

A wide-angle photograph of a busy dirt road in a refugee camp. In the foreground, a man in a bright green sweater sits on a motorcycle. The road is lined with makeshift structures made of corrugated metal and wood. Many people are walking or standing along the road. The sky is blue with scattered white clouds.

# Supporting Kakuma's Refugees

The Importance of Freedom of Movement

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## In appreciation

The Norwegian Refugee Council (NRC) and the International Human Rights Clinic at Harvard Law School (IHRC) would like to thank the refugees in Kakuma who shared their experiences with us for this briefing paper. We would also like to thank partners who supported the research, including the Refugee Consortium of Kenya and the Danish Refugee Council. Finally, we want to extend our gratitude to the NRC ICLA staff in Kakuma and IHRC students who supported the fieldwork and analysis.



Cover photo: Kalobeyei settlement, November 2017. IHRC.

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# I. Executive Summary

One of the largest refugee camps in the world, Kakuma is home to close to 186,000 refugees, nearly 40 per cent of the total number of registered refugees living in Kenya. Under Kenyan law, all refugees are required to live in and remain within one of two designated refugee camps – Kakuma and Dadaab – both located in isolated and marginalised parts of the country. It is a criminal offence, punishable by a fine and/or imprisonment, for a refugee to reside outside a designated camp without permission. Encampment contravenes Kenya's international legal obligations on refugee freedom of movement and stands in contrast to policy commitments Kenya has made in international forums. Although Kenya's encampment policy is longstanding, in recent years authorities have attempted to enforce it more strictly. For refugees who have established lives in Nairobi or elsewhere outside the camps, it has become more difficult to obtain documentation proving identity and status, and multiple refugees have been prosecuted and convicted for simply being outside of camps.<sup>1</sup>

This briefing paper seeks to shed light on the ways in which movement restrictions affect the lives and livelihoods of Kakuma's refugees and limit their opportunities to participate in the local economy as well as contribute more broadly to Kenyan society. Specifically, it analyses how restrictions on movement make it difficult for Kakuma's refugees to achieve self-reliance and reduce their dependency on humanitarian aid – goals that underlie the humanitarian approach in Kenya and refugee policy worldwide. It also describes refugees' experiences trying to obtain "movement passes," documents issued by the Refugee Affairs Secretariat (RAS) – the government body tasked with the administration of refugee affairs – that allow refugees to leave camps for temporary periods for "valid reasons," and represent the only official way to travel. Although Kenyan law provides for the existence of movement passes, there is no legal or policy guidance around their issuance. In practice, Kakuma's refugees must navigate an unpredictable and opaque set of largely ad hoc practices to obtain a movement pass, and the overall number of passes issued is low.

The briefing paper seeks to encourage local and national actors to consider alternatives to Kenya's current encampment policy and rethink existing practices around movement passes. It complements "Supporting Kakuma's Refugee Traders: The Importance of Business Documentation in an Informal Economy," which explores the challenges faced by refugees who run businesses in Kakuma and seek to obtain locally issued business permits.<sup>2</sup>

## Background

Kakuma refugee camp was established in 1992 on desert terrain with an average temperature of 35 degrees Celsius, limited access to water, and regular dust storms. It is located in Kenya's northwest corner – one of the poorest and most remote parts of the country – in Turkana County, home to the largely nomadic Turkana ethnic group. In 2015, the Turkana County government set aside land for the creation of Kalobeyei, a refugee settlement intended to decrease overcrowding in Kakuma refugee camp. Kalobeyei lies 25 kilometres northwest of the camp and is designed to be an "urban centre" that will integrate the refugee and local Turkana populations. Despite the planned integrated settlement model, in practice Kalobeyei refugees are subject to the same movement restrictions as refugees living in Kakuma refugee camp. In this briefing paper, "Kakuma" refers to Kakuma refugee camp, as well as Kalobeyei settlement. As of July



Kakuma refugee camp, 2018. © Chris Muturi, NRC.

2018, more than half of Kakuma's population hails from South Sudan, just under a fifth from Somalia, and most of the remainder from the Democratic Republic of the Congo, Ethiopia, Burundi, and Sudan. Around 20 per cent of Kakuma's refugees live in Kalobeyei.

There is no process for refugees to apply to permanently leave Kakuma and live elsewhere in Kenya, although on a case-by-case basis UNHCR (the UN Refugee Agency) does advocate for particular refugees to live outside the camp for protection, family reunification, and other specific reasons. In addition to being prohibited from leaving Kakuma without a movement pass, refugees must observe a night-time curfew, which is enforced by the local police force: every night, refugees are confined to their shelters from dusk to dawn.

## Key findings

Research for this briefing paper was primarily conducted in Kakuma in January 2018 and involved interviews and focus groups with refugees, camp and local officials, and representatives of non-governmental organisations (NGOs). This research was supplemented by a quantitative survey of 841 refugees carried out in May 2018. Several key themes emerged:

- Restricted movement of refugees results in reduced livelihood opportunities and contributes to reliance on humanitarian assistance.
- Restricted movement limits refugees' ability to add to the local host community economy and has led to largely informal business and trade opportunities only.
- Restricted movement leaves refugees with a sense of hopelessness. Refugees reported that an inability to freely leave the camp kills their dreams, limits their thinking, and inhibits them from leading fulfilling lives.
- Refugees consider the practices around movement passes to be opaque, arbitrary, and unpredictable. As a result, refugees have tried to find alternative solutions to access goods and services, such as through using middlemen or taking risks by moving without a movement pass; some have simply accepted they would not be able to leave the camp.

- The lack of clear systems around movement passes has led to corruption and exploitation of refugees.

## Recommendations

As part of a broader shift towards lessening restrictions on refugee movement in Kenya, the briefing paper recommends that relevant actors should:

- Recognise refugees' right to freedom of movement and allow refugees freedom of movement within Kenya, including by ensuring refugees have the ability to access registration and live legally outside camps.
- In the context of Kenya as a pilot country for the Comprehensive Refugee Response Framework (an annex to the 2016 New York Declaration for Refugees and Migrants), explore options to enhance refugee freedom of movement by revising legislation and making incremental changes to practices and policies, such as:
  - Waiving the requirement for refugees to have a movement pass for travel within Turkana County;
  - Providing multi-trip and/or year-long movement passes for refugees who meet stated criteria; and
  - In relation to business and trade, allowing refugees with valid business permits to receive movement passes upon request.
- In the transition towards greater refugee freedom of movement:
  - Ensure that there are properly resourced and administered systems in place around movement passes, including through the development of clear operating procedures, criteria, and processes to support uniform administration, as well as the training of RAS and other relevant personnel;
  - Provide refugees with clear information on how to obtain movement passes and the criteria for issuance, and establish an accessible appeal mechanism for those denied movement passes.
- Support the Turkana County government through humanitarian and development funding to explore options to increase refugee movement and socio-economic integration, as well as refugee inclusion in the County Integrated Development Plan.

## II. Methodology

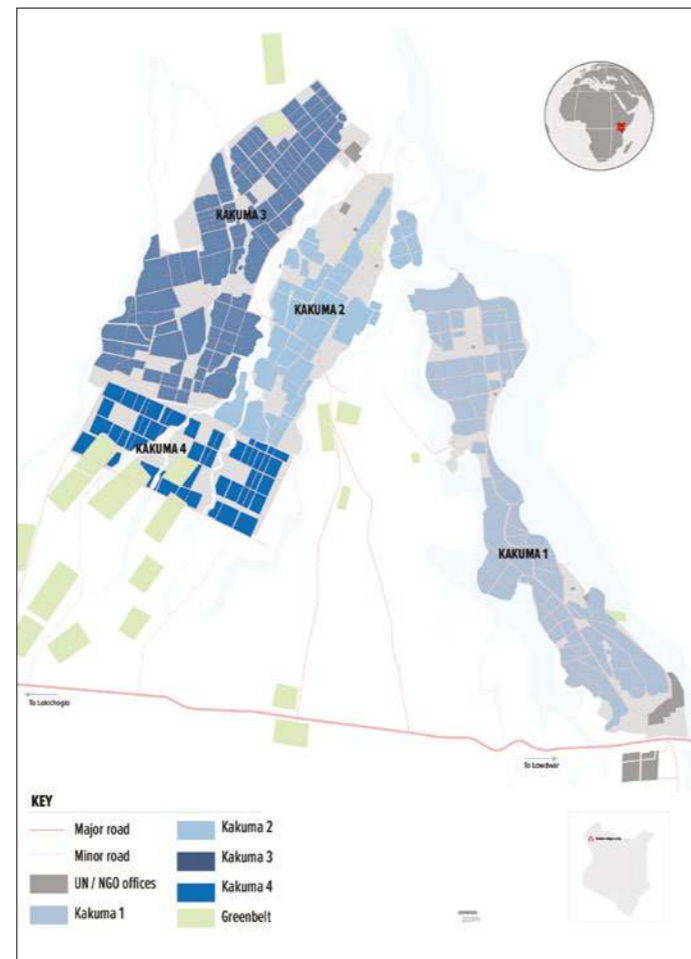
NRC Kenya and the International Human Rights Clinic at Harvard Law School (IHRC) collaborated to carry out research on refugee movement and livelihoods in Kakuma. The project began in September 2017 with desk research on relevant international, regional, and domestic law and policy. In November 2017, researchers carried out a preliminary field assessment in Kakuma. In January 2018, researchers travelled to Kakuma and conducted 40 one-on-one interviews with refugees, 12 focus group discussions with refugees, and 10 interviews with officials from county government, RAS, and other bodies, as well as NGO representatives. In March 2018, an additional three focus group discussions with refugees were held. The aim of interviews and focus groups was to gain an understanding of a broad range of refugees' experiences with movement passes and business permits, to identify challenges around obtaining these two documents, and to explore the consequences refugees faced if they could not obtain them. Interviews and focus groups were based on a common set of questions, but were qualitative in nature. Unless otherwise noted, the stories and quotes in this briefing paper came from the January 2018 research.

