Capability and Legal Empowerment for escaping the 'Refugee Warehouse' - an assessment of the Global Compact on Refugees and the Comprehensive Refugee Response Framework in Kenya

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Abbreviations

CIDP II	Country Integrated Development Plan II
CLEP	Commission of Legal Empowerment of the Poor
CPA	Comprehensive Plan of Action for Indochinese Refugees
CRRF	Comprehensive Refugee Response Framework
GCM	Global Compact for Safe, Orderly and Regular Migration
GCR	Global Compact on Refugees
GNI	Gross National Income
GRF	Global Refugee Forum
ICCPR	International Covenant on Civil and Political Rights
KISEDP	Kalobeyei Integrated Socio and Economic Development Programme
LMIC	Lower- and Middle-Income Countries
NYD	New York Declaration for Refugees and Migrants
OAU	Organization of African Unity
PRS	Protracted Refugee Situation
SDG	Sustainable Development Goals
RSD	Refugee Status Determination
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
WASH	Water, sanitation and hygiene
WFP	World Food Program

Abstract

The majority of refugees around the world face restrictive legislation and encampment policies in Lower- and Middle-Income Countries. They are stripped of their dignity and freedoms in a Protracted Refugee Situation. Drawing on the Capability Approach of Amartya Sen and Martha Nussbaum, this thesis identifies relevant capabilities that could pave the path of legal empowerment, which is necessary for refugees to make strategic decisions about their lives and to escape the Protracted Refugee Situation. Using the capability and empowerment framework the thesis analyzes the Global Compact on Refugees, a new UN document that promises among other things more refugee self-reliance. The case of Kenya illustrates the implementation of the Comprehensive Refugee Response Framework, an important element of the Global Compact on Refugees. Relying on the outcome of field studies in Kalobeyei, a new refugee settlement in North-West Kenya, this thesis assesses the implementation of the Comprehensive Refugee Response Framework. The result shows that the new international attempt to promote refugee self-reliance can only be evaluated as a partial success and that the enhancement of capabilities for legal empowerment is still at the nascent stage.

Résumé

La majorité de réfugiés dans le monde sont soumis à législation restrictive et politique de cantonnement dans des pays à revenu faible ou intermédiaire. Ils sont privés de leur dignité et liberté dans des situations d'exil prolongées. En s'inspirant de l'approche des capabilités d'Amartya Sen et de Martha Nussbaum, cette thèse identifie des capabilités pertinentes pour l'autonomisation juridique, qui est nécessaire pour les réfugiés de prendre des décisions stratégiques et d'échapper aux situations d'exil prolongées. En s'appuyant sur le cadre de capabilité et d'autonomisation juridique cette thèse analyse le Pacte Mondial pour les Réfugiés, un nouveau document de l'ONU dans le but, entre autres, d'améliorer l'autosuffisance de réfugiés. Le cas du Kenya illustre la mise en œuvre du Cadre d'action global pour les réfugiés, un élément important du Pacte Mondial pour les Réfugiés. En utilisant les résultats d'enquêtes de terrain à Kalobeyei, un camp de réfugiés dans le nord-ouest du Kenya, cette thèse évalue la mise en œuvre du Cadre d'action global pour les réfugiés. Les résultats montrent que la nouvelle tentative internationale destinée à renforcer l'autosuffisance des réfugiés ne représente qu'un demi-succès et que l'amélioration des capabilités pour l'autonomisation juridique n'est encore qu'au tout début.

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Introduction

The real refugee crisis is the encampment of millions of human beings, the immense waste of human potential, and the prisons to imagination: 'Refugee warehouses'.[1] Most people would presumably picture refugees as fleeing their country of origin and headlines often focus on issues as migrants crossing the Mediterranean Sea, or the so-called Migrant Caravan. However, while as a matter of fact refugees initially flee their country of origin, this flight most of the time only represents a brief moment in their life. The reality for the majority of refugees around the world is that after having fled from their country of origin they may end up again in a situation that limits their freedom and their potential to flourish, which is commonly referred to as a Protracted Refugee Situation (PRS) or in a more extreme form as "refugee warehousing."[2]

The PRS undermines the possibility to live with dignity and respect, which is promised under all human rights treaties and conventions. Refugees are denied their agency and are often seen as an aid-dependent burden by host states. The lack of international solidarity and the increasingly hostile immigration policy of typical resettlement destination countries limit the number of resettlement spots for refugees to the degree that resettlement becomes a durable solution for refugees in name only. In most cases, voluntary repatriation is not a viable solution for refugees due to the volatile security situation, ongoing conflicts, and persecution in their country of origin. Thus, for the majority of refugees, the only possibility is to remain in a PRS.

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[1] *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137 [*Refugee Convention*] Art. 1.A(2) (According to the Refugee Convention a refugee is a person who is "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is 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; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."); *1967 Protocol Relating to the Status of Refugees*, 31 January 1967, 606 UNTS 267 [*1967 Protocol*] (the 1967 Protocol expanded the Refugee Convention which only referred to people who fled before 1 January 1951).

[2] Merrill Smith, "Warehousing refugees: A denial of rights, a waste of humanity" (2004) 38 World Refugee Survey 38 at 38.

According to UNHCR, 78 percent of refugees (15.9 million) live in a PRS at the end of 2018.[3] It is further noted that for 5.8 million refugees this situation has been lasting for more than 20 years without any solutions, which means that whole generations grew up and likely further generations will grow up in a PRS.[4]

The purpose of this thesis is to analyze the situation of people in a PRS and to introduce a framework built on the Capability Approach and legal empowerment. The Capability Approach was first introduced by the Indian economist and philosopher Amartya Sen and further developed by other scholars, most notably the American philosopher Martha Nussbaum. The Capability Approach offers an alternative approach to traditional development theories that mainly focus on economic development. Instead, it complements other human rights frameworks and explores the enhancement of human capabilities as a means of development. As noted above, people in a PRS are deprived of agency and become reliant on humanitarian aid. This thesis argues that both, refugees and the host state would benefit from an enabling environment for the refugees to build capabilities which will allow them to be an informed participant in decision making instead of being a passive recipients of piece-meal welfare support. The legal empowerment of refugees could be a suitable means to achieve this enhancement of capabilities. Legal empowerment as applied to the situation of people in a PRS is a topic that has been underexplored in academia. This thesis will be informed by Purkey's work on legal empowerment as pertaining to the situation of people in a PRS.[5] However, in order to achieve the legal empowerment of refugees, there must be

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[3] UNHCR, *Global Trends - Forced Displacement in 2018* (2019) at 22.
[4] *Ibid*.
[5] Anna Lise Purkey, *Legal Empowerment for a Dignified Life: Fiduciary duty and human rights-based capabilities in protracted refugee situations* (London: Routledge).

an enabling environment that enhances the capabilities that are necessary for legal empowerment. This thesis will explore, which capabilities are specifically necessary for legal empowerment.

The issues of refugees living in a PRS has been the subject of a number of new international documents which have the goal to include refugees in the development process: On September 19, 2016, the United Nations General Assembly (UNGA) unanimously adopted the New York Declaration for Refugees and Migrants (NYD), which called upon Member States to develop two global compacts intended to comprehensively address all issues related to refugees and migrants.[6] On 17 December 2018 the UNGA adopted the Global Compact on Refugees (GCR) and on 19 December 2018 the Global Compact for Safe, Orderly and Regular Migration (GCM), both with the clear majority of votes in favor.[7]

The GCR is divided into four parts: First, in the introduction, the current situation of refugees is stated and the GCR acknowledges that "[m]illions of refugees live in protracted situations, often in low- and middle-income countries."[8] The first part also states the guiding principles as "fundamental principles of humanity and international solidarity."[9] It further states that it is grounded in the international refugee law regime and the Charter of the United Nations.[10] The four main objectives of the GCR are: "(i) ease pressures on host countries; (ii) enhance refugee

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[6] "New York Declaration for Refugees and Migrants", online: *UNHCR* <https://www.unhcr.org/new-york-declaration-for-refugees-and-migrants.html>.

[7] "UN affirms 'historic' global compact to support world's refugees", (17 December 2018), online: *UN News* <https://news.un.org/en/story/2018/12/1028791> ("An overwhelming number of majority States, 181, voted in favor of adopting the compact, with the United States and Hungary opposing the move. The Dominican Republic, Eritrea and Libya abstained"); "General Assembly officially adopts roadmap for migrants to improve safety, ease suffering", (19 December 2018), online: *UN News* <https://news.un.org/en/story/2018/12/1028941> ("with 152 votes in favour, 12 abstentions, and five votes against, namely by the Czech Republic, Hungary, Israel, Poland, and the United States of America. An additional 24 Member States were not present to take part in the vote").

[8] *Report of the United Nations High Commissioner for Refugees - Part II Global compact on refugees,* UNGAOR, 73rd Sess, Supp No 12, UN Doc A/73/12 (Part II), para 1.

[9] *Ibid*, para 5.

[10] *Ibid*.

self-reliance; (iii) expand access to third country solutions; and (iv) support conditions in countries of origin for return in safety and dignity."[11] The second part of the GCR implements the Comprehensive Refugee Response Framework (CRRF) as an "integral part" of the GCR.[12] The content of the CRRF is stated in Annex I of the NYD and it lays out how to manage large movements of refugees comprehensively.[13] The third part of the GCR sets out a Program of Action that contains arrangements to ensure the feasibility of the objectives of the GCR.[14] The final part establishes follow-up and review procedures that will be conducted through Global Refugee Forums (GRF), annual high-level officials meetings between the forums and a High Commissioner's annual report to the UNGA.[15]

Before the GCR was adopted in 2018, the CRRF was tested in several pilot countries. One of the testing grounds for the CRRF was Kenya, which is hosting almost half a million people in a PRS. While Kenya was generally reluctant to adopt CRRF measures in its national legislation, a new settlement was created that promoted an integrated approach, benefitting both, refugees and the host community and promoted refugee self-reliance: Kalobeyei. This new settlement was created under the principles of the CRRF and serves as a suitable case study to analyze the impact of CRRF measures locally.

This thesis will progress as follows: Chapter I will outline the situation of people in a PRS and describe the PRS in Lower- and Middle-Income Countries (LMIC) highlighting the lack of voice and public participation. Chapter II will analyze the Capability framework and the concept

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[11] *Ibid*, para 7.
[12] *Ibid*, para 10.
[13] *New York Declaration for Refugees and Migrants,* GA Res 71/1, UNGAOR, 2016, UN Doc A/RES/71/1, Annex I.
[14] note 8, paras 11–100.
[15] *Ibid*, paras 101–107.

of legal empowerment pertaining to people in a PRS. The thesis will propose a list of capabilities that is deemed necessary for the legal empowerment of refugees. Chapter III will assess GCR and CRRF measures, using a capability and legal empowerment framework. Chapter IV will first provide an overview of the situation of refugees in Kenya and will go on to evaluate the approach in the Kalobeyei settlement within the proposed theoretical framework.

Overall, the thesis argues that the Kenyan case and the GCR demonstrate potential for creating an enabling environment for the capability enhancement and legal empowerment. Especially governmental platforms, such as the GRF as well as the monthly peace forums at a local level could serve as a space for participation and deliberations for refugees. However, there remain outstanding problems, such as the lack of mobility. This thesis will intend to demonstrate on a practical example how the current international refugee framework does not support the legal empowerment of refugees sufficiently. It encourages other scholars and refugees themselves to continue the debate on capabilities that are necessary for the legal empowerment of refugees.

Chapter I: The Protracted Refugee Situations in Lower- and Middle-Income Countries

I. Background

This Chapter will introduce the situation of people in a PRS in LMIC, which is a situation that affects most refugees in the world. It will specifically show the problems of 'refugee warehousing', a practice that denies agency to refugees and undermines human dignity. Most people in a PRS lack voice and the ability to ameliorate their situation.

1. *The Protracted Refugee Situation*

Many refugees have to remain in a state of limbo without any prospect of either repatriating, effectively integrating into their host state or resettling to a third state. This situation is commonly referred to as a PRS. The United Nations High Commissioner for Refugees (UNHCR) describes a PRS as follows:

> [A] protracted refugee situation is one in which refugees find themselves in a longlasting and intractable state of limbo. Their lives may not be at risk, but their basic rights and essential economic, social and psychological needs remain unfulfilled after years in exile. A refugee in this situation is often unable to break free from enforced reliance on external assistance.[16]

Generally, UNHCR would consider a period of five years or more in such a limbo as a PRS.[17] Crisp from UNHCR calls this cut-off period "admittedly a somewhat arbitrary one."[18] Furthermore, this five-year cut-off denies the reality of refugee situations that often involve fluctuating refugee populations which consists of refugees that have been in this situation for a prolonged time period and others who just fled recently.[19] The original quantitative requirement

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[16] UNHCR, *Protracted Refugee Situations*, UNHCR ExCom Standing Committee, 30th Mtg, UN Doc EC/54/SC/CRP14 (2004), para 3.

[17] UNHCR, *Conclusion on Protracted Refugee Situations*, No 109 (LXI)-2009, 22 December 2009.

[18] Jeff Crisp, "No solution in sight: the problem of protracted refugee situations in Africa" (2003) UC San Diego: Center for Comparative Immigration Studies, Footnote 4.

[19] Purkey, *supra* note 5 at 18.

that the refugee population had to exceed 25,000 persons in order to satisfy the requirement of being a refugee population in a PRS was abolished in 2009.[20] It is not the purpose of this thesis to focus on the issues regarding the definition of a PRS, rather it is about the complex legal and social situation that people in a PRS live in.

A PRS is the result of political stalemates in the country of origin and the country of asylum and the unwillingness of third countries to resettle refugees. The three durable solutions for refugees according to UNHCR are: Voluntary repatriation to the country of origin, resettlement to a third country, and integration within the host community.[21] These durable solutions, however, are not realistic in most cases: Often the situation in the country of origin remains too precarious for refugees to return, as it is the case with refugees from Afghanistan, Iraq, and Somalia.[22] This inability to return to their country of origin is then combined with the restrictive policies in their country of asylum that hinder refugees to fully integrate into the host society or to become nationals.[23] Only a tiny fraction of refugees benefit from being resettled to third countries and others are forced to accept remaining in a PRS.[24] The main obstacles to increase resettlement spaces are political opposition and financial costs.[25] Currently, the trend is that resettlement spots will likely further decrease: For example, in 2016 there were 126,291 refugees resettled to third countries while in 2018 there were only 55,680.[26] The United States, the biggest country of

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[20] James Milner, "Protracted Refugee Situations" in Elena Fiddian-Qasmiyeh et al, eds, *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford University Press, 2014) at 152.

[21] "Solutions", online: *UNHCR* <https://www.unhcr.org/solutions.html>.

[22] Milner, *supra* note 20 at 154.

[23] *Ibid*.

[24] Cathryn Costello, "Refugees and (Other) Migrants: Will the Global Compacts Ensure Safe Flight and Onward Mobility for Refugees?" (2019) 30:4 International Journal of Refugee Law 643 at 647.

[25] Randall Hansen, "The Comprehensive Refugee Response Framework: A Commentary" (2018) 31:2 Journal of Refugee Studies 131 at 137.

[26] "Resettlement Data", online: *UNHCR* <https://www.unhcr.org/resettlement-data.html>.

resettlement, only accepted 17,112 resettled refugees in 2018 as opposed to 78,761 in 2016.[27]

Considering that the US was one of the few countries to vote against the GCR and that the current

president Trump is building his political agenda on anti-migrant rhetoric, the overall number of

resettlement spots will likely diminish over the next few years .[28] While in the past moral obligation

has caused states to offer more resettlement spots, this moral obligation is not as prevalent anymore

and states use national security as a rhetorical ploy to justify restrictive immigration policies.[29]

Thus, it is the general trend, that refugees are contained within their regions of origin with limited

possibilities to return to their country of origin and facing restrictive asylum laws of their country

of asylum.

2. _Refugees in Lower- and Middle-Income Countries_

According to UNHCR a disproportionate 84 percent of refugees live in "developing

regions."[30] Rather than "developing regions" this thesis will use the term LMIC to be more precise.

The world bank uses the "Atlas method" to determine the Gross National Income (GNI) per

capita.[31] This GNI per capita is then divided into four income classes: low-income, lower-middle-

income, upper-middle-income, and high-income.[32] LMIC are all those countries that would have

a GNI per capita of $12,375 or below. The advantage of using the four global income levels is that

it moves away from the vague dichotomy of developed vs. developing or Global North vs. Global

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[27] _Ibid_.

[28] Hansen, _supra_ note 25 at 145.

[29] Alexander Betts & James Milner, "Governance of the Global Refugee Regime" (2019) CIGI at 7.

[30] UNHCR, _supra_ note 3 at 18; See generally "Developing Regions", online: _UN Statistics Division_ <https://unstats.un.org/unsd/methodology/m49/>.

[31] For a more detailed description see "The World Bank Atlas method - detailed methodology – World Bank Data Help Desk", online: _World Bank_ <https://datahelpdesk.worldbank.org/knowledgebase/articles/378832-what-is-the-world-bank-atlas-method>.

[32] Espen Beer Prydz & Divyanshi Wadhwa, "Classifying countries by income", (9 September 2019), online: _World Bank_ <http://datatopics.worldbank.org/world-development-indicators/stories/the-classification-of-countries-by-income.html> (These numbers are for the year 2018).

South.[33] The classification according to income classes is more measurable and acknowledges that countries and persons can move between different income levels.[34]

When a situation of displacement happens, most will likely be internally displaced or move to neighboring countries. According to UNHCR there are currently 41.3 million internally displaced people in the world who still live in their country of origin but had to forcibly relocate to another region.[35] The ones that are able to cross borders are normally only able to reach the closest country.[36] Thus, four out of five refugees live in countries that neighbor their country of origin.[37] In most cases there are limited onwards movement possibilities and refugees are constrained in their region of origin.[38]

II. The Protracted Refugee Situation in Lower- and Middle-Income Countries

1. *"Refugee warehousing" – a denial of rights*

The majority of people in a PRS live in a LMIC without concrete possibilities of amelioration. Due to weak governance and corruption, LMIC are countries that often have a weak institutional capacity to deliver public goods, making it difficult for them take appropriate steps to progressively realize economic, social and cultural rights even to their own population. In this context, the policy of these countries towards refugees may often be more restrictive and keeping refugees in camps may seem to be the preferred approach in order to facilitate the provision of

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[33] "Four income levels", (9 March 2018), online: *Gapminder* <https://www.gapminder.org/topics/four-income-levels/>.

[34] *Ibid*.

[35] UNHCR, *supra* note 3 at 2 (The topic of internally displaced people exceeds the purpose of this paper, but is should be noted that the number of internally displaced people is higher than the number of refugees).

[36] Meltem Ineli-Ciger, "The Global Compact on Refugees and Burden Sharing: Will the Compact Address the Normative Gap Concerning Burden Sharing?" (2019) Refugee Survey Quarterly, online: <https://doi.org/10.1093/rsq/hdz003> at 5.

[37] UNHCR, *supra* note 3 at 2.

