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Distribution of face masks in Kakuma refugee camp during a pandemic: Legal obligations and responsibilities

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Summary: *This article argues that the inhabitants of the Kakuma refugee camp are in a special relationship with the state, resulting in an increased duty of care of the latter towards the former. The effect of this increased duty of care ultimately results in a positive obligation to provide face masks to the inhabitants to protect them from COVID-19, based on the right to the best attainable standard of health and the right to life. The article then turns to the question of who is responsible to provide such face masks in the camp. After first analysing the situation on site, the article argues that a shift of responsibility of the host state to the UN Refugee Agency took place.*

Key words: *refugee; Kakuma refugee camp; COVID-19; health; life; face masks; UN Refugee Agency; UNHCR*

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1 Introduction

The COVID-19 virus reached the Kakuma camp and Kalobeyei settlement¹ in Kenya in the beginning of 2020. In response, the United Nations High Commissioner for Refugees (UNHCR) in collaboration with the Kenyan state issued a series of notices ‘to all refugees and asylum-seekers living in Urban area in light of coronavirus (Covid-19)’.² These notices required the inhabitants of the Kakuma refugee camp to wear face masks, threatening them with a fine of up to 20 000 KES (approximately €150) or six months’ imprisonment should they fail to comply with the regulation.³

Neither the Kenyan state nor international aid agencies present in the camp provided sufficient face masks⁴ for the whole population. As the refugees living in the camp nevertheless had to move around for food distribution, to fetch water, and so forth, many private initiatives emerged in order to sell or distribute masks to the camp’s inhabitants.⁵ A face mask emanating from such a private initiative in general costs a small amount of money.⁶ However, almost 94 per cent of Kakuma’s inhabitants usually do not manage to cover all their food expenses.⁷ Consequently, only a few inhabitants have the financial means to buy face masks themselves.

This situation seems unsatisfactory. On the one hand, inhabitants are required by law to wear masks and risk extremely high and likely unproportionate penalties if they break the law. On the other hand, most inhabitants do not have the financial means to buy a mask and neither the state nor international agencies provide help in this regard. This article attempts to raise awareness about this situation

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- 1 UNHCR ‘Kakuma camp and Kalobeyei settlement’, <https://www.unhcr.org/ke/kakuma-refugee-camp> (accessed 22 January 2022).
 - 2 See the entire list of documents at <https://www.unhcr.org/ke/coronavirus-covid-19-update> (accessed 22 January 2022).
 - 3 Joint statement by UNHCR, Kenyan government ‘Important notice to all refugees and asylum seekers living in urban areas in light of Coronavirus (COVID-19)’ 19 May 2020, https://www.unhcr.org/ke/wp-content/uploads/sites/2/2020/05/IMPORTANT-NOTICE-COVID-19May-v2_English.pdf (accessed 22 January 2022).
 - 4 The term ‘face mask’ generally refers to surgical masks (also known as ‘procedure masks’ or ‘medical masks’).
 - 5 See, eg, activities of the African Initiative for Human Development, <https://www.facebook.com/AIHD2>; individual crowdfunding initiatives; and coverage of local news, <https://kanere.org/local-solutions-for-global-problems/#more-2471> (accessed 22 January 2022).
 - 6 Information from sources in the camp seems to indicate that face masks cost 50 KES, approximately €0,40.
 - 7 UNHCR/Kimentrica/WFP ‘Refugees vulnerability study Kakuma, Kenya, 2016’ 2, https://reliefweb.int/sites/reliefweb.int/files/resources/Refugee_HH_Vulnerability_Study_Kakuma_Refugee_Camp_Final_Report_2016_05_06.pdf (accessed 22 January 2022).

and help define the legal framework of refugee camp inhabitants' rights to the best attainable standard of health and right to live, as well as answer the question of who bears the responsibility for the protection of these rights in a refugee camp.

In order to do so, the article first analyses, through a comparative analysis of the jurisprudence of international and regional courts and institutions, the potential requirement of providing face masks to Kakuma's inhabitants based on a special relationship with the state. Second, the article discusses who might bear the responsibility for the provision of such face masks in Kakuma. The analysis focuses on the months following the COVID-19 outbreak in 2020.

2 Does human rights law require the provision of masks to populations in a special relationship with the state?

2.1 Kakuma inhabitants' special relationship with the state

2.1.1 *A special relation due to vulnerability?*

Human rights institutions around the world acknowledge some form of 'special relationship' between individuals and the state in particular settings. As will be shown, this special relationship results in an increased legal duty of care on the state towards an individual or a group because of perceived or actual vulnerability of the latter.

United Nations (UN) human rights institutions and actors have expressed themselves on the question of increased duties of care. As far as the right to life is concerned, the UN Human Rights Committee (HRC) considers that the state has a 'heightened duty of care to take any necessary measures to protect the lives of individuals deprived of their liberty by the state'.⁸ The HRC deduces the vulnerability of prisoners from the deprivation of liberty.⁹ By depriving individuals of their liberty, the state takes responsibility to care for their lives.¹⁰ Persons in 'liberty restricting state-run facilities', such as refugee camps or camps for internally-displaced persons, benefit from the same increased duty of care.¹¹ In fact, the HRC seems to regularly

⁸ HRC General Comment 36 para 25.

⁹ HRC General Comment 21 para 3.

¹⁰ HRC *Zhumbaeva v Kyrgyzstan* (CCPR/C/102/D/1756/2008) para 8.6; HRC *Lantsov v the Russian Federation* (CCPR/C/74/D/763/1997) para 9.2.

¹¹ HRC General Comment 36 para 25.

treat classical prisons and people otherwise deprived of their liberty in a similar way.¹² Similarly, the UN Committee on Migrant Workers (CMW) opposes all forms of detention for migrants and reminds member states of their ‘increased duty of care’ should they deprive individuals of their liberty.¹³ The CMW regards certain groups as vulnerable and as ‘particularly at risk’, among them refugees, asylum seekers and stateless persons, and reminds states that for these groups their duty ‘to effectively protect is greater than in other cases’.¹⁴ Also, the Vienna Declaration and Programme of Action (VDPA) follows the same direction, since the promotion and protection of human rights of persons with vulnerabilities need to be considered as a matter of ‘great importance’, and need to be addressed with adequate measures.¹⁵ In addition, the UN Office of the High Commissioner for Human Rights (OHCHR) defines vulnerable migrants as individuals who ‘are unable ... to enjoy their human rights, are at increased risk of violations and abuse and who, accordingly, are entitled to call on a duty bearer’s heightened duty of care’.¹⁶

The African Commission on Human and Peoples’ Rights (African Commission) regards groups facing ‘significant impediments to their enjoyment of economic, social and cultural rights’ as vulnerable.¹⁷ Refugees and asylum seekers, internally-displaced persons, as well as persons living in informal settlements are involved.¹⁸ The legal consequences of vulnerability seem not immediately clear. The African Commission mentions that to ensure the physical and economic accessibility of social rights, especially for vulnerable and disadvantaged groups, ‘special measures’ might be necessary,¹⁹ and requests member states to ‘prioritise’ and to pay ‘particular attention to’ the rights of vulnerable groups.²⁰ While the minimum core obligation of economic and social rights must be fulfilled for everyone, it is ‘particularly’ relevant for vulnerable groups, who should be ‘prioritised in all interventions’.²¹

12 See eg HRC General Comment 21 para 2.

13 HRC General Comment 36 para 25.

See eg HRC General Comment 21 para 2.

