

RETHINKING REFUGEE RIGHTS IN KENYA

BY

MARGARET WARIGIA WACHIRA

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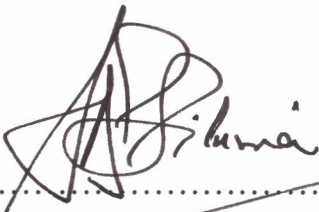
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DECLARATION

I, MARGARET WARIGIA WACHIRA, do hereby declare that this thesis has not been submitted to any other university or institution for any award. I now submit the same for the award of the Master of Laws Degree of the University of Nairobi.


.....
MARGARET WARIGIA WACHIRA
(CANDIDATE)

This dissertation has been submitted for the examination for the award of the Master of Laws Degree for which the candidate is registered with my approval as the supervisor.


.....
PROF. FRANCIS D.P. SITUMA
(SUPERVISOR)

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TABLE OF CONVENTIONS AND OTHER INTERNATIONAL INSTRUMENTS

1926 Arrangement Relating to the Issue of Identity Certificates to Russian and Armenian Refugees, 12 May 1926; 84 LNTS No. 2004.

The 1928 Arrangement Relating to the Legal Status of Russian and Armenian Refugees, 89 LNTS 53, done June 30, 1928.

1936 Provisional Arrangement Concerning the Status of Refugees Coming from Germany, 4 July 1936; 171 LNTS No. 3952.

1938 Convention Concerning the Status of Refugees Coming from Germany: 191 LNTS No. 4461.

Charter of the United Nations; 59 Stat.1031 (1945); done 26, June, 1945; entered into force October 24, 1945

The 1946 Constitution of the International Refugee Organization, UNGA Res. 62(1), 15 Dec. 1946; 18 UNTS 3; entry into force: 20 August 1948.

1948 Universal Declaration of Human Rights, adopted by the United Nations General Assembly on 10th December 1948; UNGA Resolution 217 A(III).

1949 Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GCI); 75 UNTS 31.

1949 Geneva Convention II for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (GCII); 75 UNTS 85.

1949 Geneva Convention III Concerning the Treatment of Prisoners of War (GC111); 75 UNTS 135.

1949 Geneva Convention IV Concerning the Protection of Civilian Persons in Time of War (GCIV); 75 UNTS 287.

The 1950 Statute of the United Nations High Commission for Refugees, UNGA Res. 428(V) of 14 December 1950

The 1951 United Nations Convention Relating to the Status of Refugees, adopted on 28th July 1951 by the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly Resolution 429 (V) of December 1950; 189 UNTS 150; entry into force: 22 April 1954.

The 1967 Protocol Relating to the Status of Refugees prepared and submitted to the United Nations General Assembly in 1966 and adopted in Resolution 2198(XXI) of 16th December 1966; 606 UNTS 267; entry into force 4 October 1967.

The 1969 OAU Convention on the Specific Aspects of Refugee Problems in Africa; adopted at the Assembly of Heads of State and Government at its Sixth Ordinary Session (Addis Ababa, 10th September 1969); 1000 UNTS 46; entry into force: 20 June 1974.

The 1966 International Covenant on Civil and Political Rights, UNGA Res. 2200A (XXI), adopted and opened for signature, ratification and accession in December 1966; 999 UNTS 6 (1977), Cmnd. 6702; (1967) 61 AJIL 870; entry into force Mar. 23, 1976.

The 1966 International Covenant on Economic, Social and Cultural Rights, UNGA Res. 2200A (XXI), adopted and opened for signature, ratification and accession on 16th December 1966; 993 UNTS 3; UKTS 6 (1977), Cmnd. 6702; (1967) 6 ILM 360; entry into force 1976.

The 1977 Additional Protocol I of 8 June 1977, additional to the Geneva Conventions of 12 August 1949, Concerning the Protection of Victims of International Armed Conflicts,

Misc. 19(1977), Cmnd, 6927; 1125 UNTS 609; adopted June 8, 1977, came into force 1978.

The 1977 Additional Protocol II of 8 June 1977, additional to the Geneva Conventions of 12 August 1949, and Concerning the Protection of Victims of Non-International Armed Conflicts, Misc. 19(1977), Cmnd, 6927; 1125 UNTS 609; adopted June 8, 1977, came into force 1978.

The 1982 African Charter on Human and Peoples Rights; 21 ILM 58 (1982); entry into force: 1 October 1986.

The 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNGA Resolution 39/46, 10 December 1984; 1465 UNTS 85; entry into force 26 June 1987.

TABLE OF STATUTES

The Kenya Refugee Act, No. 13 of 2006.

The Immigration Act, Cap. 172, Laws of Kenya, Revised Edition 1984 (1968).

The Aliens Restriction Act, Cap. 173, Laws of Kenya, Revised Edition 1985 (1977).

ABBREVIATIONS

ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
UN Charter	Charter of the United Nations
ICRC	International Committee of the Red Cross
OAU	Organization of African Unity
GCI	Geneva Convention I
GCII	Geneva Convention II
GCIII	Geneva Convention III
GCIV	Geneva Convention IV
API	Additional Protocol I
APII	Additional Protocol II

CHAPTER ONE

INTRODUCTION

1.1 The Meaning of the Term “Refugee”

The term “refugee” is a term of art, that is, a term with content verifiable according to principles of general international law. In ordinary usage, it signifies someone in flight, who seeks to escape conditions or personal circumstances found to be intolerable. The destination is not relevant; the flight is to freedom, to safety. The reasons for flight may be many; flight from oppression, from a threat to life or liberty, from prosecution, deprivation, or due to political or social economic reasons. Implicit in the ordinary meaning of the word “refugee” lies an assumption that the person concerned is worthy of being and ought to be, assisted, and, if necessary, protected from the causes and consequences of flight.¹ The purpose of definition and description of a class of refugees is to facilitate, and to justify, aid and protection; moreover, in practice, satisfying the relevant criteria ought to indicate entitlement to the pertinent rights or benefits.

1.2 Origins of Refugee Rights

The first body of law that influenced the origins of refugee rights regime is the international alien’s law under which governments recognized the necessity of protecting merchants and traders who traveled to other states for purposes of trade. Governments undertook bilateral negotiations of treaties in which safe passage and basic civil rights were mutually guaranteed to merchants wishing to travel in partner states. These were in the form of “friendship, commerce and navigation” treaties that guaranteed certain aspects of human dignity to aliens admitted to most trading states. Because these agreements were implemented in domestic law of state parties, certain human rights guaranteed to aliens were identified as general principles of law.² These included recognition of aliens’ juridical personality, respect for life and physical integrity and personal and spiritual liberty.

¹ Guy S. Goodwin-Gill, *The Refugee in International Law*, 2nd edition, (Oxford University Press, Oxford, 1996), p. 3.

² James C. Hathaway, *The Rights of Refugees under International Law*, (Cambridge University Press, Cambridge, 2005), p. 76.

The second body of law that influenced the origins of refugee rights regime was the League of Nations system for the protection of national minorities. Like aliens' law, the minorities treaties which emerged after the First World War required vanquished states to respect the human dignity of resident ethnic and religious minorities in the hope of limiting the potential for future international conflict. Minorities were guaranteed an extensive array of basic civil and political entitlements, access to public employment, the right to distinct social, cultural, and educational institutions, language rights and an equitable share of public funding.³

The duty to respect these rights was imposed on the governments of defeated states as a condition precedent to the restoration of sovereign authority over their territories. The minorities treaties firmly established the propriety of international legal attention to the human rights of persons at risk; the focus of concern became the well being of the minorities themselves. This evolution became important to refugees and stateless persons who, by definition, could not look at their national states to protect their interests.⁴

Another body of law that protects refugee rights is the international human rights law which focuses on preserving the dignity and well being of all people. Human rights law may be derived from customary international law that requires the existence of a relatively constant and uniform state practice that has generated a sense of mutual obligation upon states. Human rights that are argued to have acquired force as matters of customary law include freedom from systematic racial discrimination, genocide, slavery, extrajudicial execution, or enforced disappearance; torture, cruel, inhuman or degrading treatment; prolonged arbitrary detention; and serious unfairness in criminal prosecution. Of these, only the first, freedom from systematic racial discrimination, appears to be a clear candidate for customary international legal status.⁵

³ Ibid., p. 81.

⁴ Ibid., p. 83.

⁵ Ibid., p. 36.

As an alternative to custom, universally applicable human rights might also be established in the general principles of law, meaning that they are pervasively recognized as binding norms across the domestic laws of states. Universal human rights law may also be set by a treaty of universal reach.⁶ Because some human rights treaties expressly require state parties both to enact domestic legislation to protect one or more human rights and to report their efforts to one or more international supervisory body, the information basis already exists to seek out new universal human rights norms rooted in the general principles of law. This means that state parties to international covenants undertake to protect, by domestic law, the rights provided in the covenants.

Refugees may enjoy the rights in international human rights conventions. State parties to the 1966 International Covenant on Civil and Political Rights (ICCPR),⁷ considering the obligations of states under the Charter of the United Nations to promote universal respect for, observance of human rights and freedoms, undertake to respect and ensure to all individuals within their territories the rights in the Covenant and undertake to enact domestic law to give effect to these rights.

Similarly, State parties to the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR),⁸ undertake to promote universal respect for and observance of human rights and freedoms, through international assistance and co-operation, to grant to all individuals within their territories of the rights in the covenant, subject to the maximum of its available resources. States also undertake to achieve, progressively, the full realization of the rights in the Covenant by all appropriate means, including enacting domestic law to give effect to these rights.

⁶ Ibid., p. 33.

⁷ Article 2(1) and 2(2), International Covenant on Civil and Political Rights, UNGA Res. 2200A (XXI), adopted and opened for signature, ratification and accession in December 1966; 999 UNTS 6 (1977), Cmnd. 6702; (1967) 61 AJIL 870; entry into force Mar. 23, 1976.

⁸ Article 2, International Covenant on Economic, Social and Cultural Rights, UNGA Res. 2200A (XXI), adopted and opened for signature, ratification and accession on 16th December 1966; 993 UNTS 3; UKTS 6 (1977), Cmnd. 6702; (1967) 6 ILM 360; entry into force Mar.23, 1976.

Existence of universal law of human rights may also be located in the Charter of the United Nations⁹ that require states to take joint and separate action in cooperation with the organization in furtherance of human rights and fundamental freedoms.

Another body of law of clear significance in the protection of refugees is International Humanitarian Law. This law applies during armed conflict to protect persons who do not or no longer take part in hostilities and regulate or rather restrict the means and methods of warfare. This law is often mentioned in the same breath as refugee law.¹⁰ Refugees exist in peacetime and in time of war.

The four Geneva Conventions (1949) are; Geneva Convention 1 for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GC1);¹¹ Geneva Convention 11 for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (GC11);¹² Geneva Convention 111 Concerning the Treatment of Prisoners of War (GC111);¹³ Geneva Convention 1V Concerning the Protection of Civilian Persons in Time of War¹⁴ (GCIV), and their two Additional Protocols contain some provisions which govern the specific situations of refugees in time of war.

The two Additional Protocols¹⁵ to the Geneva Conventions are designed to reaffirm and develop the rules embodied in the laws of Geneva of 1949 and part of the Laws of The Hague of 1907: Protocol of 8 June 1977 Additional to the Geneva Conventions of 12 August 1949, and Concerning the Protection of Victims of International Armed Conflicts—Protocol 1—(AP1); and Protocol of 8 June 1977 Additional to the Geneva Conventions of 12 August 1949, and Concerning the Protection of Victims of Non-

⁹ Charter of the United Nations; 59 Stat.1031 (1945); done 26, June, 1945; entered into force October 24, 1945 (UN Charter), Articles 55 and 56.

¹⁰ Dieter Fleck, *The Handbook of Humanitarian Law in Armed Conflicts*, (Oxford University Press, Oxford, 1995), p. 280.

¹¹ 75 UNTS 31.

¹² 75 UNTS 85.

¹³ 75 UNTS 135.

¹⁴ 75 UNTS 287.

¹⁵ 1977 Additional Protocol 1 and 11, Misc. 19(1977), Cmnd, 6927; 1125 UNTS 609; adopted June 8, 1977, came into force 1978.

International Armed Conflicts Protocol 11—(AP11). Under Article 44 of the Fourth Geneva Convention and Article 73 of Additional Protocol 1, refugees are entitled to the same protection under international human law as other civilians affected by the consequences of hostilities.

1.3 Definitions

Under the League of Nations, refugees were defined by categories, i.e., in relation to the country of origin. Its approach was a group approach. In determining whether a particular category of persons was a refugee group of its concern, regard was had to the *objective* situation existing in the country of origin, in order to reach a general conclusion as to whether or not the individual members of the group might be exposed to danger, or other serious consequences, in the event of their returning there. If by this mechanism, a group was determined to be a refugee group, the individual members of the group could benefit from refugee status if they could show that they did not enjoy the national protection of their country of origin.¹⁶

A determination that a particular group was a refugee group of its concern did not presuppose that each member of the group was a victim or potential victim of persecution in the sense it is understood today. An individual applicant for refugee status did not have to substantiate his claim - as is the case today - by a full and detailed explanation of the reasons why he had left, or did not wish to return, to his country of origin, since these reasons were, to a large extent, already taken into account in the general determination of the refugee character of the particular group. This general group determination, therefore, created a type of *prima facie* presumption that the individual members of the group were refugees. That someone was outside their country of origin and without the protection of the government of that State, were sufficient and necessary conditions.

A Russian refugee, for example, was defined in 1926 to include “any person of Russian origin who does not enjoy or who no longer enjoys the protection of the Government of

¹⁶ Ivor C. Jackson, *The Refugee Concept in Group Situations*, (Martinus Nijhoff Publishers, The Hague/London/Boston, 1999), p. 11

the Union of Socialist Soviet Republics and who has not acquired another nationality”.¹⁷ In this instance, presence outside the country of origin was not explicitly required, but was implicit in the objectives of the arrangements, namely, the issue of identity certificates for the purpose of travel and resettlement.¹⁸

Armenian refugees were defined as “any person of Armenian origin formerly the subject of the Ottoman Empire who does not enjoy or who no longer enjoys the protection of the government of the Turkish Republic and who has not acquired another nationality.”¹⁹

The 1928 Arrangement Relating to the Legal Status of Russian and Armenian Refugees²⁰ gave refugees access to the courts, the right to work, protection against expulsion, equality in taxation, and the nature of national responsibilities to honor League of Nations identity certificates. The 1933 Convention Relating to the International Status of Refugees²¹ set a rights regime for refugees as set out in the 1928 Arrangement, obliged states to avoid *refoulement*, granted refugees access to the host state's welfare and relief system, including medical care and workers' compensation and access to education.

A group approach in defining refugees was employed in 1936 arrangements for those fleeing Germany. The arrangement provides that for “purposes of the present arrangement the term “refugee coming from Germany” shall be deemed to apply to any person who was settled in that country, who does not have any nationality other than German nationality, and in respect of whom it is established that in law or in fact, he does not enjoy the protection of the government of the Reich.”²²

This definition was later developed by article 1 of the 1938 Convention, to cover (a) persons possessing or having possessed German nationality and not possessing any other nationality who are proved not to enjoy, in law or fact, the protection of the German

¹⁷ Arrangement Relating to the Issue of Identity Certificates to Russian and Armenian Refugees, 12 May 1926; 84 LNTS No. 2004.

¹⁸ *Supra*, note 1, p. 4.

¹⁹ *Supra*, note 12, p. 97.

²⁰ The 1928 Arrangement relating to the Legal Status of Russian and Armenian Refugees, 89 LNTS 53, done June 30, 1928.

²¹ The 1933 Convention relating to the International Status of Refugees, 159 LNTS No. 3663.

²² Art. 1, Provisional Arrangement Concerning the Status of Refugees Coming from Germany, 4 July 1936; 171 LNTS No. 3952.

government, and (b) stateless persons not covered by previous conventions or agreements who had left German territory after being established therein and who were proved not to enjoy, in law or in fact, the protection of the German government.²³

After World War II, the refugee problem immediately became the concern of the newly created United Nations Organization. In order to deal with the major refugee problem existing at the close of the war, the United Nations General Assembly, by a Resolution of 15 December 1946, created the International Refugee Organization (IRO) which carried out its activities from 1947 to 1951. The refugees who fell within the mandate of the Organization were defined by categories.

However, in order to become the concern of the Organization, that is to say, to be able to take advantage of the services which the Organization provided, the refugees in the majority of these categories had to show either that they needed the help of the Organization in order to repatriate, or that they had so-called "valid objections" to returning to their country of origin. These "valid objections" were, principally, persecution or fear of persecution because of race, religion, nationality or political opinions, and, objections of a political nature judged by the Organization to be valid.

While this need to show "valid objections" was only a *condition* which had to be fulfilled by a refugee in order to benefit from the services of the Organization, in practice, it gave the refugee definitions in the IRO Constitution a more individualized character, that is to say, the applicant was in fact required to give a more detailed explanation of the reasons why he did not wish to return to his country of origin.²⁴

The Constitution of the International Refugee Organization, (IRO) therefore applies the term 'refugee' to a person who has left, or who is outside of, his country of nationality or of former habitual residence, and who whether or not he had retained his nationality. The Constitution emulates the categories of refugees to which it applies as those that belong to one of the following categories:

²³ 1938 Convention Concerning the Status of Refugees Coming from Germany; 191 LNTS No. 4461.

²⁴ *Supra*, note 12, p. 2.

(a) Victims of the Nazi or fascist regimes or of regimes which took part on their side in the Second World War, or of similar regimes which assisted them against the United Nations, whether enjoying international status as refugee or not;

(b) Spanish Republicans and other victims of the Falangist regime in Spain, whether enjoying international status as refugees or not;

(c) Persons who were considered as refugees before the outbreak of the Second World War for reasons of race, religion, nationality or political opinion;²⁵

(d) A person other than a displaced person who is outside of his country of his nationality or former habitual residence, and who, as a result of events subsequent to the outbreak of the Second World War, is unable or unwilling to avail himself of the protection of the government of his country of his nationality or former nationality;²⁶

(e) Persons who, having resided in Germany or Austria, and being of Jewish origin or foreigners or stateless persons, were victims of Nazi persecution and were detained in or were obliged to flee from, and were subsequently returned to, one of those countries as a result of enemy action, or of war circumstances, and had not yet been firmly resettled therein;²⁷ and

(f) Unaccompanied children who are war orphans or whose parents had disappeared, and who were outside their countries of origin.²⁸

The International Refugee Organization functions were repatriation, identification, registration and classification, care and assistance, legal and political protection, transport, resettlement and re-establishment of persons of concern. The High Commissioner for all refugees provided political and legal protection, superintending the entry into force of the relevant Conventions, co-coordinating the humanitarian assistance,

²⁵ Part 1: section A (1) of the 1946 Constitution of the International Refugee Organization, UNGA Res. 62(1), 15 Dec. 1946; 18 UNTS 3; entry into force 20 August 1948.

²⁶ Ibid., section A (2).

²⁷ Ibid., section A (3).

²⁸ Ibid., section A (4).

and assisting governments and private organizations in their efforts to promote emigration and permanent settlement.²⁹

As international refugee law evolved, the many definitions of a refugee and the variance in definitions to different categories of refugees at different times was noted to have inherent deficiencies. The United Nations became concerned with a narrower approach in definition of refugees.³⁰

A clearly "individual" refugee definition was introduced into the Statute of the Office of the United Nations High Commissioner for Refugees, (UNHCR) and into the 1951 United Nations Convention on the Status of Refugees, adopted on 28 July 1951. According to these definitions, a refugee is a person who is outside his former home country because of a well-founded fear of persecution for reasons of race, religion, nationality, or political opinion.

The Statute of the United Nations High Commission for Refugees³¹ (UNHCR) brings within UNHCR competence refugees covered by various earlier treaties and arrangements. It next includes refugees resulting from events occurring before 1 January 1951, who are outside their country of origin and unable or unwilling to avail themselves of its protection "owing to a well-founded fear of being persecuted' or 'for reasons other than personal convenience". The Statute extends to "any other person who is outside the country of his nationality, or if he has no nationality, the country of his former habitual residence, because he has or had a well-founded fear of persecution by reason of his race, religion, nationality or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationality, or, if he has no nationality, to return to the country of his former habitual residence."³²

²⁹ 1946 Constitution of the International Refugee Organization; UNGA Res. 62(1), 15 Dec. 1946; 18 UNTS 3; entry into force 20 August 1948.

³⁰ *Supra*, note 13, p. 5.

³¹ The 1950 Statute of the United Nations High Commission for Refugees, UNGA Res. 428(V) of 14 December 1950.

³² *Ibid.*, Article 6.

This description is of universal application, containing neither temporal nor geographical limitations. The substantive or ideological criteria are, nevertheless, a significant restriction on the scope of refugees 'strictly so-called', who must establish a well-founded fear of persecution on one or more of the stated grounds.