[38] Costello, *supra* note 24 at 647.

assistance and to keep refugees in a defined location.[39] A common practice that Merrill Smith calls

the "de facto fourth and all-too-durable solution" is "refugee warehousing."[40] Smith defines the

'refugee warehousing' as follows:

> Warehousing is the practice of keeping refugees in protracted situations of restricted mobility, enforced idleness, and dependency—their lives on indefinite hold—in violation of their basic rights under the 1951 UN Refugee Convention. Egregious cases are characterized by indefinite physical confinement in camps. Encamped or not, refugees are warehoused when they are deprived of the freedom necessary to pursue normal lives.[41]

Due to the lack of other durable solutions for refugees, warehousing refugees in peripheral

areas has become a convenient solution for the time being.[42] It is common practice that refugee

camps are in areas that are isolated from the rest of the country.[43] This encampment policy has

serious consequences on the life of refugees: The camps are normally built as the response to a

temporary emergency and designed in a way that makes them easy to be dismantled once the

emergency is over.[44] The problem arises when the emergency may be over but the situation in the

country of origin remains volatile and does not permit any return. Structures that were built for

temporary usage now become the permanent home for generations of refugees.

People in a PRS are often denied basic rights that affects their daily life. The 1951 Refugee

Convention guarantees a number of rights that contracting states are supposed to grant to refugees.

Smith has identified several "Anti-Warehouse Rights."[45] Article 17 to 19 of the Refugee

Convention guarantees the right to work and should facilitate entrepreneurship and the recognition

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[39] Purkey, *supra* note 5 at 20.
[40] Smith, *supra* note 2 at 38.
[41] *Ibid.*
[42] *Ibid* at 38–39.
[43] Eric Werker, "Refugee camp economies" (2007) 20:3 Journal of Refugee Studies 461 at 471–472.
[44] Clara Lecadet, "Refugee politics: self-organized 'government'and protests in the Agamé refugee camp (2005–13)" (2016) 29:2 Journal of Refugee Studies 187 at 191.
[45] Smith, *supra* note 2 at 40–41.

of previous diplomas.[46] Article 13 and 14 grant property rights regarding moveable, immovable and intellectual property.[47] Freedom of movement and the issuance of travel documents are provided under Article 26 and 28, respectively.[48] Non-discrimination and access to courts are guaranteed under Article 3 and 16 and should ensure due process.[49] Finally, public education and public relief with the same treatment as nationals are provided through Article 22 and 23 of the Refugee Convention.[50] In reality, however, these rights are often denied in PRS.[51] With restricted freedom of movement, refugees are confined to camps and will face punishments for leaving the camps without permission.[52] Furthermore, without access to the labor market, refugees will have difficulties to engage in any meaningful economic activities.[53] There is normally also a limited or non-existing right for refugees to become citizens, thus making it even harder to ever escape from the PRS.[54] People in a PRS, therefore, often have difficulties to exercise their rights and to live a life in dignity.

These warehousing policies also lead to security concerns for refugees: Refugee camps are often in remote border areas that have a precarious security situation that makes banditry and insurgencies in these regions more common.[55] Sexual and physical violence occur more frequently in refugee camps and refugee women, children, disabled or the elderly are particularly prone to exploitation.[56] Tensions between different ethnicities within the camp and between the camp

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[46] *Refugee Convention*, *supra* note 1 Art. 17- 19.
[47] *Ibid* Art. 13- 14.
[48] *Ibid* Art. 26; 28.
[49] *Ibid* Art. 3; 16.
[50] *Ibid* Art. 22- 23.
[51] Milner, *supra* note 20 at 155.
[52] Crisp, *supra* note 18 at 9.
[53] *Ibid* at 10.
[54] *Ibid* at 9.
[55] *Ibid* at 5.
[56] Milner, *supra* note 20 at 155.

population and the host society are frequent and can cause violence and abuse.[57] The local population may target refugees, because they consider the refugees to be better off due to the humanitarian assistance, especially considering that in LMIC refugee camps are often in remote and underdeveloped.[58] This tension also leads to refugees being seen as a scapegoat whenever there are security concerns in the host country.[59]

2. *Denial of voice and participation of people in a Protracted Refugee Situation*

Besides the daily struggles and the security concerns that people in a PRS face, they are often also essentially voiceless in determining their own life. Through the constant provision of aid that is provided by humanitarian organizations in combination with restrictions on own initiatives, refugees become dependent on humanitarian assistance and lack general control over their own life.[60] This dependency leads to disempowerment and brands refugees as helpless victims or even "freeloaders."[61]

The lack of political power is an additional problem that perpetuates the imbalance of power. Refugees are a heated topic during political debates, however, refugees themselves are very limited to participate in the political process themselves. General Comment 25 of the International Covenant of Civil and Political Rights (ICCPR) expressly limits the rights to participate in political affairs, including voting and exercise of power in the three branches of power to citizens.[62] Refugees are not citizens and not able to participate in elections, but at the same time, they are

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[57] Crisp, *supra* note 18 at 14–15.
[58] Purkey, *supra* note 5 at 22.
[59] *Ibid* at 23.
[60] *Ibid* at 21.
[61] *Ibid* at 40.
[62] UN Human Rights Committee (HRC), *CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, UN Doc CCPR/C/21/Rev1/Add7 (1996).

subject to the restrictive laws that governments, which possibly run their campaign on populism and scapegoating refugees, enacted. The state or camp authorities may act under the premise that empowerment is a "zero-sum game", which means that by giving refugees more political power, their own power and authority are at risk.[63] Therefore, states often perceive refugees as a burden and policies serve the purpose to minimize refugee participation.

As a result the laws are often detrimental for refugees and there are major barriers for refugees to access the justice system of the host country: For example, the physical distance of refugee camps to legal institutions may already be an insurmountable obstacle, especially if the freedom of movement for refugees is restricted as it is often the case.[64] Refugees also may lack the knowledge regarding their rights and the judicial system of the host country, have no access to legal aid and face a language barrier, which are procedural barriers for refugees to access courts.[65] Due to fear of reprisals and discrimination during the dispute resolution process that could be biased against them, refugees may not even consult any dispute resolutions process.[66]

Political activities within refugee camps are only encouraged to a limited degree by the camp authorities, which in most cases is UNHCR: Lecadet analyzed the political representation and participation of Togolese refugees in Benin between 2005 and 2013.[67] She noted that UNHCR, who was responsible for the camp, encouraged refugees to vote for representatives and participate to a certain degree.[68] However, UNHCR envisioned the representatives to be apolitical and

[63] Purkey, *supra* note 5 at 245.
[64] Rosa Da Costa, *The administration of justice in refugee camps: A study of practice* (Geneva: UNHCR, 2006) at 27.
[65] *Ibid* at 28–30.
[66] *Ibid*.
[67] Lecadet, *supra* note 44.
[68] *Ibid* at 3–5..

primarily responsible for the unity of the refugee community for better administration.[69] When the refugees, who themselves often had experience in political activism, started to protest and to organize themselves, UNHCR became more anxious and started to oppose "extreme events" within the camp.[70] Something similar can be observed in Uganda, which is generally hailed as having progressive and inclusive refugee policies.[71] Refugees in Uganda have the right to employment, enjoy, compared to other countries, the relative freedom of movement and Uganda adopted a policy that promises refugee self-reliance and grants refugees the right to cultivate their own plot of land.[72] Yet, political engagement is explicitly prohibited and citizenship is practically impossible to attain for refugees.[73] In fact, even citizens in some democracies may be marginalized and not have the chance of meaningful participation.[74] Hence, it seems that meaningful participation of refugees, which will be defined in more detail in the next chapter, is relatively limited and apolitical even in countries that are considered to have progressive refugee policies and even citizenship does not guarantee meaningful participation.

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[69] *Ibid* at 15.

[70] *Ibid* at 8; 6; 14; 15; 16; 17.

[71] Tigranna Zakaryan & Lina Antara, *Political Participation of Refugees The Case of South Sudanese and Congolese Refugees in Uganda* (International Institute for Democracy and Electoral Assistance, 2018) at 7.

[72] *Ibid* at 10; Lucy Hovil, "Uganda's refugee policies: The history, the politics, the way forward" (2018) Rights in Exile Policy Paper International Refugee Rights Initiative at 5–6.

[73] Zakaryan & Antara, *supra* note 71 at 11–12.

[74] Joseph Markus, "What Is the Use of a Human Right to Development - Legal Pluralism, Participation, and a Tentative Rehabilitation" (2014) 3 Journal of Law and Society 367 at 372–373.

Chapter II: The Capability Approach and legal empowerment in Protracted Refugee Situations

I. The Capability Approach

In the previous chapter, the situation of people in a PRS in LMIC has been described and it is established that refugees in such a state are often disempowered and face various barriers for a life with autonomy and dignity. This chapter shall explore the Capability Approach and legal empowerment as a theoretical framework to evaluate policies that are supposed to tackle the PRS situation. This chapter will first provide an overview of the Capability Approach, then it will discuss the theories of legal empowerment with a focus on the legal empowerment of refugees. Then the chapter will introduce the capabilities for legal empowerment and discuss in detail which capabilities should be enhanced to enable the legal empowerment of refugees. Lastly, the chapter will try to respond to some potential criticism of this approach.

While some aspects of the Capability Approach can be traced back to Aristotle, Adam Smith, and Karl Marx, the Capability Approach as a distinct theoretical framework on well-being, development, and justice was developed by Amartya Sen and further explored by Martha Nussbaum.[75] It should be noted that the Capability Approach is not a single theory but more a flexible framework that can cover multiple aspects and has an open-ended character.[76] Researchers are able to develop and adopt the pluralistic approach to different circumstances and the approach acknowledges that different cultures and societies may have different goals and values.[77] Through its malleable construct, the Capability Approach can be used as a means to assess individual well-

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[75] Ingrid Robeyns, "The Capability Approach", (2016), online: *The Stanford Encyclopedia of Philosophy* <https://plato.stanford.edu/archives/win2016/entries/capability-approach/>.

[76] *Ibid*.

[77] David A Clark, *The Capability Approach: Its Development, Critiques and Recent Advances.* (Global Poverty Research Group, 2005) at 5.

being, social arrangements and it can be used for the design of policies to foster social change.[78]

This is the reason why it is a suitable framework for the purpose of analyzing the legal empowerment of people in a PRS.

1. *The concept of Capability: Freedom is at the heart*

Traditionally development has focused on economic growth. Traditional welfare politics, which either focus on income or the fulfillment of material assets, look at the poor and marginalized as passive subjects for assistance.[79] According to Sen welfarism focuses too much on wellbeing alone, which reduces human beings to experiencers and denies the fact that humans are also "judges, evaluators, and doers" or people with agency.[80] Focusing on economic indicators alone also does not capture the whole picture, since the economy does not represent the entirety of human development. As described in the previous chapter there is a similar problem relating to people in a PRS. Refugees in many cases are seen merely as a group of vulnerable people who need aid, but they are denied the possibility to participate.

The Capability Approach goes beyond the focus on economic development or welfarism and adopts a more comprehensive approach. There are several core concepts that play an important role in the Capabilities Approach: First, there are "doings and beings" that can be described as "functionings" – they represent the different states of human beings and the different activities persons can undertake.[81] For example, "beings" can represent the fact whether one is well-nourished, educated, or being part of a social network.[82] "Doings" on the other hand can represent

[78] Robeyns, *supra* note 75.
[79] Clark, *supra* note 77 at 3.
[80] David A Crocker, "Functioning and Capability: The Foundations of Sen's and Nussbaum's Development Ethic" (1992) 20:4 Political Theory 584 at 600.
[81] Amartya Sen, "Development as capability expansion" (1990) The Community Development Reader 41 at 320–321.
[82] Robeyns, *supra* note 75.

activities, such as traveling, voting, or taking part in political debates.[83] Second, "capabilities" are necessary to achieve these functionings and "reflect a person's freedom to choose between different ways of living."[84] For example, a person may not eat because of lack of food or a person may actively choose to fast although that person has the means to eat.[85] The former would represent denial of agency and capability, while the latter would represent the capability to choose to fast.[86] Although the outcome is the same – the person is not eating – there are tremendous differences between the different capabilities of these two people. The purpose of development is to expand human capabilities instead of focusing on commodities and economic growth.[87] Third, Sen often equates capabilities and "freedoms" and describes development "as a process of expanding the real freedoms that people enjoy."[88] The Capability Approach focuses on positive freedom, which means the actual ability of a person to do something, rather than merely negative freedom, which means the absence of interference by others and is the focus of traditional economics.[89] According to Sen, a major impediment for human development are "unfreedoms," which can range from the denial of access to basic necessities, such as access to health care and clear water, to systematical denial of political rights.[90] Freedom is also sometimes referred to as an enabling environment, which according to the Human Development Report is the goal of development.[91] Freedom is a

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[83] *Ibid.*

[84] Sen, *supra* note 81 at 320–321.

[85] Clark, *supra* note 77 at 4.

[86] *Ibid.*

[87] *Ibid* at 10.

[88] Amartya Sen, *Development as freedom*, 1. ed., 6th print ed (New York: Knopf, 2001) at 23; Robeyns, *supra* note 75 (It shall be noted that Sen's notion of freedom is not referring to the concept of "free market" and the limitation of market interference).

[89] Irene van Staveren & Des Gasper, "Development as freedom: contributions and shortcomings of Amartya Sen's development philosophy for feminist economics" (2002) International Institute of Social Studies of Erasmus University Rotterdam at 2–3.

[90] Sen, *supra* note 88 at 39.

[91] United Nations Development Programme, *Human Development Report 1990* (New York: Oxford University Press, 1990) at 9.

critical element for refugees to be able to escape the PRS. Fourth, freedom is closely linked to "Agency": An "agent" is "someone who acts and brings about change, and whose achievements can be judged in terms of her own values and objectives, whether or not we assess them in terms of some external criteria as well."[92] In other words, to achieve agency people need to have a certain degree of freedom or enabling environment to expand their capabilities to function.

In order to enhance capabilities, there are certain factors that must be overcome first. These conversion factors are described as "the degree in which a person can transform a resource into a functioning" or they can also be seen as a barrier before capabilities can be achieved.[93] There are three different types of conversion factors: *personal conversion factors*, *social conversion factors*, and *environmental conversion factors*.[94] *Personal conversion factors* are factors that are directly linked to the individual, such as physical conditions or intelligence.[95] *Social conversion factors* represent laws, social norms and power relations that influence the functioning of an individual.[96] *Environmental conversion factors* are factors such as climate or location.[97] Whenever a resource is distributed or policy is implemented for the purpose of increasing the capability of people, conversion factors should be an variable in the considerations.

According to Sen, there are five different types of instrumental freedoms that contribute to the overall capability of people to live the life they want, namely "political freedom, economic facilities, social opportunities, transparency guarantees, and protective security."[98] *Political*

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[92] Sen, *supra* note 88 at 44–45.
[93] Robeyns, *supra* note 75.
[94] Ingrid Robeyns, "The Capability Approach: a theoretical survey" (2005) 6:1 Journal of Human Development 93 at 99.
[95] *Ibid*.
[96] *Ibid*.
[97] *Ibid*.
[98] Sen, *supra* note 88 at 72.

freedom is the ability of the people to choose and scrutinize authorities and include civil rights.[99]

Economic facilities represent the opportunities of people to use economic resources in order to consume, produce, or exchange, with a specific focus on the "availability and access to finance."[100]

Social opportunities refer to social arrangements, such as education and health care, that improve the overall life of an individual.[101] *Transparency guarantees* are guarantees for openness and transparency in the decision-making process and the personal dealings between individuals.[102]

Protective security is necessary as a "social safety net" to ensure some of the most basic necessities, such as food.[103] None of these freedoms stand by themselves, but their interconnectedness signify that affecting one of these freedoms will affect the other freedoms as well.[104] For Sen, the expansion of these freedoms should be the main objective and means of development.[105]

2. *Identifying capabilities*

Although Sen has introduced a list of instrumental freedoms, he has not created a list of capabilities that should be increased to enhance the quality of human life.[106] As a reason for not providing a list of capabilities Sen states that such a "predetermined canonical list of capabilities" that is determined by theorists without "any general social discussion or public reasoning" would neglect the public participation on the content of such a list.[107] Sen generally supports focusing on certain capabilities to address a specific problem but opposes the idea to have one single fixed list

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[99] *Ibid* at 73.
[100] *Ibid.*
[101] *Ibid* at 74.
[102] *Ibid* at 74–75.
[103] *Ibid* at 75.
[104] *Ibid* at 75–77.
[105] *Ibid* at 94.
[106] Purkey, *supra* note 5 at 54.
[107] Amartya Sen, "Capabilities, Lists, and Public Reason: Continuing the Conversation" (2004) 10:3 Feminist Economics 77 at 77.

of capabilities that is final and cannot be amended anymore.[108] He states three reasons against a fixed list: First, capabilities are used for different functions and have to be tailored accordingly.[109] Second, the focus of certain capabilities may change over time due to development and new technologies.[110] Third, having a fixed list may deny public reasoning regarding the role and significance of certain capabilities.[111] Thus, the main reason for not having a list is to keep the conversation ongoing and the approach flexible.