CMW Draft General Comment 5 on migrants’ rights to liberty and freedom from arbitrary detention, 2020 para 33.

14 CMW (n 13) para 52.

15 Vienna Declaration and Programme of Action, 25 June 1993 para 24.

16 OHCHR Differentiation between migrants and refugees, <https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/MigrantsAndRefugees.pdf> (accessed 22 January 2022).

17 African Commission on Human and Peoples’ Rights Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights para 1(e).

18 As above.

19 African Commission (n 17) para 3(c).

20 African Commission (n 17) para 12.

21 African Commission (n 17) para 17.

As far as the right to health is concerned, the African Commission mentions the need to 'ensure access to ... facilities, goods and services on a non-discriminatory basis, especially for vulnerable ... groups'.²² Vulnerable groups should further be prioritised in national health plans.²³ States have a 'particular responsibility to protect the human rights ... of individuals or groups who are frequently targeted or particularly at risk'.²⁴ As in the case of refugees and asylum seekers, prisoners might be especially vulnerable and in need of increased protection because of their particularly close relationship with the state. The African Commission indeed requires that states 'take measures to ensure that special protections ... are provided in relation to persons with special needs' in prison,²⁵ and includes refugees in the group of potentially-vulnerable individuals,²⁶ but does not seem to consider prisoners *per se* as vulnerable. Especially concerning the right to life, states must extend a 'heightened responsibility ... to persons detained in prisons, in other places of detention (official and otherwise), and to persons in other facilities where the state exercises heightened control over their lives'.²⁷ Summarising the above terminology, the African Commission seems to require an increased duty of care towards vulnerable groups.

Similarly, in a comparative perspective, the European Court of Human Rights (European Court) *literally* demands a 'special protection' for people belonging to disadvantaged and vulnerable groups.²⁸ This opinion does not apply in Kakuma, but it can be a tool to define the content of the obligations flowing from the status of vulnerability. The Court has considered that asylum seekers²⁹ and people in prison³⁰ categorically belong to this category. The case law of the European Court seems to base vulnerability on two key components, namely, discrimination and dependency, and sometimes associates dependency with a person's defencelessness.³¹ As persons being

22 African Commission (n 17) para 67(a).

23 African Commission (n 17) para 67(x).

24 African Commission General Comment 3 para 11.

25 Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa para 29(b).

26 Guidelines (n 25) para 34(a).

27 African Commission General Comment 3 para 37.

28 ECtHR *DH & Others v The Czech Republic* App 57325/00 13 November 2007 para 182; *Sampanis v Greece* App 32526/05, 5 June 2008; ECtHR *Orsus & Others v Croatia* (GC) App 15766/03 16 March 2010 para 147; ECtHR *Horvath and Kiss v Hungary* App 11146/11, 29 January 2013 para 102.

29 ECtHR *MSS v Belgium and Greece* (GC) App 30969/09 21 November 2011 para 251.

30 ECtHR *De Donder and De Clippel v Belgium* App 8595/06 6 December 2011 paras 70-75.

31 N Zimmermann 'Legislating for the vulnerable? Special duties under the European Convention on Human Rights' (2015) 25 *Swiss Review of International and European Law* 541.

dependent, the Court has also considered people in prison.³² The European Court considers that inherent elements of a prison, namely 'arbitrary restrictive measures applied to vulnerable individuals like prisoners inevitably contribute to the feeling of subordination, total dependence, powerlessness and, consequently, humiliation'.³³ This results in a duty to protect vulnerable individuals.³⁴ Consequently, a 'special protection' to vulnerable individuals should be afforded by states.

It can be summarised that most international human rights treaties and institutions consider vulnerability as a source for a special relationship between the individual and the state. It seems that the vulnerability can be caused by several factors, including dependency, discrimination and defencelessness. Such a special relation results in an increased duty of care. All the above examined human rights treaties and institutions consider refugees and migrants *per se* as vulnerable and in need of special protection. The conviction that the same is true for individuals in prison-like settings is widely accepted, yet not universal.

In what follows, the question will be discussed as to whether refugees in a closed camp can be considered to live in such a prison-like setting, which would result in a separate increased duty of care on the state towards them, apart from one based merely on their refugee or migrant status.

2.1.2 *Similarities between a prison and a refugee camp*

To determine whether the inhabitants of Kakuma live in a prison-like setting, it is possible to argue by analogy, meaning to apply an existing rule to an unregulated issue to the extent of the similarities between the two issues on legally-relevant points.³⁵

The limitation of certain rights in Kakuma camp, especially the right to freedom of movement, is one of the first factors suggesting similarities. This right is guaranteed by article 13 of the Universal Declaration of Human Rights (Universal Declaration); article 12 of the International Covenant on Civil and Political Rights (ICCPR);

32 ECtHR *De Donder and De Clippel* (n 30) paras 70-75.

33 Guide on the case law of the European Convention on Human Rights para 219.

34 For individuals in prison, see ECtHR *Salman v Turkey* 21986/93, 27 June 2000 para. 99; ECtHR *Younger v Royaume-Uni* 57420/00, 7 January 2003. For asylum seekers, see ECtHR *MSS v Belgium and Greece* (GC) App 30969/09, 21 November 2011 para 251.

35 M Sassoli *International humanitarian law* (2019) 224, referring to LL Weinreb *Legal reasoning: The use of analogy in legal argument* (2016) para 124.

article 26 of the Convention Relating to the Status of Refugees (CSR); and article 12 of the African Charter on Human and Peoples' Rights (African Charter), among others. Generally, refugees and asylum seekers in Kenya are subject to the Organisation of African Unity (OAU) Convention Governing Specific Aspects of Refugee Problems in Africa (OAU Convention) which, however, does not contain any specific provision related to the right to freedom of movement, and all the laws in force in Kenya (section 28(1) of the Kenyan Refugee Act, 2021). Indeed, the Kenyan state follows an encampment policy for refugees (sections 24(3)(a) and 28(3)).³⁶ Inhabitants of refugee camps in general are only allowed to leave the camp for specific circumstances ('exempt asylum seekers and refugees from residing in designated areas where there are compelling reasons to do so'; section 8(2) of the Kenyan Refugee Act, 2021).³⁷ Travelling is only possible with a movement pass, issued for a maximum duration of 30 days.³⁸ A curfew has for several years been in place in Kakuma due to security considerations, restricting the freedom of movement in the camp itself.³⁹ The general encampment policy is considered by UNHCR as potentially limiting several rights contained in CSR.⁴⁰ Apart from these limitations, a nationwide curfew due to the COVID-19 pandemic was added for a certain period of time.⁴¹ Even though the movements of the camp's inhabitants are not restricted because they committed a criminal offence – as in the case of prisoners – the effects on them are the same: To a significant extent they are deprived of their right to freedom of movement.