The 1951 UN Convention Relating to the Status of Refugees³³ (hereinafter "the 1951 UN Refugee Convention") defines a refugee as a person who "has been considered under the Arrangements of 12 May 1926 and 30th June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization" or a person who "as a result of events occurring before 1 January 1951 and owing to a 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."³⁴

However, this definition of a refugee is not universal because it is limited to those who were refugees as a result of events occurring in Europe before January 1 1951. Since the objective of the 1951 Convention was to give universal refugee protection, the United Nations adopted the 1967 Protocol on the Status of Refugees.³⁵ The rationale of the Protocol was to remove the various limitations of the definition of a refugee given that the convention definition of a refugee would not cover every refugee. The Protocol was to enable state parties to the Convention to apply the Convention beyond its strictly contractual scope, to other refugees within their territory.³⁶

The 1967 Protocol defines a refugee to mean any person within the definition of Article 1 of the 1951 Convention as if the words "As a result of events occurring before 1 January

³³ The 1951 United Nations Convention Relating to the Status of Refugees, adopted on 28th July 1951 by the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly Resolution 429 (V) of December 1950; 189 UNTS 150; entry into force 22 April 1954.

³⁴ *Ibid.*, Article 1 A(2).

³⁵ The 1967 Protocol Relating to the Status of Refugees; 606 UNTS 267; entry into force 4 October 1967.

³⁶ *Supra*, note 1, p.19.

1951 and ..." "and the words"... "a result of such events", in Article 1 A (2) were omitted.³⁷

The Protocol removed the geographical and temporal limitation thus giving the 1951 Convention universal application.

The 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa³⁸ states that a "refugee" shall mean every 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.³⁹

It has an expanded definition of a refugee. It states that the term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.⁴⁰

This Convention adopts the definition of a refugee from the 1951 Convention and expands to refugees compelled to leave their country due to "events disturbing public order." The expansion implies a move away from the 1951 Convention's "well founded fear" of persecution standard, stressing that refugees included persons fleeing civil disturbances, violence and war irrespective of whether or not they have a well founded fear of persecution. Thus, the OAU Convention definition leaves open the possibility that the basis for the harm may be indeterminate and also goes back to the pre World War II practice of recognizing group disenfranchisement.

³⁷ Supra. note 30, Article 1(2).

³⁸ The Organization of African Unity: 1969 Convention on the Specific Aspects of Refugee Problems in Africa; 1000 UNTS 46; entry into force 20 June 1974.

³⁹ Ibid., Article 1(1).

⁴⁰ Ibid., Article 1(2).

Another feature is that the OAU Convention extends protection to persons who seek to escape serious disruption of public order “in either a part or whole” of their country of origin. Therefore, a person is not required to seek refuge in a safe part of his or her country before seeking it outside.

1.4 The Kenyan Situation

Kenya is a party to the principal international conventions that provide for international principles for protection of refugees. Kenya signed the 1951 United Nations Convention Relating to the Status of the Refugees⁴¹ on 8th October 1966, the 1967 Protocol Relating to the Status of Refugees⁴² on 13 December 1967, and the 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa⁴³ on 10th September 1969. Kenya has been without a national legal framework to address the refugee situation until 29th December 2006, when a specific refugee legislation, The Refugee Act,⁴⁴ was passed by Parliament.

The Act adopts two definitions of a refugee, that is, a statutory refugee and a *prima facie* refugee. A statutory refugee is any person who “(a) owing to a well founded fear of being persecuted for reasons of race, religion, sex, 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 (b) not having a nationality and being outside the country of his former habitual residence, is unable to , owing to a well founded fear of being persecuted for any of the aforesaid reasons is unwilling, to return to it.”⁴⁵

In defining a *prima facie* refugee, the Act provides that “a person shall be a *prima facie* refugee for purposes of this Act if such a person owing to external aggression,

⁴¹ The 1951 United Nations Convention Relating to the Status of Refugees, adopted on 28th July 1951 by the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly Resolution 429 (V) of December 1950; 189 UNTS 150; entry into force 22 April 1954.

⁴² The 1967 Protocol Relating to the Status of Refugees; 606 UNTS 267; entry into force 4 October 1967.

⁴³ OAU Convention adopted at the Assembly of Heads of State and Government at its Sixth Ordinary Session (Addis Ababa, 10th September 1969); 1000 UNTS 46; entry into force 20 June 1974

⁴⁴ Act No. 13 of 2006.

⁴⁵ *Ibid.*, Section 3 (1).

occupation, foreign domination or events seriously disturbing public order in any part or whole of his country of origin or nationality is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.”⁴⁶

1.5 Statement of the Problem

Since Kenya has signed the core international instruments that deal with the protection of refugees, Kenya is under obligation to enact laws that conform to international standards of protection of refugees.

The problem to address is whether refugee rights are clearly provided for under the law that deals with protection of refugees in Kenya and the extent to which Kenya Refugee Act, 2006 has domesticated the provisions of the 1951 Convention Relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees and the 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa.

1.6 Research Question

This study will attempt to answer the following question:-

Does the refugee rights regime under the Kenya Refugee Act, 2006, conform to international refugee rights regime under the 1951 UN Convention on the Status of Refugees, the 1967 Protocol and the 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa, to which Kenya is a party?

1.7 Hypothesis

The research is premised on the hypothesis that the Kenya Refugee Act is flawed for lack of a clear refugee rights regime as required under the 1951 UN Convention on the Status of Refugees, the 1967 Protocol and the 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa, and for lack of the key elements of defining a

⁴⁶ Section 3(2) of the Kenya Refugee Act No. 13 of 2006.

refugee for purposes of satisfying the relevant criteria to indicate entitlement to the pertinent refugee rights.

1.8 Objectives of the Research

1.8.1 Main objective

The main objective of the research is to examine the Kenya Refugee Act, 2006, to point out definitional and refugee rights flaws and to make recommendations that will guarantee refugee rights in Kenya according to international standards under the 1951 UN Convention on the Status of Refugees, the 1967 Protocol and the 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa.

1.8.2 Specific Objectives

The research has two specific objectives, namely, to (a) examine international refugee rights under international conventions which Kenya is a party, to point out enforcement limitations and make recommendations; and (b) critically analyze refugee rights regime under the Kenya Refugee Act, and point out the extent to which it conforms to the international refugee rights regime.

1.9 Justification

Kenya is a signatory to the international covenants that protect refugees. The 1951 Convention guarantees refugees basic survival and dignity rights, a range of civil and socioeconomic rights, personal freedoms, and protection from discrimination, rights to property and to work and enfranchises refugees within the structures of the social welfare state. The Convention also establishes rights of solution intended to assist refugees to bring their refugee status to an end in that although promotion of repatriation is not addressed, provision is made for the issuance of travel documents and transfer of assets that would be necessary upon resettlement. The 1969 OAU Convention recognizes refugee rights under the 1951 Convention and requires member states to use their best endeavors consistent with their national legislation to secure refugee rights. Under international law, Kenya is under obligation to make refugee law that is consistent with and conforms to international legal standards of protection of refugees.

It is necessary to examine the extent to which the provisions of the Kenya Refugee Act that guarantee refugee rights conform to the rights regime under the international conventions on protection of refugees to which Kenya is a party, so as to make appropriate recommendations that will guarantee adequate protection for refugees in Kenya. This justifies this study.

1.10 Theoretical Framework

By virtue of the fact that refugees are those affected by breaches of human rights standards or by collapsing existing social order in the wake of revolution, civil strife or aggression and since they are inherently human beings, they are entitled to rights. Therefore, to the extent that this thesis calls for their protection through respect of their rights, it adopts and is informed by the Natural Law theory.

Natural law responds to nature, applies reason, is universally applied, understands the nature of humanity, is immutable and expresses natural rights.⁴⁷

Since all are born equal, naturally there are natural rights that are valued for every human being and these include life, health, knowledge, sociability, practical reasonableness and religion. Everyone is entitled to preservation of their own being, the means of preserving their values, the means to shun ignorance and avoid offending those among whom one has to live and the means of warding off any obstacles to enjoyment of those values. There is a duty of all to ensure and advance equal benefit of all values to all persons. Refugees never lose inherent rights.

This study is also informed by the theory of legal positivism which studies the law in an objective fashion free from bias or ideology.⁴⁸ This theory places the study of the law on a scientific foundation to create a strictly empirical way of understanding legal actions and legal concepts, thus understanding them as functions of the past, current or future facts. Thus legal rules were analyzed in terms of past tendencies to obey, the use by

⁴⁷ Brian Bix, *Jurisprudence: Theory and Context*, 4th ed., (Sweet and Maxwell, London, 2006), p. 66.

⁴⁸ *Ibid.*, p. 34.

legislators of particular kinds of language, predictions of what judges are likely to do and so on.⁴⁹ This study traces the origins and evolution of the refugee rights regime with a view to point out to an improved future refugee rights regime.

This study is also informed by the interpretive theory of the law which argues that legal claims are interpretive judgments and therefore combine backwards and forward looking elements; they interpret contemporary legal practice as an unfolding narrative. According to this theory, both law and legal theory are best understood as processes of “constructive interpretation”, interpretation that makes its object the best it can be. Constructive interpretation is both an imposition of form upon an object being interpreted, in the sense that the form is not apparent in the object and a derivation of form in it in the sense that the interpreter is constrained by the object of interpretation and not free to impose any form the interpreter might choose. In enforcement of refugee rights, judges will be confronted with legal problems of what the law is. Applying the theory of constructive interpretation of what the refugee rights law is, judges should adequately fit legislative enactments and judicial decisions in making the law the best it can be. Two tenets of this theory is that the law contains principles as well as rules and that for nearly all legal questions there are unique right answers. This theory attempts to discover the answer to legal disputes, within the existing legal materials to provide unique right answers. Legal problems concerning refugee rights may be resolved by providing unique right answers.

This study is also informed by the theory of modern positivism. Modern positivism approach is that ratification of international covenants is a more than sufficient basis from which to advance the human rights project, including the protection of refugees.⁵⁰ Under international law state parties to international covenants and treaties are under obligation to make them municipal law.

⁴⁹ Ibid., p. 36.

⁵⁰ Supra, note 2, p. 24.

From this theoretical framework, what emerges is that there is a need to undertake this study, point out any difficulties in enforcement of refugee rights at international and national levels and make recommendations that guarantee direct access to these rights.

1.11 Literature Review

The literature review to be considered is that dealing with application of refugee definition for purposes of guaranteeing refugee rights. In that regard the point of focus is consideration of restrictive application of various elements of refugee definition, and refugee rights regime, implementation of international refugee law and whether there are existing flaws that need to be addressed.

Ivor C. Jackson, argues that there is an important difference according to whether the 1950/51 definitions are applied individually or on a group basis. Their individual application calls for a detailed examination of the various elements - subjective and objective - which are necessary to establish whether a person has a "well-founded fear of persecution". Their application in a group situation requires a more general approach involving an examination of the objective situation in the country of origin giving rise to the particular exodus of persons and a determination as to whether, due to this objective situation the individual members of the group may be exposed to danger or other serious consequences, for reasons relevant to the 1950/51 refugee definitions, in the event of their returning to their home country. These various elements must, of course, be carefully evaluated in the light of the particular situation.⁵¹ This literature contributes to comprehension and addressing the problem whether refugee rights under the Kenya Refugee Act are as provided under the 1951 Convention Relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees and the 1969 OAU Convention Governing Specific Aspects of Refugees Problems in Africa, in that while the Kenya Refugee Act adopts the definition of refugees from both the 1951 Convention and the 1969 OAU Convention and goes further to define prima facie refugees, the Act does not show whether it applies the definition of a refugee under the 1951 Convention

⁵¹ Ivor C. Jackson, *The Refugee Concept in Group Situations*, (Martinus Nijhoff Publishers, The Hague/London/Boston, 1999), p. 3.

on a group or an individual basis. The Act does not define the elements of individual application of a refugee, - subjective and objective - which are necessary to establish whether a person has a "well-founded fear of persecution". The Act does not set out the elements of examination of the objective situation in the country of origin giving rise to the particular exodus of persons, which elements are necessary to determine whether the group may be exposed to danger or other serious consequences, for reasons relevant to the 1950/51 refugee definitions, in the event of their returning to their home country. This gap will be filled by recommendations of definitions of the various elements of application of refugee definition for access refugee rights.

James C. Hathaway argues that international refugee law as presently implemented is fundamentally flawed since the nature and scope of refugee setting today simply differs too fundamentally from the reality of the 1951 Convention for the Convention rights regime to be taken seriously as the baseline of international response to involuntary migration. With roughly 80% of refugee population today located in states of less developed world, doubts are expressed about the soundness of a Convention that both assumes access to protection, and fails to address how states should reconcile refugee protection responsibilities to their own, often difficult, domestic circumstances. As a result, international refugee law will be respected only to the extent that its obligations are in harmony with host country conditions.⁵² This literature is important to show there is need to point out refugee law flaws at international level and make recommendations for present and future applications, which recommendations show the objective of the convention which is to protect refugee rights. It is also necessary to show that under international law, ratification of international conventions is enough justification that state parties to the convention shall make laws that conform to international conventions. It is therefore important to examine the domestic law of state parties which law is expected to provide refugee protection responsibilities and conform to international refugee rights regime under international conventions on protection of refugees. It is

⁵² *Supra*, note 2, p. 992.

important to address the extent to which the Kenya refugee Act conforms to international refugee rights regime, for the protection of refugees in Kenya.

Hathaway also has argued that the 1951 Refugee Convention incorporates no clear oversight mechanisms to promote compliance and, therefore, the whole rights regime may be seen as seriously compromised. Moreover there are certain differences of accessing the rights to refugees, in the state practice of the industrialized and third world countries.⁵³ This literature review shows that though there is universality of refugee rights under the 1951 Convention, refugees enjoy these rights as long as they are provided in the host country national legislation. Since states are under international obligation to make domestic laws that conform to international conventions which they are parties, states ought to put in place a clear refugee rights regime in national legislation so as not to compromise the international refugee rights regime. Even with scarce resources for their citizens, states ought to ensure that refugee's right to live their lives with dignity is respected. Refugee rights in Kenya should be clearly set out under the Kenya Refugee Act to the standard set under international conventions which Kenya is a party.

Hathaway is convinced that if international refugee law is to achieve its intended purpose, the international community needs to promote a new paradigm of refugee protection that is both human rights-based and pragmatic. He concludes that the institution of refugee protection has collapsed since international refugee law today rarely determines how governments react to involuntary migration. Instead, states pay lip service to the importance of protecting refugees but in practice devote negligible resources to keep them.⁵⁴ This literature emphasizes the need for a refugee rights regime for protection of refugees at national level. It is important to address the gap in lack of international determination of how governments react to involuntary migration by reference to the principles of burden sharing and durable solutions expressed under the 1951 Convention

⁵³ Supra, note 2, p. 992.

⁵⁴ Supra, note 2, p. 998.

and the 1969 OAU Convention. It is equally important that these principles be clearly incorporated under the Kenya Refugee Act.

Goodwin-Gill makes observations on interpretation problems. He observes that though under customary international law, state obligations require ratifying states to a treaty to incorporate or otherwise implement the provisions of the treaty in question in their municipal law, there are no formal implementing steps. In practice major problems of interpretation and appreciation arise in view of, among others, the relative imprecision of the terminology employed in standard setting conventions; the variety of legal practices of States; the role of discretion first in the states initial choice of means and the possibility that states may be entitled to avoid responsibility by providing an equivalent alternative in event the principle required result is rendered unattainable.⁵⁵ The UNHCR⁵⁶ also observes that in terms of the interpretation of the 1951 Convention itself, some States use various complementary forms of protection, which have had the effect in some instances of diverting Convention refugees to lesser forms of protection. This literature review shows there is need for constructive interpretation of what the refugee rights law is. In interpreting the principles and the rules of legislative enactments and judicial decisions on refugee rights law, efforts should be made to make such law the best it can be as in nearly all legal questions there are unique right answers. In examining the extent to which Kenyan refugee rights regime conforms to international refugee rights regime which Kenya is a signatory, any gaps therein shall be identified to discover the right answer to the gaps within the existing Kenya refugee rights regime.

As it is today, the responsibility of protecting refugees lies with the states hosting refugees. Even though refugees have been defined differently, there are valid historical and political reasons. It is therefore the duty of every state to give a broad interpretation of who a refugee is so as to accord adequate protection. States that chose to be bound by international conventions on refugees are under obligation to make national laws that conform to the conventions.

⁵⁵ Supra, note 1, p. 238.

⁵⁶ UNHCR, *Global Consultations on International Law; Refugee Protection in International Law* (Cambridge University Press, Cambridge, 2003), p. 4.

1.12 Methodology

This was basically a library-oriented study. Sources of information included textbooks, international conventions and declarations, journal articles, and, where necessary, internet research for current information on the subject of refugees.

The libraries available and resourceful for the research were School of Law Parklands Campus Library and Jomo Kenyatta Memorial Library, at Main Campus, University of Nairobi.

CHAPTER TWO

INTERNATIONAL PROTECTION OF REFUGEES

2.1 Introduction

Under international law, a refugee is a person who moves from his or her country to another in search of safety. Such movement must be on account of fear of persecution on account of race, religion, political opinion or membership of a particular social group. In Africa, a person is also a refugee if he or she is compelled to leave his or her country on account of external aggression, occupation, and foreign domination or events seriously disturbing public order in either part or the whole of his or her country. The legal framework underpinning refugee protection is composed of international refugee law, international human rights law and, in certain circumstances, international humanitarian law and international criminal law. The core of the international law is the 1951 UN Convention on the Status of Refugees¹ and the 1967 Protocol², the only universal instruments that define a specific legal regime for those in need of international protection. The 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa³ is the specific regional instrument that protects refugees in Africa.

The 1951 Convention, which remains the cornerstone of modern international refugee law, contains substantive rights for refugees which have their origins in two main sources. Most of the entitlements are derived from the 1933 Refugee Convention, explicitly acknowledged to be the model for the 1951 Convention. A key secondary source, however, was the 1948 Universal Declaration of Human Rights.⁴ It influenced the redrafting of the content of several rights found in the 1933 Refugee Convention, and

¹United Nations Convention Relating to the Status of Refugees, adopted on 28th July 1951 by the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons; convened under General Assembly Resolution 429 (V) of December 1950; 189 UNTS 150; entry into force 22 April 1954.

² The 1967 Protocol Relating to the Status of Refugees prepared and submitted to the United Nations General Assembly in 1966 and adopted in Resolution 2198(XXI) of 16th December 1966; 606 UNTS 267; entry into force 4 October 1967.

³ OAU Convention adopted by the Assembly of Heads of State and Government at its Sixth Ordinary Session (Addis Ababa, 10th September 1969); 1000 UNTS 46; entry into force June 1974.

⁴ 1948 Universal Declaration of Human Rights, adopted by the United Nations General Assembly on 10th December 1948; UNGA Resolution 217A(III).

accounted for six additions to the earlier formulation of refugee rights. Of the four rights with no obvious predecessor, the cryptically named right to "administrative assistance" essentially codifies the assumption by state parties of the consular role previously played by the high commissioners for refugees of the League of Nations. Three provisions, namely, protection against penalization for illegal entry, exemption from measures applied against co-nationals, and the right to transfer externally acquired assets to a country of resettlement represent net additions to the conceptualization of refugee rights.⁵

The rights set out under the Refugee Convention include several critical protections which speak to the most basic aspects of the refugee experience, including the need to escape, to be accepted, and to be sheltered. Under the Convention, refugees are not to be penalized for seeking protection, nor exposed to the risk of return to their state of origin. They are entitled to a number of basic survival and dignity rights, as well as to documentation of their status and access to national courts for the enforcement of their rights. Beyond these basic rights, refugees are also guaranteed a more expansive range of civil and socioeconomic rights. While falling short of the comprehensive list of civil rights promoted by the Universal Declaration of Human Rights, the Refugee Convention, nonetheless, pays significantly more attention to the definition of a sphere of personal freedom for refugees than did any of the earlier refugee agreements. The inability of states to make any reservations to their obligation to guarantee protection against discrimination, religious freedom, and access to the courts entrenches a universal minimum guarantee of basic liberties for refugees.