Sen has been criticized for avoiding selecting and weighing capabilities and there have been attempts by other theorists to create such a list. For some critics, the Capability Approach without a coherent list of capabilities to focus on becomes vague and not operational.[112] Martha Nussbaum has been the most prominent proponent of creating a list and she has famously proposed a list herself that identifies capabilities that have "central importance in any human life."[113] This thesis will not incorporate the list by Nussbaum and therefore not discuss the central capabilities in detail.[114] She defends her proposed list by stating that is has been the center of public debate for a while and the list has been refined over the years, representing "a type of overlapping consensus" after "years of cross cultural discussion."[115] Nevertheless, her list is still being criticized: Besides Sen's arguments against developing a list of central capabilities, it was also argued that developing

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[108] *Ibid* at 78–79.
[109] *Ibid* at 79.
[110] *Ibid*.
[111] *Ibid* at 80.
[112] Clark, *supra* note 77 at 5–6.
[113] *Ibid* at 6.
[114] For a detailed description see Martha C Nussbaum, *Creating capabilities* (Harvard University Press, 2011) at 33–34.
[115] Martha C Nussbaum, *Women and human development: The capabilities approach* (Cambridge University Press, 2001) at 76.

such a central list may be paternalistic and insensible to cultural diversity.[116] Further, Nussbaum is

criticized for developing a list without having been engaged in extensive field studies herself.[117]

Without adopting a specified list of capabilities there is the remaining question on how

capabilities should be promoted and weighed in a specific situation. Sen has explained that

capabilities should be selected through a democratic process and through public reasoning but has

not gone into detail on how these processes are supposed to happen.[118] There have been attempts

by other scholars, such as Anderson, Alkire, Robeyns, and Crocker, to fill this gap.[119]

Crocker, who focuses on agency and deliberative democracy may be the most suitable for

the purposes of this thesis. According to Crocker "[o]ne is an agent when one deliberates and

decides for oneself, acts to realize one's aims, and, thereby, makes some intentional difference in

the world."[120] It is important to understand that for Crocker democracy is not merely a majority

rule which includes but is not limited to elections.[121] The "ideals" of democracy are more important

than the institutions and procedures of democracy.[122] First, democracy has intrinsic values: The

freedom to participate politically is directly associated with basic capabilities which are important

for human life and well-being.[123] This element is closely tied to the concept of agency, which

means that individuals or collectives are able to be drivers of change rather than having change

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[116] Clark, *supra* note 77 at 7.
[117] *Ibid*.
[118] Robeyns, *supra* note 75.
[119] See Elizabeth S Anderson, "What Is the Point of Equality?" (1999) 109:2 Ethics 287; Sabina Alkire, *Valuing Freedoms* (Oxford University Press, 2002); Ingrid Robeyns, "Sen's Capability Approach and gender inequality: selecting relevant capabilities" (2003) 9:2–3 Feminist Economics 61; David A Crocker, *Ethics of global development: agency, capability, and deliberative democracy* (Cambridge ; New York: Cambridge University Press, 2008).
[120] Crocker, *supra* note 119 at 298.
[121] *Ibid*.
[122] *Ibid* at 299.
[123] *Ibid* at 299–300.

imposed on them.[124] Second, democracy also has an instrumental value: governments are more

accountable to people and they are granted a voice that deserves attention.[125] Third, democracy has

constructive values: In democracies, people can exchange ideas with each other and decide on the

values and priorities that matter the most for the society.[126] This then leads to the idea of

deliberative democracies. As a definition of deliberative democracies Crocker adopts a definition

of John Rawls:

> The definitive idea for deliberative democracy is the idea of deliberation itself.
> When citizens deliberate, they exchange views and debate their supporting reasons
> concerning public political questions. They suppose that their political opinions are
> not simply a fixed outcome of their existing private or nonpolitical interests. It is at
> this point that public reason is crucial, for it characterizes such citizens' reasoning
> concerning constitutional essentials and matters of basic justice.[127]

Deliberative democracies encourage citizens to agree and disagree with policies and to

have a vivid discussion on any choices.[128] Deliberate democracies have three main principles:

"reciprocity, publicity, and accountability."[129] *Reciprocity* means that participants of the

democratic process are able to make contributions and justify those to the degree that the others

can accept in principle, which then can lead to cooperation and compromises.[130] *Publicity* requires

that the process is transparent and allows people to participate unless there are special

circumstances that require secrecy.[131] Lastly, *accountability* means that each participant of the

process is accountable to everyone who may be affected by the decisions made by the group.[132]

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[124] *Ibid* at 301.
[125] *Ibid* at 302–303.
[126] *Ibid* at 303.
[127] *Ibid* at 309; citing John Rawls, *The law of peoples: with, the idea of public reason revisited* (Harvard University Press, 1999) at 138–139 (Note: Rawls and Crocker refer to citizens, but since this thesis refers to refugees who are not citizens of their host country, it will refer to participants of the political process instead).
[128] Crocker, *supra* note 119 at 312.
[129] *Ibid*.
[130] *Ibid* at 313.
[131] *Ibid*.
[132] *Ibid* at 313–314.

Crocker identifies some of the conditions that are necessary for the deliberative democracy: First, "equal political liberty" is the basic right of people to participate in the political debate.[133] Second, "equality before the law" requires that each participant has the same fundamental constitutional right.[134] Third, "procedural fairness" must be guaranteed to allow each person the chance to participate freely in the political process. The last two conditions are also rule of law principles, which will be further discussed below.[135]

There are four steps in the process of deliberative democracy: "formulating proposals; discussing their merits; coming to an informal agreement; and converting informal agreement into official decision"[136] The formulating process represents the public act, where each participant can express a proposal that others are able to understand.[137] Then, there should be a debate regarding the proposals to identify the strength and weaknesses of each proposal.[138] Through cooperation and compromises, the group should then reach an informal agreement.[139] This informal agreement has to be transformed into an official decision, which can be done through non-objection or through voting.[140] It may seem problematic that there will eventually be a majority vote that determines the outcome. However, Crocker argues that as long as procedural fairness is guaranteed, all proposals have been discussed in-depth and there was an intention to jointly make a decision, the outcome should be acceptable for all parties.[141] Crocker offers valuable insight into the processes of agency

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[133] *Ibid* at 317–318.
[134] *Ibid* at 318.
[135] See generally: Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004).
[136] *Ibid* at 322, citing Henry S Richardson, *Democratic autonomy: public reasoning about the ends of policy* (Oxford: Oxford University Press, 2003) at 164.
[137] Crocker, *supra* note 119 at 232.
[138] *Ibid* at 323–324.
[139] *Ibid* at 325–326.
[140] *Ibid* at 326–327.
[141] *Ibid* at 328.

and deliberative democracy to determine which capabilities to focus on, which is useful in the discussion regarding refugees.

II. Capability Framework for people in a Protracted Refugee Situation

The situation of refugees, especially the ones in a PRS, can be compared to the situation of people living in poverty, which Sen sees as a deprivation of capabilities and opportunities.[142] There are in fact several similarities between people living in situations of underdevelopment and people living in a PRS. Both groups are susceptible to being affected by poverty, especially if refugees are hosted in LMIC.[143] Social exclusion is also a common occurrence for both groups and there is a lack of access to participate in the society they live in and they are likely to face discrimination.[144] Both groups are denied agency and are often excluded from the processes that affect them the most.[145] Thus, although Sen mainly referred to people living in a situation of underdevelopment and poverty, the Capability Approach can be equally applied to the situation of people in a PRS.

There is then the question regarding which capabilities matter the most for people in a PRS. Instead of adopting a list of central capabilities, it is argued here that refugees themselves should be empowered to be able to make strategic decisions about their life. This would enable them to determine which capabilities to focus on in order to improve their overall quality of life and to escape from the negative aspects of living in a PRS. It is, however, necessary that certain capabilities are recognized as inherent right by states and relevant stakeholders to the degree that refugees are enabled to participate in the processes of deliberative democracy. These capabilities shall be called the *capabilities for legal empowerment*.

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[142] Purkey, *supra* note 5 at 50.
[143] *Ibid* at 60.
[144] *Ibid* at 61.
[145] *Ibid* at 62.

1. *The role of legal empowerment*

There are several definitions of legal empowerment: One of the most authoritative may be the one of the Commission of Legal Empowerment of the Poor (CLEP), which, however, only refers to "citizens", which refugees by definition are not.[146] Instead, this thesis uses Purkey's adapted definition of legal empowerment that specifically refers to to the situation of people in a PRS:

> [T]he process through which protracted refugee populations become able to use the law and legal mechanisms and services to protect and advance their rights and to acquire greater control over their lives, as well as the actual achievement of that increased control.[147]

In Purkey's definition, four features have to be highlighted: First, similar to the rule of law, legal empowerment is "a process and a goal," through which refugees are able to advance their own rights through law and also increase the control over their own life through realizing their rights.[148] Second, legal empowerment is not only about law but it is used as a tool for refugees to gain more power.[149] Third, the focus of empowerment shall be on the individuals who need empowerment and on their capabilities.[150] Lastly, formal legal institutions must be granted that allow refugees to access the law.[151]

There is often a gap between the de jure guarantee of rights and the de facto realization of these rights for refugees, rendering them voiceless. With regard to minorities in general and

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[146] Commission on Legal Empowerment of the Poor & United Nations Development Programme, eds, *Making the law work for everyone* (New York: Commission on Legal Empowerment of the Poor: United Nations Development Programme, 2008).
[147] Anna Lise Purkey, "A Dignified Approach: Legal Empowerment and Justice for Human Rights Violations in Protracted Refugee Situations" (2013) 27:2 Journal of Refugee Studies 260 at 265.
[148] *Ibid*.
[149] *Ibid*.
[150] *Ibid*.
[151] *Ibid*.

refugees in particular, the focus has rather been on protection than legal empowerment.[152] The problem is that protection is a top-down approach that sees the protected group as a passive entity.[153] Legal empowerment, on the other hand, can be both, a top-down policy-led and a bottom-up civil society-led approach.[154]Thus, legal empowerment can be a way to increase the voice of refugees, so they are able to have meaningful participation in the deliberative democracy process.

2. *Understanding meaningful participation*

Meaningful participation should be the goal of legal empowerment. According to Markus there are two types of participation in development: "participation within," which "is the method of participation of actors within the formal processes and structure of the international legal system" and "participation without," which is about "participat[ing] in the composition of international law without using, or going through, the state or inter-state channels."[155] The former of these two categories usually involves "Special Rapporteur, UN Working Groups, and High-Level Task Forces" and most importantly states.[156] The problem is that the entities who lead the process of development are distant from the people who are the object of development.[157] This is the typical situation with refugee participation: Refugees who are the object of refugee policies have the least to say about the actual process. Thus, it is important that refugees should be enabled to 'participate without' being an actor within the formal structures of international refugee law to enhance their own capabilities. If meaningful participation of refugees in deliberative democracy is achieved,

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[152] Tove H Malloy, "National Minorities between Protection and Empowerment: Towards a Theory of Empowerment" JEMIE 11 at 12.
[153] *Ibid* at 12–13.
[154] Dan Banik, "Legal empowerment as a conceptual and operational tool in poverty eradication" (2009) 1:1 Hague Journal on the Rule of Law 117 at 130.
[155] Markus, *supra* note 74 at 370–376.
[156] *Ibid* at 377.
[157] *Ibid* at 378.

they could have more power despite not being able to vote as non-citizens. Purkey has created a

typology of participation that builds on the work of Pretty, Drydyk, and Crocker that is a suitable

framework for the purpose of this thesis:[158]

1. *Passive participation*: People participate by being told what is going to happen or has already happened. At the extreme, participants may nominally be members of decision-making groups but may not actually be present in that forum (nominal participation).
2. *Consultative participation*: People participate by providing information, being consulted and/or having their opinions listened to. No decision-making power is conceded and while decision-makers may listen to participants, they are under no obligation to do so or to take their views into account.
3. *Petitionary Participation*: People participate by petitioning authorities to make certain decisions and to do certain things (for example to remedy grievances). Participants have a right to be heard and decision-makers have a corresponding obligation to listen and consider their submissions even though the elites retain all decision-making power.
4. *Participation for material incentives*: People participate by providing resources (including labour) in return for food, money or other material incentives. Participants have little stake in prolonging the activities once the incentives end. Decision-making power is retained by elite actors.
5. *Participatory implementation (functional participation)*: Major decisions regarding goals and means are made by elite decision-makers. People participate to meet these pre-determined objectives and may have some control over the tactics employed. Involvement may include social organization that is initiated externally but may eventually become self-dependent.
6. *Bargaining*: On the basis of whatever individual or collective power they have, people participate by bargaining with elites. This form of participation is more adversarial than collaborative. Outcomes depend upon the concessions that elites are willing to make and are highly dependent upon the relative power of the different parties.
7. *Deliberative or interactive participation*: People participate in joint analysis and deliberations among themselves and with elites to forge agreements on policies that at least a majority can accept. These agreements lead to new action plans and may result in the formation of new local institutions or the strengthening of existing ones. At the "thick" or more robust end of this category, non- elite groups take control over local decisions. Participants have a stake in maintaining structures or practices.

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[158] Jules N Pretty, "Alternative systems of inquiry for a sustainable agriculture" (1994) 25:2 IDS Bull 37 at 41; Jay Drydyk, "When is development more democratic?" (2005) 6:2 Journal of Human Development 247 at 260; Crocker, *supra* note 119 at 343; Purkey, *supra* note 5 at 224.

8. *Self-mobilization*: People participate by taking initiatives independent of external institutions to change systems. This type of mobilization may or may not challenge existing inequitable distributions of wealth and power.[159]

Meaningful participation would require that refugees have a certain degree of control over their own lives and that they are involved in the decision-making process that affects them the most.[160] If refugee participation falls under the categories 1-4 it cannot be considered meaningful, their voice has little impact and they cannot be considered empowered.[161] Refugee participation that falls under category 5-8 would to a varying degree guarantee some agency to refugees and enable meaningful participation.[162] Currently, the level of participation of people in a PRS resembles more categories 1-4. The following section will analyze which capabilities for legal empowerment are necessary to reach participation of the categories 1-5.

III. Capabilities for legal empowerment

The following section proposes a list of capabilities that should be enhanced for more legal empowerment of refugees, to enable meaningful participation. This level of participation would enable refugees to decide themselves which capabilities matter to which degree. The relevant capabilities are divided between basic capabilities that must be fulfilled for humans to function and capabilities that are specifically necessary for the purpose of legal empowerment. Basic capabilities consist of human securities. Capabilities for legal empowerment are *mobility*, *knowledge*, *having a voice*, *enforcing rights*, *integration*, and *internal empowerment*.

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[159] Purkey, *supra* note 5 at 224.
[160] *Ibid* at 225.
[161] *Ibid*.
[162] *Ibid*.

1. The basic capabilities for human security

While Sen does not want to engage with a list of central capabilities, he acknowledges that several "basic capabilities" are necessary to "satisfy certain elementary and crucially important functionings up to certain levels."[163] These basic capabilities are necessary for survival and to avoid poverty.[164] It is clear that people who have difficulties to even ensure sufficient food or clean water will struggle to become legally enabled. This section will explore some of the basic capabilities that are necessary for refugees to achieve a certain degree of functioning to survive and escape poverty.

Here, basic capabilities are linked to the concept of *human security*. Human security was first introduced in the Human Development Report 1994, which expanded the concept of security beyond the nation-state and national security by focusing on people.[165] Quoting two of Franklin D. Roosevelt's "Four Freedoms," the report addresses two major components of human security: "freedom from fear and freedom from want."[166] Further, a list of seven main categories of threats to human security is introduced: "Food security", "Economic security", "Health security", "Environmental security", "Personal security", "Community security", and "Political security".[167] This list may not comprehensively capture all threats that humans face. People in a PRS may face more specific threats. Most importantly, the concept of national security can be at direct odds with the concept of human security of refugees, since refugees are often seen as a threat to national

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[163] Amartya Sen, *Inequality Reexamined* (Oxford University Press, 1995) at 45.
[164] Robeyns, *supra* note 75.
[165] United Nations Development Programme, *Human Development Report 1994* (UN, 1994) at 22.
[166] *Ibid* at 24; "FDR and the Four Freedoms Speech - FDR Presidential Library & Museum", online: *FDR Library* <https://www.fdrlibrary.org/four-freedoms>.
[167] *Ibid* at 24–25.

security.[168] Thus, one of the main security threats that refugees specifically may face is whether they will be able to seek asylum in the first place and whether that asylum is secure.[169] The following part will discuss the different aspects of human security that have to be fulfilled as a pre-condition to enable legal empowerment.

a. *Food security*

Food security requires people to have physical and economic access to food.[170] According to De Schutter, access to food can be achieved "(a) by earning incomes from employment or self-employment; (b) through social transfers; or (c) by producing their own food, for those who have access to land and other productive resources."[171] The achieved diet should "as a whole contai[n] a mix of nutrients for physical and mental growth, development and maintenance, and physical activity that are in compliance with human physiological needs at all stages throughout the life cycle and according to gender and occupation."[172] (a) would be directly related to economic security, discussed below. Chapter III will show how (b) and (c) are common among refugees. Achieving a certain degree of food security is generally a focus of the aid-based approach in a PRS and the encampment policy does normally provide people with sufficient resources to meet this vital need, although it can be argued whether this is done in a satisfactory manner.

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[168] Maria O'Sullivan, "Human Security and the Protection of Refugees in Africa" in Ademola Abass, ed, *Protecting Human Security in Africa* (Oxford University Press, 2010) 155 at 172–173.
[169] *Ibid* at 174.
[170] United Nations Development Programme, *supra* note 165 at 27.
[171] *Report of the Special Rapporteur on the right to food, Olivier De Schutter*, UNHRC, 25th Sess, UN Doc A/HRC/25/57 (2014) at 3.
[172] *Ibid*.

b. Economic security

Economic security requires one to have a stable income.[173] According to the International Committee of the Red Cross, economic security is "the ability of individuals, households or communities to cover their essential needs sustainably and with dignity."[174] For refugees, the challenge often is that the national legislation of their host country does not grant refugees the right to work or to operate businesses. Without the possibility to gain a basic income, refugees are often dependent on aid.

c. Health Security

The World Health Organization defines "[g]lobal public health security" as "the activities required to minimize the danger and impact of acute public health events that endanger the collective health of populations living across geographical regions and international boundaries."[175] Refugees often have more difficulties to attain health security: Most of the time refugees have to flee from a life-threatening situation and may have suffered from physical or mental harm. Despite the fact of being more prone to health-related problems, refugees often have difficulties to access national health coverage or high-quality health services.[176] Thus, refugee health is often a neglected topic and the aid-based approach may only provide basic services.

d. Environmental security

Environmental security refers to being safe from environmental threats.[177] The emerging climate crisis is causing increasing environmental threats, such as water scarcity, air pollution, and

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[173] United Nations Development Programme, *supra* note 165 at 25.
[174] "What is Economic Security?", (18 June 2015), online: *International Committee of the Red Cross* <https://www.icrc.org/en/document/introduction-economic-security>.
[175] "Health security", online: *WHO* <http://www.who.int/health-security/en/>.
[176] Lawrence O Gostin et al, "WHO takes action to promote the health of refugees and migrants" (2019) 393:10185 The Lancet 2016 at 2016.
[177] United Nations Development Programme, *supra* note 165 at 28.

natural disasters.[178] Refugees are often settled in remote areas that may have a harsh environment. Suitable shelter and living environment are elementary factors to guarantee adequate protection from environmental threats.

e. *Personal security*

Refugees flee for the very reason of seeking safety from persecution or war. It is important that the reason why refugees fled in the first-place ceases to be a threat for them. Being a refugee often goes hand in hand with being a minority and becoming victims of hate crimes and ethnic tensions. Thus, it is equally important that refugees are not subject to persecution and violence in the country of asylum either.

f. *Community security*

A community can be a source of safety but also a threat. While the membership in a specific group with shared values and culture can provide reassurance and protection in a foreign country, communities can also be sources of oppressive practices that are a threat to safety.[179] Therefore, it would be necessary to ensure the safety of communities and safety within the community.

g. *Political security*

Political security guarantees security from state oppression and basic human rights.[180] Since Refugees are often outside of the political process and governments often do not see themselves accountable for the rights of refugees, they are an easy target for state oppression and rights abuse. The practice of 'refugee warehousing' itself constitutes political oppression. In order to achieve basic human dignity, political security is an essential element.

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[178] *Ibid* at 29.
[179] *Ibid* at 31.
[180] *Ibid* at 32.

h. *Asylum security*

The ability to claim asylum is a specific human security for asylum seekers and refugees. Blocking asylum seekers from crossing the border or engaging in involuntary repatriation would be major threats to asylum security. Refugees and asylum seekers are often in a precarious situation, which constitutes a threat that other citizens do not face. Without asylum security refugees and asylum seekers would constantly have to live in fear and the basis for legal empowerment would not be given.

Many of the securities mentioned here are interrelated and a threat in any of these aspects can affect all other securities as well. This list of securities that should be fulfilled is not a complete list and depending on the specific situation there may be other threats. Yet, a guarantee of these basic securities should give refugees the safety net that could serve as a basis for legal empowerment. The human security concept could be transposed on the Capability framework.

