

# Examining the Doctrine and Colonial Heritage of ‘Protection’ in International Refugee Law

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## ABSTRACT

This article examines the doctrine and colonial heritage of ‘protection’ and how its imperial design is embedded in international refugee law. I deploy decolonial critique to trace the historical development of the framework of protection from the British Medieval era to its contemporary usage in refugee law and policy. During the British Medieval era, protection defined the relationship between kings and their subjects which was articulated in terms of obedience to the Crown. From the 16th century, the British participated in the Transatlantic Slave Trade with royal approval. Subsequently, protection regimes were deployed throughout the British empire in Africa and the entire Global South. In most cases, the colonialists entered into protectorate arrangement by forming alliances with the natives without claiming political sovereignty or making jurisdictional claims, but embedding within it the possibility of conquest. Gradually, the claim for alliance shifted to subjecthood which provided a clear inroad for imperial annexation. When the United Nations High Commissioner for Refugees (UNHCR) was founded in 1950 by European nations with strong colonial presence in the Global South, it adopted the doctrine of protection and retained the colonial order from which it originated. Ever since, protection continues to be its most powerful colonial symbol. Just as the natives were considered unprotected in the colonies, lack of protection is a qualification threshold for refugeehood. It is in this context that this article foregrounds that the framework of protection continues to function as a neo-colonial project. By deploying a decolonial critique and Afrocentric approaches, this article argues that protection continues to function as a tool in the externalisation of refugee policies in Africa and the Global South.

**Keywords:** Refugees; Colonialism; Decoloniality; Protection; Protectorate; Camp

## Protection in Medieval Britain

Originated from Medieval Britain, the term ‘protection’ is regarded as an exceptionally controversial episode in English legal practice (Annabel [1]). The term was first used in the context of the privilege provided by kings to their subjects by offering immunity or defence from enemy attack. The usage was later universalised by the Crown under the common law over its imperial subjects. The universal peace of the king in the earliest treaty of the English war was invoked by King Henry I as outlined by Bracton the Medieval British Jury: the king has also those things that are of peace, that the people entrusted to him may be quiet and restful in peace, and so that none should beat, wound or mistreat one another, none take another’s property by force and robbery, and none maim or kill another man (Annabel [1]). Bracton juxtaposed peace with protection, making the latter a

key feature in the theological-political thought of the Church of England and the monarchy. In this context, protection defined the relationship between the king and his subjects, and it was articulated in terms of obedience to the Crown. As the minister of God, the king presided over peace on behalf of his subjects. In so doing, he presided over his protective and defensive work using the sword as a symbol of his authority. The association of protection with the Crown was demonstrated in the royal coronation oath whereby the monarch in waiting, promises to protect the law and the land (Lauren, et al. [2]).

In an element of the oath, a prayer was offered to God that He blesses and sanctifies the sword in protection and defence of the church. This could be interpreted as royal absolutism based on the divine right to protect. In fact, it is the law that arms the king with this power, and he is the beneficiary of protection more than the protectee. This aligns with Hobbesian theory in Leviathan that, ‘covenants

without the sword are nothing, but words and of no strength to secure a man at all' (Hobbes [3]). Hobbes was referring to the fact that protection made under duress in normal settings are invalid which is reflective of such protective arrangement. A breach of this protection may entitle or even worse oblige the protector to punish the violator under common law. Despite its controversial usage, the language of protection continued to be used in British coronation ceremonies throughout the 16th century. Following Hobbesian theory, Anthony Ascham defined the nexus between protection and obedience: protection implies a return of obedience and friendship from the persons protected to those that protect them, otherwise they put themselves in the position of the enemies, and by the law of nations, which indulges liberty unto all that are in power to provide for their own security, they may be handled as public enemies, and outlaws (Anthony, 2005, p. 16). Consistent within Hobbesian theory, Ascham was alluding to the fact that obedience and subjection have to be central to this relationship.

Ascham contends that in order to behave like subjects in the midst of so many swords, the inherent rights of the society as a whole is often at a stake. As he put it, protection in such a situation becomes essentially a private arrangement. Reading Ascham's theory of protection as a political concept, the legal subjection of subordinates to whom protection is owed, means giving up the subjects' natural rights to justice. Similarly, in his *Les Six livres de la republique* 1576, Jean Bodin deployed the term protection to re-enforce the concept of sovereign power (Bodin, 1576). Bodin could be read polemically as referring to the relationship between the sovereign and his subjects. In other words, protection through subjection and subordination is a means of giving up much of our natural rights when demanded under duress. Similarly, Hobbes conceptualised the relationship between the sovereign and its subjects using social contracts theory whereby the former provides protection and in return, the latter provides obedience. As (Hobbes [3]) declares in his 1651 *Leviathan*, the end of obedience is protection. In Hobbesian sense, it is through such contractual obligation that the sovereign regulates violence by keeping his subjects obedient. Similarly, in his Latin version of political philosophy *De Cive* of 1642, which comprised three distinct parts: liberty, dominion, and religion, Hobbes observed that there is a mutual relationship between protection and obedience, but that can only happen in a democracy where law exists, but not in the colony. (Hobbes [3]) ridiculed the concept of protection by asking the provocative question, 'if it is not literary protection, what is it?'