Of particular importance are the guarantees of key socioeconomic rights that integrate refugees in the economic system of the country of asylum or settlement, enabling them to provide for their own needs. Basic rights to property and work are supplemented by a guarantee of access to the asylum country's social safety net. Refugees are also to be treated as citizens under labor and tax legislation. There are important parallels between these key socioeconomic rights and those negotiated under the 1939 and 1949 migrant

⁵ James C. Hathaway, *The Rights of Refugees under International Law*, (Cambridge University Press, Cambridge, 2005), p. 98.

labor conventions of the International Labor Organization (ILO). The ILO pioneered international legal protections against economic vulnerability, challenging the assumption of alien's law that persons outside their own country require only guarantees of basic civil rights. Recognizing that refugees, like migrant workers, face the risk of economic marginalization and exploitation, the 1951 Refugee Convention goes a substantial distance toward enfranchising refugees within the structures of the social welfare state.⁶

The Convention establishes rights of solution, intended to assist refugees to bring their refugee status to an end. The promotion of repatriation is not addressed, consistent with the position of the drafters that return should result only from the voluntary decision of a particular refugee, or in consequence of a determination by the asylum state that the basis for the individual's claim to protection has ceased to exist. In contrast, provision is made for the issuance of travel documents and transfer of assets that would be necessary upon resettlement, and also for the alternative of naturalization in the asylum state.⁷

The 1967 Refugee Protocol is a treaty which incorporates the Refugee Convention's rights regime by reference and extends those protections to all refugees by prospectively eliminating the Convention's temporal and geographical limitations for those countries which choose to be bound by it.⁸

The 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa requires participating states of the African Union (formally the Organization of African Unity) to use their best endeavors, consistent with their legislation, to receive refugees and to secure their settlement until and unless voluntary settlement is possible. The duty of *non-refoulement* is explicitly recognized within the region to prohibit rejection at the frontier, and to apply whenever there is a risk to the refugees' life, physical integrity or liberty. Equally, states bind themselves to take account of the security needs of refugees, settling away from the frontier with their country of origin. In return, refugees are to respect the asylum state's laws and comply with public order measures. They are also

⁶ Ibid., p. 95.

⁷ Ibid.

⁸ Ibid., p.110.

prohibited from engaging in subversive activities against any Member State of the OAU and even from expressing political or other views if likely to cause tension between Member States. The Convention therefore goes beyond the basic indifference of the Refugee Convention to the political rights of refugees and purports to deny some form of political free speech as the cost of enhanced basic protection rights.⁹

2.2 Protection of Refugees under the 1951 Convention on the Status of Refugees

Paragraph one of the preamble to the 1951 Convention affirms that human beings shall enjoy rights and freedoms without discrimination. Paragraph three of the preamble recognizes the social and humanitarian nature of the problem of the refugees. The Convention deals extensively with the issue of protecting refugees and lays down standards of protection, treatment and rights of refugees relating to movement, religion, education, housing, employment, identity papers, and travel documents, personal security and other rights.

The Convention also sets out the obligation of refugees. Governments may legitimately expect refugees to comply with general laws, regulations, and public order measures. Such obligations may not, however, treat refugees less favorably than other resident aliens. Most important, there is no reciprocity of rights and obligations under the Refugee Convention. While refugees who breach valid laws of the host country are clearly subject to the usual range of penalties, states are prohibited from invoking the failure of refugees to comply with generally applicable duties as grounds for the withdrawal of rights established under the Convention.¹⁰

The obligation of a refugee is to obey the laws of the host state. The Convention states that every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the

⁹ Ibid., p. 119.

¹⁰ Ibid., p. 98.

maintenance of public order.¹¹ The duty to respect the law is a reminder of the essential duties common to nationals as well as to foreigners in general.

The obligation of the state parties to the Convention is to apply the provisions of the Convention for the protection of refugees. The Convention states that “the Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin”.¹² State parties to the Convention are also under obligation to make laws relating to refugees, and to co-operate with the Office of the United Nations High Commissioner for Refugees, UNHCR, or any other agency of the United Nations which may succeed it, in the exercise of its functions and duty of supervising the application of the provisions of the Convention.

The other obligation of state parties to the Convention is to continue to accord refugees rights to which they are already entitled. The Convention provides that “each Contracting State shall continue to accord to refugees the rights and benefits to which they were already entitled, ... both to the rights and benefits referred to in articles 13, 18, 19, 21 and 22 of this Convention and to rights and benefits for which this Convention does not provide.”¹³ The purpose of this provision is to ensure that refugees are treated and protected in accordance with Convention standards in accordance with the objective of the Convention.

2.2.1 Definition

The 1951 Convention defines the term “refugee” to apply to any person who “has been considered a refugee under the Arrangements of 12 May 1926 and 30th June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization,” or any person who fulfills the condition that “as a result of events occurring before 1 January 1951 and owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the

¹¹ Supra, note 1, Article 2.

¹² Ibid., Article 3.

¹³ Ibid., Article 7.

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.”¹⁴

Although this definition of a refugee is generic, it only concerns people who fled their countries of origin as a result of events taking place before 1951. States becoming parties to the Convention have the option of restricting its application to refugees in Europe only because as initially conceived, a state party to the 1951 Refugee Convention could elect to limit its obligations to persons whose fear of being persecuted was the result of events which occurred before January 1, 1951, and also because Article 1(B) of the Refugee Convention allows a government to restrict its obligations on a geographical basis, specifically to protect only European refugees.¹⁵

The definition, limits application of the Convention to the refugee who acquired such status 'as a result of events occurring before 1 January 1951'. An optional geographical limitation also permitted States, on ratification, to limit their obligations to refugees resulting from 'events occurring in Europe' prior to the critical date. The Convention puts upon every contracting state the obligation to apply the provisions of the Convention to refugees without discrimination as to race, religion or country of origin.¹⁶

Due to geographical limitation of application of the Convention, it is possible for a government to restrict its obligations on temporal or geographical grounds. As initially conceived, a state party to the 1951 Refugee Convention could elect to limit its obligations to persons whose fear of being persecuted was the result of events which occurred before January 1, 1951. These events are the First and Second World Wars that created refugees. The First World War created refugees mainly from Russia, Germany and Turkey. A Russian refugee, for example, was defined in 1926 to include “any person of Russian origin who does not enjoy or who no longer enjoys the protection of the

¹⁴ Ibid., Article 1A(2).

¹⁵ Supra, note 4, p. 97.

¹⁶ Supra, note 1, Article 3.

Government of the Union of Socialist Soviet Republics and who has not acquired another nationality.”¹⁷ An Armenian refugee was defined as “any person of Armenian origin, formerly the subject of the Ottoman Empire, who does not enjoy or who no longer enjoys the protection of the government of the Turkish Republic and who has not acquired another nationality.”¹⁸ German refugees fleeing Germany were defined by the 1936 Arrangements that defined the term “refugee coming from Germany” to apply to any person who was settled in that country, who does not have any nationality other than German nationality, and in respect of whom it is established that in law or in fact, he does not enjoy the protection of the government of the Reich.”¹⁹

In the years immediately following the Second World War, the international community pursued the repatriation of European refugees when possible, failing which an effort was made to arrange for overseas resettlement. There was a fortuitous coalescence of interests, as the postwar economic boom in states of the New World had opened doors to new sources of labor. The scale of the resettlement project was massive; between 1947 and 1951, the International Refugee Organization (IRO) relocated more than 1 million Europeans to the Americas, Israel, Southern Africa, and Oceania. The IRO had its own specialized staff, a fleet of more than forty ships, and, most important, enjoyed the political and economic support of the developed world.²⁰

As the June 1950 date for termination of the mandate of the IRO neared, it was clear that not all Second World War refugees could be either repatriated or resettled. A strategy was moreover needed to address impending refugee flows from the Communist states of the East Bloc. In this context, the United Nations proposed the effective assimilation of all stateless persons, including refugees, under a new international regime. While political antagonism undermined realization of this holistic vision, a process was initiated which led ultimately both to the establishment of the United Nations High Commissioner for

¹⁷ Arrangement Relating to the Issue of Identity Certificates to Russian and Armenian Refugees, 12 May 1926; 84 LNTS No. 2004.

¹⁸ *Ibid.*

¹⁹ Art. 1, Provisional Arrangement Concerning the Status of Refugees Coming from Germany, 4 July 1936; 171 LNTS No. 3952.

²⁰ *Supra*, note 4, p. 91.

Refugees (UNHCR), and to the preparation of the 1951 Refugee Convention. This Convention, which remains the cornerstone of modern international refugee law, resurrected the earlier commitment to codification of legally binding refugee rights.²¹

The Convention refugee definition may be viewed as comprising five elements, each of which must be established before status is appropriately recognized. The Convention definition includes only people who have left their country of nationality or in case of stateless persons, their country of former habitual residence. Second, the refugee claimant must be genuinely at risk; there must be objective facts to provide concrete foundation for the concern which induces him or her to seek protection of another state. Third, the claimant's flight must be motivated by the prospect of 'persecution', that is, the risk of serious harm against which the state of origin is unwilling or unable to offer protection. Fourth, the risk faced by the refugee claimant must have some nexus to her race, religion, nationality, membership in a particular social group or political opinion. The critical question is whether, but for civil and political status, refugee claimants could be said to be at risk of serious harm. Fifth, there must be a genuine need for and legitimate claim to protection.

The Convention does not define the elements of 'well founded fear,' 'persecution' or 'membership of a particular social group' that must be established before status of a refugee is recognized. It has been observed that in practice, major problems of interpretation and appreciation arise in view of, among others, the relative imprecision of the terminology employed in standard setting conventions and the variety of legal practices of States.²² It is, therefore, important to have a universally acceptable interpretation of these elements in order to accord refugees universal treatment in determination of status.

The phrase 'well founded fear of persecution' is the key phrase of the definition. It replaces the earlier method of defining the refugee by categories by the general concept

²¹ Ibid., p. 97.

²² Guy S. Goodwin-Gill, *The Refugee in International Law*, 2nd edition, (Oxford University Press, Oxford, 1996), p. 238.

of 'fear'. Since fear is subjective, the definition involves a subjective element in the person applying for recognition as a refugee. Determination of refugee status will, therefore, require an evaluation of the applicant's statements rather than a judgment on the situation prevailing in his country of origin. Due to the importance that the definition attaches to the subjective element of fear, where a refugee claimant's case is not clear from the facts on record, it would be necessary to take into account the personal and family background and his own interpretation of the situation. The applicant's fear should be considered well founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition or would be, for the same reasons, intolerable if he returned there.²³

The decision of the British House of Lords in *R v. Secretary of State for the Home Department, ex parte Sivakumaran*,²⁴ analyzed the meaning of 'well founded fear' and pointed out that the objective of the Convention is to afford protection and fair treatment to those for whom neither is available in their own country. Fear of persecution, in the sense of the Convention, is not to be assimilated to a fear of instant personal danger arising out of an immediately presentable predicament. The question is what might happen if the person were to return to his country of nationality. Whether the person can be persecuted can only be determined by examining the actual state of affairs in that country.²⁵ The Court further held that "the appropriate starting point for an analysis of objective standard conditions within the refugee claimant's state of origin is an examination of that country's human rights record ... Persons who flee countries that are known to commit or acquiesce in persecutory behavior should benefit from a rebuttable presumption that they have a genuine need of protection."²⁶

²³ James C. Hathaway, *The Law of Refugee Status* (Butterworths, Toronto, 1991), p. 74.

²⁴ [1988] 1 All E.R. 193 (H.L.)

²⁵ *Supra*, note 22, at 196-197.

²⁶ *Ibid.*, p. 202.

Applying these standards of interpretation of well founded fear would amount to a guarantee of protection for refugees. What is important is the willingness and the ability to provide protection to the level that overcomes the risk of harm.

On the element of 'persecution', there is no universally accepted definition of persecution. Persecution may be defined as 'the sustained or systematic violation of basic human rights demonstrative of a failure of state protection. A well founded fear of persecution exists when one reasonably anticipates that remaining in the country may result in a form of serious harm which the government will not or cannot prevent, including either specific hostile acts or an accumulation of adverse circumstances such as discrimination existing in an atmosphere of insecurity and fear.'²⁷ What amounts to persecution depends on the circumstances of each case, including the subjective elements which require the evaluation of the opinions and the feelings of the person concerned. Thus, interpretation of what amounts to persecution may vary. What is important is that refugee law ought to concern itself with actions which deny human dignity in any key way and that the systematic denial of core human rights is the appropriate standard of interpreting what amounts to persecution.

The phrase 'membership of a particular group' has not been defined in the Convention. On this, UNHCR has stated:

Persecution on account of membership of a particular social group encompasses persecution that is directed towards an individual who is a member of a group of persons all of whom share a common, immutable characteristic. ... the particular kind of group characteristic that will qualify under this construction remains to be determined on a case by case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.²⁸

It is important that the adjudicators considering a claim of persecution on account of membership in a particular social group determine whether the class of people identified

²⁷ *Supra*, note 22, at 107.

²⁸ UNHCR, *Handbook on Procedures and Criteria for Determining Refugees Status* (UNHCR, Geneva, September 1979), para. 77.

by the asylum applicant is recognizable as a particular social group under the applicable law, whether the applicant qualifies as a member of the group, whether the group has, in fact, been targeted for persecution on account of characteristics of the group members, and whether special circumstances are present that would justify regarding mere membership in the group itself as sufficient to recognize the applicant as a refugee. These guidelines will help in determining refugee status and according protection to those refugees claiming asylum under 'membership of a particular group' persecution.

Although definition of a refugee is based on an individual approach, the Convention refugee definition may also be interpreted on a group approach. This may be based on two factors; firstly, group determination normally relates to circumstances of a fundamental and disruptive nature, resulting in a large-scale and often simultaneous, exodus of persons. If such situations involve what may be termed a "persecutory" element, they may justify a determination of group refugee character according to the 1951 Convention definition. In situations of group refugee character, an individual screening of every member of the group is normally impracticable, in view of the large numbers involved and the reasons for departure of the entire group. These factors make it necessary to place the emphasis on the *objective* situation in the country of origin, and to have recourse to what has come to be known as a *prima facie* determination of group refugee character.²⁹

2.2.2 Refugee Rights under the 1951 Convention

The Convention, which remains the cornerstone of modern international refugee law, resurrected the earlier commitment to codification of legally binding refugee rights. The substantive rights set by the Convention have their origins from the 1933 Refugee Convention, explicitly acknowledged to be the model for the 1951 agreement. A key secondary source was the 1948 Universal Declaration of Human Rights. The key additional rights are the right to "administrative assistance" that essentially codifies the assumption by state parties of the consular role previously played by the high

²⁹ Ivor C. Jackson, *The Refugee Concept in Group Situations*, (Martinus Nijhoff Publishers, The Hague/London/Boston, 1999), p. 3.

commissioners for refugees of the League of Nations. Three other provisions, namely, protection against penalization for illegal entry, exemption from exceptional measures applied against non-nationals, and the right to transfer externally acquired assets to a country of settlement represent net additions to the conceptualization of refugee rights.³⁰

The rights set by the Refugee Convention include several critical protections which speak to the most basic aspects of the refugee experience, including the need to escape, to be accepted, and to be sheltered. Under the Convention, refugees are not to be penalized for seeking protection, nor exposed to the risk of return to their state of origin. They are entitled to a number of basic survival and dignity rights, as well as to documentation of their status and access to national courts for the enforcement of their rights. Beyond these basic rights, refugees are also guaranteed a more expansive range of civil and socio-economic rights. While falling short of the comprehensive list of civil rights promoted by the Universal Declaration of Human Rights, the Refugee Convention, nonetheless, pays significantly more attention to the definition of a sphere of personal freedom for refugees than did any of the earlier refugee agreements.³¹

Of particular importance are the guarantees of key socioeconomic rights that integrate refugees in the economic system of the country of asylum or settlement, enabling them to provide for their own needs. Basic rights to property and work are supplemented by a guarantee of access to the asylum country's social safety net. Refugees are also to be treated as citizens under labor and tax legislation. Recognizing that refugees, like migrant workers, face the risk of economic marginalization and exploitation, the 1951 Refugee Convention goes a substantial distance toward enfranchising refugees within the structures of the social welfare state.³²

The Convention establishes rights of solution, intended to assist refugees to bring their refugee status to an end. The promotion of repatriation is not addressed, consistent with

³⁰ *Supra*, note 4, p. 94.

³¹ *Ibid.*, p. 95.

³² *Supra*, note 1, Articles 21-24, inclusive.

the position of the drafters that return should result only from the voluntary decision of a particular refugee, or in consequence of a determination by the asylum state that the basis for the individual's claim to protection has ceased to exist. In contrast, provision is made for the issuance of travel documents and transfer of assets that would be necessary upon resettlement, and also for the alternative of naturalization in the asylum state.³³

The Convention allows reservations, but prohibits reservations on rights to non-discrimination, religion, access to courts, *non reflouement*, by stating that “at the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16(1), 33, 36-46 inclusive.”³⁴

2.2.3 Other rights

The Convention safeguards the privileges of particular refugee classes that existed at the time the Convention came into force. The basic goal of affirming preexisting rights is consistent with other parts of the Convention, for example the recognition of refugee status granted under earlier agreements, as well as the decision to insulate previously recognized refugees from the new rules for cessation of status due to change of circumstances. The International Refugee Organization had sometimes negotiated agreements with particular states that provided for stronger rights than those codified in the Convention, which the drafters wished to ensure were not challenged on the basis of an assertion that the earlier rights were superseded by the provisions of the Refugee Convention.³⁵

The Convention states that “nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention granted to refugees by the contracting states.”³⁶ The purpose of these rights is to safeguard the privileges of particular refugee classes that existed at the time the Convention came into force. The literal meaning of the provision, therefore, requires

³³ Supra note 19, p. 95.

³⁴ Supra, note 1, Article 42.

³⁵ Supra, note 4, p. 108.

³⁶ Supra, note 1, Article 5.

states to honor not only preexisting obligations, but also whatever duties might accrue to refugees in the future.

The importance of this provision is that, while largely symbolic, it encourages states to legislate domestically beyond the standards of the Refugee Convention and, particularly, in its insistence that state parties continue to accord refugees all advantages that accrue to them by virtue of other international agreements, including under bilateral treaties with the refugee's country of origin. The provision should be read as requiring governments to respect the array of important international human rights accords negotiated in recent years. These international human rights conventions generally regulate the treatment of all persons subject to a state's jurisdiction, and are therefore critical sources of enhanced protection for refugees. It is clear that refugees need protection by additional rights acquired under the terms of other international agreements.³⁷

(i) Equality

The 1951 Convention accords refugees the same treatment as accorded to aliens generally by providing that “except where this Convention contains more favourable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally”.³⁸ Common Article 2 of the International Covenant on Civil and Political Rights³⁹ and the International Covenant on Economic, Social and Cultural Rights,⁴⁰ contains the same provisions.

The International Covenant on Civil and Political Rights guarantees non-discrimination. It provides that “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit

³⁷ Supra, note 22, p. 110.

³⁸ Supra, note 1, Article 7.

³⁹ International Covenant on Civil and Political Rights, UNGA Res. 2200A (XXI), adopted and opened for signature, ratification and accession in December 1966; 999 UNTS 6 (1977), Cmnd. 6702; (1967) 61 AJIL 870; entry into force March 23, 1976.

⁴⁰ The 1966 International Covenant on Economic, Social and Cultural Rights, UNGA Res. 2200A (XXI), adopted and opened for signature, ratification and accession on 16th December 1966; 993 UNTS 3; UKTS 6 (1977), Cmnd. 6702; (1967) 6 ILM 360; entry into force March 23, 1976.

any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁴¹

This provision prohibits discrimination in law or in fact in any field regulated and protected by public authorities. The provision is concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of this provision that its content should not be discriminatory. The legal duty of non-discrimination can be an effective means by which to address the need to enfranchise refugees on a multiplicity of fronts. To the extent that the main concern of refugees is to be accepted by a host community, a guarantee of non-discrimination might in fact be virtually the only legal guarantee that many refugees require.

The core understanding of non-discrimination is essentially a fairly formal prohibition of arbitrariness, which requires that any unequal treatment be properly justified, according to consistently applied, persuasive, and acceptable criteria. Non-discrimination may also be understood to be an affirmative guarantee of equal opportunity. Under such an understanding, non-discrimination requires public authorities to do more than ensure the absence of discrimination, but also to act positively to promote equality of opportunity between different groups. Granting refugees equal opportunities enhances refugee protection.

(ii) Property Rights

Refugees have a right acquire property and are granted this right in equality with other aliens. The Convention provides that “The Contracting States shall accord to a refugee treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the acquisition of movable and immovable property and other rights pertaining thereto, and to leases and

⁴¹ *Supra*, note 38, Article 26.

other contracts relating to movable and immovable property”.⁴² The Convention grants artistic and industrial rights to refugees as are accorded to nationals of the host country by providing that in respect of the protection of industrial property, such as inventions, designs or models, trade marks, trade names, and of rights in literary, artistic, and scientific works, a refugee shall be accorded in the country in which he has his habitual residence the same protection as is accorded to nationals of that country. In the territory of any other contracting state, he shall be accorded the same protection as is accorded in that territory to nationals of the country in which he has his habitual residence.⁴³

There are, however, a number of restrictions on this right. Refugees are restricted in wage earning employment and in gaining opportunities for self employment, in access to natural resources, and in acquisition to personal property as applied to all foreigners. Even where refugees own property, the right to enjoy the property is subject to the power of the state to enforce laws as it deems necessary to regulate the use of property in accordance with the general interest. In order to protect refugee property rights, states may enforce laws that protect refugee property from arbitrary deprivation and compensation in case of loss or unlawful confiscation.⁴⁴

(iii) Judicial Assistance

Refugees have equal treatment as nationals of host state in accessing the court. “A refugee shall have free access to the courts of law on the territory of all Contracting States. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the Courts, including legal assistance and exemption from *cautio judicialum solvi*”⁴⁵ (exception from providing security for costs). The Civil and Political Covenant, does not provide for the right of access to court although it guarantees the right to a fair hearing. It provides that “all persons shall be equal before the courts and tribunals. In the determination ... of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public

⁴² Supra, note 1, Article 13.

