaced Persons in Africa' (2018).

more significant usage of the broad definition. This would possibly benefit the recent upsurge of refugees who have moved within Africa due to multifaceted displacement factors.<sup>241</sup>

### **(c) Conclusion**

The OAU Convention is one of the most important legal documents on refugee protection. Its primary contribution to the refugee protection system has been its broadened refugee definition. The definition is formulated to fill the protection gaps caused by the narrow scope of the Geneva Convention. On the other hand, the State practices show that there are certain obstacles to the application of the OAU Convention and, in particular, its broad definition. In some cases, the lack of enforcement mechanism allows States to avoid its application, while in some other cases, the lack of case law or any authoritative interpretation of the Convention enables States to interpret the Convention narrowly. However, it must be emphasized that the Convention is applicable to a certain extent in Africa. Furthermore, recently, its broadened definition draws attention from the international community and scholars encouraging them to discuss the protection gaps of the 1951 Geneva Convention. Therefore, it can be said that the OAU Convention continues to play an essential role in refugee protection in Africa despite the aforementioned problems of treaty application. What is required for an extended scope of protection for new refugee categories like economic refugees, is perhaps a broad interpretation of the OAU Convention's refugee definition so as to give it meaning to indissolubly linked factors of displacement that are discounted by international refugee law. Blaming the OAU Convention on its 'vagueness' or 'broadness' is avoiding the new forms of harm causing large scale human displacement in Africa and around the world.

### **3.6.2. The European Union**

#### ***(a) An overview of the Common European Asylum System and proposed reforms***

The European asylum laws are categorised into the following five legislative instruments: the Qualification Directive, the Reception Conditions Directive, the Asylum Procedures Directive, the Dublin Regulation and the EUROSOLV Regulation.<sup>242</sup> The CEAS provides uniform

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<sup>241</sup> Olivia Taylor, 'Constructing the "Economic Migrant" Narrative During the Refugee Crisis: The Neoliberal State of Exception and Political-Economic "Bare Life"' (2017) 6 Oxford Monitor of Forced Migration 6, 301–302.

<sup>242</sup> The refugee definition as provided for in the Geneva Convention is reflected as such in the following European Union asylum acquis: European Union: Council of the European Union, *Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving such Persons and Bearing*

standards and rules of co-operation between the Member States to ensure that asylum seekers are treated fairly and have access to open, just and equitable application procedures as supported by the European Union Agency for Asylum. The said agency contributes to the functioning of the CEAS by providing operational and technical assistance to Member States during RSD procedures and applications.

The CEAS was established in 1999 when the European Council met in Tampere, Finland, to establish a bloc of freedom, security and justice in the European Union.<sup>243</sup> From 1999 to 2005 six key asylum legislative instruments establishing minimum standards for Member States were adopted.<sup>244</sup> The first reforms of the CEAS came between 2008 and 2013. The European Commission's Policy Plan on Asylum was presented in 2008 with the objective of setting the

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*the Consequences Thereof*, 7 August 2001, OJ L.212/12-212/23; 7.8.2001, 2001/55/EC, **Article 2(e)**, available at: <https://www.refworld.org/docid/3ddcee2e4.html> [accessed 28 June 2021]; European Union: Council of the European Union, *Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers in Member States*, 6 February 2003, OJ L. 31/18-31/25; 6.2.2003, 2003/9/EC, **Article 2(e)**, available at: <https://www.refworld.org/docid/3ddcfda14.html> [accessed 28 June 2021]; European Union: Council of the European Union, *Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national*, 18 February 2003, OJ L. 50 / 1-50 / 10; 25.2.2003, (EC) No 343/2003, **Article 2(g)**, available at: <https://www.refworld.org/docid/3e5cf1c24.html> [accessed 28 June 2021]; European Union: Council of the European Union, *Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification*, 3 October 2003, OJ L. 251/12-251/18; 3.10.2003, 2003/86/EC, **Article 2(b)**, available at: <https://www.refworld.org/docid/3f8bb4a10.html> [accessed 28 June 2021]; European Union: Council of the European Union, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, 20 December 2011, OJ L. 337/9-337/26; 20.12.2011, 2011/95/EU, **Article 2(d)**, available at: <https://www.refworld.org/docid/4f197df02.html> [accessed 28 June 2021]. The 2011 Qualification Directive supersedes the 2004 Qualification Directive: Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted; European Union: Council of the European Union, *Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status*, 2 January 2006, OJ L. 326; 13 December 2005, pp. 13-34, **Article 2(f)**, available at: <https://www.refworld.org/docid/4394203c4.html> [accessed 28 June 2021]; European Union: Council of the European Union, *Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast)*, June 29, 2013, OJ L. 180 / 1-180 / 30; 29.6.2013, (EU) 2003/86, available at: <https://www.refworld.org/docid/51d296724.html> [accessed 28 June 2021]

<sup>243</sup> Stefan Salomon, 'Constructing Equality in EU Asylum Law' (2021) 33 International Journal of Refugee Law 608 <<https://academic.oup.com/ijrl/article/33/4/608/6566810>> accessed 21 March 2023.

<sup>244</sup> The Eurodac Regulation, the Temporary Protection Directive, the Reception of Asylum Seekers Directive, the Dublin Regulation replacing the 1990 Dublin Convention, the Qualification Directive and the Asylum Procedures Directive.

basis for building an integrated system of common and uniform standards for protection. This was a reflective action taken after the first teething phase for the EU that was battling with fragmented responses to migration just after the Tampere meeting. The 2008 reforms allowed for the creation of the European Asylum Support Office so as to enhance the practical co-operation and co-ordination between Member States. The CEAS was further constrained in 2015 as contemporary forms of displacement saw an unprecedented number of irregular migrants and refugees reach the shores of Europe using unconventional means. This led to another proposal for reform in May and July of 2016, tabling seven legislative instruments to enhance asylum law and policy in the EU. According to the European Commission communique COM(2016) 197, a snapshot of the key priorities of these proposals were surmised as:

- a) Establishing a sustainable and fair system for determining the Member State responsible for asylum seekers
- b) Reinforcing the EURODAC system
- c) Achieving greater convergence in the EU asylum system
- d) Preventing secondary movements within the EU
- e) A new mandate for the EU's asylum Agency

By the year 2017, European Parliament and the Council agreed on the following five of the seven proposals: establishing a fully-fledged European Union Asylum Agency, review the Reception Conditions Directive (RCD), create the EU Resettlement framework, review the Qualification Directive and transform it into a regulation, and reform the EURODAC. A common position on the Dublin Regulation and the Asylum Procedure Regulation was not reached.

With the complications of a global pandemic that shut down the world and further impacted on asylum law and policy, the EU further proposed reforms to the CEAS in 2020 as part of the 2016 proposals. The first proposal is to replace the QD (2011/95/EU) with a regulation. The aim is to achieve convergence among Member States with regard to asylum decision making. The second proposal is a recast of the RCD so as to ensure that asylum seekers receive decent conditions throughout the EU. The third proposal on the reinforcing the European Union Asylum Agency, arguably comes for the fact the EU seeks to reduce “incentives for abuse [of the asylum procedures] and increase the possibility for asylum seekers to be self-reliant”.<sup>245</sup>

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<sup>245</sup> European Commission, ‘Common European Asylum System’ (2023) <[https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system\\_en](https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system_en)> accessed 21 August 2023.



Self-reliance is viewed as the social and economic capacity of an individual to provide for *themselves* with basic needs.<sup>246</sup> This is important for the European Union Agency for Asylum as it will be in a position to provide appropriate assistance models to Member States as they manage asylum procedures at national level.

This proposal, in the previous paragraph, acknowledges the strain put on the CEAS in 2015 and the limited mandate of the agency then could not deal with the migratory flows. As for the fourth proposal on the EU Resettlement Framework, the EU envisages unified procedures in relation to pragmatic resettlement programmes across the bloc.

In 2020, the Pact on Migration and Asylum, was adopted. It contains new legislative proposals and amendments supposedly aimed at making the CEAS effective and humane. The three key pillars of the New Pact are aimed at strengthening partnerships with third countries to stem the migratory flows, enhance efficient asylum and return procedures, and encourage solidarity and fair sharing of the refugee burden. The New Pact comes with a package of nine instruments as follows: (i) the Screening Regulation, (ii) proposal revising the Asylum Procedures Regulation, (iii) proposal to revise the Eurodac Regulation, (iv) Regulation on Asylum and Migration Management, (v) Regulation on Crisis and Force Majeure, (vi) a blueprint on Migration Preparedness and Crisis, (vii) recommendation on Search and Rescue operations, (viii) recommendation on Resettlement and complementary pathways and (ix) the Guidance on the Facilitators Directive.

For the purpose of this study, a brief analysis of the proposed screening procedure will suffice.<sup>247</sup> In proposing an instrument on screening “all third-country nationals who are present at the external border”, the proposal is aimed at the “better management of mixed migration flows”.<sup>248</sup> The explanatory memorandum further provides that the pre-screening of third-country nationals should include a preliminary health and vulnerability check, registration of biometric data, and a security check in all the European databases and the Schengen Information System.<sup>249</sup> What is disconcerting, in the ambit of this study and the calls to expand

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<sup>246</sup> Ilana Seff, Kellie Leeson and Lindsay Stark, ‘Measuring Self-Reliance among Refugee and Internally Displaced Households: The Development of an Index in Humanitarian Settings’ (2021) 15 Conflict and Health 1.

<sup>247</sup> European Commission, ‘Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL Introducing a Screening of Third Country Nationals at the External Borders and Amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817’ (2020) <[https://commission.europa.eu/document/6ff7e187-4c6d-4477-99de-79f6b9100b75\\_en](https://commission.europa.eu/document/6ff7e187-4c6d-4477-99de-79f6b9100b75_en)> accessed 21 August 2023.

<sup>248</sup> *ibid* 1

<sup>249</sup> *ibid* 2

the refugee definition, is the fact that the New Pact's proposal perpetuates the exclusionary nature of the 1951 Geneva Convention in relation to new categories of refugees. The proposed screening tool is seen as:

[...] a new effective process allowing for better management of mixed migration flows. In particular, it is important to create a tool allowing for the identification, at the earliest stage possible, of persons who are unlikely to receive protection in the [European Union].<sup>250</sup>

The implication of the Screening Regulation, in the context of economic refugees, confirms the following scenarios. First, the economic refugees will still be excluded from protection because international refugee law regards them as a misnomer. Second, it foments exclusion of new refugee categories, through what Fadl terms as “legalistic and technical” categorisation based on the protected categories of race, religion, nationality, social group or political opinion.<sup>251</sup> Critics have further slated the New Pact as vague and not directly dealing with the controversial issues at the heart of the asylum law and policy in the EU. One critic sums up the New Pact as follows:

[...] regarding the format, it is not a programmatic document paving the way for the development of migration and asylum policies in the future... Regarding the content, it is not a document trying to establish a consensus about new orientations of those controversial policies...The question is then what it could have been...<sup>252</sup>

Iris Goldner Lang is also of the view that the nature of the proposals in the New Pact have the potential to violate asylum seekers' rights.<sup>253</sup> This is because the “envisaged screening and border procedures” are probably “extremely difficult for Member States” to put into practice given the lack of consensus within the EU bloc on how migration should be managed.<sup>254</sup> Going forward into the future, observers are of the view that more challenges lie ahead for the EU bloc. It is argued that a fair and systematic asylum process should have a holistic approach

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<sup>250</sup> *ibid* 1

<sup>251</sup> Fadl (n 240) 17

<sup>252</sup> Philippe De Bruycker, ‘The New Pact on Migration and Asylum: What It Is Not and What It Could Have Been’ in Daniel Thym and Odysseus Academic Network (eds), *Reforming the Common European Asylum System: Opportunities, Pitfalls, and Downsides of the Commission Proposals for a New Pact on Migration and Asylum* (Nomos 2022) 33 <<https://www.nomos-elibrary.de/10.5771/9783748931164-33/the-new-pact-on-migration-and-asylum-what-it-is-not-and-what-it-could-have-been?page=1>>.

<sup>253</sup> Iris Goldner Lang, ‘The New Pact on Migration and Asylum: A Strong External and A Weak Internal Dimension?’ (2022) 27 *European Foreign Affairs Review* 1, 1 <<https://kluwerlawonline.com/journalarticle/European+Foreign+Affairs+Review/27.1/EERR2022001>> accessed 21 August 2023.

<sup>254</sup> *ibid* 1

from reception to integration.<sup>255</sup> As shall be discussed in the following sections, the CEAS faces a number of challenges, but has also recorded positive achievements at a time when Europe faces a daunting challenge in regulating asylum law and policy.

***(b) The Qualification Directive (QD recast) 256***

The term ‘refugee’ is defined in Article 2(d) of the QD (recast) as:

[...] a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply.

The above definition largely correlates with that in the Geneva Convention.<sup>257</sup> It defines the term ‘refugee’ in both personal and territorial scope.<sup>258</sup> The personal scope is limited to “third-country nationals or stateless persons”, while the territorial scope relates to applicants who are “outside their country of nationality” if they are third-country nationals or “outside their country of former habitual residence” if they are stateless persons.

A third-country national is a person who does not hold the nationality of the EU Member States, nor holds the nationality of the following countries: Iceland, Lichtenstein, Norway and Switzerland. The reference to third-country nationals in the QD (recast) implies that EU Member States’ citizens are excluded from the definition. The exclusion of the EU citizens is derived from Protocol No.24 on Asylum for Nationals of Member States of the EU (Aznar Protocol) which provides that EU Member States are regarded as constituting safe countries of origin in relation to asylum matters. However, if an EU national has a well-founded fear of

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<sup>255</sup> Encarnación La Spina and Birgit Glorius, ‘Reforming the Reception and Inclusion of Refugees in the European Union: Utopian or Dystopian Changes?’ (2022) 2022 Social Inclusion 15 <<https://doi.org/10.17645/si.v10i3.5222>> accessed 20 March 2023.

<sup>256</sup> Directive 2011/95 - Standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)

<sup>257</sup> Compare with: Art. 1A(2) of the Geneva Convention and its 1967 Protocol, “the term ‘refugee’ shall apply to any person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his/her nationality and is unable or, owing to such fear, is unwilling to avail him/herself of the protection of that country; or who, not having a nationality and being outside the country of his/her former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”.

<sup>258</sup> European Union: European Asylum Support Office (EASO), *Qualification for International Protection (Directive 2011/95/EU): A Judicial Analysis*, December 2016, available at: <https://www.refworld.org/docid/5a65c4334.html> [accessed 21 March 2023]

persecution while in *their* country they may seek international protection under the Geneva Convention in another Member States.<sup>259</sup>

Observers are of the view that the Article 2(d) definition of refugee in QD (recast) limits the scope of protection for refugee claimants. It is argued that to extend the scope of protection, the definition should apply to ‘any person’.<sup>260</sup> This way, the scope of protection will match the definition under Article 1A(2) of the Geneva Convention. In the previous sections, the main premise is that the refugee definition in the Geneva Convention is exclusionary as to new categories of refugees.

Then in the European Union context, we have another definition that ‘assumes’ that asylum seekers will only come from outside the bloc. What this does is to create an unconscious bias, as alluded to by the Antwerp expert, framed on nationality and country of origin.<sup>261</sup> It brings to life Cherem’s question: “where [are] the refugees located?”<sup>262</sup> And difficult as it might be to admit, this questions the humanitarian response given to Ukrainians on the basis of their location and nationality.<sup>263</sup>

The subsequent activation of the Temporary Protection Directive after the Russian invasion of Ukraine probably suggests that the EU has a splintered approach to large scale displacement.<sup>264</sup> Meltem Ineli Ciger argues that while the Temporary Protection Directive was the right response in light of the large scale humanitarian crisis, the EU had not done the same when Iraq, Afghanistan and Libya were invaded by the United States and some European countries.<sup>265</sup>

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<sup>259</sup> The application will be considered by another Member State only in the following four cases, cited *verbatim* from European Union: European Asylum Support Office (EASO) (n 273) 23: (a) Where the Member State of which the applicant is a national takes measures derogating in its territory from its obligations under the ECHR; (b) Where suspension proceedings under Article 7(1) of the Treaty on European Union (TEU) have been initiated by the Council; (c) Where the Council has adopted a decision under Article 7(1) or 7(2) (serious and persistent breach by the Member State concerned of the values referred to in Article 2 TEU); (d) If the Member State to whom the application is made should decide unilaterally to accept the application for processing, the Council must be informed and the application dealt with on the basis that it is manifestly unfounded.

<sup>260</sup> European Council on Refugees and Exiles (n 32).

<sup>261</sup> Appendix 9 (n 28)

<sup>262</sup> Max Gabriel Cherem, ‘May States Select among Refugees?’ (2020) 13 Ethics & Global Politics 33, 35 <<https://www.tandfonline.com/doi/abs/10.1080/16544951.2020.1735018>> accessed 18 February 2020.

<sup>263</sup> Näre, Abdelhady and Irastorza (n 36).

<sup>264</sup> Council Implementing Decision (EU) 2022/382 of 4 March 2022: establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection 2022.

<sup>265</sup> Meltem Ineli Ciger, ‘Reasons for the Activation of the Temporary Protection Directive in 2022: A Tale of Double Standards’ 2022 <<https://www.asileproject.eu/reasons-for-the-activation-of-the-temporary-protection-directive-in-2022-a-tale-of-double-standards/>> accessed 21 August 2023.

Arguably this refreshes the observation that for one to be recognised as a refugee in the European Union, race and nationality are decisive factors (see discussion in chapter 4).<sup>266</sup>

Another practical issue tied to Article 2(d) definition is the “forward-looking” assessment of the well-founded fear. As discussed earlier on, in order to be granted international protection status, the applicant has to show a well-founded fear or real risk of suffering serious harm upon returning to the country of origin. The refugee definition, as well as one for subsidiary protection (see next section) is forward-looking. This means that the inquiry is not about whether the refugee claimant had a good reason to flee in the past, but whether the claimant has good reasons for fearing persecution in the future.

According to an Evaluation Report on the application of the recast Qualification Directive (2011/95/EU) the ‘forward-looking’ assessment should be premised on the question: “*what would happen to you if you returned?*”<sup>267</sup> The emphasis here is to avoid “giving too much emphasis to establishing the credibility of past persecution as a criterion for granting asylum”, and emphasise on a future unknown event based on the current objective facts about country of origin.<sup>268</sup>

In the report cited above, it is noted that in practice “not all assessments were forward-looking”, meaning the EU Member States have not consistently followed the approach.<sup>269</sup> The question then becomes has this been to the advantage or disadvantage of asylum seekers. We must acknowledge that refugee claimants are coming from spaces of trauma.<sup>270</sup> A future oriented inquiry of what ‘might’ or ‘would’ happen to a refugee claimant should somehow be premised on ‘what happened’ in the past. Medical experts also acknowledge that most refugee claimants fail the RSD procedures because “memory deficits are common following trauma”, and when they answer to a ‘forward-looking’ assessment they might as well be mired in the incoherent past.<sup>271</sup>

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<sup>266</sup> *ibid*

<sup>267</sup> Directorate-General for Migration and Home Affairs European Commission, ‘Evaluation of the Application of the Recast Qualification Directive (2011/95/EU) : Final Report’ (2019) 35.

<sup>268</sup> *ibid* 33.

<sup>269</sup> *ibid*.

<sup>270</sup> Lauren Z Waterman, Cara Katona and Cornelius Katona, ‘Assessing Asylum Seekers, Refugees and Undocumented Migrants’ (2020) 44 *BJPsych Bulletin* 75 </pmc/articles/PMC7283125/> accessed 21 March 2023.

<sup>271</sup> *ibid*.

### 3.7. Conclusion

This chapter has analysed the probable scope of protection available for economic refugees under international refugee law and human rights law. It acknowledges that economic refugees are excluded from protection under international refugee law, except when their situation coincides with the requirements of the 1951 Convention definition. That is, for instance, the case in situations when economic policies are directed against a certain ethnic group. Economic refugees may enjoy some form of protection under human rights law, in particular through the principle of non-refoulement and the provision of art 3 ECHR.

Much of the reasons of their exclusion are that current international refugee law is perhaps legalistic and technical. The concept of the ‘well-founded fear’ is tied to the protected categories of race, religion, nationality, social group or political opinion, and creates a gap in protection of ‘other’ refugee categories. While Convention refugees are recognised as such due to them being unwilling or unable to return to their country of origin, this chapter argued that economic refugees also fear both the violation of their basic human rights and the grim prospect of death, or inhuman or degrading treatment. What entails ‘persecution’ is another issue of contention. The term ‘persecution’ is not defined in international refugee law, and is difficult to attach a global meaning to. The definition attributed to the term ‘persecution’ in art 9 of the Qualification Directive (QD) as: “sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights”, arguably is also broad and may give rise to different interpretations as to the scope of protection available for economic refugees. On the other hand, the OAU Convention has been viewed as innovative, pragmatic and expansive. The fact that the OAU Convention extends to every person who has been compelled to leave their country of origin or habitual residence on the account of “external aggression, occupation, foreign domination or events seriously disturbing public order...” adds other events that may give rise to refugee recognition. On the face of it, this formulation fits well with the template of cross-border displacement in the new global era. What remains a challenge is the politics of jurisdiction between the global North and the South as to what form of meaning should be attached to the phrase ‘external aggression, occupation, foreign domination or events seriously disturbing public order’.

While it is true that the OAU Convention is of limited use in Africa due to interpretation and implementation challenges, it can also be argued that if an evolutionary reading is attached to its provisions, ‘economic refugees’ may be recognised for protection if they prove that their

dire socio-economic circumstances are life threatening and a violation of their basic human rights. On the other hand, the Common European Asylum System (CEAS) in the European Union is a manifestation of the dynamic nature of the global migration flows. In terms of the art 2(d) of the QD, the term ‘refugee’ is defined in both personal and territorial scope. A refugee is seen as a ‘third country national’ and thus one coming outside the European Union bloc. Although the EU member states may extend the refugee definition in their national legislation to include EU citizens from other countries, its limitation to ‘third-country nationals’ in EU law remains exclusionary and limits the scope of protection for refugee claimants. There is also a hint of the fact that the European Union context frames refugee policy and protection on race and nationality. The activation of the Temporary Protection Directive after the Russian invasion of Ukraine, perhaps should have been the norm when Syrians, Iraqis, Afghans, and most recently Sudanese fled the war from their countries.

In that realm, the chapter has proposed three definitions for the term ‘economic refugee’ so as to remove the wrong stereotype attached to this category as persons perceived as abusing the asylum procedure. The argument is that economic refugees, just like Convention refugees, require international protection if their socio-economic situation can be interpreted as life threatening and a violation of basic human rights. A reading of Proposition 1 and 2 (in section 3.4.) can be merged into Proposition 4 as follows:

*Proposition 4*

An economic refugee is any person who is outside their country of origin because of indissolubly linked socio-economic factors and political tyranny or repression that have led to economic failure, political instability, and exceptional economic destitution that cause *them* to live in inhuman or degrading conditions.

In the next chapter, this definition will be merged with a proposition for an expanded refugee definition using the Framework Convention/Protocol approach.

## Chapter 4

### Re-interpreting the refugee definition: the efficacy of a Framework Convention

#### 4.1. Introduction

*My brother, my life is pretty complicated. Everyone has his own story.*<sup>1</sup> - Rashid, Somali refugee living in Hamburg, Germany.

After a little reprieve in Covid 19 travel regulations, in early August 2020, I travelled to Hamburg and Berlin for a period of 10 days. The purpose of the study visit was to observe the infrastructural and administrative framework available for refugees and asylum seekers in Germany. Tied to that objective, was also to determine the feasibility of my research and to baseline possible data sources. My first stop was the Hamburg police station, *Polizeikommissariat 11*, where I was granted ‘few minutes’ for an interview because of Covid 19 regulations still in place. My inquiry was as to whether the police make patrols in identifying irregular immigrants on the streets. According to the Police Commissioner, Hamburg has twelve initial shelters (*Erstaufnahme-Einrichtungen*) for asylum seekers. These centres are responsible for initial assessment of refugee claimants, who are then given shelter for a period of three months. When their applications are successful, they are allowed to move out and enjoy full benefits as per their assigned status. The deportation or removal of unsuccessful applicants only happens as a last resort measure after following the due process of law. This enquiry is pertinent in the context of economic refugees, because their asylum applications are dismissed as manifestly unfounded. When this happens, they are subject to expulsion.

The second stop was an education centre dedicated for the integration of refugees and other people with a migration background into the Germany society. My conversation with the Project Coordinator, Masoud Nemani, revealed that Syrian and Eritrean refugees have largely benefited from the programme and have been offered German language courses regardless of their immigration status. The third stop in Hamburg was at a mosque in St Georg. I was taken to a “meeting-point”, by a “security guard”, whom I later learned was an asylum seeker from the Philippines, whose asylum application had been rejected in Sweden and was living in Germany on the basis of a “Tolerated Stay Permit”: *Duldung*.<sup>2</sup> At the “meeting point” I was

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<sup>1</sup> Appendix 8 Hamburg Interview with Somalian refugees pg. 3 (On file with the author)

<sup>2</sup> According to § 60 of the Act on Residence, Employment and Intergration of Foreigners in Federal Territory 1 (*Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet 1*)



introduced to two Somalians: Rashid and Ismail ( they only want to be recognised by their first names). Over several cups of coffee, we discussed a number of issues ranging from the conflicts in the Horn of Africa and their lives as refugees in Europe.<sup>3</sup>

Reluctant to give away a lot of personal information to a stranger, Rashid began his tale by the remark: “*my brother, my life is pretty complicated. Everyone has his own story*”.<sup>4</sup> After completing his bachelor’s degree in probably Information and Technology studies, Rashid left Somalia and went to Turkey where he briefly stayed. He then returned to Somalia for fingerprints documents before going back to Europe.<sup>5</sup> From the conversation, it could be inferred that Rashid had been to Italy, France, the United Kingdom and Sweden before settling in Germany in 2017 as a refugee. Speaking in third person narrative, Rashid summarised the asylum application process in Germany as follows:

[...] they put you in an integration camp for the first time, you know, first three weeks or two weeks. ***Then they will take your fingers and stuff like that.***<sup>6</sup> And then after that, OK, they will consider about the refugees. Think about it. They will give you ***an appointment with an interview***: Why did you come from Africa? What's going to happen to you if you go back to Africa, and depending [from] which country you [came from]. They will ask you. Something like that and it depends on which city you came from your country. So, they have all the information about [your] country. Sometimes the information that they have,[about your country] can be **false information**. **And when they see in Google and then they will consider, OK, we have this information**, this guy told us this. Then they can look over it and then say, OK, I like it or not like it. But if he does not like what he doesn't like, he **just throw you away, you know.**<sup>7</sup> [*My own emphasis*]

In these jagged lines, Rashid was able to paint the process through which refugee claimants go through in Germany and probably other European Union Member States bound by the Common European Asylum System. From this interview, it can be inferred that the

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(*Aufenthaltsgesetz - AufenthG*): a Tolerated Stay Permit (*Duldung*) is granted to individuals obliged to leave Germany, but their departure is temporarily not feasible probably because of severe illness, participation in a vocational training programme, providing care for a sick relative in Germany or lack of identification papers amongst other legitimate reasons). However, the obligation to leave Germany still stands and if one is facing deportation, the tolerated stay will be extended but will not be prolonged. This means that after the expiry of the initial extension, one cannot come up with another ‘legitimate’ reason to extend their stay. My encounter with this asylum seeker was by sheer chance. While I was looking for the ‘meeting point’ he had heard me introducing myself as researcher in migration studies. He then alerted Rashid and Ismael who were in the ‘meeting point’. See attached Appendix 8 *Hamburg Interview*.

<sup>3</sup> Appendix 8: *Hamburg Interview* (n 1)

<sup>4</sup> *ibid* 3

<sup>5</sup> *ibid*. Arguably a reference to police clearance for any criminal activity.

<sup>6</sup> Probable reference to fingerprints being taken and filed in the Eurodac database, and personal data relating to nationality and country of origin.

<sup>7</sup> Appendix 8 (n 1) 1-2

identification of asylum seekers is done by taking their fingerprints and adding the data about their nationality into the Eurodac system. Then an interview will determine the ‘well-founded’ fear and real risk of serious harm, which will be assessed both objectively and subjectively. The forward-looking assessment will culminate in an inquiry based on updated country information that will lead to the RSDO coming to a determination of whether to grant or reject the asylum application. A positive RSD will lead to the granting of refugee status or subsidiary protection in terms of the EU asylum laws read together with the 1951 Geneva Convention. As reflected above, in Rashid’s words if one’s application is deemed unsuccessful ‘they just throw you away.’ Presumably, those “thrown out” are ‘economic refugees’ and other categories not covered by the refugee definition. Those excluded from international protection can be identified through the following analysis: (i) the Geneva Convention excludes those fleeing their countries of origin for reasons other than persecution linked to one of the five convention grounds, (ii) the EU asylum acquis only views third-country nationals as possible refugees and excludes the same persons as under the 1951 Geneva Convention, except those qualifying for subsidiary protection, (iii) the human rights jurisprudence has set a high, albeit, contradictory threshold as to who can be protected from deportation as a result of destitution emanating from socio-economic factors.

As for the CEAS, calls have heightened on the need to redefine a refugee as “any person” rather than restrict it only to third country nationals. The jurisprudence on the scope of protection in terms of the ECtHR further reveal that the threshold is too high and premised on a vague semantics on what entails “very exceptional cases” in regards to socio-economic factors. This then raises the following questions: Is the refugee definition, as provided in the international refugee law, exclusionary of persons in real need of international protection? How should the refugee definition be reformed, in order to adequately consider ‘economic refugees’? And if to be reformed, can the Framework Protocol/Convention be a feasible legal tool to redefine the term ‘refugee’ and expand the scope of protection in international refugee law? This study attempts to answer the above questions through the prism of the framework convention/protocol concept.

## 4.2. What is a Framework Convention/Protocol?

### 4.2.1. Defining the concept

The terms ‘framework convention’ or ‘framework protocol’ and in French ‘*convention-cadre*’ are relatively of recent origin, largely employed in the field of international environmental law.<sup>8</sup> As a way of example, most Framework Conventions/Protocols have been adopted and ratified in the field of environmental law. These include the 1976 Barcelona Convention and its attendant protocols regulating the dumping of hazardous waste, oil spillage, and land-based sources of marine pollution.<sup>9</sup> Framework Conventions or their Protocols do not have a fixed model nor a legal definition, but are largely identified by their common characteristics of treaty law.<sup>10</sup> Scholars who have written extensively on the concept, defines a Framework Convention as a legally binding treaty, formulated within the general rules of international treaty law.<sup>11</sup> This type of treaty “records the nature of the problem” and parties to the convention agree on principles, institutional framework, and appropriate action to find a sustainable solution to the issue of international concern.<sup>12</sup>

The Framework Convention deals with “issues that are of common concern to humankind” and where there is lack of global consensus on how such issues should be tackled.<sup>13</sup> The reference

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<sup>8</sup> Economic Commission for Europe, ‘Framework Convention Concept: Note by the Secretariat’ (2011) <<https://unece.org/fileadmin/DAM/hlm/sessions/docs2011/informal.notice.5.pdf>> accessed 8 April 2023.

<sup>9</sup> *The Convention for the Protection of the Mediterranean Sea Against Pollution (Barcelona Convention)*, adopted on 16 February 1976 and entered into force in 1978. The Barcelona Convention was amended in 1995 and was then renamed as the *Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean*. The following are the seven Protocols of the Barcelona Convention: (i) Protocol for the Prevention and Elimination of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft or Incineration at Sea; (ii) Protocol Concerning Cooperation in Preventing Pollution from Ships and, in Cases of Emergency, Combating Pollution of the Mediterranean Sea; (iii) Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources and Activities, (iv) Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean; (v) Protocol for the Protection of the Mediterranean Sea against Pollution Resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil; (vi) Protocol on the Prevention of Pollution of the Mediterranean Sea by Transboundary Movements of Hazardous Wastes and their Disposal; (vii) Protocol on Integrated Coastal Zone Management in the Mediterranean.

<sup>10</sup> Daniel Bodansky, ‘The Framework Convention/Protocol Approach’ (1999) 15 <<https://apps.who.int/iris/handle/10665/65355?show=full>> accessed 11 April 2021.

<sup>11</sup> Daniel Bodansky, ‘The United Nations Framework Convention on Climate Change: A Commentary’ (1993) 18 *Yale Journal of International Law* 451 <[https://openyls.law.yale.edu/bitstream/handle/20.500.13051/6301/28\\_18YaleJIntlL451\\_1993\\_.pdf](https://openyls.law.yale.edu/bitstream/handle/20.500.13051/6301/28_18YaleJIntlL451_1993_.pdf)> accessed 8 April 2023; Nele Matz-Lück, ‘Framework Conventions as Regulatory Tools’ (2009) 1 *Goettingen Journal of International Law* 439 <<https://papers.ssrn.com/abstract=1535892>> accessed 4 April 2021; Koen De Feyter, ‘Towards a Framework Convention on the Right to Development’ (2013) <<https://library.fes.de/pdf-files/bueros/genf/09892.pdf>>.

<sup>12</sup> Patrick Wall, ‘A New Link in the Chain: Could a Framework Convention for Refugee Responsibility Sharing Fulfil the Promise of the 1967 Protocol?’ (2017) 00 *International Journal of Refugee Law* 1, 18.

<sup>13</sup> De Feyter (n 11) 6.

to humankind, arguably suggests that the common problem identified is not only of concern to contracting States, but also to the international community and as such there is also a need to involve non-state actors. The involvement of non-state actors like intergovernmental organizations, NGOs, research community and business entities is aimed at galvanizing States towards a common position to tackle the identified problem.<sup>14</sup>

To this end, observers identify two key steps in the formulation of a Framework Convention as: (i) formulation of a general treaty called ‘Framework Convention’ and (ii) detailed ‘Protocol’ to fill up the gap left out by the main Convention.<sup>15</sup> Therefore, a Framework Convention approach establishes wide ranging obligations for its parties and lays out a general system of governance, while leaving more detailed rules and the setting of specific targets either to subsequent agreements between the parties in the form of ‘protocols’ or to domestic legislation. The word “Framework” is a reference to the scope for member states to transpose the agreed Convention’s provisions to their domestic legislation and governmental policies.<sup>16</sup>

Drawing experience from international environmental law regulations, Professor Bodansky explains how the Framework Convention/Protocol concept proceeds incrementally in two key steps.<sup>17</sup> First, the Framework Convention establishes general norms to be adopted by member states and relevant institutions.<sup>18</sup> In this regard, the Convention lays out the objectives, guiding principles, basic obligations as well as procedures to be followed in regulating an international problem identified. Second, the Framework Protocol will then build up on the parent agreement by supplementing with additional and more specific commitments and institutional arrangements.<sup>19</sup>

This two-step approach is pivotal in establishing the decision of contracting parties to delegate questions appropriate in achieving the objectives of the main agreement.<sup>20</sup> What is critical in this two-step structure is the will of the negotiating parties to establish not only the institutional structure, but also the development of further agreements on the identified international

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<sup>14</sup> *ibid.*

<sup>15</sup> Bodansky (n 11); Bodansky (n 10); De Feyter (n 11); Matz-Lück (n 11).

<sup>16</sup> Economic Commission for Europe (n 8).

<sup>17</sup> Bodansky (n 10).

<sup>18</sup> *ibid.*

<sup>19</sup> *ibid.*

<sup>20</sup> Matz-Lück (n 11) 440–441.

problem. In areas outside environmental law, the Council of Europe has recently adopted a Framework Convention on national minorities, and one on the value of cultural heritage.<sup>21</sup>

At the core of the Framework Convention/Protocol concept is the capacity to establish a common ground for negotiating parties. As highlighted above, this is done through the creation of basic institutional arrangements, adoption of procedures and detailed obligations. The subsequent protocols then augments the paucity in the parent agreement. This two-step approach is spun around the identified global problem. According to experts, the nature of the Framework Convention is to fit the following three scenarios: First, when there is lack of political consensus to take substantive measures against the global problem. Second, when scientific understanding is still evolving on the causes of the identified problem. Third, when the problem itself is changeable and in constant flux.<sup>22</sup> This then makes the adoption of specific commitments more feasible through the promotion of consensus about the relevant facts of the global problem “*cognitive consensus*”, and the appropriate legal response to the problem “*normative consensus*”.<sup>23</sup>

Cognitive consensus refers to similarity among group members with regards to how key issues are defined and conceptualised.<sup>24</sup> Cognitive consensus enables decision makers to “collectively make sense of ill-structured issues in a group setting” and strive towards group integration, cognitive negotiation and decision-making research.<sup>25</sup> In this scheme, cognitive consensus becomes the :

[...] lens through which a group views matters of concern and is manifested in verbal descriptions of strategic issues. What is shared are the assumptions, categories, content domains, dimensions, and/or causal maps that aid group members in assigning meaning to the issues [...] Group members who have greater cognitive consensus are likely to attend to, interpret, and communicate about issues more similarly than are those with less cognitive consensus.<sup>26</sup>

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<sup>21</sup> Framework Convention for the Protection of National Minorities (ETS No. 157) Entry in force 01/02/1998 (12 Ratifications as of 9 April 2023.); Council of Europe Framework Convention on the Value of Cultural Heritage for Society (CETS No. 199) Entry in force 01/06/2011 (10 Ratifications as of 9 April 2023.)

<sup>22</sup> Bodansky (n 10) 17; Matz-Lück (n 11).

<sup>23</sup> Bodansky (n 10) 17.

<sup>24</sup> Susan Mohammed, ‘Toward an Understanding of Cognitive Consensus in a Group Decision-Making Context’ (2001) 37 The Journal of Applied Behavioral Science 408, 408 <<https://journals.sagepub.com/doi/10.1177/0021886301374002>> accessed 10 April 2023.

<sup>25</sup> Mohammed (n 24).

<sup>26</sup> *ibid* 411.

The fact that some members of a group might have ‘greater cognitive consensus’ than others gives credence to the notion that [in the political field] “consensus should be viewed as an inherently limited good”.<sup>27</sup> This is because people with diametrically opposed views can both co-exist and co-operate without consensus. This gives room to the notion that members in a group have latitude to disagree on certain proposed issues in order to reach common consensus. Imposition of concrete courses of action stifles what Susan Mohamed terms as the unwritten “operational freedom” that allows differentiated groups to reach consensus without necessarily reaching a common ground.<sup>28</sup>

In this realm, cognitive consensus should not only be viewed as meaning the promotion of consensus about relevant facts, but also that “public consensus, agreement, and consensus of thought are [necessarily] not a priority in politics”.<sup>29</sup> Rather, cognitive consensus in global politics is the intersection of both agreement and dissensus that leads to the forging of feasible conditions for dialogue. This tension gives rise to [some Member States] seeking “actual agreement” while others “seek to avoid a disagreement so sharp as to preclude acquiescence”.<sup>30</sup> Perhaps, a more pragmatic stance towards a global problem will be the identification of an appropriate framework for international co-operation at a global level involving all institutions akin to the international problem requiring consensus.<sup>31</sup>

Normative consensus, on the other hand, refers to an agreement among “the vast majority” in a group or society about what is appropriate and expected of group members or society.<sup>32</sup> At the macro level, normative consensus refer to “structural relationships among individuals, institutions, sociologists and political scientists” who are exploring the question of social order and how it is achieved.<sup>33</sup> At the micro-level, normative consensus is the intersection of both “agreement and disagreements over attitudes, norms, and opinions held by individuals”.<sup>34</sup>

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<sup>27</sup> Nicholas Rescher, ‘Problems of Consensus as a Political Ideal’, *Pluralism: Against the Demand for Consensus* (Clarendon Library of Logic and Philosophy 1995) 199 <<https://doi.org/10.1093/acprof:oso/9780198236016.001.0001>> accessed 10 April 2023.

<sup>28</sup> Mohammed (n 24) 411.

<sup>29</sup> Rescher (n 27) 186.

<sup>30</sup> *ibid* 189.

<sup>31</sup> Nazli Choucri and Robert C North, ‘Global Accord: Imperatives for the Twenty-First Century’ in Nazli Choucri (ed), *Global Accord: Environmental challenges and International Responses* (MIT Press 1993).

<sup>32</sup> Frank W Elwell, ‘Normative Consensus Definition and Meaning’ (*Glossary of the Social Sciences*, 2011) <[http://www.larapedia.com/glossary\\_of\\_social\\_sciences\\_terms/normative\\_consensus\\_meaning\\_and\\_definition.html](http://www.larapedia.com/glossary_of_social_sciences_terms/normative_consensus_meaning_and_definition.html)> accessed 14 April 2023.

<sup>33</sup> David Rauma, ‘The Context of Normative Consensus: An Expansion of the Rossi/Berk Consensus Model, with an Application to Crime Seriousness’ (1991) 20 *Social Science Research* 1, 3.

<sup>34</sup> *ibid*.

This agreement is premised on normative reasons that a given moral or legal norm is valid, or a certain idea is defensible and has value.<sup>35</sup> Such consensus should not be misconstrued with compromise. This is because it depends on other reasons and has a different force. At the ultimate end, normative consensus is reached after the intersection of decisive and supportive reasons towards the [legal] norm in question. Decisive reasons are distinguished from supportive reasons in that, the former settles an issue for a group or society in a certain way towards the acceptance of the norm in question, while the latter “does not settle the issue but gives a weaker argument for settlement in a certain way.”<sup>36</sup> One may argue that this is largely because of the understanding that any form of consensus in the political field is determined by the “strength of the obligation accompanying the rule involved”.<sup>37</sup>

As shall be shown in *section 4.2.4*, decisive and supportive reasons work in cahoots, but only one or some of them settle the issue at hand. In reaching normative consensus, the main global challenge is the expression of ‘universalist’ standpoints by major centres of power.<sup>38</sup> It is argued that “Western normative political theorizing” has the impact of side-lining countries from the periphery on international issues. In that realm a ‘universal’ agreement largely negotiated on unequal footing always has a template of exclusionary fissures and weak political will.<sup>39</sup> In the field of political science, the divisions between the Global North and South continue to have a differentiated impact on public policy and skews normative consensus.<sup>40</sup>

Therefore, the building of both cognitive and normative consensus is critical in setting up the framework convention. In the words of Bodansky, both cognitive and normative consensus create “positive feedback loops” which facilitate the adoption of protocols with specific prescriptions to address certain commitments.<sup>41</sup> A move towards a common position to tackle the global problem at hand can thus begin by member states sharing relevant facts through national reports. These reports can then be subjected to international review to avoid skewing

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<sup>35</sup> Harald Grimen, ‘Consensus and Normative Validity’ (2008) 40 *Inquiry* 47, 53 <<https://www.tandfonline.com/action/journalInformation?journalCode=sinq20>> accessed 14 April 2023.