(Curley [4]) a royalist, labelled the *Leviathan* as 'a rebel's catechism,' for abandoning the divine right of the king to protect. Nonetheless, Hobbes maintained that protection-obedience axiom aligns with enemy-enemy axiom where the protector determines who the enemy is. There is no legitimacy, no friendship, no obligation, and no legality without which there is no genuine protection. From this perspective, there is no mutual relationship between obedience and protection. In line with Hobbesian argument, the conditional protection

offered by the protector very much infringes on the natural rights of the protectee. This conditionality gives the protector as Hobbes' political philosophy dictates, 'the *carte blanche* to do with his subjects as he will' (Martinich [5]). In other words, obedience is conditioned on protection and it cannot outlast the protection promised. In the absence of protection, the subject has to revert to natural law where they can seek protection from nature as they judge appropriate.

## Protection as a Colonial Project

The British empire, a worldwide collection of colonies and protectorates that span over three centuries, was supervised by the Crown of Great Britain. From the 16th century, Britain began sailing around the world and established a network of protectorate arrangements through dispossession and acquisition of territories and colonies. By using maritime expansion driven by commercial ambitions, the British Crown regarded the colonies as the source for raw materials to feed its manufacturing industries. The idea of protectorate travelled from the Caribbean to Australia, New Zealand and the Pacific region, the Indian basin, and Africa. This led to what is now call the British Commonwealth as a symbol of the British sovereignty embodied in its 1931 Statute. The Commonwealth now comprises of free sovereign states, but once were colonial territories, and none self-governing territories. This basically means, the Commonwealth still retains its colonial heritage. With a single language, a national church, a unified army, and a unified legal system, the British empire expanded beyond mainland Europe with the help of private companies and missionary societies. Soldiers like Thomas Dale and church Minister such as Patrick Copland were instrumental to the global expansion of the British empire (Alison [6]). When the colonies became ideal places for experimenting the doctrine of protection outside Europe, the British Crown's structured its relationship with the colonies within the framework of protection.

Claims for protection were placed selectively. In the colonies where political and military control were not practicable, the British adopted mutual alliances. Where the natives were politically weak, the language of protection leaned towards conquest. In such protectorate arrangements, the British were the single beneficiary of protection. Gradually, as the British consolidated power, the language of protection shifted to discourse of subjecthood which prepared the ground for imperial annexation. The British empire was managed by governors appointed as the Crown's representative in each colony. As the Crown's proxies, imperial agents had a range of responsibilities, including supposedly safeguarding the interests of slaves and Indigenous people, hear complaints against slave masters, oversee contracts for indenture labourers, and encourage Christianisation and civilisation. For example, in South Australia, a protector position was included among the colony's official personnel at the planning stage prior to the first settlers setting sailed (Robert, et al. [7]). So, protection was woven into the governance structure of settler societies. In such protectorate arrangements, the natives found themselves colonial sub-

jects as only one party had the power to protect. The frameworks of protection were multiple and defining their legal parameters is problematic. However, more broadly, protectorate arrangements were often framed in the form of treaties or alliances with the promise to guarantee security to the natives against external aggression.

In a period during which imperial control was the rule rather than the exception, the Crown's protection was rendered to colonial subjects in return to allegiance against supposedly enemies attack (Walker [8]). Such arrangements initially commenced without claiming political authority over the natives. However, where there was resistance, the colonisers used force to subjugate the natives. As (Lauren, et al. [2]) observed, claims for protection included forming irrevocable ties between protected groups and the protectors with significant implications such as commitments to go to war or a mere promise of gifts which were sometimes never honoured. More often than not, protection was invoked to describe security arrangements with the natives which gradually culminated into claims of political dominance. In some cases, protection claim formed the personification of coloniality. In such a relationship, imperial agents offered guarantees of protection to their subjects, but without formal affiliation. This allowed the protectors to preserve the right to violent intervention when their interests were at stake. Essentially, all European transactions in the colony were shaped within the framework of protection, but without provoking immediate resistance or dissent from those protected. For example, in 1605 the Verenigde Oostindische Compagnie (VOC) of the Dutch East India Company signed a treaty with elders of the Banda islands (Jan, et al. [9]). Under this treaty, the Dutch agreed to provide protection to the Bandanese against external aggression.

However, a few years later, the Bandanese were forced to become colonial subjects. After a wave of decolonisation wars swept the Global South in the 20th century, a number of colonial territories gained political independence from the colonisers. However, when the United Nations was founded in 1947, about 750 million people were still living under protectorate arrangements (United Nations, 2022). Although colonialism is largely regarded as something of the past, there are still 16 colonial territories around the world with over two million people still living as colonial subjects. These colonial territories are: Montserrat, Saint Helena, Anguilla, British Virgin Islands, United States Virgin Islands, Gibraltar, Cayman Islands, Falkland Islands (Malvinas), Turks and Caicos Islands, French Polynesia, American Samoa, Guam, Pitcairn, New Caledonia, Tokelau, etc. In essence, the framework of protection continues to play a strategic role in maintaining control over colonial subjects.