⁴³ Ibid., Article 14

⁴⁴ Supra, note 22, p. 524.

⁴⁵ Supra, note 1, Article 16.

hearing by a competent, independent and impartial tribunal established by law.”⁴⁶ In practice, refugees have often looked to their host countries to secure respect for their rights. Even in states where the courts have no role in refugee-status determination, judges have at times intervened to the protection of refugees. Access to justice for refugees depends on state practice. India has not acceded to either the Refugee Convention or Protocol, but in the case of *National Human Rights Commission v. State of Arunashal Pradesh*, judges have shown remarkable creativity in crafting remedies for refugees which effectively vindicate Convention rights.⁴⁷

In other contexts, the host government may effectively deny refugees access to its legal system. In Kenya, for example, Kenyan law applies to Kakuma Camp. However, in Kakuma, refugees have been allowed to establish their own "court" system which is funded by UNHCR's implementing partner and Lutheran World Federation. Punishment meted out by these courts in camps includes flogging. During a visit in July 1997, the obvious human rights implications of such decisions were brought to the attention of agency staff. This concern was dismissed with the observation that "this is their culture". The population of Kakuma Camp, although living on the territory of Kenya, is administered by humanitarian organizations, independently of the government, outside its judicial system, with no checks on powers and, in effect, without legal remedies against abuses.⁴⁸ This was allowed to happen due to lack of specific refugee law for protection of refugees in Kenya.

Refugees do not always enjoy clear access to the courts. In the United States, for example, national security concerns have been invoked to order the denial of asylum in secret hearings in which the persons seeking recognition of refugee status were not allowed to see the evidence, hear the testimony, or even know what charges were being brought against them. An administrative decision to detain a refugee claimant for the duration of the status assessment process is moreover not subject to appeal or review by

⁴⁶ Supra, note 37, Article 14(1).

⁴⁷ (1996) 83 AIR 1234 (India SC, Jan.9, 1996).

⁴⁸ Supra, note 19, p. 629.

American courts.⁴⁹ Australia has gone further still, actually "excising" some more remote parts of its territory from what it calls its "migration zone," with refugees arriving in such excised areas "treated as if they were in an overseas refugee camp - with their visas processed under (discretionary) rules, no rights to appeal to court, and no right to come to Australia if accepted as refugees."⁵⁰

(iv) Right to Work

The 1951 Convention guarantees the right to self employment and states that "the Contracting State shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment."⁵¹ The Convention allows refugees to establish commercial and industrial companies. It states that "the Contracting State shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment."⁵² The right to take liberal professions is also guaranteed by the proviso that "each Contracting State shall accord to refugees lawfully staying in their territory who hold diplomas recognized by the competent authorities of that State, and who are desirous of practicing a liberal profession, treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances."⁵³

Similarly, the Economic, Social and Cultural Covenant provides that "States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right. The steps to be taken by a state party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady

⁴⁹ Ibid., p. 631.

⁵⁰ Supra, note 28, p. 630.

⁵¹ Supra, note 1, Article 17.

⁵² Ibid., Article 18.

⁵³ Ibid., Article 19.

economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.⁵⁴

While the right to work gives refugees a wide range of opportunity to choose from, in practice the right may not be fully realized due to host countries socioeconomic, aliens and immigration workers policies. In most of the less developed world, access to the national labor market is either denied altogether or extremely limited for refugees. Host states are often concerned that allowing refugees to work will drive down wages for their own citizens, thereby creating tensions between the refugees and their hosts. This is particularly the case for poorer communities where the ability of the people and the inclination of the government to shoulder the resultant burden may be severely diminished by economic difficulties, high unemployment, declining living standards, and inevitably there are tensions between international obligations and national responsibilities in such circumstances, with the result, in a number of States, that priority is accorded to nationals over all aliens, including refugees, in fields such as employment. The exercise of the right to employment of refugees depends on the practice of each state.⁵⁵

Another concern is encampment and planned settlements. When access to work or other economic activity is conditioned on relocation to camps or planned settlements, many refugees may never get the opportunity to exercise the right to work.⁵⁶ Refugees who secure work in urban settings often find that they are at the mercy of their employers, and accept much lower wages than locals receive. Even when their work is legally authorized, refugees often have difficulty actually securing employment because of language barriers and cultural differences. As a result, work for refugees is generally concentrated in the informal sector despite the often high employable skills which refugees have to offer. Most developed states place few restrictions on the right to work of formally recognized refugees.⁵⁷

⁵⁴ *Supra*, note 39, Article 6.

⁵⁵ *Supra*, note 28, p. 731.

⁵⁶ *Ibid.*, p. 733.

⁵⁷ *Ibid.*

Member States of the 1951 Convention, the 1967 Protocol and the 1969 OAU Convention on refugees should authorize beneficiaries of refugee status to engage in employed activities subject to rules generally applicable to their professions and to the public service, immediately after refugee status has been granted. States may also ensure that national legislation and policy on refugee rights, does not restrict refugees right to work.

(v) Freedom of Movement

This right is subject to any regulations applicable to aliens generally in the same circumstances. The 1951 Convention states that “each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.”⁵⁸ This right is not absolute as it’s conditioned on the restrictions imposed by states alien’s laws and encampment policies. Administration of the camps involves a number of surveillance practices through which refugees are continually mapped, marked, and monitored. However, there is a sense in which protection of refugees is related to encampment.

In Kenyan camps, protection and assistance are inextricably linked to refugee containment and immobility. Because the vast majority of refugees in Kenya have prima facie status, they are entitled to assistance through the good offices of UNHCR. Their containment in camps renders them wholly dependent on international humanitarian assistance. They are given temporary safety and protection from *refoulement* or forcible return to the country from which they fled.⁵⁹

This strategy is endorsed by Western governments, which fund UNHCR to execute the necessary emergency relief operations. Refugee camps constitute another strategy of containment with assistance. Refugee camps are arguably a useful and acceptable short-

⁵⁸ Supra, note 1, Article 26.

⁵⁹ Supra, note 28, p. 303.

term emergency measure where refugees are entitled to basic food, shelter, and health and social services. Although encampment precludes the possibility of their generating a more independent livelihood elsewhere, prohibits employment and mobility beyond the borders of the isolated camps, UNHCR is careful not to make the camps too attractive to potential refugees or other migrants by maintaining minimum educational and other facilities, an approach that has been called “humane deterrence”. Though confinement in the camps has protection value for refugees, encampment should not be prolonged as it would curtail refugee’s rights of exercising the right of freedom of movement.

(vi) Administrative Assistance and Issuance of Documents

Administrative assistance to refugees is to enable them exercise their rights as provided for. The Convention states that “when the exercise of a right by a refugee would normally require the assistance of authorities of a foreign country to whom he cannot have recourse, the Contracting States in whose territory he is residing shall arrange that such assistance be afforded to him by their own authorities or by an international authority”.⁶⁰ Host states are also required to issue identity papers to refugees. The Convention requires that “the Contracting States shall issue identity papers to any refugee in their territory who does not possess a valid travel document,”⁶¹ and “shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require, and the provisions of the Schedule to this Convention shall apply with respect to such documents. The Contracting States may issue such a travel document to any other refugee in their territory; they shall in particular give sympathetic consideration in the issue of such a travel document to refugees in their territory who are unable to obtain a travel document from the country of their lawful residence.”⁶²

Where the applicant for a travel document is indeed a refugee within Convention and/or the Protocol, and meets the requirement of lawful stay, Article 28 permits few exceptions to the obligation to issue the travel documents. The reference to compelling reasons of

⁶⁰ *Supra*, note 1, Article 25.

⁶¹ *Ibid.*, Article 27.

⁶² *Ibid.*, Article 28.

national security and public order as justifying an exception clearly indicates that restrictive interpretation is called for. In the context, 'public order' still remains a relatively fluid concept, and certain states have not excluded the possibility of applying to the issue of Convention travel documents the same restrictions as they would apply with regard to national passports. A more serious obstacle in practice to the issue of Convention travel documents can result from the absence within a state's administration of any procedure for consideration and determination of applications for refugee status. Even where such procedures do exist, they may be limited to consideration of refugee status in the context of asylum, that is, at the point at which questions of admission, residence, and expulsion arise. The refugee admitted under a resettlement programme, or allowed to remain otherwise than by reference to his or her refugee status (for example, as a student or business person, or by reason of marriage to a local citizen) may be unable, quite simply, to invoke such status and thereby to secure treatment in accordance with the Convention. The standard of reasonably efficient and efficacious implementation suggests that some sort of procedure is required; if states are to meet their obligations under these provisions.⁶³

2.2.4 Penalties for illegal entry

The Convention prohibits Contracting States from imposing penalties for illegal entry of refugees subject to presenting themselves to the authorities and showing good cause for illegal entry. The Convention states that "the Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article I, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into

⁶³ *Supra*, note 28, p. 302.

another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.”⁶⁴

Where refugees present themselves without delay to the authorities and show good cause for their illegal entry or presence, such refugees are not to be subjected to 'penalties'. Article 31(2) makes it clear that states may impose 'necessary' restrictions on movement, which would include those prompted by security considerations or special circumstances like a large influx. Such measures also come within Article 9, and are an exception to the freedom of movement called for by Article 26. Article 31(2), nevertheless, calls for restrictions to be applied only until status in the country of refuge is regularized, or admission obtained into another country; moreover, contracting states are to allow refugees a reasonable period and all necessary facilities to obtain such admission.

Contracting states are prohibited from expelling a refugee lawfully present in their territory save on the ground of national security or public order and only pursuant to a decision taken in due process of the law. The Convention requires that “the Contracting States shall not expel a refugee lawfully in their territories save on grounds of national security or public order. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.”⁶⁵

2.2.5 Non-refoulement

Contracting States have an obligation not to return a refugee (“refouler”) in any manner whatsoever in the frontier of the territories where his life or freedom would be threatened

⁶⁴ *Supra*, note 1, Article 31.

⁶⁵ *Supra*, note 1, Article 32.

except where he is a danger to state security or has been convicted of committing a serious crime. "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, member of a particular social group or political opinion. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."⁶⁶

The principle of *non-refoulement* is recognized internationally and gives refugees adequate protection against forcible return. It does not matter how the asylum seeker comes within the territory or jurisdiction of the State; what counts is what results from the state agents. If the asylum seeker is forcibly repatriated, that is refoulement contrary to international law.⁶⁷

However, there are exceptions to the principle. *Non-refoulement* cannot be claimed by a refugee who is considered a danger to the security of the country or who has been convicted of a serious crime that constitutes a danger to that country. These exceptions are framed in terms of the individual and whether one is considered a security risk is left to the judgment of the state authorities. It will be necessary that the principles of natural justice and due process of the law be followed to determine if one is a security risk. The principle of *non-refoulement* has crystallized into a rule of customary international law, the core element of which is the prohibition of return in any manner whatsoever of refugees to countries where they face persecution. The scope and application of the rule are determined by this essential purpose, thus regulating State action wherever it takes place, whether internally, at the border, or through its agents outside its territorial jurisdiction. In addition, since the law of treaties is based on good faith, States are bound to respect international obligations. Respecting state obligation under international law protects refugees from forced return.

⁶⁶ Ibid. Article 33.

⁶⁷ Supra, note 28, at p.137

2.3 The 1967 Protocol on the Status of Refugees

There have been few formal changes to the refugee rights regime since the entry into force of the Refugee Convention. The 1967 Refugee Protocol is a treaty which incorporates the Refugee Convention's rights regime by reference, and extends those protections to all refugees by removing temporal and geographical limitations for those countries which choose to be bound by it. States may accede to the Protocol without first becoming a party to the Convention and those which do so are immediately bound to grant the rights described in the Convention to a broader class of persons, that is, to modern refugees from all parts of the world, than would have been the case by accession to the Convention itself.⁶⁸

The Convention definition of a refugee was limited to those persons who became refugees as a result of events occurring before 1st January 1951 in Europe. Refugees outside Europe were not protected under the 1951 Convention. New refugee situations arose after the Convention was adopted and it was desirable that the refugees concerned enjoy equal status enjoyed by all refugees covered by the definition in the Convention. The Protocol defines a refugee to mean any person within the definition of Article 1 of the 1951 Convention as if the words “as a result of events occurring before 1 January 1951” were omitted.⁶⁹

Although the 1967 Protocol updated the 1951 Convention by removing the temporal and geographical limitations, the Protocol failed to review the substantive content of the definitions it embraced. Specifically, even after the universalisation effected by the protocol, only persons whose migration is prompted by a fear of persecution in relation to civil and political rights come within the scope of convention based refugee protection. This means that most refugees from Africa remain *de facto* excluded as their flight is more often prompted by natural disaster, war or broadly based political or economic turmoil than by “persecution”. Thus the Protocol was a partial victory as few refugees

⁶⁸ *Supra*, note 19, p. 111.

⁶⁹ Article 1(2) of the 1967 Protocol Relating to the Status of Refugees.

can lay claim to the range of rights stipulated in the convention. However, the Protocol is of great importance in maintaining the dualistic approach in refugee law.

2.4. The 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa

The 1969 OAU Convention aims to address specific aspects of the increasing numbers of refugees in Africa and finding ways and means of alleviating their misery and suffering as well as providing them with a better life and future. Paragraph 2 of the preamble to the Convention recognizes the need for and essentially humanitarian approach towards solving the problems of refugees. Paragraph 9 recognizes that the United Nations Convention of 28 July 1951, as modified by the Protocol of 31 January 1967, constitutes the basic and universal instrument relating to the status of refugees and reflects the deep concern of States for refugees and their desire to establish common standards for their treatment. The Convention is the effective regional complement in Africa of the 1951 United Nations Convention on the Status of Refugees.⁷⁰ The Convention has two key principles of protection of refugees not found in the 1951 Convention and the 1967 Protocol, namely, asylum and burden sharing.

The 1969 OAU Convention states that a "refugee" shall mean every 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.⁷¹ It has an expanded definition of a refugee. The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole

⁷⁰ Supra, note 1, Article 8(2).

⁷¹ Supra, note 2, Article 1(1).

of his country of origin or nationality is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.⁷²

However, there are essential differences between individual and *prima facie* group determination. *Prima facie* group determination is not purely and simply equivalent to the sum of eligibilities of the members of the group pronounced on an individual basis. In the case of group determination, we are confronted with a mass of people who flee the consequences of political events in which they have not necessarily participated. In the case of individual determination, a person claims to have been individually the victim of, or threatened personally by, persecution. If an examination of all the circumstances of departure does not appear to justify a *prima facie* determination of group refugee character, the refugee status of individual members of the group will, of course, need to be determined individually.

Determination that a group is *prima facie* a refugee group, raises a presumption that the individual members of the group are refugees. As such, they can benefit from the international protection and assistance extended to them by UNHCR, on behalf of the international community. They retain their refugee character unless there are strong indications that they are not or are no longer to be considered as refugees, e.g., that they are excluded from refugee status because of serious criminal acts or that there has been a fundamental change of circumstance in their country of origin leading to a cessation of refugee status.⁷³ The Convention prohibits forcing refugees to a war frontier. It states that “no person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons...”

2.4.1 Asylum

As indicated above, asylum is one of the key principles of refugee protection under the OAU Convention. The Convention provides for asylum stating that ‘Member States of

⁷² Ibid., Article 1(2).

⁷³ Supra, note 28, p. 88.

the OAU shall use their best endeavors consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality.⁷⁴ The grant of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any Member State”.⁷⁵

The term asylum is not defined in the 1951 Convention or the 1967 Protocol or the 1969 OAU Convention. Asylum is a privilege conferred by the state. It is not a right inherent to the individual. Asylum is the protection which a state grants on its territory or in some other place under the control of its organs to a person who comes to seek it.⁷⁶ Asylum implies not only a place of refuge, but also the right to give protection to exiles and refugees. The right is subject to recognition of the fact of state sovereignty. The right to grant asylum is exercised by the government in light of its own interests and obligations. Every State has exclusive control over individuals in its territory, including all matters relating to exclusion, admission, expulsion and protection against the exercise of jurisdiction by other States.⁷⁷ From the point of view of international law, therefore, the grant of protection in the state territory derives from the state’s sovereign competence. The content of that grant of protection, whether it embraces permanent or temporary residence, freedom of movement and integration or confinement in camps, freedom to work and attain self sufficiency depends on the state’s acceptance of the obligation to grant asylum.

Therefore, despite the provision for asylum, neither the 1951 Convention nor any other permits the conclusion that states have accepted an international obligation to grant asylum to refugees in the sense of admission to residence and lasting protection against persecution and or the exercise of jurisdiction by another state. The humanitarian practice exists, but the sense of obligation is missing.⁷⁸

⁷⁴ Supra, note 2, Article 2(1).

⁷⁵ Supra, note 2, Article 2(2).

⁷⁶ Supra, note 22, p. 173.

⁷⁷ Ibid., p. 173.

⁷⁸ Supra, note 4, p. 178.

2.4.2 Burden sharing

Another key principle of refugee protection is burden sharing. On burden sharing, the Convention states that “Where a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the OAU, and such other Member state shall, in the spirit of African solidarity and international cooperation, take appropriate measures to lighten the burden of the member state granting asylum.”⁷⁹ Burden sharing is understood as meaning, and calling for, a comprehensive approach to the refugee problem. To contend with massive and complex refugee issues, a broader perspective of international solidarity and burden-sharing entails taking prevention measures and finding solutions for refugee protection. This involves the development of effective comprehensive approaches to translate the principle of international solidarity into action.

The core concepts of a comprehensive approach include willingness of all States party to it to respect the principles of the 1951 Refugee Convention, provision of protection and durable solutions and finding political solutions to the conflicts and human rights abuses that create refugee problems. The Preamble to the 1951 Convention recognizes that granting of asylum places heavy burden on certain countries and that a satisfactory solution requires international cooperation. Burden-sharing should ideally encompass all different stages of a given conflict or situation of distress producing large-scale outflows of displaced persons. It should start in the country of origin with preventive measures aimed at averting the need to leave the country and seek protection abroad.

2.4.3 Durable solutions

Finding durable solutions for refugees enhances their protection. The Convention states that the essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will.⁸⁰ The country of asylum, in collaboration with the country of origin, shall make adequate arrangements for the safe return of

⁷⁹ *Supra*, note 3, Article 2(4).

⁸⁰ *Ibid.*, Article 5(1).

refugees who request repatriation.⁸¹ The country of origin, on receiving back refugees, shall facilitate their resettlement and grant them the full rights and privileges of nationals of the country, and subject them to the same obligations.⁸²

Refugees who voluntarily return to their country shall in no way be penalized for having left it for any of the reasons giving rise to refugee situations. Whenever necessary, an appeal shall be made through national information media and through the Administrative Secretary-General of the OAU, inviting refugees to return home and giving assurance that the new circumstances prevailing in their country of origin will enable them to return without risk and to take up a normal and peaceful life without fear of being disturbed or punished, and that the text of such appeal should be given to refugees and clearly explained to them by their country of asylum.

Refugees who freely decide to return to their homeland, as a result of such assurances or on their own initiative, shall be given every possible assistance by the country of asylum, the country of origin, voluntary agencies and international and intergovernmental organizations, to facilitate their return".⁸³

This approach may be adopted by State parties by committing to respect the 1951 Refugee Convention and the other regional and international instruments on refugee protection; demonstrating political will by taking preventive measures to avert refugee outflows by addressing the root causes through curative and preventive approaches. Such approach would build the conditions for building a durable peace; securing respect for human rights and the rule of law.

2.5 Protection of Refugees under International Human Rights Law

While there has been only modest evolution of the refugee rights regime under the 1951 Convention, the broader field of international human rights law has undergone exponential change. The 1948 Universal Declaration of Human Rights and binding international human rights law under the 1966 International Covenant on Civil and

⁸¹ Ibid., Article 5(2).

⁸² Ibid., Article 5(3).

⁸³ Supra, note 2, Article 5.