2. *The capabilities for legal empowerment*

After it is established that these basic capabilities are sufficiently met so that a certain level of functioning is possible, further capabilities can be considered. The next step would be to consider the capabilities that are necessary for the legal empowerment of people in a PRS:

a. *Mobility*

Mobility is a main capability for legal empowerment of refugees, yet it is often the most limited capability. Human history has been a history of migration and according to Crépeau "mobility is part of the DNA of our species."[181] For refugees migration is often a tool to remove

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[181] François Crépeau, "Towards a Mobile and Diverse World: 'Facilitating Mobility' as a Central Objective of the Global Compact on Migration" (2018) 30:4 International Journal of Refugee Law 650 at 650.

major sources of unfreedom, such as persecution or war.[182] While this migration is an expansion of freedom at first, the situation changes when refugees arrive in their host state and wind up in a PRS and are warehoused, a situation where mobility is dramatically limited. However, mobility is an important requirement for legal empowerment: If refugees are required to stay in their camp there is a barrier to access the formal justice system of the country and decreasing the initiative to bring matters of injustice to the courts.[183] Since refugee camps are often remote, refugees would have difficulties to convey information regarding their situation to other stakeholders, such as the government, NGOs or international organizations.[184] This remoteness also makes advocacy and campaigning more difficult although modern media may alleviate this problem. The lack of mobility in combination with the remoteness of camps makes it more difficult for refugees to integrate into the host society and makes them more dependent on aid. Mobility constitutes the basis for other capabilities for legal empowerment.

b. *Knowledge and access to information*

Knowledge and access to information are important capabilities that foster the legal empowerment of refugees and can be achieved through education. Knowledge can be seen as an instrument of power and legal empowerment is "closely linked with the transfer of knowledge", since refugees need to know their rights and the applicable laws first in order to achieve legal empowerment and meaningful participation.[185] Education is an essential element to enhance knowledge. While the focus of the aid-based approach is often on elementary education, it is more the secondary and tertiary education that provides refugees with information regarding their rights

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[182] Sabrina Juran, "International migration seen through the lens of Amartya Sen's capability approach" (2016) VI:2 Migration Policy Practice 24 at 25.
[183] Purkey, *supra* note 5 at 164.
[184] Da Costa, *supra* note 64 at 6.
[185] Purkey, *supra* note 5 at 169.

and the laws. Ideally, refugees should be able to become so-called refugee paralegals that can assist the legal empowerment of their peers and can directly deal with legal matters themselves.[186] Community paralegals have been effective actors of legal empowerment in the past since paralegals, who come themselves from the community they are serving, have a much closer relationship with the local community and are better aware of problems and suitable solutions.[187] Through the effective transfer of knowledge and the right training, refugees will be better equipped to take legal matters into their own hands and to demand the rights they are owed.

c. *Having a voice*

Having a voice in the decision-making process is necessary for refugees to become involved in policy-making that affects themselves the most. Refugees are subject to various decision-making processes from the moment they have their refugee status determination (RSD) or on a larger level when the government creates policies regarding refugees. But as stated above, refugee participation is often only passive and in categories 1-4 in the typology above. The goal, thus, is to increase the participation of refugees in the categories 5-8. There are several possibilities to do that:

First, refugees should be able to contribute to the RSD process. The RSD process is "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."[188] It is a vital part of the legal empowerment process since it is the part where it is decided

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[186] Tshimankinda Christian Musenga, "Refugee paralegals | Forced Migration Review", online: *Forced Migration Review* <https://www.fmreview.org/economies/musenga>.
[187] See Vivek Maru, "How to put the power of law in people's hands", (August 2017), online (video): *TEDGlobal* <https://www.ted.com/talks/vivek_maru_how_to_put_the_power_of_law_in_people_s_hands/transcript?referrer=playlist-an_introduction_to_ted_talks#t-223566>.
[188] "Refugee Status Determination", online: *UNHCR* <https://www.unhcr.org/refugee-status-determination.html>.

whether a person qualifies as a refugee in the first place. States and the UNHCR are likely not willing to integrate refugees in the actual RSD process, but it is possible to include refugees in consultative functions. For example, during the RSD country of origin information is essential for decision-makers to determine whether the testimony of the asylum seeker is sound and whether that person indeed qualifies as a refugee.[189] If the information of the decision-maker is outdated or not accurate, this could be detrimental to the fairness of the whole procedure. Refugees should have the ability to be consulted regarding the country of origin information and verify whether the information is accurate.

Second, should have access to the justice system of the host country. This can be done through the provision of transport to the courts, translation, and interpretation into the language of the refugees, and having mobile courts that can be set closer to refugee settlements.[190] Further, often unofficial refugee dispute resolution systems play an important role to resolve disputes within the camps.[191] These proceedings could be integrated into the justice system of the host country and the rule of law should be introduced to these unofficial processes as well.

Third, refugees should have access to the political process. Despite not being able to participate in elections as non-citizens, refugees can still be part of the deliberate democratic process. Refugee representatives should have meaningful participation during this decision-making process, by contributing with ideas and suggestions in the decision-making process that affects the lives of refugees. Through a fair and transparent process, suggestions of refugees should be discussed and receive a response from other stakeholders. Refugees who are willing to

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[189] Guy S Goodwin-Gill & Jane McAdam, *The refugee in international law*, 3rd ed (Oxford ; New York: Oxford University Press, 2007) at 545–546.
[190] Purkey, *supra* note 5 at 171.
[191] Da Costa, *supra* note 64 at 37–38.

contribute to this deliberative democratic process should also be compensated for their services.[192]

Just as members of parliaments or employees of NGOs, refugees should not be forces to sacrifice

valuable time that could have been used for their own benefit without any compensation.

d. Realizing rights

There is a close relationship between capabilities and rights, especially with regards to legal

empowerment. International and national laws guarantee refugees rights, which in reality are often

derogated from due to security concerns. One essential capability to enhance the legal

empowerment of refugees would be the ability to enforce rights that are already granted. In order

to do so, the rule of law is an important basis. The World Bank defines the rule of law as follows:

> While defined in various ways, the rule of law prevails where (i) the government
> itself is bound by the law, (ii) every person in society is treated equally under the
> law, (iii) the human dignity of each individual is recognized and protected by law,
> and (iv) justice is accessible to all.[193]

While the sole focus on rule of law and protection would be a top-down approach and does

not guarantee legal empowerment by itself, rule of law is nevertheless an important basis to

guarantee that refugees can access justice and the decision-making process.[194] Therefore, the

"existence of adequate formal legal institutions" and the access thereof are essential for refugees

to be able to enforce their own rights.[195] The rights of refugees should not only exist on the paper

but should be respected by the host country and enforceable when needed. This would also require

trust in the local system and the rule of law.

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[192] Purkey, *supra* note 5 at 233.
[193] *Legal and Judicial Reform: Observations, Experiences, and Approach of the Legal Vice Presidency*
(Washington, D.C: World Bank, 2002) at 1; See also: Jacques-Yvan Morin, *L'état de droit émergence d'un principe du droit international* (The Hague [etc.]: M. Nijhoff, 1996) (In international law, the "Rule of Law" is essentially defined as the capacity for an individual to contest decisions affecting their rights and interests).
[194] Banik, *supra* note 154 at 127–128; Purkey, *supra* note 147 at 265–266.
[195] Purkey, *supra* note 147 at 265.

e. Integration

Integration into the host state is a durable solution for refugees and is also important for legal empowerment. The encampment policy has created parallel societies for refugees and the host society. This has caused tension between host societies and refugee communities who see each other as competitors for employment and resources. Being able to integrate into the society would decrease this tension, which in return could lead to less hostile policies by the host country. Integration is paramount in order to achieve meaningful participation of refugees within the host community and can be helpful to decrease the inherent power imbalance against refugees.

f. Internal empowerment

The legal empowerment of minorities within the refugee community should not be neglected. It may be convenient to imagine refugees as one homogenous mass that can be represented by a few representatives. This would, however, seriously diminish the agency of minorities within the refugee community. It is not the goal to promote a 'refugee elite' that can determine matters on behalf of the others but to also achieve legal empowerment of groups within the refugee community that may "face a double burden of oppression."[196] A gendered approach is necessary to ensure that all genders are equally represented in the decision-making process. Similarly, there are different ethnic groups within the refugee population, and it would be problematic if one minority group becomes marginalized. Therefore, legal empowerment can only happen if the human rights of individuals are guaranteed against the oppression of a majority.

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[196] Purkey, *supra* note 5 at 254.

3. Potential criticism and response

This section will first deal with existing criticism of the Capability Approach in general and then with potential criticism of the approach of creating a list of capabilities for legal empowerment.

a. Criticism of the Capability Approach

Sugden criticizes that the "collective decisions […] override some individuals' actual desires about how to live their own lives."[197] Depending on the interpretation of the Capability Approach, this would be a valid criticism. If the Capability Approach is applied to a whole society and this democratic method is used to determine which capabilities matter, some people may be overruled by the majority, which is a problem of majoritarian democracy in general. However, contemporary complex democracies rest on a triptych: political representation (majority rule), human rights (guarantees for individuals), and rule of law (access to justice by individuals and groups against majority decisions or other stakeholders violating their rights). All three pillars are essential, and interpretation must lead to implementing all pillars simultaneously. Some majority decisions will be ruled legitimate if they respect the criteria of importance and proportionality. Some will be deemed illegitimate. Finding this equilibrium should be the role of the courts and other conflict resolution mechanisms. Further, it is argued here that Sugden's criticism would not be applicable in this specific situation. The Capability Approach acts as a framework to enable refugees to escape the difficulties of being in a PRS. Refugees are already often marginalized and not part of the democratic process in the first place. Thus, this thesis argues that through enhancing

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[197] Robert Sugden, "What We Desire, What We Have Reason to Desire, Whatever We Might Desire: Mill and Sen on the Value of Opportunity" (2006) 18:1 Utilitas 33 at 41.

capabilities for legal empowerment refugees can become more resilient and expand their own freedom.

Another Critique stems from Dean, who argues that the concept of the Capability Approach is constrained due to its focus on individualism and neglects the fact that humans are dependent on other humans and "hegemonic controls over their participation in the public realm."[198] Again, this is a valid criticism of the focus on individualism in general if this focus happens without consideration of the larger society and power relations. It should be noted that Sen himself has referred to conversion factors. The issues described by Dean are related to social conversion factors.[199] In relation to the proposal of this thesis to introduce capabilities for the legal empowerment of refugees, overcoming these social conversion factors is an inherent goal of legal empowerment. The fact that refugees are not free from hegemonic controls and are dependent on other humans is the exact reason why legal empowerment is needed.

b. *Potential criticism of capabilities for legal empowerment*

Similarly, to Nussbaum's approach, it bears risk to focus on a list of capabilities. The list of capabilities this thesis introduced may be branded as patronizing and not sufficiently backed by field research. While it is conceded that these are valid reasons of concern, there are some significant differences to Nussbaum's list: First, the introduced list is not supposed to be universal. It is supposed to deal with the specific problems of people in a PRS, who have difficulties to make their voices heard. Second, it is not supposed to be a complete list of central capabilities but a list that could enable refugees to be in the position of deciding themselves which capabilities matter

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[198] Hartley Dean, "Critiquing capabilities: The distractions of a beguiling concept" (2009) 29:2 Critical Social Policy 261 at 266.
[199] Robeyns, *supra* note 94 at 99.

the most for them. The idea is to give refugees a voice and to enable them to have meaningful participation. Third, this list is not supposed to be a final list, it is intended to be a starting point to encourage further discussion on which capabilities are necessary for legal empowerment. There has been a lacuna regarding the scholarship on the legal empowerment of refugees and more research is necessary.

Another potential criticism could be related to the fact that refugees are in a weak bargaining position and host states are not easily willing to grant refugees more rights. Legal empowerment works both ways: bottom-up, where civil society plays an important role and top-down, especially if the power imbalance is as evident as with people in a PRS. It could then be argued that states or in some cases the UNHCR have little incentives to allow such top-down legal enablement to happen. The next chapter, however, shall show that the policies of UNHCR and some CRRF piloting states are changing and there is an increasing focus on refugee self-reliance. Thus, it is argued here that states are already pursuing a policy of refugee enablement. The next chapter will analyze from the perspective of the Capability Approach, whether these undertakings have been successful and what is needed to truly foster the legal empowerment of refugees.

Chapter III: The potential of the Global Compact on Refugees in promoting the legal empowerment of refugees

This chapter will determine whether the GCR has added anything to the international refugee protection regime that enhances capabilities of legal empowerment. It will first explore the status of the GCR and its potential role as a soft law instrument. Then it will analyze whether the GCR was able to realize its main objectives of strengthening refugee self-reliance, support for the host country, and international solidarity.

I. The soft law character of the Global Compact on Refugees

1. *The Global Compact on Refugees could be influential as a soft law instrument*

First, the status of the GCR must be established in order to determine whether it has the potential to bring any change. Gammeltoft-Hansen describes a compact as a "bundling of different deals or agreements across actors and issues."[200] He further states:

> Common to the compacts above is their focus on multi-stakeholder involvement, best practice, and issue linkage as a means to ensure cooperation and accountability in areas where direct reciprocity and more formal institutionalization are difficult to achieve.[201]

It is important to note that the GCR is not legally binding, but focuses on political and practical cooperation, where contributions are voluntary.[202] The GCR has been widely criticized for not being legally binding and James C. Hathaway described it as a "bureaucrat's dream" that "is all about process."[203] However, especially in the realm of human rights law, it is often difficult to fit certain norms into treaties or conventions, since they often lack clarity and certainty.[204] Instead, those norms can be treated as so-called "soft law".[205]

There is no commonly agreed definition of the term "soft law".[206] The OECD defines soft law as: "Co-operation based on instruments that are not legally binding, or whose binding force is somewhat 'weaker' than that of traditional law, such as codes of conduct, guidelines, roadmaps,

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[200] Thomas Gammeltoft-Hansen, "The Normative Impact of the Global Compact on Refugees" (2019) International Journal of Refugee Law, online: <https://academic.oup.com/ijrl/advance-article/doi/10.1093/ijrl/eey061/5310459> at 2.
[201] *Ibid*.
[202] note 8, para 4.
[203] James C Hathaway, "The Global Cop-Out on Refugees" (2019) 30:4 International Journal of Refugee Law 591 at 594.
[204] Michèle Olivier, "The relevance of 'soft law' as a source of international human rights" (2002) 35:3 Comp Int Law J South Afr 289 at 290–291.
[205] *Ibid* at 294.
[206] Ineli-Ciger, *supra* note 36 at 16.

peer reviews." [207] Boyle refers to soft law as "non-legally binding instruments used in contemporary international relations by states and international organisations."[208] Guzman and Meyer define it as: "nonbinding rules or instruments that interpret or inform our understanding of binding legal rules or represent promises that in turn create expectations about future conduct."[209] Examples for soft laws are international declarations, UNGA instruments, codes of conducts or guidelines of international organizations.[210] Soft law may not satisfy the requirement to be fully recognized as established rules of international law, nevertheless, they should still be taken seriously.[211]

While the lack of clarity and bindingness make soft law weaker instruments than "hard law", soft laws have advantages that make them appealing instruments in the realm of human rights law and refugee law. First, in today's political climate it would be difficult to achieve international consensus to create a new convention or an additional protocol to the Refugee Convention. The increasing anti-migration stance of many countries would make such an undertaking unlikely to achieve.[212] As Abbott and Snidal put it: "States, jealous of their sovereign autonomy, are reluctant to limit it through legalized commitments." [213] Since immigration and border control is a particularly sensitive topic regarding sovereign autonomy of states, it is unlikely that states would

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[207] "Soft law - OECD", online: <https://www.oecd.org/gov/regulatory-policy/irc10.htm>.

[208] Alan Boyle, "Soft Law in International Law-Making" in Malcolm Evans, ed, *International Law* (Oxford University Press, 2014) 118 at 119–120.

[209] Andrew T Guzman & Timothy L Meyer, "International soft law" (2010) 2:1 Journal of Legal Analysis 171 at 174.

[210] Boyle, *supra* note 208 at 120.

[211] Olivier, *supra* note 204 at 294.

[212] See: "World Report 2019: Rights Trends in European Union", (2019), online: *Human Rights Watch* <https://www.hrw.org/world-report/2019/country-chapters/european-union>; Abigail Abrams, "Trump Wants to Dramatically Limit People Seeking Asylum", (12 June 2019), online: *Time* <https://time.com/5604991/donald-trump-migrants-asylum/>; Antony Loewenstein, "Australia's Brutal Refugee Policy Is Inspiring the Far Right in the EU and Beyond", (29 June 2018), online: <https://www.thenation.com/article/australias-brutal-refugee-policy-inspiring-far-right-eu-beyond/>.

[213] Kenneth W Abbott & Duncan Snidal, "Hard and Soft Law in International Governance" (2000) 54:3 International Organization 421 at 435.

adopt a binding agreement that would limit their own sovereignty. Soft law can occupy the space

that the lack of a binding agreement creates, since states are more likely to agree on it.[214] During

times of anti-immigration and anti-refugee populism the very existence of the GCR and the GCM

and the declaration of states to remain "committed to promoting and protecting the rights of

refugees" can already be hailed as a success.[215] Put simply, it is better to have a legally non-binding

agreement that the majority of states agree on than to have a legally binding agreement that only

very few states take part in.

Second, soft law tends to be more flexible. Not being legally bound by strict rules it offers

states the flexibility to continue negotiating and deepening commitments whenever it is

necessary.[216] States can also more easily adapt soft law principles to a specific situation in their

own country.[217] The flexibility of soft law facilitates the engagement of more stakeholders than

hard international law, which is mainly concerned with states, thus the private sector, international

organizations and NGOs can be integrated.[218] The GCR envisages new, creative programs such as

the Canadian style private sponsorship program that enables private sponsors to be involved in the

support of the resettlement of refugees.[219] The GCR adopts a "multistakeholder approach" that will

directly "include refugees and members of host communities" into the consultation process.[220] In

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[214] Ineli-Ciger, *supra* note 36 at 16.
[215] Rouba Al-Salem, "The Global Compact on Refugees: A Cause for Celebration or a Missed Opportunity?", (15 April 2019), online: *McGill Centre for Human Rights & Legal Pluralism*
<https://www.mcgill.ca/humanrights/article/70th-anniversary-universal-declaration-human-rights/global-compact-refugees-celebration-or-missed-opportunity>.
[216] Abbott & Snidal, *supra* note 213 at 443.
[217] *Ibid* at 445.
[218] Gammeltoft-Hansen, *supra* note 200 at 3.
[219] Ineli-Ciger, *supra* note 36 at 9; "Sponsorship Agreement Holders — Sponsor a refugee", (1 May 2019), online: *Government of Canada* <https://www.canada.ca/en/immigration-refugees-citizenship/services/refugees/help-outside-canada/private-sponsorship-program/agreement-holders.html> ("Most Sponsorship Agreement Holders are religious, ethnic, community, or humanitarian organizations.").
[220] note 8, paras 33–34.

order to keep the debate going and this flexibility as a strength, effective soft law documents should have regular conferences and review sessions, where the changing circumstances and uncertainties can be addressed.[221] The GCR prescribes a periodic GRF and mid-term review with "high-level officials' meetings."[222] These GRF and other meetings could be used to ensure the continuation of discussing uncertainties and new refugee situations. Regarding the participation refugees, this approach may be preferable to a one-time event where states adopt a new convention without consulting any refugees.