## The Protection of Slaves

Slave trade and slavery was a lucrative business across the entire British empire. About ten million men, women, and children were captured and sold as slaves to meet labour demands in Europe. In the Caribbean nations of Guadeloupe, Barbados, Haiti, and Jamaica, there were more slaves than non-slave who were worked to death in su-

gar, coffee, and tobacco plantations, most of which were owned by the church of England (Adam [10]). This prompted anti-slavery campaigners in Britain to call for the adoption of slave protection policy as a humanitarian response to end the trade in human beings. Imperial administrators hoped that by using protectorate arrangements, imperial agents would be able to peacefully assimilate the natives without the need to enslave them. Controversially, this coincided with the mass emigration of British settlers to dispossess the Indigenous peoples in North America, Australasia, and Africa (Kennedy [11]). By this time, slave trade was not only legal, but it was a necessary and unstoppable part of the British colonial economy. In 1787, a committee for the Abolition of Slave Trade was formed in London to influence the slave protection campaign in the entire British empire. After about 30 years of campaign, the British eventually adopted the Abolition of Slavery Act 1833 (Allen [12]). The Quakers and Evangelical Protestants with key people such as William Wilberforce, established mission stations across the British empire to promote this 'slave trade diplomacy'.

Wilberforce described the anti-slavery campaign as fighting the traffic and 'preparing an entrance into Africa for the gospel of Christ' (Wilberforce [13]). However, the conversion of slaves to Christianity never spelt an end to slavery as new converts remained slaves even after baptism. The slave protection framework only focused on the prevention of the 'export boom' of slaves from Africa, the Indian Ocean Basin, South Asia, and the Caribbean. By this time, the Danish-English-Halle Mission had already adopted the framework of protection and announced the abolition of slave trade in 1753 through the Plakat – a public proclamation which authorised an end to the trade in slaves. The proclamation was framed in a discourse of evangelical enlightenment: in order to prevent in the future and completely to abolish a trade and enterprise in innocent and freeborn human beings, which by both Christian and Heathens is considered to be highly prohibited and intolerable, and in conflict with all-natural laws and peoples' rights' (Larsen [14]). Ironically, this proclamation was aimed at not stopping slave trade, but modernising it in the age of Enlightenment and natural rights reforms. This was mainly because slaves were still considered the bedrock of Europe as they provided free domestic and industrial labour. As (Smith [15]) observed, 'slavery has been universal in the beginnings of society, and the love of dominion and authority over others continue to make it perpetual.

Besides, the prohibition was only meant to protect people who were not yet slaves at the time, but not people who were already slaves. Despite the official proclamation, the trading of human beings continued in new colonial territories such as West Indies, St Helena, and Sri Lanka. Over the course of the 19th century, Britain created the office of the protector of slaves in all its colonies. The amelioration crusade was to prepare slaves for freedom. Although some imperial officials, majority of whom were drawn from the military were against the emancipation movement, the Edinburgh Review proclaimed that what England 'has done and suffered' to stop slave trade and slavery

'will stand as the proudest monument to the spirit of the age' (Kielstra [16]), and for the evangelicals, it demonstrated a good legacy of Christendom. Nonetheless, some abolitionists termed it 'British hypocrisy' because slaves and Indigenous protectionist policies created enormous wealth, which fuelled Britain's industrial revolution and to the English consumers (Kielstra [17]). In a letter to the Chancellor of Exchequer published in 1802, the abolitionist James Stephen expressed a deep concern about slave legislation: take into your hand's sir, the volume of the acts of assembly of the different West Indian islands, and where you find 'negroes' or 'slaves' in the index, refer to the acts that relate to them. Still within the last few years you will not find in a century or more, a single provision in these laws tending to protect a class of men by far the most numerous in these societies, from the injuries to which their situation must always have exposed them: not one clause aims to limit the master's authority, not one to punish its abuse (Stephen [17]).

In fact, the new legislation was designed to prevent extending any rights to slaves. For context, slave protectors were themselves owners of slaves who were not willing to give up their lucrative business. As the British empire was heavily reliant on free labour, more inhumane legislation was introduced which altered the existing slaves and owner's arrangement. For example, Toussaint-Louverture's draconian decree of 1800 and the Constitution of 1801, required the deployment of military force to ensure that former slaves remained on the plantations. The imperial slave emancipation discourse was dictated by laws passed by colonial legislators which were broken, crooked, and drawn in the sands of colour-coded civilisation that emerged at the back of slavery (Lauren [18]). This aligns with Seymour Drescher observation that slavery and slave trade were healthy, profitable, expanding geographically and increasing in importance to Britain's economy until abolition crippled it (Kielstra [16]). There is no nation in Europe that has plunged so deeply into this guilt as Great Britain (Christian [19]). The abolitionist agenda was somewhat arbitrary as London was using it as a philanthropic cloak because it chose to retain profitable colonies, many for decades. Throughout the 19th century, the abolitionist agenda remained an emotive topic in the British empire and back in London. The protection of slaves as a humanitarian innovation was more geared towards imperial expansion rather than protecting the rights of the natives.