Political Rights⁸⁴ and International Covenant and Economic, Social and Cultural Rights⁸⁵ extend the duty of refugee protection beyond simply respecting the norms of refugee law; it includes also the obligation to take all necessary measures to ensure that refugees are effectively protected, including through national legislation, and in compliance with their obligations under international human rights and humanitarian law instruments bearing directly on refugee protection.⁸⁶

2.5.1 The Universal Declaration of Human Rights

Refugee right of protection from cruel treatment is afforded by the Universal Declaration of Human Rights⁸⁷ which provides that “No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment.”⁸⁸ The right of employment is provided for in that “Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment. Everyone, without any distinction, has the right to equal pay for equal work.”⁸⁹ The right to freedom of movement and residence is provided for.⁹⁰ Article 13(1) provides; “Everyone has the right to movement and residence within the borders of each state.” Article 13(2) states that “Everyone has the right to leave any country, including his own, and to return to his country.” Article 14(1) provides “Everyone has the right to seek and to enjoy in other countries asylum from persecution.” And that “this right may be invoked in the case of persecutions genuinely arising from non political crimes or from acts contrary to the purposes and principles of the of the United Nations.” Article 15(1) provides that “Everyone has a right to a nationality”. Article 15(2) provides that “No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”

Although the UDHR is the sole expression of the rights to which every individual is entitled and many of its principles have been reiterated in binding treaties while some

⁸⁴ Supra, note 38.

⁸⁵ Supra, note 39.

⁸⁶ Supra, note 19, p. 119.

⁸⁷ 1948 Universal Declaration of Human Rights, adopted by the United Nations General Assembly on 10th December 1948; UNGA Resolution 217 A(III).

⁸⁸ Ibid., Article 5.

⁸⁹ Ibid., Article 23.

⁹⁰ Ibid., Article 13(1).

have gained the status of international customary law, the Declaration was passed as a non-binding resolution of the General assembly. It was the clear intention of states that the Declaration serves as a foundational statement of principle,⁹¹ with legal obligations to follow from accession of the two Covenants; the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights. Refugee rights are not adequately safeguarded by simply relying on the Declaration.

2.5.2 Refugee Rights under the International Covenant on Civil and Political Rights.

Nearly all internationally recognized *civil rights* are declared to be universal and not subject to requirements of nationality. The International Covenant on Civil and Political Rights generally extends its broad-ranging protection to "everyone" or to "all persons." Each contracting state undertakes in Article 2(1) to ensure the rights in the Covenant "to all individuals within its territory and subject to its jurisdiction . . . without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." These rights may not be limited to citizens of a state, but "must also be available to all individuals, regardless of nationality or statelessness, such as asylum-seekers and refugees. The Civil and Political Covenant also provides such rights as to life and family, freedom of opinion and expression, and protection from torture, inhuman or degrading treatment, and slavery. The Covenant provides for equality of treatment and governs the exercise of all rights, whether protected under the Covenant or not."⁹² In preserving the right to life, the Covenant states that "every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."⁹³ The Covenant guarantees the right to liberty. It states that "everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty

⁹¹ James C. Hathaway, *The Rights of Refugees under International Law*, (Cambridge University Press, Cambridge, 2005), p. 45.

⁹² *Supra*, note 62, Article 26.

⁹³ *Ibid.*, Article 6(1).

except on such grounds and in accordance with such procedures as are established by law.”⁹⁴

“Arbitrary arrest or detention” has been interpreted to prohibit arrest and detention which is not in accordance with domestic law or not in accordance with international standards of liberty and security of person. These standards concern, in particular, judicial guarantees⁹⁵ which include the right to be informed of the reason for an arrest and of the charges; the right to be brought promptly before a judge; the right to a trial within a reasonable period; and the right to a review of the lawfulness of one’s detention. Freedom of movement is provided in that “everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.”⁹⁶

However, because the Covenant on Civil and Political Rights is addressed primarily to persons who reside in their state of citizenship, it does not deal with refugee-specific concerns, including recognition of personal status, access to naturalization, immunity from penalization for illegal entry, the need for travel and other identity documents, and especially protection from *refoulement*.

The Civil and Political Covenant sets guarantees of fairness in judicial proceedings, but does not deal with the more basic issue of access to a court system. Yet refugees and other aliens, unlike citizens, are not always freely able to invoke judicial remedies. Perhaps most ominously, governments faced with genuine public emergencies are authorized to withdraw all but a few core civil rights from non-citizens, even if the measures taken would ordinarily amount to impermissible discrimination on grounds of national origin, birth, or other status. In the result, though the Covenant on Civil and Political Rights, in principle, extends to the protection of refugees, refugees do not have direct access to those rights.⁹⁷

⁹⁴ Ibid., Article 9(1).

⁹⁵ Ibid., Articles 9(2) to 9(5).

⁹⁶ Ibid., Article 12(1).

⁹⁷ *Supra*, note 19, p. 121.

In situations of tensions and disturbances the right to freedom of movement is derogable and subject to various possible limitations. The Covenant on Civil and Political Rights provides that the only restrictions permitted are those “which are provided by law, are necessary to protect the national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present covenant.”⁹⁸ In all cases any restrictions should be proportional to the necessity.

2.5.3 Refugee Rights under the International Covenant and Economic, Social and Cultural Rights

The welfare rights to housing, education, public relief, and ration granted under the 1951 Convention are subject to there being systems and laws in the contracting states that regulate those rights. Refugee rights under the International Covenant on Social Economic Cultural Rights, subject there being national laws of host countries that provide for the rights. The right to health, and access to medical supplies and facilities are provided and the Covenant sets as an objective “the right of everyone to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health.”⁹⁹ The second paragraph of this article requires States to take measures to attain this objective and requires notably “the creation of conditions which assure to all medical service and the medical attention in case of sickness.” The “right of everyone to an adequate standard of living for himself or his family, including adequate food, clothing and housing” is provided.¹⁰⁰ The Covenant recognizes the right to education for everyone- particularly compulsory and free primary education.¹⁰¹

States Parties have a minimum core obligation to ensure the satisfaction of each of, at the very least, minimum essential levels of each of the rights. A State party that is unable to fulfill this obligation must demonstrate that every effort has been made to use all

⁹⁸Supra, note 38, Article 12(3).

⁹⁹ Supra, note 39, Article 12.

¹⁰⁰ Ibid., Article 11(1).

¹⁰¹ Ibid., Article 13.

resources available in an effort to satisfy as a matter of priority those minimum obligations. This effort includes not only resources within the country but also resources made available by the international community. This requirement can be interpreted as a burden sharing obligation upon States for purposes of protecting refugees.

While the basic non-discrimination obligation under the International Covenant on Economic, Social and Cultural Rights is essentially indistinguishable from that set by the Civil and Political Covenant, states are authorized to decide, considering their economic situation, the extent to which they will guarantee the economic rights of the Convention to non-nationals.

Second, as with the Civil and Political Covenant, the substantive formulation of general socioeconomic rights in the Economic, Social and Cultural Covenant does not always provide sufficient contextual specificity to ensure respect for the most critical interests of refugees. For example, while the Economic, Social and Cultural Covenant establishes a general right to an adequate standard of living, it does not explicitly guarantee equal access to rationing systems, a matter of frequent immediate concern to involuntary migrants in war zones and other areas of crisis. Most critically, generally applicable socioeconomic rights are normally conceived simply as duties of progressive implementation. Under the Economic, Social and Cultural Covenant, for example, states are required simply to "take steps" progressively to realize economic, social and cultural rights to the extent possible within the limits of their resources.

In states without national legislation on right to housing, welfare rights may not be enforceable. However, should there be welfare policies and other administrative measures put in place to provide the rights to citizens, refugees may benefit from such policies and measures. States may begin taking steps to progressively facilitate the realization of these rights within the available resources.

2.6 Conclusion

In conclusion it may be said that there exist gaps in international protection of refugees that need to be addressed at international and national or domestic levels. Firstly,

restrictive interpretations of the kind mentioned, disregarding the various forms which persecution can assume and the various types of situation in which it may exist, can have the effect of wrongly excluding from refugee status under the 1951 Convention, and the High Commissioner's competence under the UNHCR Statute, large numbers of persons fleeing situations of armed conflict and violence even though such situations can in many cases be regarded as having a "persecutory" element justifying the application of the 1951 definition on a group basis. Such a result may be wholly inconsistent with the humanitarian objectives and purposes of the 1951 Convention.

Secondly, there exists no general definition of "persecution" which, it should be stressed, is not a precise scientific term. The question whether persons who flee from situations of armed conflict, violence, or generalized violations of human rights, can be considered to be fleeing from "persecution" and in what circumstances is essentially a question of interpretation. When addressing this question of interpretation, the manner in which the international community has in the past applied the 1951 Convention on refugee definitions in group situations is a relevant factor to be taken into account.

The Convention, nevertheless, defines a number of rights for the protection of refugees, which have to be respected *irrespective* of whether they have been granted durable residence in the territory of a Contracting State, in particular, the right not to be forcibly returned to a territory where they have reason to fear persecution. It follows that the Convention leaves room for special arrangements, in large-scale group situations, whereby refugees may be granted temporary admission and protection until a more durable solution, e.g., voluntary repatriation can be found for them. There is, therefore, no *legal* need to treat the refugees in such group situations as falling into a separate category outside the scope of the 1950/51 refugee definitions.

For the refugees to be able to enjoy these rights, several measures may be considered. Refugees arrive in host countries either as individuals or in groups. The reception and treatment they receive is in accordance with the laws of the host country. To ensure maximum protection of such refugees and asylum seekers, their detention should only be

maintained for as long as strictly required by the exigencies of the situation. In case of individual asylum seekers, initial period of deprivation of liberty may be unavoidable to establish identity and the bona fide nature of the asylum claim. Detention should be envisaged only where action is being taken for deportation. In cases of large scale influx, restriction on freedom of movement might also be unavoidable. Appropriate procedures for determination of refugee status should be as expeditious as possible so as to ensure that any measures of detention are not unduly prolonged. The measures of detention should not be applied in a manner which violates the principle of non discrimination nor should detention be resorted to in order to deter further refugee movements.

Where refugee status has not been determined refugees should not be forced back to war frontier but should be accorded enjoyment of the principle of *non refoulement* and their human rights be respected. Whenever possible the national authorities, with international assistance, may provide suitable work and education as well as conditions which respect religious and cultural identity and personal dignity. National authorities and UNHCR may permit intergovernmental agencies and other non governmental agencies concerned with welfare and protection of refugees to contribute and supervise the well being and protection of refugees.

CHAPTER THREE

REFUGEE PROTECTION IN KENYA

3.1 Introduction

Kenya is a party to the principal international conventions that provide for international principles for protection of refugees. Kenya signed the 1951 United Nations Convention Relating to the Status of the Refugees¹ on 8th October 1966, the 1967 Protocol Relating to the Status of Refugees² on 13 Dec 1966, and the 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa³ on 10th September 1969. Despite being a party, Kenya has been without a specific legislation on refugees until 29th December, 2006, when specific refugee legislation, the Kenya Refugee Act of 2006⁴ was passed by parliament. The Act establishes legal authority for managing refugee affairs. It creates an institutional framework including relevant offices, formalizes administrative processes on how to seek asylum and restores refugee management as a function of the government. Refugee recognition, protection and refugee status determination is carried out under the Act. The Act protects refugees from persecution in respect of unlawful presence in Kenya. Refugee related documents are issued as provided by the Act.

3.2 Domestic Legal Protection Before Enactment of Kenya Refugee Act

3.2.1 Legal Framework

Domestic legal protection of refugees in Kenya has for a long time been considered within the framework of the Immigration Act,⁵ the Aliens Restriction Act,⁶ and, since

¹ United Nations Convention Relating to the Status of Refugees, adopted on 28th July 1951 by the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons; convened under General Assembly Resolution 429 (V) of December 1950; 189 UNTS 150; entry into force 22 April 1954.

² The 1967 Protocol Relating to the Status of Refugees prepared and submitted to the United Nations General Assembly in 1966 and adopted in Resolution 2198(XXI) of 16th December 1966; 606 UNTS 267; entry into force 4 October 1967.

³ OAU Convention adopted at the Assembly of Heads of State and Government at its Sixth Ordinary Session (Addis Ababa, 10th September 1969); 1000 UNTS 46; entry into force 20 June 1974.

⁴ The Refugee Act, 2006, No. 13 of 2006.

⁵ Cap. 172, Laws of Kenya (Revised Edition, 1984).

⁶ Cap. 173, Laws of Kenya (Revised Edition, 1985).

January 2007, the Kenya Refugee Act.⁷ The Immigration Act consolidates the law in relation to immigration into Kenya and for matters incidental thereto. The immigration law does not distinguish refugees and asylum seekers as a special class of aliens, who normally do not enter in host countries armed with the usual travel documentation required of aliens. Nothing in the Act, however, is in place to implement Kenya's obligations under international instruments relating to refugee protection and to which Kenya is a state party. Kenya's Immigration Act applies to all non-citizens, including refugees. All aliens who enter Kenya are required to register their presence in Kenya under section 13(2)C of the Immigration Act, failure to which they face charges of being unlawfully present in Kenya.

The Act describes a class of entry permit for individuals generally fulfilling the definition of the Refugee Convention (though not the definition of a refugee as given in the OAU refugee convention). The class M pass of the Immigration Act is issued upon application to the Immigration Department "to a person who is a refugee, that is to say, is, owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, unwilling to avail himself of the protection of the country of his nationality or who, not having a nationality and being outside the country of his former habitual residence for any particular reason, is unable or, owing to such fear, is unwilling to return to such country, and any wife or child over the age of 13 years of such a person." This provision would allow asylum seekers to apply for class M permits from immigration officers at points of entry into Kenya, if proper administrative procedures were in place. However, due to the circumstances under which refugees enter the country, regardless of what the law says, there is no way an asylum seeker may ask for legal permission to enter or remain in Kenya as a refugee through an entry point.

The same position obtains for the Aliens Restriction Act which, in section 2, defines an alien as "any person who is not a citizen of Kenya." It provides that all non-citizens who enter Kenya without a valid entry permit or pass are unlawfully present and subject to

⁷ Supra, note 4.

arrest, detention and prosecution by immigration officers. As soon as they enter Kenya, asylum seekers and refugees, as aliens, are also subject to the Aliens Restriction Act. The Act sets out precisely to accomplish what its title implies, that is, to restrict the presence and rights of aliens in Kenya. Section 3(3) of the Act as read with Regulation 4(1) of the Aliens Registration order,⁸ require all aliens to register as aliens in Kenya. Section 3(2) of the Act provides that the Minister may at any time require, by order, that aliens residing in Kenya comply with provisions such as registration, notification of change of abode, or travel in the manner specified in the order. The Act gives the Minister in charge of immigration, during times of war or imminent danger, the power to impose several types of restrictions on aliens, including prohibition of entry and residence in designated areas.

Although the Aliens Restriction Act was passed after Kenya became party to the 1951 Refugee Convention, there are no specific provisions for the status and rights of asylum seekers and refugees. It may, however, be implied that refugees are required to be so registered in the light of section 6(1) of the Aliens Restriction order which provides that “a registered alien shall, upon payment of a fee of one hundred shillings, be issued with a certificate... but a certificate shall be issued to a recognized refugee to Kenya free of charge.” The implication here is that a refugee is by law required to register as an alien after which he is issued with an alien certificate normally valid for a period of two years, in accordance with section 6(2). Paragraph 10 of the First Schedule of the Aliens Restriction Act requires a refugee in Kenya to complete Form A1 for registration as an alien, indicate the date of arrival in Kenya and whether he has been accepted as a refugee in Kenya or not.

The Immigration Act and Aliens Restriction Act do not accord refugees their rights as enshrined in the international instruments. As the Kenyan legal status demonstrates, the signing of international conventions and protocols by countries does not guarantee rights to refugees. International conventions and protocols are not considered a source of law and thus do not accord any legal rights, interests, liabilities or duties at the domestic level.

⁸ L.N.139/1981.

They do not create any legitimate expectations that decision makers will follow them or consider them when making decisions. Until such treaties are domesticated by the enactment of appropriate domestic legislation, the rights and liberties enshrined in these treaties remain unenforceable at domestic level.

The Government of Kenya cooperates with UNHCR in protecting refugees, albeit on an ad hoc basis. Kenya attempted to apply the 1951 Convention and 1969 OAU Convention in the treatment of the 1979 Ugandan refugees. The Government of President Amin was overthrown in April 1979 and many Ugandans fled to Kenya as refugees seeking protection. They were accommodated at Kakamega. On 10th April the Kenya Department of Immigration informed the UNHCR Branch Office that the newcomers would not be considered as refugees but as "displaced persons" who had left their country for safety reasons. At that date, Kenya was not yet a party to the 1969 OAU Refugee Convention. Kenya agreed, however, to provide temporary asylum and, if need be, limited assistance, undertaking to deal with the refugee problem according to Kenyan law, and, most probably, taking into account the provisions of the 1951 Refugee Convention. UNHCR noted and appreciated the traditional humanitarian attitude of the Government of Kenya in regard to persons seeking refuge within its borders and its unswerving adherence to the international instruments to which it was a party.⁹

A second exodus followed in 1980, due to the turmoil following the disputed election of that year, which brought Milton Obote back to power as President of Uganda.

In this situation, UNHCR obtained assurances from the Kenyan authorities that there would be no forcible return of Ugandans who met the criteria of the 1951 Refugee Convention. Refugee status of applicants from Uganda was determined by an eligibility team composed of an officer of the Immigration Department and a UNHCR protection officer. Kenya having acceded only to the 1951 Convention and the 1967 Protocol, but not to the OAU Convention, the team, in order to recognize a person as a refugee, had to be satisfied that there was a "well-founded fear of persecution". However, the team also

⁹ Ivor C. Jackson, *The Refugee Concept in Group Situations*; (Martinus Nijhoff Publishers, The Hague/London/ Boston, 1999), p. 292.

applied the wider refugee definition contained in the OAU Convention when examining cases of Ugandans originating from areas where guerilla operations were taking place.¹⁰

There is no explanation as to the specific reasons why these persons were apparently considered to fall under the "extended" OAU definition, rather than under the definitions in the 1951 Convention and the 1967 Protocol.¹¹ There is no explanation why the circumstances of flight could not have been evaluated and refugee status determined according to the definitions in the 1951 Convention and the 1967 Protocol.

It may be said that Kenya did not take sufficient account of the difference in the 1951 Convention refugee definition in individual and group situations. The application of the definitions in the group situations involve a *prima facie* determination of group refugees' character with the application of broad criteria to the objective situation from the country of origin.¹² However, persons considered as refugees in Kenya are supposed to receive the same legal status or treatment as those covered by the definition in the 1951 Convention, the 1967 Protocol and the 1969 OAU Convention.

3.2.2 Institutional Framework

Without a policy on refugee protection or an Act of Parliament on refugees in Kenya, UNHCR stepped in its international mandate of providing protection for refugees. The functions of UNHCR encompass providing international protection and seeking permanent solutions to the problems of refugees by way of voluntary repatriation or assimilation in new national communities. UNHCR is responsible for refugees, based on its Statute and in conjunction with the 1951 Convention and 1967 Protocol, which oblige signatory states to assist forcibly displaced migrants who meet specific criteria. The work of UNHCR is inclusive of promoting the conclusion of international conventions of the protection of refugees, supervising their application and proposing their amendments thereto; promoting through special agreements with the governments the execution of any

¹⁰ Ibid., p. 293.

¹¹ Ibid., p. 294.

¹² Ibid., p. 178.

measures calculated to improve the situation of refugees and to reduce the number requiring protection; and promoting the admission of refugees.¹³

In that regard, UNHCR carried out refugee status determination (RSD) on behalf of the Government of Kenya. However, UNHCR provides assistance to recognized refugees, administratively. The work of the High Commission for refugees is of an entirely non political and humanitarian character. UNHCR can only give protection to refugees within its international mandate, unlike states which give full conventional status according to the 1951 Convention and 1967 Protocol and the 1969 OAU Convention. The mandate granted by UNHCR does not allow refugees to enjoy full rights as enshrined in the Refugee Convention. The Convention provides for certain rights, such as the right to work, to earn a living, and for freedom of movement.

As of 1991, UNHCR, through its good offices, recognized refugees who could not be processed under conventional or statutory definitions, but who required protection. Noting the Government of Kenya adherence to the international instruments to which it is a party in regard to persons seeking refuge within its borders, UNHCR started applying the idea of preventive protection in Africa that saw the creation of preventive zones and refugee camps. This move was intended to prevent Somali refugees from crossing to Kenya and also encourage those in Kenyan camps to return to Somalia.¹⁴

3.2.2.1 Protective Zones

In southern Somalia, UNHCR created a preventive zone along the Kenyan border in order to slow the flow of potential refugees into Kenya and to encourage Somali refugees in Kenyan camps to return home. This cross-border operation (CBO), launched in 1991, was also a strategy to empty the Kenyan camps after the Government of Kenya signaled its intention to forcibly return Somali refugees. Some refugees did return home, but other Somali nationals left their war-torn country for Kenya during the same period. In the

¹³ Guy S. Goodwin-Gill, *The Refugee in International Law*, 2nd edition, (Oxford University Press, Oxford, 1996), p. 212.