Another argument is the dependence of the inhabitants on the state and/or international aid organisations. Around 70 per cent

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- 36 Office of the Attorney-General and Department of Justice, National Policy and Action Plan on Human Rights, Session Paper 3 of 2014 33, <https://academia-ke.org/library/download/oatg-sessional-paper-no-3-of-2014-on-national-policy-and-action-plan-on-human-rights/?wpdmdl=7392&refresh=6325c9a5565b61663420837> (accessed 17 September 2022).
- 37 UNHCR Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report – Universal Periodic Review: Kenya, 2014, <https://www.refworld.org/docid/54c0f47f4.html> (accessed 22 January 2022).
- 38 UNHCR/Kimentrica/WFP Refugees Vulnerability Study, Kakuma, Kenya 2016 5.
- 39 C Djemila & P O'Keeffe 'Potemkin villages and refugee camps during the Coronavirus crisis' *The Geneva Observer* 20 April 2020, <https://medium.com/@thegenevaobserver/potemkin-villages-and-refugee-camps-during-the-coronavirus-crisis-5e15d46471c7> (accessed 22 January 2022).
- 40 UNHCR Comprehensive Refugee Programme 2019-2020 5, <https://globalcompactrefugees.org/sites/default/files/2019-12/Kenya%20Comprehensive%20Refugee%20Programme%20282019%29.pdf> (accessed 22 January 2022).
- 41 Joint statement UNHCR, Kenyan government 'Important notice to all refugees and asylum seekers living in urban areas in light of Coronavirus (COVID-19)' issued 25 March 2020, <https://www.unhcr.org/ke/wp-content/uploads/sites/2/2020/03/English-25-March-2020-IMPORTANT-NOTICE.pdf> (accessed 22 January 2022).

of households in Kakuma camp indicate that they do not have an independent income source.⁴² Almost 94 per cent of Kakuma's inhabitants usually do not manage to cover all their food expenses.⁴³ These households rely almost entirely on the camp administration. The encampment policy mainly contributes to the fact that inhabitants are not allowed to find other resources to live independently, making them largely dependent on assistance.⁴⁴ UNHCR has acknowledged this reality by stating that because of 'harsh environment and tight restrictions on refugee movement and employment, the population at Kakuma camp is almost entirely dependent upon outside assistance, which is provided principally by the UN and some international and Kenyan NGOs'.⁴⁵

A further reason for making an analogy to a prison-like setting in Kakuma camp is the structural similarity due to an imposed boundary between the inhabitants and the outside world. The imposition of a boundary between the camp space and the world beyond seems inherent to the concept of a refugee camp.⁴⁶ Logically, this divide is amplified the tighter the border control between the camp space and the world beyond it is. Kakuma is placed in a remote and poor region of Kenya.⁴⁷ Together with the encampment policy, this results in an almost complete division between the camp and the world outside. Because of such a boundary, refugee camps have already been described as 'total institutions',⁴⁸ 'occupied enclave',⁴⁹ a 'practice of "parking" refugees in camps when there are no permanent solutions available'.⁵⁰ Because of these inherent injustices and the containment effect, descriptions of such camps as 'legal anomaly'⁵¹ and 'prisons of the stateless' for whom UNHCR would be the 'patron'⁵² are common.

A further similarity is the reason why the institution is depriving the individuals of certain rights. Any deprivation of liberty must be justified

42 UNHCR/Kimentrica/WFP (n 38) 17.

43 UNHCR/Kimentrica/WFP (n 38) 2.

44 UNHCR, Kenya Comprehensive Refugee Programme 2019-2020 5.

45 UNHCR 'Minimum standards and essential needs in a protracted refugee situation: A review of the UNHCR programme in Kakuma, Kenya' Annex 1 37, <https://www.unhcr.org/3ae6bd4c0.pdf> (accessed 22 January 2022).

46 K McConnachie 'Camps of containment: A genealogy of the refugee camp' (2016) 7 *Humanity: An International Journal of Human Rights, Humanitarianism and Development* 398.

47 World Bank/UNHCR/University of Notre Dame 'Refugee impacts on Turkana hosts – A social impact analysis for Kakuma Town and Refugee Camp' 21; UNHCR (n 45) para 50.

48 McConnachie (n 46) 398.

49 H Brankamp 'Occupied enclave: Policing and the underbelly of humanitarian governance in Kakuma refugee camp, Kenya' (2019) 71 *Political Geography* 67.

50 UNHCR (n 45) 8 fn 5.

51 S Jacobs 'Prisons of the stateless: The derelictions of the UN High Commission for Refugees and the Japanese role' (2007) 5 *The Asia Pacific Journal* 11.

52 Jacobs (n 51) 2.

by legitimate state objectives.⁵³ The idea behind the deprivation of liberty, among others, is to protect society from a person. It suffices to say that the Kenyan state names security concerns as the main reason for the encampment policy, following a series of terrorist attacks,⁵⁴ making a general assumption that all inhabitants pose a danger to society. In addition to these objective reasons suggesting an analogy between a prison and a refugee camp, the opinion of the person living in the camp should also receive attention and, indeed, inhabitants have described themselves as ‘voluntary prisoners’.⁵⁵

Because of the similarities in the situation analysed above, Kakuma camp can be considered a prison or a prison-like setting. As seen from the discussion,⁵⁶ this fact leads to a special relationship, resulting in an increased duty of care on the state towards the individuals. Bearing in mind that refugees and migrants per se are considered vulnerable and should have their needs prioritised, the fact that refugees in closed camps can also be considered living in a prison-like setting even increases the urgency to address their needs.

In what follows, legal duties arising from the right to the best attainable standard of health and right to live are analysed. These obligations should now be seen under the lens of the special relationship and the increased duty of care the state has towards Kakuma’s inhabitants.

2.2 Legal basis of face mask provision due to a special relationship in the context of the COVID-19 pandemic

2.2.1 *Right to best attainable standard of health*

The right to the best attainable standard of health is guaranteed by article 12 of ICESCR and article 16 of the African Charter, which require states to take protective measures, particularly in the context of epidemic diseases in order to respect, protect and fulfil this right.⁵⁷

53 CMW Draft General Comment 5 ‘On migrants’ rights to liberty and freedom from arbitrary detention’ 2020 para 23 and its references; OHCHR Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 1985.

54 UNHCR (n 44) 8.

55 *Kakuma News Reflector’s Twitter Account*, <https://twitter.com/KanereNews/status/1182505692319625216> (accessed 22 January 2022).

56 As above.

57 HRC General Comment 31 paras 5-7.

Whether the right to the best attainable standard of health requires the state to provide face masks to individuals in a special relationship with the state has not yet received attention in the literature. Several arguments can be found in favour of this. This right entitles every human being to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realisation of the highest attainable standard of health conducive to living a life in dignity.⁵⁸ Functioning public health and healthcare facilities, goods and services, as well as programmes, have to be available in sufficient quantities provided by the state.⁵⁹ The precise nature of the facilities, goods and services will vary depending on numerous factors.⁶⁰ However, from a *prima facie* perspective, medical face masks can without further discussion be considered a medical good and might fall in the range of potential positive obligations on a state to provide in certain circumstances.