While the principle of abolition is incontestable, its application was difficult as its legacy continued well into the end of the 19th century with the introduction of the indenture labour system. The British later introduced a seven year 'apprenticeship' period for slaves to be Christianised and educated in preparation for full independence. However, the slaves were still obliged to work for four to five days a week without pay and strict vagrancy laws were enforced (Kielstra [16]). The British apprenticeship or what Charles Dickens called 'telescopic philanthropy' discounted the brutality of the slave protection regime. Effectively, the apprenticeship program was abandoned in 1838 in favour of economic benefits for free slave labour. This is a

clear indication that the British did not intend to completely abolish slave trade as the continuity of slavery was inherent in the abolitionist agenda. This meant, protectorate arrangement played a key role in civilising the process of colonialism. The anti-slavery campaign only functioned to discourage the slaves export boom to Europe as it was later preceded by indentured labour system. Although slavery was abandoned socially, it was substituted and instituted with European indenture wage labour system. Indentured or treaty labour system was a form of labour recruitment in which slaves were made to agree to work in plantations in the colonies, but without salary. The indenture labour system was a global free and forced labour system that scattered more than 2.2 million slave workers throughout European colonies in Africa, Australasia, the Caribbean, Asia, the South Pacific, and mainland Europe.

This labour system was part of a complex emancipatory reform agenda aimed supposedly at protecting the natives from being sold in slave market. This policy later led to what (Alan, et al. [20]) referred to as 'humanitarian imperialism'. This humanitarianism commenced in five major sugar-producing Crown colonies of Demerara, Trinidad, St. Lucia, Mauritius, and British Guiana as a pilot project, but with strong settler interests. It provided a powerful ideological validation for the extension of British imperial rule and the annexation of more territories. (Chatterjee [21]) argues that Britain markedly showed little interest in abolishing slave trade. In other words, the slave traders were only interested in evading laws intended to curtail slave trade and slavery. As such, the long-standing tradition of slavery and the appetite for free labour facilitated this institutional change in the cosmopolitan world of empires. In essence, protectorate arrangements were never intended to stop, but to regulate relationship between the metropole and the colonies. Although slavery abolitionists in Europe continued with their campaign several decades later, slave trade remained legal and widespread throughout the British empire.

## The Protection of Aborigines

As colonialism was premised on dispossession and exploitation, the British later established the Aborigines Protection Society (APS) in 1837 in all its colonies in response to the injustices caused by earlier history of colonialism. Framed within the trinity of 'Christianity, civilisation, and commerce,' protection as a European innovation was a 'mutable mobile,' project that was later replicated across the globe, spreading from Australia to New Zealand, Fiji, South Africa, Indian Basin, the Caribbean, Canada, and Congo (Aidan [22]). In the Australasia colonies, Aboriginal people were already subjecting to the British jurisdiction. Effectively, the Crown appointed the protectors of Aborigines across the colonies which served as 'colonial diplomacy' to hide the exploitation and dispossession which were the two defining faces of colonialism. (Heartfield [23]) contends that the goal of the protection of Aborigines was flawed from the outset, delusionary, and its outcome instead enhanced the growth of British empire. Similarly, (Heartfield [23]) concluded with an imperial tone saying, 'we

are all immigrants' regardless of the time of arrival in the new land'. Similarly, (Lorimer [24]) argued that the new society abandoned the campaign on native rights and under the leadership of Reverend John Harris, became an advocate of imperial trusteeship. By and large, the moral question at the heart of Australian colonial history does not only lie in the protectorate arrangement, but also in the many years of dispossession of Aboriginal land and sovereignty.

The APS distanced itself from blanket criticism of colonisation and instead became the champion of annexation. In support of the APS, (Jared [25]) argued that the extension of imperial sovereignty was the most effective way of protecting the Indigenous people. In essence, protection was viewed through the colonial worldview and some historians believed that it has some utility to the protectee as the case of the Māori of New Zealand since the colonialists were frequently encroaching their land (Lester, et al. [26]). This claim laid the foundation stone for protectorate arrangement in all British colonies. Although shaped in humanitarian language, (Heartfield [23]) explained that protectorate arrangement was an interim measure 'between annexation and independence,' which marked the growth of the British empire. As in the case of New Zealand, the APS approved of the Treaty of Waitangi, which was believed to have transformed the Māori from independent people into colonial subjects (Heartfield [23]). For the APS, this meant Māori had gained the rights to be protected (Jared [25]). However, as (Woollacott [27]) observed, settler colonial growth was dependent not only upon the appropriation of Indigenous land, but also upon the combined labour 'of the free and the unfree'. Similarly, (Banivanua [28]) contends that Indigenous people of Australasia and the wider Pacific drew upon the imperial language of sovereignty. The Aborigines obligations to the colonial state were heavily policed as they were classified as criminals when they did not acquiesce to colonial authority.