Third, soft law can reaffirm, strengthen and expand existing international obligations. Soft law can strengthen the enforcement system of hard international law by referring to it and by "pushing the interpretation of existing obligations under international refugee law."[223] While the GCM derives from a very rudimentary international migration law, the GCR was nested in the well-established realm of international refugee law and further reaffirms regional refugee law and human rights instruments, as well as international humanitarian law.[224] Countries that are not a signatory of the Refugee Convention or its 1967 Protocol have now taken a first step towards an international refugee law framework by signing the GCR.[225]

Fourth, soft law has a normative force. In liberal human rights theory, this norm-setting role of soft law is interpreted as stimulating subsequent crystallization of legal principles.[226] A parallel can be drawn to the 1984 Cartagena Declaration on Refugees.[227] It started as a non-binding

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[221] Abbott & Snidal, *supra* note 213 at 443.
[222] note 8, paras 17–19.
[223] Gammeltoft-Hansen, *supra* note 200 at 1.
[224] *Ibid* at 3.
[225] *Ibid* at 6.
[226] *Ibid* at 5.
[227] *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, 22 November 1984, online: www.unhcr.org/refworld/docid/3ae6b36ec.html.

soft law document that expanded the refugee definition to include among others "victims of generalized violence." [228] The Cartagena Declaration has been implemented in the national legislation of fifteen states in the Americas and was also referred to by the Inter-American Court of Human Rights.[229] Similarly, the CRRF has already been implemented in fifteen countries in Africa, the Americas, and Afghanistan.[230] For example, the CRRF inspired the Nairobi Declaration on Somali Refugees, the Djibouti Declaration on Refugee Education, the Comprehensive Regional Protection and Solutions Framework in the Americas, and was adopted by the Afghan government.[231] Thus, despite being not legally binding per se, the CRRF has already influenced the creation of regional agreements and legally binding national legislation.

In the realm of international law soft law can sometimes be more effective than hard law: While hard law, such as treaties or conventions, can often be violated without having to fear significant punishments, well-drafted soft law documents can have the normative force that leads to the adoption of binding legal documents. Thus, although it is clear from the wording in the GCR that it is not legally binding, it can still make a significant contribution as a soft law instrument.[232]

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[228] Diego Acosta & Monica Oehler, "The Global Compact for Refugees as a Soft Law Instrument: Lessons from the application of the Cartagena Declaration on Refugees in Mexico", (1 March 2019), online: *Refugee Law Initiative Blog* <https://rli.blogs.sas.ac.uk/2019/03/01/the-global-compact-for-refugees-as-a-soft-law-instrument-lessons-from-the-application-of-the-cartagena-declaration-on-refugees-in-mexico/>.
[229] *Ibid*.
[230] "Global CRRF Poster September 2018", (September 2018), online: *UNHCR* <https://www.unhcr.org/events/conferences/5b993d424/global-crrf-poster-september-2018.html> (namely in Chad, Djibouti, Ethiopia, Kenya, Rwanda, Uganda, Zambia, Belize, Costa Rica, Guatemala, Honduras, Mexico, Panama and Afghanistan).
[231] *Nairobi Declaration on Durable Solutions for Somali Refugees and Reintegration of Returnees in Somalia*, 25 March 2017; *Djibouti Declaration on Regional Conference on Refugee Education in IGAD Member States* (2017); *San Pedro Sula Declaration*, 26 October 2017, online: https://www.acnur.org/5b58d75a4.pdf; "Afghanistan", online: *Global CRRF* <http://www.globalcrrf.org/crrf_country/afghanistan/>.
[232] note 8, para 4.

2. *How the Global Compact on Refugees does not fully translate as a soft law instrument and may actually weaken the protection of refugees*

While it is established that the GCR is a soft law document and that soft law documents in the realm of human rights and refugee law can play an important role, it is an entirely different debate whether the GCR is indeed successful as a soft law document.

It is argued that the GCR is too vague to be effective as a soft law instrument. In order to be successful as a soft law instrument, it would have been important to spell out some clear guidance and obligations for states that can be followed. According to Hathaway, the GCR should have been drafted "clearly and firmly to show how a dependable, managed model of sharing could meet the needs of all."[233] Instead, the GCR has a very cautious approach and avoids any clear obligations for states.[234]

The GCR could even worsen the status quo of international refugee law in some aspects. According to Chimni, the GCR even "dilutes established principles of international refugee law."[235] It seems that the GCR caters to the underlying goal of keeping asylum seekers out and that the focus is on controlling the flow of refugees rather than having clear humanitarian objectives.[236] It is furthermore worrying that the principle of voluntary repatriation seems to be undermined. In Paragraph 87 of the GCR, it is stated that "[i]t is recognized that voluntary repatriation is not necessarily conditioned on the accomplishment of political solutions in the country of origin, in order not to impede the exercise of the right of refugees to return to their own country".[237] Not

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[233] Hathaway, *supra* note 203 at 596.
[234] Ineli-Ciger, *supra* note 36 at 17.
[235] B S Chimni, "Global Compact on Refugees: One Step Forward, Two Steps Back" (2019) 30:4 International Journal of Refugee Law 630 at 630.
[236] *Ibid* at 631.
[237] note 8, para 87.

linking the return to a political solution can mean that refugees are returned while conditions in their country of origin are still volatile.[238] While the original draft included references to the principles of non-refoulement, this crucial element was deleted in the final GCR.[239] Thus, states may justify their restrictive practices by referring to sections of the GCR that speak in their favor, while neglecting the international refugee law regime.[240] Overall, it can be said that a soft law instrument that is too uncertain about obligations and gives too much flexibility to states to interpret the clauses in their own favor, risks softening previous binding international law.

This could be a major setback for the legal empowerment efforts of refugees. If established rights and principles become watered down by the GCR, refugees will have more difficulties to realize their rights. Without the capability to enforce their own rights, refugees are more likely to be put in a PRS, with a clear limitation of their rights. It is, however, possible to address this issue through future additions. Ineli-Ciger suggests that some of the insufficiencies of the GCR can be strengthened subsequently through an additional annex that can be agreed on during the next GRF.[241] Thus, it is not too late to still make the obligations and guidelines of the GCR clearer and more forceful. The GRF could be a useful venue for these purposes. It is important, however that refugees achieve meaningful participation during this process.

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[238] Chimni, *supra* note 235 at 631.
[239] *Ibid*.
[240] *Ibid* at 634.
[241] Ineli-Ciger, *supra* note 36 at 18.

II. Are people in a Protracted Refugee Situation benefitting from the Global Compact on Refugees?

The next question would be whether the GCR could be suitable to "enhance refugee self-reliance" as it promises.[242] Self-reliance will be assessed through the theoretical framework developed in Chapter II.

1. *Failing to enhance mobility on an international level*

The 1951 Refugee Convention has one major flaw: it does not specify how responsibility should be shared among states regarding the protection of refugees.[243] While originally the Refugee Convention was supposed to include an article about equitable responsibility-sharing, this article was dropped in the final version of the refugee convention and instead it was moved to the preamble.[244] There it is recognized that asylum "may place unduly heavy burdens on certain countries" and that "international co-operation" is necessary to overcome this.[245] However, the language is vague and the provision is not binding on the signatories. Therefore, the lack of a provision regarding international solidarity leaves one of the main protection gaps in the international refugee law protection regime.[246] According to António Guterres, "if there is one Protocol that is yet to be drafted to complement the 1951 Convention, it is one on international solidarity and burden-sharing."[247]

As stated in Chapter I, people living in a PRS is partially the result of lack of international solidarity and lack of resettlement spots. Currently, most refugees are hosted by countries that are

[242] note 8, para 7.
[243] Hathaway, *supra* note 203 at 591.
[244] Ineli-Ciger, *supra* note 36 at 6.
[245] *Refugee Convention*, *supra* note 1 Preamble.
[246] Ineli-Ciger, *supra* note 36 at 3.
[247] *Ibid* at 14.

neighboring countries of origins of refugees and the responsibility they carry is disproportionate.[248] Apart from hosting refugees, there is also a disproportionate financial contribution: in 2017 only 10 states financed 93 percent of UNHCR's budget and three states were resettling destinations for 90 percent of resettled refugees.[249] Under the current system only less than one percent of refugees every year are resettled.[250] It becomes clear from these numbers that international solidarity is one of the main issues that need to be addressed in the realm of international refugee law.

Since mobility is one of the capabilities that are particularly important for refugees, resettlement would have been an important way to expand the mobility of refugees. The GCR was a great opportunity to close this gap at least normatively but failed to do so. The GCR restates the provision in the preamble in paragraph 2 and in paragraph 3 that the GCR "intends to provide basis for predictable and equitable burden- and responsibility-sharing."[251] However, the GCR failed to address some of the problems of the previous system, which leaves the incentives for solidarity still rather weak.

While resettlement is considered one of the "durable solutions" by UNHCR, the GCR does not address the problematic status quo of resettlement.[252] There is still the assumption that there is a clear distinction between flight and onward movement, which encourages richer countries to enter into agreements with poorer countries of first arrival to contain refugees there and hinder them from moving further.[253] The lack of resettlement spots cause the continuation of PRS.[254] The

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[248] *Ibid* at 5.
[249] *Ibid* at 7.
[250] Hathaway, *supra* note 203 at 593.
[251] note 8, para 3.
[252] *Ibid*, para 85.
[253] Costello, *supra* note 24 at 647.
[254] *Ibid*.

GCR has not offered any solution to overcome these main obstacles in a feasible way, nor has it introduced any formal mechanism to increase responsibility-sharing or to support host states.[255]

Further, the GCR has not addressed the ever-increasing arsenal to fight undesirable migration, such as border control cooperation at sea and on land, the sharing of databases containing nominal information about migrants, the funding of repressive apparatuses in transit countries or countries of origin to prevent unauthorized border crossings, the training of border and coast guards, the procuring of material assets (speedboats, computers, satellite access...), which all contribute to making it impossible for refugees to find a safe haven. Another problematic issue is the sanctioning of carriers if they carry undocumented travelers. For example, the EU imposes sanctions on airline companies if they carry passengers without valid travel documents and further carriers are required to return those passengers on their own cost.[256] The directive specifies that it is not intended to be applied to refugees.[257] However, the determination whether somebody would satisfy being a potential asylum seeker or not relies entirely on the decision of the inadequately prepared airline personnel.[258] Because of the costly consequences of being sanctioned, most airlines would require travel documents before allowing a passenger to board.[259] These policies cause a surge in numbers of people who resort to smugglers and other dangerous irregular migration channels, where they are forced to pay a high sum and to risk their lives.[260] Carrier sanctions have been criticized for violating human rights and being "a form of unjustifiable

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[255] T Alexander Aleinikoff, "The Unfinished Work of the Global Compact on Refugees" (2018) International Journal of Refugee Law, online: <https://academic.oup.com/ijrl/advance-article/doi/10.1093/ijrl/eey057/5258096> at 2.
[256] Council of Europe, "Directive 2001/51/EC supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985" (2001) 187 OJ L 45.
[257] *Ibid* at 45.
[258] Jascha Galaski, "Ever Wondered Why Refugees Don't Take the Plane?", (10 December 2018), online: *Liberties.eu* <https://www.liberties.eu/en/news/why-refugees-do-not-take-the-plane/16529>.
[259] *Ibid*.
[260] *Ibid*.

coercion." [261] Although UNHCR has provided their reservation regarding restrictive visa requirements and carrier sanctions, this topic was not addressed at all in the GCR.[262] Instead, the NYD has the goal to "vigorously combat human trafficking and migrant smuggling with a view to their elimination."[263] If regular routes of migration keep being barred, refugees will either stay in protracted situations in LMIC or have to embark on the perilous journey with smugglers.

These failures to act show that at least on an international level, not much has been done to address the issue of lack of mobility for people in a PRS. From the perspective of the Capability Approach migration is a way to "expand people's freedoms."[264] For refugees the initial migration, although often done involuntarily, is a crucial part of their lives. In order to escape the difficulties of a PRS onward movement is often the only solution but the GCR has offered little support in this regard. On the contrary, it seems that the GCR has been used to keep refugees in their region of origin, taking away any agency and restricting their legal empowerment.

While the GCR has not managed to contribute to the guarantee of more mobility on an international level, the GCM might be a better place to look for the facilitation of mobility. According to Crépeau "facilitating mobility" plays a paramount role in the GCM.[265] The problem remains, however, that since the GCM is not legally binding either, the facilitation of mobility remains under the discretion of the destination countries. Due the nationalist populist agenda of many countries, it seems unlikely that facilitating mobility, especially of refugees, would be a

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[261] Theodore Baird, "Carrier Sanctions in Europe: A Comparison of Trends in 10 Countries" (2017) 19:3 European Journal of Migration and Law 307 at 310.
[262] UNHCR, *UNHCR Position: Visa Requirements and Carrier Sanctions* (1995).
[263] note 13, para 35.
[264] Juran, *supra* note 182 at 25.
[265] Crépeau, *supra* note 181 at 651–652.

priority of many destination countries.[266] Nevertheless, the GCM could serve as the normative

foundation for future endeavors of responsibility sharing measures that the GCR failed to be.

2. *Global Refugee Forums – the chance for refugees to participate on an international level*

Although overall, there was a failure to improve the international solidarity, the GCR has

also introduced the GRF, which could potentially be meaningful events where refugees could

participate in the decision-making process on an international level: The GRF is a forum that

includes all UN member states and "relevant stakeholders", who will meet every four years "to

announce concrete pledges and contributions towards the objectives of the global compact."[267] At

the same time, there will be "high-level officials' meetings, held every two years between GRF,

which will provide an opportunity for 'mid-term review'."[268] Hathaway is rather critical and

describes the GRF and the high-level officials' meetings as "lots and lots of meetings" that do not

really lead to anything.[269] Aleinikoff and Martin are more optimistic: "For the first time since

adoption of the 1951 Refugee Convention, international structures would be established to bring

States together on a regular basis with the express goal of enhancing international responsibility

sharing."[270] Indeed, the GRF is presumably the most important feature of the GCR to address the

solidarity gap and could be a venue for refugee participation. It may be true that the concrete role

of these meetings is only vaguely described in the GCR, but it is already a positive step that all

states come together on a regular basis to discuss current refugee issues. As described above, these

GRF can play an important role to draft an additional annex that could remedy some of the

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[266] *Ibid* at 655.
[267] note 8, para 17.
[268] *Ibid*, para 19.
[269] Hathaway, *supra* note 203 at 594.
[270] T Alexander Aleinikoff & Susan Martin, *Making Global Compacts Work: What Future for Refugees and Migrants?* (The University of New South Wales Policy Brief, No 6, 2018) at 10.

remaining problems of the GCR. It is particularly noteworthy that not only states, but also other stakeholders will play a role.

For the purpose of this thesis, it is important that the GCR recognizes refugees themselves as stakeholders and specifically mentions the facilitation of "meaningful participation of refugees, including women, persons with disabilities, and youth, in Global Refugee Forums."[271] Meaningful refugee participation in such an international forum that includes representatives of states and other stakeholders would indeed be a great step towards more legal empowerment of refugees and would greatly enhance the capability of having a voice. Although this is a reason to be cautiously optimistic, there are several issues that must be addressed:

First, the GCR does not clarify what "meaningful participation of refugees" means and how participation is measured but instead leaves the determination to the Member States.[272] If refugee participation merely becomes just tokenism, it cannot be considered meaningful. GRF could have the potential to become forums of deliberative democracies if refugees are treated as full participants and are able to formulate proposals and discuss the merits of proposals. It is already a positive step that refugees have become co-sponsors of areas of focus during the preparation work before the GRF and it seems that their input goes beyond merely being present.[273] It remains to be seen what their actual role will be during the GRF.

Second, it is not clear how these refugee representatives are chosen and whether they are truly representative of the whole refugee community. It would defeat the purpose of empowerment if a small number of 'refugee elites' represent the entire refugee population of the world if there is

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[271] note 8, paras 3; 107.
[272] Hayley Drozdowski & Mark Yarnell, *Promoting Refugee Participation in the Global Refugee Forum: Walking the Walk* (Refugee International, 2019) at 2.
[273] *Ibid* at 3; "Refugee co-sponsors", online: *UNHCR* <https://www.unhcr.org/refugee-co-sponsors.html>.

no transparency on how refugees are selected. The selection of refugee representatives should adhere to principles of internal empowerment within the refugee community. Although it may be a difficult task to find a way to truly represent all refugees, the suggestion to abandon refugee participation altogether because of the impossible task to fairly represent the heterogeneity of refugees around the world would be a clear move towards the wrong direction.[274] Instead, one way to improve refugee participation in a fair way would be to promote remote refugee participation through video conferences and social media.[275] UNHCR has already started the undertaking to drastically increase the connectivity of refugees around the world to improve communication opportunities.[276] Enabling refugees to participate remotely in the GRF and the preparations could be included in this undertaking.

Third, it is important that refugees have the relevant knowledge to be able to make informed decisions. As discussed in Chapter II, knowledge and access to information are important capabilities that serve as a basis of legal empowerment. Thus, it is important that refugees receive sufficient information regarding the discussed topics during the GRF. UN conferences can easily drift into bureaucratic lingo and procedures that would be opaque and hard to understand for laypersons. Therefore, besides providing sufficient information to refugees, it is also important that the whole process is conducted in a manner that makes it possible for laypersons to easily follow.

Fourth, it is not clear how the bargaining imbalance can be overcome. Representatives of states and the UNHCR would have a stronger bargaining position than refugees, which would not

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[274] Drozdowski & Yarnell, *supra* note 272 at 5.
[275] *Ibid* at 5–6.
[276] *Connecting Refugees How Internet and Mobile Connectivity can Improve Refugee Well-Being and Transform Humanitarian Action* (Geneva: UNHCR, 2016).

fulfill the conditions that are necessary for deliberative democracy as identified by Crocker: "equal political liberty", "equality before the law", "economic justice", and "procedural fairness."[277] One way to improve the bargaining power of refugees would be to include refugees in the delegations of each member state in addition to include a "refugee-only delegation."[278] If refugees would be part of the respective delegations they could give their suggestions and perspectives already before the GRF starts and influence the stance of the participating member states from the very beginning. At the same time, having a refugee-only delegation would give refugees a distinct voice during the forum and in the future, it can be measured how refugee suggestions played a role in the implementation of GCR-related policies.

3. *Support platforms as a solution for the Protracted Refugee Situation*

Large scale movements of refugees and the lack of support of the host countries, which are mainly LMIC and have limited resources, are some of the main reasons that lead to PRS, 'refugee warehousing' and the unfreedom of refugees. The GCR could offer a solution for this problem through establishing a support platform, which can be activated by host countries of refugees when there is "a large-scale and/or complex refugee situation" or "a protracted refugee situation where the host State(s) requires considerable additional support, and/or a major opportunity for a solution arises."[279] The support mechanism focuses on political support and advocacy, financial, material and technical assistance, resettlement spots, developmental responses, easing pressure on the host country, and supporting refugee self-reliance.[280] These are some of the most concrete solidarity

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[277] Crocker, *supra* note 119 at 317–321.
[278] Drozdowski & Yarnell, *supra* note 272 at 7.
[279] note 8, para 24.
[280] *Ibid*, para 23.

measures in the GCR that people in a PRS and refugee-hosting LMIC could potentially benefit from.