The prevention, treatment and control of diseases (article 12(2)(c) of ICESCR) requires governments to make immunisation programmes and other 'strategies of infectious diseases control' available to their population.⁶¹ In the context of pandemics, access to medication and protective equipment is fundamental.⁶² States are encouraged to rather invest in primary and preventive health care (such as masks that benefit large parts of the population) than in expensive curative health services.⁶³ Even though in itself not sufficient, according to the World Health Organisation (WHO), the use of face masks is part of a comprehensive prevention and control package to limit the spread of an airborne disease such as the COVID-19 virus,⁶⁴ but which entails their systematic use.⁶⁵ In this sense, the question arises as to whether the provision of face masks is an effective measure to prevent the spread of COVID-19, and one of the most cost-effective measures to ensure the right to the best attainable standard of health in times of a pandemic.

The right to the best attainable standard of health is subject to progressive realisation, meaning that certain constraints on the enjoyment of this right due to the limits of available resources are

58 ESCR Committee General Comment 14 para 9.

59 ESCR Committee General Comment 14 para 12(a).

60 ESCR Committee General Comment 14 para 9.

61 ESCR Committee General Comment 14 para 16.

62 UN General Assembly Declaration of Commitment on HIV/AIDS, Resolution S-26/2, 27 June 2001 paras 15, 23.

63 ESCR Committee, General Comment 14 para 19.

64 WHO 'Advice on the use of masks in the context of COVID-19' 2020 1, https://apps.who.int/iris/bitstream/handle/10665/331693/WHO-2019-nCov-IPC_Masks-2020.3-eng.pdf (accessed 22 January 2022).

65 WHO 'The reason why WHO recommends masks to be worn all the time', <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public/when-and-how-to-use-masks> (accessed 22 January 2022).

acknowledged.⁶⁶ On the other hand, core obligations of the right require the state to ensure the immediate satisfaction of, at the very least, the minimum level,⁶⁷ including essential primary health care.⁶⁸ The minimum core includes access to health facilities, goods and services especially for vulnerable or marginalised groups,⁶⁹ in order to prevent, treat and control epidemic diseases.⁷⁰ It requires states to ensure the availability of drugs and technologies, their adequacy, acceptability and, above all, their accessibility, whose economic side requires affordable prices.⁷¹ Core obligations require states 'to ensure that no significant number of individuals is deprived of the essential elements of a particular right. This obligation exists regardless of the availability of resources and is non-derogable'.⁷² This immediacy includes situations 'where the state does suffer from demonstrable resource constraints, caused by whatever reason, including economic adjustment, the state should still implement measures to ensure the minimum essential levels of each right to members of vulnerable and disadvantaged groups, particularly by prioritising them in all interventions'.⁷³ Especially at the beginning of the COVID-19 pandemic, face masks were very scarce and expensive.⁷⁴ Every state struggled to organise masks. While such a lack of availability should not immediately entail legal responsibility, over time, this assessment changes. With the increasing availability of face masks on the world markets at decreased prices, states find themselves in a position where the provision of masks becomes substantially easier.

Masks are health goods and during an airborne pandemic can be considered a core component of the right to health. Face masks are vital to suppress the transmission of COVID-19 and are considered an effective protective and preventive tool in the fight against the virus.⁷⁵ At this stage, it should be noted that the Kenyan government introduced a regulation making it mandatory to wear face masks

66 ESCR Committee General Comment 3 para 1.

67 ESCR Committee General Comment 3 para 10; African Commission Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights para 14.

68 ESCR Committee General Comment 14 para. 43; Africa Commission Principles and Guidelines (n 67) para 17.

69 Africa Commission Principles and Guidelines (n 67) para 67(a).

70 Africa Commission Principles and Guidelines (n 67) para 67(d).

71 Africa Commission Principles and Guidelines (n 67) paras 3 & para 67(z).

72 Africa Commission Principles and Guidelines (n 67) para 17.

73 As above.

74 OECD 'Policy responses to Coronavirus (COVID-19), The face mask global value chain in the COVID-19 outbreak: Evidence and policy lessons' 2020, <https://www.oecd.org/coronavirus/policy-responses/the-face-mask-global-value-chain-in-the-covid-19-outbreak-evidence-and-policy-lessons-a4df866d/> (accessed 22 January 2022).

75 As above.

in the whole country,⁷⁶ including in Kakuma camp. By issuing such a compulsory face mask obligation, the state recognised masks as a *sine qua non* to prevent and control the pandemic. It reinforces the position that masks belong to the core element of the right to health during the COVID-19 outbreak. While this legislative effort of Kenya may be understood to be part of the state's duty to protect, the state simultaneously must ensure their availability⁷⁷ and economic accessibility for Kakuma's inhabitants.⁷⁸ This seems especially true if the state has an increased duty of care. Recalling the overwhelming economic dependency of Kakuma's population on the camp's authorities, their lack of financial means, the increased duty of care the state has towards the inhabitants based on their special relationship, and the serious penalties faced in case of non-compliance with the obligation of wearing face masks, the latter should be provided to them at no cost.

2.2.2 *Right to life*

At the time of writing, more than 6 500 000 people have died because of the COVID-19 virus worldwide.⁷⁹ The right to life is protected by article 3 of the Universal Declaration, article 6 of ICCPR and article 4 of the African Charter, and is considered the 'cornerstone on which the realisation of all other rights and freedoms depend'.⁸⁰

All human rights impose a combination of negative and positive duties on states, which can be understood as the duty 'to respect, protect, promote and fulfil' these rights.⁸¹ The duty to protect, in particular, includes an obligation on states to adopt any appropriate laws or other measures in order to protect life from all reasonably foreseeable threats.⁸² The legal obligation to wear face masks constitutes the authorities' acknowledgment that there is a need to protect the Kakuma inhabitants' lives from COVID-19 through legislation. However, apart from legislative measures, the state must also undertake concrete measures, *in casu*, access to essential goods, such as food and health care. Protection includes specific

76 'Kenya: Masks now mandatory in public places, Kenya declares' *AllAfrica News* 5 April 2020, <https://allafrica.com/stories/202004060049.html> (accessed 22 January 2022).

77 ECOSOC General Comment 14 para 12(a).

78 ECOSOC General Comment 14 para 12(b).

79 Johns Hopkins University of Medicine 'COVID-19 dashboard', <https://coronavirus.jhu.edu/map.html> (accessed 25 September 2022).

80 *African Commission v Kenya* Application 6/2012, Judgment 26 May 2017 para 152.