This protectionist agenda was embedded into the indenture protection system in post-abolition era. When the protectors of Aborigines were appointed to the Australasian colonies, their duties were to implement the Crown's sovereignty, and make the Aborigines subjects of the British empire. The British protectorate philosophy was about locating Aborigines to dedicated reserves where they would practice agriculture and Christianity. Gradually, protection became institutionalised as a form of government surveillance through very strict legislative measures. This led to the expansion of pastoral frontiers and the absorption of the Aborigines to work in the pastoral sector, mining and pearling industry (Amanda [29]). As (Lauren, et al. [30]) argued, protection did not serve the interest of the natives, but rather it reinforced the legitimacy of the British imperial jurisdiction. This colonial diplomacy was not only to encourage the natives to become British subjects, but it was also used as a repertoire of imperial practice across the British empire. After becoming British subjects, the Aborigines were policed as criminals if they did not subject themselves to imperial authority. The British protection policy signalled the power to exclude than include which by default, normalised se-

ttler colonial interests. The British subjecthood also provided a historical foundation that facilitated the installation of privilege and the transition from settlement to nationhood. Protection continued to be a legitimising device for the expansion of British empire.

The British colonial rule was felt the most in Africa with the entire continent placed under protectorate arrangement by the end of the 18th century. Numerous European colonial powers ventured into Africa, but the Belgian administration was considered the most controversial episode in modern European colonial history in the African continent due to its abhorrent violence. Imperial protectorate arrangement was extended to the Congo by Belgian King Leopold II when he established the Congo Free State Protectorate which was welcomed by the APS (Heartfield [23]). Despite King Leopold's extensive atrocities, torture, and murder in the Congo, he retained his position as a distinguish member of the APS, which clearly explains the colonial intent of the APS. Writing about Belgium rule in the Congo, (Fabian [31]) argued that colonialism was 'phrased' in a humanitarian language, but was 'dictated by imperial demands' to produce, reproduce, and docile people in the colonies. As Western interventions in the Global South are often accompanied by humanitarian gesture, such gestures continue to civilise the process of colonialism. Whether the colonisers took an evangelical crusade or a bureaucratic bent, protection was the pinnacle of the colonial agenda. As in the Congo, King Leopold 'civilising mission' was paternalistic as it was aimed at the Belgianisation of the natives. Although not a 21st century invention, protection policy continues to be deployed in the Global South as a humanitarian project, but without disturbing its colonial heritage.

While this article focuses only on the historiography of protection in the British empire, other colonial nations such as Holland, Italy, Spain, France, Germany, and Belgium had their own protection framework or slave codes embedded within their imperial systems. For example, the France had Code Noir or the Black Code which was applied in all its colonies, including in Martinique, Guadeloupe, and St Christophe. Code Noir marked France's historic rendezvous with slavery. First promulgated by Louis XIV in 1685, the Code's sixty articles regulated the birth, marriage, life, religion, purchase, and death of slaves in all French colonies. Some of the protection provisions in Code Noir gave slave owners absolute rights over their slaves. For example, article seven provides that children born from marriages between slaves shall be slaves. After slavery was officially abolished in France on 4 February 1794, Code Noir remained in force for 163 years. (Kell [32]) referred to Code Noir as the most monstrous legal document of modern times. A leading abolitionist, François Isambert asserted that this demonstrated King Louis Philippe's determination to 'adjourn indefinitely' the question of slave emancipation (Lawrence [33]). As slavery was central in the creation of European colonial empires across the globe, protection policy marked the beginning of the globalisation of Western humanitarian intervention. This perspective is significant in examining the political context in which the term protection continues to be used throughout the millennia to date.

## The UNHCR Intervention in Africa

The refugee agency was founded in 1950 initially as a European institution to respond to refugee crisis, but only in Europe. The colonised were excluded, silenced, or represented by the colonisers during the drafting of this legal instrument (Krause [34]). Similarly, when this instrument was adopted, it was geographically limited to persons who became refugees in Europe before 1 January 1951. While this restriction was removed with the adoption of the 1967 Additional Protocol, some European nations maintained it, including France till 1971; Luxembourg till 1972; Portugal till 1976; Italy till 1990; Latvia till 1997; Hungary until 1998 and Malta till 2002 (Selm [35]). It was during this same period that powerful European nations, including Britain, France, Belgium, Germany, and Portugal owned vast colonial empires in the Global South. Due to fear and anxiety, some European nations with strong colonial presence in Africa resisted the proposal for the UNHCR to intervene in Africa. Despite opposition from France and silence from other major European nations during an intense voting, the UNHCR intervened in Africa in 1957 in response to the Algerian refugee crisis. Although the UNHCR had made its way to Africa in 1957, the refugee agency oriented its interventions towards providing material relief and encouraging 'zonal development'<sup>2</sup>, but without modifying its Statute.