To supplement the qualitative research, in May 2018 NRC Kakuma conducted a quantitative survey of 841 refugees. In this briefing paper, this survey is referred to as "NRC's survey." A mix of cluster, proportionate, and systematic random sampling was used to select survey respondents. The camp was divided into five clusters and further subdivided into 13 zones and 133 blocks from which a proportionate sample of four to six respondents were selected and interviewed by enumerators using a combination of open- and closed-ended questions.

In the survey, the majority of respondents were aged 18 to 30 (46 per cent) and 31 to 40 years (33 per cent) with an approximately even split of male (45 per cent) and female (55 per cent) respondents. South Sudanese comprised 36 per cent of respondents, followed by Somali (26 per cent) and Sudanese (12 per cent). Many refugees had no formal education

(32 per cent) but almost a third had completed secondary school (31 per cent) and a lower number had completed only primary school (23 per cent). Twenty-eight per cent of respondents had arrived in Kenya since 2016, and almost a quarter (24 per cent) indicated they had lived in or been relocated from Dadaab. The average family size was six people.

This briefing paper builds on NRC and IHRC's previous collaboration on "Recognising Nairobi's Refugees: The Challenges and Significance of Documentation Proving Identity and Status," a policy report published in November 2017.



Map of Kakuma refugee camp, June 2016. The boundaries and names shown and the designations used on this map do not imply official endorsement or acceptance by the United Nations. © UNHCR.

## III. Background

### Kakuma refugee camp and Kalobeyei settlement

Kakuma refugee camp is adjacent to the town of Kakuma, inside Turkana County, close to the border with South Sudan, in the northwest corner of Kenya. Kenya's second-largest county, Turkana County is home to the Turkana, an ethnic group facing significant economic and livelihood challenges. Refugees comprise around a fifth of the county's population.<sup>3</sup> Kakuma's setting is remote: the closest town, Lodwar, is several hours' drive away; roads are often insecure and sometimes impassable; and transport costs are high. The area is also plagued by drought, with the authors of a 2016 World Bank and UNHCR study noting that "[c]ombined with the lack of public infrastructure and services, these droughts grow into famines with high mortality of both humans and livestock."<sup>4</sup>

Originally established in 1992 to house Sudanese refugees fleeing war, Kakuma refugee camp is divided into four sections, Kakuma I-IV. In 2012, the camp surpassed its capacity of 100,000.<sup>5</sup> As of July 2018, it has a population of nearly 148,000 refugees.<sup>6</sup> Fifty-four per cent are from South Sudan, 23 per cent from Somalia, and refugees from the Democratic Republic of the Congo, Sudan, and Burundi respectively each comprise around five to seven per cent of the rest of the population.<sup>7</sup> Approximately 56 per cent of the camp's inhabitants are aged under 18, and there are slightly more men than women.<sup>8</sup>

In June 2015, the Turkana County government handed over a 15-square-kilometre site for the creation of a new refugee settlement, intended to decrease overcrowding in Kakuma camp generally and to house the increasing numbers of South Sudanese refugees in particular.<sup>9</sup> In 2016, UNHCR began relocating refugees to this new settlement, Kalobeyei, located about 25 kilometres northwest of Kakuma town.<sup>10</sup> As of July 2018, of the 38,300 refugees living in Kalobeyei, more than 73 per cent are from South Sudan, 12 per cent from Ethiopia, and nearly eight per cent from Burundi.<sup>11</sup> UNHCR has refrained from describing Kalobeyei as a "refugee camp,"<sup>12</sup> instead emphasising its focus on integrating the refugee and local Turkana populations and on developing Kalobeyei "as an urban centre."<sup>13</sup> UNHCR estimates that Kalobeyei will eventually host a local population of 20,000 and a refugee population of 60,000.<sup>14</sup> Despite being planned as a settlement, in practice refugees from Kalobeyei are subject to the same movement restrictions as refugees living in Kakuma refugee camp.

Refugees who leave Kakuma encounter police roadblocks – the first of which is just outside the town of Kakuma – at which police require that refugees produce movement passes to continue their journey. Criminal punishment is a real risk, with monitoring organisations recording multiple prosecutions of refugees who have travelled without movement passes.<sup>15</sup>



Kalobeyei settlement, November 2017. IHRC.

## Domestic and international law and policy on refugee movement

Under Kenya's refugee encampment regime, all refugees are legally required to live in and remain within one of Kenya's two refugee camps: Kakuma or Dadaab. From its inception, the 2006 Refugees Act – the primary piece of domestic legislation regulating refugee affairs in Kenya – contemplated that refugees would live in “designated areas,” and officials enforced a policy of encampment.<sup>16</sup> However, no areas were officially designated until the government designated Kakuma and Dadaab in March 2014.<sup>17</sup> From that

point on, any refugee who ventured beyond a camp without a movement pass risked criminal punishment in the form of a fine of up to 20,000 KSH (\$200 USD) or up to six months' imprisonment, or both.<sup>18</sup> (The offence of residing outside a designated area had been included in the 2006 Act, but only took legal effect when the camps were designated in 2014.)

Kenya's encampment policy was further formalised in 2016 through amendments to 2009 regulations issued under the Refugees Act, specifying that “[a] refugee or an asylum seeker shall be required to reside within a designated refugee camp” and that refugees “who wish to reside outside a designated refugee camp shall apply to the Commissioner for



Kakuma IV market, January 2018. IHRC.

Refugee Affairs for an Exemption.”<sup>19</sup> However, as of July 2018, there is no official public guidance on the grounds or procedure for refugees to apply for an exemption under the Act, nor is there any established set of practices (although, as an exceptional measure, on the basis of case-by-case advocacy by UNHCR, RAS has permitted small numbers of refugees – usually those with specific protection concerns related to the camps – to live in Nairobi or elsewhere; the legal mechanism for these exceptions is unclear).<sup>20</sup>

In terms of temporary movement, the 2006 Refugees Act specifies that in each refugee camp there must be a refugee camp officer whose functions include to “issue movement passes to refugees wishing to travel outside the camps,” but the law provides no guidance on the process or criteria for the issuance of movement passes (which refugees commonly refer to as a “travel document” or “travelling document”).<sup>21</sup> The 2009 regulations state that movement passes shall be issued to refugees who have “a valid reason to travel outside a designated area” and require that when an official refuses to grant a movement pass, they must give reasons in writing.<sup>22</sup> The regulations also specify that officials may issue “pupil passes” to refugees who are students, but give no other indication as to what might comprise a “valid reason” to travel, nor set out any procedural guidance.<sup>23</sup> Likewise, there are no publicly available policy documents on movement passes and a range of practices have emerged, largely dependent on the officials involved and their preferences.

Kenya is party to a number of international and regional treaties that guarantee the right of refugees to freedom of movement, including the International Covenant on Civil and Political Rights (ICCPR), the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, and the 1986 African Charter on Human and Peoples' Rights. Taken together, Kenya's international obligations – which the Kenyan Constitution directly incorporates into Kenyan domestic law<sup>24</sup> – allow the government to impose some restrictions on refugees' freedom of movement, but say that restrictions must be necessary and proportionate to the achievement of legitimate aims and must not infringe on other rights enshrined in

treaties to which Kenya is a party. Kenya's encampment policy, as it stands in July 2018, is not in compliance with these requirements.<sup>25</sup> An appendix to this briefing paper outlines the reasons why this is the case.