81 HRC General Comment 31 paras 5-7; African Commission Principles and Guidelines (n 67) para 4.

82 HRC General Comment 36 para 18.

actions, in particular systems to prevent epidemics.⁸³ As established above, face masks are a means to control the COVID-19 pandemic and, therefore, can constitute 'other measures' that states need to undertake to protect the right to life. These positive obligations seem to especially extend to vulnerable persons, including persons deprived of their liberty, towards whom states have a heightened duty of care to protect their right to life.⁸⁴ The African Commission sees in the right to life 'the inviolable nature and integrity of the human being'.⁸⁵ It is a non-derogable right regardless of the state of emergency a government is facing, with an *erga omnes* effect,⁸⁶ and belongs to *ius cogens*.⁸⁷ The obligation on the state is to protect the right to life of every person 'within its territory and under its jurisdiction'.⁸⁸

As discussed above, Kakuma's inhabitants may be considered deprived of their liberty by the state, and are particularly vulnerable. In principle, towards individuals in such situations, states cannot simply rely on the argument of lacking financial resources to explain the lack of measures to protect the right to life.⁸⁹ If nevertheless the state were to lack adequate funds to distribute the necessary face masks, then the law should not require of individuals placed in a strong dependency relation to the state, as in Kakuma, to bear the costs of these masks by themselves, recalling the serious penalties in case of non-compliance with this obligation.

The next part focuses on the question of which entity should provide these face masks. It indeed is not always clear who should be responsible for which task in a refugee camp.

83 HRC General Comment 36 para 26 ; A Redelbach 'Protection of the right to life by law and by other means' in BG Ramcharan (ed) *The right to life in international law* (1985) 215.

84 HRC General Comment 36 para 25.

85 *African Commission v Kenya* Application 6/2012, Judgment 26 May 2017 para 152.

86 WP Gormley 'The right to life end the rule of non-derogability: Peremptory norms of *ius cogens* in Ramcharan (n 84) 137, 146, 147; HRC General Comment 6 para 1.

87 Redelbach (n 84) 186.

88 PM Taylor *A commentary on the International Covenant on Civil and Political Rights* (2020) 144.

89 HRC General Comment 36 para 25.

2.3 Whose responsibility?

2.3.1 *Responsibilities in a refugee camp and the sovereignty concept in question*

One of the key principles in public international law is the principle of state sovereignty. States have a central role in international public law, as they create the law and are the principal addressee of it (article 4(1) UN Charter). Every state that fulfils certain requirements⁹⁰ is considered sovereign and therefore is responsible to respect, protect and fulfil the human rights of all people in its territory and under its jurisdiction.⁹¹

UNHCR emphasises this responsibility, stating that ‘sovereign states have the primary responsibility for respecting and ensuring the fundamental rights of everyone within their territory and subject to their jurisdiction’.⁹² According to this ‘traditional approach’ to international law, Kenya, as a sovereign state, has overall responsibility for the inhabitants of Kakuma camp and would be responsible for the provision of face masks.

This traditional understanding of sovereignty poses several questions and might not reflect the realities and the overwhelming position UNHCR holds in certain refugee camps, including in Kakuma camp. Furthermore, the importance of absolute state sovereignty seems to be diminishing in general.⁹³ As UNHCR certainly is not a state, the organisation does assume a range of governmental functions in different settings.⁹⁴ This article will discuss a potential shift of responsibility for human rights protection and fulfilment from the state to UNHCR in certain areas.

2.3.2 *The question of UNHCR as quasi-state*

Before arguing about a potential shift of responsibilities, it is important to introduce the different actors and their main role in

90 Montevideo Convention on the Rights and Duties of States 1933.

91 Art 2 ICCPR; African Commission Principles and Guidelines (n 67) para 4.

92 UNHCR Note on International Protection, UN Doc A/AC.96/830, 7 September 1994 para 13.

93 K Niamh ‘Implied human rights obligations of UNHCR’ (2016) 28 *International Journal of Refugee Law* 251.

94 F Mégret & F Hoffmann ‘The UN as a human rights violator? Some reflections on the United Nations changing human rights responsibilities’ (2003) 25 *Human Rights Quarterly* 314 326; A Slaughter & J Crisp ‘A surrogate state? The role of UNHCR in protracted refugee situations’ (2009) 168 *New Issues in Refugee Research* 2.

Kakuma camp, namely, the government of Kenya, UN agencies, non-governmental organisations (NGOs) and the inhabitants. The latter will not be analysed in detail here, as they do not have a formal role. However, it must be noted that the inhabitants themselves are an extremely important provider of assistance and protection.⁹⁵

The Kenyan government seems mainly to ensure the physical safety and security of refugees and provides land for their settlement.⁹⁶ As a party to the main international human rights treaties and refugee treaties,⁹⁷ the state is obligated to respect human rights law and the non-refoulement principle.⁹⁸ Since 2004 state courts have been permanently present in the camp and administer formal justice, but many of the state's judicial and legal responsibilities are handled by traditional systems of justice.⁹⁹ The provincial authorities are present in the camp and provide, with UNHCR support, additional security personnel.¹⁰⁰ The Commissioner for Refugee Affairs (CRA) registers new arrivals and conducts refugee status determinations.¹⁰¹ Permissions to travel outside Kakuma – therefore, to be temporarily exempt from the encampment policy – are also issued by CRA.¹⁰² Overall, the state seems mainly to be involved in activities relating to aspects of security and, to a certain extent, the administration of justice.¹⁰³ While Kenyan state agencies are involved in the provision of other services to inhabitants, such as health care, education, social security, and so forth, these do not seem to be the primary fields of intervention. UNHCR states that assistance to the camps population is 'provided principally by the UN and some international and Kenyan NGOs',¹⁰⁴ but nevertheless emphasises that 'the government is in the lead'.¹⁰⁵

95 A Betts & K Pincock & E Easton-Calabria 'Research in Brief: Refugees as Providers of Protection and Assistance' (2018) *Oxford Refugee Studies Centre*, https://reliefweb.int/attachments/d911c586-38e6-3101-b520-7778038d63f3/RiB-10_global-governed_final.pdf (accessed 22 January 2022).

96 UNHCR (n 45) 38.

97 OHCHR UN treaty database, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=90&Lang=EN (accessed 22 January 2022).

98 UNHCR (n 45) para 13.

99 I Griek 'Traditional systems of justice in refugee camps: The need for alternatives' (2006) 27 2.

100 UNHCR (n 45) 38.

101 Sec 8 paras 2(b) & (c) Kenyan Refugee Act 2021; Department of Refugee Services website, https://refugee.go.ke/?page_id=620 (accessed 22 January 2022); UNHCR Kenya website, <https://www.unhcr.org/ke/refugee-status-determination> (accessed 22 January 2022).