So rather than rely on the legal definition of a refugee under article 1A of the 1951 Convention, the refugee agency instead relied on its 'good offices' under UNGA Resolution 1673 (XVI) of 18 December 1961.<sup>3</sup> This Resolution acknowledged that the African refugee situation was never envisaged by the drafters of the 1951 Convention. Recognising the limitation of the 1951 Convention, the African continent adopted its own refugee convention – the 1969 Convention Governing Specific Aspects of Refugees in Africa (the 1969 Convention). The UNHCR as 'a colonial institution' (Peterson [36]), sanctioned its first humanitarian operation in Africa in 1961. This was the time when the majority of African states were still fighting decolonisation wars, including the Democratic Republic of Congo where the first UNHCR's flag was first raised. (Barnett [37]) believes that the UNHCR is 'a product of Cold War Era'. This narrative shaped the development of international law which continues to affect its reading today. However, postcolonial scholars have rejected this depoliticised view of the international systems following the wars of decolonisation (Moyn [38]; Said, 1979; Spivak, et al. [39-41]). Similarly, (McFadyen [42]) highlighted the colonial silence in the history of the UNCHR when she raised the perennial question: 'human rights for whom when so many states were the possessions of colonial powers?'

Who was the recipient of human rights when Africa was firmly attached to European empires? This perspective is significant in examining the political context in which the refugee agency intervened in Africa, and over the years how it has reformulated the framework of protection in all its humanitarian engagement in the Global South. The UNHCR intervened in Africa very cautious and well a calculated

move. To put it in context, Africa was fighting to free itself from the colonialists who established the refugee agency and it was highly political that any intervention would compromise its neutrality. As the result, the refugee agency was limited its intervention to social and economic rights under the umbrella of its 'good offices'. Second, the UNHCR was not mandated to intervene directly in Africa at the time due to the dateline and geographic limitation the 1951 Convention has imposed by the colonisers. Third, it was also perceived that the wars of independence were internal and wouldn't last long, a view that solidified the 'internalist' conceptualisation of the refugee phenomenon in Africa. Although, the African refugee situation has evolved significantly over the decades, the colonial mentality of managing refugees by concentrating them in mega camps remained the same. Subsequently, the UNHCR resorted to 'care and maintenance' of refugee camps or as (Agier, 2002) put it, 'the new forms of warfare or the will of the world's only superpower to manifest its humanist compassion'.

As such, states that host refugees have resorted to invoking insecurity to justify their restrictive encampment policy. By 1979, Africa had about four million refugees who fled from Mozambique, Eritrea, Chad, Congo, Ethiopia, Angola and Uganda, and spontaneously self-settled in rural areas. There was hardly any assistance from the international community as host nations used their own resources to care for the refugees. The UNHCR later shifted its focus to Africa after the amendment of the 1951 Convention the 1967 Protocol which expanded the protection scope of beyond Europe. In the preceding seven decades, the UNHCR established a network of mega refugee camps hosting over 120 million refugees and asylum seekers across the continent of Africa. Although seen as a new phenomenon in Western epistemology, the camp as an epistemological policy, has already been encoded within settler imperial expansion in Africa. Taking Kenya as a case study, Britain during its 65 years colonial rule in Kenya, established a network of concentration camps across this country as a means of suppressing the Mau-Mau rebellion against colonial occupation. Carolyn Elkins in her book titled 'Imperial reckoning: the untold story of Britain's Gulag in Kenya', provided a critical assessment of Britain's brutal and protracted colonial wars in Africa. Elkins depicted the Kenyan camp as 'British Gulag' which remains an enduring feature of British rule in Africa (Elkins 2005). By default, this has laid the ground for prolonged encampment which perpetuates colonial continuity. Suffice to state that some of the core features of the camp were pioneered in the colonies.

This article asserts that the refugee agency is still bootstrapped in its colonial legacy, dominated by concerns over state interest rather than the interest of the refugees. Noting that active colonialism has ended, the UNHCR's colonial legacy and imperial imagery of keeping large numbers of refugees in prolonged encampment remains its hallmark. Suffice to note that refugee camps are often borne out of emergencies and evolve into ghettos, hallmarked by dependency and bureaucracy.

## The Concept of Protection in International Refugee Law

In colonial terms, protection means acquiring partial or full control over the natives or their territory through invasion and laying claims over them in what the colonialists refer to as a 'civilising mission' (Opi [43]). The justification for protection began with European invasion and settler colonialism. As a Eurocentric construct, protection was colonially structured, aimed at segregation, subordination, control, and informed by racial hierarchy and privilege embedded within white policy (Morton Robinson [44]). In essence, the settlers set the rules around what constituted protection in which they acted as gatekeepers because they were the beneficiaries of protection. As such, protection framework has always remained illusionary as it is epistemologically evasive in seeking the full emancipation of the colonised. When Britain colonised Kenya in 1989, it used the same framework of protection. For instance, the Nandi tribe were the first colonial subjects to be put in 'protection reserve' as punishment for protesting the construction of the Kenya-Uganda railways through their farmland. This colonial perspective is significant in examining the UNHCR refugee protection agenda in Africa. The concept protection was first articulated as the only criterion in the refugee instrument during the League of Nations in relation to Russian and Armenian refugees in 1915.