At a policy level, encampment is difficult to reconcile with recent commitments Kenya has made internationally. In September 2016, the UN General Assembly adopted the New York Declaration for Refugees and Migrants (New York Declaration), in which UN member states recognised that refugee camps “should be the exception,” and endorsed a range of measures to promote refugee self-reliance and increased access to “durable solutions” (local integration; resettlement in a third country; or repatriation to a refugee's country of origin).<sup>26</sup> The Declaration contains an annex – the Comprehensive Refugee Response Framework (CRRF) – which UNHCR anticipates will form part of the “Global Compact on Refugees,” an agreement (expected in late 2018) that states committed to working towards in the Declaration.<sup>27</sup> In October 2017, Kenya signed up to be a pilot country for the CRRF and committed to reviewing its refugee policy and practice, including assessing refugees' access to effective durable solutions.<sup>28</sup> A blanket encampment policy sits uneasily alongside the New York Declaration and CRRF, which reassert refugees' fundamental rights and aim to expand opportunities for durable solutions, such as local integration.

In addition, in March 2017 Kenya signed the Nairobi Declaration on Durable Solutions for Somali Refugees and Reintegration of Returnees in Somalia (the Nairobi Declaration), which was negotiated under the auspices of the IGAD (the Intergovernmental Authority on Development), comprising the four Horn of Africa states – Djibouti, Ethiopia, Somalia, and Eritrea – as well as Sudan, South Sudan, Uganda, and Kenya.<sup>29</sup> In the Nairobi Declaration, IGAD states commit to “progressively advance alternative arrangements to refugee camps and facilitate the free movement of refugees,” in addition to a variety of other measures to “maintain[] protection and promot[e] self-reliance” for Somali refugees.<sup>30</sup> As of July 2018, the Kenyan government is developing action plans for its implementation of both its CRRF and Nairobi Declaration commitments.

## IV. Significance of Refugee Movement

The ability to move freely beyond Kakuma is essential to the ability of refugees to lead autonomous, self-sustaining lives, pursue their professional and educational goals, and contribute meaningfully to the Turkana economy and Kenyan society more broadly. In interviews, refugees consistently emphasised the importance of movement in seeking better employment and livelihood opportunities, conducting business and trade, and remaining optimistic about the possibility of achieving self-reliance. Whether they wanted to travel so that they could pursue opportunities inside or outside the camp, visit relatives and friends living outside Kakuma, or move for other reasons, refugees identified restrictions on movement as a key obstacle to living fulfilling lives and a significant source of frustration, difficulty, and despair. Regardless of their reasons for wanting to travel, most refugees felt that lessening or eliminating limitations on movement would benefit them and alleviate many of the challenges they face while living in Kenya.

### Hopelessness

Movement restrictions hinder the ability of refugees to pursue economic opportunities, run businesses effectively, and achieve economic self-reliance. These obstacles, and the dependence on humanitarian assistance they foster, impact the way refugees perceive their place, and their futures, in Kenya. A young Sudanese photographer who wished to leave Kakuma explained: “When you confine a bird in a cage, you’re making its wings useless – it was meant to fly.” He added: “Refugees are also human beings. We have dreams. We want to make it outside. When you get confined here [in the camp], it actually kills your dreams.” A Ugandan woman felt that the Kenyan government failed to appreciate “the contributions of refugees.” With reference to encampment, she thought that “what comes into our minds is that we’re locked in this area.” She added: “You feel like Kenya hates you .... Whenever you ask to be integrated, they say they don’t want [that].” An Ethiopian man emphasised how leaving the camp would allow for personal development and growth: “As an individual

who is optimistic you need to see other places. Learn what is there. Meet other people. When you come back to the camp, it will be like you’ve come with another mind from that place.”

Other refugees described the frustration of being forced to rely on humanitarian assistance because they lacked other opportunities to support themselves. A Congolese refugee observed: “There’s no good in living in the camp, and it’s very hard to earn a living in the camp; you’re just waiting for the day for [the World Food Programme] to distribute food – that’s the only way we are living; we wait for that day.”

Several refugees expressed the sentiment that Kenyans and Kenyan authorities associated refugees with terrorism, limiting the ability of refugees to take part in Kenyan society. A Sudanese man explained that “when you’re caught without a movement pass at a roadblock, you’re counted as a terrorist.” A South Sudanese refugee similarly highlighted the connection between movement restrictions and perceptions of refugees: “Most terrorism happens when terrorists pretend to be refugees, so they don’t allow refugees to travel. [They think] you might be a terrorist if you’re a refugee. That’s the reason why they have a lot of restrictions when it comes to movement passes.”

Integration into Kenyan society remains a distant prospect for the vast majority of refugees. In NRC’s survey, while most refugees said they would prefer to live elsewhere in Kenya, a significant proportion found it difficult to conceive of leaving Kakuma for another part of Kenya. Fifty-four per cent of respondents said that if they had the choice, they would prefer to live in Nairobi or another part of Kenya. However, just over a quarter (27 per cent) said they did not want to live elsewhere in Kenya, and a fifth (19 per cent) did not know. An earlier 2017 survey NRC conducted in Kakuma on refugees’ intentions around return to their countries of origin complements these findings: only two per cent of respondents believed that any form of local integration was an option for them in Kenya; in general their future plans centred around hopes of

resettlement (53 per cent), while others stated that they simply did not know what they were going to do (31 per cent).

Many refugees have spent significant portions of their lives in Kakuma, unable to move beyond its confines. In NRC’s 2018 survey, half of the respondents had been living in Kakuma since 2013; 14 per cent, since 2008. Taking into account time living in Dadaab, nearly a quarter (24 per cent) of respondents had spent ten years or more in Kenya’s refugee camps. But only 17 per cent of respondents said that they had expected to spend more than five years in a refugee camp when they arrived in Kenya: the majority (61 per cent) thought they would spend less than five years, or “less time than I have been here.”

### Reduced livelihood opportunities

Restrictions on movement can have a negative effect both on refugees’ ability to achieve economic self-reliance and on their capacity to contribute to the local economy and society. Just as encampment entrenches refugees’ dependence on humanitarian assistance and reduces the possibility of self-reliance, it also deprives Turkana County – one of Kenya’s poorest areas – of a valuable source of skills, experience, labour, and other forms of human capital.

As a 2017 OECD report explained: “Refugees can positively contribute to host countries’ economies through several channels. They can bring skills and contribute to the human capital stock, as well as stimulate trade and investment. Refugees may also create employment opportunities, and attract aid and humanitarian investments in, for example, infrastructure, which would benefit refugees as well as the society as a whole.”<sup>31</sup> Rather than allowing refugees to pursue economic opportunities and contribute to the surrounding region, encampment “can engender dependency and weaken the ability of refugees to manage their own lives, which perpetuates the trauma of displacement and creates barriers to solutions, whatever form they take.”<sup>32</sup>

NRC’s survey confirms that Kakuma’s refugees experience high unemployment and limited work and business opportunities. Two thirds of respondents said that they relied on humanitarian assistance as a primary form of support, and only 19 per cent indicated that they earned money through employment (self-employment, casual labour, or otherwise) or business. Just over half (51 per cent) of those earning money earned less than 5,000 KSH (\$50 USD) a month, and a further 44 per cent earned between 5,000 and 10,000 KSH (\$100 USD) a month. Seventy per cent of respondents cited the lack of opportunities in Kakuma as a barrier to



A group of refugees gather in Kakuma for a TEDx talk, June 2018. © Chris Muturi, NRC.

earning an income, and 23 per cent pointed directly to lack of freedom of movement as a barrier.

As a result of limited opportunities in Kakuma, many refugees said in interviews that they wished to travel to seek work and business opportunities. One South Sudanese student explained that “I would like when I finish [school] to go to Nairobi and then find a job there – but in the camp, there’s nothing I can find.” A South Sudanese mechanic had similar impressions regarding opportunities inside and outside the camp, noting that as a mechanic, “some other jobs are available down country, but they’re not available here.” He emphasised the importance of leaving the camp to seek employment, declaring that “we need to move to get a life.” A Ugandan man also highlighted the value of being able to search for opportunities elsewhere, explaining that “it would be good to go out of Kakuma to look for jobs” and noting that Kenyans outside Kakuma “don’t know much about [refugees] – especially companies that are offering the jobs.”

Whether seeking to pursue employment in cities across Kenya, identify new clients for businesses in the camp, import materials into Kakuma, or create other economic opportunities, refugees emphasised that the prohibition on leaving the camp without a movement pass impeded their ability to accomplish their goals and achieve economic independence. One Congolese woman offered a broad description of the livelihood challenges refugees faced, as well as their connection to movement restrictions: she noted that there were few opportunities to earn a living in the camp, especially given the inability to grow crops and the comparatively small number of “incentive worker” jobs (employment with UN agencies or NGOs). Given a challenging reality in which securing a job and “even assistance” presented difficulties, she wondered: “Why is it that the government hasn’t decided to make it easier to get a movement pass so people can assist themselves in another way?”