<sup>36</sup> *ibid.*

<sup>37</sup> Peter H Rossi and Richard A Berk, ‘Varieties of Normative Consensus’ (1985) 50 *American Sociological Review* 333, 333 <<https://www.jstor.org/stable/2095543>> accessed 14 April 2023.

<sup>38</sup> Ericka Tucker, ‘Developing Normative Consensus: How The “International Scene” Reshapes The Debate Over Internal and External Criticism’ (2013) 3 *Journal of East-West Thought* 107, 119 <<https://philarchive.org/archive/TUCDNC>> accessed 14 April 2023.

<sup>39</sup> Tucker (n 38).

<sup>40</sup> Abdullahi An-na’im, ‘Cultural Transformation and Normative Consensus on the Best Interests of the Child’ (1994) 8 *International Journal of Law, Policy and the Family* 62 <<https://academic.oup.com/lawfam/article/8/1/62/908802>> accessed 14 April 2023.

<sup>41</sup> Bodansky (n 10) 18.

consensus to one Global side. This then encourages scientific research and assessment of feasible steps to take in addressing the identified problem.

One such step can be the creation of a Working Group, as a way to better understand the causes and effect of the problem. Such a step leads to consensual knowledge and empowers not only individuals but other stakeholders towards normative consensus. Take for example, when the Framework Convention for the Protection of National Minorities (FCPNM) was set up, the United Kingdom established the Cornish National Minority Working Group in 2015. Amongst others, the Cornish National Minority Working Group was tasked with monitoring the implementation of the FCPNM within the United Kingdom. Also, the Working Group was tasked with formulating responses to the Council of Europe in respect of the draft United Kingdom's compliance reports to the FCPNM.<sup>42</sup>

Such a structure allows framework conventions to be legal tools and platforms of discussion and negotiation over the identified global problem. Observers applaud the nature of flexibility allowed by framework conventions.<sup>43</sup> At the very basic, they become the fulcrum for international public opinion allowing stakeholders to create both rapport and trust. The flexibility of the framework convention as a legal tool comes into play upon reaching consensus on specific commitments and obligations. This allows the creation of protocols to the parent convention allowing States to determine freely their role towards the problem despite the fact that they have ratified the protocol or not. This novelty is crucial in persuading states that were initially reluctant to consent to the framework convention. It is further argued that the framework convention can be put into place by just a few countries and upon adoption, the international law-making process can gather inertia of its own and take it to States that were at first reluctant.<sup>44</sup>

Having laid bare the nature of the framework convention, attention now focusses on the constitutive elements that makes up framework conventions. It is noted that framework conventions have no specific format or structure.<sup>45</sup> Like the Vienna Ozone Convention, a typical framework convention can just have basic provisions constituting of objectives,

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<sup>42</sup> Cornwall Council, 'Cornish National Minority Working Group' (*Cornwall Council Website*, 2022) <<https://www.cornwall.gov.uk/people-and-communities/equality-and-diversity/cornish-national-minority/cornish-national-minority-working-group/>> accessed 15 April 2023.

<sup>43</sup> De Feyter (n 11); Matz-Lück (n 11).

<sup>44</sup> De Feyter (n 11) 8.

<sup>45</sup> Bodansky (n 10).



principles, institutions and general obligations.<sup>46</sup> Specific measures and obligations are then supplemented by a protocol as in the case of the Montreal Protocol to the Vienna Ozone Convention.<sup>47</sup>

However, some framework conventions like the UN Framework Convention on Climate Change have more substantive elements with detailed obligations, and institutional structures.<sup>48</sup> Probably the main reason why framework conventions have a flexible legal structure is to allow accessibility and harness consensus over the problem at hand. As noted by critics, the structure and elements of a framework convention have the same elements of a Treaty and can include provisions of State succession, treaty interpretation or territorial application.<sup>49</sup> The choice of the structure and elements that makes up a framework convention are in the end determined by the nature of the subject matter and the political will by the member states to tackle the problem. A close reading on the literature on framework conventions, reveals the following basic elements that are common to the concept, as shown in the *Table* below.<sup>50</sup>

#### 4.2.2. Elements of a Framework Convention

ELEMENTS OF A FRAMEWORK CONVENTION	
ELEMENT	DESCRIPTION
Objective (s):  <i>“The ultimate objective of this Convention and its subsequent protocols is to achieve...”</i>	<ol style="list-style-type: none"> <li>1. Enunciate the Parties overarching purpose</li> <li>2. Sometimes the objectives are set in the preamble</li> <li>3. Objectives legitimize the problem as matter of international concern</li> <li>4. Objectives help to build normative consensus</li> </ol>
Principles:  <i>“Parties in achieving the set objectives of the Convention shall be guided by the following principles...”</i>	<ol style="list-style-type: none"> <li>1. Principles set the terms of debate</li> <li>2. Principles help in establishing legal standards</li> <li>3. Principles set forth general standards that guide the application and future development of the treaty</li> <li>4. Principles do not, however, determine which measures should be or should not be taken</li> </ol>
General Obligations	<ol style="list-style-type: none"> <li>1. Also known as fundamental principles</li> <li>2. General obligations determine the legal character of the Convention</li> </ol>

<sup>46</sup> Vienna Convention for the Protection of the Ozone Layer (Vienna, 22 March 1985) No. 26164 United Nations, *Treaty Series*, vol. 1513, p. 293.

<sup>47</sup> Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal, 16 September 1987) No. 26369

<sup>48</sup> UN General Assembly, *United Nations Framework Convention on Climate Change : resolution / adopted by the General Assembly*, 20 January 1994, A/RES/48/189, available at: <https://www.refworld.org/docid/3b00f2770.html> [accessed 15 April 2023]

<sup>49</sup> Bodansky (n 10); Matz-Lück (n 11).

<sup>50</sup> Bodansky (n 10); Bodansky (n 11); Economic Commission for Europe (n 8); Matz-Lück (n 11); De Feyter (n 11).

	<ol style="list-style-type: none"> <li>3. General obligations can be specified in terms of economic disparities between the Parties</li> <li>4. General obligations can have specific targets</li> </ol>
Institutions	<ol style="list-style-type: none"> <li>1. Institutions are created to allow ongoing governance of an issue</li> <li>2. Conference /Meeting of the Parties</li> <li>3. The Secretariat</li> <li>4. Institutions on Science and Research</li> <li>5. Institutions on Finance and Implementation</li> </ol> <p>NB: This is not a closed list</p>
Implementation Mechanisms	<p>Implementation procedures are done through:</p> <ol style="list-style-type: none"> <li>1. National reporting</li> <li>2. International review</li> <li>3. Dispute Resolution (non-binding methods of dispute resolution are mainly used)</li> <li>4. Multilateral Consultative process</li> </ol>
Decision making procedures	<p>Framework conventions do not give legislative powers to institutions. Therefore, law making proceeds through:</p> <ol style="list-style-type: none"> <li>1. Amendments</li> <li>2. Negotiations</li> <li>3. Adoption of protocols</li> </ol>
Final Clause	<p>The final clause has the following basic elements:</p> <ol style="list-style-type: none"> <li>1. Signature</li> <li>2. Ratification/Approval/Accession</li> <li>3. Entry into force</li> <li>4. Reservations</li> <li>5. Withdrawal</li> <li>6. Relation to other treaties</li> </ol>

Table 3: Elements of a Framework Convention

The *Table* above, will be applied in *section 4.2.4* to come up with a proposition for a Framework Convention related to the refugee definition

#### **4.2.3. Legal Effect**

A framework convention is a legally binding treaty of international law, and does not differ from other conventions.<sup>51</sup> It is bound by the same rules on the law of treaties with regards to interpretation, modification and termination. Although the Vienna Convention on the Law of

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<sup>51</sup> Bodansky (n 10); De Feyter (n 11); Matz-Lück (n 11).

Treaties (VCLT) does not mention framework agreements, this does not side-line the framework convention/protocol from the law of treaties.<sup>52</sup>

Framework conventions do not contain concrete targets, but are legally binding.<sup>53</sup> Both framework conventions and protocols are legally binding since they are ratified by national parliaments, which are then required to adopt implementing legislation.<sup>54</sup> The legal effect of a framework convention/protocol manifests itself in the following four ways: First, the framework convention allows Parties to address the problem identified in a step-by-step manner (incrementally) rather than all at once. Second, the framework convention does not contain stringent obligations, so as to garner cognitive and normative consensus. Third, once the problem has been identified, willing Parties can start addressing the issue of concern without waiting for cognitive and normative consensus to emerge. Fourth, once the main problem has been identified, different aspects of the problem can be addressed in separate protocols.<sup>55</sup>

The legal nature of framework conventions is that they rely upon a closed treaty regime. This means that only member states that are party to the framework agreement can become members to the protocol.<sup>56</sup> This then guarantees that states are going to be legally bound by the guiding principles of the framework convention. Arguably, this is crucial when stringent obligations are interpreted and implemented in the subsequent protocols. Ordinarily, this issue is addressed in the text of the framework convention, and parties are aware of the impending stringent obligations prior to ascension. For example, the Vienna Ozone Convention has such a provision that says States can only be party to a protocol if it has become party to the parent convention.<sup>57</sup>

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<sup>52</sup> United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: <https://www.refworld.org/docid/3ae6b3a10.html> [accessed 17 March 2023] The VCLT was adopted in 1969 and as such does not mention framework convention/protocol as this was recently established as a regulative technique of public international law. Matz-Lück asks a pertinent question as to whether the VCLT can still be used as a viable tool to assess modern multilateral treaties. This inquiry is outside the scope of this study and relevance is attached to the legal nature and character of framework conventions in addressing an issue of international concern. See; Matz-Lück (n 10) 451; Robert A Denemark and Matthew J Hoffmann, 'Just Scraps of Paper? The Dynamics of Multilateral Treaty-Making' (2008) 43 *Cooperation and Conflict* 185 <<https://www.jstor.org/stable/45084519>> accessed 16 April 2023. The argument here is that pressing global issues "cannot be left to the unreliable confines of pen and ink."

<sup>53</sup> Economic Commission for Europe (n 8).

<sup>54</sup> Matz-Lück (n 11).

<sup>55</sup> Bodansky (n 10) 15–19.

<sup>56</sup> Matz-Lück (n 11) 451.

<sup>57</sup> Vienna Ozone Convention (n 46). Article 16 (1) provides that: "A State or a regional economic integration organization may not become a party to a protocol unless it is, or becomes at the same time, a Party to the Convention".

As for framework protocols, they are subsequent agreements on more detailed issues that have not been dealt with in the parent agreement. The legal nature of the protocols is that they constitute international treaties and the rules on international treaties also apply to them. As a result, thereof, protocols are not easier to negotiate in comparison to other treaties. To that end, if member states take a lengthy process in coming up with consensus on a framework convention, it is likely that States will have great difficulty in adopting protocols. This then might hamper clear enforcement of concrete obligations. Critics are of the view that, since framework conventions are incremental in nature, consensus to adopt protocols can be engendered through further developments such as scientific evidence or institutional support on the issue of concern. With the help of international review and probably new scientific evidence on the issue, States are likely to join hands and bind themselves to more concrete obligations set in the protocol.

Much will thus depend on the guiding objectives of the parent framework on whether States entering into negotiations on the matter may reach consensus on the substantive content of the protocol.<sup>58</sup> Observers are of the view that there is no specific way in which future obligations can be stated in a framework convention. One way is to highlight future obligations to be included in a protocol from the beginning in the framework convention.<sup>59</sup> The other option is that a procedure to adopt protocols (without providing specific topics) is provided for in the framework convention.<sup>60</sup> Bodansky is of the view that the most effective way is to include the most pertinent provisions for further protocols in the text of the framework convention.<sup>61</sup> This helps in keeping focus on the most pressing needs for future developments. It is advised that the list provided in the framework convention should not be enumerative of all pressing issues so as to avoid a modification procedure in the event of a change in circumstances that might require another protocol.<sup>62</sup> This way, Parties to the framework convention are thus obliged to co-operate through or with assistance by the convention's organs so as to negotiate on specific issues while they are still within reach to discuss other issues.

Treaties emerge, most likely, because of collective problems.<sup>63</sup> In that vein, the inclusion of the guiding principles and institutional framework in the framework convention is a precursor

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<sup>58</sup> Bodansky (n 10); Bodansky (n 11).

<sup>59</sup> Matz-Lück (n 11).

<sup>60</sup> *ibid.*

<sup>61</sup> Bodansky (n 10).

<sup>62</sup> Matz-Lück (n 11).

<sup>63</sup> Denmark and Hoffmann (n 52).

to ‘future’ emerging issues that might come upon adoption of the framework convention. The inclusion of the guiding principles in the parent agreement, effectively “reduce[s] the freedom of the parties to design the protocols and their national legislation.”<sup>64</sup> However, this limitation does not mean that the general rules of treaty law are not applicable. Protocols will still enter into force if a certain number of States join, and every Member State willing to consent to the protocol has to sign and ratify the protocol at a later stage. The legal character of both the framework convention and the protocol has an impact on the political field. States weigh the opportunities and challenges that a treaty may bring and the political consequences thereof. This is because:

[...] every treaty obligation brings some burden to a State-party and purports to restrain its freedom of action. Hence, States will not ordinarily assume treaty obligations unless they judge them to be in their political interest, and are assured that political stakes with the state of affairs envisaged under the relevant treaty make it worth joining.<sup>65</sup>

Therefore, framework conventions, because of their legal character, elevates the political will of States for both action and consensus. Framework conventions and their protocols thus create a comprehensible treaty regime that is premised on a predominant agreement. When States agree on the normative structure and content of a framework convention (just like any other ordinary treaty), they would have looked at its legal nature, effect and character so as to “foresee or (mis)judge the extent to which its political stakes will be fulfilled or redeemed”.<sup>66</sup> This view is pertinent with regards to state practice. Countries tend to adopt own home-grown policies and laws in an effort to contain an issue of global concern. The flexibility of the framework convention/protocol approach in allowing governments the discretion to develop national policies and strategies based on their own countries’ capabilities is crucial in elevating political ego and will. Most importantly States feel empowered to own the problem if they are given the political freedom to take reasonable legislative measures within their reach and capability in tackling an issue of concern.

Perhaps the key concern on the efficacy of a framework convention/protocol approach is the question on why States should take a two-step approach to tackle an issue of international concern. On the face of it, this seems to be more political than legal. The reason being that

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<sup>64</sup> Matz-Lück (n 11) 453.

<sup>65</sup> Alexander Orakhelashvili, ‘Political Life of Treaties: Indeterminacy, Interpretation and Political Consequences’ (2021) 20 Chinese Journal of International Law 545, 545 <<https://academic.oup.com/chinesejil/article/20/3/545/6381515>> accessed 16 April 2023.

<sup>66</sup> *ibid* 546.

there seems to be more currency placed on political will rather than the legal regulation of the matter identified. Matz-Lück notes that in framework conventions States are likely to agree on the urgency to address the issue of concern, but do not reach consensus on all details of a regulation. Probably this is what in the end makes treaties mere papers and ink as all is arguably premised on political stakes and consequences.<sup>67</sup> The pragmatic notion of it is perhaps rooted in what is politically feasible, as this gives room for institutions to evaluate scientific evidence and advice to tackle the issue at hand.<sup>68</sup>

It can further be argued that the legal effect of a framework convention is the intersection of consensus and compromise.<sup>69</sup> Timetables in the framework convention may exert pressure on parties to adopt protocols when they are actually not in ‘good’ political position to do so. The deferral of questions for later regulation then becomes an evasive action to reach a solution. Postponement, in this scenario, can prove to be more successful than negotiations that culminate due to political pressure to reach agreement within a stipulated timeframe. It still remains unclear whether political pressure perpetuated by time constraints garners the required consensus, or is a sign of political compromise that undermine substantive treaty’s objectives. In the next section, the above discussed theoretical elements of the framework convention/protocol will be applied to the field of international refugee law.

#### ***4.2.4. Application to international refugee law***

It has been established in chapter 3 that migration has become the most troubling world problem in the new global era.<sup>70</sup> At the heart of these migratory flows is the reluctance by most countries to acknowledge that human mobility is “inextricably intertwined” to displacement factors that gives rise to new classes of refugees not protected by the 1951 Geneva Convention.<sup>71</sup> Therefore, the challenge we refuse to face is that these new classes of refugees, just like most Convention refugees, hail from countries where economic failure, political instability, poverty, and persecution are indissolubly linked. The question for determination

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<sup>67</sup> Denemark and Hoffmann (n 52).

<sup>68</sup> A good example is the multilateral environmental agreement on climate change and ozone depletion. In this Vienna Ozone Convention, drafters at first were in agreement with the general principles, objectives and the institutional framework, but, left out specific targets and timetables for later regulation.

<sup>69</sup> Matz-Lück (n 11).

<sup>70</sup> Michael S Teitelbaum, ‘Right Versus Right: Immigration and Refugee Policy in the United States’ (1980) 59 Foreign Affairs 21 to 59 <<https://www.jstor.org/stable/20040652>> accessed 14 March 2023.

<sup>71</sup> Andrea Lawlor and Erin Tolley, ‘Deciding Who’s Legitimate: News Media Framing of Immigrants and Refugees’ (2017) 11 International Journal of Communication 967 <<https://ijoc.org/index.php/ijoc/article/view/6273/1946>>.

then becomes: Who needs international protection today, and what is the possible efficacy of a framework convention/protocol approach in regulating the refugee definition?

The UN General Assembly and the Economic and Social Council have further reiterated that “refugee problems are a matter of international concern” and states should work in solidarity to “prevent causes leading to refugee flows”.<sup>72</sup> The research community has boldly called for the injection of new life into international refugee law so as to expand the arc of protection for refugee claimants by moving away from soft law to hard law that comes with concrete obligations. While calls have been made to expand the refugee definition, consensus has not been reached as to how this should be done considering the great political divide between the Global North and the South.<sup>73</sup> The lack of political will has led to harrowing images of migrants drowning at sea, and some dying in forests in an attempt to reach the European Union territory. Upon arrival, some refugee claimants are dismissed as bogus and mere economic migrants fleeing economic destitution, and thus do not qualify for international protection. It has been argued in chapter 3 that the current refugee definition in the Geneva Convention excludes persons with genuine claims for international protection. On the other hand, the OAU Convention despite its novelty on inclusion, also excludes internally displaced persons who do not have internal flight alternative.<sup>74</sup> As for the EU asylum acquis, a refugee is defined in terms of proximity from the European Union territory. This has created gaps in protection and has left out a number of persons in need of international protection.

Recently it has further been argued that a new link, in the form of a framework convention, could be a plausible tool to share the refugee burden.<sup>75</sup> The argument is premised on the fact

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<sup>72</sup> UN High Commissioner for Refugees (UNHCR), *Thematic Compilation of General Assembly & Economic and Social Council Resolutions*, June 2014, 4th edition, pg. 330, available at: <https://www.refworld.org/docid/5538d06d4.html> [accessed 17 April 2023]

<sup>73</sup> At regional level, the refugee definition is broad and encompasses the current global conditions that have given rise to the refugee crisis. Jeff Crisp, the former Head of Policy Development and Advocacy at the UNHCR once said: “*The [Organisation of African Unity] definition makes sense in Africa, but not in industrialised states taking the pragmatic line, you need public opinion on your side and the European context is not ready for an OAU Refugee definition. Pragmatically no new definition will be accepted and agreed upon.*” See Jeff Crisp., in Laura Barnett, ‘Global Governance and the Evolution of the International Refugee Regime’ (2002) 14 *International Journal of Refugee Law* 238.

<sup>74</sup> The internal flight alternative (IFA) refers to the limit placed on an asylum seeker whose risk of persecution is confined to a specific area of country of origin. IFA allows asylum officers to deny refugee status to an asylum seeker who faces harm or persecution in the area of previous residence, but presumably can live safely somewhere else in the same country. See: UN High Commissioner for Refugees (UNHCR), ‘Guidelines on International Protection No. 4: “Internal Flight or Relocation Alternative” Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees’ (2003) <<https://www.refworld.org/docid/3f2791a44.html>> accessed 9 March 2021.

<sup>75</sup> Wall (n 12).

that there should be a mechanism to distribute the refugee burden equally between States, so as to offer durable solutions for refugees. According to the Global Compact On Refugees Indicator Report, nine out ten refugees are hosted in countries with lower incomes as shown in *Figure 13* below<sup>76</sup>

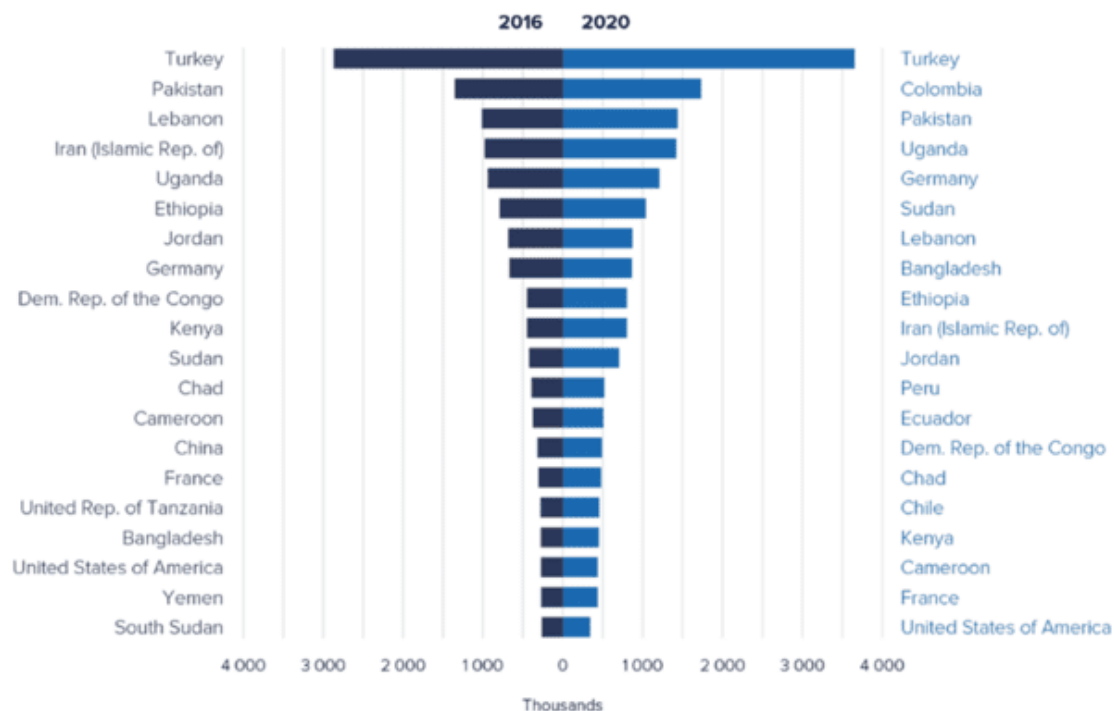


Figure 11: Top 20 refugee hosting countries

Therefore, with 86 percent of the world's displaced persons living in countries with developing economies, the call to regulate the refugee burden through the framework convention has been premised on coordinated and incremental mechanisms that will equalize the global refugee burden.<sup>77</sup> Further, the novelty of the framework convention/protocol approach, as shown above, has been fulcrum of regulation in the environmental field. It is argued that refugee protection, just like environmental protection, is an international issue that requires collective action. While a framework convention on sharing the refugee burden is commendable, and probably feasible, this study argues that before devising a mechanism to share the refugee burden through hard law, there is need for normative consensus on who needs international protection in the contemporary world. The task in this section is thus to propose an expanded

<sup>76</sup> United Nations High Commissioner for Refugees, 'Global Compact On Refugees Indicator Report' (2021) 17 <<https://www.unhcr.org/global-compact-refugees-indicator-report>> accessed 17 April 2023.

<sup>77</sup> Wall (n 12).



refugee working definition to be regulated by a framework convention. Defining who is a refugee is the first step towards refugee burden sharing.

#### **4.3. The first proposal: *normR* (expanded refugee definition).**

While this study focuses on the exclusion of ‘economic refugees’ and how they can be given some form of protection, it is pertinent to first do an analysis of the broader categories currently excluded from the refugee definition. As indicated in the introduction of this chapter, categories excluded can be described as follows: (i) the Geneva Convention excludes those fleeing their countries of origin for reasons other than persecution linked to one of the five convention grounds, (ii) the EU asylum acquis only views a refugee as a third-country national and excludes the same persons as under the 1951 Geneva Convention, except those qualifying for subsidiary protection, (iii) the human rights jurisprudence has set a high, albeit, contradictory threshold as to who can be protected from deportation as a result of destitution emanating from socio-economic factors.<sup>78</sup> With this set, the proposition below attempts to expand the refugee definition. The proposed expanded definition will be referred to as *normR* (*expanded refugee definition*) and defines the term ‘refugee’ as:

[...] any person who has fled their country of residence because of a well-founded fear of persecution, including the fear arising from indissolubly linked political, social, economic and environmental factors that are life-threatening and inhibiting one’s freedom, to which the State does not avail protection.

This proposal was presented to delegates at two international conferences.<sup>79</sup> An online survey form was further sent to selected migration scholars affiliated to the same research groups as the author: the Zolberg Institute on Migration and Mobility PhD Writing Group (N=10), the Migration Law Research Group at Ghent University (MigrLaw) (N=5), and the University of Ottawa’s Forced Displacement Workshop for Junior Scholars (N=10).<sup>80</sup> The online survey had a response rate of 16 per cent by the time of writing.<sup>81</sup> The survey remains open for input as

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<sup>78</sup> See discussion in chapter 3

<sup>79</sup> Chapter 4 of this study was presented at two international conferences as follows: Socio-Legal Studies Association Annual Conference 2023, Ulster University, Derry-Londonderry, Northern Ireland, “*Who is a genuine refugee? The efficacy of a Framework Convention in regulating the refugee definition*” 4-6 April 2023, and in Poland (Polish-Belarus border) Seminar on the Border: Organised by Researchers on the Border / Centre of Migration Research, University of Warsaw, The European Irregularized Migration Regime in the Periphery of the EU: from Ethnography to Keywords (ERIM, HRZZ), The Institute of Ethnology and Folklore Research Zagreb and Laboratory for Critical Migration and Border Regime Research, University of Göttingen : *Who is a genuine refugee? The efficacy of a Framework Convention in regulating the refugee definition* — 22 April 2023.

<sup>80</sup> Appendix 7 Online Survey Form

<sup>81</sup> Appendix 7A Online Survey Form Preliminary Findings (On file with the author)

this is an area for future research. For the purpose of analysing the above proposal, decisive reasons are defined as those that settle an issue towards accepting or rejecting the *normR*, while supportive reasons are those that do not settle the issue on accepting or rejecting the *normR* but rather offer a weaker argument thereof.

#### **4.4. Possible decisive and supportive reasons for accepting *normR***

As indicated in chapter 3, both the persecuted and those fleeing random violence face the prospect of life-threatening circumstances if they stay. The proposed *normR* does acknowledge the life-threatening nature of such circumstances that pose a direct threat to lives, such as war, genocide, or natural disasters. This recognition is essential for ensuring that individuals who are in need of immediate protection receive it. At the core, is the recognition of the limitations of state protection. The expanded definition acknowledges that individuals may be forced to flee their home country because they are unable to obtain adequate protection from their own government. By extension, the State might also be systemically weakened and as such not in a position to provide protection for its citizenry.

A senior research associate at the Institute of Ethnology and Folklore Research and Assistant Professor at the University of Zagreb, Croatia, affirms the above line of thought.<sup>82</sup> She accepts the proposed *normR* on the grounds that the “current definition is inadequate and needs to be more oriented towards structural inequalities”.<sup>83</sup> It was argued in the opening chapter of this study, that the adoption of neo-liberal policies has subverted the economic structure of most developing economies and thereby creating latent forms of displacement that have not been envisaged by the current regime of international refugee law. Arguably, these structural inequalities have been factored into the global mobility infrastructure and now have culminated into what the expert terms as the “basis for exclusion, illegalization, deportations, [and] detentions...”<sup>84</sup> The expert’s view perhaps further suggests that the proposed *normR* fits the scheme of an evolving world. It reflects the changing nature of global challenges, and thus recognizes the need for evolutionary legislation that measures up to new forms of displacement factors. The reluctance to expand the refugee definition, fails to account for instances when a

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<sup>82</sup> The expert wishes to remain anonymous. Name and personal details of the expert are on file with the author

<sup>83</sup> Appendix 7A (n 81)

<sup>84</sup> *ibid*

citizen is forced to flee country of residence due to compelling reasons other than persecution..<sup>85</sup>

#### 4.5. Possible decisive and supportive reasons for rejecting *normR*

In the above proposition, where the *normR* is defined for the purpose of the proposed *Framework Convention on an Expanded Refugee Definition*, some experts consulted on this study rejected *normR* by giving different decisive and supportive reasons for their selection. An expert with the Migration Law Research Group at Ghent University (MigrLaw), rejects the proposed *normR* on the grounds of the limited scope of persecution.<sup>86</sup> He acknowledges that “the definition problem is indeed a complicated issue” and failure to define the term may lead to the erosion of protection for refugees. He is of the view that the term ‘persecution’ as proposed in *normR* “requires an actor, whereas the emphasis should be on the need of protection, independent from who or what caused the [persecution]”.

The MigrLaw expert makes key pertinent observations. He alludes to the fact that the *normR* should emphasise more protection rather than persecution. He suggests that there should be no requirement of any ‘actor’ of persecution involved, there should thus not be a requirement of ‘persecution’ but of protection needs. In terms of Article 6 of the QD (recast), the actors of persecutions should be listed as one of the following: (a) the State; (b) parties or organisations controlling the State or a substantial part of the territory of the State; (c) non-State actors (including international organisations). If this formulation is allowed to stand, *normR* will possibly be exclusionary of climate refugees who really do not fear ‘persecution’. Their fear is much into the vagaries of the weather and the possible failure of the state to provide protection thereof.

As argued in chapter 1, in the context of Africa this line of thought opens up fresh calls for an expanded refugee definition. Most African countries have adopted aggressive neo-liberal economic measures that have become a latent form of persecution described by critics as “war by any other means which has contributed to more deaths during the post-Cold War era than all weapons of mass destruction throughout history”.<sup>87</sup> Arguably, the long after effect of these neo-liberal forces is that it has handicapped the very State that should be availing protection.

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<sup>85</sup> Luara Ferracioli, ‘The Appeal and Danger of a New Refugee Convention’ (2014) 40 *Social Theory and Practice* 123 <<https://www.jstor.org/stable/24332266>> accessed 22 April 2023.

<sup>86</sup> Appendix 7A (n 81)

<sup>87</sup> John Mueller and Karl Mueller, ‘Sanctions of Mass Destruction’ (1999) 78 *Foreign Affairs* 43.

As a result, this thus makes the State a default actor of persecution, and one from which one runs away out of fear of severe economic destitution that is life-threatening and inhibiting one's freedom.

This line of thought is picked up by the second expert who commented on the *normR*. The expert, who is a member of the University of Ottawa's Forced Displacement Workshop for Junior Scholars, rejects *normR* on the grounds that:

[...] this definition is still falling prey to the Eurocentric ideals of who is deserving or not of protection. I suggest that you move away completely from that perspective. Rather than being patronizing, I suggest you [focus on] those who are compelled to leave yet have no protection.<sup>88</sup>

The expert seems to suggest that if one is compelled to leave the country of origin, currency should not be placed on “who” or “what” caused persecution as also implied by the MigrLaw expert. This approach expands the ambit of the *normR* to other forms of displacement factors such as famine and environmental disasters. The fact that the Ottawa expert castigates *normR* as Eurocentric probably raises the politics of jurisdiction. Jurisdiction is an exercise of legal authority primarily within territorial boundaries.<sup>89</sup> Politics of jurisdiction is then an embodiment of the three base concepts that are referent points of a political community, *viz*, territory, inclusion and governance.<sup>90</sup> In the face of a global concern, countries make decisions based on their common understanding of what defines their territories. Therefore, the description of *normR* as Eurocentric seems to lean towards an understanding that the current regime of international refugee law is skewed and does not recognise other displacement factors. It is thus argued, the proposed *Framework Convention on an Expanded Refugee Definition* should not be polarising so as to avoid extreme political divide between the Global North and the South. What is arguably required is to garner decisive and supportive reasons that allow normative consensus.

A forensic linguist, who was also consulted to comment on the linguistic style of *normR*, suggests that the proposed *normR* should be improved in that regard. He is of the view that the proposed *normR* should contain two limbs. The first one should indicate that the main premise of the concept of persecution should stand on its own. This should then be qualified by another

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<sup>88</sup> Appendix 7A (n 81)

<sup>89</sup> Devika Hovell, ‘The Authority of Universal Jurisdiction’ (2018) 29 The European Journal of International Law 427 <<https://academic.oup.com/ejil/article/29/2/427/5057077>> accessed 29 August 2023

<sup>90</sup> Asha Kaushal, ‘The Politics of Jurisdiction’ (2015) 78 The Modern Law Review 759 <<https://www.jstor.org/stable/43829150>> accessed 29 August 2023

sentence that acts as an extender of the current definition. He is of the view that the proposed *normR* should read as follows:

[...] any person, who has fled their country of residence because of a well-founded fear of persecution. **The definition extends** to the fear arising from indissolubly linked political, social, economic, and environmental factors that are life-threatening, and inhibiting one's freedom, to which the State does not avail protection.<sup>91</sup>

A follow up to this argument might also rest on the closed list provided in the second sentence. Delegates at two the international conferences where the *normR* was proposed also critiqued the limited nature of the second limb of the definition. Perhaps more clarity is required on what constitutes a "life-threatening" or "inhibiting" factor. The main argument here being that the 'life threatening' or 'inhibiting' factor may lead to subjective interpretations and inconsistent application, thus making it difficult to determine who qualifies as a refugee.

The other possible source of discord over the proposed *normR* might be the difficulty in proving claims. Migration debate on the credibility of refugee claimants has gone beyond framing most asylum seekers as bogus.<sup>92</sup> The evaluation of asylum seeker's credibility is based on three dimensions: "internal consistency, external consistency (congruence with known facts), and plausibility."<sup>93</sup> All these three facets must provide a consistent narration of a well-founded fear of persecution or serious harm in the event of being returned to country of origin. To that end, an evaluation of the proposed *normR*, suggests that the inclusion of economic and environmental factors may affect the credibility of asylum seekers. This is because these claims are difficult to prove and require objective evidence to substantiate such claims. For example, in the African context, where the OAU Convention provide broad phrases like 'external aggression, occupation, foreign domination...', it will be quite a task to prove that the IMF and the World Bank have indirectly caused forced migration through their economic policies that have been argued to have caused more human displacement than war and generalised violence. What constitutes 'foreign domination' or 'aggression' may not be interpreted in the same prism as persecution caused by the five protected categories. While this is a cogent argument, the study is premised on the fact that the discourse of 'fake asylum seekers' might be the by-

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<sup>91</sup> Appendix 7A (n 81)

<sup>92</sup> James A Sweeney, 'Credibility, Proof and Refugee Law' (2009) 21 International Journal of Refugee Law 700 <<https://academic.oup.com/ijrl/article/21/4/700/1529897>> accessed 23 April 2023; Nuno Ferreira, 'Utterly Unbelievable: The Discourse of "Fake" SOGI Asylum Claims as a Form of Epistemic Injustice' (2023) XX International Journal of Refugee Law 1 <<https://academic.oup.com/ijrl/advance-article/doi/10.1093/ijrl/eeac041/7019623>> accessed 23 April 2023.

<sup>93</sup> Sweeney (n 92) 700–701.

product of “inadequate credibility assessment skills of asylum authorities”.<sup>94</sup> The proposal of a framework convention is to move away from the current basis of institutional bias, for it fails to account for contemporary displacement factors that are currently causing unprecedented cross-border movements.

#### **4.6. Refining the *normR***

As indicated in the discussion above, there is no consensus on accepting or rejecting the *normR* as proposed. Experts gave varied reasons and there is a need to incorporate their views in coming up with a much-refined *normR* before proposing it in the Framework Convention in the next section. In refining the definition credence will be given to the following four areas impacting on both decisive and supportive reasons; (i) residence, (ii) persecution, (iii) life-threatening and (iv) state protection.

First, clarifying what entails residence is important in the context of refugees. In chapter 3, the study argued that economic refugees flee their countries due to skewed economic policies that are interconnected to social, political, environmental (amongst others) factors. Therefore, it is pertinent to specify the phrase ‘country of origin’ or in the case of those stateless, the phrase ‘country of habitual residence’ is more appropriate. Experts consulted after and during the conferences where *normR* was presented argue that for the normative consensus to be garnered there is need to have an objective assessment of the country of origin or of habitual residence. One expert rightly points that failure to mention ‘country of origin/ habitual residence’ may result in a situation where :

[a] Cameroonian [national] fleeing from Libya, but without "problems" in Cameroon, would be entitled to international protection...<sup>95</sup>

It is therefore important to emphasize the country of origin when making an asylum claim. This helps, as discussed in chapter 3, to speed up RSD procedures using available information to prove the claim. In the event that the claim has been rejected and one takes the human rights law option to appeal against the rejection, an objective enquiry will be made to assess if the said ‘problems’ in the said country of origin are enough to violate basic human rights of the applicant. Expanding the ambit of protection to anyone fleeing a certain country because of

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<sup>94</sup> Ferreira (n 92).

<sup>95</sup> Email on file with author

economic destitution will burden the host country and strain available resources available for its citizenry.

The second issue relates to the term ‘persecution’. In the above proposed definition, the term ‘persecution’ is not bound to the protected categories of race, religion, nationality, social group or political opinion. In *section 3.1.3* of the previous chapter, an observation was made in relation to the term ‘persecution’. The fact that the term ‘persecution’ can be defined in many dimensions, might suggest a move from providing a closed list of what entails persecution.<sup>96</sup> Perhaps cross-border displacement in the new global era should be viewed as a “response to disempowerment and oppression”.<sup>97</sup> Further, it was established in *section 3.1.3* that the definition of persecution as provided for in art 9 of the Qualification Directive (QD) is also broad and can be interpreted from many perspectives. This study agrees with other scholars that “persecution is self-identifying” and should not be defined.<sup>98</sup> By using the term ‘persecution’ the *norm* is leaving the term undefined and open to many levels of interpretation. However, the problem with this formulation is that, under the current interpretations in refugee law and perhaps a literal reading of the term, persecution implies that there is an “actor” of persecution identifiable. This study argues that certain ‘events’ in the new global era do not have identifiable actors of persecution. An IMF agreement or financial sanctions may be seen as persecution to which both the State and the IMF can be interpreted as agents of persecution. At the same time, the asylum applicant may never be able to prove this. In short, the recurring argument on persecution with regards to new refugee categories is the acknowledgement that aggressive neo-liberal economic measures are latent forms of persecution described by critics as “war by any other means which has contributed to more deaths during the post-Cold War era than all weapons of mass destruction throughout history”.<sup>99</sup> To that end, this study proposes to strike off the term ‘persecution’ and give currency to both objective and subjective fear, for instance, of dire socio-economic circumstances. (see refined definition at the end of this section).

The third issue for discussion is the phrase ‘life-threatening’. In chapter 3, case law on art 3 ECHR has shown that one has to prove that expulsion to the country of origin or habitual

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<sup>96</sup> Hugo Storey, ‘What Constitutes Persecution? Towards a Working Definition’ (2014) 26 International Journal of Refugee Law 272 <<https://academic.oup.com/ijrl/article/26/2/272/1513048>> accessed 20 March 2023.

<sup>97</sup> Abou El Fadl, ‘Islamic Ethics, Human Rights and Migration’ in Ray Jureidini and Said Fares Hassan (eds), *Migration and Islamic Ethics* (Brill 2020) 15 <<https://www.jstor.org/stable/10.1163/j.ctv2gjx01g.6>>.

<sup>98</sup> Storey (n 96); *ibid*.

<sup>99</sup> Mueller and Mueller (n 87).

residence will subject them to torture or to inhuman or degrading treatment or punishment.<sup>100</sup> The meaning of ‘inhuman and degrading treatment’ means that the applicant has shown the “minimum level” of severity required to trigger the protection of art 3 ECHR.<sup>101</sup> Perhaps, this threshold is a lesser standard to prove than one in which ‘life-threatening’ situation is mentioned. The ‘life-threatening’ standard will require a high burden of proof. With this in mind, as earlier argued in chapter 3, changing the wording to ‘inhuman or degrading treatment’ might provide a lesser threshold for not only those fleeing economic destitution but other new forms of harm not covered by the 1951 Convention.

The fourth issue is about State protection. The current standard under international refugee law is that a person is described as a refugee if they are not willing or able to avail themselves of the protection of their home state. According to one expert consulted during the drafting of *normR*, the phrase “..to which the State does not avail protection” should be replaced by the current standard “as a result of such events, is unable or, owing to such fear, is unwilling to return to it” The expert rightly argues that the current *normR* formulation:

[...] may be more limiting, as in certain cases a state may say that they provide protection, yet for the specific individual this may be not feasible or desirable.”<sup>102</sup>

A refugee claimant should be in a position to refuse to avail themselves of the given state protection because they still have fear that such protection is not durable. Alternatively, they may be in difficult circumstances to be able to avail themselves for the granted state protection. This line of argument is further explored in chapter 5 on the socio-economic and political situation in Eritrea.

Therefore, having analysed possible decisive and supporting reasons for the adoption of an expanded refugee definition, this study provides the following proposal as possible refugee definition for the envisaged Framework Convention:

[...] any person who is outside their country of origin or country of habitual residence because of a well-founded fear arising from indissolubly linked political, social, economic and environmental factors that leads to inhuman or degrading treatment and who as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

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<sup>100</sup> Compare with *N v UK* and *D v UK* cases, and *Paposhvili v Belgium* discussed in chapter 3

<sup>101</sup> *Ireland v. The United Kingdom*, 5310/71, Council of Europe: European Court of Human Rights, 13 December 1977, available at: <https://www.refworld.org/cases,ECHR,3ae6b7004.html> [accessed 29 August 2023]

<sup>102</sup> Correspondence on file with author



#### 4.7. The proposal: Framework Convention on an Expanded Refugee Definition

This section provides a hypothetical Framework Convention on an expanded refugee definition, in its elementary form.