Lack of protection also featured in the constitution of the International Refugee Organisation in 1946. In almost identical definition, the concept of protection was defined in the travaux préparatoires of the UNHCR Statute pursuant to the United Nations General Assembly (UNGA) Resolution 428 (V) of 14 December 1950 (UNHCR Statute, [45]). The Statute stipulates *inter alia*, that the refugee agency 'shall assume the function of providing international protection under the auspices of the United Nations, to refugees who fall under the present Statute' (UNHCR Statute, [45]). Similarly, the 1951 Convention defines a refugee as a persecuted individual who lacks protection. Article 1A (2) of the 1951 Convention introduced additional elements which later became a permanent feature of the refugee. It stipulates that a refugee is a person who: Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it (UNHCR, [46]).

It is very clear from the phrase above that the concept of protection is political. Although protection is granted on political ground, in the wording of the convention, protection seems humanitarian and non-political. Nonetheless, all the five convention grounds for granting protection: 'race, religion, nationality, and membership of a particular social group, or political opinion' are political and they provide

the legal bond between the individual and the state. Evidently, the duty to protect is the responsibility of the state in relation to the allegiance that citizens owe to the state and with political considerations in mind. So, in the absence of sovereign protection, the UNHCR intervenes as a surrogate protector until a replacement for that sovereign is found, making protection a political problem. However, as (Bodin, 1575) alluded to, so long as the protector is regarded as the embodiment of justice, the obligation to obey is conditional on the protection being provided. The 1951 Convention also depicts refugees in reference to their 'unwillingness or inability' to accept the protection of the country of nationality or habitual residence. Alte Grahl-Madsen maintains the view that the definition of a refugee as person who lacks protection in existing international instruments is, but a symptom of political controversy, namely the relation between the oppressor and his victim (Grahl Madsen [47]). This correlates with the situation in the colonies where the protectors required the protectees to submit to the imperial administration in return to the protection being offered.

Similarly, refugees have the duty of allegiance to the state in which they leave in return to the protection they enjoy. So, states conceptualise protection in the light of their national interests while prioritising national security. The language of security has become mainstream and this gives legitimacy to xenophobia and it frames the conversation on refugees in a popularist prison of fear (Opi [43]). This aligns with what a refugee in Kakuma camp described himself and other camps residents as 'voluntary prisoners' (Brankam [48]). This convergence trajectories have transformed refugee camps into 'carceral humanitarianism' (Brankamp [48]) which is being managed like an occupied enclave as the refugees are excluded from global mobility. Drawing on the case study Kakuma refugee camp in Kenya which currently hosts about 300,000 refugees, carceral humanitarianism is a system that uses humanitarian aid to contain and control the refugees often for a long period of time, sometimes for decades. The camp as I experienced it, is locked in a constant state of emergency, a space where humanitarianism flourishes. Suffice to state that humanitarianism which are exported to the Global South, resembles colonial enclaves where the refugees cede their rights to free movement in exchange to the aid being offered.

It is in this context that refugee incarceration has become the most prevalent institutional responses to global displacement under the disguise of protection. This explains the logic of protection as refugee vulnerability requires a globalised humanitarian apparatus, a network of agents across the world to mobilise resources to fund their protection. Setting up the camp in distant geographical spaces becomes the exclusive *raison d'être* of this humanitarian project or what (Agier, 2020) terms 'the left hand of empire'. Although the camp is situated at the intersection of humanitarianism, justice, and compassion, nowhere in the world has this project proved successful or durable.

From this perspective, protection becomes the means for mobilising resources for protecting those interests as a priority and the refugees become peripheral. In this context, protection becomes not only an instrument of humanitarian governance, but also a means for ensuring the legal subjugation of those protected. John Hutt, the protector of Aborigines once acknowledged that 'while in words we pretend to regulate our intercourse with them on the strictest principles of equality, circumstances require us to violate those principles daily (Amanda, 2012). As John attested to, perfect equality before the law and full protection is easier said than done, hence making the institution of protection hostile to the protected. This aligns with the observation that 'the refugee agency plays the role of the patriarchal protector' when it relates to refugees in order to 'provoke feelings of allegiance, safety, and submission' (Anthony, 2002, p.22). This political patriarchy is what Burke refers to as an aporia. The understanding of patriarchy is critical in problematising the relationship between the protector and the protected. The hierarchy in patriarchy sets the inequality in protection discourse and signifies the imbalance in the power relationship between the protector and the protected. It is this hierarchical construction and subordination that has facilitated the separation of the two. When the Refugee Convention was established in 1951, its key founding members: Britain, France, Germany, Belgium, and Spain still owned vast colonial empires in Africa and other parts of the Global South. Writing about the refugee phenomenon in the 1950s and 1960s, Hathaway, Loescher, and Harrell-Bond casually referred to colonialism as a trigger to drafting of the 1951 Convention (Gillian [52]). When the 1951 Convention came into force, the instrument of ratification was not extended to postcolonial states due to the presence of powerful states still claiming more colonial territories at the time.