For refugees with tertiary qualifications, professional backgrounds, or vocational skills (around 10 per cent of refugees, according to NRC’s survey), the inability to pursue employment outside the camp resulted

in feelings of frustration and wasted potential. One Burundian refugee explained: “Many of us are learned, we have degrees, and we are wasted just staying here in the camp. If we could go outside, it would be better and we could continue our lives.” A Congolese man pointed out that restrictions on refugee movement hurt Kenyans as well: “Some of us have so many skills, like from vocational trainings; we could go outside and share these skills with Kenyans.”

The inability of refugees to put their skills to use could undercut the efforts of NGOs offering education and vocational courses in Kakuma. Given movement restrictions, refugees who have completed NGO training programs or even higher education have been unable to pursue opportunities in their fields of expertise or training, or have found that they are paid significantly less as incentive workers than Kenyans in equivalent jobs. Several expressed the view that Kenyans working in the camp considered educated refugees to pose a “threat” to their jobs.

In reducing the ability of Kakuma’s refugees to find employment, run businesses, and share their skills and experiences with Kenyans, encampment hinders refugees’ capacity to contribute to Turkana County’s economy. Kakuma camp has strong economic connections to the neighbouring Kakuma town, which refugees are permitted to visit (but not venture beyond) during the day without a movement pass. As a 2018 study by the International Finance Corporation (IFC) has recorded, Kakuma camp and Kakuma town “have become socioeconomically interdependent with refugees hiring, trading, and working with town residents and vice versa. For example, refugees hire Turkana locals as porters, shopkeepers, security guards, or casual labor.... At the same time, Kakuma town residents shop in the camp and sell livestock and charcoal to refugees, who do not have easy access to these resources.”<sup>33</sup> A 2016 economic study likewise showed that “the more interaction refugees have with the host-country economy around them, the greater the potential there is to create benefits for both refugees and host countries.”<sup>34</sup> But encampment severely limits the potential of existing connections, as refugees struggle to move beyond Kakuma and build links with the broader Turkana economy.

## Importance of movement to refugee business owners

Confronted with restrictions hindering their ability to leave Kakuma, refugee business owners and tradespeople often depend on Kenyan middlemen to bring goods and supplies into the camp, incurring substantial extra costs and added risks, and leaving refugees unable to select supplies themselves. Additionally, refugees’ client bases are largely limited to those within the camp, as movement restrictions make expansion outwards nearly impossible. Refugee business owners expressed general frustration at the difficulty of obtaining movement passes to conduct business.

### Kakuma’s Businesses

The IFC’s 2018 study found that there were more than 2,000 businesses in Kakuma.<sup>35</sup> In NRC’s survey, 18 per cent of respondents indicated that they operated a business in Kakuma (IFC’s study found a slightly lower number, 12 per cent, of self-identified business owners). A third (34 per cent) ran shops selling mostly or exclusively food, 23 per cent ran shops selling goods other than food, and 16 per cent ran a hotel, restaurant, or bar (a “hotel” refers to a restaurant or bar).

Of those who were not business owners or self-employed, nearly two thirds (65 per cent) wanted to start a business, but identified barriers to that goal, such as lack of money (77 per cent) and the challenges and expense of obtaining goods to sell in Kakuma (17 per cent).

In interviews, business owners considered that reliance on middlemen and suppliers outside Kakuma meant their costs – and the prices they charged – were higher than they should have been. An Ethiopian hotel-owner stated that “[if] I have a chance to go elsewhere I would get supplies on my own because it would be cheaper – I would go to Nairobi or Kitale [a town more than 400 kilometres south of Kakuma].” A Sudanese businessman likewise asserted that “it is better if people can move to discover resources where they can get cheaper prices.” These impressions

were echoed by other refugee business owners in the camp, who felt that being able to buy cheaper goods in other parts of Kenya would allow them to sell at more competitive prices in the camp. As one trader in Kalobeyei explained, “if we want the things [at a good price] we need the movement,” adding, “if we bring things from Kitale, we will sell [goods in Kakuma] at the price of the wholesaler [in Kitale].”

Reliance on middlemen has also left refugee business owners vulnerable to fraud. One Congolese trader explained that he and two others had received a loan from an NGO in the camp to start a business. Having been rejected for a movement pass, he sent money to someone in Nairobi, seeking to purchase a printer, a kiosk, a laminator, and a copier. However, when his supplies arrived in Kakuma, the man discovered that he had not received the objects he had specified, and he could not retrieve the money.

### Artists in Kakuma

Artists in Kakuma face a number of challenges related to their inability to move freely. One South Sudanese artist and business owner explained that he had twice been rejected for a movement pass and so he had been unable to travel to Nairobi to repair equipment that had broken. He was instead forced to purchase supplies, such as ink and printer paper, at high prices, due to the increased cost of these types of goods within the camp. Though he had persevered and continued to work, he was frank about the ways in which operating in Kakuma had limited his opportunities: “If we were allowed to settle in another town, we could have been more successful, [and earned] some real money.” A Somali hip-hop artist likewise highlighted the limited client base within Kakuma: “We produced CDs...but there’s nowhere to sell them in the camp; there’s no market for them here.”

Other refugee business owners similarly emphasised the importance of travelling for the purposes of selecting goods themselves. A Sudanese mechanic explained that his primary difficulty was obtaining spare parts from outside of the camp. He had started a motorcycle repair business with nine other refugees, none of whom had been able to obtain movement

passes. When he applied for a movement pass, a RAS official reportedly asked him, “Why do you need to make a business as a refugee? [WFP] gives you food and you can just stay at home” and informed him that he “wasn’t allowed to get a movement pass because [he] wasn’t sick.” Obligated to rely on middlemen to bring in supplies, the mechanic emphasised his desire to purchase the parts himself: “We try to communicate with the people outside and I send for someone in Nairobi. [But] the prices are then higher.” He felt that “if I could go to Nairobi I would be able to get better prices and quality spare parts and test them before [buying them].”

As refugees cannot sell their goods or pursue clients beyond Kakuma without a movement pass, their business opportunities are generally limited to the local market and local clients. Refugee electricians and plumbers, for example, noted that essentially the only client base for tradespeople is international organisations operating in the camp. The inability to pursue clients and sell goods outside Kakuma heightens competition for already limited opportunities within the camp, and prevents refugee-owned businesses from reaching their full potential.



A market in Kakuma I, January 2018. IHRC.

### Curfew in Kakuma

Just as refugees are prohibited from travelling beyond Kakuma town without a movement pass during the day, their movement is further restricted – to their shelters – during the evening and night. Kakuma’s daily curfew, which takes effect in the evening and lasts until dawn, prohibits refugees from moving within the camp and requires non-refugees to remain outside the camp until morning. Police patrol the camp nightly enforcing the curfew. The curfew has been in place for a number of years, but IHRC and NRC have been unable to locate any official public document outlining its official start time, duration, or legal justification.<sup>36</sup>

In NRC’s survey, two thirds of refugees considered that the curfew had an impact on them: it made it more difficult to visit friends and family (42 per cent), run a business (18 per cent), or access goods and services (17 per cent). However, likely reflecting the law-and-order concerns that a police representative stated underlie the curfew,<sup>37</sup> refugees had mixed feelings about whether the curfew should be relaxed: 29 per cent agreed with the statement that they would prefer that there were no curfew, while 41 per cent did not agree with that statement and 30 per cent did not know. Similarly, while 38 per cent of refugees thought it was “very difficult” to comply with the curfew, 17 per cent thought it was “very easy.”

While the curfew has an effect on all refugees, it poses particular challenges for refugee business owners as it can hinder their ability to conduct business inside the camp. In interviews, one Rwandan man working as a butcher noted that the curfew has prevented him from selling to potential customers who seek to purchase meat during the evenings. He explained that conducting business after the curfew can result in serious consequences: “When you want to start business around 5pm or 6pm police will come, arrest people, and take them to the police station .... This is such a hard life.” A Somali business owner offered a similar view, stating that “when you reach beyond 7pm and police find customers in the shop, they can arrest you and the customers in the shop.”

## V. Movement Passes

Although movement passes are the only official way to leave Kakuma, they have often been inaccessible to refugees. Information on movement passes is limited and generally informal, and practices related to their issuance seem unpredictable, opaque, and arbitrary to refugees. The practices that have emerged in Kakuma exist without legal or policy guidance: while Kenyan legislation specifies that refugees must live in designated refugee camps and provides for the existence of movement passes, no law, regulation, or policy guidance provides details around the criteria under which passes shall be granted, the application procedure, or the duration of passes. Arbitrary and ad hoc practices around movement passes mean that refugees’ ability to leave Kakuma with permission, even for temporary periods, can be very limited. Travelling without a movement pass puts refugees at risk of arrest, detention, and criminal punishment.