##### **Framework Convention on an Expanded Refugee Definition**

**Objective:** The objective of this Convention is to expand the definition of the term ‘refugee’, so as to provide protection and assistance to individuals who are forced to flee their countries due to a range of displacement factors other than persecution.

The Convention seeks to ensure that the rights of all refugees are respected and protected, and that they are able to find safety, security, and durable solutions in a timely and effective manner.

##### **Principles:**

1. Non-refoulement: No individual shall be returned to a country where they may face persecution or harm.
2. Non-discrimination: All individuals shall have access to protection and assistance without discrimination based on race, gender, religion, or other dimensions.
3. Access to rights: All refugees shall enjoy basic human rights, including the right to work, education, healthcare, and freedom of movement.

##### **General Obligations:**

1. States shall refrain from deporting or returning any individual to a country where they may face persecution or serious harm.
2. States shall provide access to basic human rights, including the right to work, education, healthcare, and freedom of movement.
3. States shall provide access to asylum procedures and ensure that these procedures are fair, efficient, and effective.
4. States shall cooperate with one another to ensure the protection and assistance of refugees, and shall share the responsibility for providing resources and support to countries hosting large numbers of refugees.
5. States shall work to find durable solutions for refugees, including resettlement, repatriation, and local integration.

##### **Institutions**

1. The Conference of the Parties (COP):
  - a) The COP shall be the supreme decision-making body of the Convention.
  - b) The COP shall be composed of all the states that have ratified the Convention
  - c) The COP shall promote international cooperation and solidarity in the protection of refugees
  - d) The COP shall establish policies and guidelines for the implementation of the Convention.
  - e) The COP also monitors the implementation of the Convention by member states and assesses the effectiveness of their efforts in protecting refugees.
  - f) The COP shall make decisions related to the provision of assistance and protection to refugees.

2. The Secretariat (entrusted to the office of the United Nations High Commissioner for Refugees) shall be responsible for the following:
  - a) Provide technical assistance and guidance to states parties in implementing the Convention, including helping them to interpret its provisions and develop appropriate policies and procedures.
  - b) Serve as a forum for communication and cooperation among states parties, facilitating the exchange of information, best practices, and experiences related to the Convention.
  - c) Monitor the implementation of the Convention by states parties, including reviewing their reports and conducting field missions to assess the situation on the ground.
  - d) Help states parties to build their capacity to implement the Convention, including providing training and technical assistance to relevant officials and institutions.
  - e) Provide administrative support for the operation of the Convention, including organizing meetings of states parties, maintaining records, and preparing reports.
3. A Refugee Coordination Committee
4. The Refugee Appeals Board
5. An Emergency Response (Search and Rescue (SAR) operation
6. A Trust Fund for Refugees.
7. The Refugee Advisory Council
8. A Refugee Data Hub shall be established to collect, analyse, and disseminate data on refugee flows, needs, and trends, to support evidence-based decision-making and programming.
9. Refugee Education Fund shall be established to provide resources and support to ensure that all refugee children have access to quality education.
10. Refugee Health Initiative shall be established to provide resources and support to ensure that all refugees have access to quality healthcare services.
11. Refugee Livelihoods Programme shall be established to provide resources and support to enable refugees to earn a living and contribute to the local economy.

The institutions established under this Convention shall work in partnership with one another, with states, with international organizations, with NGOs, and with refugees themselves, to ensure that the protection and assistance of refugees is effective, efficient, and sustainable.

## **ARTICLE 1**

### **DEFINITIONS**

For the purposes of this Convention:

1. The term 'refugee' refers to [...] any person who is outside their country of origin or country of habitual residence because of a well-founded fear arising from indissolubly linked political, social, economic and environmental factors that leads to inhuman or degrading treatment and who, as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

#### 4.8. Concluding remarks

This chapter attempted a bold endeavor of re-defining the term refugee for the envisaged Framework Convention in section 4.7. The motivation stems from the plight of economic refugees and other categories that fall outside the ambit of the protected categories of race, religion, nationality, social group or political opinion. It is herein argued that an expanded refugee definition (without any regional undertone) could be the basis for durable solutions to such new categories. However, as shall be shown in the concluding chapter of this study, definitions alone will not be enough in the field of refugee policy and protection. The final proposed *normR* in section 4.7 recognizes the interconnectedness of political, social, economic, and environmental factors, while at the same time acknowledging the limitations of the state to give protection. Possibly, the expanded definition encourages a more holistic approach in addressing the root causes of displacement and upholds international legal obligations with regards to the principle of non-refoulement which has become a customary *jus cogens*. Therefore, if the proposed *normR*, acknowledges the interdependence of political, social, economic, and environmental factors, it fits the prevailing reality in the new global era that recognizes that refugees may be forced to flee their countries of origin due to a combination of factors that are not always easily distinguishable. Such factors are not tied to ‘persecution’ either, nor should they be caused by any listed protected category. The chapter has argued that ‘persecution’ should not be the standard, but rather the fear for inhuman or degrading treatment. What is required is evidence of fear in the objective and subjective sense of the indissolubly linked political, social, economic and environmental factors giving rise to cross-border displacement. Such displacement should be viewed as a response to disempowerment and tyranny. For example, as shall be shown in chapter 5, political instability may lead to social unrest, which in turn may cause chronic economic collapse and environmental degradation, making it impossible for individuals to lead a safe and secure life. While there was no consensus in the formulation of the first *normR* definition, the revised definition may provide protection to people fleeing their homes because of a complex and intertwined set of reasons.

## PART 3

### Analysing Specific Challenges in Focus Countries

#### Introduction

The empirical claim in this study is that economic liberalization has subverted the economies of African countries and has caused cross-border displacement. This part of the study, thus, aims to evaluate the impact of economic liberalization on refugee movements in Eritrea and Uganda. These two African countries have posed difficult questions in the field of refugee protection and policy.<sup>1</sup> As established in the introduction of this study, Eritrea has become a country of origin of mixed migration that is constantly swamped by threats of war, youth despondency, militarization and chronic poverty. On the other hand, Uganda, despite its tumultuous political history and weak economy, has become a place of refuge for millions fleeing various forms of persecution from East and Central Africa.



Figure 12: Map of Africa (adapted from MapSVG)

For Eritrea, a country that has adopted the autarky economic policy, after its political independence, the claim of economic liberalization causing refugee movements is arguably questionable. Autarky is an economic system of self-reliance in which a country has limited

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<sup>1</sup> MapSVG, 'Map of Africa' (2023) <<https://mapsvg.com/maps/africa>> accessed 9 May 2023.

trade linkages, with other countries.<sup>2</sup> This policy of self-reliance goes against the logic of the neoliberal policies peddled by the Washington Consensus. As has been noted by some scholars, “Autarky is good for China, but not for the rest of the world”.<sup>3</sup> Therefore, for Eritrea, the key question for determination then becomes: to what extent has the mix of displacement factors caused cross-border movements? This then calls for a thorough analysis of the Eritrean economy before and after gaining political independence to determine its impact on refugee movements.

Conversations with experts on Eritrea, have warned the danger of categorising refugee movements in that country as only stemming from one source.<sup>4</sup> Although, literature on Eritrea’s refugee movements converge to the fact that many are fleeing forced national service and political repression,<sup>5</sup> recent observations have pointed out the impact of the ‘government’s misguided economic policies’ as a source of refugee outflows.<sup>6</sup> In Tanja Müller’s words, Eritrean refugees should thus be “analysed within wider frameworks of globalisation” rather than a constricted narrative of the 1951 Geneva Convention.<sup>7</sup> This argument will be pursued and analysed at length in chapter 5.

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<sup>2</sup> Eric Helleiner, ‘The Return of National Self-Sufficiency? Excavating Autarkic Thought in a De-Globalizing Era’ (2021) 23 *International Studies Review* 933 <<https://academic.oup.com/isr/article/23/3/933/6063510>> accessed 13 May 2023; James E Anderson and Douglas Marcouiller, ‘Anarchy and Autarky: Endogenous Predation as a Barrier to Trade’ (2005) 46 *International Economic Review* 189 <<https://www.jstor.org/stable/3663593>> accessed 13 May 2023.

<sup>3</sup> Heribert Dieter and Johanna Biedermann, ‘The New Advocacy for Autarky: Self-Sufficiency Is Now Once Again Becoming Popular for Geopolitical Reasons’ (2022) 19 *The Economists’ Voice* 263 <<https://www.degruyter.com/document/doi/10.1515/ev-2022-2003/html?lang=en>> accessed 13 May 2023.

<sup>4</sup> Appendix 9 Antwerp Expert (on file with the author)

<sup>5</sup> Milena Belloni, *The Big Gamble: The Migration of Eritreans to Europe* (University of California Press 2019); Katie Kuschminder and Anna Triandafyllidou, ‘Smuggling, Trafficking, and Extortion: New Conceptual and Policy Challenges on the Libyan Route to Europe’ (2020) 52 *Antipode* 206 <<https://onlinelibrary.wiley.com/doi/abs/10.1111/anti.12579>> accessed 11 July 2020; Meressa Tsehaye Gebrewahd, ‘Securitization and Militarization of the Border: Security Dilemma in Post-1998 Ethiopia and Eritrea’ (2018) 12 *Hungarian Journal of African Studies* 82 <<https://heinonline.org/HOL/Page?handle=hein.journals/hgnjloa12&id=246&div=23&collection=journals>> accessed 9 May 2023; Dan Connell, ‘Refugees, Migration, and Gated Nations: The Eritrean Experience’ (2016) 59 *African Studies Review* 217 <<https://www.cambridge.org/core/journals/african-studies-review/article/refugees-migration-and-gated-nations-the-eritrean-experience/6E0CCF14C7B142CB046567A7FEC14B63>> accessed 9 May 2023.

<sup>6</sup> Bertelsmann Stiftung, ‘BTI 2022 Eritrea Country Report’ (2022) 20 <<https://bti-project.org/en/reports/country-report/ERI>> accessed 9 May 2023; Senai W Andemariam, ‘Modernisation in Isolation: The Nature and Roots of Eritrea’s Defining Economic Ideology’ (2022) 14 *Critical African Studies* 293 <<https://www.tandfonline.com/doi/abs/10.1080/21681392.2022.2145978>> accessed 9 May 2023.

<sup>7</sup> Tanja R Müller, ‘Representing Eritrea: Geopolitics and Narratives of Oppression’ (2016) 43 *Review of African Political Economy* 658, 660 <<https://www.tandfonline.com/doi/abs/10.1080/03056244.2015.1111201>> accessed 13 May 2023.

The case study on Uganda is critical in two ways. First, the enquiry helps to evaluate the impact of economic liberalization on refugee protection and policy in Uganda. Second, a critical lens on refugee sustenance and livelihoods may help in explaining secondary refugee movements. While it has been established that refugee status determination is based on events in the country of origin, it is also important to analyse the reasons why economic refugees move from one 'safe country' to another in search of durable protection. Therefore, to what extent are such movements premised on economic destitution and skewed economic policies of the host country? As noted in the first chapter, Uganda is a refugee reception country whose economy is fraught with so many fiscal challenges, and yet continues to shoulder the refugee burden.<sup>8</sup> Is it, therefore, possible that life in the Ugandan refugee settlements may not sustain refugee livelihoods and give rise to secondary movements? Secondary displacement is premised on the sustainability of refugee camps in terms of livelihoods and economic opportunities (employment). Chapter 6 will thus provide a critical analysis of the impact of economic liberalization in Uganda, and how this has been a source of further secondary refugee movements out of Uganda.<sup>9</sup>

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<sup>8</sup> Frank Ahimbisibwe, 'Uganda and the Refugee Problem: Challenges and Opportunities' (2019) 13 *African Journal of Political Science and International Relations* 62; Naohiko Omata and Josiah Kaplan, 'Refugee Livelihoods in Kampala, Nakivale and Kyangwali Refugee Settlements. Patterns of Engagement with the Private Sector' 1 <<http://www.rsc.ox.ac.uk/files/publications/working-paper-series/wp95-refugee-livelihoods-kampala-nakivale-kyangwali-2013.pdf>>.

<sup>9</sup> SADC, 'Major Milestones Achieved in SADC Regional Integration, Economic, Social and Political Developments' (10 July 2021) <<https://www.sadc.int/latest-news/major-milestones-achieved-sadc-regional-integration-economic-social-and-political>> accessed 28 May 2023.

## Chapter 5

### Factors impacting on cross-border displacement: the case of Eritrea

#### 5.1. Eritrea: the land of the sea



Figure 13: Eritrea regional map (from Wikimedia Creative Commons)

Eritrea is situated in the northeast of Africa along the Red Sea and wedged between Djibouti and Sudan. The northeast region consists of Eritrea, Sudan, Ethiopia, Djibouti and Somalia. The Red Sea further separates northeast Africa from the Arabian Peninsula, and contains rich mineral deposits of gold, oil, and iron ore among others. The Asian side of the Red Sea is dominated by Israel, Jordan, Saudi Arabia, and Yemen. As shall be shown in the next section, the Red Sea is a source of constant warring between Ethiopia and Eritrea because of its proximity to the open waters of the oceans.<sup>1</sup> The constant foreign involvement and intervention by European, African and Asian powers has arguably turned the Red Sea into a battlefield.<sup>2</sup>

<sup>1</sup> Daniel Kendie, 'An Aspect of The Geo-Politics of The Red Sea' (1990) 12 *Northeast African Studies* 117 <<https://www.jstor.org/stable/43660318>> accessed 13 May 2023.

<sup>2</sup> Mussie G Tesfagiorgis, *Eritrea: Africa in Focus* (ABC-CLIO 2011) <<https://shorturl.at/gopZ4>> accessed 13 May 2023.

With Asmara being the most populous city, Eritrea has an estimated total landmass of 125,320 square kilometres, with a coastline extending along the Red Sea for about 1,200 kilometres.<sup>3</sup> As shown in the *Figure above*, the Eritrean coastline consists of a number of islands that are a habitat of diverse fish and coral reef populations. The Dahlak Archipelago is made up of over 350 small, arid and largely uninhabited islands.<sup>4</sup> Large islands like Dahlak Kebir, Norah, Haba and Gobba Baka thrive on fishing and pastoral activities.<sup>5</sup> The coastline situates Eritrea in a strategic location that has busy maritime routes and commercial ships floating to and from the Mediterranean Sea through the ports of Massawa and Assab.

For the purpose of this study, it is also important to point out that Eritrea has three main climatic regions. The eastern and western lowlands are dominated by an arid and semi-arid climatic belt. This area is comprised of the eastern coastal plains that includes, among others, the Semhar Plains, the Dankalia region, and the Barka and Gash territories.<sup>6</sup> The Barka and Gash regions are populated by almost one-third of Eritreans and the two seasonal rivers (Gash and Barka rivers) demarcates Eritrea from Ethiopia.<sup>7</sup> The Gash-Barka region is considered the breadbasket of Eritrea and the agricultural activities produce a variety of crops, vegetables and fruits.<sup>8</sup> The second climatic region is the cool and mild plateau largely experienced in Akele Guzayi and Seraye provinces now known as Zoba Debub, and also in Zoba Ma'ekel (formerly known as the Hamasien province).<sup>9</sup>

The third climatic belt is found in the mountainous region and the highlands of Eritrea. This area has rugged terrain and deforested mountains that are prone to the vagaries of the weather, thus affecting Eritreans living a pastoral life in Sahel, Anseba and Habab. As noted by Mussi Tesfagiorgis, in all these three climatic regions, “rainfall is one of the most decisive environmental factors” affecting livelihoods and quality of life in Eritrea.<sup>10</sup> This point is important for further discussion in the next section. As argued by critics, famine is a natural hazard based on the vagaries of the weather and is beyond the control of governments, but

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<sup>3</sup> *ibid.*

<sup>4</sup> *ibid.*

<sup>5</sup> *ibid.*

<sup>6</sup> *ibid.*

<sup>7</sup> Hans van der Splinter and Mebrat Tzchaie, ‘Gash Barka - Eritrea’ (*Eritrea . be*, 2018) <<http://www.eritrea.be/old/eritrea-gash-barka.htm>> accessed 13 May 2023.

<sup>8</sup> *ibid.*

<sup>9</sup> Tesfagiorgis (n 2) 6.

<sup>10</sup> *ibid* xx.



States should not further induce famine by crafting non-responsive policies that results in further harm.<sup>11</sup>

The above-described climatic zones flourish with ethnolinguistic diversity. The nine ethnolinguistic groups in Eritrea are: the Afar, Bilen, Hedareb, Kunama, Nara, Rashaida, Saho, Tigre and Tigrinya. This collage of multicultural Eritrea, is however, interwoven in “prevalent conflicts, movement of people, and external intervention”.<sup>12</sup> Key to their survival is the ability to cling to “assorted strategies of survival” as a way of facing the vicissitudes of life culminating from natural and man-made hardships.<sup>13</sup> To fully understand these ‘assorted strategies of survival’ and the ‘natural and man-made hardships’ confronting Eritreans, the next section shall delve at the chronology of events spanning from 1890 to 2020, so as to fully grasp the causes of cross-border displacement and various forms of persecution in Eritrea.

## 5.2. Historical background

Eritrea has been and is a scene of politics of contested sovereignty embedded with conflicts, resistance and oppression.<sup>14</sup> From the Italian colonisation, the meddling by the British and the annexation by fellow African country and bitter neighbour, Ethiopia, it can be argued that Eritrea’s political history of endurance and repression has also been replicated in the present day. Even after gaining statehood after a bitter armed struggle against Ethiopia, the present-day Eritrea is “still a dictatorship” where political participation is prohibited and there is gross violation of public and civil rights, and a general environment of muted freedom of expression.<sup>15</sup> This section aims to map out the historical chronology of Eritrea from the days of colonialism to the post-liberation era. As shown in the *Figure* below, this section will briefly discuss Eritrean existence during the colonial era, and the successive agreements or disagreements with Ethiopia and other outside forces that have led to present day Eritrea. The red colour on the *Figure* is representative of the political struggle endured from 1890, 1941,

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<sup>11</sup> Bahlbi Y Malk, ‘State-Induced Famine in Eritrea: Persecution and Crime against Humanity’ (2017) 10 *Journal of Politics and Law*.

<sup>12</sup> Tesfagiorgis (n 2) xx.

<sup>13</sup> *ibid*.

<sup>14</sup> Dan Connell, ‘Refugees, Migration, and Gated Nations: The Eritrean Experience’ (2016) 59 *African Studies Review* 217 <<https://www.cambridge.org/core/journals/african-studies-review/article/refugees-migration-and-gated-nations-the-eritrean-experience/6E0CCF14C7B142CB046567A7FEC14B63>> accessed 9 May 2023.; Tekle M Woldemikael, ‘Introduction to Special Issue: Postliberation Eritrea’ (2013) 60 *Africa Today* <<https://www.jstor.org/stable/10.2979/africatoday.60.2.v>> accessed 13 May 2023.

<sup>15</sup> Bertelsmann Stiftung, ‘BTI 2022 Eritrea Country Report’ (2022) 20 <<https://bti-project.org/en/reports/country-report/ERI>> accessed 9 May 2023; Senai W Andemariam, ‘Modernisation in Isolation: The Nature and Roots of Eritrea’s Defining Economic Ideology’ (2022) 14 *Critical African Studies* 293 <<https://www.tandfonline.com/doi/abs/10.1080/21681392.2022.2145978>> accessed 9 May 2023.

1961, 1998, and 2020. The blue colour represents temporary reprieve in political conflicts through the intervention of external forces and parties in trying to quell hostilities in 1952 and 2000, while the green colour in 1991, 1993 and 2018 gives the picture of hope and cessation of hostilities. The analysis of the Eritrean historical period will not dwell into the intricacies of the agreements nor disagreements, but will portray an overview of the chronology of events and their impact on refugee movements so as to fit the scope of the study.

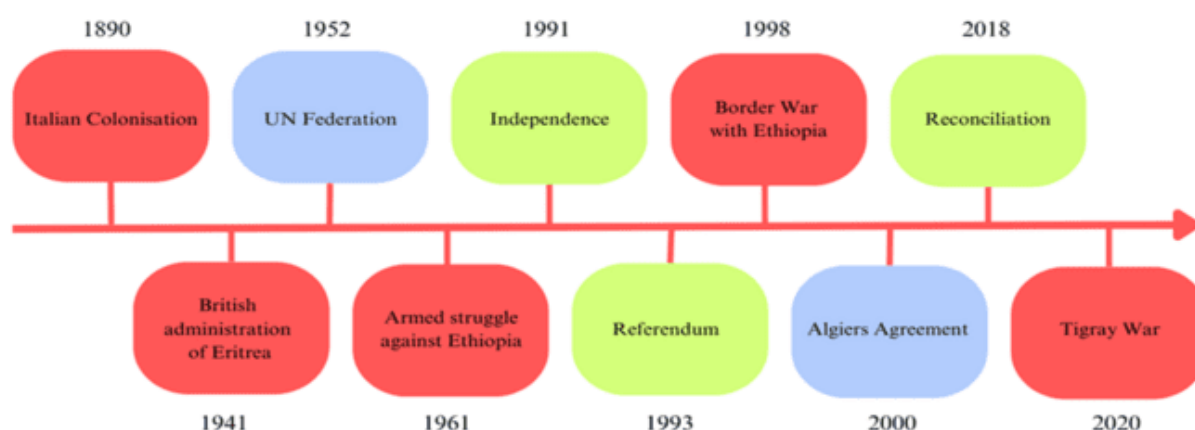


Figure 14: Eritrea's historical background (1890-2020)

Eritrea became an Italian colony on 1 January 1890. The process of Italian colonisation began in 1882 when Italy took control of the Red Sea coastal area of Assab from the Egyptians.<sup>16</sup> The Italians then expanded their control to Massawa by 1885 thus setting a springboard to move into the interior of Ethiopia where they were defeated at the battle of Dogali in January 1887.<sup>17</sup> The following three years saw erratic skirmishes between the Italians and the Ethiopians, and the fighting ended when Ethiopia withdrew and ceded control to the Italians by signing the 1889 Treaty of Ucciali, leading to the colonisation of Eritrea in the following year.<sup>18</sup>

It must be highlighted from the onset that, among Italy's former colonies, Eritrea has arguably received the least attention.<sup>19</sup> It is further observed that Italy's internal policies were often "erratic and inconsistent" and were accompanied by a heavy-handed approach aimed at cowing

<sup>16</sup> Kaleab Sigatu Tadesse, 'No Peace No War: The Ethiopian-Eritrean Conflict' (2019) 18 AARMS – Academic and Applied Research in Military and Public Management Science 79 <<https://folyoirat.ludovika.hu/index.php/aarms/article/view/1034>> accessed 9 May 2023.

<sup>17</sup> *ibid.*

<sup>18</sup> Morten Jerven, Donatella Strangio and Jacob Weisdorf, 'A Case of Its Own? A Review of Italy's Colonisation of Eritrea, 1890-1941' (2021) 1 The Journal of European Economic History 99 <<https://www.jeeh.it/articolo?urn=urn:abi:abi:RIV.JOU:2021;1.99&ev=1>> accessed 9 May 2023.

<sup>19</sup> *ibid.*

Eritreans into submission.<sup>20</sup> In summary, the Italians adopted a policy of marginalization of the indigenous population. Land was expropriated on the premise of racial lines and most Eritreans were left to eke out a pastoral life on the fringes of the arid and rugged terrain. Educational policies became repressive and exclusionary as Eritreans were allowed only four grades of basic education.<sup>21</sup> Instead, Eritreans were prepared to be mere resources for the army so as to fight Italian wars in Libya, Ethiopia and Somalia.<sup>22</sup> This led to discontent among Eritreans placed in high colonial offices and led to intermittent rebellion by Eritreans.

Although the attempt to rebel against Italian rule was futile, the fight by Eritreans for their rights was remarkable as it led to Italy to reconsider some of its colonial policies.<sup>23</sup> Therefore from the onset, the colonial management of Eritrea was not productive and made Eritrea qualify “as a poor region.”<sup>24</sup> It is further observed that the short Italian control (1890-1941) did not have any productive impact on Eritrea’s economic development.<sup>25</sup> Of note during the Italian rule is the signing of three border treaties with Ethiopia. The border treaties of 1900, 1902, and 1908 designated rivers and use of cartography as determinants of border delimitation.<sup>26</sup> These treaties, as it shall be seen in the next paragraphs, remain a source of conflict between Eritrea and Ethiopia.<sup>27</sup>

The Italian control of Eritrea ended in 1941 following their defeat by the Allied Forces in World War II (WWII). The British Military Administration (BMA) took control of Eritrea for a decade, and critics are of the view that it was a period of looting and plunder smeared with some form of political tokenism.<sup>28</sup> The BMA led a dual economy in which the Italians were still in control of certain institutions. During this time, the BMA is slated for having “sold or relocated a number of industrial plants in [Eritrea]”.<sup>29</sup> At the same time observers are of the view that the BMA introduced “remarkably constructive” policies to open both the public and

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<sup>20</sup> Tesfagiorgis (n 2) xxi.

<sup>21</sup> Tesfagiorgis (n 2).

<sup>22</sup> *ibid.*

<sup>23</sup> *ibid.*

<sup>24</sup> Jerven, Strangio and Weisdorf (n 18) 103.

<sup>25</sup> *ibid.*

<sup>26</sup> Kaiyan Homi Kaikobad, ‘The Eritrea-Ethiopia Boundary Commission: A Legal Analysis of the Boundary Delimitation Decision of 13 April 2002 and Relevant Subsequent Decisions’ in Andrea de Guttry, Harry HG Post and Gabriella Venturini (eds), *The 1998–2000 Eritrea-Ethiopia War and Its Aftermath in International Legal Perspective* (TMC Asser Press, The Hague 2021) <[https://link.springer.com/chapter/10.1007/978-94-6265-439-6\\_10](https://link.springer.com/chapter/10.1007/978-94-6265-439-6_10)> accessed 15 May 2023.

<sup>27</sup> Leenco Lata, ‘The Ethiopia-Eritrea War’ (2003) 30 *Review of African Political Economy* 369 <<https://www.jstor.org/stable/4006982>> accessed 15 May 2023.

<sup>28</sup> Tesfagiorgis (n 2).

<sup>29</sup> *ibid* xxi.

civil space.<sup>30</sup> Among the reforms introduced by the BMA was making basic education accessible to all, establishing teacher training institutions, and most importantly allowing the creation of political parties. As remarked by Lloyd Ellington, this was at a time when Ethiopia, through emperor Haile Selassie, was pushing for the incorporation of Eritrea and Italian Somaliland into the Ethiopian State.<sup>31</sup> On the other hand, in Eritrea discordant voices were emerging through the group called *Mahbar Feqri Hagar Eretra* (Society for the love of the land of Eritrea), that believed Eritrea had been ‘stolen’ by the Italians and should be returned.<sup>32</sup>

During this time the question of Eritrea’s independence became an act of external intervention. Two questions were critical; first, whether Eritrea should be given to Ethiopia, and second, whether Eritrea should become a sovereign state. On the tail of it, was the outright claim by the Egyptians during the Paris Peace Conference of 1946 that Eritrea belonged to Egypt and by implication to the Arab League.<sup>33</sup> Given these political contestations, steps towards the federation of Eritrea with Ethiopia were taken by the Four Victorious Powers (Britain, France, the United States and the Soviet Union). The notion of a federated Eritrea was presented to the United Nations in 1950. The justification by the UN was that this would provide autonomy to Eritrea under its own constitution and elected government.<sup>34</sup> In 1952, the federation came into effect, ratified by the Ethiopian emperor Haile Selassie. This effectively ended the BMA control over Eritrea, and was a precursor to more political conflicts with its neighbour, Ethiopia.

The federation deprived Eritrea of the right to self-determination.<sup>35</sup> Critics further argue that the current struggle of the Eritrean people is perhaps a by-product of Ethiopian expansionist policies.<sup>36</sup> Semere Haile provides an in-depth analysis of the reasons that led to the failure of the federation and the subsequent bitter war that ensued in 1961 with Ethiopia.<sup>37</sup> The annexation of Eritrea by Ethiopia in 1962, was a culmination of a series of breaches. The Ethiopian army occupied Eritrea, political parties were banned and dismembered, the Tigrigna

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<sup>30</sup> *ibid.*

<sup>31</sup> Lloyd Ellington, ‘The Emergence of Political Parties in Eritrea, 1941–1950’ (1977) 18 *The Journal of African History* 261 <<https://www.cambridge.org/core/journals/journal-of-african-history/article/emergence-of-political-parties-in-eritrea-19411950/5CD4329113C0C650B5D411E058D3B4D9>> accessed 9 May 2023.

<sup>32</sup> *ibid.*

<sup>33</sup> Kendie (n 1) 124.

<sup>34</sup> Tadesse (n 16).

<sup>35</sup> Semere Haile, ‘The Origins and Demise of the Ethiopia-Eritrea Federation’ (1987) 15 *A Journal of Opinion* 9 <<https://www.jstor.org/stable/1166919>> accessed 14 May 2023.

<sup>36</sup> *ibid.*

<sup>37</sup> *ibid.*

(also spelt as *Tigrinya*) and Arabic languages were officially replaced by Amharic (Ethiopian official language), and the Eritrean national seals were all replaced with that of Ethiopia.<sup>38</sup> In the ultimate end, Eritreans began an underground resistance group: the Eritrean Liberation Movement (ELM). Countrywide strikes and sabotage became a norm thus upsetting the economic activities of Eritrea.<sup>39</sup> In short, the period between 1952 and 1962 was another epoch of destabilisation of Eritrea, this time by a fellow African country. In the context of present-day Eritrea, the history of its oppression during the federation, is unfortunately a reflection of present-day politics. As summarised by Haile:

Emperor Haile Selassie denied Eritreans their basic democratic and human rights by undermining the autonomy of the Eritrean government, curtailing the freedom of the press, prohibiting popular organizations and demonstrations, persecuting and imprisoning Eritrean patriots, suppressing Eritrean languages and culture and imposing the Amharic (Ethiopian) language upon an unwilling population.<sup>40</sup>

As shall be discussed in the next section, the above quote also reflects the current life in post liberated Eritrea.<sup>41</sup> The incursions on the civil and political liberties by Ethiopia then led to Eritreans organising underground groups of resistance that led to the thirty-year armed struggle between 1961-1991 with Ethiopia.

The legacy of the 30-year armed struggle for self-determination against Ethiopia took a heavy toll on the Eritrean society.<sup>42</sup> Two political organisations with a fractious relationship, but driven by the same objective against Ethiopia, were at the heart of the Eritrean struggle for self-determination. The Eritrean Liberation Front (ELF) was formed in Cairo by Eritrean Muslims who were disenchanted by the Ethiopian rule.<sup>43</sup> The Ethiopian authorities labelled ELF as an Arab tool aimed at destabilising the region, and thus it ran a campaign to rally Eritrean Christians to oppose it. However, the worsening economic environment and the replacement of *Tigrinya* with Amharic, made more Eritrean Christian students to engage in political activism and more Christians joined the ELF.<sup>44</sup> With more Christians joining the organization, the ELF began excluding them and this led to the formation of a secular and Marxist

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<sup>38</sup> *ibid.*

<sup>39</sup> Tesfagiorgis (n 2).

<sup>40</sup> Haile (n 35) 15.

<sup>41</sup> Magnus Treiber and Tricia Redeker Hepner, 'The Immediate, the Exceptional and the Historical: Eritrean Migration and Research since the 1960s' (2021) 55 *Canadian Journal of African Studies / Revue canadienne des études africaines* 563 <<https://www.tandfonline.com/doi/abs/10.1080/00083968.2021.1871638>> accessed 16 May 2023; Bertelsmann Stiftung (n 15).

<sup>42</sup> Bertelsmann Stiftung (n 15).

<sup>43</sup> Tadesse (n 16).

<sup>44</sup> *ibid.*

organization called the Eritrean People's Liberation Front (EPLF).<sup>45</sup> For the purpose of this study, it is also important to mention that the EPLF had a good relationship with the Tigray People's Liberation Front (TPLF), that was fighting within Ethiopia to remove the Ethiopian government.<sup>46</sup>

The fractious relationship between the ELF and EPLF gave rise to factional fighting and organisational fragmentation.<sup>47</sup> This arguably dragged the armed struggle to over three decades, thus making it the most enduring conflict in post-colonial Africa. Over two million people lost their lives, the war produced a steady stream of refugees into the neighbouring Sudan and other countries in close proximity. Furthermore, the economic damage to both Eritrea and Ethiopia was innumerable, with Ethiopia reported to have run into USD 9 billion debt by May 1991.<sup>48</sup> Justification of such an expenditure to gain control of Eritrea is probably premised on the fact that capturing Eritrea would allow Ethiopia unfettered access to the Red Sea and the port infrastructure.<sup>49</sup> The Ethiopian government spent all this much to cow Eritreans into submission, just as the Italians had sought to do during the colonial era. In so doing Ethiopia perpetuated suppression and normalised torture, mass-murders, arbitrary detention and torture. Critics have argued that present Eritrea might not be able to recover from this past which then, like now, reduces the life of Eritreans to bare existence bereft of rights and any form of protection.<sup>50</sup>

The defeat of Ethiopia and gaining of statehood by Eritrea in May 1991 and the subsequent referendum are probably periods of relative peace in Eritrea. At the same time, the ending of Ethiopian imperialism, after the colonisation by Italy and Britain, ushered in a fresh impetus of hope and reinvigoration to the new state. The referendum was an outright claim for independence as over 98 per cent voted for self-determination.<sup>51</sup> In 1994, the EPLF, having played a dominant role to end the Ethiopian rule, rebranded itself to the People's Front for

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<sup>45</sup> Michael Woldemariam, 'The Eritrean Liberation Front: Jebha in Action, 1960–1982', *Insurgent Fragmentation in the Horn of Africa: Rebellion and its Discontents* (Cambridge University Press 2018) <<https://www.cambridge.org/core/books/insurgent-fragmentation-in-the-horn-of-africa/eritrean-liberation-front/4F58B8143F87B33292446B0C2D0C3218>> accessed 9 May 2023.

<sup>46</sup> Tadesse (n 16).

<sup>47</sup> Woldemariam (n 45).

<sup>48</sup> *ibid.*

<sup>49</sup> Edward Morgan, 'A Geographic Evaluation of the Ethiopia-Eritrea Conflict' (1977) 15 *The Journal of Modern African Studies* 667 <<https://www.cambridge.org/core/journals/journal-of-modern-african-studies/article/geographic-evaluation-of-the-ethiopiaeritrea-conflict/286269F233D34527D63FCC283B6507FF>> accessed 13 May 2023.

<sup>50</sup> Woldemikael (n 14) ix.

<sup>51</sup> David Styan, 'Eritrea 1993: The End of the Beginning' in Allen Tim (ed), *In search of cool ground: war, flight & homecoming in northeast Africa* (James Curry 1996).

Democracy and Justice (PFDJ) and set a temporary government led by the incumbent President Isaias Afwerki (as of 2023). The PFDJ was to spend the first five years consolidating its power and turning Eritrea into a one-party state by drafting a constitution that was later rejected.<sup>52</sup> In the process of such consolidation, the PFDJ began to violate the public and civil rights of the very Eritreans it had helped to liberate from Ethiopian imperialism. War veterans were systematically disabled to smother any form of rebellion, arbitrary detentions became the order of the day, and protesters were brutally killed.<sup>53</sup> The acronym PFDJ became a parody for “Please Forget Democracy and Justice” as the PFDJ subjugated Eritreans to new forms of tyranny.<sup>54</sup>

During this transition phase, the Eritrean government signed a Treaty of Friendship with Ethiopia as a way to formalise relations.<sup>55</sup> The brief reconciliatory act allowed Eritreans to use the Ethiopian *Birr* as their currency. This proved to be advantageous for the Eritrean side as they would import a variety of goods for *Birr* from Ethiopia. At the same time the currency regulation proved to be a source of another war (the Border War) with Ethiopia in 1998.<sup>56</sup> Critics are of the view that the use of the *Birr* allowed Eritreans to maximize savings of hard currency as Eritrea had its own policy regarding the exchange of hard currency.<sup>57</sup> The second point is that there were notions of Eritrean traders abusing the transit rights for Eritrean goods in a way to earn profit on the Ethiopian market.<sup>58</sup>

The 1998-2000 Border War is another sad chapter in the Eritrean/Ethiopian history. As suggested above, the consternation over currency could have been the cause for the unnecessary war.<sup>59</sup> Described as the senseless fight by two men over a comb, the Border War started on May 6, 1998 in Badme. Also viewed from a social, cultural and political lens, the war “pitted brothers against brothers” and fractured the family unit.<sup>60</sup> The media describes Badme, a border town in Gash-Barka region of Eritrea, as a “humble, dusty market town with

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<sup>52</sup> Tadesse (n 16).

<sup>53</sup> Victoria Bernal, ‘Please Forget Democracy and Justice: Eritrean Politics and the Powers of Humor’ (2013) 40 *American Ethnologist* 300 <<https://www.jstor.org/stable/24027334>> accessed 14 May 2023.

<sup>54</sup> *ibid* 302.

<sup>55</sup> Tadesse (n 16) 82.

<sup>56</sup> Lata (n 27).

<sup>57</sup> Tadesse (n 16).

<sup>58</sup> *ibid*.

<sup>59</sup> Lata (n 27) 377.

<sup>60</sup> Kjetil Tronvoll, “‘Brothers at Peace’: People-to-People Reconciliation in the Ethiopian–Eritrean Borderlands’ (2019) 39 *War & Society* 58, 58–59 <<https://www.tandfonline.com/doi/abs/10.1080/07292473.2019.1701618>> accessed 16 May 2023.

no value”.<sup>61</sup> Arguably, two of Africa’s poorest countries engaged in deadly combat over a stony, rugged terrain with catastrophic results. Over 70,000 military personnel lost their lives, with more than a million people displaced and great economic opportunities wasted on the both sides of the border.<sup>62</sup> The two-year conflict had direct impact on women and children, curtailed economic growth and left families separated, scattered and in perpetual grief.<sup>63</sup> The intermittent peace was quashed and Ethiopians and Eritreans who had reconciled and were living together on either side of the border were torn apart with strife and hatred of each other.<sup>64</sup>

In the year 2000 the warring parties signed a pact to end hostilities in Algiers on 18 June 2000. The Boundary Commission published its binding decision two years later, and yet both countries, for nearly two decades, could not implement the decision.<sup>65</sup> The Commission concluded that the Western portion of the border covering the town of Badme belonged to Eritrea as stated in the 1902 Treaty.<sup>66</sup> As for the Ethiopian claim, the Commission acknowledged that despite Ethiopian extensive administrative role in the contested area, Ethiopia had not shown sufficient evidence “to displace the title of Eritrea” to the contested area of Badme.<sup>67</sup> Ethiopia disputed the decision and Eritrea demanded for the immediate implementation of the ruling. Ethiopia called for further talks, while Eritrea called for the implementation of the decision thus locking the traditional foes into cold peace. During this impasse, the United Nation further made the situation worse by imposing arms embargo, travel ban, assets freeze and targeted sanctions on Eritrea in the year 2009.<sup>68</sup> The sanctions were on the basis that Eritrea had armed militant groups in Somalia thus undermining peace efforts in that country.

As noted by observers, the conflict between Ethiopia and Eritrea is not only about principle of title to territory, but also a constant reminder that in the modern era, impacted by multivariate sources of displacement, “borders should be de-emphasised and not perceived as Chinese

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<sup>61</sup> Tesfalem Araia, ‘Remembering Eritrea-Ethiopia Border War: Africa’s Unfinished Conflict’ *BBC Tigrinya* (London, 2018) <<https://www.bbc.com/news/world-africa-44004212>> accessed 15 May 2023.

<sup>62</sup> *ibid.*

<sup>63</sup> Tesfagiorgis (n 2).

<sup>64</sup> *ibid.*

<sup>65</sup> Kaikobad (n 26).

<sup>66</sup> Martin Plaut, ‘Ethiopia and Eritrea: Returning to War?’ (2005) 2 *International Journal of Ethiopian Studies* 179, 180 <<https://www.jstor.org/stable/27828861>> accessed 15 May 2023.

<sup>67</sup> *ibid.*

<sup>68</sup> United Nations, ‘Security Council Imposes Sanctions on Eritrea over Its Role in Somalia, Refusal to Withdraw Troops Following Conflict with Djibouti’ (*UN Press’ (United Nations Security Council SC/9833)*, 2009) <<https://press.un.org/en/2009/sc9833.doc.htm>> accessed 16 May 2023.



walls”.<sup>69</sup> In the case of political repression, leaders end up using legitimate concerns about ‘titles to territory’ as a means of staying in power to protect the sovereignty of the country. Literature on the conflict further alludes to the fact that the Eritrean leadership used the Border War conflict to stay in power.<sup>70</sup> The government blamed external intervention, economic sanctions, and country’s domestic problems as being caused by the Border War conflict. As a justification for protecting Eritrean’s sovereignty, Asmara implemented more rigorous extensions to national service in the name of fighting for self-determination.<sup>71</sup> It is ironic that while both countries routinely blamed each other for dictatorial tendencies, they could not at the same time call out their own dictatorial tendencies stifling peace and stability in their own countries.<sup>72</sup> In a nutshell:

War is the convenient excuse for tyranny: the “no war, no peace” stand-off with Ethiopia has been used since 2000 to justify never implementing the [Eritrean] 1997 constitution, the absence of national elections, indefinite national service and the imposition of numerous illiberal and oppressive policies.<sup>73</sup>

The impasse over the border was then broken in June 2018, when the then new Prime Minister—Abiy Ahmed Ali—brokered reconciliation with Eritrean leadership.<sup>74</sup> Diplomatic relationships were rekindled, the shared border between the two countries was re-opened and peaceful co-existence was again emphasised. For his efforts towards realigning brotherhood and solidarity with Eritrea, Ali was awarded a Noble Peace Prize in 2019.<sup>75</sup> However, critics insist that peace without freedom is as just a good as a loosened noose. This notion of cold peace is succinctly summarised in the following lines, and will be critical for the discussion in *section 5.3*:

...the peace between Ethiopia and Eritrea remains a historic achievement, but two and a half years after it is still nothing but a peace on paper. The border is closed, there is no formal trade, no roadmap on the border demarcation, and there is absolutely no impact on the domestic situation – no progress on human rights, no

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<sup>69</sup> Lata (n 27); Kaikobad (n 26).