It is for this reason that Glen Peterson mimic that, 'the colonial origin of the UNHCR might have escaped the attention of refugee scholars' (Glen [53]). It is crystal clear that colonialism was the precursor to the concept of protection. Right from its inception, the UNHCR had a broader competence *ratione personae* and its protection mandate has been progressively expanding through subsequent UNGA Resolutions (Opi [43]). Ever since, the refugee agency has never had a coherent reconceptualisation of the term 'protection'. It merely reconceptualised protection in terms of the work it does: the rights to asylum and refugee status determination procedures and promoting the principle of non-refoulement. As I experienced it, the camp is built using colonial lens: lack of free movement (confinement), identity (borders), and ethics and social justice (exclusion), which were symbols of anti-colonial struggle. The camp disguised as a 'site of protection', emerged at the height of colonial expansion in the Global South, is not just an ideology, it developed into a permanent institution containment. To date, the doctrine of protection continues to resemble a return to the colony which permitted recourse to force and violence in dealing with refugees and asylum seekers. This is because individuals seeking international protection, but who may not qualify as refugees under

the 1951 Convention, including people fleeing from civil wars and climate change, are considered not deserving of protection as they do not meet refugee status qualification threshold.

Within this jurisprudence, the relationship between the state and the refugees further entrenches this colonial continuity. As such, international refugee law in its primordial form, raises the continued centrality of the protector and the protected dichotomy. While the concept of protection is not clearly spelled out in international refugee law, the UNHCR over the years, has reconceptualised it to include a myriad of assistance ranging from the delivery of tents and food items to education and healthcare services – collectively referred to as 'protection strategy' (UNHCR [54]). This reconceptualisation, which is centred on material assistance, defined the work of the UNHCR during the Cold War Era (CWE) when 'persons of concern' who had no firm legal status became the beneficiary of protection. In the late 1990s, the UNHCR established an 'assistance division' parallel to the protection division which relies heavily on Executive Committee composed of concerned states. The office seems to rely far more heavily upon sophisticated political negotiation and the provision of financial or technical assistance as demonstrated by the recently failed deal in which the UK intended to outsource its refugee responsibility to Rwanda, one of the poorest countries in the world.

As refugee protection is donor funded, the UNHCR has to spend more time writing reports to donors to keep itself funded. As I experienced it, in the reports, the refugees, routinised, counted, but become nameless, dehumanised, and invisible objects which feeds into the abstract legal construction of the refugee Western knowledge production. It is this bureaucracy of counting and coding or what (Spivak, 1994, p.66) terms 'Western production of knowledge' is neither neutral nor innocent as it aligns with Western economic interests [55-62].

## Conclusion

This article examines the origin and colonial heritage of the term protection, its usage from the British Medieval period to the contemporary refugee and humanitarian space by the UNHCR. In Medieval Britain, protection was used in the context of the privilege provided by Kings to their subjects by offering immunity or defence from enemy attack. The usage was later universalised by the Crown under the common law over its imperial subjects. From this perspective, protection as a political concept had a broad range of significance, including in social, legal, religious, and cultural elements. From the 16th century, Britain established a network of protectorates through dispossession and acquisition of new territories in the Global South through settler colonies. The idea of protectorate travelled from the Caribbean to Australia, New Zealand, the Indian basin and to Africa. Protection became central to the British Crown during imperial expansion as it was the sole beneficiary of protection. The claim for protection was made by a range of actors, including missionaries, and co-



lonial administrators. However, the framework of protection was not aimed at stopping slavery and slave trade, but aimed at modernising it in the age of Enlightenment and natural rights reforms. This was mainly because slaves were still considered the bedrock of Europe as they provided free domestic and industrial labour.

Although by this time protectorate arrangements have significantly receded, its legacy and assimilative logic in settler colonies continued to structure relations between the colonies and the metropole. Throughout the 18th century, colonisation was recast as protection as it was interwoven with humanitarianism. It is on this basis that Edward Said critiqued that protection created the very 'Orient' (Said, 2003) that defined the colonial hegemony of the West. In essence, protection was the pinnacle of colonial administration as it became the civilising language in which the expansion of empires was couched. When the UNHCR was founded in 1950 by European nations owning vast colonial empires around the world at the time, the refugee agency adopted the doctrine of protection in all its refugee and humanitarian operations. Ever since, protection continues to be its most powerful colonial apparatus. Just as the natives were considered unprotected persons, similarly, lack of protection is the qualification threshold for refugeehood. So protection is not only deeply rooted in political alienation of the refugee, but it also grants the UNHCR its legal personality as it laid the foundation stone for the UNHCR protection mandate. In its 71 years of operation, the refugee agency's mandate has ballooned and the category of people it protects has increased markedly, including IDPs, returnees, stateless persons, and other persons of concern to this office.

The reformulation of the framework of protection has inevitably led to it being tied to resources utilisation. The danger with this reappraisal is that the legality of refugee protection upon which the mandate of the refugee agency relies is diminishing. Ever since, the UNHCR has continued to glorify its doctrine of protection, but diplomatically detached itself from the tradition that shaped it. By claiming to be the protector of the refugees, the UNHCR has retained the colonial legacy of protection which remains its imperial touchstone. Similarly, the camp, a 'Western phenomenology' has become a permanent institution for managing population decarded by modernity and swept in prolonged encampment, 'a site of protection'.

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