### Procedural practices

As of July 2018, refugees in Kakuma must apply for movement passes at the RAS office on the edge of Kakuma I, a section of the camp located near the Kakuma airstrip. The RAS camp manager’s practice is to issue movement passes with the help of a vetting committee, comprising members of security agencies operating in Kakuma. While there are no official criteria on the reasons for which movement passes may be issued (with the exception of education), the movement pass application form RAS has provided to refugees in Kakuma indicates that RAS has developed its own internal criteria. The form, which has been available only in English, lists six reasons for travel: medical, education, visiting an embassy, visiting a friend or relative, business or trade, and “other,” and gives examples of additional documents refugees should provide to support each reason. On the form, refugees must state their reason for travel, the location to which they hope to travel, and the duration (in days) of their requested stay outside Kakuma.

In January 2018, the RAS camp manager explained in an interview that he typically issues around 200 to

300 passes a month, with higher numbers at the end and beginning of the year when children return to school and require new movement passes. He was unable to quantify what proportion of applications were typically successful, but noted that most passes are issued on medical and educational grounds. The ambiguous “other” category encompasses a very limited number of circumstances, such as attending a conference or a religious gathering, which are determined by RAS officials on an ad hoc basis. Practices around movement passes for business reasons in particular have differed across time: for a period in 2017, RAS ceased granting movement passes for business reasons altogether, and made this practice known to refugees through posters at the RAS office.

In January 2018, researchers observed the movement pass issuance process. Each Thursday morning, refugees who wished to leave the camp travelled to the RAS office, where they filled out a form and attached supporting documents. RAS’ practice was to issue movement passes on Thursdays only. Refugees waited outside the office while their application was reviewed. The vetting committee would call in applicants for questioning if the committee deemed it necessary. For example, the committee may have been concerned that the reason for which a refugee requested to travel was not genuine. Later in the day, RAS officials took the fingerprints of refugees whose applications had been approved that day and started issuing them with movement passes from the early afternoon onwards. For unsuccessful applicants, there was no appeal process, although they could reapply for movement passes without limit.

The movement pass itself is an A4-sized document that includes the refugee’s photo, the reason for travel, and the pass’s duration; the document also states that a refugee “who overstays the validity of the movement pass will be subjected to sanctions in accordance with [the section of the Refugees Act that establishes the offence of residing outside a designated area]<sup>38</sup> and notes that the pass must be “surrendered to the RAS office” the day after it expires.



## Practices in movement pass issuance

In interviews, a number of refugees expressed confusion and dissatisfaction regarding RAS' practices around movement pass issuance. Many stated that practices were discretionary and unpredictable, with no clear or consistent criteria governing whether or not officials approved or denied a movement pass application. One Congolese man emphasised the arbitrary nature of practices, stating that "you might have the same reason when you're applying, and one person gets it, the other doesn't." Out of five applications for movement passes, he had only succeeded once. As another refugee explained: "The criteria for someone to be given a movement pass, that is not known." This view was shared by an NGO representative whose NGO had assisted refugees in applying for movement passes: she noted that "at times"

applications were successful, "but a number of times they say no, or [we're] not giving it now; come some other time."

Rates of success seem variable depending on the time period and practices in place. In NRC's survey, 15 per cent of respondents said they had applied for a movement pass at some point in the past. A large majority (91 per cent) of those who applied said they had been successful in obtaining at least one movement pass throughout their time in Kakuma, but a significant number (82 per cent) had had an application for a movement pass rejected on one or more occasions, and nearly a third (32 per cent) had been rejected more than twice. For those who were successful on their last attempt to obtain a movement pass, the majority received movement passes for medical (30 per cent) and educational (25 per cent) reasons.

Example of a RAS Kakuma movement pass application form, January 2018. IHRC.

Example of a Kakuma-issued movement pass, November 2017. IHRC.

Refugees also faced practical challenges to obtaining movement passes. As the movement pass application form has been available only in English, refugees who cannot read English have been unable to complete it unless they receive assistance from other refugees; reportedly, some refugees have sought assistance from brokers to make movement pass applications. Additionally, the RAS office is some distance from areas where many refugees live: for a refugee living in Kakuma III, it could take two to three hours to walk to the office, and Kalobeyei residents must make a journey of 25 kilometres, at a cost of 200 KSH (\$2 USD) by motorbike, simply to apply. One Kalobeyei resident noted that refugees without jobs struggled to afford this cost, adding that "it is not easy for them to move from here to Kakuma [refugee camp] on foot." Others – particularly Kalobeyei residents – raised the risk of being robbed or attacked on the journey, which many refugees made early in the morning to ensure they arrived at the RAS office before long queues developed. Some refugees encountered delays at the RAS office that meant they made this journey multiple times. The RAS office itself has a variety of responsibilities apart from issuing movement passes, and faces significant capacity constraints, such as poor internet connectivity and lack of paper.

### Profile of movement pass applicants

In NRC's survey, 15 per cent of respondents said they had gone to the RAS office and filled in an application for a movement pass at least once. Longer-term Kakuma residents, who often live in more established parts of the camp, were predictably more likely to have applied for a movement pass. For example, 31 per cent of Somali respondents, and 27 per cent of Kakuma I respondents said they had applied for a pass. By contrast, only two per cent of Kalobeyei and three per cent of Kakuma IV respondents had applied. Very few South Sudanese respondents had applied: only 19 of the survey's 302 South Sudanese respondents (six per cent) had applied for a movement pass. Applicants were also more likely to be male: 19 per cent of all male respondents had applied, as compared to 12 per cent of all female respondents.

The duration of passes varies according to officials' discretion, and refugees have sometimes been granted insufficient time to complete the tasks that formed the basis for their movement pass application. RAS appears to make judgments based on what officials deem a reasonable amount of time to travel to various parts of Kenya for different purposes, but no law or policy helps guide officials in setting the duration of movement passes. A Somali woman who travelled to Nairobi to purchase supplies for her clothing shop in Kakuma noted that the 12 days she received was "not enough time – to reach Nairobi it takes many days; the road might be rough." She expressed frustration that there was no process through which to request additional time.

RAS' practice has been to require refugees to return to the RAS office in Kakuma to apply for a new movement pass if they need more time outside Kakuma than their original movement pass provides, rather than approaching RAS in Nairobi or elsewhere. An Ethiopian man in his late 30s who spent eight months in Nairobi receiving medical treatment reported that he had to make the long journey back to Kakuma every two months to apply for new movement passes. Similarly, an NGO worker explained that whereas RAS previously granted movement passes for education reasons on an annual basis, around 2017 officials began issuing passes that lasted for several months only, forcing refugee students to come back to Kakuma between terms. Movement passes also only permit movement to a specified place: a refugee with permission to study in one part of the country may be unable to attend school-related conferences in other parts of Kenya, for example.

Practices around the issuance of movement passes for business reasons in particular have differed over time, causing confusion and frustration among business owners. Many refugee business owners expressed the belief that RAS rarely issued movement passes for business reasons. Although the camp manager confirmed that, as of January 2018, movement passes were available for business reasons, there have been periods in which this has not been the case, and changes in practice have not been effectively communicated to business owners. In NRC's survey,

only 34 per cent of business owners who had left the camp for business-related reasons said that they had received a movement pass before their most recent trip, meaning that business travel had exposed them to the risks of travelling without a movement pass.

Additionally, although the movement pass application form lists a business permit as a requirement to obtain a movement pass for business reasons, RAS has not consistently treated a business permit as sufficient to receive a pass. A 33-year-old Somali woman who owned a clothing shop and whose movement pass application had been rejected in 2017 explained that “if we try to go to the office for the movement pass, the business permit is not enough.” Given her inability to travel to purchase goods, she worried about the future of her business: “You can see now that I don’t have many clothes [for sale in my shop]. And I can’t get new clothes [to sell] because I don’t have a movement pass.”

Some refugees believed that corruption existed in the movement pass issuance process. One Congolese refugee noted that movement passes are “officially free, but people often have to pay.” Other refugees described experiencing discrimination on the basis of nationality. A Somali refugee said that when she tried to apply for a movement pass to buy goods for her business, a RAS official told her that “Somali[s] are not getting movement passes.” In addition, at least two women alleged that a male RAS official had demanded that the woman engage in sexual conduct with him before granting her a movement pass. A Congolese woman explained: “I have not been given any [movement passes] as the officer asked me for

sexual favours. I have not returned to RAS again to make any application. Some will ask for your number, call you and direct you where to meet. Once you fail to go then...rest assured your movement pass will never be out.”

## The essential role of movement passes in refugee travel

In the context of Kenya’s encampment policy, obtaining a movement pass is a vital step for those seeking to leave Kakuma for any reason whatsoever, as there is no other official way to leave. Refugees who travel beyond Kakuma without a movement pass may face a variety of consequences, including: arrest, fines, criminal prosecution, detention followed by return to the camp, and demands for bribes. While having a movement pass mitigates risk, even refugees with movement passes may face these consequences, as refugees are a marginalised population in Kenya and the encampment policy has fostered in police the idea that refugees should not travel.