These ad-hoc support platforms can be traced back to UNHCR's history of successful ad-hoc solutions in refugee situations. [281] The Comprehensive Plan of Action for Indochinese Refugees (CPA) was such a short term solution where the international solidarity mechanism regarding a specific refugee situation that worked exceptionally well. [282] The CPA was a multilateral agreement to deal with the issue of large numbers of 'Vietnamese Boat People' arriving in other South East Asian countries at the end of the 1980s.[283] The CPA was criticized for its lack of human rights commitments, the unfair screening mechanism, and the forced repatriation.[284] Nevertheless, the clear division of responsibility between different stakeholders, the pragmatic solution to this problem where there was no particular 'looser', and the relative strong bargaining power of refugee-hosting LMIC made the CPA a remarkable example of international cooperation during a refugee crisis.[285] The support mechanism under the GCR could be based on a similar idea: at moments of large refugee movements, host states could activate the mechanism to receive financial and political support as well as increased resettlement spots.

These additional resources and resettlement spots could be used to address the unfreedoms that people in a PRS face and to enhance the capabilities of refugees. These support platforms should also be used to enhance the voice of refugees. When a support platform is called, meaningful refugee participation in the process could raise awareness about the situation and

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[281] Ineli-Ciger, *supra* note 36 at 12.
[282] Alexander Betts, "Comprehensive Plans of Action: Insights from CIREFCA and the Indochinese CPA" (2006) UNHCR Evaluation and Policy Analysis Unit Working Paper No 120 at 5.
[283] *Ibid* at 31–32.
[284] See: Richard Towle, "Processes and critiques of the Indo-Chinese comprehensive plan of action: an instrument of international burden-sharing?" (2006) 18:3–4 International Journal of Refugee Law 537.
[285] W Courtland Robinson, "The comprehensive plan of action for Indochinese refugees, 1989–1997: Sharing the burden and passing the buck" (2004) 17:3 Journal of Refugee Studies 319 at 321.

provide their perspective to the situation. Solutions could then be made with consideration to the proposals of refugees to ensure a more inclusive approach. Time will tell whether states will take advantage of this cooperation mechanism.

III. Refugee protection and development: A collaborative process

Now the question would be, why states would be interested to encourage legal empowerment of refugees rather than to keep the status quo. As mentioned in Chapter I, the majority of refugees live in LMIC where development is a vital interest of the host country.[286] However, rather than accepting the refugees as possible drivers for development, refugees are often dehumanized, and crisis management is prioritized.[287] Generally, refugees were originally often seen as a "burden."[288] The focus is on temporary humanitarian aid that specifically targets the refugees and not the local population.[289]

LMIC development and refugee protection go hand in hand: for example, Sub-Saharan African host states are often hindered by a lack of resources to grant socio-economic rights to refugees.[290] Neither the Refugee Convention, the 1967 Protocol nor the Organization of African Unity (OAU) Convention addresses the issue of lack of development.[291] The GCR is different, as it recognizes that refugee protection and development should be linked. It mentions that "[t]here is also increasing recognition of the development challenges posed by large refugee situations and the advantages of shared and inclusive economic growth in refugee-hosting areas from which all

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[286] Volker Türk, "The Promise and Potential of the Global Compact on Refugees" (2019) 30:4 International Journal of Refugee Law 575 at 576.
[287] Fatima Khan & Cecile Sackeyfio, "What Promise Does the Global Compact on Refugees Hold for African Refugees?" (2019) International Journal of Refugee Law, online: <https://doi.org/10.1093/ijrl/eez002> at 1.
[288] *Ibid* at 2.
[289] Hansen, *supra* note 25 at 141.
[290] Khan & Sackeyfio, *supra* note 287 at 2.
[291] *Refugee Convention*, *supra* note 1; *1967 Protocol*, *supra* note 1; *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa*, 10 September 1969, 1001 UNTS 45 [*OAU Convention*].

can benefit, in line with the 2030 Agenda for Sustainable Development."[292] In total, the word "development" is mentioned 73 times, which shows the importance of linking refugee protection to development.[293]

The Sustainable Development Goals (SDGs) are part of the 2030 Agenda for Sustainable Development which builds on and complements the Millennium Development Goals.[294] Human rights, gender equality and the empowerment of women and girls are specified as important goals within the SDGs.[295] The three dimensions that are balanced within the SDGs are: "economic, social and environmental."[296] One of the most important SDG for refugees is Goal 10, which aims to "[r]educe inequality within and among countries." [297] Empowerment and reduction of discriminatory laws are at the center of this goal and are some of the main aspects that are needed for the personal development of refugees.[298] This idea is also embedded in the GCR.

The GCR recognizes refugees as agents of development. Rather than treating refugees as a humanitarian crisis as it used to be the case in the past, refugee situations are considered as a development challenge. [299] The GCR aims to have an integrated approach by engaging humanitarian and development actors, as well as refugees and members of the host community in order to develop more refugee self-reliance.[300] The goal is to integrate refugees into the social and economic environment of their host country through education and access to labor markets, rather

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[292] note 8, para 64.
[293] note 8.
[294] *Transforming our world: the 2030 Agenda for Sustainable Development*, GA Res 70/1, UN GAOR, 70th Sess, UN Doc A/Res/70/1 (2015) Preamble.
[295] *Ibid*.
[296] *Ibid*.
[297] *Ibid*.
[298] *Ibid*.
[299] Hansen, *supra* note 25 at 141.
[300] note 8, paras 7, 34, 35.

than creating a parallel social structure as it was the case in the past.[301] This, in return, should improve the development of their host country, since refugees are now active members of the society.[302] The World Bank and other development banks have provided US$ 6.5 billion for projects that foster the development of refugee-hosting LMIC.[303] While some of the concrete measures are still to be determined, it can be said that the focus on the self-reliance of refugees and the development of their host country can serve as a basis for the legal empowerment of refugees. With this in mind, the next chapter explores Kenya as a field study in more detail.

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[301] Hansen, *supra* note 25 at 141.
[302] Türk, *supra* note 286 at 578.
[303] *Ibid*.

Chapter IV: Kenya as a testing ground of the Comprehensive Refugee Response Framework – an analysis through the Capability lens

I. The Protracted Refugee Situation in Kenya

1. *Refugees in Kenya*

Kenya is a typical LMIC country were most refugees live in a PRS and are situated in camps. According to the World Bank Kenya is a lower-middle-income country with a GNI per capita of 1,620.0 in 2018.[304] The Kenyan population has steadily increased over the last decades and in 2018 it was estimated that there were 51,393,010 Kenyans.[305] Kenya has a Human Development Index of 0.590 and is ranked 142nd in the world.[306] Life expectancy is 67.3 years and expected years of schooling is 12.1 years.[307]

Kenya is a major refugee-hosting country in East Africa: From the total refugee population of 476,695 more than half, 54.5%, originate from Somalia, 24.4% from South Sudan, 8.8% from the Democratic Republic of Congo, 5.9% from Ethiopia and the remaining 6.4% from Sudan, Rwanda, Eritrea, Burundi, Uganda, and other countries.[308] There are two large refugee camps in Kenya: Dadaab and Kakuma in Northern Kenya.[309] Around 44% of refugees live in Dadaab, 40% in Kakuma and 16% in Nairobi and other urban areas.[310]

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[304] "Kenya | Data", online: *World Bank* <https://data.worldbank.org/country/kenya>."Kenya | Data", online: *World Bank* <https://data.worldbank.org/country/kenya>.

[305] *Ibid*.

[306] "Kenya - Human Development Indicators", online: *U N Dev Programme Hum Dev Rep* <http://hdr.undp.org/en/countries/profiles/KEN>; For more information on the HDI see "Human Development Index (HDI)", online: *U N Dev Programme Hum Dev Rep* <http://hdr.undp.org/en/content/human-development-index-hdi> (The HDI is a composite measure that goes beyond economic strength of a country. Among other factors it considers life expectancy, education and GNI per capita. It should be noted that the HDI is heavily influenced by the the Capability Approach).

[307] note 306.

[308] "Figures at a Glance - UNHCR Kenya", (2019), online: *UNHCR* <https://www.unhcr.org/ke/figures-at-a-glance>.

[309] Marc-Antoine Perouse de Montclos & Peter Mwangi Kagwanja, "Refugee camps or cities? The socio-economic dynamics of the Dadaab and Kakuma camps in Northern Kenya" (2000) 13:2 Journal of refugee studies 205 at 205.

[310] note 308.

a. *International commitment*

Kenya is part of a wider international and regional refugee protection framework: Kenya ratified the Refugee Convention in 1966 and its 1967 Protocol in 1981.[311] Kenya also signed the 1969 OAU Convention.[312] Kenya has adopted the NYD and has agreed to be a piloting country for the CRRF.[313] Further, Kenya has ratified most major human rights treaties.[314] Regionally, Kenya signed the Nairobi Declaration on Durable Solutions for Somali Refugees and Reintegration of Returnees in Somalia that addresses the displacement of Somalis and the 2017 Djibouti Declaration on Regional Refugee Education that calls for the integration of refugee children into the national educational system.[315]

b. *Reasons for the restrictive approach for refugee-hosting*

Historically, there have been several incidents with large numbers of refugees seeking asylum in Kenya after becoming independent from the British in 1963.[316] In the 1970s less than 15,000 refugees fleeing from the Ugandan dictator Idi Amin came to Kenya.[317] The relatively small number and the fact that many of the refugees were well-educated helped the swift integration of the refugees.[318] In the 1990s larger number of reufgees came to Kenya, fleeing civil wars in Sudan

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[311] "Kenya Treaties", online: *Kenya Treaties Online*
<http://treaties.mfa.go.ke/treaties?category=7&type=&page=1>.

[312] *OAU Convention*, *supra* note 291.

[313] "Kenya", online: *Global CRRF* <http://www.globalcrrf.org/crrf_country/kenya-2/>.

[314] note 311 (For example: The International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the Convention on Elimination of All Forms of Discrimination against Women, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment).

[315] note 231; note 231; note 313.

[316] Simeon Hongo Ominde, Kenneth Ingham & Mwenda Ntarangwi, "Kenya - History", (12 July 2019), online: *Encyclopedia Britannica* <https://www.britannica.com/place/Kenya>.

[317] Nyabuto Nyakerario, "Kitaaluma: The Refugee Situation In Kenya in a Nutshell. – Refugee Consortium of Kenya", online: *Refugee Consortium Kenya* <https://www.rckkenya.org/kitaaluma-the-refugee-situation-in-kenya-in-a-nutshell/>.

[318] *Ibid*.

and Somalia, ethnic tensions in Burundi and genocide in Rwanda.[319] The sudden increase of the refugee population of up to 400,000 refugees led to a major shift in refugee policies.[320] While the first Ugandan refugees were welcomed in Kenya through amicable policies and integration measures, the increase of refugees caused the government to adopt an encampment policy and the creation of Kakuma and Dadaab.[321] Increasingly, refugees were also seen more as a security threat rather than an asset as before.[322] This stance still influences the refugee policies of today.

Despite its international legal commitments, Kenya is known to have a restrictive approach to refugee rights.[323] Kenya has faced a series of terrorist attacks in the past, which caused the government to value security over refugee self-reliance.[324] Kenya has engaged an encampment policy that requires refugees to stay in the camps and makes travel outside the camps difficult.[325] After al-Shabab, a Somalia based Islamist militant group, carried out a number of attacks in Kenya, the government decreed in 2013 that all urban refugees had to either move to Dadaab or Kakuma refugee camp.[326] However, as of September 2017 UNHCR estimates that 64,000 refugees still reside in Nairobi alone.[327]

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[319] *Ibid.*
[320] *Ibid.*
[321] *Ibid.*
[322] *Ibid.*
[323] Alexander Betts, "Refugee Economies in Uganda: What Difference Does the Self-Reliance Model Make?" (2019) Oxford RSC at 4.
[324] "A look at terror attacks in Kenya since the 1998 U.S. embassy bombing", (16 January 2019), online: *Citizentv* <https://citizentv.co.ke/news/a-look-at-terror-attacks-in-kenya-since-the-1998-u-s-embassy-bombing-227031/>.
[325] Betts, *supra* note 323 at 7.
[326] Tshegofatso D Thulare et al, "A Comparative Policy Analysis of the Comprehensive Refugee Response Framework in Uganda and Kenya" in *Comparative Perspectives on Refugee Youth Education: Dreams and Realities in Educational Systems Worldwide* (New York: Routledge, 2019) at 143; For further information on al-Shabab see: "Who are Somalia's al-Shabab?", *BBC News* (22 December 2017), online: <https://www.bbc.com/news/world-africa-15336689>.
[327] *Recognising Nairobi's refugees: The challenges and significance of documentation proving identity and status* (Norwegian Refugee Council, 2017) at 1.

c. The legal framework

In general, there have been some controversial decisions regarding refugees in Kenya: In 2014 the government decided to cap the number of Somali refugees at 150,000, while in reality the number of registered Somali refugees already exceeded 550,000.[328] Eventually, the High Court of Kenya overturned this decision and the decision of the government to close the Dadaab camp and to repatriate all Somali refugees in 2016.[329] Since then the Kenyan government has refused to register newly incoming Somali refugees, which are estimated to be over 12,000 by now.[330] Without the relevant documentation, "these refugees face police harassment, arbitrary arrest and detention, and the threat of deportation for being in the country 'illegally'."[331] Thus, the legal landscape has been restrictive for refugees and the legal framework does not seem to change to the better anytime soon.

The valid law that is governing the situation of refugees is the 2006 Refugee Act.[332] The 2006 Refugee Act grants several rights to refugees under article 16.[333] In theory, it grants the right to employment, but includes the condition that refugees are "subject to the same restrictions as are imposed on persons who are not citizens of Kenya."[334] This requires refugees to apply work permits, which are valid for two years and rarely granted by the government, thus making this requirement an almost insurmountable obstacle for most refugees to gain legal employment.[335]

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[328] Victor Nyamori, "Kenya: Global Compact on Refugees must be quickly anchored in national policy", (24 December 2018), online: *Amnesty Int* <https://www.amnesty.org/en/latest/news/2018/12/kenya-global-compact-on-refugees-must-be-quickly-anchored-in-national-policy/>.

[329] *Ibid*.

[330] *Ibid*.

[331] *Ibid*.

[332] *Refugee Act, 2016,* (Kenya), No 13 of 2006 [*Refugees Act, 2006*].

[333] *Ibid*, s 16.

[334] *Ibid*.

[335] Sorcha O'Callaghan & Georgina Sturge, *Against the odds: refugee integration in Kenya*, HPG Working Paper (Overseas Development Institute, 2018) at 6.

This does not hinder refugees, however, to work in the informal economy together with the majority of Kenyans, albeit with greater risks.[336]

In 2017 a new bill passed the parliament that could have substantially widened the rights of refugees but was vetoed by the president. The 2017 Refugees Bill made it easier for refugees to seek employment and made it possible to use and even acquire land under certain circumstances.[337] This bill would have given 500,000 refugees the right to work and to farm.[338] However, President Uhuru Kenyatta rejected the bill and stated that there was no public participation regarding the proposed act.[339] In 2019 the parliament has passed the 2019 Refugee Bill, which has omitted the provisions regarding the right to work and to farm.[340] Without freedom of movement and access to the labor market, Kenya is clearly not fulfilling its international obligations under the refugee convention as discussed above.

2. *The Protracted Refugee Situation in Kenya*

As a consequence, the majority of refugees live in a PRS in Kenya: First, as mentioned above, there is still a substantial refugee population living in urban areas, but the situation of urban refugees in Kenya is not well documented. The role of refugees in Nairobi is played down by officials and they normally do not have access to assistance.[341] Refugees decide to live in the city rather than in designated camps for a number of reasons, including insecurity and lack of livelihood

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[336] *Ibid*; See also "Leveraging Kenya's informal sector for growth – Financial Sector Deepening Kenya", (27 June 2017), online: *FSD Kenya* <https://fsdkenya.org/blog/leveraging-kenyas-informal-sector-for-growth/> (In Kenya 82.7% of all employment is in the informal sector).
[337] *The Refugees Bill, 2016*, Kenya Gazette Supplement No 101 [*The Refugees Bill, 2016*], ss 34–35.
[338] Thulare et al, *supra* note 326 at 144.
[339] Samwel Owino, "Uhuru rejects bill giving refugees right to jobs and land", (8 November 2017), online: *Business Daily* <https://www.businessdailyafrica.com/economy/Uhuru-rejects-bill-giving-refugees-right-to-jobs-and-land/3946234-4178936-xf36adz/index.html>.
[340] *The Refugees Bill, 2019*, Kenya Gazette Supplement No 126 [*The Refugees Bill, 2019*].
[341] O'Callaghan & Sturge, *supra* note 335 at 10.

in camps, the lack of education and medical services or the higher possibility of moving onwards

from the city.[342] Refugees who decide to remain in urban areas do so at a high cost, however: There

is a lot of confusion regarding registration as urban refugees and there is a lack of information

provided by UNHCR or the relevant government agencies.[343] Some urban refugees had to face

registration delays of several years before finally being registered as refugees.[344] Having to

repeatedly visit registration offices also meant high travel costs that became unbearable for some

refugees.[345] For urban refugees, registration plays a paramount role: Being registered as a refugee

guarantees a legal status and access to services.[346] Refugees without any documents would also be

more prone to police harassment, bribe extraction and criminal charges related to the lack of

documentation.[347] Without documentation, refugees would have difficulties obtaining a work

permit, or a resettlement spot.[348] Thus, it becomes clear that urban refugees have been in the blind

spot of Kenyan refugee policies and none of the durable solutions are feasible for them.

Second, although humanitarian organizations and the government focus on the refugees in

the camps, they face different but equally limiting problems. One of the biggest flaws of Kenyan

refugee policies is the lack of freedom of movement. The Kenyan legislation requires refugees to

stay in their camps and requires refugees to ask for a permit in order to travel outside of the camp.[349]

Permissions to travel are only granted for a limited number of reasons, such as medical reasons,

higher education requirements or prevailing protection concerns in the camp.[350] The practice of

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[342] *Ibid.*
[343] note 327 at 2.
[344] *Ibid* at 14.
[345] *Ibid* at 18.
[346] *Ibid* at 20.
[347] *Ibid.*
[348] *Ibid.*
[349] *Supporting Kakuma's Refugees - The Importance of Freedom of Movement* (Norwegian Refugee Council, 2018) at 5–6.
[350] O'Callaghan & Sturge, *supra* note 335 at 6.

issuing movement passes is rather opaque and refugees are often asked for bribes or even sexual services for the issuance of a movement pass.[351] Refugees who travel without a movement pass risk high fines and imprisonment if caught.[352] This bears several problems: As stated above, refugees require a work permit to work legally, which can only be done in the capital Nairobi.[353] Without the means and necessary permission to travel to Nairobi to apply for a working permit, this possibility remains an empty promise. Similarly, without the possibility to travel outside the camps, businesses will be more difficult to maintain, and refugee business owners are dependent on Kenyan middlemen for the supply of goods, who in return often overcharge them.[354] Without real freedom of movement, Kenya is effectively practicing refugee warehousing.