102 Sec 8 para 2(o) Kenyan Refugee Act 2021.

103 Griek (n 103) 2.

104 UNHCR (n 45) 37.

105 UNHCR (n 44) 4.

NGOs and UN agencies are involved in an wide range of activities, from health, nutrition, sport programmes and family reunification services, to reproductive healthcare programmes and camp management activities.¹⁰⁶ The health and nutrition sector, for example, is handled by various UN Agencies (the United Nations Children’s Fund (UNICEF), WHO, the World Food Programme (WFP), UNHCR), the national and county government (Ministry of Health, Kakuma Mission Hospital, National Health Insurance Fund), diverse NGOs (International Rescue Committee, KRCS, AIC, Lutheran World Federation, Impact of Energy, EGPAF) and others (GIZ, World Bank, Refugees).¹⁰⁷ Water, sanitation and hygiene (WASH) are also handled by various UN Agencies (WFP, FAO, UNESCO, UNHCR), the government and county, the Ministry of Water and Irrigation and Ministry of Public Health), the private sectors (contractors not determined according to the source), several NGOs (NRC, PWJ, AAHI, WVI, KRCS, Team&Team, Lutheran World Federation, LOKADO, Sanivation) and others (GIZ, Refugees and host community).¹⁰⁸ Concerning health care, in particular, UNHCR aims to support equitable access to quality, comprehensive and cost-effective health and nutrition services for refugees and the host population in Turkana West and to have the health facility in Kakuma registered as a county facility.¹⁰⁹

Of all the actors in the camp, UNHCR has a dominant position, because the organisation coordinates and administers the activities and camp life in collaboration with the government of Kenya, other UN agencies and NGOs.¹¹⁰ UNHCR documents are in no way binding on the Kenyan state, but it is informative to understand the agency’s perspective. In Kenya, the UNHCR itself writes that UN agencies ‘play a central role in supporting coordination’, by convening, facilitating and leveraging strategic engagement with various partners.¹¹¹ UNHCR elaborates the Comprehensive Refugees Programmes, which provide an overview ‘of context and challenges, strategic priorities, achievements, planned responses and areas in need of attention and knowledge development across locations and sectors of the Kenyan refugee operation’.¹¹²

106 UNHCR (n 45) 38.

107 UNHCR (n 44) 51.

108 UNHCR (n 44) 52.

109 UNHCR (n 44) 29.

110 UNHCR (n 45) 38.

111 UNHCR (n 44) 12.

112 UNHCR (n 44) 4.

The administration of refugee camps should be considered an implied power of the UNHCR¹¹³ because, even if this function is not explicitly mentioned in its statutes, the administration of camps has become essential to the fulfilment of its duties.¹¹⁴ Especially in cases of mass influx of refugees or protracted refugee situation, states often are unwilling or incapable to assume the complete responsibility of the camp administration.¹¹⁵ In Kenya, the ‘traditional approach to assistance based on only humanitarian assistance does not constitute a long-term solution’ and UNHCR considers that ‘a more integrated and comprehensive approach’ is needed.¹¹⁶ The organisation to coordinate this ‘comprehensive approach’, WHICH has developed into a complex collaboration between many different entities, is UNHCR.

UNHCR seems to also have certain regulatory powers on the territory of Kakuma camp. Several authoritative regulations requiring a certain behaviour of the populations and threatening sanctions in the case of non-compliance promulgated during the pandemic were issued by UNHCR and the Kenyan Government.¹¹⁷ UNHCR also can be considered to have certain executive powers, as the agency is responsible for the resettlement programme¹¹⁸ and, therefore, to a certain extent is responsible for who leaves the territory. Similarly, UNHCR used to register new arrivals and conduct refugee status determinations.¹¹⁹ Now, CRA is responsible for these activities, funded by UNHCR.¹²⁰ UNHCR also organises the elections of zone and block leaders in Kakuma,¹²¹ as the Constitution of Kakuma requires (art 4 ff Constitution of Kakuma Refugee Camp). In doing so, UNHCR influences the procedures of how representatives of a small entity on the territory of Kenya are elected.

113 N Kinchin ‘Implied Human Rights Obligation of UNHCR’ (2016) 28,2 *International Journal of Refugee Law* 262.

114 Kinchin (n 113) 260; see also B Wilson ‘UNHCR and access to justice: Mixed-method disputed resolution for encamped refugees’ (2017) 11-12.

115 Kinchin (n 113) 262.

116 UNHCR (n 44) 5.

117 See the entire list of documents at <https://www.unhcr.org/ke/coronavirus-covid-19-update> (accessed 22 January 2022).

118 UNHCR ‘Kenya’, <https://www.unhcr.org/ke/resettlement> (accessed 22 January 2022).

119 For a criticism on this system, see Wilson (n 118) 12. This changed in the middle 2010s, and now UNHCR provides ‘technical support to ensure that activities are harmonised, efficient and of quality, and transparent procedures are maintained at all times’, whereas the CRA is officially in charge of the procedure; see also UNHCR (n 44) 26.

120 UNHCR ‘Kenya’, <https://www.unhcr.org/ke/refugee-status-determination> (accessed 22 January 2022); UNHCR ‘Kenya’ <https://www.unhcr.org/ke/registration> (accessed 22 January 2022).

121 The first election occurred in 2012 according to Kakuma News Reflector, <https://kanere.org/refugee-election-in-kakuma/> (accessed 22 January 2022).

To summarise, UNHCR, through its mandate and the implied power doctrine, has the task to administer refugee camps, mainly by coordinating the activities of the state actors, UN agencies and international and national NGOs. UNHCR also enjoys some regulatory and executive functions in Kakuma. Several services essential for the survival of the inhabitants are furthermore directly implemented by UNHCR.¹²² UNHCR consequently undertakes direct tasks of governance and is the primary administrator of daily life in the camp.

The next point to analyse is whether such quasi-state functions also entail a shift of responsibilities for the implementation of human rights to a certain extent, such as the right to the best attainable standard of health and the right to life, from the state to the quasi-state actor.

2.3.3 *Shift of human rights responsibility from the state to UNHCR*

The basis for a potential shift – International cooperation and legal personality of UNHCR

In principle, the management of refugee camps (also called ‘designated areas’) belongs to the CRA’s functions (section 8(2) (k) of the Kenyan Refugee Act, 2021). Nevertheless, UNHCR was delegated the various above tasks in a sense of international cooperation.¹²³ UNHCR is a subsidiary organ of the UN, which has international personality,¹²⁴ perusing a mandate given by the UN General Assembly.¹²⁵ UNHCR, therefore, can be considered as having a international legal personality derivative from the UN,¹²⁶ as large international organisations may have subsidiary bodies that have considerable authority performing executive, advisory, rule-making and judicial functions.¹²⁷ With a distinct legal personality, there also comes legal responsibility.¹²⁸ The UN accepted that state responsibility is applicable to international organisations whenever

122 UNHCR (n 45) 38.

123 Art 56 UN Charter.

124 ICJ Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion), ICJ Rep 1949 174.

125 Art 1 UNHCR Statutes.

126 Kinchin (n 113) 253; R Wilde ‘*Quis custodiet ipsos custodes? Why and how UNHCR governance of “development” refugee camps should be subject to international human rights law*’ (1998) 1 *Yale Human Rights and Development Law Journal* 114.

127 LF Damrosch & SD Murphy *International law, cases and materials* (2019) 386.

128 Damrosch & Murphy (n 127) 115.

damage is caused by any violation of an international obligation attributable to said organisation.¹²⁹

There are different opinions in the legal literature on whether the primary responsibility for human rights can shift from states to international organisations, in this case UNHCR, in certain circumstances. Farmer and Janmyr argue that the delegation of day-to-day operations of camp administration to UNHCR does not in general include a delegation or shift of legal responsibility.¹³⁰ Farmer argues that the government usually remains responsible for the security of the camps,¹³¹ leaving the question of a responsibility shift in other areas open. However, Janmyr sustains that non-state actors increasingly have a *de facto* responsibility for protecting refugees in camps, for whom they could be held responsible.¹³² Protection in this case means ‘full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law’,¹³³ including the right to the best attainable standard of health.