<sup>70</sup> Tadesse (n 16); Makeda Saba, ‘No War, No Peace: Life and Death in Eritrea’ [2020] *The Elephant* <<https://www.theelephant.info/features/2020/10/23/no-war-no-peace-life-and-death-in-eritrea/>> accessed 3 December 2021.

<sup>71</sup> Jean Baptiste Jeangene Vilmer, ‘Peace without Freedom in Eritrea: Causes and Consequences of the Ethio-Eritrean Rapprochement’ (2021) 15 *Journal of Eastern African Studies* 23 <<https://www.tandfonline.com/doi/abs/10.1080/17531055.2020.1871556>> accessed 16 May 2023.

<sup>72</sup> Lata (n 27) 385.

<sup>73</sup> Vilmer (n 71) 27.

<sup>74</sup> Tronvoll (n 60).

<sup>75</sup> *ibid.*

reforms of the institutions or the economy. The frozen conflict has been replaced by a frozen peace.<sup>76</sup>

The above statement is evidence that the entrenched socio-economic disparities embedded in the political and institutional paradigms of Eritrea make it difficult for the country to have perpetual peace. This is well exemplified by the Tigray war of 2020. The Tigray War is an armed conflict between the federal Ethiopian National Defence Force (ENDF) and the forces of the former main political party in Ethiopia, the Tigray People's Liberation Front (TPLF).<sup>77</sup> The war started in early November of 2020 and the Eritrean forces joined hands in support of the ENDF. The devastating war, described by observers as a crime against humanity, destroyed lives in the Tigray region of Ethiopia. The large-scale massacre of civilians, involuntary displacement of thousands, the rape of young girls and children, and the entrapment of Eritrean refugees make a grim reading in a region that has lost natural, physical and human resources in the previous conflicts.<sup>78</sup> Further, the involvement of Eritrea in the conflict dashes hopes of durable peace in the region and further leaves Eritreans at home, in Ethiopia and the diaspora in a state of liminality. These constant states of war have probably made Eritrea uninhabitable. Also, the prospects of life in an economy constantly facing war shocks bouncing on political repression, may further lead to large scale displacement of Eritreans. As it shall be discussed in the next section, the factors of displacement in Eritrea are interconnected and as such it is probably impossible to isolate one source of displacement as the root cause thereon.

### 5.3. Eritrea: a State of Exception?

The above chronology of the Eritrean history from 1890-2020, may aptly be described as a timeline of pain, grief, and despondency. It is punctuated by a series of vicious violent episodes of war, subjugation, repression, economic malaise, and large-scale displacement. In short, Eritrea is a country underlining the Agambenian state of exception in which Afwerki uses the Ethiopian-Eritrean border dispute as a veneer to exert totalitarianism over Eritreans so as to have a stranglehold on power.<sup>79</sup> Woldemikael explores the idea of a state of exception as put forward by Schmitt and Agamben in the context of how Eritrean leadership has used these

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<sup>76</sup> Vilmer (n 71) 36.

<sup>77</sup> Eric Pichon, 'Ethiopia: War in Tigray - Background and State of Play' (2022) <[https://www.europarl.europa.eu/thinktank/en/document/EPRS\\_BRI\(2022\)739244](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2022)739244)> accessed 18 May 2023.

<sup>78</sup> *ibid.*

<sup>79</sup> Woldemikael (n 14); Giorgio Agamben, *State of Exception: Translated by Kevill Attel* (University of Chicago Press 2005) <<https://altexploit.files.wordpress.com/2017/07/giorgio-agamben-kevin-attell-state-of-exception-university-of-chicago-press-2005.pdf>> accessed 16 July 2020.

series of events as a threat to Eritrean's sovereignty.<sup>80</sup> In so doing, the Eritrean leadership has suspended the constitution, violated fundamental human rights of its own people, and plunged the State into a vicious circle of despondency with large scale human displacement.<sup>81</sup> With its own rules and laws, only aimed at benefiting a few elites, perhaps it can be deduced that Eritreans have been reduced to a "level of bare existence, merely [becoming] bodies that have no rights and protections".<sup>82</sup>

Alternatively, as echoed by Stephen Humphreys on the state of exception theory, the constant use of the "vocabulary of war" in such fragmented states like Eritrea can be viewed as a convenient excuse to violate the rights of the citizens which in the corollary legitimises illicit practices like human smuggling.<sup>83</sup> This is because the citizens in such fragmented states will find the illicit activity as a necessity to escape such constant threats. Also as noted in the chronology of events above, Eritrea has not adequately utilized its strategic geopolitical location and this has smothered development. The Human Development Index Report ranks Eritrea at 176 out of 185 countries and scores lowly in terms of quality of health, education and standard of living.<sup>84</sup> Media experts suggest that the Eritrean government restricts humanitarian access and free movement such that soldiers are instructed to shoot at anyone discovered trying to leave the country illegally.<sup>85</sup> Despite this extreme policy, between 2013 and 2020, over 520, 000 Eritreans have been recognised as refugees around the world, while 30, 498 Eritreans not entirely fitting the Geneva Convention's refugee definition have been categorised as "others of concern".<sup>86</sup> With such a myriad of complex push factors like forced conscription, gross human rights violation endemic poverty, economic sanctions and constant fear of war, Eritreans have fled the country *en masse* taking risky routes to Libya and fatal Mediterranean voyages in an attempt to reach Europe.<sup>87</sup> In the context of the expanded Framework Convention's s expanded

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<sup>80</sup> Michael Mcconkey, 'Anarchy, Sovereignty, and the State of Exception: Schmitt's Challenge' (2013) 17 Source: The Independent Review 415.

<sup>81</sup> Woldemikael (n 14).

<sup>82</sup> *ibid* ix.

<sup>83</sup> Stephen Humphreys, 'Legalizing Lawlessness: On Giorgio Agamben's State of Exception' (2006) 17 European Journal of International Law 677, 677 <<https://academic.oup.com/ejil/article/17/3/677/2756274>> accessed 16 May 2023.

<sup>84</sup> UNDP, 'Human Development Report 2021-22' (2022) <<https://hdr.undp.org/>>. accessed 16 May 2023

<sup>85</sup> Martin Plaut, 'Eritrea – Evidence of Shoot to Kill Policy as Group Gunned Down' *Harnnet.org* (Asmara, 16 December 2016) <<https://www.harnnet.org/index.php/articles-corner/english-articles/item/3276-eritrea-evidence-of-shoot-to-kill-policy-as-group-gunned-down>> accessed 30 April 2020.

<sup>86</sup> UNHRC, 'Refugee Data Finder' (2022) <<https://www.unhcr.org/refugee-statistics/download/?url=v3uTRf>>. Accessed 13 August 2023

<sup>87</sup> Tekle Mariam Woldemikael and others, *Postliberation Eritrea* (Tekle Mariam Woldemikael ed, Indiana University Press 2018).

refugee definition discussed in chapter 4, , the lingering question is: to what extent can the human displacement in Eritrea be attributed to various interconnected factors of displacement?

As indicated in chapter 2, my brief stay at the Centre for Migration and Intercultural Studies (CeMIS, Antwerp) opened up a critical discussion against the view of economic liberalization as a source of human displacement in Eritrea. The expert was of the view that the proposition of economic liberalization in Eritrea is weak and cannot be supported by facts on the ground.<sup>88</sup> The expert advises for a more plausible explanation in which there is an analysis of a “specific political intervention” by the Eritrean authorities leading to economic destitution.<sup>89</sup> Alternatively, an analysis can be made on the impact of a developmental project like the construction of a dam in which citizens are displaced thereon to make way for such a project.<sup>90</sup> With regards to external interventions, the expert further argues that one has to critically look at how external actors have subverted the Eritrean economy thus resulting in human displacement. In a nutshell, a view against the hypothesis on economic liberalization subverting the Eritrean economy and thus causing cross-border displacement, can be countered as follows:

[...there is] need to focus on specific economic interventions. [One] cannot just talk about poverty in general, but...need to show how certain political and economic interventions have led to extreme destitution for a group of people [in Eritrea]. But then what you may find out, because that is what migration theory says, is that the most deprived people are not the ones that move, ...So, you might find that these people stay stuck and are not the ones who arrive in Europe for one reason or another.<sup>91</sup>

While it is true that the poorest will not migrate, the expert’s views may arguably be countered by the fact that this does not imply that economic liberalization has not caused the other middle class to migrate. Furthermore, the migration theory mentioned in the quote above, is reference to the realm of the neo-classical theory discussed in chapter 2. It is an insinuation of what has now become known as the *de Haas paradox* that is framed on the grounds that the poorest of the world cannot afford to migrate.<sup>92</sup> It must further be noted that the expert makes pertinent remarks with regards to the forces of displacement at play in Eritrea. However, as argued in chapter 3 and 4, the framework of the Antwerp expert’s argument is premised on the current

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<sup>88</sup> Appendix 9 Antwerp Expert: on file with the author

<sup>89</sup> *ibid* 00:48: 47

<sup>90</sup> *ibid* 00:41:32.

<sup>91</sup> *ibid* 00:43:22.

<sup>92</sup> Hein De Haas and others, ‘International Migration: Trends, Determinants, and Policy Effects’ (2019) 45 *Population and Development Review* 885; Francesco Castelli, ‘Drivers of Migration: Why Do People Move?’ (2018) 25 *Journal of Travel Medicine* 1 <<https://academic.oup.com/jtm/article/25/1/tay040/5056445>> accessed 18 July 2022.

regime of international refugee law that is exclusionary of other forms of persecution and displacement.

The argument here can be formulated in the following question: what are the latent effects of economic liberalization programmes on persecution and cross-border displacement in Eritrea? The question is an acknowledgment that cross-border displacement in Eritrea is not *per se* a result of economic liberalization, but its effect can be inferred and thus discounting economic liberalization will not be helpful in the scheme of creating an inclusive international refugee law regime. As argued in chapter 3 and 4, restricting refugee protection to such forms of displacement as developmental projects affecting a certain social group within a country, fails to blame the process that leads to such displacement.

The root cause in these new forms of displacement and persecution are arguably embedded in economic policies and planning. To that end, the inquiry with regards to Eritrea should include an analysis of the impact of the political repression, national service, any other attendant dictatorial policies, and economic policies and planning. This analysis will perhaps show how these various, but interconnected factors, have led to the subversion of the Eritrean economy and human displacement. As a point of departure, there is need to begin by examining elements of economic liberalization in Eritrea and analyse their impact thereon on human displacement. In chapter 2, it was determined that economic liberalization manifests itself in the following forms (among others): deregulation of industries, monopolies, restrictive trade practices, devaluation, disinvestment, privatization, globalization, agriculture reforms and land tenure and rights.

Having established the many forms of economic liberalization adopted by many African countries after gaining political independence, the chronology of events in Eritrean history should then be factored in. As shown in *the Figure* below, a funnel analysis of the state of Eritrean economy is critical. This should look at all factors affecting the Eritrean economy from the Italian colonization to the modern-day Eritrea. The indication in the Eritrean timeline is that Italy from the onset did not develop Eritrea, when the British took over, they opened up the political space but evidence shows systematic plunder of key institutions and infrastructure during their control. Then the federation with Ethiopia from 1952-1960 was dominated by Ethiopia. The enduring war that followed for three decades eclipsed fundamental economic progress leading to stunted growth and adoption of a hybrid of economic policies to stay afloat.

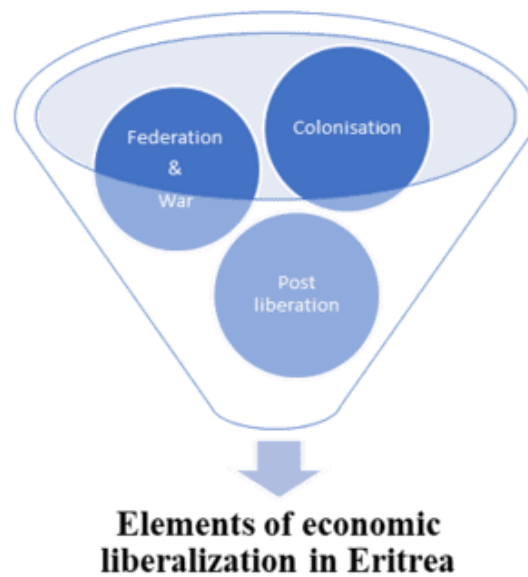


Figure 15: Funnel analysis of the Eritrean economy

As for the post liberation era, the transition phase was also dominated by Ethiopia and Eritrea as they both tried to re-establish geo-political presence in the region. The departure from using a common currency with Ethiopia and the adoption of the *nakfa* (ERN) thereafter led to devaluation wars not only with Ethiopia but also the key global financial institutions. This all played out in a new economic paradigm of self-reliance (*autarky*) when the United Nations sanctions were weighing heavily on the isolated Eritrean government. The subsequent wars in Badme and Eritrean involvement in Tigray should also be factored in the funnel analysis.

#### 5.4. Eritrean economy: the eye of the storm

Eritrea assumed membership to the IMF and the World Bank on July 6, 1994.<sup>93</sup> After the consultation, the head of the IMF delegation acknowledged that Eritrea is an agrarian economy built on the strength of the mining sector and has...

[...] emerged from [more than] twenty years of conflict with Ethiopia and a decade of sanctions imposed by the international community. The war and then international isolation [has] deprived the country of vital investment, trading opportunities and external support, and [has] left the economy in a difficult situation. The peace agreement with Ethiopia and lifting of international sanctions

<sup>93</sup> International Monetary Fund, 'Eritrea: Recent Economic Developments', vol 1995 (International Monetary Fund 1995) <<https://www.elibrary.imf.org/view/journals/002/1995/004/article-A001-en.xml>> accessed 14 May 2023.

provide a welcome opportunity to build an impetus for economic development and to begin implementing much needed reforms.<sup>94</sup>

The above quote acknowledges that the deterioration of the Eritrean economy is a by-product of a number of factors. First, it is the incessant presence of conflict with its neighbour Ethiopia. Second, the intervention of external forces has led to further isolation through economic sanctions at a global level. Third, the fact that the “economy [is] in a difficult situation” probably is a suggestion that the “much needed reforms” in Eritrea should begin with an overhaul of the economy so as to establish political stability.

According to a relatively recent report by the International Fund for Agricultural Development (IFAD), the Eritrean agrarian economy has also been subjected to a number of shocks.<sup>95</sup> The report acknowledges the high unemployment rate and few income generating opportunities on the back of a non-performing agriculture sector. With 26 per cent prime arable land, only four per cent is under cultivation. This is further dampened by the fact that agricultural activities are affected by erratic rainfall, inefficient farming systems, weak agricultural institutions and poor soil fertility. The impact of all these shocks have resulted in making 65 per cent of the rural population poor, increased food insecurity, and poverty levels. The report further says that the primary constraints on agricultural development include erratic rainfall, rainfed and inefficient farming systems, insufficient access to, and use of modern inputs, inadequate technical skills, weak institutional capacity and limited soil fertility. While it is difficult to determine poverty levels in Eritrea because of lack access due to political reasons, the report further lists the following as determinants of endemic poverty: poor performing economy, poor performing agriculture sector, limited access to education, number of family members, number of children, age of children going to school, and rent of land per household.<sup>96</sup>

In an environment of ‘protracted crisis’, the skewed Eritrean economy and the political environment have also heightened youth despondency.<sup>97</sup> The lingering threat of conflict in Eritrea, at whatever stage of the country’s historical timeline, has arguably led to “social

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<sup>94</sup> IMF, ‘IMF Staff Completes 2019 Article IV Mission to Eritrea: Press Release No. 19/179’ (2019) <<https://www.imf.org/en/News/Articles/2019/05/22/pr19179-eritrea-imf-staff-completes-2019-article-iv-mission>> accessed 18 May 2023

<sup>95</sup> IFAD, ‘State of Eritrea Country Strategic Opportunities Programme 2020-2025’ (2020) <<https://webapps.ifad.org/members/eb/129/docs/EB-2020-129-R-12.pdf>> accessed 20 May 2023.

<sup>96</sup> *ibid* 24.

<sup>97</sup> Milena Belloni, ‘Family Project or Individual Choice? Exploring Agency in Young Eritreans’ Migration’ (2019) 46 *Journal of Ethnic and Migration Studies* 336 <<https://www.tandfonline.com/doi/abs/10.1080/1369183X.2019.1584698>> accessed 20 May 2023.

disruption, economic deprivation, [and] political oppression”.<sup>98</sup> In this context, migration then becomes an escape out of a deteriorating urban setting that is beset with endemic unemployment and limited access to meaningful life prospects.<sup>99</sup> This does not then make Eritrean refugees “mere economic migrants” or non-deserving refugees.<sup>100</sup> Labelling them as such, fails to take into consideration the practical reality of the interconnected factors stemming from such a bruised economy. As remarked by Dan Connell, every migrant and refugee is driven by two common factors: preservation of life, and a desire to live a better life. Connell summarises this predicament for Eritrean refugees in the face of the current international refugee law:

[...] a few could be called purely “economic migrants,” but the over-whelming majority are not seeking so much as fleeing, pushed by circumstances at home more than pulled by prospects elsewhere. This is a crucial distinction, since whether or not a person qualifies for political asylum under international law depends on the reason he or she left—whether there was a legitimate fear of persecution. The desire, say, to go to school or work to send money home or better one’s life in some other way is not relevant. All refugees and migrants want this.<sup>101</sup>

Probably this is crucial in understanding the plight of Eritrean refugees. It is the “circumstances at home” rather than the lure of a better life anywhere that makes people refugees. Those circumstances at home includes lack of social services, insufficient educational opportunities, corruption, poor infrastructure, and insufficient access to goods.<sup>102</sup> These factors if interconnected to political factors should thus not be discounted in the prism of the Geneva Convention or the EU asylum acquis. In the context of the OAU Convention, the above-mentioned factors might be interpreted as “events seriously disturbing public order” and are perhaps inhuman and may lead to degrading treatment as argued in chapter 4. Phrases like “mere economic migrants” or “poverty in general” may fail to capture the interconnectedness of displacement factors that are inherently interwoven in the economic fabric of the country of origin. After all, even the neo-classical migration thought suggesting that the poorest people

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<sup>98</sup> *ibid* 337.

<sup>99</sup> Belloni, ‘Family Project or Individual Choice? Exploring Agency in Young Eritreans’ Migration’ (n 97).

<sup>100</sup> Andreas Holm Røsborg and Kjetil Tronvoll, ‘Migrants or Refugees? - The Internal and External Drivers of Migration from Eritrea’ (2017) <<https://www.udi.no/statistikk-og-analyse/forsknings-og-utviklingsrapporter/migrants-or-refugees---the-internal-and-external-drivers-of-migration-from-eritrea/>> accessed 9 May 2023.

<sup>101</sup> Connell (n 14) 220.

<sup>102</sup> Integral Human Development, ‘Eritrea - Migrants & Refugees Section’ (2021) <<https://migrants-refugees.va/country-profile/eritrea/>> accessed 18 May 2023.



are not able to escape their countries of origin cannot stand the practical reality that says “the mobility of the poor has outflanked the old barrier of distance”.<sup>103</sup>

Perhaps part of the problem is that international migration is constricted by the idea that “relative poverty and the lack of opportunity in developing countries” push people out of their countries, as they are ‘pulled’ by the “growing demand for labour in industrialised states”.<sup>104</sup> This dichotomy of ‘push and pull’ factors somehow negates the fact that human mobility from Africa is not an escape of generalised poverty, but an escape from a combination of debilitating displacement factors that makes life meaningless. In the next section, the study will critically analyse the nexus between the elements of economic liberalisation in Eritrea and their impact on the causes of human displacement. The analysis will dwell on the economic framework during the postliberation phase and how it has led to such repressive policies like the mandatory national service.

#### **5.4.1. Macroeconomic Policy of 1994**

Upon gaining statehood, the Eritrean government adopted a Macroeconomic Policy Paper in the year 1994.<sup>105</sup> The aim of the policy paper was to undertake tax reforms, improve resource allocation, promote equitable distribution of income, foster savings and private investment, and promote competition in the domestic market.<sup>106</sup> The blueprint referred to war, drought and inappropriate economic policies as the “triple scourges” affecting Eritrea.<sup>107</sup> A subsequent report by the International Monetary Fund (IMF) acknowledged the challenges that were being faced by the PFDJ government after the war with Ethiopia as follows:

[...] the Eritrean government inherited an economy characterized by state-owned enterprises, most of which were barely operational; an agricultural and industrial base disrupted by the war; and a damaged and decayed economic and social infrastructure, including health and educational facilities.<sup>108</sup>

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<sup>103</sup> Gwyne Dyer, ‘Closing the Door on Economic Refugees’ *The San Francisco Examiner* (San Francisco, California, 6 July 1980) 23 <<https://www.newspapers.com/image/460726733/?terms=%22economic%22&match=1>> accessed 14 March 2023.

<sup>104</sup> Oliver Bakewell, “‘Keeping Them in Their Place’: The Ambivalent Relationship between Development and Migration in Africa” (2008) 29 *Third World Quarterly* 1341.

<sup>105</sup> Eritrea Digest, ‘Eritrea Macro Policy – 1994’ (*Eritrea Digest*, 26 March 1995) <<https://www.eritreadigest.com/eritrea-macro-policy-1994/>> accessed 20 May 2023.

<sup>106</sup> International Monetary Fund, ‘Eritrea: Recent Economic Developments’ (n 93) 40.

<sup>107</sup> Eritrea Digest (n 105) 3.

<sup>108</sup> International Monetary Fund, ‘Eritrea: Selected Issues’, vol 1997 (International Monetary Fund 1997) 5 <<https://www.elibrary.imf.org/view/journals/002/1997/088/article-A001-en.xml>> accessed 9 May 2023.

This near paralysis of the Eritrean economy meant that the new Eritrean government had to forge alliances with the outside world and its warring neighbour. As alluded earlier on, Eritrea assumed membership with the World Bank and the IMF on July 6, 1994.<sup>109</sup> The Ethiopian central bank assumed transitional custody for all transactions as both countries agreed on using the Ethiopian *Birr* as the common currency.<sup>110</sup> According to an IMF report, the new government of Eritrea was a beneficiary of the Economic Recovery and Rehabilitation Project (RRPE) sponsored by the World Bank and other donors.<sup>111</sup> The World Bank through the International Development Association (IDA), which is a part of the World Bank, extended credit of US\$25 million, with Italy, the European Union (EU), Sweden, Germany, Denmark, the Netherlands, and the United Nations Development Programme (UNDP) pledging US\$114 million to the RRPE.

The report further alluded to the fact that the RRPE included an Economic and Financial Management Program (EFMP) aimed at building basic capacity for economic management in the Eritrean Government. This economic intervention was to further assist in institutional capacity for economic management of the Office of the President, the Ministries of Finance and Development, the Bank of Eritrea and the Commercial Bank of Eritrea. In the same realm, the report confirmed that the United Nations Development Programme had finalised a multi-donor technical assistance package.<sup>112</sup> The Eritrean government also received external loans and signed loan agreements with China, Kuwait, and the European Investment Bank.<sup>113</sup>

This was also at a time when Ethiopia had initiated a Structural Adjustment Programme (SAP) financed by IDA, the World Bank and the African Development Fund (ADF).<sup>114</sup> The common currency agreement between Ethiopia and Eritrea was also in place, with the Ethiopian central bank in charge of the monetary policy.<sup>115</sup> The Programme Performance Evaluation Report (PPER) for the Ethiopian SAP reveals that a loan of UA 63.55 million was approved on 23 June 1993 with the distribution of the first and second tranche of funds being finalised by 30

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<sup>109</sup> International Monetary Fund, 'Eritrea: Recent Economic Developments' (n 93) 35.

<sup>110</sup> Rena Ravinder, 'Historical Development of Money and Banking in Eritrea from the Axumite Kingdom to the Present' (2007) 6 *African and Asian Studies* 135 <[https://mpira.ub.uni-muenchen.de/12423/1/MPRA\\_paper\\_12423.pdf](https://mpira.ub.uni-muenchen.de/12423/1/MPRA_paper_12423.pdf)> accessed 15 May 2023.

<sup>111</sup> International Monetary Fund, 'Eritrea: Recent Economic Developments' (n 93) 2.

<sup>112</sup> *ibid.*

<sup>113</sup> *ibid* 35.

<sup>114</sup> African Development Bank, 'Ethiopia Structural Adjustment Programme: Project Performance Evaluation Report (PPER)' (2000) ii <[https://www.afdb.org/fileadmin/uploads/afdb/Documents/Evaluation-Reports-\\_Shared-With-OPEV\\_/05092255-EN-ETHIOPIA-STRUCTURAL-ADJUSTMENT-PROGRAMME.PDF](https://www.afdb.org/fileadmin/uploads/afdb/Documents/Evaluation-Reports-_Shared-With-OPEV_/05092255-EN-ETHIOPIA-STRUCTURAL-ADJUSTMENT-PROGRAMME.PDF)>.

accessed 21 May 2023

<sup>115</sup> Ravinder (n 110) 24.

June 1996.<sup>116</sup> The unit of account for the African Development Bank (AfDB) is “UA” which is equivalent to the IMF’s Special Drawing Right (SDR), and the value of the SDR varies on a daily basis and is computed daily in U.S. dollars.<sup>117</sup> A historical conversion of UA 63.55 million puts the SAP loan credited to Ethiopia then at USD 100.45 million.<sup>118</sup> As shall be discussed below, this probably had an impact on the Eritrean economy during the first seven years of independence.

By adopting a liberal Macroeconomic Policy, the Eritrean government was in pursuit of the common macroeconomic objectives. The main goal of a macroeconomic reform is to create a market economy in which the State has little control and the policy should help in regulating, among others, national income, unemployment, inflation and money supply.<sup>119</sup> Experts from the IMF also warn that the implementation of a macroeconomic policy does not guarantee economic growth, nor poverty reduction. In their view, sustained growth is dependent on how a government adopts “key structural measures” that are consistent with trade liberalization, privatisation, and civil service reform among others.<sup>120</sup> This is achieved through the following key pillars: fiscal policy, monetary policy and exchange rate policy.

In the context of Eritrea, a liberal macroeconomic policy did not improve the situation.<sup>121</sup> While they were able to deregulate the private economy, implement a new taxation structure, and improve revenue administration, the IMF is of the view that Eritrea did not implement land ownership reforms, failed to privatize state-owned enterprises, and the liberalization of the exchange and trade system was not completed.<sup>122</sup> Rena Ravinder probably provides a plausible explanation for the failure by Eritrea to implement the Macroeconomic Policy. He is of the view that:

[...] during the seven-year common currency era, the Ethiopian monetary authorities conducted a monetary policy for the *birr* as a whole. Eritrea was not in a position either to conduct its own monetary policy or to influence Ethiopian

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<sup>116</sup> African Development Bank (n 114) ii.

<sup>117</sup> African Development Bank, ‘Information Statement’ (2016) <[https://www.afdb.org/fileadmin/uploads/afdb/Documents/Financial-Information/2016\\_Information\\_statement.pdf](https://www.afdb.org/fileadmin/uploads/afdb/Documents/Financial-Information/2016_Information_statement.pdf)>.

<sup>118</sup> FxTop, ‘Historical Currency Converter with Official Exchange Rates from 1953’ (21 May 2023).

<sup>119</sup> Aris Trantidis and Peter J Boettke, ‘Macroeconomic Policy as an Epistemic Problem’ *Journal of Public Finance and Public Choice* GMU Working Paper in Economics No. 22-37’ (2022) 37 *Journal of Public Finance and Public Choice* 211 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4189574](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4189574)>. accessed 21 May 2023.

<sup>120</sup> Brian Ames and others, ‘Macroeconomic Policy and Poverty Reduction’ (2001) <<https://www.imf.org/external/pubs/ft/exrp/macropol/eng/>> accessed 21 May 2023.

<sup>121</sup> International Monetary Fund, ‘Eritrea - Recent Economic Developments Country Report No. 96/66’ (1996).

<sup>122</sup> *ibid.*

monetary policy. As the currency-issuing authority, the National Bank of Ethiopia was the sole beneficiary of the seignior age that accrued as a result of monetary expansion.<sup>123</sup>

Another explanation is that in the context of Africa, the market has “imperfect information and staggered adjustments” and this affects implementation.<sup>124</sup> Eritrea has also been slated for not providing updated economic data.<sup>125</sup> As argued by Ravinder, with all these imperfections and Ethiopia pursuing a drastic SAP, Eritrea was probably working with asymmetrical information on how to implement the policy.<sup>126</sup> Further, with the political space in Eritrea continuing to be more repressive as the PFDJ clung to power, the implementation of the Macroeconomic Policy became a pipedream.<sup>127</sup> Observers are also of the view that the more the PFDJ used the state of exception as a veneer against non-implementation of the 1994 policy, then statistical data became more unreliable and non-existent.<sup>128</sup> Added to that, literature on IMF loans and the World Bank suggests that countries receiving any form of loans to streamline their economies in the scheme of economic liberalization tend to remove all kinds of trade and capital restrictions that systematically decrease employment.<sup>129</sup>

#### **5.4.2. Impact of Autarky Policy**

Autarky is an economic policy whose main objective is to reduce the dependency on imports to limited levels.<sup>130</sup> The term can also be defined as “the ability of the economic and social system to survive – should it need to – without foreign assistance or international interaction at all.”<sup>131</sup> As noted earlier, only China can dare to have such a self-reliant mantra.<sup>132</sup> Upon gaining political independence, Eritrea cautiously straddled between twin principles: self-reliance and market economy. The National Charter of Eritrea (hereinafter ‘the Charter’) spelt out that the Eritrean political, economic, and cultural space will be driven by the spirit of self-

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<sup>123</sup> Ravinder (n 110) 10.

<sup>124</sup> George Kararach, ‘Macroeconomic Policy Challenges in Africa’ [2014] *Development Policy in Africa* 39 <[https://link.springer.com/chapter/10.1057/9781137360595\\_3](https://link.springer.com/chapter/10.1057/9781137360595_3)> accessed 21 May 2023.

<sup>125</sup> IFAD (n 95) 5.

<sup>126</sup> Ravinder (n 110).

<sup>127</sup> Tadesse (n 16).

<sup>128</sup> Bertelsmann Stiftung (n 15) 20.

<sup>129</sup> Muhumed Mohamed Muhumed and Sayid Aden Gaas, ‘The World Bank and IMF in Developing Countries: Helping or Hindering?’ (2016) 28 *International Journal of African and Asian Studies* 39 <[www.iiste.org](http://www.iiste.org)> accessed 21 May 2023.

<sup>130</sup> Heribert Dieter and Johanna Biedermann, ‘The New Advocacy for Autarky: Self-Sufficiency Is Now Once Again Becoming Popular for Geopolitical Reasons’ (2022) 19 *The Economists’ Voice* 263 <<https://www.degruyter.com/document/doi/10.1515/ev-2022-2003/html?lang=en>> accessed 13 May 2023.

<sup>131</sup> Andemariam (n 15)

<sup>132</sup> Dieter and Biedermann (n 130) 272.

reliance where “internal capabilities” will be given premium attention without completely isolating “[Eritrea] from the international community”.<sup>133</sup> The Charter stressed the need for Eritrea to carve its own political path without “going to the market for ideas in vogue”.<sup>134</sup> This was probably an attack on how other African countries had sought for international intervention to solve their political problems just after gaining political independence.<sup>135</sup> Therefore, having allowed Ethiopia to control Eritrea’s fiscal policy during the first seven years of transition, the Eritrean government adopted its own currency in the year 1998 so as to control its own financial destiny.<sup>136</sup> The adoption of the *nakfa*, a sign of self-reliance, was to further strain the political relationship with Ethiopia and arguably led to the war in Badme. Critics have given a number of reasons as to the implications of adopting the *nakfa* currency by Eritrea.

First, the introduction of the *nakfa*, with the proposition that it has equal value with the *birr*, would mean that Eritrea would have large reserves of the *birr* and thus allowing them to purchase goods and services from Ethiopia without using hard currency.<sup>137</sup> Second, and most bitter for the Ethiopians, the introduction of the *nakfa*, would mean that the Eritrean central bank would have large quantities of the worthless *birr* notes to be dumped in the Ethiopian market at their advantage, and this angered Ethiopians.<sup>138</sup> Other critics are of the view that the adoption of the *nakfa* was another bold step by Eritrea towards self-determination and protection of Eritrean’s sovereignty as spelt out in the Charter.<sup>139</sup>

As warned by Girma Kebbede, “autarky is not a viable course for a small economy like Eritrea”.<sup>140</sup> This view is premised on the grounds that Eritrea has gone through vicious episodes of destruction and plunder and as such failing to have a symbiotic relationship with its neighbour is the beginning of economic ruin. Allowing Ethiopia to access the sea ports will make Eritrea gain from “transit commerce” and boost import revenue.<sup>141</sup> So from the start, Eritrea would not entirely be self-dependent given its strategic geo-location.<sup>142</sup>

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<sup>133</sup> GoE, ‘Hagerawi Charter Ertra (The National Charter of Eritrea)’ (1994) <[https://snitna.com/PFDJCharter\\_Eng.pdf](https://snitna.com/PFDJCharter_Eng.pdf)> accessed 21 May 2023.

<sup>134</sup> *ibid* s2(5).

<sup>135</sup> Bertelsmann Stiftung (n 15).

<sup>136</sup> Ravinder (n 110).

<sup>137</sup> Tadesse (n 16).

<sup>138</sup> *ibid*.

<sup>139</sup> Ravinder (n 110).

<sup>140</sup> Girma Kebbede, ‘The Challenges of Reconstructing Eritrea’ (1993) 31 *GeoJournal* 220, 222.

<sup>141</sup> *ibid*.

<sup>142</sup> Kendie (n 1).

While observers view the Eritrean adoption of the new currency as a course towards self-determination and self-reliance,<sup>143</sup> others point to this as another subversion of the Eritrean economy with catastrophic results.<sup>144</sup> The introduction of the *nakfa* is viewed as the beginning of two wars: the Badme border war and ‘economic warfare’ between Eritrea and Ethiopia.<sup>145</sup> Meressa Tsehay Gebrewahd paints the predicament faced by Eritrea as follows: upon introducing the *nakfa*, Eritrea demanded an equal exchange rate with Ethiopia. On the other hand, Ethiopia rejected this and went ahead to print new *birr* currency notes so as to prevent the flow of old *birr* notes from Eritrea. This move took the Eritrean market by surprise and created an “unexpected problem to their economy” which led the Eritrean government to label the Ethiopian move as declaration of economic war.<sup>146</sup> All the while, this ‘economic war’ was being waged in an environment of political repression and violation of human rights.<sup>147</sup>

Sigatu Tadesse Kaleab further notes that “Eritrea suffered most” as a result of the currency debacle.<sup>148</sup> Eritrea was dependent on the Ethiopian economy as it exported 65 per cent of its products to Ethiopia, while only 9 per cent of Ethiopian products were imported to Eritrea.<sup>149</sup> While both countries suffer from erratic rains, Eritrea was also relying on Ethiopia for food consumption.<sup>150</sup> So, in trying to ‘go it all alone’, Eritrea was caught up in the political reality that self-reliance in the new global era requires forging alliances with your neighbours and extended world.

Tied to this conundrum is the question about the value of the *nakfa* currency. Upon inception the Eritrean officials pegged the *nakfa* at par with the U.S. dollar. According to an IMF report the currency depreciated by almost 35 per cent to around ERN 13.8 per U.S. dollar and by mid-2002 to ERN 14.1 to the greenback.<sup>151</sup> As indicated above, it is also difficult to get updated economic data from the Eritrean central bank and treasury.<sup>152</sup> Indications are that the current

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<sup>143</sup> Ravinder (n 110).

<sup>144</sup> Meressa Tsehay Gebrewahd, ‘Securitization and Militarization of the Border: Security Dilemma in Post-1998 Ethiopia and Eritrea’ (2018) 12 Hungarian Journal of African Studies 82 <<https://heinonline.org/HOL/Page?handle=hein.journals/hgnjloa12&id=246&div=23&collection=journals>> accessed 9 May 2023; Tadesse (n 16).

<sup>145</sup> Gebrewahd (n 144).

<sup>146</sup> *ibid* 86.

<sup>147</sup> Dan Connell, ‘Redeeming the Failed Promise of Democracy in Eritrea’ (2005) 46 Race and Class 68.

<sup>148</sup> Tadesse (n 16) 83.

<sup>149</sup> *ibid*.

<sup>150</sup> Tadesse (n 16).

<sup>151</sup> International Monetary Fund, *Eritrea: Selected Issues and Statistical Appendix* (International Monetary Fund 2003).

<sup>152</sup> Bertelsmann Stiftung (n 15).

official exchange rate is pegged ERN 15.38 to the U.S. dollar.<sup>153</sup> The IMF is of the view that the official exchange rate imposed by the Bank of Eritrea (BoE) “significantly overvalues the *nakfa*”.<sup>154</sup> As indicated in chapter 2, devaluation of currencies is aimed at boosting exports, reduce trade deficits and shrink the sovereign debt.<sup>155</sup> While the critics of devaluation are of the view that devaluation benefits the developed states to cheaply acquire prized state assets, and is an indirect way of co-opting elites into economic planning thus taking away the right to self-determination.<sup>156</sup>

The reports on the implications of the currency exchange rate, devaluation or overvaluation had devastating economic effects on Eritrea.<sup>157</sup> In terms of macroeconomic implications, an overvalued *nakfa* has affected the exchange rate structure and dampened external competitiveness. This means that there are reduced export volumes from the agriculture and mining sector.<sup>158</sup> In turn this has created an active parallel market and has caused inflation to rise.<sup>159</sup> For example, when Eritreans in the diaspora send money home, it is exchanged in the informal market at relatively higher rate than the official exchange rate. Further, individuals use the “hawala” system to circumvent the official pegged rate.<sup>160</sup> The “hawala” system is rooted in Eritrean historical and familial network, where individuals in the diaspora transfer money through third persons (in particular migrants) who want to send or give foreign currency to a broker abroad.<sup>161</sup> The foreign-based agent then contacts a local agent who gives the beneficiaries in Eritrea their remittance in *nakfa* without using the official platform.<sup>162</sup> In response, the Eritrean government has introduced ‘currency reforms’ where cash withdrawals

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<sup>153</sup> Trading Economics, ‘Eritrea - Official Exchange Rate, LCU Per USD, Period Average - 2023 Data 2024 Forecast 1987-2020 Historical’ (*Trading Economics*, May 2023) <<https://tradingeconomics.com/eritrea/official-exchange-rate-lcu-per-usd-period-average-wb-data.html>> accessed 22 May 2023.

<sup>154</sup> International Monetary Fund, *Eritrea: Selected Issues and Statistical Appendix* (n 152).

<sup>155</sup> Serap Durusoy and Zeynep Beyhan, ‘Recent Problem of Global Capitalism: Rate of Exchange Wars’ (2015) 23 *Procedia Economics and Finance* 992.

<sup>156</sup> Julie L Mueller, ‘The IMF, Neoliberalism and Hegemony’ (2011) 25 <http://dx.doi.org/10.1080/13600826.2011.577032> 377

<<https://www.tandfonline.com/doi/abs/10.1080/13600826.2011.577032>> accessed 30 November 2021; Stambuli P Kalonga, ‘Africa: Inside the Triangle of Devaluation, Inflation and Stagnation’ (2002) <<https://eldis.org/document/A12871>> accessed 22 November 2021.

<sup>157</sup> Bertelsmann Stiftung (n 15); International Monetary Fund, *Eritrea: Selected Issues and Statistical Appendix* (n 151).

<sup>158</sup> International Monetary Fund, *Eritrea: Selected Issues and Statistical Appendix* (n 151).

<sup>159</sup> Bertelsmann Stiftung (n 15).

<sup>160</sup> Fikrejesus Amahazion, ‘Understanding Remittances in Eritrea: An Exploratory Study’ (2019) 5 *International Journal of African Development*.

<sup>161</sup> *ibid.*

<sup>162</sup> *ibid.*

have been severely limited to 5,000 *nakfas* per family per month. This has even trapped Eritreans in a web of a cashless society without access to modern cash-free methods.<sup>163</sup>

The other impact of the valuation of the *nakfa* is that it has led to the scarcity of foreign currency in Eritrea. This is because the Eritrean government has stuck to its official exchange rate that is deemed overvalued by the IMF and the World Bank. As a result, the overvalued exchange rate is “stuck below the market equilibrium, leading to excess demand for foreign exchange.”<sup>164</sup> As discussed above, the shortage of foreign currency affects exports and in turn leads to limited flows of foreign exchange. In a globalised modern era, this isolates Eritrea and triggers financial crises. In the ultimate end, this has led to constant power outages, shortages of fuel and drinking water, and decaying infrastructure.<sup>165</sup>

The picture painted above is one that creates uncertainty to potential investors. The interference of the government in all facets of the economy, coupled with non-existing institutions of accountability and transparency create an opaque and unfriendly business environment. As a result, this directly affects Foreign Direct Investment (FDI). The IMF remarks that once a country like Eritrea has low FDI, this reduces economic growth, lowers exports, constricts foreign exchange in a country that will in the long-term depend on imported technology.<sup>166</sup>

#### 5.4.3. Impact of sanctions

The United Nations’ Security Council (UNSC) imposed sanctions on Eritrea on 23 December 2009.<sup>167</sup> The sanctions were in the form of arms embargo, travel ban, assets freeze on key political and military personnel, and travel restrictions.<sup>168</sup> The sanctions were imposed on the grounds that Eritrea had provided support to militant groups in Somalia, and that it had not withdrawn its military personnel following clashes with Djibouti the previous year.<sup>169</sup> At the end of the year 2011, the UNSC expanded the sanctions by demanding the Government of Eritrea (GoE) to stop using its diaspora tax as a medium of funding militants in Somalia.<sup>170</sup>

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<sup>163</sup> Bertelsmann Stiftung (n 15).

<sup>164</sup> International Monetary Fund, *Eritrea: Selected Issues and Statistical Appendix* (n 151).

<sup>165</sup> Bertelsmann Stiftung (n 15) 3.

<sup>166</sup> International Monetary Fund, *Eritrea: Selected Issues and Statistical Appendix* (n 151).

<sup>167</sup> United Nations (n 68).