A number of refugees emphasised the likelihood of arrest and fines for those who travel outside Kakuma without a movement pass. In NRC’s survey, 21 per cent of respondents said they had left Kakuma without a movement pass at some point in the past – most (17 per cent of respondents) had done so only once. Men were more likely to have travelled outside Kakuma without a movement pass than women: 26 per cent of men said they had left Kakuma without a movement pass on one or more occasions, while only 17 per cent of women said the same.



A roller and ink pad used in the issuance of movement passes in Kakuma, January 2018. IHRC.

## Scale of official movement

In January 2018, the Kakuma camp manager showed researchers statistics that indicated that he had issued a total of 540 refugees with movement passes in December 2017 (the overall number of movement passes may have been lower, as groups – such as children going to the same school – can receive one “group” movement pass). The camp manager noted that the number of passes he typically issues each month is around 200 or 300, though he issues more in December and January because children are returning to school. These figures suggest that only a tiny percentage of Kakuma’s population of 186,000 people have the opportunity to leave Kakuma in any given time period, and the majority of these are leaving only to obtain necessary medical treatment or attend school.

## Prosecution statistics

According to the Refugee Consortium of Kenya (RCK), an NGO active in representing Kakuma-based refugees in court, refugees arrested for travelling without movement passes are either charged with residing outside a designated area, or released without charge and returned to the camp.<sup>39</sup> (Authorities interpret “residing” to include merely being outside a designated area without a movement pass, an interpretation noted on movement passes themselves.) RCK reported that in 2017 it represented 51 individuals in the local Kakuma court who were charged with residing outside a designated area – 34 were released without conviction, 17 were fined between 5,000–10,000 KSH (\$50 – \$100 USD), and two repeat offenders were fined 20,000 KSH (\$200 USD).<sup>40</sup> RCK also reported that in 2017 at least 107 additional refugees were apprehended outside Kakuma – but still within Turkana County – and charged with residing outside a designated area.<sup>41</sup> The number of refugees found in Turkana who were arrested and returned to the camp, but not formally charged, is unknown, and statistics on prosecutions of Kakuma-based refugees beyond Turkana County are not available.

In interviews, refugees described their experiences. A Somali refugee who had previously received a movement pass to purchase goods for her shop noted that, because of the police roadblock located close to the camp, “you can’t get out without a movement pass.” She explained that what occurs at roadblocks depends on whether or not a refugee is in possession of a movement pass: “They will stop the [vehicle] and ask for people who have a movement pass. If you have it, you will comfortably travel. If you don’t have it, people even go to court – they will arrest you for going outside the camp.” A Congolese refugee noted that “even if you go with [a movement pass], and it’s expired – you get one week, and you stay for more than one week – when you get back you’ll be challenged on the road.” In addition to arresting refugees travelling without movement passes, police may return them to Kakuma. Another Congolese refugee observed that “many [refugees] have been arrested at the first road block, and they are taken back.” A Ugandan refugee recounted that she was “arrested and returned back to the camp” when she attempted to travel without a movement pass.

Other refugees spoke of the challenges facing refugees at police checkpoints, including the possibility that police might demand bribes. Police corruption is a well-recognised issue in Kenya and international studies suggest that bribery is especially prevalent.<sup>42</sup> A South Sudanese refugee explained that, from his perspective, if a refugee could not obtain a movement pass but needed to travel, bribery was the only option: “You can pass, but you lose a lot [of money]. Maybe you want to go to Nairobi – you have to have a lot of money. Money is the only thing that can say anything. Money talks.” Refugees generally expressed the view that a movement pass offered protection but did not fully insulate refugees from risks. A Somali refugee explained that “if you have [a movement pass], you won’t be stopped – it will protect you.” By contrast, a Sudanese refugee alleged: “Sometimes [the movement pass] doesn’t help. They [police] see it and ask for money, for other documents.” A Congolese refugee similarly alleged that “we are told to give bribes again to the police officer along the way despite having valid [movement passes].”

## VI. Recommendations

As the Human Rights Committee – the official body of independent experts created by the ICCPR to monitor the implementation of the treaty – has noted, “[l]iberty of movement is an indispensable condition for the free development of a person,” and is connected to a variety of other rights.<sup>43</sup> These include rights to work, freedom of association, education, and health-care. In the context of Kakuma, movement restrictions have a significant impact on refugees, impeding their ability to pursue professional and education opportunities, achieve economic self-reliance, and lead autonomous and fulfilling lives.

To better protect refugees’ human rights, particularly the right to freedom of movement, IHRC and NRC make the following recommendations:

### The National Government of Kenya should:

- Recognise refugees’ right to freedom of movement and allow refugees freedom of movement within Kenya, including by ensuring refugees have the ability to access registration and live legally outside camps.
- In the context of Kenya as a pilot country of the CRRF, explore options to enhance refugee freedom of movement through commitments to introduce incremental changes in current practice and revise legislation.
- Ensure that RAS is appropriately resourced and supported to carry out its functions in Kakuma.

### The Refugee Affairs Secretariat should:

- Ensure that any movement pass system is properly administered through the development of clear operating procedures, criteria and systems to ensure uniform administration, and the training of RAS and other relevant personnel.
- Revise current practices around movement passes to allow for greater freedom of movement for refugees.

- As a first step towards lessening restrictions on refugee movement, explore options around the duration and geographic scope of movement passes, such as:
  - Waiving the requirement for refugees to have a movement pass for travel within Turkana County; and
  - Providing multi-trip and/or year-long movement passes for refugees who meet stated criteria.
- In relation to business and trade, allow refugees with valid business permits in the camps to receive movement passes upon request.
- Create a mechanism for refugees to be given clear information on reasons for denial of movement passes and ensure that there is an accessible appeal mechanism in place.
- Collaborate with refugee representatives, UNHCR, local actors working with refugees, and the Turkana County government to develop and disseminate regular information on the movement pass system and procedures.

### The Turkana County Government should:

- In consultation with UNHCR and the national government, explore options for lessening restrictions on refugee movement at least within Turkana County as a first step.
- Work with local NGOs and the national government to ensure that refugee voices and perspectives are heard in the development of County Integrated Development Plans<sup>44</sup> and relevant county laws, as well as in national refugee policy, since refugees constitute an essential part of Turkana County.
- Work with UNHCR and other refugee actors to engage with refugee policy at the county level, as refugees play a significant role in Turkana County’s economy and society.

- Explore, with police and other actors, options for reducing or eliminating the curfew in light of its effects on refugees and Kenyan residents of Kakuma town.
- Continue advocating for policies that actively seek to promote livelihood opportunities for refugees.

### The National Police should:

- Revisit the curfew prohibiting movement within Kakuma at night, and assess whether this movement restriction should be lifted or reduced in duration.
- Continue to work towards ensuring that police abide by international human rights standards on arrest and detention.

### National and International NGOs and Donors should:

- Support the Government of Kenya and Turkana County government to carry out the above recommendations.
- Provide development and multi-year funding to county governments to support implementation of County Integrated Development Plans.
- Follow up with the Government of Kenya and RAS in relation to the implementation of CRRF and IGAD commitments and support, through funding and stakeholder engagement, the creation of an enabling environment for Kenya to meet these commitments.



A market in Kakuma I, January 2018. IHRC.

# Appendix

## Refugee Freedom of Movement in International Law

Freedom of movement is a right accorded to refugees in international law and protected in treaties to which Kenya is a party, particularly: the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (1951 Refugee Convention); the International Covenant on Civil and Political Rights (ICCPR), and the 1986 African Charter on Human and Peoples' Rights (the Banjul Charter).

- The 1951 Refugee Convention specifically protects refugee freedom of movement. Article 26 stipulates that states parties “shall accord to refugees lawfully in its territory the right to choose their place of residence to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.”
  - The phrase “lawfully in its territory” has been interpreted to include refugees admitted to the host state’s territory, even for a short period of time, pursuant to domestic law, or whose entrance has been regularised.<sup>45</sup> In the context of Kenya, once refugees register, this requirement is met – receiving official recognition as a refugee is not a precondition to enjoying freedom of movement.
  - In situations in which large numbers of refugees enter a country across a short time period, processing and temporary residence in camps may be permissible “as part of a humane public order system for managing the influx, but such restrictions must be temporary in character and should not constitute detention or internment.”<sup>46</sup> Kenya’s encampment policy is not temporary, does not distinguish between refugees who have registered and those who have not, and imposes criminal penalties on refugees who leave camps without movement passes.
  - Article 26 excludes the possibility of restrictions on movement that apply exclusively to refugees, as such measures would contravene the language

of “subject to any regulations applicable to aliens generally in the same circumstances.”<sup>47</sup> Consequently, a policy, such as Kenya’s, that exclusively restricts freedom of movement for refugees and applies to no other class of aliens would contravene Article 26.