Several authors come to a similar conclusion and also seem to focus on the *de facto* situation on site. Kagan notes that the prevailing answer to this question is to re-focus on state responsibility,¹³⁴ but suggests an alternative by arguing that the institution best positioned to carry out the duty of protecting human rights should be responsible.¹³⁵ While by default this role falls to the state, there are situations where the state lacks capacity or will, and where the UN ‘may be best able to promote the protection of refugees by taking on some of the responsibility for refugee protection’.¹³⁶ Kagan therefore also focuses on the *de facto* situation on site. Similarly, Mégret and Hoffmann argue with the ‘degree to which actors can impact’ human rights¹³⁷ and draw parallels between refugee camps and the administration of territory by the UN,¹³⁸ consequently also

129 Damrosch & Murphy (n 127) 408-409, quoting the UN Secretary General, see its references.

130 A Farmer ‘Refugee responses, state-like behaviour, and accountability for human rights violations: A case study of sexual violence in Guinea’s refugee camps’ (2006) 9 *Yale Human Rights and Development Journal* 75; M Janmyr *Protecting civilians in refugee camps: Unable and unwilling states, UNHCR and international responsibility* (2012) 188.

131 Farmer (n 130) 75.

132 Janmyr (n 130) 357.

133 IASC ‘Protection in humanitarian action’ 2016 2, IASC Policy on Protection in Humanitarian Action, 2016.pdf (interagencystandingcommittee.org) (accessed 22 January 2022).

134 M Kagan ‘We live in a country of UNHCR, the UN surrogate state and refugee policy in the Middle East’ UNHCR: Policy Development and Evaluation Service Research Paper 201 21.

135 Kagan (n 134) 22.

136 As above.

137 Mégret & Hoffman (n 94) 321.

138 Mégret & Hoffman (n 94) 338.

relying for the responsibility question on the 'de facto control'.¹³⁹ Slaughter and Crisp follow the same route and suggest that with the all-encompassing scope of UNHCR's activities, the 'notion of state responsibility was weakened further',¹⁴⁰ and argue that UNHCR 'has been transformed from a humanitarian organisation to one that share certain features of a state'.¹⁴¹ In fact, they argue that UNHCR, by having this overwhelming position as the key provider of aid in refugee camps, has widely been perceived as a 'surrogate state',¹⁴² suggesting a responsibility shift.

Kinchin approaches the question differently. He suggests that a shift in responsibility to respect, protect and fulfil human rights from the state to international organisations takes place where the organisations administer refugee camps 'in lieu' of a state.¹⁴³ He argues that a subsidiary organ of the UN should have to respect international obligations of a territory the UN effectively controls.¹⁴⁴ The question of whether UNHCR controls Kakuma refugee camp is not straightforward but, as seen above, the agency definitely is a key player in fulfilling many of the social rights of the camp inhabitants. UNHCR's obligation in such situations amounts to 'fill[ing] the protection vacuum created'.¹⁴⁵ In an analogue manner, the European Commission of Human Rights recognised a transfer of responsibility for the protection of human rights from a state to an international organisation as valid if the latter offers the same standards as a state would have.¹⁴⁶ Finally, Mweded retains a shared responsibility between UNHCR and the host state, suggesting a multilayer and hierarchical ladder of responsibilities according to the effective control criteria,¹⁴⁷ therefore also relying on the de facto situation on site.

After this brief review of the literature, an analysis of the relevant *de facto* situation and the agreements to formalise said *de facto* situation is provided.

139 Mégret & Hoffman (n 94) 339.

140 Slaughter & Crisp (n 94) 8.

141 Slaughter & Crisp (n 94) 2.

142 Slaughter & Crisp (n 94) 8.

143 Kinchin (n 113) 268.

144 Kinchin (n 113) 255-256, leaning on the 'effective control' recognised to the UNMIK; see *Behrami and Behrami v France* App 71412/01 and *Seramati v France, Germany and Norway* App 78166/01 ECtHR 2 May 2007.

145 Kinchin (n 113) 257.

146 As above.

147 M Mengesha 'Human rights violations in refugee camps: Whose responsibility to protect? A case of Ethiopia' (2016) *Lund University Student Papers* 68.

De facto situation on site and memoranda of understanding

It seems as if most authors allow a responsibility shift and justify the shift by relying on the factual situation on site, but only to the extent that the realities on site give the international organisation a state-like, or *de facto*, state position. By taking over functions normally attributed to a modern government in refugee camps, UNHCR has already been described as a 'surrogate state',¹⁴⁸ a 'quasi-state'¹⁴⁹, or 'quasi-sovereign'.¹⁵⁰ Wilde argues that UNHCR is *de jure* an invited guest on the state's territory, but *de facto* the agency is exercising sovereignty.¹⁵¹ The terminology '*de facto*' or '*quasi*' simply suggests that UNHCR does not have a formal mandate or treaty obligation to assume state-like functions.¹⁵² In Kakuma, where UNHCR controls and administers a wide range of state-like activities and, therefore, has *de facto* control over the camp, a responsibility shift should consequently be an option. However, the extent of this shift is open to discussion, to a certain extent needs to be formalised, and should concern an area where UNHCR has the capacity to significantly impact human rights.

The cooperation between UNHCR and the host state usually is formalised by an agreement, which might allow a more precise identification of which activities UNHCR has taken, or was delegated responsibility for.¹⁵³ These agreements between UNHCR and host states usually are institutionalised with a memorandum of understanding (MoU), which codifies the division of labour, though on a general and abstract level that does not necessarily exclusively deal with the management of camps.¹⁵⁴ It should be noted that these agreements can differ in each region and, therefore, the tasks accorded to UNHCR and a possible responsibility shift might be different in each region.¹⁵⁵

MoUs between UNHCR and host governments have emerged as an alternative legal instrument for regulating the status of refugees¹⁵⁶ and the administration of a refugee camps.¹⁵⁷ In Kenya, the MoU between the UNHCR and the Kenyan government unfortunately is inaccessible by the public. A comparison with MoUs that UNHCR

148 Kagan (n 134) 1.

149 Farmer (n 130) 76.

150 Kinchin (n 113) 252.

151 Wilde (n 126) 113.

152 G Verdirame *The UN and human rights – Who guards the guardians?* (2011) 230.

153 Wilde (n 126) 122.

154 Kagan (n 134) 15.

155 Slaughter & Crisp (n 94) 1.

156 Kagan (n 134) 15.

157 Kinchin (n 113) 263.

concluded with other states can give insights. In Guinea, for example, the government has ceded large portions of its day-to-day operations in the camps to UNHCR through a MoU.¹⁵⁸ The transfer of power from the government to UNHCR supports the assumption of state-like character of UNHCR's operations,¹⁵⁹ and allows the assumption that a responsibility shift took place in areas where UNHCR assumes state-like responsibilities.