<sup>168</sup> *ibid*

<sup>169</sup> Nicole Hirt, ‘The Eritrean Diaspora And Its Impact On Regime Stability: Responses to UN Sanctions’ (2014) 114 *African Affairs* 115 <<https://academic.oup.com/afraf/article/114/454/115/2195155>> accessed 22 May 2023; Redie Bereketeab, ‘The Morality of the U.N. Security Council Sanctions against Eritrea: Defensibility, Political Objectives, and Consequences’ (2013) 56 *African Studies Review* 145 <<https://www.jstor.org/stable/43904932>> accessed 22 May 2023.

<sup>170</sup> Hirt (n 169).



Diaspora tax is levied at 2 per cent for every remittance received by a family with a relative abroad, and this tax is coerced on Eritreans by the ruling party.<sup>171</sup> These sanctions were lifted on 14 November 2018 after a positive assessment by the UN showing that Eritrea had stopped arming militants in Somalia and had withdrawn its forces from Djibouti.<sup>172</sup>

According to the Eritrean Minister of Information, Yemane Gebremeskel, the UN backed sanctions impacted negatively on the Eritrean economy.<sup>173</sup> The Eritrean government argues that the sanctions were politically motivated and further destabilized Eritrea. The following has been listed by the GoE as the economic consequences of the sanctions: “deleterious impact on investment; harassment of mining companies; higher cost of capital for commercial loans; higher shipping/insurance costs; [and] barriers to imports.”<sup>174</sup> As for the arms embargo the GoE is of the view that this was a measure to disarm Eritrea and further violate its right to self-determination.

On the other hand, observers argue that the decade long sanctions were ineffective from the start due to the informal and clandestine nature of the GoE’s businesses and illicit money laundering activities.<sup>175</sup> It is argued that the GoE operates an informal economy that is only accountable to the PFDJ and collects unofficial streams of revenue from the Eritrean diaspora. As a result, these monies are deposited to legitimate Eritrean companies abroad but with strong ties to the PFDJ junta. Take for example, the state-owned enterprise called the Red Sea Corporation, is alleged to be exporting illicit gold and alcoholic beverages to Sudan using individual trading networks that are issued with genuine trading certificates by the GoE.<sup>176</sup> As a result, thereof, the opaque business activities by the junta in Eritrea, through formal manipulation of the informal economy, has actually helped Eritrea to evade the imposed sanctions. The experts further suggest that these decade long sanctions on the GoE should have been specific by identifying and targeting sources of revenue propping the PFDJ

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<sup>171</sup> Bertelsmann Stiftung (n 15).

<sup>172</sup> United Nations, ‘Unanimously Adopting Resolution 2444 (2018), Security Council Lifts Sanctions on Eritrea, Renews Arms Embargo against Somalia’ (*UN Press (United Nations Security Council SC/13576)*, 2018) <<https://press.un.org/en/2018/sc13576.doc.htm>> accessed 16 May 2023.

<sup>173</sup> Abdur Rahman Alfa Shaban, ‘Eritrea Outlines Economic Injuries Caused by UN Sanctions’ *africanews*. (Pointe-Noire, 6 October 2018) <<https://www.africanews.com/2018/10/06/eritrea-outlines-economic-injuries-caused-by-un-sanctions/>> accessed 23 May 2023.

<sup>174</sup> *ibid*.

<sup>175</sup> Kjetil Tronvoll and Mohamed Kheir Omer, ‘Do Sanctions Work ? The Case of Eritrea Says “No”’ [2022] *DIA: Democracy in Africa* <<https://democracyin africa.org/do-sanctions-work-the-case-of-eritrea-says-no/>> accessed 23 May 2023.

<sup>176</sup> *ibid*.

government.<sup>177</sup> The fact that the sanctions never mentioned the office bearers in person, nor handicapped the Eritrean ambassadors and consular offices is seen as one of the major reasons why the sanctions were not effective.

The morality of the UN sanctions on Eritrea has also been scrutinised by critics.<sup>178</sup> They are of the view that the UNSC sanctions in general tend to impact negatively on the common people than the political elite.<sup>179</sup> The sanctions probably affected exports and in turn deprived Eritreans such critical imported goods as food, medical supplies, fuel and construction materials.<sup>180</sup> These sanctions came when Eritrea was in a state of ‘no war-no peace’ with its warring neighbour Ethiopia. In the words of Redi Bereketeab this “resuscitated in the Eritrean psyche a deeply seated image-ghost - one that has been haunting them for the last sixty years or so...”.<sup>181</sup> This is on the back of the fact that Eritreans have constantly faced enduring conflicts, and imposition of sanctions will not only be a symbol of perpetual struggle but also of humiliation. In such a repressive state, where national service is mandatory, the leaders can thus use this as an excuse to continue forced conscription as a veneer of protecting Eritrea’s sovereignty from outside forces.<sup>182</sup>

It is also suggested that the UNSC sanctions worsened a precarious situation in Eritrea.<sup>183</sup> The GoE probably used the sanctions to apply stringent national service requirements and this in turn caused an upsurge in people fleeing Eritrea. By being forced to join the national service, the personal lives of many youths were disrupted and prospects of life in a fragile economy were dimmed.<sup>184</sup> Faced with dim economic prospects, lingering threats of war, life of despondency as conscripted soldier, the GoE has thus become an agent of persecution.<sup>185</sup> In fact, some scholars argue that it has gone beyond the envisaged forms of harm listed in the current international refugee law and the GoE has been described in the following terms:

[a] government that deprives its citizens of the basic necessity of life such as food is as dangerous as the one that persecutes its citizens on the grounds of race, religion, political opinion, nationality and social affiliation. In fact, politically

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<sup>177</sup> *ibid.*

<sup>178</sup> Bereketeab (n 169).

<sup>179</sup> *ibid* 154.

<sup>180</sup> Bereketeab (n 169).

<sup>181</sup> *ibid* 151.

<sup>182</sup> Woldemikael (n 14).

<sup>183</sup> Nicole Hirt, ‘Commentary: UN Security Council Resolution 2444 (2018) and the Lifting of Sanctions against Eritrea: A Commentary on Domestic and Regional Perspectives’, *Ethiopian Yearbook of International Law*, vol 2018 (Springer 2019).

<sup>184</sup> Bertelsmann Stiftung (n 15).

<sup>185</sup> Connell (n 147); Connell (n 14); Woldemikael (n 14).

induced deprivation of one of the most fundamental needs in Africa is a persecution far more likely to pose a significant existential threat to humanity than some Convention-based persecutions.<sup>186</sup>

While the sanctions have put spotlight on the junta in Eritrea, what has not been fully scrutinised is the effectiveness of such sanctions. The fact that the PFDJ is still in power, arguably suggests that the sanctions have rather emboldened the junta and the Eritrean people will continue to bear the brunt of the futile but bruising global interventions on Eritrea.<sup>187</sup> The economic situation continues to be discounted as a factor at the centre of human displacement in Eritrea and this has probably created protection gaps in refugee policy and protection.

### 5.5. To be or not to be a soldier

The hallmark of the Eritrean displacement is rooted in people fleeing forced national service, also known in Tigrinya as *Hagerawi Agelglot*.<sup>188</sup> National service was introduced in 1994 with the overall aim of defending and rebuilding Eritrea after decades of conflict with Ethiopia.<sup>189</sup> Dubbed the “school of the nation”, the GoE wanted the programme to be a vehicle for social change, economic prosperity, self-dependency and a platform for transmitting conscious political rhetoric.<sup>190</sup> With time, national service turned out to be used by the PFDJ as a reservoir of military personnel.<sup>191</sup> The national service has two key components: the military training and the civil task. It is mandatory that all conscripts undertake military training before being assigned or deployed to either civil or military tasks. Those assigned to civil tasks are deployed to companies owned by the PFDJ specializing in agriculture, tourism, transport and communication, trade and fishing.

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<sup>186</sup> Malk (n 11).

<sup>187</sup> Michael Plaut, ‘Sanctions Are Being Lifted against Eritrea. Here’s Why’ [2018] *The Conversation* <<https://theconversation.com/sanctions-are-being-lifted-against-eritrea-heres-why-106881>> accessed 23 May 2023.

<sup>188</sup> Belloni, ‘Family Project or Individual Choice? Exploring Agency in Young Eritreans’ Migration’ (n 97); Pichon (n 77); Treiber and Hepner (n 41); Andemariam (n 15); Gaim Kibreab, ‘Forced Labour in Eritrea’ (2009) 47 *The Journal of Modern African Studies* 41 <<https://about.jstor.org/terms>> accessed 9 May 2023; Gaim Kibreab, ‘The Overarching Impact of the Eritrean National Service on the Social Fabric of Eritrean Society’ (Boydell & Brewer 2017) <<https://www.cambridge.org/core/books/eritrean-national-service/overarching-impact-of-the-eritrean-national-service-on-the-social-fabric-of-eritrean-society/5D7C4AFD130AB5739D6693F82821B073>> accessed 9 May 2023.

<sup>189</sup> Gaim Kibreab, ‘The Overarching Impact of the Eritrean National Service on the Social Fabric of Eritrean Society’, *The Eritrean National Service: Servitude for ‘the common good’ and the Youth Exodus* (Eastern Af, Boydell & Brewer 2017) <<https://www.cambridge.org/core/books/eritrean-national-service/overarching-impact-of-the-eritrean-national-service-on-the-social-fabric-of-eritrean-society/5D7C4AFD130AB5739D6693F82821B073>> accessed 9 May 2023.

<sup>190</sup> *ibid*.

<sup>191</sup> Kibreab, ‘The Overarching Impact of the Eritrean National Service on the Social Fabric of Eritrean Society’ (n 189).

According to a report on Eritrea, it is compulsory for Eritrean males and females aged 18-40 to be drafted for national service.<sup>192</sup> Those exempted from national service include former liberation fighters, the disabled, the visually impaired and mentally ill persons. It is also reported that the policy on exemptions is not consistently followed and depends sometimes on a case-by case basis in particular in reference to ‘motherhood’.<sup>193</sup> As for the recruitment of minors, the GoE has ratified the Optional Protocol of the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict which prohibits conscription of children under 18 into the military.<sup>194</sup> However, there are indications that students who have completed their 11<sup>th</sup> grade are called to the main military camp for early training.<sup>195</sup>

Conscripts drawn from school (upon completing Grade 12) are usually drafted into civilian service and their final examination marks play a crucial role in their deployment. Females also are most likely to be drafted for civil service, while men are deployed into the military. As for the rural population, it is most likely that they are deployed into the military. It must be noted that children and relatives of those with elite and political connections with the PFDJ hierarchy are likely to be assigned into civil service.<sup>196</sup>

In terms of Article 8 of the National Service Proclamation of 1995 active national duty should last for 18 months.<sup>197</sup> This includes six months of military training and 12 months of civil service. In times of war and state of emergencies, the Proclamation provides that the time may be extended.<sup>198</sup> Numerous observations by human rights organisations in and out of Eritrea argue that national service is open ended and in some cases one can serve between 10 to 20 years.<sup>199</sup> The punishment for desertion, evading, transgressing and repeated offenders varies

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<sup>192</sup> EASO, ‘Eritrea National Service, Exit, and Return: Country of Origin Information Report’ (2019) <<http://europa.eu>> accessed 23 May 2023.

<sup>193</sup> UK Home Office, ‘Country Policy and Information Note Eritrea: National Service and Illegal Exit’ (2021) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1020555/ER\\_I\\_CPIN\\_National\\_service\\_and\\_illegal\\_exit.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1020555/ER_I_CPIN_National_service_and_illegal_exit.pdf)> accessed 23 May 2023.

<sup>194</sup> UN General Assembly, *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, 25 May 2000, available at: <https://www.refworld.org/docid/47fdfb180.html> [accessed 23 May 2023]

<sup>195</sup> EASO (n 192).

<sup>196</sup> *ibid.*

<sup>197</sup> *Eritrea: Proclamation on National Service No. 82/1995 of 1995* [Eritrea], 23 October 1995, available at: <https://www.refworld.org/docid/3dd8d3af4.html> [accessed 23 May 2023]

<sup>198</sup> *ibid.*

<sup>199</sup> Bertelsmann Stiftung (n 15); Integral Human Development (n 102).

from one month to three years in prison.<sup>200</sup> There are suggestions that offenders are screened, profiled, interrogated, tortured and either imprisoned or reassigned to a new post.

The type of assignment for those in the civil service is determined by the immediate needs of the GoE.<sup>201</sup> Some are assigned as teachers even if it is not their calling and once drafted may find themselves stuck in a field they have no keen interest in. In general, conscripts work in public works, firms owned by the ruling party PFDJ and those companies owned for personal enrichment by the top elite PFDJ members.<sup>202</sup> The remuneration is largely ‘pocket money’ and is reported to be between 800 to 5,000 *nakfa* per month (about \$53-\$330 per month).<sup>203</sup> This wage has been described as intolerable, and extremely low for anyone to sustain a family.<sup>204</sup> Tied to this, are harsh working conditions in which conscripts do not have a choice with regards with where they will be deployed. Travelling abroad is not allowed, and as for a few lucky ones who are sent abroad on an “international training workshop”, 70 per cent of them do not return to Eritrea after completing the training.<sup>205</sup>

Therefore, the overarching impact of the Eritrean National Service has been put to question.<sup>206</sup> The aim of the national service is supposedly to rebuild the war-torn economy of Eritrea, but indications are that this has not materialised. A study premised on the experiences of conscripts who have provided national service for an average of six years reveals that 62 per cent of them agree that conscription has damaged the Eritrean economy.<sup>207</sup> They are of the view that national service has benefitted few individuals and has propped the PFDJ to power.<sup>208</sup> Also, most of the people serving for national service are able bodied men and women who have been forced to leave their farms and livestock unattended. Such human resources would be better placed if they continue with their pastoral lives and contribute to national food security through subsistence farming.<sup>209</sup>

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<sup>200</sup> EASO (n 192).

<sup>201</sup> Kibreab, ‘Forced Labour in Eritrea’ (n 188).

<sup>202</sup> *ibid.*

<sup>203</sup> UK Home Office (n 193).

<sup>204</sup> *ibid.*; EASO (n 192); Kibreab, ‘Forced Labour in Eritrea’ (n 188).

<sup>205</sup> Connell (n 14).

<sup>206</sup> Kibreab, ‘Forced Labour in Eritrea’ (n 188); Kibreab, ‘The Overarching Impact of the Eritrean National Service on the Social Fabric of Eritrean Society’ (n 189).

<sup>207</sup> Kibreab, ‘The Overarching Impact of the Eritrean National Service on the Social Fabric of Eritrean Society’ (n 189) 128.

<sup>208</sup> *ibid.*

<sup>209</sup> *ibid.*; Bertelsmann Stiftung (n 15).

National service has also heightened youth despondency and in turn the youth have fled the country.<sup>210</sup> It is observed that the “Eritrean youth are ‘*voting with their feet*’ and leaving the country in droves”.<sup>211</sup> The prospects of being stuck in national service in a country with lingering threats of war, broken economy and infrastructural decay has prompted families to ‘sponsor’ the long and dangerous journeys to Europe.<sup>212</sup> This is because national service has become institutionalised forced labour.<sup>213</sup> Reports further suggest that during the Tigray war, the GoE drafted conscripts into the army and deployed them to fight along Ethiopian soldiers.<sup>214</sup> As discussed earlier on, the Eritrean government further used the veneer of war to make national service open ended and also leveraged the conflict as an exception to violate fundamental human rights.

## 5.6. Conclusion

The main claim in this study is that various factors of human displacement interconnected to economic liberalization has become a new form of persecution causing cross-border displacement in Africa. The case study on Eritrea shows the dynamic nature of this proposition: *Eritrea is different, but not far from the claim*. The outline of Eritrea’s geo-location has shown that the agrarian economy is subject to the vagaries of the weather and this greatly impacts on the economy. Tied to this, is the painful and enduring cycle of conflict from the colonial days, and the intermittent phases of peace with its warring neighbour, Ethiopia. The tension between these two countries has also been reflected in their economies. Both have gone through a number of prescriptive interventions, not only from each other, but from external global actors. To that end, the chapter argues that the Eritrean economy is the epicentre of human displacement. With Eritrea, finally gaining statehood in the year 1991, the new country adopted a collage of economic policies with emphasis on self-reliance. During the first seven years of transition (1991-1997), Eritrea allowed Ethiopia to be in charge of its fiscal policy, and this proved to be another source of friction. The adoption of the Macro-Policy by Eritrea in 1994 was probably a cautious leaning towards a liberal agenda whose task was to undertake tax reforms, improve resource allocation, promote equitable distribution of income, foster savings and private investment, and promote competition in the domestic market. However, without

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<sup>210</sup> Belloni, ‘Family Project or Individual Choice? Exploring Agency in Young Eritreans’ Migration’ (n 97); Røsberg and Tronvoll (n 100).

<sup>211</sup> Røsberg and Tronvoll (n 100) 64.

<sup>212</sup> Belloni, ‘Family Project or Individual Choice? Exploring Agency in Young Eritreans’ Migration’ (n 97).

<sup>213</sup> Bertelsmann Stiftung (n 15).

<sup>214</sup> *ibid*.

control of the fiscal policy, and with Ethiopia going through a Structural Adjustment Programme, it can be argued that this was the first step towards the subversion of the Eritrean economy. The adoption of the Eritrean *nakfa* in 1998 and the subsequent border war with Ethiopia further deteriorated the economic template and pushed the PFDJ government into more repressive policies. As argued by scholars, the ‘no war-no peace’ period that followed the stalemate further plunged the Eritrean economy into the abyss and with massive exodus of Eritreans who were not only escaping the repressive junta but the chronic economic situation. This environment was further dampened by international sanctions creating a spectre of doom for the youth who were forced to join the open-ended national service programme. It is herein argued that the human displacement in Eritrea, should thus be viewed from an economic perspective and this does not make Eritreans ‘mere’ economic migrants, but deserving ‘economic refugees’ at par with ‘conventional/political refugees’ all fleeing persecution threatening their lives and fundamental freedoms.

## Chapter 6

### Refugee burden sharing mechanisms: the case of Uganda

#### 6.1. Introduction

My first impression of Uganda was that *everyone was selling something to everyone!* The hype of activities at Kisenyi (Kampala) bus terminal, the nerve centre of Uganda's public transport, made it difficult to discern between the buyers and the vendors. In the background, the atmosphere was drowned by the *boda-bodas* (motorcycle taxis) going in every direction picking and dropping passengers in Kampala. As the bus drove out of the capital city towards Fort Portal, a tourist town in the western region of Uganda, the same image of vendors, *boda-bodas*, and the informal market stalls remained the dominant picture.

As shown in *Figure 12*, in the previous chapter, Uganda is a landlocked country in Eastern Africa. Located along the equator, Uganda shares its borders with South Sudan, Kenya, the United Republic of Tanzania, Rwanda and the Democratic Republic of Congo (DRC). With a total landmass area of 241,550 square kilometres, Uganda is the 27<sup>th</sup> smallest country in Africa and 81<sup>st</sup> in the world. Much of Uganda's land forms an interior plateau averaging 1,200 metres in height with flat-topped hills scattered in the central, western and eastern parts of the country. The Ruwenzori mountain range in the west (also known as the Mountains of the Moon) are among the highest mountains in Africa with Mount Stanley (or Mount Ngaliema) towering at 5,190 meters.<sup>1</sup>

Unlike Eritrea, much of Ugandan land is arable. According to a country report, about 37 per cent of Uganda's land is under cultivation, while 17 percent of the country has inland water bodies in the form of the following lakes: Victoria, Albert, Kyoja, Edward and George.<sup>2</sup> Swamps take over 11 percent of the land, with a receding forest accounting to 12 percent (a sharp decline from the previous 24 percent in the year 1990). This subdivides the country into two distinct agro-ecological systems. The first being the highly fertile and productive land zone of the south and southwest along the Lake Victoria region. This region is also known as the "tall-grass zone" and is characterised with bimodal rainfall and perennial cropping. Bimodal

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<sup>1</sup> FU Bauer and others, 'The Rwenzori Mountains of Western Uganda – Aspects on the Evolution of Their Remarkable Morphology within the Albertine Rift' (2012) 73–74 *Journal of African Earth Sciences* 44.

<sup>2</sup> FAO, 'AQUASTAT Country Profile – Uganda' (2014) <<https://www.fao.org/3/i9827en/I9827EN.pdf>> accessed 27 May 2023.



rains are from March to June and from September to November.<sup>3</sup> The second zone has unimodal rainfalls and is known as the “short grass zone”. This zone is dominated by annual crops grown during the erratic and temporal March-June rains resulting in food insecurity in the northern part of Uganda.<sup>4</sup> All this is set in an equatorial climate with variations of both humid and semi-arid weather. The regions with bimodal rainfall also experience intermittent seasons of “moisture deficit” between December-February and also between June and September.<sup>5</sup>

In terms of ethnicity, Uganda is described as a highly fragmented society.<sup>6</sup> Two randomly selected individuals are likely to be from a different ethnic group.<sup>7</sup> In country with a population of 45.7 million (as of 2020), the main Uganda’s ethnic groups are the Banganda, Banyankole, Basoga, Bakiga, Iteso, Langi, Bagisu, Acholi, and Lugbara among others.<sup>8</sup> The country’s constitution of 1995 recognised 56 indigenous groups.<sup>9</sup> The Constitution Amendment Act of 2005 further added the Aliba, Aringa, Banyabutumbi, Banyaruguru, Barundi, Gimara, Ngikutio, Reli, and Shana as indigenous groups, thus making Uganda more ethnically diverse considering its stature in geographical size.<sup>10</sup> The official languages are English and Swahili, but Ganda/Luganda is the most used Niger-Congo language.<sup>11</sup> In the context of refugee policy and protection (as shall be discussed later) the issue of ethnicity is fractious and probably a source of conflict.

On the political front, the following three political figures remain dominant in the history of Uganda: Apolo Milton Obote, Idi Amin Dada Oumee, and Yoweri Tibuhaburwa Kaguta Museveni. Obote became Prime Minister in October 1962 following the national elections held

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<sup>3</sup> FAO, ‘Global Information and Early Warning System Country Brief Uganda’ (2022) <<https://www.fao.org/gIEWS/countrybrief/country.jsp?code=UGA&lang=en>> accessed 27 May 2023.

<sup>4</sup> *ibid.*

<sup>5</sup> FAO (n 2).

<sup>6</sup> James D Fearon, ‘Ethnic and Cultural Diversity Ethnic and Cultural Diversity by Country’ (2003) 8 *Journal of Economic Growth* 195, 207 <<http://www.jstor.org/stable/40215943>> accessed 27 May 2023.

<sup>7</sup> Fearon (n 6).

<sup>8</sup> Integral Human Development, ‘Migration Profile - UGANDA’ (2021) <[www.migrants-refugees.va](http://www.migrants-refugees.va)> accessed 31 May 2023.

<sup>9</sup> Uganda’s Constitution of 1995 with Amendments through 2017 1995 (constituteproject.org).

<sup>10</sup> Paul Ogwang Tulibaleka, Kenneth Tumwesigye and Lillian Ssunga Nakayima, ‘Urbanization in Africa: Integrating Multiculturalism in Urban Development in Uganda’ (2021) 13 *Journal of African Studies and Development* 74 <<https://academicjournals.org/journal/JASD/article-abstract/9AF6ADF67940>> accessed 27 May 2023. See also Third Schedule of the Uganda’s constitution: Uganda’s Indigenous Communities as at 1st February, 1926. (Article 10 (A))

<sup>11</sup> Integral Human Development (n 8).

in April of the same year.<sup>12</sup> By becoming the prime minister, Obote had accepted the constitution giving federal powers to the traditional kingdoms in Uganda.<sup>13</sup> This led to an uneasy coalition composed of his political party Uganda People's Congress (UPC) and the Buganda's Kabaka Yekka ("King Alone") Party.<sup>14</sup> With Obote's influence, King Edward Luwangula Mutesa was elected as the first president of Uganda in 1963. His reign was to end in 1966 after Obote sent soldiers led by Idi Amini, who was then an officer from the northern district, to attack the King's palace, and Mutesa fled to the United Kingdom.<sup>15</sup> As a way to put a firm grip on power, Obote introduced a new constitution abolishing any form of federalism, and he established the executive presidency, which he assumed thereafter. He then started to rely on the military and the police to quash any form of dissent. This led to heightened resentment among the southern Ugandans (Baganda, Basoga, Banyoro, Bagisu, Batoro and the Banyankole) and Idi Amini took the opportunity to overthrow Obote in a coup in 1971 with the help of his own Kakwa people.<sup>16</sup>

The reign of Amin (1971–1979) has gained international notoriety for his tyranny and political misdemeanours.<sup>17</sup> Through the leadership of Tanzanian leader Julius Mwalimu Nyerere and the help of Ugandan exiles, Amini was removed and multiparty elections were held in 1980.<sup>18</sup> Obote is believed to have rigged the elections, despite the presence of international election observers, and was again re-elected into office.<sup>19</sup> Yoweri Museveni, who had contested under the banner of the Ugandan Patriotic Movement (UPM), rejected the election result as fraudulent and began a guerrilla movement with the National Resistance Army (NRA) and the National Resistance Movement (NRM).<sup>20</sup> In mid-1985, Obote was again removed through a coup by his own army and Tito Okello Lutwa became the interim leader until January 1986 when the incumbent, Museveni, was sworn in as president.<sup>21</sup> In the field of migration, the chronology

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<sup>12</sup> Garth Glentworth and Ian Hancock, 'Obote and Amin: Change and Continuity in Modern Uganda Politics' (1973) 72 *African Affairs* 237 <<https://www.jstor.org/stable/719846>> accessed 27 May 2023.

<sup>13</sup> Harriet Aldrich, 'Uganda, Southern Sudan and the Idi Amin Coup' (2020) 48 *The Journal of Imperial and Commonwealth History* 1109 <<https://www.tandfonline.com/doi/abs/10.1080/03086534.2020.1765530>> accessed 27 May 2023.

<sup>14</sup> Glentworth and Hancock (n 12).

<sup>15</sup> *ibid.*

<sup>16</sup> Aldrich (n 13).

<sup>17</sup> Mark Leopold, *Idi Amin: The Story of Africa's Icon of Evil* (Yale University Press 2021) <<https://academic.oup.com/yale-scholarship-online/book/43130>> accessed 27 May 2023.

<sup>18</sup> *ibid.*

<sup>19</sup> Bertelsmann Stiftung, 'BTI 2022 Country Report - Uganda' (2022) <<https://www.bti-project.org>> accessed 27 May 2023.

<sup>20</sup> Aldrich (n 13).

<sup>21</sup> Derek R Peterson, 'A History of the Heritage Economy in Yoweri Museveni's Uganda' [2017] *Journal of Eastern African Studies*.

and ethnicity of the three key leaders mentioned above is critical in understanding refugee policy and protection in Uganda. As noted by Alexander Betts, the three dominant Ugandan leaders have leveraged refugee policy as a way to “strengthen patronage and assert political authority.”<sup>22</sup>

In the same realm, Uganda has had a welcoming attitude towards refugees. According to the updated UNHCR’s database, Uganda has a total population of 1,521,424 people in need.<sup>23</sup> Of these people, Uganda has offered refugee status to 1,481,827 people mainly from South Sudan (57 per cent), DRC (32 per cent), Somalia (4 per cent) and Rwanda (2 per cent).<sup>24</sup> The *Table* below further highlights the distribution of refugees across Uganda’s refugee settlements.<sup>25</sup>

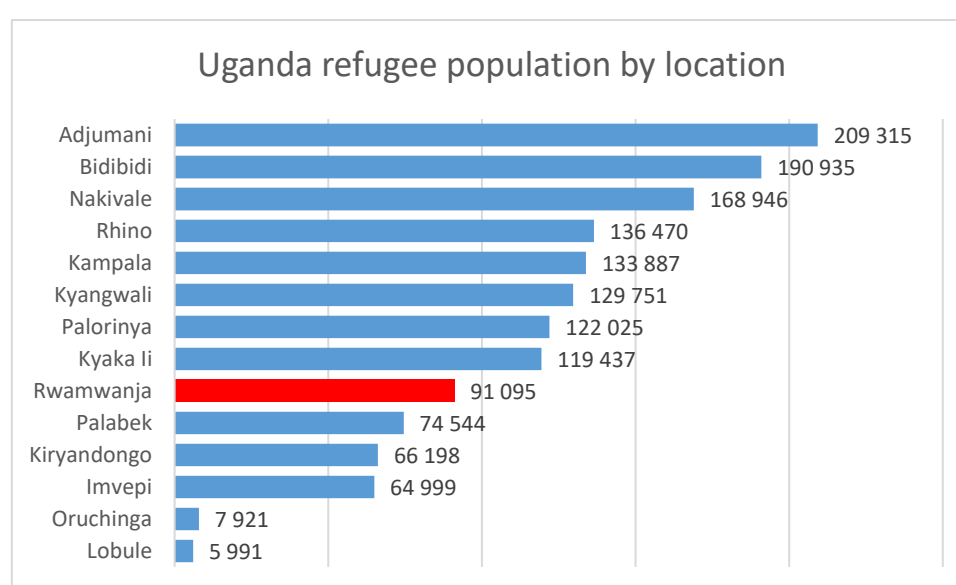


Table 4: Refugee population by location in Uganda: UNHCR (2023)

The refugee population in Kampala includes other urban centres. Most of the refugees are settled in the rural areas (1,387,537) and are eligible to get food and cash assistance through the Office of the Prime Minister (OPM).<sup>26</sup> Of these refugees, 80 per cent are women and children with the youth (15-24 years old) constituting 24 per cent of the refugee population.<sup>27</sup> This study focused on Rwamwanja refugee settlement. As we indicated in our previous study,

<sup>22</sup> Alexander Betts, ‘Refugees and Patronage: A Political History of Uganda’s “Progressive” Refugee Policies’ (2021) 120 *African Affairs* 243, 243 <<https://academic.oup.com/afraf/article/120/479/243/6217351>> accessed 28 May 2023.

<sup>23</sup> UNHCR, ‘Uganda - Refugee Statistics February 2023’ (*The United Nations Office for the Coordination of Humanitarian Affairs (OCHA reliefweb)*, 1 March 2023) <<https://reliefweb.int/report/uganda/uganda-refugee-statistics-february-2023>> accessed 29 May 2023.

<sup>24</sup> *ibid.*

<sup>25</sup> *ibid.*

<sup>26</sup> *ibid.*

<sup>27</sup> *ibid.*

the Rwamwanja refugee settlement was established in 1964 and is in western Uganda.<sup>28</sup> After the repatriation of Rwandan refugees, the settlement was briefly closed and was again re-established in 2012 when there was a surge in numbers of refugees coming from the DRC.

Therefore, this chapter aims to fulfil the second research aim of this study: identify sustainable refugee sharing mechanisms as enunciated in the *Global Compact on Refugees*.<sup>29</sup> This will be done by evaluating the refugee protection and policy in Uganda. It is argued that refugee protection and policy in Uganda is affected by the economic situation of the country. In turn this economic situation gives rise to secondary movements as refugees seek durable protection. To that end, the next section will give a literature review on the following two aspects: (i) the economic situation of Uganda, and (ii) Uganda's refugee response plan. This will then be followed by an evaluation of the research design and methodology that was used in collecting data in Rwamwanja refugee settlement. A thematic approach will then be adopted in analysing and discussing the findings before drawing a conclusion on the findings.

## **6.2. Literature Review**

### **6.2.1. The economic overview of Uganda**

In the early 1990s, the government of Yoweri Museveni followed a number of economic liberalization programmes from the international financial institutions.<sup>30</sup> The first of such programmes had been prescribed in 1981 to the second government of Milton Obote after the 1980 disputed elections.<sup>31</sup> In 1987, the Ugandan government started the second phase of the Structural Adjustment Programmes (SAP) financed by the multilateral and bilateral creditors and donors.<sup>32</sup> As of June 2021, the Ugandan government had agreed to the terms of an Extended Credit Facility (ECF) with the IMF for a total of SDR 722 million, which is equivalent to about US\$ 1 billion.<sup>33</sup> The acronym SDR stands for (Special Drawing Rights), and this is not a

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<sup>28</sup> Gorret Kugonza and Shepherd Mutsvara, 'Psychosocial Support and Protection for Refugee and Host Communities in Uganda: A Needs Assessment' (2022) 35 *Afrika Focus* 5.

<sup>29</sup> UN High Commissioner for Refugees (UNHCR), *Global Compact on Refugees* (United Nations 2018) <<https://www.refworld.org/docid/63b43eaa4.html>> accessed 29 May 2023.

<sup>30</sup> Bertelsmann Stiftung (n 19) 5.

<sup>31</sup> Mahmood Mamdani, 'Uganda: Contradictions of the IMF Programme and Perspective' (1990) 21 *Development and Change* 427.

<sup>32</sup> IMF, 'Policy Framework Paper-Uganda: Enhanced Structural Adjustment Facility and Policy Framework Paper 1998/99-2000/01 - Text' (1998) <<https://www.imf.org/external/np/pfp/uganda/102998.htm>> accessed 29 May 2023.

<sup>33</sup> IMF, 'Uganda: 2021 Article IV Consultation and First Review Under the Extended Credit Facility Arrangement and Requests for Modifications of Performance Criteria—Press Release; Staff Report; and Statement by the Executive Director for Uganda' (2022).

currency but a value based on the following five currencies: the US dollar, the euro, the Chinese renminbi, the Japanese yen, and the British pound sterling.<sup>34</sup> The recent ECF for Uganda , stated above, is in line with the country's goal of attaining middle income status by 2040, mitigate the impact of the COVID-19 pandemic, and boosting the private sector.<sup>35</sup>

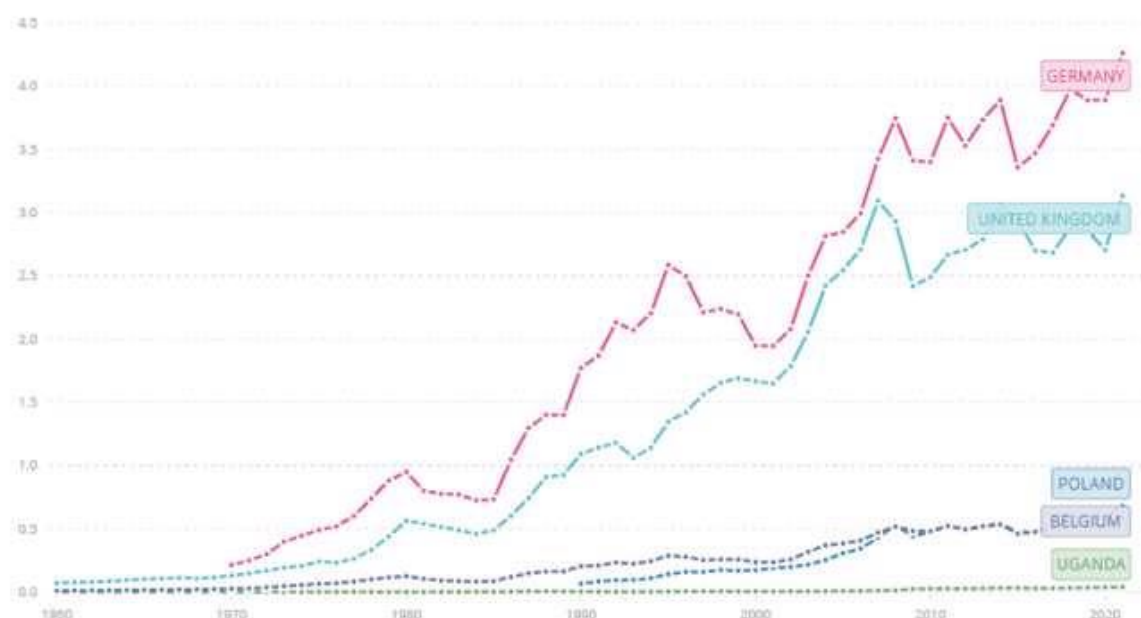


Figure 16: GDP for Uganda in comparison to Belgium, Poland, UK and Germany<sup>36</sup>

At the same time the Ugandan economy has sluggish growth and is mainly buoyed by the informal sector. According to the World Bank, an informal economy is also called the 'shadow economy' because it is neither taxed nor monitored by the government. The Ugandan informal economy is estimated to be 34.4 per cent thus representing approximately US\$ 55 billion gross domestic product (GDP) based on purchasing power parity (PPP). While the GDP estimates seem to be on the rise, the Ugandan economy with a growing population estimated at 45 million, is far less in comparison to some European countries as shown in the *Figure* above.<sup>37</sup>

<sup>34</sup> Edwin M Truman, 'The Case for Annual Special Drawing Right Allocations' (2023) 51 *Atlantic Economic Journal* 65 <<https://link.springer.com/article/10.1007/s11293-023-09761-0>> accessed 29 May 2023. The SDR is a creature of the IMF, which in 1969 was defined as a supplementary international reserve tied to the price of gold and the US dollar. In 1973, the IMF redefined the SDR in terms of the value of a basket of world currencies. This was after the demise of fixed exchange rates in 1973. The SDR is not a currency but an asset that holders (IMF member countries) can exchange for currency when needed.

<sup>35</sup> IMF (n 32).

<sup>36</sup> World Bank, 'GDP (current US\$) - Uganda, Belgium, Poland, United Kingdom, Germany'; (2022) <<https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=UG-BE-PL-GB-DE>> accessed 18 August 2023.

<sup>37</sup> Worldometer, 'Uganda Population (2023) - Worldometer' (*Worldometer*, 30 May 2023) <<https://www.worldometers.info/world-population/uganda-population/>> accessed 30 May 2023.

In the light of the COVID-19 pandemic the Ugandan GDP took a hit because of the lockdown regulations. This worsened the country's poverty ratio, led to chronic job losses, increased subsistence agriculture, cut on private savings, and led to school closures.<sup>38</sup> While this has been true for other countries on the global scale, observers are of the view that the key economic determinants for Uganda economy, at whatever stage of growth, are mired in managing inflation, monitoring government expenditure, attracting investments, improving exports, and have a policy rooted in the rule of law framework.<sup>39</sup>

This becomes even more difficult in a largely informal economy. Although informal economies have been slated for providing temporary means of survival, the growing trend is that informal economies are becoming a norm for both the developed and developing world. With regards to Uganda, the informal sector has grown from mere petty hawking to retail selling making the sector an important job creator.<sup>40</sup> The challenge is rather with the Ugandan government creating legal pathways to formalise this sector. Critics are of the view that such a move by the Ugandan government will help to create “secure livelihoods and generate employment opportunities for the unemployed rather than seeing the sector as a source of illegality”.<sup>41</sup>

On the other hand, Mahmood Mamdani argues that the informal sector is a result of the IMF policy prescription that led to the “disintegration of the wage-earning class by its gradual movement into petty trade”.<sup>42</sup> He is of the view that the IMF policies of 1981, and those that came up in 1987, had the effect of “recompradorization” of not only the Ugandan economy but also other African countries on SAP prescription.<sup>43</sup> The IMF conditionality of import substitution industrialization created highly import-dependent industries whose existence solely turned out to be transfer of resources from the agriculture sector (the mainstay of African economies) to the West.<sup>44</sup> The impact of this ‘conditionality’ was thus threefold for Uganda.

First, in all phases of the IMF policies, the terms of external trade dropped sharply, leading to a marked drop in the purchasing power of exports. Second, the conditionality on import

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<sup>38</sup> IMF (n 32) 5.

<sup>39</sup> Richard Sendi and others, ‘Determinants of Economic Growth: An Empirical Evaluation of the Ugandan Economy’ in Musa Jega Ibrahim (ed), *Macroeconomic Analysis for Economic Growth* (IntechOpen 2021) 14 <<https://www.intechopen.com/chapters/79329>> accessed 30 May 2023.

<sup>40</sup> Salmon Mugoda and others, ‘The Portrait of Uganda’s Informal Sector: What Main Obstacles Do the Sector Face?’ (2020) 8 Cogent Economics & Finance 1 <<https://www.tandfonline.com/doi/abs/10.1080/23322039.2020.1843255>> accessed 25 May 2023.

<sup>41</sup> *ibid* 23.

<sup>42</sup> Mamdani (n 31) 441.

<sup>43</sup> *ibid* 428.

<sup>44</sup> *ibid*.

substitution led to a drop in commodity price. In particular, the price for coffee fell drastically. This also led to the decline of the real minimum wage, because the wage bill had ballooned and as a way to sustain the wage bill it led to cutting wages or sacking the redundant staff.<sup>45</sup> Third, the IMF policies in Uganda led to the devaluation of the Ugandan shilling. As of today, one US dollar is equivalent to 3,700 Ugandan shillings.<sup>46</sup> The effect of devaluation is that it creates trade surplus by making imports expensive and exports cheap in the domestic country.<sup>47</sup>

It is also an economic imperative that after devaluation, the short-term effect is that trade balance will decrease, but in the long term the trade balance will increase as both exports and imports readjust to the time lag.<sup>48</sup> The major impact of devaluation on the Ugandan economy has been the inflationary environment.<sup>49</sup> While this has led the wage-earning class into the informal sector, it is the export-producing peasantry who have been hit the hardest. The agriculture price paid to them is state determined. With each devaluation, the farmers ‘seem’ to have an increase in their pay-outs for the produce, when in actual fact the “nominal increases in prices [actually] disguise a real fall”.<sup>50</sup>

Critics are of the view that this is unsustainable and call upon the Ugandan government to invest in infrastructure, modernise agriculture, facilitate domestic production as a way to give value to the devalued Ugandan currency.<sup>51</sup> One of the results of devaluation is an increase in transport costs and this has a knock-on effect on the prices. Therefore, the Ugandan government is urged to utilise the opportunity of enhancing new technology on alternative fuel so as to cut on importation fees for oil.<sup>52</sup> Also, the investment in key industrial infrastructure is critical so as to reduce the cost of production, and increase national income.<sup>53</sup>

The recent IMF report acknowledges the scars of the COVID-19 pandemic on the Ugandan economy. It identifies the education system as heavily constrained by the COVID-19 in that

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<sup>45</sup> *ibid* 439.

<sup>46</sup> FxTop, ‘Historical Currency Converter with Official Exchange Rates from 1953’ (21 May 2023).

<sup>47</sup> Godwin Kamugisha and Joe Eyong Assoua, ‘Effects of a Devaluation on Trade Balance in Uganda: An ARDL Cointegration Approach’ (2020) 12 *International Journal of Economics and Finance* 42 <<https://doi.org/10.5539/ijef.v12n7p42>>.

<sup>48</sup> *ibid*.

<sup>49</sup> Mamdani (n 31); Kamugisha and Assoua (n 47).