- Other articles of the 1951 Refugee Convention allow for movement restrictions in specifically defined circumstances that could not be used to justify a general policy of encampment.
  - Article 31(2) allows states to restrict the movement of a refugee who entered the country unlawfully and whose status as a refugee has not yet been recognised, but only to the degree that such a restriction is “necessary.”
  - Article 9 of the Convention allows for provisional measures in situations of “war or other grave and exceptional circumstances,” that are “essential to the national security in the case of a particular person,” which could include measures limiting an individual’s movement prior to the determination of that individual’s refugee status.
  - Encampment policies, such as Kenya’s, that are not temporary and fail to distinguish between officially recognised and unrecognised refugees fall outside these provisions.
- Article 12(1) of the ICCPR stipulates that “every one lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.” Any restrictions on that right must comply with Article 12(3): freedom of movement “shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the [ICCPR].”
  - The Human Rights Committee has interpreted the phrase “lawfully within the territory of a

state” to include anyone who has been officially admitted to a state pursuant to its domestic law, a situation that applies to refugees in Kenya once they register.<sup>48</sup>

- To be lawful, restrictive measures must not only be “necessary” to protect national security or one of the other listed reasons, but they also must “be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.”<sup>49</sup>
- An encampment policy of unlimited duration that subjects all refugees to significant movement and residency restrictions would be unlikely to pass this test. In particular, it would be difficult to demonstrate that Kenya’s encampment policy satisfies the “least intrusive instrument” element of the proportionality test.

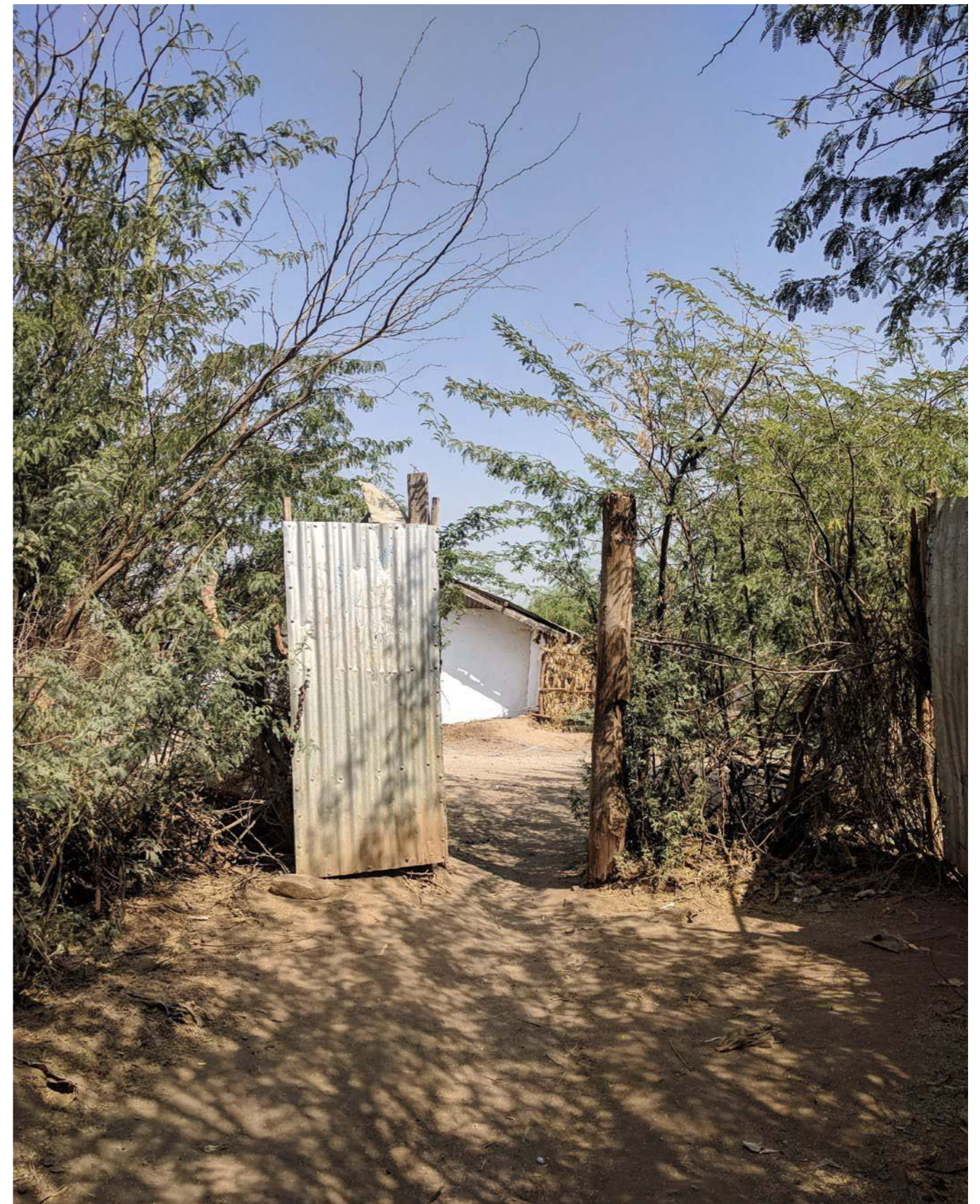
- Article 12(1) of the Banjul Charter provides that “every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.”
  - Although “provided he abides by the law” appears to allow for a wide range of permissible restrictions on the right to freedom of movement, the African Commission on Human and Peoples’ Rights has held that restrictions must meet additional requirements drawn from other parts of the Banjul Charter.<sup>50</sup> Namely, restrictions on freedom of movement and residency must: be undertaken for a prescribed set of legitimate aims; satisfy a necessity and proportionality analysis; and not infringe on other rights laid out in the Banjul Charter.<sup>51</sup> In effect, these requirements align the right to freedom of movement under the Banjul Charter with the equivalent right enshrined in the ICCPR.



Market in Kakuma I, January 2018. IHRC.