¹⁴ Jennifer Hyndman, *Managing Displacements; Refugee and the Politics of Humanitarianism*, (University of Minnesota Press, Minneapolis, 2000), p. 23.

short term, the cross-border operation did not meet its objectives, despite generous initial funding from donors.¹⁵

3.2.2.2 Encampment

Refugees in Kenya live in refuge camps. The provisions of the 1951 UN Convention Relating to the Status of Refugees clearly envisaged a situation where refugees are granted basic rights that allow them to continue living with dignity. These include the rights to work, to move, to education, to be granted identity and travel documents, among other rights. By resorting to camp confinement, the Government overtly restricted the application of the 1951 UN Convention and its 1967 Protocol. Isolating refugees in camps and settlements and providing parallel protection also undermine local institutions and systems. Refugees' rights have thus been impacted negatively.

However, refugee camps constitute a strategy of containment with assistance. Prima facie designation of refugees is usually made on a group basis rather than by the individual determination procedures that are the norm for determining convention status. It is conceptually linked to preventive protection in that it is a temporary measure that tends to provide assistance in a contained area to a displaced group of persons.

Though camps are arguably a useful and acceptable short-term emergency measure, the ad hoc status of prima facie refugees accorded to refugees in these refugee camps as they await refugee determination status is problematic. In Kenya, the vast majority of displaced Somalis and Sudanese fall into this ad hoc category of refugees. Though this status does entitle them to basic food, shelter, and health and social services in the camps, it precludes the possibility of their generating a more independent livelihood elsewhere. Employment is prohibited, and mobility beyond the borders of the isolated camps is restricted. All prima facie refugees are required by the Kenyan government to live in camps located in arid and semi arid border areas.¹⁶ There are two major refugee camps in the country, namely, Dadaab which comprises three other sub-camps, that is, IFO, Dagahaley, and Hagadera, situated in the country's remote north eastern part of the

¹⁵ Ibid., p. 21.

¹⁶ Ibid. p. 24.

country, near the Kenya/Somalia border, and Kakuma refugee camp which is established on the north western part of the country, bordering Sudan. Both camps are located in hot, arid areas with temperatures often as high as 40° C.¹⁷

Because the vast majority of refugees in Kenya have prima facie status, they are entitled to assistance through the good offices of UNHCR, but they remain, in a practical sense, second-rate refugees. Their containment in camps renders them wholly dependent on international humanitarian assistance. They are given temporary safety and protection from *refoulement*. Though refugees are officially prohibited from moving outside the camps, some are able to move to more strategic locations. This unauthorized movement of Somali refugees, in particular, annoys the Government of Kenya (GOK), which then complains to UNHCR. Yet it is also a political statement that the government of Kenya cannot simply contain the refugee problem. Nonetheless, the movement of refugees in the refugee camps is highly restricted, for their safety and state security.¹⁸

The gaps in legal protection that refugees and asylum seekers encountered in Kenya, may be said to include lack of a government policy for protection of refugees, lack of a specific law for protection of refugees, procedural deficiencies and delays in the status determination process, failures of accessibility to protection officers, lack of social assistance while awaiting registration, conflicting responsibilities for refugee status determination and lack of proper institutional and administrative structures to address some of these problems.

3.3 The Kenya Refugee Act No. 13 of 2006

Protection of refugees in international law involves protection of refugee rights, specifically, prevention of the return of refugees to a territory where their life and liberty would be endangered, access to a procedure for determination of refugee status, the grant of asylum, prevention of expulsion, issue of identity and travel documents, facilitation of

¹⁷ Refugee Consortium of Kenya, *Refugee Insights; Protracted Refugee Situations*, Issue No. 8 January – June 2005, p. 4.

¹⁸ *Supra*, note 13, p. 26.

voluntary repatriation, family reunion, assurance of access to education institutions, assurance of the right to work and the benefit of other social and economic rights and treatment generally in accordance with international standards.¹⁹

The Refugee Act captures the definitive elements of the term “refugee” from both the 1951 Convention and the 1969 OAU Convention. The definition is used to ascertain who qualifies for refugee status, protection and assistance. The Act also makes provisions for the rights and the obligations of refugees relating to movement, religion, education, housing, employment, identity papers and travel documents, personal security and the principle of *non-refoulement*, in line with international refugee law. However, it does not guarantee the right of asylum, or right of entry, but only obliges the state not to impose penalties for illegal entry on asylum seekers provided they report their arrival to the authorities without delay and show good cause for their actions.

The Refugee Act takes precedence over the Immigration Act and Aliens Restriction Act on refugee matters and creates an institutional framework including relevant offices, namely, the commissioner, the department, and camp officer, and formalizes administrative processes on how to seek asylum and apply for appeal. The Act reserves refugee management as a function of government. Refugee recognition in the Immigration Act is now superseded by the refugee status determination process in the Refugee Act. The Act protects refugees from prosecution in respect of unlawful presence in Kenya while on refugee status determination process. Refugee-related documents are issued as provided by the Act.

3.3.1 Definitions

Asylum, asylum seeker and members of a refugee's family

Asylum is defined as the provision of shelter and protection by the government to refugees. Asylum seeker is a person who seeks refugee status in accordance with the Refugee Act. The members of a refugee's family include the spouse, dependent children under 18 and extended family members who are dependent on the refugee.

¹⁹ Guy S. Goodwin-Gill, *The Refugee in International Law*, 2nd edition, (Oxford University Press, Oxford, 1996), p. 230.

Refugee

Through the Act, the government takes authority for determining who is and is not a refugee. The Act captures the definitive elements of the term "refugee" from both the 1951 Convention and the 1969 OAU Convention. The definition is used in ascertaining who qualifies for refugee status, protection and assistance.

The Act adopts the definition of a statutory refugee²⁰ from the 1951 Convention. It provides that a person shall be a statutory refugee for the purposes of the Act if such a person "owing to a well founded fear of being persecuted for reasons of race, religion, sex, 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 not having a nationality and being outside the country of his former habitual residence, is unable to , owing to a well founded fear of being persecuted for any of the aforesaid reasons is unwilling to return to it."

The Act adopts the 1969 OAU definition of a *prima facie*²¹ refugee as a person who "owing to external aggression, occupation, foreign domination or events seriously disturbing public order in any part or whole of his country of origin or nationality is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or Nationality.

Although the Kenya Refugee Act adopts the 1951 definition of a refugee, Ivor C. Jackson, argues that there is an important difference according to whether the 1950/51 definitions are applied individually or on a group basis. Their individual application calls for a detailed examination of the various elements - subjective and objective - which are necessary to establish whether a person has a "well-founded fear of persecution". Their application in a group situation requires a more general approach involving an examination of the objective situation in the country of origin giving rise to the particular exodus of persons and a determination as to whether, due to this objective situation the

²⁰ Section 3 (1) of the Kenya Refugee Act, No. 13 of 2006.

²¹ *Ibid.*, section 3(2).

individual members of the group may be exposed to danger or other serious consequences, for reasons relevant to the 1950/51 refugee definitions, in the event of their returning to their home country. These various elements must of course, be carefully evaluated in the light of the particular situation.²²

As the Act applies the individual application of the definition of a refugee, there has to be standards of a detailed examination of the various elements - subjective and objective - which are necessary to establish whether a person has a "well-founded fear of persecution". If the Act applies the group definition, there has to be general standards of examining the objective situation in the country of origin giving rise to particular exodus of persons.

The Kenya Refugee Act, just like the 1951 Convention, does not define the elements of 'well founded fear', 'persecution' or 'membership of a particular social group' that must be established before status of a refugee is recognized. It has been observed that in practice major problems of interpretation and appreciation arise in view of, among others, the relative imprecision of the terminology employed in standard setting conventions; the variety of legal practices of States; the role of discretion first in the states initial choice of means and the possibility that states may be entitled to avoid responsibility by providing an equivalent alternative in event the principle required result is rendered unattainable.²³

It is, therefore, important the Kenya Refugee Act adopts a universally acceptable interpretation of these elements in order to accord refugees universal treatment in determination of status. Restrictive interpretations of these elements, disregarding the various forms which they can assume and the various types of situation in which they may exist, can have the effect of wrongly excluding from refugee status large numbers of persons fleeing situations of armed conflict and violence.

²² Ivor C. Jackson, *The Refugee Concept in Group Situations*, (Martinus Nijhoff Publishers, The Hague/London/Boston, 1999), p. 3.

²³ Guy S. Goodwin-Gill, *The Refugee in International Law*, 2nd edition, (Oxford University Press, Oxford, 1996), p. 238

The Minister has powers under section 3(3) of the Act, to declare any class of persons as *prima facie* refugees and to revoke such declaration. However, it can be said that if the Minister declares that a group is *prima facie* a refugee group, it raises a presumption that the individual members of the group are refugees who should benefit from protection and assistance extended to individual refugees under the Act. They retain their refugee character unless there are strong indications that they are not or are no longer to be considered as refugees, e.g., that they are excluded from refugee status because of serious criminal acts, as stated under section 4 or that there has been a fundamental change of circumstance in their country of origin leading to a cessation of refugee status as provided for under section 5 of the Act.

Revoking such a declaration may expose refugees to forcible return to their country of origin. The Refugee Act, under section 18, prohibits forcing refugees to a war frontier or taking measures such as rejection at the frontier, return or expulsion, which would compel refugees to return to or remain in a territory where their life, physical integrity or liberty would be threatened.

3.3.2 Voluntary acts of the Refugee

Broadly, there are four sets of circumstances in which refugee status may be lost or denied, that is, by reason of voluntary acts of the individual, by reason of change of circumstances, by reason of protection accorded by other States or international agencies, and in the case of criminals and other undeserving cases.²⁴

3.3.2.1 Exclusion from Refugee Status

Under section 4 of the Refugee Act, as under Article 5 of the 1969 OAU Convention, a person is excluded from refugee status if he or she has committed a crime against peace, a war crime, crime against humanity, a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee or he/she has been guilty of acts contrary to the purposes and principles of the United Nations. Refugee status may be revoked if the state determines that there has been a fundamental change in the

²⁴ *Supra*, note 18, p. 80.

circumstances that caused the flight. It may also be revoked if the grant of status was not in line with the conventions. In addition, the Minister responsible for refugee affairs has powers to disqualify a person seeking refugee status on the grounds of national security. The Minister can also revoke refugee status where an applicant commits a serious non-political crime while in Kenya.²⁶ Exclusion and cessation clauses ensure that Kenya is not obliged to keep undeserving people as refugees, those who are threats to the national and international community or who have the protection of another country and, therefore, do not need surrogate protection. This provision excludes persons who are not deserving of refugee protection from the regime of international refugee protection.

3.3.2.2 Cessation of Refugee Status

The UNHCR Statute,²⁵ the 1951 Convention²⁶ and the 1969 OAU Convention²⁷ provide for loss of refugee status where the individual, by his or her own actions, indicates that a well founded fear of persecution no longer exists or that international protection is no longer necessary.²⁸ Section 5 of the Kenya Refugee Act provides that a refugee status ceases when a person goes back to his/her country of his/her own free will and receives the protection of his/her country or becomes a citizen of another country or when the reasons that caused him/her to flee have ceased to exist and there is no reason why s/he should not take up the protection and nationality of his/her country.

The 1951 Convention²⁹ and the 1969 OAU Convention³⁰ require the Contracting States to issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require, and in particular give sympathetic consideration in the issue of such a travel document to refugees in their territory who are unable to obtain a travel document from the country of their lawful residence. Section 7(2)(j) of the Act mandates

²⁵ Article 6(a)-(d) of the Statute of the United Nations for High Commissioner for Refugees, UNGA Res. 428 (V) of 14th December 1950.

²⁶ Supra, note 1, Article 1 C (1)-(4).

²⁷ Supra, note 3, Article 5.

²⁸ Supra, note 18, p. 80.

²⁹ Supra, note 1, Article 28.

³⁰ Supra, note 3, Article 6.

the Department of Refugee Affairs to issue travel documents. The process of issuance of such documentation needs to be specified if this provision is to be implemented.

3.4 The Department of Refugee Affairs

The 1969 OAU Convention³¹ requires Contracting States of asylum to determine whether an applicant is a refugee. The 1951 Convention³² requires the Contracting Parties to give administrative assistance in the exercise of a right by a refugee. It requires states to make arrangements for an authority to accord such assistance, which authority shall deliver or cause to be delivered under their supervision to refugees such documents or certifications as would normally be delivered to aliens by or through their national authorities. Section 6 of the Kenya Refugee Act establishes the Department of Refugee Affairs, which shall be responsible for all administrative matters concerning refugees in Kenya. It can be said that section 6 of the Act conforms to international requirements for an authority for administration of refugee affairs.

The Department has mandate, under section 7 of the Act, to register all refugees, receive and process applications for refugee status, take measures that promote the welfare and protection of refugees, formulate policy on refugee matters in accordance with international standards, manage refugee camps, while the Minister under whose portfolio this department falls is to make regulations providing for the procedures to be followed in the recognition of refugee status and expulsion. By having an eligibility procedure, the application process will reassure applicants and also minimize against arbitrary police detention and brutality.

The issue of refugee status determination is well addressed in the Act, by requiring the refugee camp officer, appointed under section 17 of the Act, to receive and register all asylum seekers and submit to the Refugee Status Determination Committee all

³¹ Supra, note 3, Article 6.

³² Supra, note 1, Article 25.

applications for refugee status. However, the legislation is silent on availing information to refugees and asylum seekers. There may be provision for a right to such information.

Section 8 the Act places the responsibility of refugee status determination on the Refugee Affairs Committee that comprises representatives from the Ministries of Home Affairs, Foreign Affairs, Local Government, Health, Finance and Planning, the Attorney General and a representative from Department of Immigration, Police, National Security Intelligence Service, National Registration Bureau, a representative from the host community and a member from the civil society. The refugee and asylum applications will be adjudicated by a Refugee Status Determination Committee with membership drawn from key ministries, security agencies and under the authority of the Commissioner for Refugee Affairs. A dissatisfied applicant will have an opportunity to appeal to the Refugee Appeals Board established under section 9 of the Act.

The Act seeks to speed up the process of adjudicating the application for refugee status from applicants by giving a time frame for the process. Under section 11 of the Act, a refugee entering Kenya must inform the Commissioner for Refugee Affairs of his intentions to stay within 30 days of such entry. Under section 11(5), the Commissioner is required to consider all applications referred to him within 90 days of the application, where necessary, inquire or investigate any such application and give the applicant an opportunity to make an oral presentation. By section 11(6)(b), the Commissioner must notify the applicant in writing of the decision within 14 days and in the case of a rejected application, give reasons thereof. Moreover, under section 12(1), every applicant for status as a refugee and every member of the family will be allowed to remain in Kenya pending a decision of the applicant and until he or she has exhausted his right of appeal in case of initial rejection. Further, where the appeal has been rejected, such a person shall be allowed at least 90 days to seek admission to a country of his or her choice.

However section 16(b) of the Act requires that refugees shall be subject to all laws in Kenya. This means that unless the provisions of the Immigration and Alien Restriction Acts are amended there may be two parallel systems of dealing with refugees especially during the transition period.

3.5 Withdrawal (Cancellation) of status

Section 3(3) of the Act allows the Minister to revoke declaration of prima facie refugee. Section 19 of the Act allows the Commissioner to withdraw the refugee status of any person where there are reasonable grounds for regarding the person as a danger to national security or to any community of that country. Section 20 allows the Commissioner to revoke the refugee status of a person who should not have been recognized or has ceased to be a refugee for purposes of this Act. The 1951 Convention and the 1969 OAU Convention do not have such provisions for revocation and withdrawal of refugee status.

The Refugee Act is silent on what becomes of the status of such refugees whose refugee status has been withdrawn. If such refugees become illegal immigrants, they are entitled to receive the Convention minimum standard treatment, which is accorded to aliens generally. If they are found to have entered illegally or staying illegally, under Article 31 of the 1951 Convention, no penalties should be imposed on them on account of such illegal entry or presence and such refugees should be given a reasonable period and all the necessary facilities to obtain admission into another country. Under section 10 of the Refugee Act, such refugees may appeal against the Commissioner's decision to the Appeals Board within thirty days of receiving the Commissioner's decision. If they are aggrieved by the decision of the Appeals Board, under section 10(3), they may within 21 days appeal to the High Court. Should the affected refugees be required to leave Kenyan territory, they may be allowed reasonable time to seek admission to a country of their choice as provided under section 12(1)(c) of the Act, be issued with travel documents under section 7(2)(j) and, in conformity with Article 28 of the 1951 Convention, the Kenya government may, in particular, give sympathetic consideration in the issue of such a travel documents to refugees who are unable to obtain travel documents from the country of their lawful residence.

3.6 Expulsion of Refugees

The 1951 Convention³³ prohibits expelling refugees save on the grounds of national security and public order. However, expulsion shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority. The Convention allows such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such measures as they may deem necessary.

Section 21 provides that the Minister responsible for refugee affairs may expel a refugee and/or members of his family if considered a threat to national security or public order. The Minister does so in consultation with Minister for Internal Security and with regard to due process. The 1951 Convention expulsion is through a decision of a judicial process of the law. The ministerial decision to expel under the Refugee Act is clearly contrary to expulsion standards set under the 1951 Convention. Moreover, the 1969 OAU Convention³⁴ prohibits Member States from subjecting any person to measures such as rejection at the frontier, return or expulsion which would compel him to remain in a territory where his life, physical integrity or liberty would be threatened. Section 21 of the Act is inconsistent with international provisions on expulsion. It also contravenes section 18 of the Act which guarantees the right to *non-refoulement* and prohibits compelling a refugee from returning to a country where his life and liberty are threatened.

3.7 Duties of Refugees

In essence, refugees have no preferential treatment before the law of the host country and must respect the laws and regulations as well as measures taken for the maintenance of public order. The 1951 Convention³⁵ provides that every refugee has duties to the country in which he finds himself, which require in particular that he conforms to its laws and regulations as well as to measures taken for the maintenance of public order. The 1969

³³ Supra, note 1, Article 32.

³⁴ Supra, note 3, Article 2(3).

³⁵ Supra, note 1, Article 2.

OAU Convention³⁶ prohibits subversive activities and requires every refugee to conform to the host country's laws and regulations as well as measures taken for public peace. To ensure this, the 1969 OAU Convention, requires states where refugees are residing to prevent them from attacking any state member of the OAU, by any activity likely to cause tension.

The Refugee Act 2006 has expressly captured this obligation under section 16(1)(b). Refugees are also under duty to refrain from engaging in subversive activities such as armed insurrection, against their country of origin. The duty to respect the law is common to nationals as well as to foreigners in general. Under section 25 of the Act, a refugee who falsifies declarations and information or is found in the country after expulsion under section 21 of the Act, commits an offence which attracts a custodial sentence. This provision conforms to international obligation of refugees to obey the laws of host countries.

3.8 Refugee Rights under the 1951 Convention Relating to the Status of Refugees applicable by virtue of Section 16 of the Kenya Refugee Act

Pursuant to section 16 of the Refugee Act, refugees in Kenya are entitled to the rights in international conventions to which Kenya is a party. Refugee rights set by the 1951 Refugee Convention include several critical protections which speak to the most basic aspects of the refugee experience, including the rights to non discrimination,³⁷ religion,³⁸ equal treatment to aliens generally,³⁹ need to escape, to be accepted, and to be sheltered, basic survival and dignity rights, the right of every human being to life, liberty, and security. Intellectual property rights,⁴⁰ and the right to acquire property,⁴¹ right of association,⁴² as well as to documentation of their status and access to national courts,⁴³ for the enforcement of their rights are provided. Right to engage in wage earning

³⁶ Supra, note 3, Article 3.

³⁷ Supra, note 1, Article 3.

³⁸ Ibid., Article 4.

³⁹ Ibid., Article 7.

⁴⁰ Ibid., Article 14.

⁴¹ Ibid., Article 13.

⁴² Ibid., Article 15.

⁴³ Ibid., Article 16.

employment,⁴⁴ self employment⁴⁵ and to practice liberal profession is also granted.⁴⁶ Expansive range of socio-economic rights include housing,⁴⁷ public education,⁴⁸ public relief,⁴⁹ labor legislation and social security.⁵⁰ Rights to administrative assistance⁵¹ and freedom of movement⁵² are also granted.

Refugees are also to be treated as citizens under labor and tax legislation. The Convention establishes rights of solution, intended to assist refugees to bring their refugee status to an end. Provision is made for the issuance of travel documents⁵³ and transfer of assets⁵⁴ that would be necessary upon resettlement, and also for the alternative of naturalization in the asylum state. The right to non *refoulement*⁵⁵ is guaranteed.