<sup>50</sup> Mamdani (n 31) 441.

<sup>51</sup> Kamugisha and Assoua (n 47).

<sup>52</sup> *ibid*.

<sup>53</sup> *ibid*.

the “public education expenditure has failed to keep up with the growing number of pupils”.<sup>54</sup> While the report urges private schools to bridge that gap, it fails to acknowledge that private schools thrive on high school fees which are out of reach of the common citizenry. Further the poor educational outcome across Uganda has had a negative impact on the quality of teaching and the outcome thereof. The infrastructure in schools is sparse and the ratio of teacher-to-pupil is high and thus affects the quality of education. As shall be discussed in the next section, the incoming refugees have also constrained that public space thus calling on the Ugandan government to allocate enough funds for the education sector.

This situation in Uganda is also not helped by a ballooning public debt.<sup>55</sup> It was established earlier on, that the Ugandan government has an external credit facility close to US\$ 1 billion dollars.<sup>56</sup> The impact of such a loan can either be positive or negative. It is urged that a government on such a credit facility can utilize such funds to transform the peasantry class into middle-income status by emphasizing on infrastructure such as roads, electricity and efficient innovations in the transport sector.<sup>57</sup> On the other hand, excessive public debt burdens the State and it fails to leverage on investment as it will be trying to service the national bond. In the case of Uganda, critics urge the Ugandan government to develop initiatives in the area of technology that enable the young population to contribute to the economy in the long run. As for leveraging from the benefits of international trade, a credit facility, can be used for export-oriented policies aimed at value addition. Doing so will equalize the difference between the export income and the import expenditure and thus nurture an enabling business environment for all classes of people in the economy.<sup>58</sup> It must also be noted that, in the context of refugee protection, the first and main aspect for hosting countries is to embrace a humanitarian approach.<sup>59</sup> However, as it shall be argued in section 6.5.1. , the consequences of a weak economic framework, helps in understanding the dynamics of cross-border displacement and durable solutions thereof. In the next section, an evaluation of Uganda’s refugee response will be undertaken in light of the weak and struggling economy.

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<sup>54</sup> IMF (n 32) 6.

<sup>55</sup> Richard Ssempala, Kurayish Ssebulime and Enoch Twinoburyo, ‘Uganda’s Experience with Debt and Economic Growth: An Empirical Analysis of the Effect of Public Debt on Economic Growth-1980-2016’ (2020) 9 *Journal of Economic Structures* <<https://doi.org/10.1186/s40008-020-00224-2>> accessed 30 May 2023.

<sup>56</sup> IMF (n 32).

<sup>57</sup> Ssempala, Ssebulime and Twinoburyo (n 55).

<sup>58</sup> *ibid.*

<sup>59</sup> Christian Dustmann and others, ‘On the Economics and Politics of Refugee Migration’ (2017) 32 *Economic Policy* 497.



### 6.2.2. Uganda's refugee response plan

#### (a) *The Constitution*

Uganda ratified the Geneva Convention and its Protocol in 1976, and in 1987 the country acceded to the OAU Convention on Refugees. In 2009, Uganda became the first country to adopt the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (the Kampala Convention). The country has also committed to a number of other international treaties.<sup>60</sup> At regional level, Uganda is party to the African Charter, the Women's Protocol and the African Children Charter amongst others.<sup>61</sup> On the domestic front, Uganda has a legal framework (see discussion below) that has allowed it to host the fifth highest number of refugees globally and the highest on the African continent.<sup>62</sup> This admission rate, in a country with a strained economy, has earned Uganda international praise in terms of humanitarian response.<sup>63</sup> The provision of socio-economic rights to refugees by allowing them to provide for themselves through farming, makes the Uganda's thirteen hosting districts safe havens and paragons of self-reliance.<sup>64</sup> This non-encampment policy is firmly embedded in the country's refugee response plan whose main objective is to ensure that refugees and asylum seekers have the right to asylum and access to fair and swift asylum procedures as set in the Uganda's 2006 Refugee Act and the 2010 Refugee Regulations, and the international treaties.<sup>65</sup>

The legal framework for the Ugandan Refugee Response Plan (RRP) is entrenched in the Constitution and is codified in the 2006 Refugee Act and the 2010 Refugee Regulations.<sup>66</sup>

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<sup>60</sup> Uganda has ratified the following international treaties: International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic, Social and Cultural Rights (ICESCR); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); Convention on the Rights of Persons with Disabilities (CRPD); Convention on the Rights of the Child (CRC); International Convention on the Elimination of All Forms of Racial Discrimination (CERD); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW)

<sup>61</sup> Uganda is party to the following regional treaties: African Charter on Human and Peoples' Rights; African Charter on the Rights and Welfare of the Child; AU Convention Governing Specific Aspects of Refugee Problems in Africa; Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa; AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa

<sup>62</sup> Stephen Meili, 'Uganda', *The Constitutionalization of Human Rights Law* (Oxford University Press Oxford 2022) <<https://academic.oup.com/book/44565/chapter/376622801>> accessed 1 June 2023.

<sup>63</sup> Frank Ahimbisibwe, 'Uganda and the Refugee Problem: Challenges and Opportunities' (2019) 13 *African Journal of Political Science and International Relations* 62.

<sup>64</sup> Sarah Doyel, 'Paragon of "Self-Reliance": A Critical Narrative Analysis of Refugee Self-Reliance Policies in Uganda' (2022) 2 *New Sociological Perspectives* 1 <<https://nsp.lse.ac.uk/%0D%0A>>; Betts (n 22).

<sup>65</sup> UNHCR, 'Protection Dashboard: Uganda Refugee Response Plan (RRP) 2022-2023' (2022).

<sup>66</sup> National Legislative Bodies / National Authorities, Uganda: The Refugees Regulations, 2010, 27 October 2010, S.I. 2010 No. 9, available at: <https://www.refworld.org/docid/544e4f154.html> [accessed 1 June 2023] 2010; The

Having gone through a turbulent political history involving Obote, Amin and the incumbent president, Yoweri, the Constituent Assembly of Uganda adopted a new Constitution in 1995. In terms of Chapter 4 of the Constitution, all organs of state, private entities and individuals should respect and uphold the Bill of Rights so as to strengthen, protect and preserve fundamental human rights.<sup>67</sup> Although critics are of the view that the Ugandan Constitution is just good on paper and is not consistently applied or interpreted, the scope of this study is to enumerate the basis of the RRP in Uganda.<sup>68</sup> The Constitution has a number of human rights provisions for “all persons” with regards to human dignity, education, environment, equality, labour and employment rights, personal freedom, and right to the fair and just due process of law.<sup>69</sup>

In the context of refugees, the provisions of article 29(1) are crucial. This article provides for and guarantees the right for “every person” to freedom of expression, conscience, movement, religion, assembly and association. The right to movement, among others, is important for refugees to feel at home and allows them to integrate with the host population. It is also noted that refugees are generally marginalised groups and as such tend to be segregated in the new host countries. The Ugandan Constitution seems to bridge this by providing not only the right to education, but also by prohibiting all laws, cultures and practices that are inimical to human dignity of all persons in particularly the vulnerable.<sup>70</sup> As noted by Muyenga Mugerwa-Sekawabe, the right to education for refugees unlocks their potential and can act as a fulcrum to get out of the poverty cycle.<sup>71</sup> He is of the view that refugees require education as a step to enjoy other forms of human rights that are conferred upon them in the host country. In addition, most refugees are viewed as draining public resources and this increases the hostility against

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Refugee Act 2006 , Act 21, 24 May 2006, available at: <https://www.refworld.org/docid/4b7baba52.html> [accessed 1 June 2023] 2006.

<sup>67</sup> Uganda’s Constitution of 1995 with Amendments through 2017.

<sup>68</sup> Michael Addaney, ‘A Step Forward in the Protection of Urban Refugees: The Legal Protection of the Rights of Urban Refugees in Uganda’ (2017) 17 *African Human Rights Law Journal* 218 <[http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S1996-20962017000100011](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1996-20962017000100011)> accessed 1 June 2023; Meili (n 62).

<sup>69</sup> The Constitution provides for human dignity (Art 24), education (Art 30), environment (Art 17(1)), equality (Art 21), labour and employment rights (Art 25), personal freedom (Art 23), and right to the fair and just due process of law (Art 247).

<sup>70</sup> Article 32 (1) of the Ugandan Constitution provides as follows: “notwithstanding anything in this Constitution, the State shall take affirmative action in favour of groups marginalised on the basis of gender, age, disability or any other reason created by history, tradition or custom, for the purpose of redressing imbalances which exist against them”.

<sup>71</sup> Muyenga Mugerwa-Sekawabe, ‘Increasing Access to Education for Refugees in Uganda’ (2021) 25 *Law Democracy & Development* 546, 548 <<http://dx.doi.org/10.17159/2077-4907/2021/1dd.v25.19>> accessed 30 May 2023.

them, therefore, education can help in challenging such skewed beliefs and empower the vulnerable by enabling them to contribute positively to the host country.<sup>72</sup>

In the same vein, the provisions of article 34 (2) of the Constitution are critically assessed.<sup>73</sup> In terms of this article, “a child is entitled to basic education which shall be the responsibility of the State and the parents of the child”.<sup>74</sup> It is argued that this might be punitive for refugee children whose parents are most likely in an impoverished position and cannot fulfil this duty due to their weak economic position. As shall be seen in the case of Rwamwanja refugee settlement, most refugee parents are unable to provide for their families due to unemployment and the constrained economic position. The adverse impact of such provision is that it will lead to school dropouts and this is more disempowering for the refugee community.<sup>75</sup>

In terms of article 26 (1), “every person” has a right to own property in individual capacity or as group. This provision, in the context of the refugees, manifests itself in the allocation of land to refugees for self-reliance thus making Uganda one of the few countries that emboldens refugees and allows them to be self-sustaining.<sup>76</sup> Even though, the non-Ugandans can only have leaseholds under the Land Act (section 40)<sup>77</sup>, it is argued that the fact that refugees are allowed to fend for themselves by being allocated a piece of land is a great step towards provision of socio-economic rights.<sup>78</sup> Another issue with regards to refugee protection and policy is about citizenship. Article 13(2) of the Constitution confers citizenship to “every person” who has “voluntarily” migrated to Uganda and has stayed for a minimum of 20 years.<sup>79</sup> This provision prevents refugees from acquiring citizenship since they have been “involuntarily” displaced. As noted by critics, this is further complicated by intermarriages and the cumbersome process of formalising citizenship matters in such regards.<sup>80</sup> While comfort may be drawn from the fact that the provision of article 13(2) applies to “every person” and does not specifically mention “refugees”, the Ugandan jurisprudence seems to have not been tested on this provision. This is

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<sup>72</sup> *ibid.*

<sup>73</sup> Addaney (n 68).

<sup>74</sup> Uganda’s Constitution of 1995 with Amendments through 2017 art 34(2).

<sup>75</sup> Addaney (n 68).

<sup>76</sup> Lucy Hovil, ‘Self-Settled Refugees in Uganda: An Alternative Approach to Displacement?’ (2007) 20 *Journal of Refugee Studies* 599; Naohiko Omata and Josiah Kaplan, ‘Refugee Livelihoods in Kampala, Nakivale and Kyangwali Refugee Settlements. Patterns of Engagement with the Private Sector’ 1 <<http://www.rsc.ox.ac.uk/files/publications/working-paper-series/wp95-refugee-livelihoods-kampala-nakivale-kyangwali-2013.pdf>>; Ahimbisibwe, ‘Uganda and the Refugee Problem: Challenges and Opportunities’ (n 66).

<sup>77</sup> The Land Act (Cap. 227). 1998.

<sup>78</sup> Addaney (n 68).

<sup>79</sup> Uganda’s Constitution of 1995 with Amendments through 2017 Art 13(2).

<sup>80</sup> Addaney (n 68); Meili (n 62).

viewed as a violation to the rights of the refugees which the Ugandan government pledged to protect by acceding to the Geneva Convention and its Protocol.<sup>81</sup> Be that as it may, the provisions of the Ugandan Constitution seem to be progressive on refugee protection and policy. The next section will thus discuss how these provisions are incorporated into the Refugees Act of 2006 and the 2010 Refugee Regulations.

*(b) The Refugees Act of 2006*

Initially, the Ugandan legislation dealing with refugees was promulgated in 1955 and repealed in 1960 by the Control of Alien Refugees Act (CARA).<sup>82</sup> In the year 2006, when Uganda was experiencing significant refugee flows from the DRC, Sudan, Burundi and Rwanda, the country promulgated a comprehensive Refugees Act. The Act had been tabled in parliament in 1998, and came into force in 2008 before becoming operational in 2010 through the adoption of the Refugees Regulations.<sup>83</sup> In the words of Meili, the Refugees Act is “extremely progressive” for it incorporates international legal norms.<sup>84</sup> The Act acknowledges the importance of enforcing obligations arising from international law, international refugee law, and humanitarian law. However, the efficacy of the Act in terms of interpretation, application, and scope of protection has always been questioned.<sup>85</sup> For the purpose of this study, focus will be on who qualifies as a refugee (section 4), and the refugee determination process (section 25).

The promulgation of the Refugees Act was on the premise that CARA was wholly inadequate in providing protection to refugees in the context of global developments in the field of international refugee law and Uganda’s own turbulent political history. For example, CARA is slated for having provisions that violated the right to freedom of movement and this was contrary to the spirit of self-reliance for refugees that the Ugandan government had adopted.<sup>86</sup> Notwithstanding its inherent weaknesses on implementation and interpretation, the Refugees Act may thus be viewed as an expansive legislation that can be utilised for the protection of refugees under the Geneva Convention, the OAU Convention on Refugees and those with a

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<sup>81</sup> Meili (n 62) 139.

<sup>82</sup> Jamil Ddamulira Mujuzi, ‘From Archaic to Modern Law: Uganda’s Refugees Act 2006 and Her International Obligations’ (2008) 14 East African Journal of Peace & Human Rights 399 <<https://repository.uwc.ac.za:443/xmlui/handle/10566/2083>> accessed 2 June 2023.

<sup>83</sup> Addaney (n 68).

<sup>84</sup> Meili (n 62) 144.

<sup>85</sup> Frank Ahimbisibwe, ‘The 2006 Refugees Act in Uganda: Between Law and Practice’ (2020) <<http://www.uantwerp.be/iob>> accessed 2 June 2023; Mujuzi (n 82); Addaney (n 68); Meili (n 62).

<sup>86</sup> Mujuzi (n 82) 402.

well-founded fear based on gender discrimination.<sup>87</sup> This has been described as “injecting new blood into the veins of the administration and procedures for refugees”, and observers are of the view it is an ‘act’ of humanitarian effort aimed at upholding the fundamental rights of asylum seekers and refugees.<sup>88</sup>

Notwithstanding the recent border closures due to COVID-19 regulations, the spirit of the Refugees Act is to receive and host refugees in Uganda.<sup>89</sup> The granting of the refugee status by Uganda is a gesture of humanitarianism and an acknowledgement of one’s fundamental human rights.<sup>90</sup> To that end, in term of section 4 of the Refugees Act, one qualifies as a refugee in the following six categories. The first category relates to the Geneva Convention grounds, that is, on the grounds of race, religion, nationality, membership of particular social group, and political opinion. Second, the Refugees Act explicitly includes those persons who have suffered persecution on the grounds of sex or failing to conform to gender discriminating practices. Ordinarily, this group is recognised as Convention refugees as well under the ‘particular social group’ criterion. The third category, is that of those that are stateless and being outside the country of their former habitual residence. Fourth, the provision incorporates the OAU expanded refugee definition in relation to those displaced due to “external aggression, occupation, foreign domination or events seriously disturbing public order”. As argued earlier on in *section 3.6.1*, if the impact of globalization and prescribed economic policies are considered, this category is open to numerous and divisive interpretations. The fifth is the category that qualifies for refugee status as defined in any of the treaties to which Uganda is a party or any laws in force upon enactment, and the sixth relates to the category with persons whom the Ugandan government would have declared eligible for refugee status through national administrative procedures.<sup>91</sup>

Mujuzi is critical of the ground on gender discrimination practices.<sup>92</sup> While he praises the Refugee Act for having widened the refugee definition beyond the Geneva Convention, he is

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<sup>87</sup> As of May 29, 2023, the incumbent president of Uganda, Yoweri Museveni, signed into law the Anti-Homosexuality Bill. The law, described by the media as one of the world’s toughest anti LGBTQ laws, calls for the death penalty for “serial offenders” who spread terminal illness like HIV/AIDS through gay sex. It also calls for a 20-year sentence for “promoting” homosexuality.  
into law after parliament watered it down.

<sup>88</sup> Mujuzi (n 82) 404.

<sup>89</sup> Ahimbisibwe, ‘The 2006 Refugees Act in Uganda: Between Law and Practice’ (n 85).

<sup>90</sup> The Refugees Act 2006 , Act 21, 24 May 2006, available at: <https://www.refworld.org/docid/4b7baba52.html> [accessed 1 June 2023] s 3(1).

<sup>91</sup> *ibid* s 4 (a)-(f).

<sup>92</sup> Mujuzi (n 82) 406.

of the view that the ground on gender discrimination in the context of Uganda poses implementation challenges. It is argued that while it is easy to understand the impact of acts such as rape, genital mutilation, domestic violence, it is difficult to discern what entails “other gender related activities”. Mujuzi argues that Refugee Status Determination Officers (RSDOs) might not determine such activities leading to gender discrimination and in the end, persons with genuine concerns might not be granted protection due to the vague wording of the phrase.<sup>93</sup> Perhaps this is made more difficult by the recent passing of the controversial Anti-Homosexuality Act, that condemns same sex partners to life imprisonment in Uganda.<sup>94</sup> Some other critics, maintain that while the Refugees Act is expansive and widens the refugee definition, they are concerned about the gap in protection that might arise due to the “difference between the words of the Refugees Act and the lack of implementation on the ground”.<sup>95</sup>

### 6.2.3. The Refugee Status Determination (RSD) process

Uganda has a two layered approach to refugee status determination. It confers refugee status on a *prima facie* basis and regular asylum processing. The determination of RSD procedures is a prerogative of States, since the Geneva Convention is silent on how countries should establish rules and norms on RSD procedures.<sup>96</sup>

#### (a) RSD for *prima facie* refugees

Uganda offers *prima facie* determination to refugees from South Sudan, and as for Congolese this is only done if they come through the official border.<sup>97</sup> A *prima facie* determination is a process of refugee status determination in which refugee status is given to a group or class of refugees fleeing their country of origin due to circumstances that are indicative of conditions for refugee status.<sup>98</sup> This group-based approach, usually carried out with the help of the UNHCR, is done in cases of humanitarian emergencies and mass influxes when refugees flee

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<sup>93</sup> *ibid* 406–407.

<sup>94</sup> Uganda, ‘Anti-Homosexuality Act 2023’, < <https://chapterfouruganda.org/sites/default/files/downloads/The-Anti-Homosexuality-Bill-2023-latest-version.pdf> > accessed 18 August 2023. The argument here being that the Anti-Homosexuality Act is a direct confrontation of the criterion on ‘gender discrimination practices’ mentioned in the Refugees Act of 2006. The fact that one can be convicted for life on the mere ground of ‘suspicion’ of homosexuality is arbitrary and is a legal dent to refugee policy and protection.

<sup>95</sup> Meili (n 62) 145.

<sup>96</sup> Matthew Albert, ‘Governance and “Prima Facie” Refugee Status Determination: Clarifying the Boundaries of Temporary Protection, Group Determination, and Mass Influx’ (2010) 29 Source: Refugee Survey Quarterly 61 <<https://www.jstor.org/stable/45074227>> accessed 3 June 2023.

<sup>97</sup> UNHCR, ‘Protection Dashboard: Uganda Refugee Response Plan (RRP) 2022-2023’ (n 65).

<sup>98</sup> Alison Ryan, ‘Refugee Status Determination A Study Of The Process In Uganda’ (2018) 9 <<https://www.nrc.no/globalassets/pdf/reports/refugee-status-determination/refugee-status-determination---a-study-of-the-process-in-uganda.pdf> > accessed 30 May 2023.

their country of origin due to occupation, conflict, generalized violence, and gross human rights violations.<sup>99</sup> Refugees are registered on the basis of their nationality and are usually settled in a camp as a temporary measure. The ending of a *prima facie* approach will therefore be an indication that the objective causes of the circumstances that gave rise to the mass influx no longer exists, or that there is a need to determine the refugee status on a case-by-case basis.<sup>100</sup>

In the context of Uganda, *prima facie* determinations are authorised through the provisions of the Refugees Act.<sup>101</sup> The government does not make an individual determination as to whether an asylum seeker from South Sudan is eligible for refugee status. These group determinations for citizens of South Sudan and sometimes Congo, remain valid for two years after implementation, or until cessation of circumstances giving rise to mass influxes.<sup>102</sup> Most refugees from South Sudan are settled along the West Nile area of Uganda, with most of them settled in Adjumani resettlement camp.<sup>103</sup> As for the Congolese, most of them are settled in the Southwest of the country and are mainly found in Rwamwanja refugee settlement.<sup>104</sup> Given the resource constraints, *prima facie* determinations are done in one focal area, and refugees go through a short interview to affirm their nationality before being issued with refugee identity cards.<sup>105</sup> It is observed that *prima facie* determinations in Uganda are a model of how States can make the right to asylum accessible by maintaining open borders.<sup>106</sup>

#### *(b) Regular RSD determination*

The Refugee Eligibility Committee is responsible for the regular RSD interviews for nationalities other than South Sudanese or Congolese.<sup>107</sup> Non *prima facie* determinations are rare and usually done at designated points.<sup>108</sup> Ugandan officials largely preside over these RSD interviews and the UNHCR has an observer status.<sup>109</sup> The process for regular RSD begins with an application by the asylum seeker at the Old Kampala Station. A security screening interview is done on the same day with an interview booked on a later day with the RSD eligibility

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<sup>99</sup> Albert (n 96).

<sup>100</sup> UNHCR, 'Prima Facie Recognition of Refugee Status' (*UNHCR Emergency Handbook*, 2022) <<https://emergency.unhcr.org/emergency-preparedness>> accessed 3 June 2023.

<sup>101</sup> The Refugee Act 2006, Act 21, 24 May 2006, available at: <https://www.refworld.org/docid/4b7baba52.html> [accessed 1 June 2023] s 25.

<sup>102</sup> *ibid.*

<sup>103</sup> Ryan (n 98).

<sup>104</sup> UNHCR, 'Uganda - Refugee Statistics July 2022 - Rwamwanja' (2022).

<sup>105</sup> Meili (n 62).

<sup>106</sup> *ibid.*

<sup>107</sup> UNHCR (n 65).

<sup>108</sup> Ryan (n 98); Meili (n 62).

<sup>109</sup> UNHCR (n 65).

committee. On the day of the interview, an asylum seeker is assessed on the following key elements: country of origin, and assessment of the credibility of well-founded fear. The determination of the final decision from the committee is usually slow and leaves the refugee claimants vulnerable to agents who charge huge sums of money under the guise of helping in expediting the process.<sup>110</sup>

Judicial review is available for refugee claimants whose claims would have been rejected. It is observed that most applicants whose application is rejected during the first stage have poor understanding of not only the process but also the grounds provided for rejection. A recent report suggests that the Refugee Appeal Board had to review 277 appeal cases of 969 individuals from Eritrea, DRC, Ethiopia, Burundi and Rwanda.<sup>111</sup> Despite the impact of the COVID-19 in slowing the regular RSD sessions, the grant rate is positive. It is reported that of the 3,242 applications in Kampala, the RSD eligibility committee handed down 3,197 positive decisions at its first meeting after the COVID-19 lockdown.<sup>112</sup>

### **6.3. Research design and Methodology**

As of August 2022, when the study was conducted, Rwamwanja settlement had a refugee population of 82,731 spread across 12,900 hectares of arable land.<sup>113</sup> The refugees are settled in ten zones/sections.<sup>114</sup> As noted in chapter 2, accessing the Rwamwanja settlement was bureaucratic and political. After getting clearance from the OPM for our previous study<sup>115</sup>, colleagues from the SOS Children's Villages of Uganda and Mountains of the Moon University were able to set up contact with refugee leaders in the following three zones/sections: Mahani, Mahega and Buguta. To avoid research fatigue, the previous zones that participated in our first study were not part of the Focus Group Discussion (FGDs). Three FGDs were set, as shown in the Table below, in Mahani (N=8), Mahega (N=13), and Buguta (N=9).

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<sup>110</sup> Meili (n 62); Ryan (n 98).

<sup>111</sup> UNHCR (n 65).

<sup>112</sup> Meili (n 62) 147–148.

<sup>113</sup> UNHCR, 'Uganda - Refugee Statistics July 2022 - Rwamwanja' (n 104)

<sup>114</sup> *ibid.* The ten zones/sections are populated as follows: Kyempango (21,429); Kaihora (11,341); Mahani (10,566); Nkoma (8,601); Ntenungi (8,294); Base Camp (7,628); Mahega (4,318); Kikiuru (2,648); Waijagahe (2,130), and Buguta (1,524).

<sup>115</sup> Kugonza and Mutsvara (n 28)



Zone	Participant Sex	Age	No. of children	Country of Origin	Note
<b>Mahani</b>	Male (disabled)	47	08	DRC	<b>17/08/2022</b> <b>Duration: 58mins</b>
	Male	42	04	DRC	
	Female	42	07	DRC	
	Female	32	07	DRC	
	Female	34	03	DRC	
	Female	36	07	DRC	
	Male (Translator)	37	02	DRC	
	Female	40	07	DRC	
<b>Mahega</b>	Male	36	07	DRC	<b>17/08/2022</b> <b>Duration: 59mins</b>
	Female	25	03	DRC	
	Female	35	05	DRC	
	Male	34	04	DRC	
	Male	36	05	Undisclosed	
	Male	42	02	DRC	
	Female	30	03	DRC	
	Female	35	08	DRC	
	Male	80	05	DRC	
	Female	35	05	DRC	
	Female	37	03	Undisclosed	
	Male	25	02	DRC	
	Male (Minor)	16	----	DRC	School dropout
<b>Buguta</b>	Female	36	09	DRC	<b>18/08/2022</b> <b>Duration: 59mins</b>
	Male	40	05	DRC	
	Female	50	07	Undisclosed	
	Female	28	04	DRC	
	Male	24	----	DRC	Twin 2
	Male	37	06	DRC	
	Female	26	02	DRC	
	Male	20	01	Undisclosed	
	Female	24	---	DRC	Twin 1

Number of Males	Number of Females
14 (46.7%)	16 (53.3%)

Table 1: Focus Group Discussion Demographic Data Chart

The three FGDs were fairly distributed to reflect the demographic profile of the refugees in the settlement. Women constituted 53 per cent, while men were 47 per cent. With the exception of the minor (16 years old) who insisted to stay in one of the FGDs, the age group of the participants ranged between 20 to 80 years old. Three distinct age groups were noted as follows:

those aged between 20 to 40 years (77 per cent), 40 to 60 years (17 per cent), and 60 to 80 years bracket (6 per cent). We had initially agreed that the participants should be aged 18 and above, but the minor mentioned above, refused to leave the FGDs insisting that he wanted to be part of the discussions. Since it was the cultivation season, we also agreed to have the FGDs run between 45 to 60 minutes. The refugees spoke in Kinyabwishi, and this was translated into English by one of the volunteers who was also a participant in the FGDs. A thematic approach was adopted to enquire on the economic situation in the settlement and how this may give rise to secondary movements. As for the expert interviews, focus was on Uganda's capacity to host refugees and opportunities/challenges in lessening the refugee burden. Opinion was also sought from five selected key informants working with organisations that support refugees in Rwamwanja as shown in the Table below. The study also benefits from secondary sources on the themes explored.

<b>Name of organisation</b>	<b>Kind of support offered</b>
The United Nations High Commissioner for Refugees (UNHCR)	protection, regulation, registration of refugees and coordination of other support organisation
SOS Children's Village Uganda (Fort Portal)	livelihood support and psychosocial
Advocates Coalition for Development and Environment (ACODE)	supporting regional peacebuilding initiatives
Adventist Development and Relief Agency (ADRA)	food distribution and livelihood
Office of the Prime Minister (OPM)	registration and regulation of asylum seekers and refugees

Table 2: Organisations supporting refugees and their roles

## **6.4. Ethical Considerations**

Research on forced migration involving vulnerable refugee communities requires strict observance of ethical considerations.<sup>116</sup> The study paid attention to conflict by including maintaining impartiality, independence and being considerate of possible tensions and power structures in the hosting communities of Mahani, Mahega, and Buguta. The issue of nationality is quite a divisive matter in the camp especially between ethnic groups of Hutu Tutsi origin coming from the DRC and those originally from Rwanda. During the set-up meeting with the refugee leaders and officials from the SOS Village Uganda and the OPM, it was agreed the FGDs respondents were not obliged to disclose their nationality. This is important because it enhances protection of people and groups providing data. We further considered protection threats and the risk caused by asking questions which result in the storage and/or sharing of personal data. Rwamwanja refugee settlement is culturally diverse as it shelters refugees and asylum seekers from the Democratic Republic of Congo, Rwanda, Burundi, and South Sudan. Therefore, it was important to consider the cultural appropriateness of the assessment methodology, terminology and the behaviour and attitudes. For example, a meeting could not be convened without full consultation of the ‘elders’ in Mahani, Mahega and Buguta. Furthermore, ethical principles, including respecting privacy, confidentiality, voluntary participation, informed consent, and the best interests of the interviewee were observed. At no time during the FGDs and expert interviews were expectations of respondents raised by promising tangible benefits as compensation for partaking in the FGDs or interviews.

## **6.5. Limitations**

The FGDs were constrained by the language barrier. The researcher spoke English, while the refugees switched between Rutoro, Swahili, Kinyarwanda and Kinyabwishi. This inhibited participation, as contextual and background information was lost through translation into the English language. The other limiting factor tied to language barrier was cultural bias. Female participants could only talk after being prompted and some talked after getting cue from the refugee local leaders. Some refugees were not forthcoming with personal information out of fear of their security. This remains a challenge in many global refugee settings and inhibits researchers to make a holistic assessment of the situation at hand, and in turn stalls action to alleviate the situation in refugee camps. The researcher is grateful with the assistance he got

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<sup>116</sup> PD Deps and others, ‘Ethical Issues in Research with Refugees’ (2022) 24 *Ethics, Medicine and Public Health* 100813 <<https://www.sciencedirect.com/science/article/pii/S2352552522000627>> accessed 4 June 2023.

from the Office of the Prime Minister. However, the information on the regulation and registration of refugees by the OPM was largely from desktop research as it takes long to have an appointment clearance from the office for face-to-face interviews.

## **6.6. Findings and discussion**

The study was primarily guided by the following three questions: (i) what are the economic challenges faced by refugees in Rwamwanja settlement?, (ii) in light of the enumerated economic challenges, what are the prospects of leaving the Rwamwanja refugee settlement?, and (iii) how can the refugee burden be lessened on Uganda given its economic situation? The first two questions were directed to the FGDs while the experts were presented with all the questions. A thematic approach was taken in analysing and blending the findings. The findings were then categorised into the following three distinct categories: economic challenges, secondary movements of refugees, and sharing the refugee burden. The picture below, is a snapshot of some of the houses for the refugees in Rwamwanja settlement.



Figure 17: Refugee houses in Rwamwanja settlement, Uganda. (author own photo)

### **6.6.1. Economic challenges**

The refugee livelihoods are constrained by acute economic challenges that make their life unbearable in the settlement. They acknowledge that the ever-rising number of refugees coming from the DRC and South Sudan has meant that the economic resources available are shared amongst many refugees and this has affected the quality-of-life thereon. The refugee

population in Rwamwanja settlement continues to be on the rise. In our first study<sup>117</sup>, the refugee population was approximately 76,000 and this number rose to 82,731 in the year 2022. By the time of writing this study, the refugee population had risen to over 90,000 in the year 2023.<sup>118</sup> The general sentiment in all the discussions was that the refugees are facing difficult economic problems. This can be summarised by a participant in the FGD as follows:

We would like to thank the [Ugandan] government for receiving us with open hands. We came, we were received well. We were given a small piece of land, and the monthly pay-out was UGX 31, 000. We were also getting a sack of *posho* (maize-meal), cooking oil and soap. With that we were content and could survive and we had peace. We really don't know how the programme changed from UGX 31,000 to UGX 13, 000 and we no longer receive the food ration. But now our money is reduced. A sac [of maize-meal] is now three times [more] expensive. It was UGX 25, 000 and now it is UGX 75,000. For most of us with big families this is not enough and has led others to commit suicide, and others have decided to go back to Congo despite the war.<sup>119</sup>

The major concern expressed above was that the cash-based intervention by the UNHCR and the food ration from the World Food Programme (WFP) do not sustain most households who have an average of five children and above.<sup>120</sup> The UNHCR provides cash-based intervention by providing each head per household a sum of UGX 13,000 and this figure is equivalent to US 4 dollars.<sup>121</sup> On the other hand, the WFP is supposedly obliged to give every household food rations in the form of a sack of beans, cooking oil and a bag of maize-meal (*posho*). The Livelihoods Officer at SOS Children's Village Uganda is of the view that the refugees do not understand the obligation of the WFP. While he acknowledges that the UNHCR's pay-out does not go a long way in sustaining refugee livelihoods, he clarifies that the WFP food ration is "only [for] new arrivals" and the food ration is given in accordance to the family size.<sup>122</sup> After the first ration, the OPM assigns a piece of land to the new refugees to promote the spirit of self-reliance.

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<sup>117</sup> Kugonza and Mutsvara (n 28).

<sup>118</sup> UNHCR, 'Uganda - Refugee Statistics February 2023' (n 23).

<sup>119</sup> Appendix 14 FGD Maega at 00:25:56 to 00:28:19. The same concern is raised in Appendix 13 FGD Mahani at 00:08:22, and Appendix 15 FGD Buguta 00:07:43.(on file with the author)

<sup>120</sup> Table 1 in section 6. 3 above

<sup>121</sup> Appendix 13 (n 119); Appendix 14 (n 119); Appendix 15 (n 119)

<sup>122</sup> Conversation with the Livelihoods Officer at SOS Children's Village Uganda: mail on file with the author



Figure 18: Refugees in Buguta section cultivating land (author own photo)

While refugees in Rwamwanja praise the OPM for allocating land, they cite a number of problems with regards to the land policy. First of all, most refugees in the FGDs arrived in Rwamwanja when the settlement was re-established after the repatriation of Rwandese refugees in the year 2012. At that time, the refugees were allocated large swathes of land because their numbers were manageable. With increasing numbers of refugee flows they were made to share the land with incoming refugees. The result of this was that they were left with small pieces of land measuring 22 metres by 60 metres in size.<sup>123</sup> This has drastically affected the expected harvest and with the increasing household population, refugees have struggled to fully provide for themselves.<sup>124</sup> The second factor tied to this is that the OPM does not allow refugees to leave the settlement in search of employment in the city centres and this leaves the refugees to rely on the piece of land that has been reduced in size to cater for the ever-increasing refugee population.<sup>125</sup>

From a political and historical perspective, the land issue has always been about available land and the number of incoming refugees.<sup>126</sup> The constant is that if there are more refugees coming into a country, the burden to provide for them becomes higher and in turn refugees' livelihoods are curtailed leading to a challenging economic environment. My conversation with the former Ambassador Extraordinary & Plenipotentiary of the Republic of Uganda to the United States

<sup>123</sup> Appendix 13 (n 119) 00:29:51; Appendix 15 (n 119) 00:13: 26, the land is described as measuring 20 metres by 60 metres.

<sup>124</sup> *ibid*

<sup>125</sup> Appendix 15 (n 119)

<sup>126</sup> Appendix 11 (HE) Ambassador Stephen T.K. Katenta-Apuli Interview (on file with the author)

of America, Belgium and Tanzania, His Excellency (HE) Stephen Kapimpina Katenta-Apuli provided invaluable information on refugee policy and protection in Uganda. In his first role as the Assistant Director of Refugees in the Ministry of Culture and Community Development between 1968 and 1971, the policy of self-reliance for refugees was a top priority. Although his main task was the repatriation of Congolese and Sudanese, he recalls the policy on land and self-reliance as follows:

[...] our refugee settlements were not camps. They were organized villages where each family had 10 acres of arable land. Sudanese refugees were encouraged to work hard to achieve self-sufficiency and they had animals and household property...<sup>127</sup>

It can thus be argued that between 1968-1971, Uganda did not face the same refugee pressures and burden as of today. However, the observations by Ambassador Katenta-Apuli are critical in two ways. First, the observations above are an affirmation of the welcome spirit of the Ugandan people even early in its infancy. The country, despite different governments, has had a welcoming spirit which was also echoed by the current refugees in Rwamwanja. Second, the quote probably shows that refugee numbers are always manageable if the flows are minimal and there is availability of resources. The fact that the Ugandan government, in its infancy, could allocate ten acres of land per family suggests that they intended to integrate the refugees and allow them to be self-sufficient.<sup>128</sup> This is also the case with the Rwamwanja refugees, but arguably the incoming number of refugees constrain the OPM to do more for them which limits refugees' sources of sustainable livelihoods.

The effect of reduced harvest due to limited land in Rwamwanja, coupled with a meagre UNHCR's pay-out, has a knock-on effect on access to education and health.<sup>129</sup> Participants in the FGDs were of the view that the requirement to pay school fees seriously impacts on their livelihoods.<sup>130</sup> They are of the view that charging school fees further exacerbates their economic position as they do not have any other source of income except the UNHCR's pay-out. In all three FGDs, participants observed that even the requirement to pay the school fees "in kind" through a bag of maize or beans is not easy given their weak economic position. The impact of the school fee requirement has led to school dropouts, despondency among the youth,

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<sup>127</sup> Appendix 12 Follow Up Interview with Ambassador Katenta-Apuli (on file with the author)

<sup>128</sup> Appendix 11 (n 126)

<sup>129</sup> Appendix 13 (n 119) at 00:07:34

<sup>130</sup> Appendix 15 (n 119)



and a situation of generalised poverty as the refugees lack education and attendant skills that will allow them to be employed.<sup>131</sup>



Figure 19: Primary school in Rwamwanja refugee settlement (author own photo)

For those who have managed to pay the fees, they have raised serious concerns about the infrastructural decline of the available school in the settlement.<sup>132</sup> The classes are overcrowded with one class having over 100 students.<sup>133</sup> In turn, the children are not given enough attention by the understaffed teaching personnel. With regards to access to health, the UNHCR's pay-out is insufficient to cater for medical services. To begin with the available clinic in the settlement does not provide medication. The medication is prescribed and the cost is way out of reach of the refugees' source of income. It must also be noted that the dire economic situation has also had a negative impact on the social fabric of the community. It has led to family disintegration, psychosocial predicaments and generalised poverty.<sup>134</sup>

However, some refugees were of the view that the OPM has tried its best under the prevailing circumstances.<sup>135</sup> Although they cite numerous financial problems, they were of the view that when they first arrived in 2012, the OPM, UNHCR and the WFP had generous interventions. The UNHCR pay-out was pegged at UGX 31,000 ( about US\$10) per head and they had large pieces of land (which some still have today). Perhaps, the impact of inflation and devaluation

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<sup>131</sup> *ibid*

<sup>132</sup> Appendix 14 (n 119)

<sup>133</sup> Appendix 15 (n 119) at 00:10:55

<sup>134</sup> This is a general observation from all three FGDs and various discussions with experts in the field of refugee protection in Uganda. See also Kugonza and Mutsvara (n 28)

<sup>135</sup> Appendix 14 (n 119)



discussed earlier on might have had a hand in heightening the economic situation. There is also evidence of vocational skills programmes to bolster refugees' self-reliance. This is despite the fact these programmes are not financed and are run by refugees who are in financial dire straits. For example, in Mahani section refugees established the *Build Refugee Hope* (BRH) as a vocational initiative towards sustaining livelihoods.<sup>136</sup> The BRH has introduced tailoring, driving school, brick-laying course, computer training, and mushroom farming amongst others.<sup>137</sup> One of the course instructors has alluded to the fact that the programmes are unsustainable as there are no financial resources to run them and this has heightened youth dependency.<sup>138</sup>

### 6.6.2. Secondary movements of refugees

Secondary movements occur when refugees move from initial areas of safety to newer destinations with the objective of claiming asylum.<sup>139</sup> This is regardless of the fact that they have already been registered as refugees. Such secondary movements are likely to be viewed as “voluntary and motivated by economic or quality of life concerns than by safety”.<sup>140</sup> However, recent events in Europe have shown that secondary movements are perhaps not only spurred by economic motivations, but also by the quest for durable safety and the need to be in close proximity with family members.<sup>141</sup> The categorisation of refugee movements as ‘secondary’ pushes refugee claimants into the asylum-migration nexus category and thus precipitates the problematic categories of genuine and undeserving refugee discussed earlier on.<sup>142</sup> In that regard, given the innumerable economic challenges faced by refugees in Rwamwanja, the second question for determination was: what are the prospects of leaving the Rwamwanja refugee settlement?

As discussed earlier on, the Ugandan refugee policy allows refugees and asylum seekers to seek work, have unfettered freedom of movement, and access to basic social services.<sup>143</sup> However, the discussions with the refugees in all three FDGs revealed that the prospects of

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<sup>136</sup> Appendix 13 (n 119) 5

<sup>137</sup> *ibid*

<sup>138</sup> Appendix 15 (n 119) at 00:40:09

<sup>139</sup> Susan E Zimmermann, ‘Irregular Secondary Movements to Europe: Seeking Asylum beyond Refuge’ (2009) 22 *Journal of Refugee Studies* Vol. 22, No. 1 74.

<sup>140</sup> *ibid* 75.

<sup>141</sup> Lena Näre, Dalia Abdelhady and Nahikari Irastorza, ‘What Can We Learn from the Reception of Ukrainian Refugees?’ (2022) 12 *Nordic Journal of Migration Research* 255 <<https://doi.org/10.1080/16075589.2022.2111111>> accessed 10 March 2023.

<sup>142</sup> Zimmermann (n 139).

<sup>143</sup> World Bank Group, ‘An Assessment of Uganda’s Progressive Approach to Refugee Management’ (World Bank, Washington, DC 2016) <<http://hdl.handle.net/10986/24736>> accessed 31 May 2023.

leaving the settlement are bleak. First, the refugees noted that the OPM does not allow people to come to the settlement and offer jobs to refugees. According to SOS Children's Village Uganda this policy protects refugees from getting into forced labour and abuse. They are of the view that it might lead to illicit activities detrimental to the refugee community.