Third, the political participation of refugees in Kenya is limited and access to citizenship is almost impossible. In order to be able to formally participate politically in Kenya, such as voting or joining a political party, it is required to be a Kenyan citizen, which is, thus, out of reach for refugees.[355] During field interviews with Somali and South Sudanese refugees in Dadaab and Kakuma, Opon found out that non-formal participation, such as forming advocacy groups or grassroots movements, was limited by refugees themselves due to fear of risking their protection.[356] This was particularly the case with Somali refugees living in urban settings, who are targeted by Kenyan authorities after terrorist attacks.[357] There are some exceptions, where refugees seem to be politically engaged, however: For example, the Somali diaspora in Nairobi was able to register a

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[351] note 349 at 13–17.
[352] *Ibid* at 6.
[353] Betts, *supra* note 323 at 12.
[354] note 349 at 11.
[355] Caleb Otieno Opon, *Political Participation of Refugees - The Case of Somali and South Sudanese Refugees in Kenya*, Refugees, Asylum Seekers and Democracy project (IDEA, 2018) at 13–14.
[356] *Ibid* at 14.
[357] *Ibid*.

Kenyan branch of *Save Somali Women and Children*.[358] Furthermore, there are periodic elections of community leaders in Kakuma, where refugees are allowed to campaign and have forums to present their plans.[359] In focus group interviews, however, it appeared that refugees did not feel that these community leaders were taken seriously and the real authority was still vested in the host community.[360] Moreover, in Kakuma refugees have been explicitly discouraged to engage in any political activism due to security concerns.[361] Thus, it seems that the political participation of refugees is still very basic and limited for both, urban and camp refugees.

II.   The implementation of the Comprehensive Refugee Response Framework in Kenya: Kalobeyei – A glimpse of hope?

As described above, the legislation in Kenya regarding refugees has not changed since 2006 and the opportunity to provide refugees with the right to work and to farm by adopting the 2017 Refugee Bill was missed. Further, the encampment policies in Dadaab and Kakuma are still part of the previous aid-based model.[362] Generally, it can be said that Kenya was more reluctant to adopt CRRF measures than its neighbor Uganda.[363]

There have been some positive changes in Kenya after the adoption, however. Refugees play a role in Kenya's development planning. The inclusion of refugees is an integral plan in the "Sustainable Development Goals, Kenya's Vision 2030 and the Big Four agenda." [364] The

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[358] *Ibid.*
[359] *Ibid.*
[360] *Ibid* at 15.
[361] *Ibid* at 14.
[362] Alexander Betts et al, *Self-reliance in Kalobeyei? Socio-economic outcomes for refugees in north-west Kenya.* (Refugee Studies Centre, 2018) at 4; Thulare et al, *supra* note 326 at 143.
[363] Betts, *supra* note 323 at 10.
[364] note 313.

government has further adopted several regional agreements, which are in line with the CRRF.[365] On the ground, Kenya has created a technical training institute in Dadaab camp to enable refugees to train their skills.[366] For the purpose of this thesis, the most interesting development is the establishment of a third refugee settlement: Kalobeyei, which has adopted a "self-reliance model."[367]

Kalobeyei lies around 40km northwest of Kakuma camp in Turkana County in northwest Kenya.[368] UNHCR and the Government of Kenya already agreed in 2015 to create another settlement that differs from the previous aid-based camps through its emphasis on self-reliance and to have an integrated approach for refugees and members of the host society.[369] After the NYD in 2016 Kenya became a pilot country for the CRRF and Kalobeyei became a testing ground for the CRRF in Kenya.[370] The "Kalobeyei Integrated Socio and Economic Development Programme" (KISEDP) has been developed by UNHCR, the county government of Turkana and partner organizations and it gives an overview of the plans.[371] According to KISEDP the underlying idea behind this new approach is the "Choice Theory" that "allow refugees and host communities to maximise their potential in an enabling environment."[372] This approach intends to build such an enabling environment through "[l]egal framework and policies", "[p]rivate sector engagement and

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[365] *Ibid* (Such as: the Nairobi Declaration on Durable Solutions; the Djibouti Declaration on Regional Refugee Education; or the Kampala Declaration on Jobs, Livelihoods and Self-Reliance for Refugees, Returnees and Host Communities in the IGAD Region").

[366] Eva Dick & Benjamin Schraven, "Global but not regional? The role of African regional migration regimes in the international governance architecture" (2019) European University Institute at 13.

[367] Betts et al, *supra* note 362 at 4.

[368] "Kalobeyei Settlement - UNHCR Kenya", online: *UNHCR* <https://www.unhcr.org/ke/kalobeyei-settlement>." -settlement>.

[369] *Kalobeyei Integrated Socio-Economic Development Plan in Turkana West - Phase One: 2018-2022 Comprehensive Refugee and Host Community Plan in Turkana West, Kenya* (UNHCR, 2018) at 1.

[370] *Ibid.*

[371] *Ibid.*

[372] *Ibid* at 3.

investment", "[a]ccess to and availability of markets" "[a]ccess to and availability of tailored credit and financial services", "[j]ob creation", "[i]nfrastructure investment and refugee inclusion in national service systems", "[i]nstitutional and technical local capacities" and "[i]nnovative aid delivery models" which in return should enable refugees to become more self-reliant and to fully maximize their capabilities.[373] These ideas are directly related to Paragraph 13(b) of the CRRF, which calls for "measures to foster self-reliance."[374]

KISEDP will be implemented in three phases after a preparatory stage from 2016-2017, which had the purpose to engage stakeholders from the private sector, the government, the World Bank, humanitarian and development organizations and community-based organizations and to establish basic services of the camp.[375] Currently, Phase I is being implemented, which will align the KISEDP with the Country Integrated Development Plan II (CIDP II).[376] The aim is to move away from a strict aid based model, where refugees would simply receive in-kind aid towards a developmental approach, where refugees would rather receive cash-based intervention that enables them to become active participants of the local economy.[377] The strong focus on promoting better resilience and sustainability echoes the aims of the CRRF.[378] Compared to the previous strict encampment policy in Kenya, KISEDP seems to be a positive departure that has been achieved through the implementation of the CRRF. Betts hailed Kalobeyei as "a potentially exciting 'third

[373] *Ibid.*
[374] note 13, para 13(b).
[375] note 369 at 20.
[376] *Ibid.*
[377] *Ibid.*
[378] *Ibid*; note 13, paras 13(b-c).

way' beyond camps and urban integration, creating a new integrated settlement for both hosts and refugees."[379]

The Kalobeyei settlement is still relatively new and not all the policies have been implemented, nevertheless, the comparison between the Kalobeyei settlement and Kakuma camp offers a good insight for the purposes of studying the impact of the CRRF, since both are in close proximity and share the same environmental aspects but operate under different guiding principles. Kalobeyei and Kakuma are both in a semi-arid environment with a low population density, since the Kenyan government had the policy to prevent refugees to compete against Kenyans about the rich land in southern and central Kenya.[380] The hostile climate and remoteness from urban areas are major impediments for the economic development of both, Kalobeyei and Kakuma.[381] In fact, refugees make up around 40% of the entire population in the whole area, Turkana West.[382] However, since it is a common practice among refugee-hosting LMIC to allocate low-quality land to refugees, the harsh environment is a parameter that can be applied to many refugee settlements.[383] Thus, it is worth examining the different outcomes of the two models within those circumstances.

Betts et al. from the Oxford Refugee Studies Center have examined the outcome of the self-reliance model in Kalobeyei as opposed to the aid-based model in Kakuma comprehensively in 2018 and 2019.[384] For the study, 2560 adults from 1397 households in Kalobeyei or Kakuma

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[379] Alexander Betts, "The Global Compact on Refugees: Towards a Theory of Change?" (2018) 30:4 International Journal of Refugee Law 623 at 625.
[380] Montclos & Kagwanja, *supra* note 309 at 207.
[381] Betts et al, *supra* note 362 at 5.
[382] note 368 at xiii.
[383] Werker, *supra* note 43 at 72.
[384] See: Betts et al, *supra* note 362; A Betts, N Omata & O Sterck, "The Kalobeyei Settlement: A self-reliance model for refugees?" (2019) Journal of Refugee Studies.

were interviewed in 2017 and 2018.[385] This study offers a good insight into a more traditional refugee camp and a new settlement that was created with the guidelines of the CRRF in the background. Kalobeyei offers an exciting case study to analyze the implementation of policies that focus on the enhancement of refugee capabilities.

III.   Are refugees in Kalobeyei really more self-reliant?

The self-reliance of refugees is one of the four main goals of the GCR.[386] Generally, refugee self-reliance is defined as the "ability for refugees to live independently from humanitarian assistance."[387] Humanitarian actors often mainly focus on the economic aspect of self-reliance, but neglect social, cultural, political and systematic aspects of self-reliance and employment are seen as an "end goal marker of self-reliance."[388] It is argued here that refugees are indeed more self-reliant when their basic capabilities and human securities are guaranteed and they have the possibility to use their capabilities for legal empowerment for growth. The following section will use the theoretical framework developed in Chapter II to assess whether the Kalobeyei model can serve as an enabling environment for the enhancement of capabilities for legal empowerment and compare the outcome with Kakuma, wherever possible.

1. *Guarantee of basic capabilities for human security*

First, it must be established whether the basic capabilities that are necessary for functioning can be provided and whether refugees in Kalobeyei have a minimum of human securities.

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[385] Betts et al, *supra* note 362 at 4; Betts, Omata & Sterck, *supra* note 384 at 10.
[386] note 8, para 7.
[387] Amy Slaughter et al, *Refugee self-reliance: moving beyond the marketplace* (Refugee Studies Centre, 2017) at 1.
[388] *Ibid* at 1–2.

a. Food security

Food insecurity is generally a big issue in the region and the situation in Kenya, although better than the countries of origin of most refugees in Kenya, is considered to be "stressed."[389] It is not surprising, therefore, that the food security in both, Kalobeyei and Kakuma is relatively low.[390] However, with the general lack of food security in the country in mind, there are still big differences between the food aid policies in Kalobeyei and Kakuma: While refugees in Kakuma mainly receive in-kind food aid and some monetary subsidies, refugees in Kalobeyei receive their assistance mainly through the so-called "Bamba Chakula" program that was introduced by the World Food Program (WFP), which gives refugees a food credit that can be used to buy food items of choice in destined shops.[391] Bamba Chakula has had some success in increasing the food diversity and safety in Kalobeyei compared to Kakuma camp.[392] Another program that has positively affected the food security and the self-reliance of refugees in Kalobeyei is the kitchen garden program which allocates small farm plots to households, similar to the policy in Uganda, which has a much larger scale, however.[393] Through a specifically developed approach that makes the cultivation of edible plants in this arid area more efficient, refugees are able to grow plants for their own consumption, making the settlement more sustainable and less dependent on aid.[394] Overall, the food consumption score that combines food variety, food frequency, and nutritional stats is in an "acceptable" range in Kalobeyei, while the situation in Kakuma is considered

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[389] "Africa's Unresolved Conflicts a Key Driver of Food Insecurity", (17 October 2018), online: *Africa Center for Strategic Studies* <https://africacenter.org/spotlight/africas-unresolved-conflicts-a-key-driver-of-food-insecurity/>.
[390] Betts et al, *supra* note 362 at 13.
[391] *Ibid* at 8.
[392] *Ibid* at 13.
[393] *Ibid* at 9.
[394] Benson Rioba, "Kitchen gardens cultivate bond between refugees, Kenyan hosts", *Reuters* (17 August 2017), online: <https://www.reuters.com/article/us-kenya-refugees-environment-water-idUSKCN1AX0AW>.

"borderline."[395] It seems that refugees are able to achieve more access to food through social transfers or by producing their own food and have a better diet overall. The Kalobeyei model seems to follow De Schutter's suggestion to increase the flexibility of food systems by decentralizing them and encouraging income-generating activities.[396]

b. *Economic security*

Economic security is still impeded by the legal framework. While the NYD encourages states to open their labor markets to refugees, Kenya has kept a restrictive approach towards employment of refugees, wherefore most refugees work in the informal sector.[397] In both, Kalobeyei and Kakuma, most refugees and especially women, are unemployed and are not participating in any economic activity.[398] The number of Burundian refugees in Kalobeyei that have an economic activity is slightly higher with over 30% among the men and more than 15% among the women, which is due to the employment through fellow Burundians in Kakuma.[399] Among the refugees who work, around 80% work as incentive workers for NGOs and are not paid a full salary due to legal restrictions.[400] Some refugees have managed to build their own businesses but there are some major impediments. Besides increasing food stability and variety Bamba Chakula has also increased the business activity of refugees and members of the host society, who can act as traders and sell food through the Bamba Chakula program.[401] Bamba Chakula is operating on a "free market" principle and prices can be set by the traders.[402] However, WFP limits

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[395] Betts et al, *supra* note 362 at 14.
[396] note 171, para 35.
[397] note 13, para 84.
[398] Betts et al, *supra* note 362 at 16.
[399] *Ibid* at 16–17.
[400] *Ibid* at 17; 27.
[401] Channon Hachandi, "Opinion: Look to retail techniques to support humanitarian cash programs", (26 March 2019), online: *Devex* <https://www.devex.com/news/sponsored/opinion-look-to-retail-techniques-to-support-humanitarian-cash-programs-94423>.
[402] Betts et al, *supra* note 362 at 25.

the number of Bamba Chakula traders in order to protect the existing traders, which in return limits the number of people who can benefit from this program as traders.[403] Refugees are also banned from producing certain goods, such as livestock or forest resources to protect the business of the host community.[404] But the main barrier to the development of businesses in Kakuma and Kalobeyei is the lack of access to financial credits to start businesses.[405] Overall, while some refugees were able to become more self-reliant through their own businesses especially benefitting from the Bamba Chakula program, the legal and financial barriers hindered most refugees to be able to start a business. Thus, limitation to the right to work and to access financial credits hinder full guarantee of economic stability.

c. *Health security*

Health security in Kalobeyei is still limited but plans of building an integrated health center for the refugees and the host community promise improvement. At the time of the studies in 2017 adequate health was still not guaranteed.[406] On the contrary, it seems that residents and the host community preferred the health services offered in Kakuma.[407] The government, however, has since then built the so-called "Kalobeyei 'Super' Health Centre" that promises to provide services to 38,000 residents, which also includes the host community.[408] If the promise can be fulfilled, it would be a positive step towards achieving health security and offering integrated services for refugees and members of the host society. However, the more recent study has shown that refugees

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[403] *Ibid* at 26.
[404] *Ibid.*
[405] *Ibid* at 28–29.
[406] *Ibid* at 20.
[407] *Ibid.*
[408] Salwa Asmat, "Kalobeyei Health Centre providing vital health support to refugee and host communities - UNHCR Kenya", (26 July 2018), online: *UNHCR* <https://www.unhcr.org/ke/13931-kalobeyei-health-centre-providing-vital-support-refugee-host-communities.html>.

in Kalobeyei still do not have adequate access to health facilities as opposed to refugees in Kakuma.[409] Under the current circumstances, it cannot be said that the model in Kalobeyei has led to a better outcome in achieving health security.

d. *Environmental security*

Environmental security is very fragile in Kalobeyei. As mentioned above, Turkana County has an arid climate and faces water scarcity.[410] There is a lack of access to water infrastructure in Kalobeyei and the average waiting time to fetch water ranges from 26 minutes to over 80 minutes, while the waiting time in Kakuma ranges from 40 minutes to one hour.[411] The dry and hot climate put additional pressure on the water infrastructure and expanding the existing camp will become increasingly difficult.[412] It seems that for the moment through the efforts of UNHCR and the Norwegian Refugee Council water access has improved in Kalobeyei and Kakuma since 2017.[413] Further, the KISEDP states that sustainable and permanent shelter should be built for refugees, which would be an improvement compared to the temporary shelter in Kakuma since it could offer more protection from the harsh climate.[414] However, Turkana County is particularly affected by the emerging climate crisis and food and water shortage will become more prevalent.[415] Water scarcity, desertification, and climate change are major threats for the refugees in both Kalobeyei and Kakuma and it is questionable whether environmental security can ever be achieved in such a hostile environment.

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[409] Betts, Omata & Sterck, *supra* note 384 at 22–23.
[410] Betts et al, *supra* note 362 at 40.
[411] *Ibid* at 21.
[412] Marianne Jahre et al, "Approaches to the design of refugee camps: An empirical study in Kenya, Ethiopia, Greece, and Turkey" (2018) 8:3 Journal of Humanitarian Logistics and Supply Chain Management 323 at 334.
[413] Betts, Omata & Sterck, *supra* note 384 at 23.
[414] note 369 at 69.
[415] Andrew Wasike, "Climate change threatens Kenya's Turkana communities", (30 October 2015), online: *DW* <https://www.dw.com/en/climate-change-threatens-kenyas-turkana-communities/a-18816731-0>.

e. *Personal security*

Personal security is generally considered low but there are some positive initiatives that could bring more personal security in the future. The KISEDP has laid out plans to create child-friendly spaces to offer additional protection for children who have suffered from sexual and gender-based violence, child labor or drug abuse.[416] Community Peace and Protection Teams, which is an initiative that consists of refugees who cooperate with the Kenyan police to manage crime and security have added to a slight improvement of the perception of security in both Kalobeyei and Kakuma.[417] Nevertheless, it seems that overall refugees in Kalobeyei feel more insecure than in Kakuma.[418] This could be related to the difference in community security in Kalobeyei and Kakuma.

f. *Community security*

Community security is at risk in Kalobeyei due to tension with the host society. Refugees and members of the host communities often share the same access to public goods, such as Water, Sanitation and Hygiene (WASH) facilities. Among the Turkana, the host community, only around six percent of the households currently have access to safe water.[419] Members of the host society feel that their own water supply is inadequate compared to the water supply for refugees and that refugees pollute their wells, leading to tension.[420] From the study, it does not seem that the model in Kalobeyei has significantly reduced this tension or has managed to find a way to adequately give access to water for both, Turkana and refugees.[421] In Kalobeyei refugees feel particularly

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[416] note 369 at 53.
[417] Betts, Omata & Sterck, *supra* note 384 at 23.
[418] *Ibid.*
[419] note 369 at 46.
[420] Betts et al, *supra* note 362 at 21–22.
[421] *Ibid.*

unsafe and targeted by the host community while in Kakuma refugees seem to have achieved more protection through the community. [422] This tension could be the negative side of having an integrated approach. Due to shared services and resources, the interaction is growing, which gives rise to more potential to conflicts. It is possible that integration measures in the future may reduce this tension and time will help refugees in Kalobeyei to assimilate with the host society.

g. Political security

The fact that Kalobeyei is considered a more progressive integral settlement does not change the fact that it is subject to the same restrictive regulations as the rest of the country. [423] As discussed above, this means that it is almost impossible for refugees to obtain working permits, difficult to obtain travel permits or to be politically active. [424] If these policies remain, the situation in Kalobeyei still constitutes 'refugee warehousing' and refugees are effectively politically oppressed.

h. Asylum security

There is no information available regarding the repatriation of refugees in Kalobeyei specifically but a major threat to the asylum status of refugees in Kenya, in general, is the potential practice of forced repatriation. While the government claims that the repatriation of refugees from Kenya is voluntary and therefore satisfies the UNHCR guidelines of being a durable solution, the reality is often that especially Somali refugees are threatened until they repatriate. [425] This practice could constitute *refoulement*, the forced repatriation of refugees to their country, where their life

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[422] Betts, Omata & Sterck, *supra* note 384 at 23–24.
[423] *Ibid* at 15.
[424] See above.
[425] Dulo Nyaoro, "From Co-option, Coercion to Refoulement: Why the Repatriation of Refugees from Kenyan Refugee Camps Is Neither Voluntary Nor Dignified" in Johannes Dragsbaek Schmidt, Leah Kimathi & Michael Omondi Owiso, eds, *Refugees and Forced Migration in the Horn and Eastern Africa* (Cham: Springer International Publishing, 2019) 221.

or freedom would be at risk, a practice that is forbidden under international refugee law.[426] Without asylum security refugees in Kenya live in a precarious situation that would inhibit any further growth.