Although the Convention spells out substantive refugee rights, it allows any State to make reservations to articles of the Convention other than to articles 1, 3, 4, 16(1), 33, 36-46 inclusive. Articles 36-46 are executory and transitory provisions. This means that all substantive rights other than non-discrimination, freedom of religion, access to the courts, and protection against *refoulement* may be excluded or modified by a state through reservation upon signature, ratification, or accession to the Convention. An evaluation of refugee rights under section 16 of the Refugee Act requires that account be taken of any reservations by the Kenyan government.

It can be said that advances in refugee rights since 1951 have, however, largely occurred outside of refugee law itself through the development of a pervasive treaty-based system of international human rights law. The Universal Declaration of Human Rights, an unenforceable General Assembly resolution, and binding international human rights law

⁴⁴ Ibid., Article 17.

⁴⁵ Ibid., Article 18.

⁴⁶ Ibid., Article 19.

⁴⁷ Ibid., Article 21.

⁴⁸ Ibid., Article 22.

⁴⁹ Ibid., Article 23.

⁵⁰ Ibid., Article 24.

⁵¹ Ibid., Article 25.

⁵² Ibid., Article 26.

⁵³ Ibid., Article 28.

⁵⁴ Ibid., Article 28.

⁵⁵ Ibid., Article 33.

established by the 1966 Human Rights Covenants⁵⁶, have filled many critical gaps in the Refugee Convention's rights regime.

Evolution of human rights conventions that include refugees within their scope has resulted in a net level of legal protections significantly greater than envisaged by the Refugee Convention. By synthesizing refugee-specific and general human rights, it is now possible to respond to most critical threats to the human dignity of refugees.⁵⁷ Therefore, for section 16 of the Refugee Act to be applicable regard of human rights conventions to which Kenya is a party must be taken. Moreover, it should be clear that unless international conventions are domesticated, refugees cannot enforce those rights in the national courts.

The duty of protection therefore goes beyond simply respecting the norms of refugee law; it includes also the obligation "to take all necessary measures to ensure that refugees are effectively protected, including through national legislation, and in compliance with their obligations under international human rights and humanitarian law instruments bearing directly on refugee protection."⁵⁸ Section 16 of the Act does not spell specific rights contained in the international conventions which Kenya is a party which bear directly on refugee protection.

The rights regime under the 1951 Convention is inclusive of a number of basic survival and dignity rights, as well as to documentation of their status and access to national courts for the enforcement of their rights, guarantees of key socioeconomic rights that integrate refugees in the economic system of the country of asylum or settlement, basic rights to property and work are supplemented by a guarantee of access to the asylum country's social safety net.⁵⁹ Section 16 of the Refugee Act should reflect the Convention

⁵⁶ International Covenant on Civil and Political Rights Adopted and opened for signature, ratification and accession in December 1966; 999 UNTS 172, and International Covenant on Economic, Social and Cultural Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16th December; 999 UNTS 172.

⁵⁷ James C. Hathaway, *The Rights of Refugees under International Law*, (Cambridge University Press, Cambridge, 2005), p. 110.

⁵⁸ *Ibid.*, p. 120.

⁵⁹ *Supra*, note 1, Articles 21-24, inclusive.

rights subject to any reservations under the Convention. The Convention allows other rights negotiated under international agreements. This encourages states to legislate domestically beyond the standards of the Refugee Convention and, particularly, in its insistence that state parties continue to accord refugees all advantages that accrue to them by virtue of other international agreements, including under bilateral treaties with the refugee's country of origin. This provision requires section 16 of the Refugee Act to reflect the array of important additional human rights acquired under international human rights accords negotiated in recent years for enhanced protection of refugees in Kenya.⁶⁰

The 1948 Universal Declaration of Human Rights⁶¹ and binding international human rights law under the 1966 International Covenant on Civil and Political Rights⁶² and International Covenant on Economic, Social and Cultural Rights⁶³ also extend the duty of refugee protection beyond simply respecting the norms of refugee law. The Declaration includes also the obligation to take all necessary measures to ensure that refugees are effectively protected, including through national legislation, and in compliance with their obligations under international human rights and humanitarian law instruments bearing directly on refugee protection.⁶⁴ Section 16 of the Act ought to clearly show the rights under those international instruments that refugees in Kenya are entitled to. Due to the nature of its unenforceability this provision is not in conformity with international law of protection of refugees. It is imperative that section 16 of the Refugee Act spells out refugee rights under international conventions that Kenya is a party. This will not only be a domestication of the rights of refugees under international conventions but will also show the rights that directly bear on protection of refugees.

⁶⁰ *Supra*, note 22, p. 110.

⁶¹ 1948 Universal Declaration of Human Rights, adopted by the United Nations General Assembly on 10th December 1948; UNGA Resolution 217 A(III).

⁶² International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession in December 1966; 999 UNTS 6 (1977), Cmnd. 6702; (1967) 61 AJIL 870: entry into force March 23, 1976.

⁶³ International Covenant on Economic, Social and Cultural Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16th December 1966; 993 UNTS 3; UKTS 6 (1977), Cmnd. 6702; (1967) 6 ILM 360: entry into force March 23, 1976.

⁶⁴ *Supra*, note 19, p. 119.

3.9 Refugee Rights under the 1967 Protocol Relating to the Status of Refugees that may apply by virtue of section 16 of the Kenya Refugee Act

The 1967 Refugee Protocol⁶⁵ is a treaty which incorporates the Refugee Convention's rights regime by reference and extends those protections to all refugees by prospectively eliminating the Convention's temporal and geographical limitations for those countries which choose to be bound by it. It can be said that the rights under the Protocol are those under the 1951 Convention.

3.10 Specific Refugee Rights under International Conventions Domesticated by the Refugee Act, 2006

Refugee rights specifically provided for under the Act are *non-refoulement*, identity documents, wage earning employment, and administrative assistance.

3.10.1 Non- refoulement

The principle of *non-refoulement* is now recognized as a component of customary international law and is considered binding on all states, even those not parties to the 1951 UN Convention.⁶⁶ This principle is firmly reflected in Kenya's Refugee Act 2006,⁶⁷ and is based on the Universal Declaration of Human Rights,⁶⁸ which states that everyone has the right to seek and to enjoy in other countries asylum from persecution.⁶⁹ The 1951 UN Convention and the 1969 OAU Convention contain provisions establishing the right of *non-refoulement*. The 1951 Convention provides that "no Contracting State shall expel or return (re-fouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."⁷⁰ The 1969 OAU Convention provides that "no person shall be subjected by a member state to measures such as rejection at the frontier, return or expulsion, which would compel him

⁶⁵ Supra, note 2.

⁶⁶ Guy S. Goodwin-Gill, *The Refugee in International Law*, 2nd edition, (Oxford University Press, Oxford, 1996), p. 167.

⁶⁷ Section 18 of the Refugee Act, 2006.

⁶⁸ Supra, note 60.

⁶⁹ Ibid., Article 14.

⁷⁰ Supra, note 1, Article 33(1).

to return to or remain in the territory where his life, physical integrity or liberty would be threatened."⁷¹

This right is central to the very notion that people fleeing conflict or persecution are entitled to protection and should not be returned to the frontiers of a country where they would be placed at risk on account of their race, religion, nationality, membership of a particular social or political group. However, the Convention does not create a right to enter another state, neither does it recognize the individual's rights to asylum, but only allows a limited obligation on a national state not to expel or return a refugee to a state where he or she faces persecution.

The principle of *non-refoulement* finds further expression in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁷² This Convention prohibits states parties from expelling, returning ("refouler") or extraditing a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. Should there be need for determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."⁷³

The African Charter on Human and Peoples Rights,⁷⁴ a foundation of human rights documents for the African Union, provides the right to seek and obtain asylum. It provides that "every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions."⁷⁵ The Charter prohibits mass expulsion of non nationals. It further

⁷¹ Supra, note 3, Article 2(3).

⁷² United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, entry into force 26 June 1987; UNGA resolution 39/46, 10 December 1984; 1465 UNTS 85; entry into force: 26 June 1987.

⁷³ Ibid., Article 3(1)(2).

⁷⁴ African Charter on Human and Peoples Rights; 21 ILM 58 (1982); entry into force 1 October 1986.

⁷⁵ Ibid., Article 12(2).

provides "the mass expulsion of non nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups."⁷⁶

A state can nevertheless expel refugees under article 32 on grounds of safeguarding public order. But even then, a refugee is entitled to challenge that decision before a competent authority and where such a decision prevails, he must be given another chance to seek legal admission into another country. The Refugee Act under section 21, allows the Minister to expel and in regard to the principle of non-refoulement, expulsion should be only in accordance with the law. The right to *non-refoulement* under the Refugee Act is in accordance with international conventions on refugee protection.

3.10.2 The Right to Employment

The 1951 Refugee Convention guarantees refugees "the most favourable treatment" possible, meaning that they must be treated as well as foreign nationals in similar circumstances, regarding their right to participate in wage-earning employment and self-employment. This right is also available under the International Covenant on Economic, Social, and Cultural Rights (ICESCR).⁷⁷ It states that "the States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right."

The right to engage in wage earning employment plays an important role in the ability of refugees to pursue productive livelihoods. Migrants who do not meet the criteria of refugee are not guaranteed the right to seek employment, but can do so under the ICESCR. This restriction impacts on the livelihood of those refugees without a secure legal status as states may not allow them to pursue wage-earning employment. The Kenya Refugee Act 2006 allows refugees and members of their family to engage themselves in wage-earning employment, but within the same limitations as those imposed on non-citizens. Moreover, section 16(2)(b) of the Refugee Act allows the Minister for immigration to designate certain areas as refugee camps, which refugees

⁷⁶ Ibid., Article 12(5).

⁷⁷ Supra, note 38, Article 6(1).

cannot leave without authority from the camp officer. Although encampment is not permanent, it limits refugees from becoming self-reliant and leading productive lives. The requirement that refugees lawfully staying in an asylum state benefit from the same right to access wage-earning employment as most-favored foreigners has not been incorporated in the Kenya Refugee Act. This means that Kenya has failed to discharge its international obligation of the state parties to the Convention to apply the provisions of the Convention for the protection of refugees. The Convention states that “the Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin”.⁷⁸

The implication of section 16(2)(b) of the Refugee Act is that access to work for refugees or other economic activity is conditioned on relocation to camps or planned settlements with the result that priority is accorded to nationals over refugees in field employment. Another implication is that many refugees who resist such constraints and choose instead to self-settle exist outside the national legal framework do not receive protection and other forms of refugee assistance. Refugees who secure work in urban settings often find that they are at the mercy of their employers, and accept much lower wages than locals receive. Even when their work is legally authorized, refugees often have difficulty actually securing employment because of language barriers and cultural differences. As a result, work for refugees is generally concentrated in the informal sector despite the often high employable skills which refugees have to offer. The Refugee Act should be amended so as to remove the conditions pegged on the right to work.

3.10.3 The Right to Identity Documents

The 1951 UN Convention⁷⁹ requires host governments to issue identity documents to refugees who do not have valid travel documents. The OAU Convention does not address issuance of identity documents. Section 14 of the Refugee Act guarantees the right to issue identity cards or identification passes to refugees in the camps. Section

⁷⁸ Ibid., Article 3.

⁷⁹ Supra, note 1, Article 27.

17(f) allows the camp officer to issue movement passes to those wishing to travel outside the camps. In order to work and travel within or outside the territory of the host country, an individual usually requires identity documents. The right to identity documents is tied to a refugee's ability to exercise other rights in the Conventions. The Convention requires that "the Contracting States shall issue identity papers to any refugee in their territory who does not possess a valid travel document,"⁸⁰ Therefore, the Refugee Act, rightly articulates the right to issue identity documents.

This provision also conforms to the 1951 Convention requirement of administrative assistance to issue identity documents to enable refugees to exercise their rights. The Convention states that "when the exercise of a right by a refugee would normally require the assistance of authorities of a foreign country to whom he cannot have recourse, the Contracting States in whose territory he is residing shall arrange that such assistance be afforded to him by their own authorities or by an international authority."⁸¹

3.10.4 Right to Travel Documents

The 1951 Convention⁸² provides for the issuance of travel documents to travel outside a host country's territory. The 1969 OAU Convention⁸³ requires member states to issue travel documents to refugees lawfully staying in their territories in accordance with the 1951 Convention. Section 7(2)(j) of the Act mandates the Commissioner for Refugees to issue travel documents. The Act is not clear whether issuance of travel documents is a right or discretion of the Commissioner of Refugees and whether there are conditions or restrictions attached to it. Where the applicant for a travel document is indeed a refugee within Convention and/or the Protocol, and meets the requirement of lawful stay, article 28 permits few exceptions to the obligation to issue the travel documents.

The reference to compelling reasons of national security and public order as justifying an exception clearly indicates that restrictive interpretation is called for. In the context, 'public order' still remains a relatively fluid concept, and certain states have not excluded

⁸⁰ Ibid.

⁸¹ Ibid., Article 25.

⁸² Ibid., Article 28.

⁸³ Supra, note 3 Article 6(1).

the possibility of applying to the issue of Convention travel documents the same restrictions as they would apply with regard to national passports. A more serious obstacle in practice to the issue of Convention travel documents can result from the absence within a state's administration of any procedure for consideration and determination of applications for refugee status. Even where such procedures do exist, they may be limited to consideration of refugee status in the context of asylum, that is, at the point at which questions of admission, residence, and expulsion arise. The standard of reasonably efficient and efficacious implementation suggests that some sort of procedure is required; if states are to meet their obligations under these provisions.⁸⁴

3.11 Convention Refugee Rights Presumed by Section 16 of the Kenya Refugees Act

Section 16 of the Kenya Refugee Act provides for general refugee rights contained in international conventions to which Kenya is a party.

3.11.1 The Right to Freedom of Movement

Freedom of movement is a fundamental human right guaranteed in the 1951 Convention,⁸⁵ the 1966 International Covenant on Civil and Political Rights and the African Charter on Human and People's Rights. The 1951 UN Convention states that "each contracting state shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances".⁸⁶ This provision applies to all categories of refugees irrespective of where they are residing within the host country.

The Universal Declaration of Human Rights,⁸⁷ and the International Covenant on Civil and Political Rights⁸⁸ guarantee the right to freedom of movement and residence within

⁸⁴ Supra, note 28, p. 302.

⁸⁵ Supra, note 1, Article 15.

⁸⁶ Supra, note 1, Article 26.

⁸⁷ Article 13 of the Declaration of Human and Peoples Rights adopted by the United Nations General Assembly on 10th December 1948; UNGA Resolution 217 A(III).

⁸⁸ Supra, note 61, Article 12.

the borders of each state. This right, however, as in the case of Article 26 of the Refugee Convention, is available to those who are lawfully present in the state and should not be intended for the creation of subversive activities against the host state or country of origin. This means that people fleeing conflict or persecution who are living without the permission of the host country are not necessarily guaranteed the right to choose where they live under either the 1951 Refugee Convention or the International Covenant on Civil and Political Rights.

The fact that freedom of movement is only guaranteed for forced migrants who are legally residing in the state presents a paradox for some refugees, because, in many cases, their legal status is defined by whether or not they choose to live in designated areas. Despite this, states still retain the right to limit the enjoyment of this right by any person within their territories in order to protect public health and morals, national security, and the rights and freedom of others.⁸⁹

The Kenya Refugee Act does not specifically guarantee right to freedom of movement. Section 17 of the Act requires refugees to present themselves to the refugee camps for registration and application for determination of refugee status. Pursuant to section 17(f), refugees do not leave the camps unless they are issued with movement passes. Therefore, even though the right to freedom of movement may be inferred under section 16 of the Act, this right is not absolute as it is conditioned on the restrictions imposed by states alien's laws and encampment policies. Administration of the camps involves a number of surveillance practices through which refugees are continually mapped, marked, and monitored.

Refugees in Kenya cannot enforce the right to freedom of movement because, like in international conventions, the right is not absolute. However, any limitations on the refugees' freedom of movement should be subject to any regulations applicable to aliens generally in the same circumstances, as provided for under Article 26 of the 1951 Convention. Once the refugee status has been established freedom of movement should

⁸⁹ *Supra*, note 62, Article 12(3).

be limited only in so far as it applies to other aliens generally or in accordance with the laws on state security.

3.11.2 The Right to Physical Security

Refugees are entitled to physical security within the host country, specifically from criminal violence, torture, inhuman or degrading treatment. Under the 1951 Convention⁹⁰ the laws governing such status are the laws of the host country. The law that may be said to apply to these rights to refugees is the Constitution of Kenya. Chapter V of the Constitution provides rights, liberties and freedoms to “every person”⁹¹ on Kenyan land. These include right to life,⁹² liberty,⁹³ protection from slavery and forced labor,⁹⁴ protection from inhuman treatment,⁹⁵ protection from deprivation of property,⁹⁶ protection against arbitrary search or entry,⁹⁷ protection of the law,⁹⁸ protection of freedom of conscience⁹⁹ and protection of freedom of expression.¹⁰⁰ To enable refugees enjoy these rights, host countries are required to put in place adequate arrangements to protect refugees from these criminal acts, particularly where they are motivated by racism or xenophobia.

Although the rights are properly articulated under the Constitution of Kenya, section 80 of the constitution is specific that if anyone alleges that any of the rights under sections 70 to 83 inclusive have been contravened, the person shall apply to the High Court for redress. The High Court shall have original jurisdiction in determining the application. The process of the application is usually complex and only refugees with legal representation may resort to such a process. Properly adhered to, these provisions may provide protection of refugee rights in Kenya.

⁹⁰ Supra, note 1, Article 12.

⁹¹ Section 70 of the Constitution of Kenya.

⁹² Ibid.; section 71.

⁹³ Ibid.; section 72.

⁹⁴ Ibid.; section 73.

⁹⁵ Ibid.; section 74.

⁹⁶ Ibid.; section 75.

⁹⁷ Ibid.; section 76.

⁹⁸ Ibid.; section 77.

⁹⁹ Ibid.; section 78.

¹⁰⁰ Ibid.; section 79.

3.11.3 Right of Access to Court

This right is premised on the provisions of the 1951 UN Convention¹⁰¹ that guarantee a refugee's entitlement to the right of access to courts in the host country for the purposes of settling any disputes that may arise. In exercise of this right, refugees should be given the same treatment as a national in matters pertaining to access to the Courts, including legal assistance and exemption from *cautio judicialum solvi* ” (exception from providing security for costs). The Civil and Political Covenant, also provides that all persons shall be equal before the courts and tribunals and entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”¹⁰² States are expected to uphold them for the benefit of refugees.

However, it has been observed that in the refugee camps, the refugee community is left to administer justice for itself. In Kakuma, refugees have been allowed to establish their own "court" system which is funded by UNHCR's implementing partner and Lutheran World Federation. This kind of court system is administered by humanitarian organizations. It functions independently of the government, outside its judicial system, with no checks on powers and, in effect, without legal remedies against abuses.¹⁰³ Nevertheless, there is a judicial court system in refugee camps though on a visiting basis.

Legal problems that refugees may encounter in enforcing their rights have not been addressed under the Act. Procedural issues, like the ability of refugees to seek appeals before courts of law, access to counsel to assist them in applying to the court and provision for interpreters where they cannot speak the national or official language of the court have not been addressed. However, section 77 of the Constitution of Kenya, guarantees the right to a fair trial, presumption of innocence, information of the nature of the charge, adequate time and facilities for preparation of defence, legal representation of one's choice, to examine the witnesses, and the right to an interpreter. It can therefore be

¹⁰¹ Supra. note 1, Article 16.

¹⁰² Supra, note 76, Article 14(1).

¹⁰³ Supra, note 55, p. 629.

said that refugees in Kenya are entitled to rights under the Constitution by virtue of section 70 thereof.

3.11.4 Welfare Rights

The welfare rights to housing, education, public relief, and ration granted under the 1951 Convention¹⁰⁴ are subject to there being systems and laws in the contracting states that regulate those rights. Similarly, under the International Covenant on Economic, Social, Cultural Rights, refugees may enjoy these rights depending on the laws of host countries. The right to health, and access to medical supplies and facilities are provided and the Covenant sets as an objective “the right of everyone to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health.”¹⁰⁵ The second paragraph of this article requires States to take measures to attain this objective and requires, notably, “the creation of conditions which assure to all medical service and the medical attention in case of sickness.” The “right of everyone to an adequate standard of living for himself or his family, including adequate food, clothing and housing” is provided.¹⁰⁶ The Covenant recognizes the right to education for everyone- particularly compulsory and free primary education.¹⁰⁷

The Kenya Refugee Act does not embrace social economic rights. It may be recalled that under the 1951 Refugee Convention,¹⁰⁸ any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16(1), 33, 36-46 inclusive. This means that all substantive rights other than non-discrimination, freedom of religion, access to the courts, and protection against *refoulement* may be excluded or modified by a state through reservation upon signature, ratification, or accession to the Convention. Kenya does not have any reservations. The implication is that Kenya is under international obligation of the state parties to the Convention to apply the provisions of the Convention for the protection of refugees. The Convention states that “the Contracting States shall apply the

¹⁰⁴ Supra, note 1, Articles 20-24.