Second, in all the three FGDs, the refugees were of the view that it was much better to be content with life in the settlement than to move to the main cities or out of the country. They cite that for those who have tried to venture out of the settlement to boost their income, they were conscripted into forced labour and never got paid.<sup>144</sup> Third, the most likely movement out of the settlement is seeking a job in major cities while you leave your family members tending the agricultural plot. For women, this has caused major family disintegration as most of the households are female headed. To that end, movements out of the settlement to major cities are done at one's own risk as it might result in more harm.

Secondary movements of refugees out of Uganda are possible, but done irregularly.<sup>145</sup> The general pattern is that refugees begin by going to the big cities (and this is against the OPM policy).<sup>146</sup> Then from the big city like Kampala, they have the capacity to go to a neighbouring country near Uganda. According to the field notes taken during the study, there are five possible options of getting out of Uganda. The first, in terms of proximity, is to go back to North or South Kivu in the DRC. The second option is to cross into Rwanda through the Katuna border in Kabale district. The third option is to cross into Tanzania through the Ugandan villages of Kikagati, Bugango, Mutukula and the shoreline of Lake Victoria. The fourth option is to go to Kenya through the Malaba border. The fifth option would be to get into South Sudan through the Elegu-Nimule border crossing.

Considering the ethnic tensions between Rwanda, the DRC and Uganda, perhaps the most likely option to get out of Uganda will be Kenya.<sup>147</sup> While two of the three FGDs are of the view that it is impossible to get out of Rwamwanja settlement and go to another country, the Buguta FGD cautiously pointed out that it is possible but dangerous. The example given was of "so many women" who have gone to Kenya but had difficulties in being registered as

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<sup>144</sup> Appendix 14 (n 119) at 00:29:31; Appendix 15 at 00:28:48

<sup>145</sup> Appendix 13 (n 119) at 00:11:32; Appendix 14 at 00:32:52

<sup>146</sup> Appendix 14 (n 119) at 00:29:31

<sup>147</sup> Africa Research Bulletin, 'Dr Congo – Rwanda – Uganda: Cross-Border Clashes' (2022) 59 Africa Research Bulletin; Political Social and Cultural Series 23617 <<https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1467-825X.2022.10564.x>> accessed 07 June 2023.

refugees. For those who have returned to the settlement, they have forfeited their piece of land and ceased to be recognised for international protection by the OPM.<sup>148</sup>

In the context of Rwamwanja, the narrative of conflict created by the fighting rebels in the DRC has always been a cause for concern for the Ugandan officials.<sup>149</sup> They fear that returning refugees to the DRC are actually being recruited by the fighting rebels across the border. This has led to the interception of refugees by the Ugandan officials. Observers cite that the refugees are trekking back to the war zone because of the limited income sources, food shortages, lack of medicines, sanitary facilities, and adequate shelter.<sup>150</sup> Speaking in a collective voice, because of the sensitivity attached to the topic in Rwamwanja settlements, some of the FGD participants in Maega section are of the cautious view that they would rather go back to the DRC than move to another country. Considering their current economic predicament, the option to go back to the DRC is much better because “[they] would rather be killed by a gun, than die of hunger”.<sup>151</sup>

The concept of secondary movements has always been a common feature in the Ugandan refugee policy.<sup>152</sup> It is rooted in the concept of ‘first country of asylum’ also known as ‘safe third country principle’ that justifies returning a refugee or asylum seeker to another country if it is deemed that they are coming from an initial place of safety. While the prospects of moving out of the Rwamwanja settlement to another country as refugees are bleak, historically the Ugandan government has assessed ‘safe third country’ applications from other countries. In the European Union, it is the government that invokes the safe third country principle as a reason to reject the asylum application.<sup>153</sup> Ambassador Katenta-Apuli recalls his days as the Assistant Director of Refugees between 1968-1971:

Uganda was home for over one million refugees [after the] 1955 Anyanya One Rebellion in Sudan, the turmoil in Congo after the assassination of Patrice Lumumba, and the conflict in Rwanda between the Tutsi and the Hutu. After graduating from Makerere [University] in 1965, I joined the Government of Uganda as an Administrative Officer serving as Assistant District Commissioner. I was transferred to the Ministry of Culture and Community Development in February 1968 to serve as Assistant Director of Refugees up to the end of 1971. I

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<sup>148</sup> Appendix 14 (n 119) at 00:53:00

<sup>149</sup> The Independent, ‘Refugees Escape Settlement Camps to Return to DR Congo’ *The Independent* (Kampala, 2022) <<https://www.independent.co.ug/refugees-escape-settlement-camps-to-return-to-dr-congo/>> accessed 07 June 2023.

<sup>150</sup> *ibid.*

<sup>151</sup> Appendix 14 (n 119) at 00:23:07

<sup>152</sup> Appendix 12 (n 127)

<sup>153</sup> European Union Agency for Asylum, ‘Safe country of origin and safe third country concept’, (2023)<<https://euaa.europa.eu/easo-asylum-report-2021/432-safe-country-origin-and-safe-third-country-concept>> accessed 18 August 2023.

was fully in-charge of the Combined Uganda Government, UNHCR and World Food Programs in 12 Refugees Settlements and the capital Kampala. In the period under review (1968-1971) [there] was limited inflows of new refugees. War and conflict activities in the neighboring countries had lessened to the extent that we contemplated repatriation of some refugees to their countries of origin. [...] The other migration exercises I was involved in were for individuals especially students and professionals seeking Third Country Asylum.<sup>154</sup> Less than 500 [fell] in this category during my time as Assistant Director of Refugees.<sup>155</sup>

In the context of this study, the above narrative is critical in two ways. First, it underlines the recurring ethnic conflicts in East and Central Africa that give rise to persecution and cross-border displacement. Second, in the context of secondary movements, it alludes to the importance of receiving countries in undertaking security screening before accepting a refugee so as to protect the host citizens. In that end, it also suggests that countries have a prerogative as to who should come to their countries. Perhaps the idea that in that era, the Ugandan refugee policy was giving currency to asylum applications from “students and professionals” already granted protection in other countries, points to the selective nature in which countries can base their criteria as to who to give international protection. As noted by the participants in the FGDs “there is no chance” of them getting out of the settlement and go to another country. If anything, this can only be done in the sphere of resettlement where European countries agree in partnership with the UNHCR and the OPM to resettle some refugees outside Uganda. On that note, the participants noted that since 2012, there have been rare cases, if not none, of resettlement. Resettlement is only for a certain type of refugees who are in dire need of medical emergencies, or those recommended by the eligibility committee of the OPM.<sup>156</sup> As shall be discussed in the last chapter, the overall impression may be that the dire economic situation does not lead to secondary movements, but there is evidence that the refugees in Rwamwanja settlement have tried to escape the economic destitution by getting out of Uganda irregularly.

### **6.6.3. Sharing the refugee burden**

As noted in this chapter, Uganda has kept the tradition of extending a warm hand to displaced persons fleeing different forms of harm in East and Central Africa. This has been consistent despite the recurring theme of political and economic malaise.<sup>157</sup> The refugees also

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<sup>154</sup> A reference to applications made by those recognised as refugees in other neighbouring countries in particular Kenya and Tanzania.

<sup>155</sup> Appendix 12 (n 127)

<sup>156</sup> Appendix 15 (n 119) at 00:34:26; Appendix 14 (n 119) at 00:13:37

<sup>157</sup> Betts (n 22).

acknowledge this warm reception in the face of the economic challenges above.<sup>158</sup> The question for determination then becomes: how can the refugee burden be lessened on Uganda given its economic situation? Experts interviewed in this regard are of the view that hosting refugees is a humanitarian act that requires global solidarity. There is global consensus on the fact that hosting refugees puts a strain on the available resources and facilities.<sup>159</sup>

During the field visit, my interactions with members of the five organisations cited earlier on as providing support to refugee organisations acknowledges that Uganda requires more global solidarity. The refugee burden requires huge financial resources that should be channelled into building sustainable livelihoods for refugees. In an economy like Uganda, struggling to gain momentum after the global effects of COVID-19, some experts suggest that the policy of self-reliance should operate in full-fledged mode.

Livelihood officers at SOS Children's Village Uganda say that with the ever-increasing numbers of refugees coming into the settlement, the cash-based intervention by UNHCR and food rations from WFP actually encourages dependency syndrome amongst the refugees. Although the OPM and the UNHCR could not confirm, there are suggestions that the UNHCR will be scrapped off. It is argued that it is not sustainable to continue giving this pay-out. Organisations that deal with self-dependency are of the view that removing the *mopokelo* will allow refugees to be self-sustaining rather than wait for handouts.

On the launch of the Global Compact on Migration, Uganda called for a "holistic approach and enhanced international cooperation" in refugee policy and protection.<sup>160</sup> As noted in the opening chapter, the Global Compact on Refugees, acknowledges the reality of an uneven economic playing field for host asylum countries which counter against the achievement of its objectives; which are: (i) reduce pressures on host countries; (ii) enhance refugee self-reliance; (iii) expand access to third country solutions, and (iv) support conditions in countries of origin for return in safety and dignity.<sup>161</sup>

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<sup>158</sup> Appendix 13 (n 119); Appendix 14 (n 119); Appendix 15 (n 119)

<sup>159</sup> <sup>159</sup> UN News, 'World Refugee Day: UN calls for solidarity and inclusion amid record displacement' *United Nations* (New York, 20 June 2023) <<https://news.un.org/en/story/2023/06/1137907>> accessed 18 August 2023. *The Independent* (n 149).

<sup>160</sup> Marcellino Bwesigye, 'Uganda Statement: Intergovernmental Conference to Adopt Compact for Safe Orderly and Regular Migration' (2018) <<https://www.un.org/en/conf/migration/assets/pdf/GCM-Statements/uganda.pdf>>.

<sup>161</sup> UNHCR, 'Global Compact on Refugees' (2018) <<https://www.refworld.org/docid/63b43eaa4.html>> accessed 07 June 2023.

The situation in Rwamwanja shows that the objective of enhancing refugee self-reliance may be difficult to achieve. For Uganda, it has had support through the cash-based interventions from the UNHCR and the distribution of food rations through the WFP.<sup>162</sup> As noted earlier on, Livelihood officers are of the view that if cash-based interventions and WFP food rations are scrapped off, refugees may not rest on their laurels. However, the challenge, as observed by Meili, is that refugee policy in Uganda appears to be good “on paper” and not implemented on the ground. Refugees in Rwamwanja are of the view that the OPM in Rwamwanja does not allow refugees to go out of the settlement and find extra sources of income. This literally handicaps the refugees and actually increases further burden on the UNHCR and the OPM in regulating and protecting refugees.

In huge operations like repatriation, Uganda requires intergovernmental solidarity and international cooperation. There are refugees who expressed the desire to go back to the DRC despite the volatile situation in their country of origin.<sup>163</sup> Media reports have also indicated that some refugees are being intercepted by the Ugandan officials as they try to leave the refugee settlement.<sup>164</sup> The fundamental objective of repatriation is to address the needs of refugees by finding viable and sustainable ways of returning refugees to their country of origin in safety.<sup>165</sup> Refugees should not be exposed to further harm, and donors should not take geo-political positions when funding repatriation. A case in point is the tension in Rwamwanja settlement with regards to ethnicity and country of origin. There were refugees who were unwilling to disclose their nationality out of fear of exposing themselves to political rhetoric.<sup>166</sup> It is herein argued that this affects the mechanism of refugee burden sharing in two ways.<sup>167</sup> First, the positive aspect of repatriation is that it reduces pressures on the host country. Second, when repatriation is carried out, it should be after thorough examination of safety in the country of origin so that refugees return in safety and dignity. The Rwamwanja case shows that some refugees would rather go back to the DRC out of necessity without ascertaining their safety. It

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<sup>162</sup> UNHCR, ‘Cash-Based Interventions Dashboard: Uganda Refugee Response Plan (RRP) 2022-2023’ (2022) <<https://data.unhcr.org/en/documents/details/99234>>; Patience Akumu, ‘Cash Grants from WFP Empower Refugees in Uganda’ (*World Food Programme*, 2022) <<https://www.wfp.org/stories/cash-grants-wfp-empower-refugees-uganda>> accessed 6 June 2023.

<sup>163</sup> Appendix 13 (n 119) Appendix 14 (n 119) ; Appendix 15 (n 119)

<sup>164</sup> The Independent (n 149)

<sup>165</sup> Frank Ahimbisibwe, ‘The Politics of Repatriation: Rwandan Refugees in Uganda’ (2017) Working Paper/2017-09.

<sup>166</sup> Table 1

<sup>167</sup> Repatriation to country of origin" is not really "sharing" burden of refugees, as these persons are then not 'refugees' anymore. However, the argument here is that repatriation eases pressure on hosting refugees. Therefore, by returning to their country of origin more resources are at the disposal of the host citizens. In the case of Uganda, with a low GDP this would be a welcome economic relief.

is argued that the politics of repatriation in East Africa are perhaps premised on mistrust and this affects the mechanisms of burden sharing.<sup>168</sup>

To illustrate the above point further, Ambassador Katenta-Apuli is of the view that burden sharing begins with bona fide diplomatic interventions that do not result in flaring up ethnic tensions. Diplomatic negotiations in protracted refugee situations may help in ending conflicts and also cross-border displacement. This paves way for voluntary return of refugees to their countries of origin. Durable peacebuilding initiatives then become central in preventing displacement in that regard. Ambassador Katenta-Apuli gives a practical example of this during his tenure as Assistant Director of Refugees as follows:

[...] the first repatriation of Congolese refugees that I was involved in was occasioned by High Level Negotiations between Moishi Tshombe, the Congolese Prime Minister and the United Nations represented by the UNHCR. The Kinshasa Government gave the UN an undertaking to have the Lumumbist Rebel Leaders based in Uganda to be repatriated to Kinshasa for purposes of reconciling and integration into the Tshombe Government. Pierre Mulele was the targeted leader. The Lumumbist leaders were convinced and my department together with [the] UNHCR Officials escorted the group to [the] West Nile and handed them to the Congolese Government at Aru border post. Unfortunately, the group never made it to Kinshasa. They were immediately executed in cold blood.<sup>169</sup>

At present, there are still unconfirmed reports of Rwandese refugees of Hutu origin afraid to leave the settlement or disclose their identity. Therefore, it is important that durable solutions like voluntary return be premised on a level ground of trust. If well implemented, voluntary return arguably becomes a sustainable way of sharing the refugee burden. As shall be discussed in the last chapter, the study found a number of sustainable ways that can be adopted in sharing the refugee burden not only in Uganda but in the top refugee hosting countries around the world.

## **6.7. Conclusion**

Uganda has a generous refugee policy built around the concept of self-reliance. The volatile political situation in East and Central Africa has seen millions displaced across the region, and Uganda has offered refuge to the bulk of them. This is despite a sluggish economy fed on by a number of prescriptive policies from the global financial institutions like the IMF and the World Bank. While it is argued that these economic liberalization policies have led to

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<sup>168</sup> Ahimbisibwe, 'The Politics of Repatriation: Rwandan Refugees in Uganda' (n 165).

<sup>169</sup> Appendix 12 (n 127)

efficiency and prudence in public expenditure, perhaps the practical reality in Uganda is that economic liberalization has led to a ballooned public debt, devaluation, and massive job losses. This has in turn led to the creation of the informal sector in an inflationary environment. This economic climate is on the back of a progressive and modern refugee law and policy that has seen Uganda host millions of refugees. However, it may be argued that despite Uganda's progressive refugee laws and policies, the gaps in refugee protection are a by-product of a burdened economy. It is further argued that if Uganda gets sustainable international cooperation, the refugees in the settlement may benefit from durable solutions that will help in lessening the refugee burden on Uganda. The Rwamwanja case study is a good example of the Uganda's refugee policy. It has shown that the Uganda government will continue providing humanitarian assistance by providing refuge. However, the economic challenges faced by the refugees may ultimately erode the protection measures put in place by Uganda, with the help of the UNHCR and other global humanitarian organisations.



## Chapter 7

### Conclusion: towards an inclusive refugee policy and protection

*The very definition of your expertise, is your recognition that it cannot be done.*<sup>1</sup> —Martti Koskenniemi.

#### 7.1. Introduction

During the last lap of my studies, I had an academic encounter with Professor Martti Koskenniemi on the common pitfalls and good practice in developing a scientific project.<sup>2</sup> The realization that the global international problem cannot be resolved is not in itself an end. Perhaps, it is an opportune moment to ask the question: “what does it require to *believe* that [new rules] or [policies] are the right ones?”<sup>3</sup>

The object of this study was to explore how international refugee law should consider the situation of persons fleeing their country of origin due to economic hardship. This is in the context of gaps in protection of such persons because of the ‘wrong category’ they find themselves in. This has resulted in reluctance, by receiving countries, to push the boundaries of international refugee law and accept ‘refugees’ falling outside the ambit of ‘conventional norms’ of displacement. In fact, there is absolutely no intention to cater for economic refugees and other new refugee categories. Even the recent announcement by the Council of the European Union on the ‘new’ proposals to make the EU more efficient in managing migratory flows have drawn criticism from academics and NGOs on the nature of the proposals. The proposals, as discussed in chapter 4, risk limiting the protection or standards that are now available for ‘convention refugees’ and persons entitled to subsidiary protection.<sup>4</sup> Furthermore, despair looms at the reading of the global displacement forecast report predicting the displacement of over 5,4 million people by the end of 2024, with three million estimated to

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<sup>1</sup> Appendix 10 Prof. Koskenniemi Public Lecture at the University of Edinburgh (14 February 2023). On file with the author.

<sup>2</sup> Edinburgh Law School, ‘Professor Martti Koskenniemi Launches New Book and Leads PhD Masterclass’ (*Edinburgh Centre for International and Global Law*, 2023) <<https://www.law.ed.ac.uk/news-events/news/professor-martti-koskenniemi-launches-new-book-and-leads-phd-masterclass?fbclid=IwAR2FuKBwrMEdXKny3osVPjNslQCfqSTd0EolbNci3-u3L0z838VwmBDtmQc>> accessed 10 June 2023.

<sup>3</sup> Appendix 10 (n 1)

<sup>4</sup> Council of the EU, ‘Migration Policy: Council Reaches Agreement on Key Asylum and Migration Laws’ (*Consilium Europa: Press Release*, 2023) <<https://www.consilium.europa.eu/en/press/press-releases/2023/06/08/migration-policy-council-reaches-agreement-on-key-asylum-and-migration-laws/>> accessed 10 June 2023.

be from Sub-Saharan Africa.<sup>5</sup> To that end, this concluding chapter summarises the main findings, the theoretical contributions of the study, and considerations for future research in the realm of the asylum-migration nexus and the mechanisms of refugee burden sharing. The findings of this study are provisional and incomplete.

## **7.2. Summary of findings**

The summary findings for this study are discussed in three ways. First, the discussion will be on the main claim: economic liberalization has subverted African economies and in turn caused cross-border displacement. Second, it summarise how international refugee law has excluded certain categories of refugee claimants. Tied to this, is also the institutional response to such exclusion of ‘new refugee’ categories. Finally, the efficacy of a Framework Convention in regulating the refugee definition is discussed together with plausible mechanisms for refugee burden sharing as seen through the case study on Uganda.

### **7.2.1. Economic liberalization as a latent form of displacement**

The empirical claim in this study is that economic liberalization has subverted the economies of African countries and is a source of persecution causing cross-border displacement. This claim was investigated through a number of methods, including document analysis, and interviews. This study found that there is no consensus among experts and respondents on the claim, and rather the impact of economic liberalization on cross-border displacement should be viewed in the following potentially overlapping three ways:

#### *(a) Economic liberalization as war by any other means*

Economic liberalization is viewed as another form of war and responsible for cross-border displacement. The study found that this claim manifests itself in various forms as stated below:

- Economic liberalization leads to imposition of costly user fees on education, healthcare, water, electricity and housing. This leads to the marginalisation of the impoverished, who constitute the majority of the citizenry in the context of Africa.<sup>6</sup>

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<sup>5</sup> Danish Refugee Council, ‘Global Displacement Forecast Report 2023’ (2023) <[https://pro.drc.ngo/media/4c5hxa5c/230310\\_global\\_displacement\\_forecast\\_report\\_2023.pdf](https://pro.drc.ngo/media/4c5hxa5c/230310_global_displacement_forecast_report_2023.pdf)> accessed 10 June 2023.

<sup>6</sup> Kathomi Gatwiri, Julians Amboko and Darius Okolla, ‘The Implications of Neoliberalism on African Economies, Health Outcomes and Wellbeing: a Conceptual Argument’ (2020) 18 Social Theory & Health 86.

- Economic liberalization has subverted economies of countries that have applied such measures and generated war and in turn making the same countries dependent on international capital, control and occupation.<sup>7</sup>
- Economic liberalization has led to economic interference. In the case of Eritrea, it is found that during the first transitional years, the country could not independently formulate its own fiscal policies.<sup>8</sup>
- Economic liberalization leads to “brutal impoverishment” which in turn forces people to flee their countries of origin, and those left behind in particular the youth are recruited into warring factions.<sup>9</sup>
- Economic liberalization is a new form of war to conquer territories in the Global South for the sustenance of the industrialised states.<sup>10</sup>
- Economic liberalization creates structural poverty, unemployment and job insecurity, the impact of which causes society’s fragility and triggers cross-border displacement.<sup>11</sup>

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<sup>7</sup> Silvia Federici, ‘War, Globalization, and Reproduction’ (2000) 25 *Peace & Change* 153 <[https://onlinelibrary.wiley.com/doi/epdf/10.1111/0149-0508.00148?saml\\_referrer](https://onlinelibrary.wiley.com/doi/epdf/10.1111/0149-0508.00148?saml_referrer)> accessed 3 April 2021.

<sup>8</sup> Rena Ravinder, ‘Historical Development of Money and Banking in Eritrea from the Axumite Kingdom to the Present’ (2007) 6 *African and Asian Studies* 135 <[https://mpa.ub.uni-muenchen.de/12423/1/MPPA\\_paper\\_12423.pdf](https://mpa.ub.uni-muenchen.de/12423/1/MPPA_paper_12423.pdf)> accessed 15 May 2023; African Development Bank, ‘Ethiopia Structural Adjustment Programme: Project Performance Evaluation Report (PPER)’ (2000) <[https://www.afdb.org/fileadmin/uploads/afdb/Documents/Evaluation-Reports-\\_Shared-With-OPEV\\_/05092255-EN-ETHIOPIA-STRUCTURAL-ADJUSTMENT-PROGRAMME.PDF](https://www.afdb.org/fileadmin/uploads/afdb/Documents/Evaluation-Reports-_Shared-With-OPEV_/05092255-EN-ETHIOPIA-STRUCTURAL-ADJUSTMENT-PROGRAMME.PDF)>.

<sup>9</sup> Federici (n 7) 155; Bertelsmann Stiftung, ‘BTI 2022 Eritrea Country Report’ (2022) <<https://bti-project.org/en/reports/country-report/ERI>> accessed 9 May 2023; Milena Belloni, ‘Family Project or Individual Choice? Exploring Agency in Young Eritreans’ Migration’ (2019) 46 *Journal of Ethnic and Migration Studies* 336 <<https://www.tandfonline.com/doi/abs/10.1080/1369183X.2019.1584698>> accessed 20 May 2023; Andreas Holm Røseberg and Kjetil Tronvoll, ‘Migrants or Refugees? - The Internal and External Drivers of Migration from Eritrea’ (2017) 64 <<https://www.udi.no/statistikk-og-analyse/forsknings-og-utviklingsrapporter/migrants-or-refugees---the-internal-and-external-drivers-of-migration-from-eritrea/>> accessed 9 May 2023; Gaim Kibreab, ‘The Overarching Impact of the Eritrean National Service on the Social Fabric of Eritrean Society’, *The Eritrean National Service: Servitude for ‘the common good’ and the Youth Exodus* (Eastern Af, Boydell & Brewer 2017) <<https://www.cambridge.org/core/books/eritrean-national-service/overarching-impact-of-the-eritrean-national-service-on-the-social-fabric-of-eritrean-society/5D7C4AFD130AB5739D6693F82821B073>> accessed 9 May 2023.

<sup>10</sup> Subcomandante Marcos, ‘The Fourth World War Has Begun’ (1997) 2.3 *Nepantla: Views from the South* 559 <<https://thebasebk.org/wp-content/uploads/2013/02/Subcomandante-Marcos-The-Fourth-World-War-Has-Begun.pdf>> accessed 4 December 2021; Vibeke Bjørnlund, Henning Bjørnlund and Andre F Van Rooyen, ‘Why Agricultural Production in Sub-Saharan Africa Remains Low Compared to the Rest of the World – a Historical Perspective’ (2020) 36 *International Journal of Water Resources Development* S20.

<sup>11</sup> Bonnie Campbell, ‘Liberalisation, Deregulation, State Promoted Investment - Canadian Mining Interests in Africa’ (2009) 13 *Minerals and Energy - Raw Materials Report* 14 <<https://www.tandfonline.com/doi/abs/10.1080/14041049809409280>> accessed 12 June 2023; Marcos (n 10) 564; Ernesto Castañeda and Amber Shemesh, ‘Overselling Globalization: The Misleading Conflation of Economic Globalization and Immigration, and the Subsequent Backlash’ (2020) 9 *Social Sciences* 61 <<https://www.mdpi.com/2076-0760/9/5/61/htm>> accessed 12 June 2023; Charles Chukwuma Soludo, Michael Osita Ogbu and Ha-Joon Chang (eds), *The Politics of Trade and Industrial Policy in Africa : Forced Consensus?* (Africa World Press 2004).

*(b) Economic liberalization as a bilateral consensual act*

As shown in chapter 1, when countries accept financial packages or structural adjustment programmes (SAPs), they consent to a bilateral act. The consent is aimed at maintaining low levels of domestic savings in both the private and public sectors. In that realm, economic liberalization should be viewed as a way for countries to strive towards fiscal discipline, streamlining public expenditure, tax reforms, adoption of a single and competitive exchange rate, elimination of barriers to foreign direct investment, privatisation of state entities, market deregulation and securing property rights.<sup>12</sup>

In the case of Eritrea, despite the lack of official documents from the Eritrean government<sup>13</sup>, evidence shows that Eritrea assumed membership to the World Bank and the IMF as a sovereign act of self-determination.<sup>14</sup> Also, the resumption of bilateral talks with the IMF and the World Bank in the year 2019 is an indication that Eritrea would want to be subjected to fiscal surveillance of exchange rates, domestic economic policies, and the impact of its own domestic policies on the stability of not only Eritrea but also the global economy.<sup>15</sup> Further, experts are of the view that membership of IMF or World Bank does not mean automatic adoption of economic liberalization policies. Eritrea is “on the other spectrum” as a Marxist State that is against the free individual enterprise.<sup>16</sup>

The case study on Eritrea further shows that *Eritrea is different, but not far from the claim*. According to the Antwerp expert consulted for this study, and who has written extensively on Eritrea, the Eritrean refugees are not ‘economic refugees’.<sup>17</sup> However, this study shows that the Eritrean economy is the epicentre of human displacement. This culminates from a concoction of failed political policies, economic malaise, external political interference, United Nations sanctions, and the constant threat of war with Ethiopia. As shall be shown in the next section, if cross-border displacement is a by-product of such economic situations that are intertwined with borderline factors of displacement, thus making it difficult to distinguish

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<sup>12</sup> John Williamson, ‘The Washington Consensus as Policy Prescription for Development’ (Institute for International Economics, 2004), World Bank, Washington DC, Lecture series: Practitioners of Development. <<https://www.piie.com/sites/default/files/publications/papers/williamson0204.pdf>> accessed 22 August 2021.

<sup>13</sup> Bertelsmann Stiftung (n 9) 20.

<sup>14</sup> International Monetary Fund, ‘Eritrea: Recent Economic Developments’, vol 1995 (International Monetary Fund 1995) <<https://www.elibrary.imf.org/view/journals/002/1995/004/article-A001-en.xml>> accessed 14 May 2023.

<sup>15</sup> International Monetary Fund, ‘IMF Staff Completes 2019 Article IV Mission to Eritrea: Press Release No. 19/179’ (2019) <<https://www.imf.org/en/News/Articles/2019/05/22/pr19179-eritrea-imf-staff-completes-2019-article-iv-mission>> accessed 18 May 2023.

<sup>16</sup> Appendix 9 Antwerp Expert Interview pg.1

<sup>17</sup> *ibid*

between a refugee and migrant, such persons deserve international protection that is at par with that of ‘conventional/political refugees’.

As for Uganda, economic liberalization programmes and their attendant financial packages stimulate and boost economic growth.<sup>18</sup> The country has adopted economic liberalization programmes since 1981, and has implemented the second phase in 1987, and as of June 2021, Uganda has agreed to an extended credit facility equivalent to about US\$ 1 billion.<sup>19</sup> Evidence, from the IMF and the World Bank, shows that the SAPs and its accompanying economic prescripts have helped in streamlining unnecessary expenditure, thus leading to high growth, low inflation (this is debatable), and increased vibrancy in the private sector. Economic liberalization programmes have further helped Uganda meet its obligations under the Initiative for Heavily Indebted Poor Countries (HIPC Initiative).<sup>20</sup>

*(c) Economic liberalization and the nexus to border security*

In the sphere of globalization, economic liberalization makes movement of goods and services easy, yet movement of certain nationalities from the Global South to the Global North results in xenophobic sentiments, repression, and secondary persecution.<sup>21</sup> In that realm, *non-entrée* and border security policies are then blended as principles of national sovereignty. It is found that the neoliberal agenda of border security, internal security and national security labels migratory movements as ‘irregular’ and thus certain group of migrants as ‘irregular’ and ‘undeserving’.<sup>22</sup>

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<sup>18</sup> Richard Sendi and others, ‘Determinants of Economic Growth: An Empirical Evaluation of the Ugandan Economy’ in Musa Jega Ibrahim (ed), *Macroeconomic Analysis for Economic Growth* (IntechOpen 2021) <<https://www.intechopen.com/chapters/79329>> accessed 30 May 2023.

<sup>19</sup> Bertelsmann Stiftung, ‘BTI 2022 Country Report - Uganda’ (2022) 5 <<https://www.bti-project.org>> accessed 27 May 2023; Mahmood Mamdani, ‘Uganda: Contradictions of the IMF Programme and Perspective’ (1990) 21 *Development and Change* 427, 427; IMF, ‘Policy Framework Paper-Uganda: Enhanced Structural Adjustment Facility and Policy Framework Paper 1998/99-2000/01 - Text’ (1998) <<https://www.imf.org/external/np/pfp/uganda/102998.htm>> accessed 29 May 2023; IMF, ‘Uganda: 2021 Article IV Consultation and First Review Under the Extended Credit Facility Arrangement and Requests for Modifications of Performance Criteria—Press Release.

<sup>20</sup> IMF, ‘Uganda: 2021 Article IV Consultation and First Review Under the Extended Credit Facility Arrangement and Requests for Modifications of Performance Criteria—Press Release;; IMF, ‘Policy Framework Paper-Uganda: Enhanced Structural Adjustment Facility and Policy Framework Paper 1998/99-2000/01 - Text’.

<sup>21</sup> Marcos (n 10) 565; Kasia Narkowicz, ‘“Refugees Not Welcome Here”: State, Church and Civil Society Responses to the Refugee Crisis in Poland’ (2018) 31 *International Journal of Politics, Culture and Society* 357, 357 <<https://link.springer.com/article/10.1007/s10767-018-9287-9>> accessed 12 June 2023; European Council on Refugees and Exiles, ‘Input by ECRE to the 2021 EASO Asylum Report’ (2021) 6 <[https://euaa.europa.eu/sites/default/files/ECRE\\_0.pdf](https://euaa.europa.eu/sites/default/files/ECRE_0.pdf)> accessed 09 December 2022.

<sup>22</sup> Sally Davison and George Shire, ‘Race, Migration and Neoliberalism: How Neoliberalism Benefits from Discourses of Exclusion’ (2015) 59 *Soundings: a journal of politics and culture* 81, 81; Maria Giannacopoulos, ‘Offshore Hospitality: Law, Asylum and Colonisation’ (2014) 17 *Law Text Culture* 163 & 172.

### 7.2.2. Exclusion of economic refugees in international refugee law

Economic refugees are excluded from protection under international refugee law, except when their situation coincides with the requirements of the 1951 Convention definition. That is, for instance, the case in situations when economic policies are directed against a certain ethnic group. However, the term ‘economic refugee’ is not included in the UNHCR database.<sup>23</sup> Eminent literature on international refugee law labels the term a misnomer.<sup>24</sup> Invariably, the term is associated with ‘economic migrants’ and is interchangeably used to refer to persons outside their country of origin or habitual residence out of fear of economic destitution.<sup>25</sup> Economic refugees are thus seen as persons who treat migration as an escape from economic oppression, toilsome conditions, immense poverty and hunger. To that end, such asylum seekers are associated with the following stereotypical tropes: ‘boat-people’, ‘black-boat people’, ‘wet-backs’, ‘illegals’, ‘queue-jumpers’, ‘*makwerekwere*’, and ‘forest people’ amongst others.<sup>26</sup>

This study argues that the term ‘economic refugee’ is just another category of refugees who deserve international protection if it can be shown that they come from countries where economic failure, political instability, poverty, and persecution are indissolubly linked.<sup>27</sup> It is further argued that differentiating between political and economic refugees is impossible for the reason cited above. As shown in chapters 3 and 4, a holistic approach that evaluates the nexus between the Geneva Convention grounds for persecution (race, religion, nationality, membership of a particular social group or political opinion) and other compelling

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<sup>23</sup> UN High Commissioner for Refugees (UNHCR), ‘UNHCR - Master Glossary of Terms’ (*The UN Refugee Agency: Online Library*, 2023) <<https://www.unhcr.org/uk/master-glossary.html>> accessed 11 March 2023.

<sup>24</sup> Atle Grahl-Madsen, ‘Identifying the World’s Refugees’ (1983) 467 *The ANNALS of the American Academy of Political and Social Science* 11 <<http://journals.sagepub.com/doi/10.1177/0002716283467001002>> accessed 18 May 2020.

<sup>25</sup> European Council on Refugees and Exiles (n 21) 8.

<sup>26</sup> Jackson Nyamuya Maogoto, ‘Queue Jumpers or Refugees: Fudging Domestic Policy with International Obligations in the Reception of Spontaneous Arrivals’ (2016) 7 *Journal of the Philosophy of International Law* 45; *The Sydney Morning Herald*, ‘Editorial’ *The Sydney Morning Herald* (New South Wales, Australia, 22 September 2001) <<https://www.newspapers.com/image/121673368/?terms=%22economic%20refugees%22&match=1>> accessed 14 March 2023; Calvin Zon, ‘Black Poles to Make Policy a Campaign Test’ *Hawaii Tribune-Herald* (28 January 1980) 6 <<https://www.newspapers.com/image/556099930/?terms=%22economic%20refugees%22&match=1>> accessed 14 March 2023.

<sup>27</sup> *The Age*, ‘A Challenge We Refuse to Face’ *The Age* (Melbourne, Victoria, Australia, 12 November 1977) 19 <<https://www.newspapers.com/image/828650612/?terms=%22economic%20refugees%22&match=1>> accessed 14 March 2023; Dorota Bartyzel and Konrad Krasuski, ‘Welcoming Refugees Start to Take Its Toll on Poland’ *The Independent* (London, Greater London, England, 27 March 2022) 50 <<https://www.newspapers.com/image/828171268/?terms=%22economic%20refugees%22&match=1>> accessed 14 March 2023; Eric Neumayer, ‘Bogus Refugees? The Determinants of Asylum Migration to Western Europe’; Elizabeth Kay Harris, ‘Economic Refugees: Unprotected in the United States by Virtue of an Inaccurate Label’ (1993) 9 *American University Journal of International Law and Policy* 269.

displacement factors must be adopted when RSDOs make determinations on asylum seekers' applications. The compelling determination is that both Convention refugees and those fleeing economic destitution, arguably, "face the same possibility of death" due to State's mass terror campaigns and economic policies resulting in chronic poverty.<sup>28</sup>

The study further found that the definitional limitation of the term 'refugee' creates categories of refugees who are not entitled for international protection. The 1951 Geneva Convention, as supplemented and amended by the 1967 Protocol excludes people fleeing circumstances other than those listed as grounds of persecution in the Convention.<sup>29</sup> The EU asylum acquis only views third-country nationals as possible refugees and excludes the same persons as under the 1951 Geneva Convention, except those qualifying for subsidiary protection. On the other hand, the human rights jurisprudence has set a high, albeit, contradictory threshold as to who can be protected from deportation as a result of destitution emanating from socio-economic factors.<sup>30</sup>

It is argued that international refugee law should also consider offering refugee status to those fleeing war, famine or environmental disasters.<sup>31</sup> It is further argued that recent State practice of assessing asylum applications on the grounds of nationality and geo-political location is exclusionary.<sup>32</sup> Article 2(d) of the Qualifications Directive (recast) defines the term 'refugee' in both personal and territorial terms. The term refugee should extend to 'any person' rather than 'third-country nationals'.<sup>33</sup> In that realm of exclusion, based on interviews, document analysis, case law and observations, this study proposed three definitions for the term 'economic refugee'. Out of these three, the study came up with an integrated "Proposition 4" to capture a number of interconnected displacement factors at the root of cross-border displacement in the new global era. To that end, the study defined an economic refugee as

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<sup>28</sup> Harris (n 27) 269; Chandran Kukathas, 'Are Refugees Special?', *Migration in political theory: The ethics of movement and membership* (Oxford University Press 2016) 255 <[https://ink.library.smu.edu.sg/soss\\_research/2984](https://ink.library.smu.edu.sg/soss_research/2984)>; Matthew J Gibney, 'The Ethics of Refugees' (2018) e12521 *Philosophy Compass* 1.

<sup>29</sup> The Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 (*United Nations Treaty Series*, Vol. 189, p. 150, No 2545 (1954)), entered into force on 22 April 1954. It was supplemented and amended by the Protocol Relating to the Status of Refugees, concluded in New York on 31 January 1967, which entered into force on 4 October 1967 ('the Geneva Convention')

<sup>30</sup> See discussion in chapter 3

<sup>31</sup> Kukathas (n 28); Gibney (n 28).

<sup>32</sup> Appendix 9 (n 16) at 00:24:42

<sup>33</sup> European Council on Refugees and Exiles (n 21).; European Union: European Asylum Support Office (EASO), *Qualification for International Protection (Directive 2011/95/EU): a Judicial Analysis*, December 2016, available at: <https://www.refworld.org/docid/5a65c4334.html> [accessed 21 March 2023]

#### Integrated Proposition 4

*An economic refugee is any person who has fled their country of origin because of indissolubly linked socio-economic factors and political tyranny or repression that has led to economic failure, political instability, and exceptional economic destitution that cause them to live in inhuman or degrading conditions.*

The above proposition seeks to remove the negative stereotype attached to persons fleeing dire socio-economic circumstances. As shown in chapter 3, this study argues that economic refugees are not at all included for international protection under current international refugee law, and state practice has further shown that the arc of protection will not be extended to such categories unless they comply with the current requirements. Moreover, the scope of protection under current international refugee law has been eroded by arbitrary State practice.

The study proposes a case-by-case analysis of refugee claims rather than *prima facie* dismissals, detentions or returns. If asylum seekers coming from ‘relatively safe’ countries show that they are fleeing circumstances that are interconnected to endemic unemployment, political tyranny, sanctions and skewed economic policies threatening their lives and freedoms, they should have their applications assessed.<sup>34</sup>

This study further reiterates that the principle of non-*refoulement*, as discussed in chapter 3, is a peremptory norm that has crystallised into a rule of customary international law. To that end, economic refugees are also entitled to protection against being returned to a country or place where *they* may face persecution, torture, inhuman or degrading treatment or punishment. This will be a direct violation of the principle of non-*refoulement* as provided in human rights law.

On the scope of protection offered by the European Court of Human Rights (ECtHR) to ‘economic refugees’, the study found that the threshold set for economic destitution to amount to a violation of art 3 ECHR/the principle of non-*refoulement* is high, vague and exclusionary. The ECtHR case law shows that an extremely high threshold (exceptional circumstances) must be met in relation to seriously ill persons.<sup>35</sup> In this regard, focus is on the fact that the illness is naturally occurring and has nothing to do with lack of resources in the country of origin. Yet the reasoning in *Paposhvili* seems to show that an inhuman situation emanating from illness

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<sup>34</sup> Lea Ypi, ‘The Haunting Divide between Refugee and Economic Migrant’ *Financial Times* (30 December 2022) <<https://www.ft.com/content/28ad8fae-7101-45e0-a26b-4f868002b3d2>> accessed 22 February 2023.

<sup>35</sup> Compare *N v UK*. And *D v UK* discussed in chapter 3.



and destitution (resource shortages) from the country of origin, can constitute grounds to find a violation of article 3 ECHR.<sup>36</sup> Although this case law is in reference to seriously ill persons, it can be inferred that a determination of dire social circumstances in the country of origin can be used in defense of economic refugees. If health facilities are not accessible for the person concerned, this can give rise to objective and subjective fear in the person concerned and is ground to trigger art 3 ECHR protection.

The study further finds that the reasoning in *Sufi and Elmi v. United Kingdom* can provide some protection to persons fleeing dire socio-economic circumstances on the grounds of severe humanitarian conditions.<sup>37</sup> The court adopted the approach in *M.S.S. v. Belgium and Greece*, that considered the following criterion: ability to cater for basic needs such as food, hygiene and shelter, the threshold vulnerability to ill-treatment, and the chances of improving one's situation within a reasonable time-frame.<sup>38</sup> *Sufi and Elmi* considered both the political and socio-economic factors and noted the severe humanitarian conditions the applicants were to be exposed to as "sufficiently dire" and amounting to treatment reaching the threshold of art 3 ECHR.<sup>39</sup> This general reasoning in *Sufi and Elmi* has seldomly been applied afterwards. It is the study's view that more application of *Sufi and Elmi* can result in a broadened protection for persons fleeing dire socio-economic circumstances.