Kagan took on this question as he analysed several MoUs between governments and UNHCR in the Middle East. He concluded that responsibility for most social and economic concerns was assigned to UNHCR.¹⁶⁰ When discussing responsibilities, Kagan suggests focusing on a positive/negative liberties distinction: If direct resources or active implementation are required, the UN would take primary responsibility.¹⁶¹ For example, health care, schools and administrative services would fall under the responsibility of UNHCR. The state would mainly remain responsible for negative liberties, such as ensuring the safety of the person by providing critical security and refraining from refoulement,¹⁶² because UNHCR simply could not take over such tasks.¹⁶³ The distinction Kagan proposes seems to reflect the realities in Kakuma camp: UNHCR seems to be the overall provider and coordinator of services, while the Kenyan state primarily assures the general security with a police force and courts for purposes of criminal proceedings. Following this approach would suggest that as UNHCR is the primary service coordinator and provider for, among others, health care, the agency would have human right responsibilities in these areas.

The shift of responsibility in a certain, quite precise area also is in line with recent developments in business and human rights. Corporations should bear human rights responsibilities.¹⁶⁴ The intergovernmental working group on transnational corporations and other business enterprises with respect to human rights recently proposed a revised draft treaty. The scope of said draft treaty is to elaborate an international legally-binding instrument to regulate activities of businesses in international human rights law. It recognises that even though states have the primary responsibility for human rights, businesses also 'have the responsibility to respect all human rights' by avoiding abuses, addressing them if they occur,

158 Farmer (n 130) 75.

159 Farmer (n 130) 76.

160 Kagan (n 134) 17.

161 Kagan (n 134) 23.

162 Kagan (n 134) 3.

163 Kagan (n 134) 23.

164 HRC Resolution 26/9, A/HRC/RES/26/9, 14 July 2014.

and preventing them.¹⁶⁵ This responsibility to fulfil human rights in areas where the state power has waned, such as conflict zones and areas where states in general are unable to govern,¹⁶⁶ suggests that the question of responsibility should be answered following a new criterion, namely, the impact on human rights. It is interesting to note that this is also in line with Mégret and Hoffman's argument.

In the context of Kakuma camp, this approach would suggest that because the lives and the rights of refugees living in the camp are overwhelmingly influenced by UNHCR, the agency should bear responsibilities. Considering that the host state intentionally delegated part of its ability to impact individuals' or groups' basic rights in refugee camps, it should be considered that the responsibility was assigned to the actor that has the ability to influence these rights, in this case UNHCR.¹⁶⁷

UNHCR does not by itself directly provide health services. The health system is mainly operated by NGOs and institutions of the Kenyan state, whereas UNHCR coordinates and finances most of these activities. Such 'implementing partners' can be considered agents of UNHCR. Similarly, the UN acknowledges that whenever 'an organ of a state is placed at the disposal of an international organisation, the organ may be fully seconded to that organisation. In this case the organ's conduct would clearly be attributable only to the receiving organisation'.¹⁶⁸ This is also the case where the seconding state has concluded an agreement with the organisation over placing an organ or agent at the latter organisation's disposal.¹⁶⁹ The criterion for the attribution of conduct is the factual control over the specific conduct taken by the organ or agent placed at the organisation's disposal, depending on the factual circumstances and the particular context.¹⁷⁰ Flowing from the statement that host states have given UNHCR in refugee camps tasks and duties linked to the human rights obligations traditionally associated with states, authors advocate a shift from the concept of 'sovereignty' to the concept of

165 OEIGWG Chairmanship, Second Revised Draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises, Preamble, 2020, https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf (accessed 22 January 2022).

166 A Ramasastry 'Corporate social responsibility versus business and human rights: Bridging the gap between responsibility and accountability' (2015) 14 *Journal of Human Rights* 250-251.

167 Mégret & Hoffmann (n 94) 321.

168 UN General Assembly Report of the International Law Commission (2011) A/66/10 87.

169 As above.

170 UN General Assembly (n 168) 87-89 and its references.

'control' as a criterion to bear the human rights responsibility.¹⁷¹ As discussed above, even if UNHCR might not be considered 'sovereign' in Kakuma camp, the agency certainly is 'in control' whereas agents from other implementing partners are at its disposal. With this control over the camp's activities, although sometimes delegated or executed by other NGOs or UN agencies, would also come the responsibility to protect, respect and fulfil human rights.

The concept of absolute state sovereignty is dwindling in international law and a shift of responsibility to certain other entities is possible. Through MoUs, Kenya and UNHCR have formalised their cooperation, institutionalising the *de facto* control UNHCR has over the camp and emphasising the agency's ability to influence the human rights of the population in certain areas. In Kakuma refugee camp, therefore, the responsibility to fulfil human rights seems to a certain extent to have shifted to UNHCR.

The authors of this article favour the view that a shift in human rights responsibility can and should take place given the situation in Kakuma camp. Indeed, Kagan argues convincingly that the entity that by default is responsible for the protection of the human rights of the camp's inhabitants is the state. However, this responsibility of protection can shift, especially according to the degree by which an actor influences the human rights of the camp's inhabitants. In the areas where UNHCR directly ensures that the basic needs of the population in Kakuma are met, and recalling the situation of vulnerability and dependency of the inhabitants, as well the increased duty of care, it leads to a convincing case of a, at least partial, shift of human rights responsibilities from the state to UNHCR. Returning especially to the right to the best attainable standard of health, this would suggest that UNHCR, within the limits consented to by the Kenyan government, has to ensure the fulfilment of the core content of this right, including the provision of face masks.

3 Conclusion

This article has established that the inhabitants of Kakuma refugee camp are in a special relationship with the state. Because of this special relationship, the state has an increased duty of care towards the inhabitants. This increased duty of care results in an obligation to provide face masks for the inhabitants, based on the core obligations

¹⁷¹ Mégret & Hoffmann (n 94) 341.

of their right to the best attainable standard of health and right to life.

However, it is questionable whether the state should indeed provide face masks to the inhabitants. While in the traditional understanding the sovereign state is the only responsible entity to ensure the human rights of the persons under its jurisdiction, this perception seems to be changing and does not reflect the realities on site in most refugee camps. The overwhelming position that UNHCR holds in certain refugee camps, a *de facto* and 'quasi state' position, combined with the overall control and administration UNHCR has over Kakuma camp, formalised by a MoU, results in UNHCR being able to significantly impact the human rights of the camp's population. This is especially true for the right to the best attainable standard of health during the COVID-19 pandemic. Therefore, the factual situation on site in Kakuma camp resulted in a shift of responsibilities for certain human rights to UNHCR, arguably also for the provision of face masks.

The authors attempted to raise awareness about the unsatisfactory human rights situation in Kakuma camp, exacerbated during the crisis time of COVID-19, and help define the legal framework of refugees' protection. By analysing the responsibility question, it is hoped that the factual situation on site in most refugee camps is increasingly acknowledged, and hopefully formalised in the future, allowing for a better understanding of the obligations of the different actors involved. The main goal of the article is to work with Kakuma camp's inhabitants towards the fulfilment of their human rights.