¹⁰⁵ Supra, note 62, Article 12.

¹⁰⁶ Ibid., Article 11(1).

¹⁰⁷ Ibid., Article 13.

¹⁰⁸ Supra, note 1, Article 42.

provisions of this Convention to refugees without discrimination as to race, religion or country of origin".¹⁰⁹ Kenya is also under obligation to make refugee law that deals extensively with protection of refugees, and lays down standards of protection, treatment and rights of refugees relating to movement, religion, education, housing, employment, identity papers, and travel documents, personal security and other rights.

Though social economic rights may be inferred by virtue of section 16 of the Refugee Act, the rights are unenforceable for various reasons. First, Kenya does not have a national legislation on welfare rights. Second, generally applicable socioeconomic rights are normally conceived simply as duties of progressive implementation as states are required simply to "take steps" progressively to realize economic, social and cultural rights to the extent possible within the limits of their resources. Third, the substantive formulation of general socioeconomic rights in the Economic, Social and Cultural Covenant does not always provide sufficient contextual specificity to ensure respect for the most critical interests of refugees. However, Kenya may begin to take steps to progressively facilitate the realization of these rights within the available resources. Such steps include putting in place welfare policies and other administrative measures to provide the rights to citizens. Refugees may benefit from such policies and measures.

3.12 Refugee Rights under the OAU Convention Governing Specific Aspects of Refugee Problems in Africa that may be applied by virtue of section 16 of the Refugee Act

The specific refugee rights under the OAU Convention¹¹⁰ are *non-refoulement*,¹¹¹ non discrimination,¹¹² right to voluntary repatriation,¹¹³ and the right to travel documents.¹¹⁴ The preamble¹¹⁵ to the OAU Convention recognizes the 1951 Refugee Convention as the

¹⁰⁹ Ibid., Article 3.

¹¹⁰ OAU Convention adopted at the Assembly of Heads of State and Government at its Sixth Ordinary Session (Addis Ababa, 10th September 1969); 1000 UNTS 46; entry into force 20 June 1974.

¹¹¹ Ibid.; Article 2(3).

¹¹² Ibid., Article 4.

¹¹³ Ibid., Article 5.

¹¹⁴ Ibid., Article 6.

¹¹⁵ Ibid., Paragraph 9.

basic and universal instrument that sets common standards for treatment of refugees. The preamble¹¹⁶ also recognizes that human beings shall enjoy fundamental rights and freedoms without discrimination. The Convention seeks to apply the provisions of the 1951 Convention to refugees in Africa.

Conclusion

Refugee rights set by the 1951 Refugee Convention include the rights to non discrimination,¹¹⁷ religion,¹¹⁸ equal treatment to aliens generally,¹¹⁹ need to escape, to be accepted, and to be sheltered, basic survival and dignity rights, the right of every human being to life, liberty, and security. Intellectual property rights,¹²⁰ and the right to acquire property,¹²¹ right of association,¹²² as well as to documentation of their status and access to national courts,¹²³ for the enforcement of their rights are provided. Right to engage in wage earning employment,¹²⁴ self employment¹²⁵ and to practice liberal profession is also granted.¹²⁶ An expansive range of socio-economic rights include housing,¹²⁷ public education,¹²⁸ public relief,¹²⁹ labor legislation and social security.¹³⁰ Rights to administrative assistance,¹³¹ and freedom of movement,¹³² the right to issuance of travel documents¹³³ and transfer of assets¹³⁴ that would be necessary upon resettlement, and

¹¹⁶ Ibid., Paragraph 6.

¹¹⁷ Supra, note 1, Article 3.

¹¹⁸ Ibid., Article 4.

¹¹⁹ Ibid., Article 7.

¹²⁰ Ibid., Article 14.

¹²¹ Ibid., Article 13.

¹²² Ibid., Article 15.

¹²³ Ibid., Article 16.

¹²⁴ Ibid., Article 17.

¹²⁵ Ibid., Article 18.

¹²⁶ Ibid., Article 19.

¹²⁷ Ibid., Article 21.

¹²⁸ Ibid., Article 22.

¹²⁹ Ibid., Article 23.

¹³⁰ Ibid., Article 24.

¹³¹ Ibid., Article 25.

¹³² Ibid., Article 26.

¹³³ Ibid., Article 28.

¹³⁴ Ibid.

also for the alternative of naturalization in the asylum state and the right to *non-refoulement*¹³⁵ are also granted.

The Kenya Refugee Act has many progressive aspects of refugee protection in Kenya. Institutional and administrative measures that help refugees to exercise their rights may be lauded. The Refugee Act captures the definitive elements of the term “refugee” from both the 1951 Convention and the 1969 OAU Convention. The definition is used to ascertain who qualifies for refugee status, protection and assistance. The Act makes provisions on the rights and the obligations of refugees relating to movement, religion, education, housing, employment, identity papers and travel documents, personal security and the principle of *non-refoulement*, in line with international refugee law.

However, the Act fails to conform to international conventions in many ways. Although the right to *non-refoulement* is in accordance with international conventions, section 21 allows the Minister to expel refugees without stating that such expulsion should be only in accordance with the law. The right to engage in wage-earning employment is within the same limitations as those imposed on non-citizens. The requirement that refugees lawfully staying in an asylum state benefit from the same right to access wage-earning employment as most-favored foreigners has not been incorporated in the Kenya Refugee Act. The right to identity documents is properly articulated. The right to travel documents is also articulated but a procedure is required to meet the obligation under this provision.

The procedure may allow refugees to apply for passport from the consular authorities of their country of origin, having arrangements for vetting such applications to ensure that no documents are issued to travel to a country which is politically estranged with Kenya. The Kenya government may issue travel documents intended to serve the purpose of a national passport, or may issue standardized travel documents similar to the Refugee Convention specimen annexed thereto, which include a clause guaranteeing the right to

¹³⁵Ibid., Article 33.

reenter Kenya and having in place arrangements to resolve details of transfer of responsibility of the refugees concerned.

The Act does not guarantee the right of asylum, or right of entry, but only obliges the state not to impose penalties for illegal entry on asylum seekers provided they report their arrival to the authorities without delay and show good cause for their actions. Freedom of movement is not guaranteed in the Act. Like in international conventions, the right is not absolute. Freedom of movement should be limited only in so far as it applies to other aliens generally or in accordance with the laws on state security. The right of access to justice is not guaranteed.

The rights implied by section 16 of the Refugee Act are enforceable because once the international legal provisions are domesticated by municipal law, they become justiciable in domestic courts. The international conventions establish human rights obligations that bind all members of the international community and not individuals. International conventions show recognition of fundamental human rights which a state ought to concede for its citizens and that those rights ought to exist. Formalization of those rights in domestic law affords concrete evidence of the intention to be bound.¹³⁶

The refugee rights regime under the Kenya Refugee Act conforms to international refugee rights regime but it is imperative that specific refugee rights under international conventions to which Kenya is a party are clearly provided for under the Act.

¹³⁶Supra, note 56, p. 34.

CHAPTER FOUR

CONCLUSION AND RECOMMENDATIONS

4.1. Conclusion

Having laid down the body of law that influenced the origins of refugee rights regime, the legal framework underpinning refugee protection, the core of the international universal instruments that define a specific legal regime for international refugee protection, the 1951 Convention on the Status of Refugees¹ and the 1967 Protocol,² and the 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa,³ the specific regional instrument that protects refugees in Africa, it can be said that there exist gaps in international protection of refugees that need to be addressed at international level. Further, having laid down the legal protection of refugees in Kenya which has been considered within the framework of the Immigration Act,⁴ the Aliens Restriction Act,⁵ and the Kenya Refugee Act⁶ it can also be said there exist gaps that need to be addressed at national level.

The Convention does not define the elements of ‘well founded fear’, ‘persecution’ or ‘membership of a particular social group’ that must be established before status of a refugee is recognized. It has been observed that in practice major problems of interpretation and appreciation arise in view of, among others, the relative imprecision of the terminology employed in standard setting conventions, the variety of legal practices of States, the role of discretion, first in the states initial choice of means, and the

¹United Nations Convention Relating to the Status of Refugees, , adopted on 28th July 1951 by the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons; convened under General Assembly Resolution 429 (V) of December 1950; 189 UNTS 150; entry into force 22 April 1954.

² The 1967 Protocol Relating to the Status of Refugees prepared and submitted to the United Nations General Assembly in 1966 and adopted in Resolution 2198(XXI) of 16th December 1966; 606 UNTS 267; entry into force 4 October 1967.

³ OAU Convention adopted at the Assembly of Heads of State and Government at its Sixth Ordinary Session (Addis Ababa, 10th September 1969); 1000 UNTS 46; entry into force 20 June 1974.

⁴ Cap. 172, Laws of Kenya, (Revised Edition 1984).

⁵ Cap. 173, Laws of Kenya, (Revised Edition 1985).

⁶ Act No. 13 of 2006.

possibility that states may be entitled to avoid responsibility by providing an equivalent alternative in event the principle required result is rendered unattainable.⁷

Firstly, restrictive interpretations of the kind mentioned, disregarding the various forms which persecution can assume and the various types of situation in which it may exist, can have the effect of wrongly excluding from refugee status, under the core international refugee conventions, large numbers of persons fleeing situations of armed conflict and violence even though such situations can, in many cases, be regarded as having a "persecutory" element justifying the application of the 1951 Convention, 1967 Protocol and 1969 OAU Convention definitions. Such a result may be wholly inconsistent with the humanitarian objectives and purposes of the Conventions.

Secondly, though there may be variations in interpretation of the Convention, such variations may not necessarily present problems as long as the obligations contained in the Convention are upheld. Nevertheless, there is value in fostering clearer common understandings of interpretative issues as international refugee law is a regime that needs to be responsive to individual circumstances.

Thirdly, there are gaps in application of international human rights law as it is binding only upon governments and not individuals. The Universal Declaration of Human Rights is the sole expression of the rights to which every individual is entitled and many of its principles have been reiterated in binding treaties while some have gained the status of international customary law. However, the Declaration was passed as a non-binding resolution of the General assembly. It was the clear intention of states that the Declaration serves as a foundational statement of principle,⁸ with legal obligations to follow from accession of the two covenants, namely, the Covenant on Civil and Political Rights and the Covenant and Economic, Social and Cultural Rights. Refugee rights are not adequately safeguarded by simply relying on the Declaration.

⁷Guy S. Goodwin-Gill, *The Refugee in International Law*, 2nd edition, (Oxford University Press, Oxford, 1996), p. 238.

⁸ James C. Hathaway, *The Rights of Refugees under International Law*, (Cambridge University Press, Cambridge, 2005), p. 45.

At the same time governments are allowed to derogate from human rights provisions under certain circumstances. Some refugee rights are derogable. The Covenant on Civil and Political Rights allows derogation of the right to movement in situations of tensions and disturbances. However, the only restrictions permitted are those “which are provided by law, are necessary to protect the national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.”⁹ In all cases, any restrictions should be proportional to the necessity. Similarly the 1951 Convention and the 1969 OAU Convention allow derogation of non-refoulement subject to criminal record of the individual concerned.

Socio-economic rights are also subject to States’ minimum core obligation to ensure the satisfaction of each of, at the very least, minimum essential levels of each of the rights. A State party that is unable to fulfill this obligation must demonstrate that every effort has been made to use all resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations. This effort includes not only resources within the country, but also resources made available by the international community. This requirement can be interpreted as a burden sharing obligation upon States for purposes of protecting refugees.

4.2 Recommendations

It is important to have a universally acceptable interpretation of a refugee by a definition of the key elements of a refugee; these definitions may be provided in national legislation subject to international guidelines.

While it may generally be acceptable that refugee rights under international instruments and international human rights obligations apply to states, national legislation is expected to enforce those rights through domestic law that conforms to international standards of protecting refugees.

⁹ Article 12(3) of the International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession in December 1966; 999 UNTS 6 (1977), Cmnd. 6702; 61 AJIL 870: (1967); entry into force March 23, 1976.

In states without national legislation on right to housing, this right may not be enforceable. However, states may create an enabling policy, legislative and administrative environment as well as review of policy, legislative and administrative processes that enable citizens to realize the said rights. Refugees may benefit from such policies and measures. States may begin taking steps to progressively facilitate the realization of these rights within the available resources.

It has been established that refugees do not always enjoy clear access to some rights like judicial assistance. Member states to international conventions that provide for refugee rights may take measures that ensure refugees are guaranteed such rights at national level.

There is need to articulate a comprehensive approach in protecting refugee rights. The principle elements of such an approach will include tackling the root causes of forced migration, respect of human rights and rule of law, respect for the institution of asylum, including the fundamental principle of *non-refoulement*, and ensuring international protection to all those who need it.

It involves putting in place measures to reinforce international solidarity and burden sharing, the establishment and fostering of mechanism designed to avoid or reduce the incidence of conflict and designing reconciliation measures where necessary and possible, notably in post-conflict situations.

In support of voluntary repatriation, there may be rehabilitation, reintegration and reconstruction measures which will underpin the sustainability of repatriation. National legislation may put in measures that facilitate resettlement of refugees and granting them full rights and privileges of nationals of the country and subject them to the same obligations. National refugee policy may provide for public education on peace and human rights at community and national levels in both countries of origin and countries of asylum, and public information to raise awareness about refugee and migration issues in both host countries and countries of origin, particularly with a view to countering xenophobia and racism.

4.3 The Kenyan context

The passing of the Refugee Act is no doubt a watershed and major milestone in Kenya's domestic refugee legislation and management practice. Kenya has adopted a wider definition of a refugee than both the 1951 and 1969 OAU conventions. Although the individual's subjective fear of "persecution" as well as the objective evidence of persecution are the major criteria in determining refugee status, Kenya's Refugee Act, just as the international refugee instruments, does not define the notion of persecution. Despite this, from the language of Article 33 of the 1951 Convention, it can be inferred that a threat to an individual's life or his/her physical freedom constitutes persecution, as would other violations of human rights.

This definitional scope covers not only a deliberate act of persecution by a government against an individual claiming refugee status, but also victims of general insecurity, natural disasters, and oppression or systematic economic deprivation. For a person to qualify, he or she must be outside his/her home country and be unwilling to return to the country of origin. The definition covers situations of mass flight from war or politically coerced and displaced people.

It is recommended that since the objective of the Kenya Refugee Act is to afford protection and fair treatment to refugees, the question to be determined should be what might happen to refugees if they were to be returned to their country of nationality where they fear that they might be persecuted. Whether they might be persecuted can only be determined by examining the actual state of affairs in that country and an examination of that country's human rights record. Applying these standards of interpretation of well founded fear would amount to a guarantee of protection for refugees.

Like the 1951 Convention and the 1969 OAU Convention, under the Kenya Refugee Act, the phrase 'well founded fear of being persecuted' is a key phrase of the definition. Since fear is subjective, the definition involves a subjective element in the person applying for recognition as a refugee. Determination of refugee status in Kenya will, therefore, require an evaluation of the applicant's statements rather than a judgment on the situation prevailing in his country of origin. Where a refugee claimant's case is not clear from the

facts on record, it would be necessary to take into account the personal and family background and own interpretation of the situation. The applicant's fear should be considered well founded, if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition or would be for the same reasons intolerable if he returned there.

On the element of 'persecution', noting that persecution is 'the sustained or systematic violation of basic human rights demonstrative of a failure of state protection, noting that a well founded fear of persecution exists when one reasonably anticipates that remaining in the country may result in a form of serious harm which the government will not or cannot prevent, interpreting 'persecution' under the Refugee Act should depend on the circumstances of each case including the subjective elements which require the evaluation of the opinions and the feelings of the person concerned. Interpretation ought to concern itself with actions which deny human dignity in any key way. Systematic denial of core human rights is the appropriate standard of interpreting what amounts to persecution.

The phrase 'membership of a particular group' has not been defined in the Refugee Act. The phrase 'persecution on account of membership of a particular social group' encompasses persecution that is directed towards an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case by case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.

It is important that Kenyan adjudicators considering a claim of persecution on account of membership in a particular social group, determine whether the class of people identified by the asylum applicant is cognizable as a particular social group under the applicable law, whether the applicant qualifies as a member of the group, whether the group has, in

fact, been targeted for persecution on account of characteristics of the group members and whether special circumstances are present that would justify regarding mere membership in the group itself as sufficient to recognize the applicant as a refugee. These guidelines will help in determining refugee status and according protection to those refugees claiming asylum under ‘membership of a particular group’ persecution.

The following definitions of those elements are recommended. First, “well founded fear” may be defined as being established if the applicant can establish to a reasonable degree that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition or would be for the same reasons intolerable if he returned there, considering that country’s human rights record.

Second, “persecution” may be defined as those actions which deny human dignity in any key way and which amount to systematic denial of human rights.

Finally, the phrase “membership of a particular group” may be defined as a member or members of a social group of persons, or a member or members of a particular social group under an applicable law, all of whom share a common, immutable characteristic that has been targeted for persecution on account of characteristics of the group members.

The Kenya Refugee Act makes provisions on the rights and obligations of refugees relating to movement, religion, education, housing, employment, identity papers and travel documents, personal security and the principle of *non-refoulement*, again, in line with relevant international refugee law.

For a comprehensive refugee rights regime, section 16 of the Act should be amended to spell out clear rights that bear directly on refugee protection as follows. These include:

(a) Equality- Kenya’s legislation must comply with the requirement of this provision that its content should not be discriminatory. The legal duty of non-discrimination can be an

effective means by which to address the need to enfranchise refugees on a multiplicity of fronts. To the extent that the main concern of refugees is to be accepted by a host community, a guarantee of non-discrimination might in fact be virtually the only legal guarantee that many refugees require.

(b) Property Rights -Refugees have a right acquire property and are granted this right in equality with other aliens. This is to conform to the 1951 Convention that requires “The Contracting States shall accord to a refugee treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the acquisition of movable and immovable property and other rights pertaining thereto, and to leases and other contracts relating to movable and immovable property”.¹⁰ The Convention grants artistic and industrial rights to refugees as are accorded to national of the host country by providing that “In respect of the protection of industrial property, such as inventions, designs or models, trade marks, trade names, and of rights in literary, artistic, and scientific works, a refugee shall be accorded in the country in which he has his habitual residence the same protection as is accorded to nationals of that country.”¹¹ Kenyan legislation should have specific provision guaranteeing protection of refugees’ property rights.

(c) Access to court – Refugees have access to national courts. However refugees in camps rely on visiting courts to exercise their rights. The Government of Kenya may take measures to increase the number of visiting courts dealing with refugees inside refugee camps, train personnel managing such courts on refugee rights and create awareness of refugee rights amongst refugees.

(d) Right to work - To achieve the full realization of this right, the Government of Kenya should include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment for refugees. Although access to the national labor

¹⁰ Supra, note 1, Article 13.

¹¹ Ibid., Article 14.

market is either denied altogether or extremely limited for refugees due to immigration and aliens laws, refugees who have been accorded refugee status according to Kenya Refugee Act may be accorded the right to work in the same manner accorded to aliens generally. Aliens are limited to work in sectors that require special skills that cannot be sourced locally.

(e) **Freedom of movement** - In order to accord refugees equal treatment with other aliens, there should be a provision on the right of movement for refugees whose status has been determined, to allow them to enjoy the right as other aliens generally. Though the right is derogable, it may be limited only where situations affecting general public order and security arise.

In addition to legal framework, the government should develop and put in place programmes, resource allocations and other arrangements that integrate the goal of addressing refugee rights which should be implemented hand in hand with the legal framework, providing for protection and institutionalized rights-based management of refugees in accordance with international law. If this balance is not struck, the Kenya Refugee Act, may be confronted with utter neglect, while Kenya may continue to pay lip service to refugee protection but do everything possible to ignore refugees in its pursuit of pressing national goals.

Finally, in practice, refugees have often looked to their host country's courts to secure respect for their rights. Even in states where the courts have no role in refugee-status determination, judges have at times intervened for the protection of refugees.¹² The Kenyan judges can be active in grafting remedies for refugees which effectively vindicate Convention rights. There should be judicial activism in refugee protection.

¹² James C. Hathaway, *The Rights of Refugees under International Law*, (Cambridge University Press, Cambridge, 2005), p. 623.

BIBLIOGRAPHY/REFERENCES

BOOKS

Guy S. Goodwin-Gill, *The Refugee in International Law*, 2nd edition, (Oxford University Press, Oxford, 1996).

Ivor C. Jackson, *The Refugee Concept in Group Situations*; (Martinus Nijhoff Publishers, The Hague/ London/ Boston, 1999).

James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, Cambridge, 2005).

James C. Hathaway, *The Law of Refugee Status* (Butterworth, London, 1991).

Jennifer Hyndman, *Managing Displacements; Refugee and the Politics of Humanitarianism* (University of Minnesota Press, Minneapolis, Copyright 2000).