With regards to persecution, the study found that "persecution is self-identifying", latent and cannot be limited to a definition.<sup>40</sup> There should be no requirement of any 'actor' of persecution involved, but rather of protection needs. Persecution should not be the standard in defining refugees, but rather the fear for inhuman or degrading treatment and lack of state protection thereof. For all refugee categories, the standard should be on protection to be offered to those

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<sup>36</sup> Lourdes Peroni, 'Paposhvili v. Belgium: Memorable Grand Chamber Judgment Reshapes Article 3 Case Law on Expulsion of Seriously Ill Persons', (15 December 2016) Strasbourg Observers<<https://strasbourgobservers.com/2016/12/15/paposhvili-v-belgium-memorable-grand-chamber-judgment-reshapes-article-3-case-law-on-expulsion-of-seriously-ill-persons/>> accessed 20 August 2023.

<sup>37</sup> *Sufi and Elmi v. United Kingdom*, Applications nos. 8319/07 and 11449/07, Council of Europe: European Court of Human Rights, 28 June 2011, available at: <https://www.refworld.org/cases,ECHR,4e09d29d2.html> [accessed 19 March 2023]

<sup>38</sup> *M.S.S. v. Belgium and Greece* at para 282-283.

<sup>39</sup> *Sufi and Elmi v. the United Kingdom* at para 291

<sup>40</sup> Hugo Storey, 'What Constitutes Persecution? Towards a Working Definition' (2014) 26 International Journal of Refugee Law 272 <<https://academic.oup.com/ijrl/article/26/2/272/1513048>> accessed 20 March 2023. ; *ibid.*

displaced by the state. In that realm, displacement should be viewed as a response to disempowerment and oppression.<sup>41</sup>

The study further found that the provision of art 6 of the QD (recast), that lists the actors of persecution as one of the following: (a) the State; (b) parties or organisations controlling the State or a substantial part of the territory of the State; (c) non-State actors (including international organisations), is exclusionary of new refugee categories in which the actors of persecution are latent or non-existent. Therefore, a refugee definition formulated on the basis of persecution will lead to the exclusion of new categories who are not in fear of ‘persecution’ but indissolubly linked political, social and economic factors giving rise to inhuman and degrading treatment. This study argues that certain ‘events’ in the new global era do not have identifiable actors of persecution.

In short, the recurring argument on persecution with regards to new refugee categories is the acknowledgement that aggressive neo-liberal economic measures may be interpreted as latent forms of persecution described by critics as “war by any other means which has contributed to more deaths during the post-Cold War era than all weapons of mass destruction throughout history”.<sup>42</sup> To that end, this study proposes to remove the term ‘persecution’ from the current refugee definition and give currency to both objective and subjective fear of dire socio-economic circumstances leading to inhuman or degrading treatment that can trigger cross-border displacement in the new global era. In the context of the OAU Convention, the phrase “foreign domination” may suggest colonial domination, occupation, or foreign intervention.<sup>43</sup> From a Global South perspective this may relate to what Maria Giannacopoulus terms as “neoliberal missions” perpetuating colonial sovereignty and thus a latent form of persecution.<sup>44</sup>

### **7.2.3. The efficacy of the Framework Convention in broadening the refugee definition**

In chapter 4, this study proposed a hypothetical Framework Convention as a way to regulate the refugee definition. It has been shown that a Framework Convention is a legally binding treaty that is formulated within the general rules of international treaty law.<sup>45</sup> As discussed in

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<sup>41</sup> Abou El Fadl, ‘Islamic Ethics, Human Rights and Migration’ in Ray Jureidini and Said Fares Hassan (eds), *Migration and Islamic Ethics* (Brill 2020) 15 <<https://www.jstor.org/stable/10.1163/j.ctv2gjx01g.6>>.

<sup>42</sup> John Mueller and Karl Mueller, ‘Sanctions of Mass Destruction’ (1999) 78 *Foreign Affairs* 43..

<sup>43</sup> Marcos (n 10)

<sup>44</sup> Giannacopoulos (n 22)

<sup>45</sup> Patrick Wall, ‘A New Link in the Chain: Could a Framework Convention for Refugee Responsibility Sharing Fulfil the Promise of the 1967 Protocol?’ (2017) 00 *International Journal of Refugee Law* 1; Daniel Bodansky,

chapter 4, the Framework Convention deals with “issues that are of common concern to humankind” and where there is lack of global consensus on how such issues should be tackled.<sup>46</sup> The refugee problem remains such a global concern, and State practice shows that there is no consensus on dealing with key asylum and migration issues.<sup>47</sup> As stated earlier in the introduction to this study, amending the refugee definition in the Geneva Convention, is a challenging legal task considering the differing interests between the Global North and Global South.<sup>48</sup> At the core of the Framework Convention/Protocol concept is the capacity of the parties to establish a common ground by reaching both cognitive and normative consensus.

Cognitive consensus relates to the promotion of consensus about the relevant facts of the global problem (in our case: the refugee definition), while normative consensus refers to the appropriate legal response to the problem.<sup>49</sup> In reaching the consensus (this does not necessarily mean agreement), parties should give decisive and supportive reasons in support of their position. In chapter 4, decisive reasons are distinguished from supportive reasons in that, the former settles an issue for a group or society in a certain way towards the acceptance of the norm in question, while the latter “does not settle the issue but gives a weaker argument for settlement in a certain way”.<sup>50</sup> The distinction is crucial because the understanding of any form of consensus in the political field is determined by the “strength of the obligation accompanying the rule involved”.<sup>51</sup>

To that end, a two-step approach was followed in formulating a probable expanded refugee definition. As indicated in chapter 4, the first definition was presented to delegates at two

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‘The Framework Convention/Protocol Approach’ (1999) <<https://apps.who.int/iris/handle/10665/65355?show=full>> accessed 11 April 2021; Nele Matz-Lück, ‘Framework Conventions as Regulatory Tools’ (2009) 1 Goettingen Journal of International Law 439 <<https://papers.ssrn.com/abstract=1535892>> accessed 4 April 2021; Koen De Feyter, ‘Towards a Framework Convention on the Right to Development’ (2013) <<https://library.fes.de/pdf-files/bueros/genf/09892.pdf>>.

<sup>46</sup> De Feyter (n 45) 6.

<sup>47</sup> Council of the EU (n 4).

<sup>48</sup> L Barnett, ‘Global Governance and the Evolution of the International Refugee Regime’ (2002) 14 International Journal of Refugee Law 238 <[https://academic.oup.com/ijrl/article-lookup/doi/10.1093/ijrl/14.2\\_and\\_3.238](https://academic.oup.com/ijrl/article-lookup/doi/10.1093/ijrl/14.2_and_3.238)> accessed 8 March 2021. Jeff Crisp, the former Head of Policy Development and Advocacy at the UNHCR was cited as saying: “The [Organization of African Unity] definition makes sense in Africa, but not in industrialized states taking the pragmatic line, you need public opinion on your side and the European context is not ready for an OAU Refugee definition. Pragmatically no new definition will be accepted and agreed upon.”

<sup>49</sup> Bodansky (n 45); Susan Mohammed, ‘Toward an Understanding of Cognitive Consensus in a Group Decision-Making Context’ (2001) 37 The Journal of Applied Behavioral Science 408 <<https://journals.sagepub.com/doi/10.1177/0021886301374002>> accessed 10 April 2023.

<sup>50</sup> Harald Grimen, ‘Consensus and Normative Validity’ (2008) 40 Inquiry 47 <<https://www.tandfonline.com/action/journalInformation?journalCode=sinq20>> accessed 14 April 2023.

<sup>51</sup> Peter H Rossi and Richard a Berk, ‘Varieties of Normative Consensus’ (1985) 50 American Sociological Review 333, 333 <<https://www.jstor.org/stable/2095543>> accessed 14 April 2023.

conferences and also an online survey form was sent to selected scholars undertaking Migration Law research in different global settings. From the online survey 75 per cent of the respondents rejects the proposed definition, while 25 per cent accepts the proposal.<sup>52</sup> All respondents do not give the same decisive and supportive reasons for their position. The first definition proposal (*normR*) was formulated as follows:

[The term refugee refers] to any person who has fled country of residence because of a well-founded fear of persecution, including the fear arising from indissolubly linked political, social, economic and environmental factors that are life-threatening and inhibiting one's freedom, to which the State does not avail protection.

**a) Possible decisive and supportive reasons for accepting *normR***

The following was identified as possible reasons for accepting *normR*

1. The proposed *normR* appears to recognise the interconnectedness of political, social, economic, and environmental factors, while at the same time acknowledging the limitations of the state to avail protection.
2. The *normR* addresses the root causes of displacement.
3. The proposed *normR*, acknowledges the interdependence of political, social, economic, and environmental factors, and fits the prevailing reality in the new global era that recognizes that refugees may be forced to flee their countries of origin due to a combination of factors that are not always easily distinguishable.
4. The proposed *normR* provides a more comprehensive understanding of the complex reasons why people flee their home countries.
5. The proposed *normR* fits the scheme of an evolving world and recognizes the need for evolutionary legislation that measures up to new forms of displacement.

**b) Possible decisive and supportive reasons for rejecting *normR***

The above *normR* was rejected by experts and conference delegates on the following basis (see full discussion in chapter 4)

1. The proposed *normR* has limited scope of persecution. 'Persecution' as proposed in *normR* requires an actor and irrespective of "who" or "what" has caused persecution, the State should avail protection for those affected.

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<sup>52</sup> *ibid*

2. The *normR* is Eurocentric. The enquiry as to why one has fled their country of origin should not be on ‘who’ or ‘what’ caused persecution.
3. In terms of semantics, *normR* should have two limbs. The first indicating persecution, while the second qualifying other forms of harm.
4. The *normR* is too broad for the purpose of proving asylum claims.
5. The *normR* should clarify residence as ‘country of origin’ or ‘country of habitual residence’ for those that are stateless. Emphasis on country of origin or habitual residence is crucial in objectively assessing the objective and subjective fear of the refugee claimant.
6. The phrase ‘life-threatening’ requires a high burden of proof and should be replaced by a lesser standard of ‘inhuman treatment’ as envisages in article 3 ECHR.
7. The *normR* is limiting in terms of state protection. The current standard in international refugee law should be maintained, that is, “...person is not willing or able to avail themselves of state protection”. The phrase “...to which the State does not avail protection”, may be more limiting, as in certain cases a state may say that they provide protection, yet for the specific individual this may be not feasible or desirable..”<sup>53</sup>

### **c) Redefining the proposed *normR***

After the above review and critique of the first definition, the input from the experts consulted was incorporated and the following definition was formulated as a probable working definition for the hypothetical Framework Convention. In the second stage of formulation, this study, defined the term refugee as:

[...] any person who is outside their country of origin or country of habitual residence because of a well-founded fear arising from indissolubly linked political, social, economic and environmental factors that leads to inhuman or degrading treatment and who, as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

In coming up with the above formulation, the term persecution was removed from the definition. The formulation for redefining the *normR* was made on the basis of the following four areas impacting on both decisive and supportive reasons; (i) residence, (ii) persecution, (iii) life-threatening and (iv) state protection.

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<sup>53</sup> Correspondence on file with author

1. . The refined *normR* retains the formulation of the 1951 Convention on residence. The phrase “any person who is outside their country of origin or country of habitual residence” allows for an objective assessment of the country of origin or habitual residence. It also caters for people who did not initially flee their country but ‘became’ refugees after a regime change (*refugees sur place*). This formulation also curtails ambiguous asylum procedures. For example, if country of origin is not stated, then it would mean that a Cameroonian [national] fleeing from Libya, but without “problems” in Cameroon, would be entitled to international protection. Expanding the ambit of protection to anyone fleeing a certain country because of economic destitution will burden the host country and strain available resources available for its citizenry.
2. Persecution is not defined in international refugee law, and as such it will be limiting to account for cross-border displacement on the basis of the protected categories of race, religion, nationality, social group or political opinion. This study agrees with other scholars that “persecution is self-identifying” and should not be defined.<sup>54</sup> The fact that the term ‘persecution’ can be defined in many dimensions, might suggest a move from providing a closed list of what entails persecution.<sup>55</sup> Perhaps cross-border displacement in the new global era should be viewed as a “response to disempowerment and oppression”.<sup>56</sup>
3. The third aspect that was changed was the phrase ‘life-threatening’. The study argues for a lesser stringent standard: “inhuman or degrading treatment”. This will align with the minimum level of severity required to trigger the protection of art 3 ECHR, which seems to offer some scope of protection to persons irrespective of their migration status. Perhaps, this threshold is a lesser standard to prove than one in which ‘life-threatening’ situation is mentioned.
4. The fourth change on the *normR* relates to State protection. The current standard under international refugee law is that a person is described as a refugee if they are not willing or able to avail themselves of the protection of their home state. Therefore, *normR* retains the 1951 formulation of “as a result of such events, is unable or, owing to such fear, is unwilling to return to it”. In the prior proposition, the clause on state protection was more limiting as in certain cases a state may say they provide protection, and yet this may not be desirable or feasible for the specific individual.

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<sup>54</sup> Storey (n 40).

<sup>55</sup> *ibid.*

<sup>56</sup> Fadl (n 41).

#### **7.2.4. Refugee Burden Sharing**

This study further shows that lower income countries host more refugees than high income countries. The study showed that Uganda is among the top refugee hosting countries with lower incomes and sluggish economies.<sup>57</sup> As noted earlier on, the Global Compact on Refugees, aims to (i) reduce pressures on host countries; (ii) enhance refugee self-reliance; (iii) expand access to third country solutions, and (iv) support conditions in countries of origin for return in safety and dignity.<sup>58</sup>

Rwamwanja settlement has been home to many refugees including the current Rwandan President.<sup>59</sup> When the repatriation of the Rwandese was done between 2008 and 2010, the settlement was closed. However, the surging refugee flows from the DRC led to the re-opening of the settlement in 2012. Ever since then the number of refugees has been on a steady rise as shown in chapter 6. This has put a severe strain on the limited financial resources for Uganda, considering its own growing population. The findings in Rwamwanja show that the land being allocated to refugees is getting smaller in size as more refugees arrive. Added to that, refugees are not allowed to leave the settlement to supplement on their meagre monthly pay-out.

The case study shows that Uganda requires international solidarity in sharing the refugee burden. Garnering international support is crucial in lessening the burden in two ways. First, if international support is given to Uganda refugee protection will be enhanced since there will be increased financial support. The financial support, in an informal economy, can help in boosting resources for refugee sustenance. Perhaps, infrastructural development may enhance provision of basis services like education, health and public transport. Second, as discussed in (section 6.5.3) international support can come in the form of bona fide diplomatic negotiations that do not flare up more conflict. The African Union can solve a number of conflicts before they result in cross-border conflict if negotiating parties do not take sides in the conflict. This study found that refugee burden sharing in Uganda should be built on durable peacebuilding initiatives as shown in chapter 6.

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<sup>57</sup> United Nations High Commissioner for Refugees, 'Global Compact On Refugees Indicator Report' (2021) 17 <<https://www.unhcr.org/global-compact-refugees-indicator-report>> accessed 17 April 2023.

<sup>58</sup> UNHCR, 'Global Compact on Refugees' (2018) <<https://www.refworld.org/docid/63b43eaa4.html>> accessed 07 June 2023.

<sup>59</sup> Appendix 11 Ambassador Katenta-Apuli interview

Another plausible way of reducing the refugee burden is provision of more self-reliance programs. The Rwamwanja case study shows that refugees can no longer rely on the land as it keeps getting smaller. A way to lessen the burden on the Ugandan government and international donors will be to invest in currently available vocational programmes for refugees. The FGD reveal that these programs are just white elephants as they lack funding and as such they do not become successful when implemented.

For example, the *Build Refugee Hope* vocational programme has been in place since the year 2020.<sup>60</sup> The refugee-led project is not sustainable as it is financed by the refugees who do not have enough livelihood means to survive. Therefore, the intended skills (mushroom farming, carpentry, sandal making, mechanics, and brick laying amongst others) do not flourish as planned. The result is that this creates more dependency on cash-based interventions and food handouts. It is herein advised that enhancing refugees' self-reliance programmes will be a catalyst towards lessening the refugee burden as refugees will be able to cater for themselves.

This study further found that there is need for more integration between the host and the refugee community as a step towards lessening the refugee burden. Evidence shows that there is a reluctant relationship between the host and the refugee community. However more efforts can be invested in encouraging local integration and resettlement. This probably leads to refugees becoming more productive members of the Ugandan society. It reduces the strain on the refugee settlement, as more refugees integrate with the community not only proving labour but also creating employment.

In conclusion, the Rwamwanja settlement continues to receive high numbers of refugees every year. This creates further strain on the available resources for the host and the refugee community. It is urged that for the concept of self-reliance to flourish in Rwamwanja and other settlements, Uganda requires financial and international solidarity in fulfilling the basic socio-economic needs for the refugees.

### **7.3. Theoretical contributions**

This study is a culmination of number of disciplinary and methodological perspectives in order to understand and analyse the situation of persons fleeing their country of origin due to economic hardship. Perhaps to turn Martti Koskenniemi's question: what does it require to

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<sup>60</sup> Appendix 13 FGD Mahani section at pg. 5



*believe* that [a new rule] or [policy] are the right ones?<sup>61</sup>, on its head, in the theoretical realm the same question may read: what does it require to believe that a certain migration theory explains the circumstances of asylum seekers fleeing their countries of origin due to economic destitution?

This is in the face of the current reality that such persons are arguably ‘mere economic migrants’ fleeing the constraints of poverty and seeking better life prospects. Explaining this on the dividing plane of the neoclassical theorists and historical structural theorists might then become blurred in semantics and interpretations given that “migration [appears] to go on without definite [theory]”.<sup>62</sup>

This study has shown that the neoclassical theorists view migration through the economic lens and that international migration is an intersection of supply and demand created by global labour markets. On both the national and domestic front, the core neoclassical theorists in the form of Hicks (1932), Lewis (1954) and Harris and Todaro (1970), assumed international migration was a result of the variations in wages and employment opportunities.<sup>63</sup> It is argued that the “Gospel of High Wages” draws immigrants to the receiving country and in the process lowers the rise in wages in that country. The underlying premise of the neoclassical theorists is that the economic development of both the migrant sending country and that of the migrant receiving country largely determine migrant movements. This study has shown that this neoclassical theory premise cannot be applied to all countries in Sub-Saharan Africa. The case of Eritrea shows that the neoclassical theory is to a large extent relevant when economic development is a factor. The migration of Eritreans to Ethiopia, just after 1991 when they gained statehood, falls into the Hicks’ Theory of Wages. In that context it can be argued that Eritrean migrants made “rational individual decision(s), based on a complete and reliable information on the [labour] market situation” in Ethiopia. However, when these economic grounds were destabilised by war, dictatorship, political repression, and violation of fundamental rights, Eritrean mobility became a multifaceted migration chain based on interpersonal human communication that formed into a network leading to ‘safe’ places of absorption. As remarked earlier, the movement of Eritreans out of their country, is more on the

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<sup>61</sup> Appendix 10 (n 1) 5

<sup>62</sup> Ernest George Ravenstein, ‘The Laws of Migration’ (1885) 48 *Journal of the Statistical Society of London* 167, 167 <<https://doi.org/10.2307/2979181>>.

<sup>63</sup> Alexandr A Tarasyev and Jeenat B Jabbar, ‘Dynamic Modeling of Labor Migration Impact on the Economic System Development’ (2018) 51 *IFAC-PapersOnLine* 407.

basis of escaping circumstances that are dire rather than the prospect of the “ Gospel of High Wages” and bright lights in Europe and beyond.

The neoclassical thought that international migration is “determined by lifetime net income (earnings) maximisation choice made by individuals”, suggests that migrants cross international borders for the sole reason of improving their economic outlook.<sup>64</sup> In that context, the theoretical contributions of this study are that in the sphere of forced migration the ‘highest net gain’ for migrants is safety and durable protection from the perceived receiving country in comparison to the ‘negative costs’ of staying in the country of origin. In the scheme of forced migration, undocumented migrants are motivated to move to the country of destination after assessing the highest net gain that can be derived after the negative costs of movements.

Perhaps the historical structuralist school of thought might be the best pivot to understand the theoretical contributions of this study. In the scheme of the historical structuralists, migration is inimical to the economy of the sending country. It argues that such a flight from misery does not help the country to escape the stranglehold of “global capitalist expansion”. The Wallersteinian thought that migration destabilises poor societies and undermines economic growth and displaces populations fits the category of economic liberalization discussed in this study.

This study further shows that cross-border displacement is a culmination of “pressures and counterpressure”, as coined by the historical structuralists.<sup>65</sup> These pressures stem from internal and external influences. For refugees living in Rwamwanja settlement the pressure coming from within Uganda is that of sustainable livelihoods that leads to secondary movements, albeit scarce and limited by financial resources, to countries like Kenya or Rwanda.

As for Eritrea, as has been argued in chapter 5, the pressures within Eritrea (political, social, economic) have created a situation of constant cross-border mobility. This can also be explained in terms of the counterforces coming from Ethiopia and the international community through United Nations sanctions. Such external pressures, perhaps, creates a fissure of migratory movements out of Eritrea. However, this study stresses that cross-border movements

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<sup>64</sup> Aldona Zawojka and Tomasz Siudek, ‘A Theoretical And Empirical Approach To Foreign Labour Migration And Employment: The Case Of Agri-Food Migrant Workers In Developed Economies’ (2021) 20 *Acta Sci. Pol. Oeconomia* 63, 65.

<sup>65</sup> Charles H Wood, ‘Equilibrium and Historical-Structural Perspectives on Migration’ (1982) 16 *The International Migration Review* 298, 302 <<https://about.jstor.org/terms>> accessed 15 February 2023.

within the sub-Saharan Africa are probably an intersection of many migration theories. It will be limiting to subject these movements to one theoretical source as forced migration is multivariate and a position in constant flux.

#### **7.4. Considerations for future research**

This study showed that people fleeing economic destitution are considered not worth of international protection under current international refugee law. At the core of the problem is the definition of the term refugee and a lack of normative consensus to widen the ambit of protection to new refugee categories. As indicated in chapter 4, the lack of consensus on an inclusive and broad definition is perhaps on two legs. First, the Global North is not inclined to accept a broader refugee definition that may imply straining available resources meant for its citizenry. Second, if the refugee burden is to be shared equally and fairly, there is perhaps a need to first define who requires international protection in the new global era.<sup>66</sup> Either way, the two positions call for a refugee definition acceptable for both the Global South and North.

This study has shown that a Framework Convention is legally binding and can be implemented progressively to solve an ongoing common concern to humankind. Furthermore, the fact that the findings of this current study are partial and ongoing, gives the impetus to explore the efficacy of a Framework Convention/Protocol in broadening the refugee definition. The current study has not explored all zones of exclusion in terms of forced migration. Moreover, there is need to explore also how internally displaced persons (IDPs) can be protected or find feasible ways to enjoy their human rights. The case of IDPs, just as that of new refugee categories, is an exercise that requires gathering cognitive and normative consensus on a global scale, and calls for political will towards the global concern.

In the ultimate end, this study and considerations for future research on the efficacy of a Framework Convention in broadening the refugee definition, are premised on the lingering

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<sup>66</sup> The other counter argument to this is that, sharing the burden will become even more difficult if -under the new definition- more people are entitled to international protection. However, Aleinikoff and Zamore seem to argue that emphasis should not be on the burden that comes with more people being given international protection, but on what they term “mobility and voice”. They are of the view that it is not about ‘more people’ getting international protection, but emphasis should be on first identifying excluded categories so as to (i) enhance their ability to pursue opportunities for economic, educational and social advancement through movement, and most importantly (ii) ensure that those displaced have a role in the crafting international and domestic responses to their displacement. See: ‘The Arc of Protection: Toward a New International Refugee Regime’ (*Public Seminar Books*, 2019) 1 <<https://www.publicseminar.org/wp-content/uploads/2018/06/Click-here-to-download-the-Arc-of-Protection.pdf>> accessed 20 May 2020

question: what does it require to *believe* that [new rules] or [policies] in refugee policy and protection are the right ones?

**Shepherd Mutsvara**

.....  
imię, nazwisko/ name

Kraków, dnia/date 12.09.2023

## **OŚWIADCZENIE / DECLARATION**

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## APPENDICES

### *Appendix 1: Interview Participation Form*

#### **Interview Guide- Bremen**

Semi-Structured Questionnaire with oral informed consent script

#### **Economic refugees: An analysis of persecution and displacement in the new global era**

##### **Introduction** – Information about the study:

My name is Shepherd Mutsvara, a Zimbabwean living and studying in Poland. I am a researcher at the Pedagogical University of Cracow, Poland and the Human Rights Centre at Ghent University in Belgium.

The central question of my research is: **How does/should international refugee law consider the situation of persons fleeing their country of origin due to economic hardship?** This is situated in the context of increasing numbers of people moving within and beyond Africa as a result of economic deprivation that is systemic and the product of a coercive world order. Recent events in Europe have also shown that the definition of the term refugee in the European Union asylum laws has not been adequately defined to fit the current situations that have given rise to human displacement around the world.

Your input in this research will help in drafting guidelines for the United Nations High Commissioner for Refugees (UNHCR) and national asylum authorities on people fleeing persecution that is interconnected to the main persecution factors (**race, religion, nationality, membership in a particular social group and political opinion**).

If you wish to participate in this study, please indicate with an (X) on the table below and return the slip to Mr **Andreas Kunkel (Integrative project coordinator)**. Your identity will remain anonymous in all instances.

Online Zoom Interview (English Language)	Face to Face interview From 15-20 June 2022 (English/Tigrinya)	Anonymous Online Survey (English/Tigrinya)  *Please provide email address	Anonymous Written interview (English/ Tigrinya)

**Regards**

**Shepherd Mutsvara**

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**Appendix 2: Interview Participation Form In Tigrinya language**

**እዚ ሰነድ እዚ ብጉግል ትራንስሌት ተጠቂምካ ተተርጉሙ ኣሎ።**

**መምርሒ ቃለ መሕትት- ብሬመን**

**ፍርቂ ቅርጺ ዘለዎ መሕተቲ ምስ ኣፋዊ ሓበሬታ ዘለዎ ናይ ፍቓድ ስክሪፕት።**

**ቁጠባዊ ስደተኛታት፡ ትንታነ ስደትን ምምዝባልን ኣብ ሓድሽ ዓለማዊ ዘመን**

መእተዊ – ሓበሬታ ብዛዕባ እቲ መጽናዕቲ፤

ጓሳ ሙትስቫራ ይበሃል፡ ኣብ ፖሊንድ ዝነብርን ዝመሃርን ዚምባብወዊ እዩ። ኣነ ኣብ ፔዳጎጂካል ዩኒቨርሲቲ ክራኮው ፖሊንድን ኣብ ቤልጅየም ዩኒቨርሲቲ ጌንት ኣብ ዝርከብ ማእከል ሰብኣዊ መሰላትን ተመራማሪ እዩ።

እቲ ማእከላይ ሕቶ መጽናዕተይ፡ ኣህጉራዊ ሕጊ ስደተኛታት፡ ብሰንኪ ቁጠባዊ ጸገም ካብ መበቆል ሃገሮም ዝሃድሙ ሰባት ንኹነታት ብኸመይ ኣብ ግምት ዮእትዎ/ክርእዮ ኣለዎ? እዚ ድማ ብሰንኪ ስርዓታውን ውጽኢት ናይ ሓደ ኣስገዳዲ ዓለማዊ ስርዓትን ዝኾነ ቁጠባዊ ስእነት ኣብ ውሽጢ ኪኖን ኣፍሪቃ ዝንቀሳቐሱ ቁጽሪ ሰባት እናወሰኸ ኣብ ዝኸደሉ ዘሎ ኩነታት ዝተቐመጠ እዩ። ኣብ ቀረባ እዋን ኣብ ኤውሮጳ ዝተፈጸሙ ፍጻሜታት'ውን ኣብ ሕግታት ዑቕባ ሕብረት ኤውሮጳ ዘሎ ትርጉም ስደተኛ ዝብል ቃል ምስቲ ኣብ መላእ ዓለም ስደተኛታት ደቂ ሰባት ዝፈጠረ ህሉው ኩነታት ዝሰማማዕ ብእኹል መንገዲ ከምዘይተገልጸ ኣርእዩ እዩ።

ኣብዚ መጽናዕቲ ዝሃብካዮ ርእይቶ፡ ምስ ቀንዲ ረቕሒታት ስደት (ዓሌት፡ ሃይማኖት፡ ዜግነት፡ ኣባልነት ኣብ ሓደ ፍሉይ ማሕበራዊ ጉጅለ፡ ኣባልነት ዘለዎ ስደት ዝሃድሙ ሰባት ዝምልከት፡ ንላዕሊ ዘመረክር ስደተኛታት ሕቡራት ሃገራት (UNHCR)ን ሃገራዊ በዓል መዚ ዑቕባን ዝምልከት መምርሒታት ኣብ ምንዳፍ ክሕግዝ እዩ። ከምኡ'ውን ፖለቲካዊ ርእይቶ።

ኣብዚ መጽናዕቲ ክትሳተፉ ምስ እትደልዩ፡ በጃኹም ኣብዚ ታሕቲ ዘሎ ሰሌዳ ብ(X) ኣመልክቱ እሞ፡ ነቲ ስሊፕ ናብ ሚስተር ኣንድርያስ ኩንክል (ኣተሓባባሪ ውሁድ ፕሮጀክት) ምለሱ። መንነትካ ኣብ ኩሉ ኣጋጣሚታት ስሙ ዘይተገልጸ ኮይኑ ክቕጽል እዩ።

ቃለ መሕትት ብኢንተርቪት ዙም (ቋንቋ እንግሊዝ)	ገጽ ንገጽ ቃለ መሕትት። ካብ 15-20 ሰነ 2022 ዓ.ም (ትግርኛ/ትግርኛ)	ስሙ ዘይተገልጸ ናይ ኣንላይን መጽናዕቲ (እንግሊዝኛ/ ትግርኛ)  *ኢመይል ኣድራሻ ክትህቡና ብትሕትና ንሓትት።	ስሙ ዘይተገልጸ ጽሑፋዊ ቃለ መሕትት (እንግሊዝኛ/ ትግርኛ)

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### ***Appendix 3: Interview Guide for Eritrean refugees***

Our interview will be guided by the following key research question(s):

#### **RQ1: In which circumstances are persons fleeing economic hardship currently protected under international refugee and human rights law?**

- i. Are they ‘only’ fleeing economic conditions: If so, they are not protected and do not fall under the refugee definition of Geneva Convention.
- ii. What is protection against refoulement?
- iii. When do socioeconomic conditions amount to violation of refoulement?
- iv. What is protection offered by regional systems: The African Union *vs* The European Union.

I hope to speak with other Eritreans living in Germany/Belgium and evaluate their way of life before they fled Eritrea. The information provided by them will be used in my doctoral thesis, published reports, academic articles, and blog posts. I may include quotes from those interviewed but the name and all information that can identify the interviewee will not be recorded or disclosed.

#### **Oral Informed Consent Script (the person will also receive the participation sheet):**

Before beginning the interview, I want to emphasize that participation is voluntary. There is no requirement for participation, nor penalty for not participating. If you consent to be interviewed, you can refuse to answer any question, and you may stop the interview at any time for any reason. You can withdraw from this study at any time, and all the information provided will be deleted and not used in the study anymore. The interview will be stored in secure places following the highest international security standards. We do not expect participation in this interview to benefit you personally. We hope that the project will be of public benefit and generate knowledge to inform public policies and decision-making processes. This interview is an opportunity for you to express yourself on important topics regarding your experience with cross-border displacement. I have a series of questions I would like to ask over the next 20 minutes or so. The interview will be audio-recorded unless you prefer that only handwritten notes be taken.

Following the interview, if you have any questions regarding this project, you can contact me, Shepherd Mutsvara, at [shepherd.mutsvara@doktorant.up.krakow.pl](mailto:shepherd.mutsvara@doktorant.up.krakow.pl) / [Shepherd.Mutsvara@UGent.be](mailto:Shepherd.Mutsvara@UGent.be) ([+32492650144] or +48 513 625 218

1. Do you have any questions about the research project, or the purpose of this interview? (Yes/No)
2. Do you voluntarily agree to participate in the study? (Yes/No)
3. Do I have your permission to audio record the interview? (Yes/No)

Thank you. I will now proceed with the interview.

1. Which region of Eritrea are you originally from?
2. What is your level of education?
3. What was your occupation prior to migration? What is it now?
4. What were your reasons for leaving Eritrea?

5. When you left Eritrea, what was the first country of destination in Africa?
6. What challenges did you face in that country before embarking on international migration?
7. How did your economic position change when you came to Europe?
8. How would you judge economic support in Eritrea compared to Belgium?
9. How does your access to services (health, education, compare to the one prior to migration?
10. Do you consider Belgium a place where you would like to settle if so, what are the reasons?
11. How significant of a factor in your migration was financial stability?
12. Where you encouraged to leave Eritrea if so, what were the promises given to you do you think they were fulfilled, who encouraged you?
13. How do you think economic factors contributed to you fleeing your country of origin?
14. What challenges did you face during your asylum application in Belgium or any other European country you arrived to first?
15. Would you consider coming back to Eritrea if you were guaranteed better economic standing than the one you have right now, why /why not?
16. What is your opinion on the idea that migrants are taking away jobs of citizens?
17. How do you think your presence is contributing to the economy of your host country?
18. How do you feel about the practice of sending money back to Eritrea, do you think it has a positive or negative impact on its economy?

### **End of the interview**

I asked you all the questions that I needed to ask. Thank you so much for answering my questions. Your interview contributed a lot to my study. I will send you the results of my research as soon as I finish writing them. At any time, if you do not feel comfortable or if you do not want to be part of this research anymore, you can contact me without any problems. You have my phone number and my email. Please enter in contact with me whenever you need. Thank you again for your time and attention

## ***Appendix 4: Expert Interview Guide for Eritrea***

### **Expert Interview: Eritrea**

**PURPOSE OF INTERVIEW:** To evaluate if economic liberalization has become a serious form of economic persecution which international law should take into consideration when assessing asylum claims, using Eritrea as a case study.

#### **Research Question(s):**

**How does/should international refugee law consider the situation of persons fleeing their country of origin due to economic hardship?**

**RQ1: In which circumstances are ‘economic refugees’ protected under the Geneva Convention (and/or the OAU Convention?)**

- In which circumstances can economic policies constitute *persecution*?
- In which circumstances can such persecution be linked to one of the *grounds* in the Refugee Convention (race, religion, nationality, political opinion, particular social group)?
- In which circumstances can people have a *well-founded fear* to return to countries enacting such economic policies?
- In which circumstances is the government *unable or unwilling to provide protection*? (this aspect will be easy when it concerns national policies)

**RQ2: How should international refugee law be *reformed*, in order to adequately consider ‘economic refugees’?**

- what are strengths and weaknesses of drafting a Framework Protocol/Convention including an expanded refugee definition which considers current realities of economic neoliberalization?
- in which other ways could economic refugees enjoy protection under international refugee law?

#### **Introduction to the interview:**

**OBJECTIVE:** To build rapport and a sense of trust with the respondent (greeting, thanks, purpose of the survey, anonymity, appreciation of the respondent, duration, benefits, consent to recording, etc.)

Good morning **Dr. Expert X** and thank you for agreeing to undertake this interview with me despite your hectic schedule at **(NAME OF INSTITUTION)**.

My name is Shepherd Mutsvara, and I am pursuing a joint Doctorate program in Political Sciences with the Pedagogical University of Krakow and Ghent University. Your responses will be used in my doctoral thesis entitled: ***Economic refugees: an analysis of persecution and displacement in the new global era*** and will be useful in answering the research question. The aim of the project is to assess the extent to which economic liberalization programs have contributed to the persecution and displacement of

refugees in sub-Saharan Africa with special focus on Eritrea. Your experience as **(EXPERT EXPERIENCE)**, together with your numerous publications on Eritrea are crucial in understanding the plight of refugees who are not recognized by the Convention Relating to the Status of Refugees of 1951

because economic reasons do not fall under the purvey of the Convention. And yet, most refugees hail from countries where economic failure, political instability, poverty, and persecution are indissolubly linked.

**Interview questions:**

1. You taught at Asmara University between 2000 and 2003 **[OR LIVED IN ERITREA]**, what were your first impressions of Eritrea as a country then?
2. How has the political situation in Eritrea (no democratic election since independence in 1993) impacted on the general population?
3. In your opinion, how has the authoritarian regime of President Isaias Afwerki affected the macroeconomic landscape of Eritrea?
4. Eritrean refugees are labelled “economic refugees” because they come from a country with “no war and no peace”. How is Eritrea’s economic situation a source of refugee persecution and displacement?
5. Eritrea adopted Macroeconomics Policies and Programmes in 1994 which were in favour of trade liberalization. To what extent has such economic programmes had a causal effect on the refugee movement in Eritrea?
6. How has the African Union Organization of African Unity (OAU), Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention") addressed refugee protection in the region?
7. Jeff Crisp, the former Head of Policy Development and Advocacy at the UNHCR once said: “The [Organization of African Unity] definition makes sense in Africa, but not in industrialized states taking the pragmatic line, you need public opinion on your side and the European context is not ready for an OAU Refugee definition. Pragmatically no new definition will be accepted and agreed upon.” What are your views on this statement in relation to Eritrean refugees?
8. How has the poverty alleviation programs adopted by the Eritrean government eased off migration pressures to Europe?
9. What legal challenges are faced by Eritrean refugees when seeking international protection here in **[NAME OF EUROPEAN COUNTRY]**
10. What other critical issues regarding Eritrean refugees do you think this interview has not discussed?
11. Do you perhaps know other experts who have lived, worked and/or written extensively on Eritrea?

## ***Appendix 5: Expert Interview Guide for Uganda***

### **Expert Interview: Uganda**

**PURPOSE OF INTERVIEW:** To evaluate the Uganda refugee protection and policy in light of economic liberalization programmes.

#### **Research Question(s):**

RQ1: To what extent is the Ugandan model of refugee reception sustainable in minimizing secondary refugee movements?

RQ2: and (to what extent) are the principles of burden sharing feasible amongst African Member States in light of the non-binding Global Compact on Refugees?

#### **Introduction to the interview:**

**OBJECTIVE:** To build rapport and a sense of trust with the respondent (greeting, thanks, purpose of the survey, anonymity, appreciation of the respondent, duration, benefits, consent to recording, etc.)

Good morning **Dr. Expert X** and thank you for agreeing to undertake this interview with me despite your busy schedule at **(NAME OF INSTITUTION)**.

My name is Shepherd Mutsvara, and I am pursuing Doctorate program in Political Sciences with the Pedagogical University of Krakow. Your responses will be used in my doctoral thesis entitled: *Economic refugees: an analysis of persecution and cross-border displacement in the new global era* and will be useful in answering the research question. The aim of the project is to evaluate the Uganda refugee protection and policy in light of economic liberalization programmes.

Your experience as **(EXPERT EXPERIENCE)**, together with your publications on Uganda are crucial in understanding the Uganda Refugee Protection Policy and Law.

#### **Questions to be guided by the following:**

- Role of expert and institution affiliation
- Uganda's economic outlook
- Uganda refugee policy from 1962 to present day
- Uganda open refugee settlement policy
- UNHCR and other stakeholders roles, e.g., World Food Programme, ACODE, SOS Uganda
- The Office of the Prime Minister (OPM)
- Host and refugee communities
- Secondary movements
- Refugee burden

## ***Appendix 6: Focus Group Discussion Guide***

### **Information to record for an FGD:**

Location: \_\_\_\_\_ Date: \_\_\_\_ / \_\_\_\_ / \_\_\_\_

Facilitator(s): \_\_\_\_\_

Group name/description: \_\_\_\_\_

# of male participants: \_\_\_\_\_ # of female participants: \_\_\_\_\_

Were vulnerable groups present (elderly, disabled etc.)? \_\_\_\_\_

Was everyone able to participate in the discussion equally? Y/N

Were any community leaders present during the discussion? Y/N

<b>Nationality</b>	<b>Ethnicity</b>	<b>Sex</b>	<b>Age</b>	<b>Arrival in Rwamwanja camp</b>	<b>People living in the same house (e.g., Wife, brother, sister, etc.)</b>

### **Structure of the FGD**

1. Welcome remarks
2. Introduction
3. Confidentiality clause
4. Ground rules
5. Guiding/probing questions
  - Describe your experience as refugees here at Rwamwanja settlement
  - Describe your economic situation
  - Describe the support you get from the OPM, UNHCR , SOS, etc
  - What are the prospects of leaving the settlement and go to another country?
  - What are the prospects of returning to country of origin?
6. Concluding remarks

## *Appendix 7: Online survey*

### **Reinterpreting the refugee definition: The efficacy of a Framework Convention**

#### **Introduction – Information about the study:**

My name is Shepherd Mutsvara. I am a Zimbabwean living and studying in Poland. I am a researcher at the Pedagogical University of Cracow, Poland, and the Human Rights Centre at Ghent University in Belgium. Currently, I am a Visiting Ph.D. Researcher at the University of Edinburgh, Scotland, United Kingdom.

My research project is entitled: *Economic Refugees: An Analysis of Persecution and cross-border displacement in the new global era.*

The central question of my research is: **How should international refugee law consider the situation of persons fleeing their country of origin due to economic hardship?** This is situated in the context of increasing numbers of people moving within and beyond Africa as a result of economic deprivation that is systemic and the product of coercive world order. Recent events in Europe have also shown that the definition of the term refugee in the European Union asylum laws has not been adequately defined to fit the current situations that have given rise to human displacement around the world.

In chapter 4 of my dissertation (**Reinterpreting the refugee definition: The efficacy of a Framework Convention**), I propose the following expanded refugee definition to include other factors outside the ambit of the 1951 *Convention Relating to the Status of Refugees* and its *1967 Protocol*. The proposed definition also takes into cognizance that the 1969 OAU Convention expanded refugee definition excludes internally displaced persons and that the EU Asylum law in terms of Article 2(d) of the Qualification Recast Directive 2011/95/EU only defines a refugee in terms of proximity to the European Union territory “Third Country National”.

#### **Proposed definition:**

*A refugee is any person who has fled their country of residence because of a well-founded fear of persecution, including the fear arising from indissolubly linked political, social, economic, and environmental factors that are life-threatening and inhibiting one’s freedom, to which the State does not avail protection.*

Indicate whether you **ACCEPT** or **REJECT** the proposed definition and briefly provide reasons for your choice.

By filling out this form, you consent to take part in this research.



FGD Mahani discussants (Translator in yellow T-shirt)

Photo credit: Author



FGD discussants (Maega section)

Photo credit: author





Figure 2: FGD Buguta section (Rwamwanja)  
Photo credit: author

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