# Endnotes

- 1 See IHRC and NRC, *Recognising Nairobi's Refugees: The Challenges and Significance of Documentation Proving Identity and Status*, November 2017.
- 2 In this briefing paper, the term "refugee" is used to refer to all persons in need of international protection in Kenya, regardless of whether the Government of Kenya or UNHCR – the United Nations Refugee Agency – has recognised their status as a refugee or asylum seeker.
- 3 World Bank and UNHCR, "Yes" *In My Backyard? The Economics of Refugees and their Social Dynamics in Kakuma, Kenya*, 2016, p 46, available at <http://documents.worldbank.org/curated/en/308011482417763778/Yes-in-my-backyard-The-economics-of-refugees-and-their-social-dynamics-in-Kakuma-Kenya>.
- 4 Ibid, p 6.
- 5 Emmanuel Nyabera, UNHCR, "Kakuma camp in Kenya surpasses its 100,000 capacity," 6 August 2012, available at <http://www.unhcr.org/en-us/news/latest/2012/8/501fdb419/kakuma-camp-kenya-surpasses-its-100000-capacity.html>.
- 6 UNHCR, "Kakuma Camp Population Statistics," July 2018, available at <https://data2.unhcr.org/en/documents/download/64767>.
- 7 Ibid.
- 8 Ibid.
- 9 UNHCR, "Kalobeyei Settlement," available at <http://www.unhcr.org/ke/kalobeyei-settlement>.
- 10 Ibid.
- 11 UNHCR, "Kalobeyei Settlement Population Statistics," July 2018, available at <https://data2.unhcr.org/en/documents/download/64768>.
- 12 Sora Halake, "UNHCR, Refugees at Odds over Quality of Life at New Kenya Settlement," *VOA News*, 25 August 2017, available at <https://www.voanews.com/a/kenya-kalobeyei-refugee-settlement-living-conditions/4000462.html>.
- 13 UNHCR, "Kalobeyei Settlement."
- 14 Ibid.
- 15 See Refugee Consortium of Kenya, "Refugee Protection Situation Reports," available at <https://www.rckkenya.org/resource-center/>.
- 16 Refugees Act 2006, section 25(f) (although the text of section 25(f) erroneously references section 15(2) instead of section 16(2)). 2014 amendments to the Act reinforced the encampment policy, with section 14 being amended to state that refugees "shall... not leave the designated refugee camp without the permission of the Refugee Camp Officer." Refugees Act 2006, section 14(c) (as amended by Act No 19 of 2014).
- 17 "The Refugees Act: Designation of Areas as Refugee Camps" (March 2014) *The Kenya Gazette*.
- 18 Refugees Act 2006, section 25(f).
- 19 Refugees (Reception, Registration and Adjudication) Regulations 2009, sections 35A(1) and (2).
- 20 See IHRC and NRC, *Recognising Nairobi's Refugees*, p 41.
- 21 Refugees Act 2006, section 17(f).
- 22 Refugees (Reception, Registration and Adjudication) Regulations 2009, section 35.
- 23 Ibid, section 36.
- 24 Article 2(6) of the Constitution states that "any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution." Freedom of movement is also specifically protected by Article 39(1) of the Kenyan Constitution, which states that "every person has the right to freedom of movement." In a series of cases since 2013, the Kenyan courts have struck down certain encampment-related policies for infringing refugee rights, or for failing to satisfy the general limitations clause enshrined in Article 24 of the Kenyan Constitution. However, there is no clear indication that the Kenyan courts consider that encampment constitutes a per se violation of the Constitution (and thereby, international law). See, for example, *Attorney General v Kituo Cha Sheria & 7 others* [2017] (Court of Appeal); *Refugee Consortium of Kenya & another v. Attorney General & 2 others* [2015] (High Court); *Samow Mumin Mohamed & 9 others v. Cabinet Secretary, Ministry of Interior, Security and Coordination & 2 others* [2014] (High Court).
- 25 For a discussion on alternatives to encampment in the context of Kakuma, see World Bank and UNHCR, "Yes" *In My Backyard?*
- 26 New York Declaration for Refugees and Migrants, A/RES/71/1, 3 October 2016, para 73, available at [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/71/1](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/1).
- 27 See UNHCR, "Comprehensive Refugee Response Framework," available at <http://www.unhcr.org/en-us/comprehensive-refugee-response-framework-crrf.html>.
- 28 NRC, *Putting Protection at the Heart of the Global Compact: Refugee Prospectives from Ethiopia, Kenya and Djibouti*, December 2017, available at <https://www.nrc.no/resources/reports/putting-protection-at-the-heart-of-the-new-global-compact/>.
- 29 Nairobi declaration on durable solutions for Somali refugees and reintegration of returnees in Somalia, March 2017, available at <https://data2.unhcr.org/en/documents/details/58248>.
- 30 Ibid. See also Alex Aleinikoff, "Nairobi Declaration on Somali Refugees," *Forced Migration Forum*, 30 March 2017, available at <https://forcedmigrationforum.com/2017/03/30/nairobi-declaration-on-somali-refugees/>.
- 31 Organisation for Economic Co-operation and Development, *Assessing the contribution of refugees to the development of their host countries*, September 2017, p 11, available at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DEV/DOC\(2017\)1&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DEV/DOC(2017)1&docLanguage=En).
- 32 UNHCR, "UNHCR Policy on Alternatives to Camps," UNHCR/HCP/2014/9, 2014, p 4, available at <http://www.unhcr.org/5422b8f09.html>.
- 33 International Finance Corporation (IFC), *Kakuma as a Marketplace: A consumer and market study of a refugee camp and town in northwest Kenya*, 2018, p 35, available at [https://www.ifc.org/wps/wcm/connect/8fb8fab4-af24-4b09-bd-ff-2109d2c45974/20180427\\_Kakuma-as-a-Marketplace\\_v1.pdf?MOD=AJPERES](https://www.ifc.org/wps/wcm/connect/8fb8fab4-af24-4b09-bd-ff-2109d2c45974/20180427_Kakuma-as-a-Marketplace_v1.pdf?MOD=AJPERES).
- 34 J Edward Taylor, "Research: Refugees can Bolster a Region's Economy," *Harvard Business Review*, October 2016, available at <https://hbr.org/2016/10/research-refugees-can-bolster-a-regions-economy>, referencing J Edward Taylor, Mateusz J Filipski, Mohamad Alloush, Anubhab Gupta, Ruben Irvin Rojas Valdes, and Ernesto Gonzalez-Estrada "Economic impact of refugees," *Proceedings of the National Academy of Sciences*, May 2016, available at <http://www.pnas.org/content/pnas/113/27/7449.full.pdf>.
- 35 IFC, *Kakuma as a Marketplace*, p 14.
- 36 The presumptive legal basis for the curfew is the Public Order Act 1950, which provides: "The Cabinet Secretary, on the advice of the Inspector-General of the National Police Service may, if he considers it necessary in the interests of public order... direct that, within such area and during such hours as may be specified in the curfew order, every person or... every member of any class of persons... shall... remain indoors in the premises at which he normally resides, or at such other premises as may be authorised by or under the curfew order." (Public Order Act, Article 8(1)) [emphasis added]. This law – enacted in 1950 prior to Kenya's independence and most recently amended in 2014 – contains two articles on the state's ability to impose "curfew orders" and "curfew restriction orders" (Public Order Act, Articles 8 and 9). However, the exact scope of the government's curfew power remains somewhat ambiguous, particularly in cases in which the curfew applies exclusively at night. Though several High Court cases have dealt with curfews and the Public Order Act, none appear to provide a clear answer to the scope of the government's power to impose curfews. See *Muslims for Human Rights (MUHURI) & 4 others v Inspector General of Police & 2 others* [2014] (High Court); *Haki na Sheria Initiative v Inspector General of Police & 2 others* [2015] (High Court).
- 37 Interview with police representative, Turkana County, January 2018.
- 38 The wording mirrors the form set out in Schedule 10 of the Refugees (Reception, Registration and Adjudication) Regulations 2009.
- 39 Interview with RCK representatives, Kakuma, January 2018.
- 40 Ibid.
- 41 Ibid.
- 42 See *Transparency International, People and Corruption: Africa Survey 2015*, December 2015, pp 17, 35, and 39, available at [https://www.transparency.org/whatwedo/publication/people\\_and\\_corruption\\_africa\\_survey\\_2015](https://www.transparency.org/whatwedo/publication/people_and_corruption_africa_survey_2015); see also Samuel Karanja, "EACC survey ranks Interior ministry as 'most corrupt,'" *The Daily Nation*, 15 March 2016, available at <http://www.nation.co.ke/news/EACC-survey-ranks-Interior-ministry-as-most-corrupt/1056-3117500-411wb8/index.html>.
- 43 Human Rights Committee, General Comment 27, freedom of movement (Art. 12), CCPR/C/21/Rev.1/Add.9, 1999, para 1.
- 44 For a general description of County Integrated Development Plans, see the Council of Governors, "County Integrated Development Plans," available at <http://cog.go.ke/about-us/20-the-council-of-governors/484-county-integrated-development-plans>.
- 45 See James Hathaway, *The Rights of Refugees Under International Law* (2005). Chaloka Beyani interprets Article 26 differently: "the requirement of lawful presence in State territory as a result of the determination of refugee status should be taken as a condition for free movement and the choice of residence." Chaloka Beyani, *Human Rights Standards and the Movement of Peoples Within States* (2000), p 113. Even on this more restrictive interpretation, however, the majority of Kakuma's refugees would be entitled to the protections of Article 26.
- 46 Beyani, p 129.
- 47 The term "in the same circumstances" is defined in Article 6 of the Convention: "For the purposes of this Convention, the term 'in the same circumstances' implies that any requirements (including requirements as to length and conditions of sojourn or residence) which the particular individual would have to fulfil for the enjoyment of the right in question, if he were not a refugee, must be fulfilled by him, with the exception of requirements which by their nature a refugee is incapable of fulfilling."
- 48 Human Rights Committee, General Comment 27, freedom of movement (Art. 12), CCPR/C/21/Rev.1/Add.9, 1999, para 4.
- 49 Ibid, para 14.
- 50 The African Regional Human Rights system consists of the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights, two bodies charged with interpreting a wide range of regional human rights treaties as well as non-treaty documents. The Commission has additionally established special mechanisms, including special rapporteurs, working groups, and committees. The African system operates under the auspices of the African Union (AU).
- 51 This three-part test is drawn from a broad analysis of the Commission's jurisprudence, as well as analysis of the jurisprudence of the African Court on Human and Peoples' Rights. See, for example, ACHPR, Communication 225/98, *Huri-Laws v. Nigeria*, para 50; ACHPR, Communication 105/93-128/94-130/94-152/96, *Media Rights Agenda and Constitutional Rights Project v. Nigeria*, paras 69–70; ACHPR, Communication 212/98, *Amnesty International v. Zambia*, para 50.



A shelter in Kakuma I, January 2018. IHRC.

## Norwegian Refugee Council (Kenya)

The Norwegian Refugee Council (NRC) is an independent, humanitarian non-governmental organisation which provides assistance, protection, and durable solutions to refugees and internally displaced persons worldwide. In Kenya, NRC helps refugees and internally displaced people in Kenya's camps access clean water, food, education, and shelter, and helps them exercise their rights.

## International Human Rights Clinic at Harvard Law School

The International Human Rights Clinic (IHRC) at Harvard Law School seeks to protect and promote human rights and international humanitarian law through documentation; legal, factual, and strategic analysis; litigation before national, regional, and international bodies; treaty negotiations; and policy and advocacy initiatives.

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