Overall, it can be said that refugees in Kalobeyei have achieved better food security through the Bamba Chakula program which also positively affected their economic security as opposed to the situation in Kakuma. Health security, personal security, and community security still seem to be lower than in Kakuma, which could be related to the fact that the infrastructures in Kalobeyei are still being built and the relationship with the host society is not strengthened. The restrictive legal framework applies equally to Kalobeyei, thus employment, political security or asylum security are difficult to achieve without major changes. Similarly, Kalobeyei is situated in an environment that makes life difficult to sustain without outside aid. Therefore, the Kalobeyei self-reliance strategy can only be evaluated as semi-successful in achieving human securities.

2. *An enabling environment for capabilities and legal empowerment*

The next question would be whether the situation in Kalobeyei would be suitable for growth and for enhancement of capabilities for legal empowerment.

a. *Mobility*

Mobility is identified as one of the main capabilities for the legal empowerment of refugees, but it is also one of the biggest problems for refugees in Kenya. While there is frequent travel between Kalobeyei and Kakuma, the travel to the rest of the country is very restricted.[427] Despite the emphasis on refugees having a "choice," refugees from Kalobeyei are subject to the same

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[426] *Refugee Convention*, *supra* note 1 Art. 33(1).
[427] Betts et al, *supra* note 362 at 34.

regulations as the rest of the country.[428] Without freedom of movement, naming Kalobeyei a "settlement" rather than a camp is mere window dressing since effectively people are still encamped. Mobility is an important capability to achieve more economic security and it would also offer refugees the possibility to escape the environmental threats if the situation becomes too dire. Most importantly, mobility is an essential capability to achieve more legal empowerment. Being restricted to the camp takes away agency from refugees and is a sign of powerlessness. The remoteness of Kalobeyei will make it difficult for refugees to access courts, government offices or to make their voices heard in urban areas. This physical restriction will also hinder refugees to integrate. Thus far the Kalobeyei model has not achieved a higher level of mobility as compared to the other camp-based models in Kenya.

   b. Knowledge and access to information

Limited access to tertiary education hinders knowledge and access to information. According to the GCR, it should be the goal to include refugees in the national education system.[429] Education is generally seen as an important aspect for the human development and psychological wellbeing of individuals, further education is also important for acclimatization.[430] UNHCR has identified education as a key component in order to achieve self-reliance.[431] Kenya has pledged to enroll refugees in Kenyan schools.[432] However, it seems that, although UNHCR opened three new schools in Kalobeyei, these were congested and classrooms had to accommodate more than 300 students.[433] In fact, refugees in Kalobeyei have started to teach voluntarily in informal primary and

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[428] Betts, *supra* note 323 at 11–12; note 349 at 5–6; note 369 at 3.
[429] note 8, para 68.
[430] Thulare et al, *supra* note 326 at 134.
[431] *Ibid* at 137.
[432] *Ibid* at 143.
[433] Betts et al, *supra* note 362 at 22.

nursery schools.[434] While this may be a generous contribution of the volunteers, this does, however, show a failure in implementing the GCR ideal to integrate refugees in the national education system. Furthermore, the education of adults is better in Kakuma than in Kalobeyei, where the majority of adults do not have any possibility to attend some kind of education.[435] This is particularly problematic, considering that the NYD has stated that tertiary education "acts as a catalyst for the recovery and rebuilding of post-conflict countries."[436] In order to achieve more self-reliance of refugees, secondary and tertiary education is essential to provide them with the necessary skills.[437] It seems that KISEDP addresses this problem and it is planned to set up a Turkana West University campus, to provide more scholarships and to recognize the accreditation of qualifications from the country of origin.[438] These could be important steps that also enables the training of refugee paralegals who could play an important role in putting the law into the hands of the people.

c. *Having a voice*

Having a voice consists of being able to scrutinize the RSD process, having access to justice and having access to the political decision-making process. Kalobeyei offers some interesting initiatives that could be useful for strengthening the voice of refugees.

Since the Kalobeyei settlement was first established the Kenyan government took over the control of the RSD process instead of UNHCR.[439] A positive innovation that has been developed since then is the Kiosk Automated Services and Information (KASI) which enables refugees to

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[434] *Ibid* at 23.
[435] *Ibid.*
[436] note 13, para 82.
[437] Thulare et al, *supra* note 326 at 141.
[438] note 369 at 41.
[439] *Ibid* at 54.

access information about their files and scheduled appointments online.[440] Further, it seems that WhatsApp Communication Trees enable two-way communication and a complaints procedure.[441] Considering that around 47% of the surveyed households in the Refugee Studies Centre study stated that they possessed a mobile phone, KASI and WhatsApp could be viable means of communication to give refugees a voice in the RSD process.[442] Refugees and refugee paralegals specifically could use these means of communication to complain in cases of unfair practice or to update information regarding the country of origin.

It is a positive signal that according to KISEDP legal advocacy clinics should be promoted to "community awareness on access to justice, the legal system and due processes."[443] It is also stated that "access to legal aid partners/pro and low-bono lawyers" should be facilitated without mentioning details on how this facilitation will play out.[444] KISEDP expressly states that it wants to "engage communities as agents of protection."[445] A potentially important step towards the legal empowerment of refugees and access to justice is the fact that the KISEDP is "[d]eveloping community led alternative dispute resolution mechanisms (mediation, arbitration and negotiation) and provide training."[446] As stated in Chapter II, integrating and training refugee dispute resolutions can be an efficient means to improve access to justice for many refugees and give them more agency. Further, the KISEDP lists a number of activities that have the goal to improve legal aid, legal awareness of refugees, build the capacity of local authorities regarding refugees with

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[440] *Ibid* at 57.
[441] *Ibid* at 56.
[442] Betts, Omata & Sterck, *supra* note 384 at 18.
[443] note 369 at 58.
[444] *Ibid* at 56.
[445] *Ibid* at 59.
[446] *Ibid.*

special circumstances, and advocacy measures.[447] If implemented effectively, these measures could be useful for access to justice for refugees, however, the KISEDP remains rather vague on how these measures should be implemented, making increased access to justice for refugees more an aspirational goal.

Access to the political process remains rather limited for refugees in Kalobeyei. As non-citizens refugees are not able to participate in the formal political process through voting or being elected. Thus, alternative ways of political participation to be engaged in deliberative democracy should be the focus for refugees. One potential forum of deliberative democracy is the monthly "peace initiative forums between refugee and host community to ensure peaceful coexistence."[448] There is no further information available on these monthly forums, thus it is difficult to tell what level of participation refugees will be able to reach and what scope these forums will have. In order to satisfy the requirements of a deliberative democratic process, refugees should be able to reach meaningful participation with the ability to bring in suggestions and have equal rights to other participants of these forums. The enhancement of capabilities could become part of the discussion as well as issues that are relevant for the interaction between refugees and the host community. So far it does not seem that refugees have been able to have meaningful participation in the political process: According to the Refugee Studies Center study, the dependency on aid hinders any participation of refugees in the decision-making process, although it is the goal of UNHCR.[449] Some smaller initiatives have been possible, however, such as an advocacy group in Kalobeyei that includes refugees in reviewing camp policies to enhance integration and mobility.[450] These

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[447] *Ibid* at 58–60.
[448] *Ibid* at 59.
[449] Betts, Omata & Sterck, *supra* note 384 at 14.
[450] Opon, *supra* note 355 at 14.

kind of initiatives should be promoted in addition to achieving meaningful participation levels in

the forums to enable access to the political process for refugees on a local level.

d. Realizing rights

Realizing rights remains difficult for refugees without the guarantee of the rule of law.

Currently, Kenya ranks relatively low in the World Justice Project Rule of Law Index as 101st of

126th.[451] Especially, corruption, right to life and security, and right to privacy are problematic,

while Kenya does reasonably well in aspects regarding open government, constraints on

government power and order and security.[452] With respect to refugees, the discrimination of Somali

refugees and the derogation from the doctrine of non-refoulement are violations of the rule of law

of refugees.[453] If the rule of law cannot be guaranteed for refugees, it will become difficult for

refugees to realize their rights. It does not seem that the adoption of the CRRF has significantly

changed the situation. While the KISEDP mentions that the national level development strategy,

which contains KISEDP, envisions the improvement of the rule of law, transparency, and

accountability, it falls short of mentioning how this will specifically be achieved for refugees.[454]

e. Integration

Integration is one of the main focuses of the KISEDP since the new strategy is to promote

an integrated approach, benefitting both, refugees and the host community and enabling mutual

engagement. The GCR promotes policies that depart from the traditional encampment policies and

embrace systems that provide refugees with the possibility to positively contribute to their host

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[451] "Kenya", (2019), online: *World Justice Project Rule Law Index*
<http://data.worldjusticeproject.org/#/groups/KEN>.
[452] *Ibid.*
[453] See Oscar Gakuo Mwangi, "Securitisation, non-refoulement and the rule of law in Kenya: the case of Somali refugees" (2018) 22:10 The International Journal of Human Rights 1318.
[454] note 369 at 16.

community through economic and social inclusion.[455] In the case of Kalobeyei, the idea was to have an "area-based approach," to encourage interaction between refugees and the host community and to benefit both through integrated service delivery.[456] The GCR prescribes that humanitarian assistance to refugees is not supposed to be parallel anymore but the goal is rather to "deliver assistance through local and national service providers where appropriate."[457] Interventions to promote integration and peaceful coexistence between refugees and the host community include the beforementioned peace initiative forums and integrated urban development planning. [458] Further, Kalobeyei is innovative for creating shared access to markets, where the Bamba Chakula program plays an important role.[459] Indeed, the business interaction between refugees and the host community in Kalobeyei seems to be higher than in Kakuma and refugees and members of the host society seem to become more engaged with each other in general.[460] Not all interactions are positive, however. The KISEDP promotes integrated service delivery by providing services, such as education, health, and WASH to refugees and host communities.[461] However, as noted above, this has led to tensions between host society and refugees because of the perceived competition for resources.[462] The monthly forums could be suitable venues to discuss issues related to shared resources to lower the risk of tensions. Overall, it seems that the Kalobeyei approach seems to be a suitable model to promote more refugee integration, an important capability for legal empowerment.

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[455] Türk, *supra* note 286 at 578.
[456] note 369 at 7; 22.
[457] note 8, para 66.
[458] note 369 at 59; 67.
[459] Betts, Omata & Sterck, *supra* note 384 at 34.
[460] *Ibid* at 16.
[461] note 369 at 22.
[462] Betts, Omata & Sterck, *supra* note 384 at 16–17.

f. Internal empowerment

Internal empowerment seems to be promoted by the KISEDP but there have not been any measurable outcomes yet. The KISEDP promises to promote "gender equality and woman empowerment as well as disability inclusion."[463] It is stated that every component of the KISEDP is supposed to have a gendered approach, and policies are designed to include people with disabilities or other marginalized groups.[464] Steps to ensure this include the presence of gender officers, ensuring services to be safe and suitable for people with different backgrounds, increasing the number of child-friendly spaces and making procedures more child-friendly, and promotion of gender equality through awareness training.[465] In reality, it seems that gender equality is still low in Kalobeyei. Women are much less engaged in community-based activities, less likely to be employed and more likely to be occupied by housework.[466] Women are also much less likely to own a mobile phone or an email address, which restricts their possibilities to use social media to amplify their voices or to use the before mentioned communication paths to complain about the RSD mechanism.[467] There is no information available on how well minority groups are integrated. In order to be truly legally empowered, empowerment must happen within the refugee community as well to prevent the creation of an 'elite'.

In summary, the CRRF implementation in Kenya as measured in Kalobeyei was a partial success regarding enhancing capabilities for legal empowerment but there is still a long way to go. Although Kalobeyei is still relatively new and not all measures have been implemented, it has already increased the interaction of refugees and the host community, albeit this also lead to more

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[463] note 369 at x.
[464] *Ibid* at 8..
[465] *Ibid* at 58–59.
[466] Betts et al, *supra* note 362 at 15; 27.
[467] *Ibid* at 33.

tension. There are some innovative initiatives, such as the use of WhatsApp for the RSD process and the monthly peace forums that could be suitable venues of deliberative democracy. It also seems that the KISEDP recognizes and plans to enhance refugee alternative dispute resolutions and the general legal awareness of refugees, which would be positive steps towards access to justice. There are initiatives to increase the internal legal empowerment of marginalized groups within the refugee community, but the findings of the study show that so far women are still often neglected in terms of employment or social participation. A major problem is the continuation of a restrictive encampment policy that hinders the enhancement of refugee mobility, an important capability for refugees. Furthermore, while there is some emphasis on education, the focus lies more on primary education and not secondary and tertiary education that would be more important for legal empowerment. There seem to be some activities designed to increase the legal knowledge of refugees, but in order to be effective, these measures should go far enough to enable the training of refugee paralegals. Finally, refugees face a rather weak rule of law in Kenya that may treat them unfairly. Without the improvement of the general legal system and the reduction of biases against refugees, the CRRF implementation in Kenya may not be able to properly enhance capabilities for legal empowerment of refugees. Further, only a small portion of the refugee population so far is living in Kalobeyei. If over the years the Kalobeyei model seems to be successful and truly enhances the capabilities for the legal empowerment of refugees, this model should be applied to other refugees in Kenya. Otherwise, Kalobeyei remains a model testing ground that is bringing little change to the majority of refugees in Kenya, especially the urban refugees that fall through the cracks. The enhancement of refugee capabilities would give refugees the chance to become active drivers of developments in their host countries.

Conclusion

> Development consists of the removal of various types of unfreedoms that leave people with little choice and little opportunity of exercising their reasoned agency. The removal of substantial unfreedoms, it is argued here, is constitutive of development.[468]

People in a PRS experience those unfreedoms on daily basis, which renders generations of refugees to mere passengers in their own lives, who have little control over their own destiny. Without the ability to expand their own capabilities refugees become dependent on aid, and their host states, which are often LMIC, likely see them as an additional burden to development.

This thesis argues that reducing the unfreedoms of refugees and expanding the capabilities of people in a PRS, would benefit refugees and the development of the host state, who could benefit from refugees becoming drivers of development rather than obstacles. In order to be able to expand the relevant capabilities, refugees must be in the position to have meaningful participation in the decision-making process. Legal empowerment can be a way to reach this level of participation. This thesis suggested a list of capabilities that would be necessary as a basis for human security in order to ensure a certain level of functioning and a list of capabilities that would be necessary for legal empowerment.

These capabilities are then used as a background to evaluate the GCR and the CRRF that have the goal to promote the self-reliance of refugees. Further, the CRRF implementation in Kenya, is then assessed using the capability and legal empowerment framework. Especially the policies regarding Kalobeyei, a new refugee settlement that is built with the principles of the CRRF, is an insightful case study to be examined.

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[468] Sen, *supra* note 88 at xii.

The fact that the GCR is not legally binding is not a negative aspect per se since it is common that human rights principles are first introduced as a soft law instrument. However, there are some major issues regarding the GCR: It is rather vague and weakens long-established principles of international refugee law. Moreover, the issues regarding responsibility sharing are not sufficiently addressed, and the focus seems to lie on keeping refugees in their regions of origins. While the GCM seems to fill this gap to a certain degree, it would still require political willingness on behalf of the destination states to facilitate the mobility of refugees, which does not seem to be given currently. At the same time, the GRF could be a platform that gives refugees the chance to participate and make their voice heard on an international level. Similarly, refugees should have a role in activating support platforms, which could be used to alleviate the situation of PRS and could be helpful in increasing international solidarity. The focus of refugees as agents of development serves as a foundation for the empowerment of refugees that moves away from the traditional aid-based model.

The CRRF in Kenya has only been partially successful in enhancing the capabilities for legal empowerment. Kenya is generally reluctant to adopt measures that grant refugees freedom and encamps refugees due to security concerns and the valid legislation still stems from 2006. The biggest change in Kenya was the creation of the third refugee settlement Kalobeyei. New innovations have been effective in increasing food security and economic security since refugees have more choice and are able to trade. At the same time, the remaining lack of infrastructure and competition with the host society about resources have negatively affected health security, personal security and community security in Kalobeyei. The decision to build another settlement in the desert remains problematic and will be difficult to sustain. Furthermore, the national policies remain restrictive and there is a risk of *refoulement* through the non-voluntary repatriation of

refugees. The promotion of capabilities for legal empowerment is equally, only partially successful. Integration has been the focus of the Kalobeyei development plan to support both, refugees and the host state. Indeed, it seems that there is more interaction between refugees and the host community in Kalobeyei, which, however, also leads to more conflicts. The monthly peace forums and the usage of social media for communication between decision-makers and refugees seem to be positive steps to amplify the voice of refugees. Furthermore, the recognition and training of refugee-led alternative dispute resolutions is an important step for refugees to access justice and gives them more agency. Although, the Kalobeyei model also stresses the integrated education of refugees and members of the host community, secondary and tertiary education is not adequately provided so far. Moreover, the internal empowerment of marginalized groups within the refugee community is listed as a goal in Kalobeyei, but it does not seem to be achieved currently. There is a general weakness of the legal empowerment institutions available to all in Kenya. The most problematic issue that hinders refugees to enhance their capabilities for legal empowerment is limited mobility, making it difficult for refugees to leave the settlement, to become entrepreneurs, or to become politically engaged.

The GCR and the CRRF as applied in Kenya have not managed to increase mobility on an international level nor on a domestic level in Kenya and it does not seem that any attempt is being made to change this in the future. It should be noted that Kalobeyei is not necessarily representative for the rest of the country and even less so regarding the situation of refugees in camps around the world, however, since it was created as a model for refugee self-reliance and an integrated development approach, Kalobeyei could serve as a blueprint for other refugee settlements if it is successful.

Although the GCR and the CRRF have various flaws, their malleable character as soft law is also an opportunity for progressive change in the future. Especially the GRF offer a new platform for refugees to express their voices and have the potential to become venues of meaningful participation of refugees in the decision-making process on an international level. This thesis has provided an evaluation of the current policies and it is hoped that the future debate regarding refugee empowerment could center on capabilities for legal empowerment. It is time that refugees stop being mere passengers but become active drivers of their own lives.

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