DOMESTIC IMPLEMENTATION OF INTERNATIONAL REFUGEE LAW: THE KENYAN CASE

BY

CATHERINE MUSAKALI

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DECLARATION

I, Catherine Musakali, do hereby declare that this is my original work and has not been submitted and is not currently being submitted for a degree in any other University

CATHERINE MUSAKALI

DATE 1/11/04

This thesis is submitted for examination with our approval as University Supervisors

PROF. GITHU MUIGAI

DATE 1/11/04

AHMEDNASSIR ABDULLAHI

DATE 9/11/2004

DEDICATION

TO MY HUSBAND, DR. PATRICK WABOMBA FOR ALL THE ENCOURAGEMENT, LOVE AND CARE.

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ABBREVIATIONS

AACC	All African Churches Council
ECOSOC	Economic and Social Council of the United Nations
EXCOM	Executive Committee of the Red Cross Commissioner's Programme
ICARA	International Conference on Assistance to Refugees in Africa
ICEM	Intergovernmental Committee for European Migration
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IGADD	Intergovernmental Authority on Drought and Development
IRO	International Refugee Organization
JRSK	Joint Refugee Services of Kenya
KCS	Kenya Catholic Secretariat
NATO	North Atlantic Treaty Organization
NGO	Non Governmental Organization
OAU	Organization of African Unity
PCIRO	Preparatory Commission of the International Refugee Organization
PCJ	Permanent Court of Justice
UN	United Nations
UNDP	United Nations Development Programme
UNESCO	United Nations Economic and Social Council
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNRRA	United Nations Relief and Rehabilitation Administration

UDHR	Universal Declaration of Human Rights
WFP	World Food Programme
WHO	World Health Organization

ABSTRACT

It is becoming increasingly clear that international refugee protection developed since the beginning of the 20th century is under extreme pressure and unless concerted action is taken, the institution of refugee protection will be totally eroded. It is further clear that although modern international law offers refugees a whole plethora of rights covering all aspects of life, there are practical difficulties in implementing these international standards at the national level. In some circumstances, international law has not been translated into municipal law in spite of the states having ratified the various conventions. This is the case in Kenya albeit having drafted a Refugee Bill way back in 1994. In other circumstances, the question of sovereignty is often a stumbling block. The thesis hence suggests that while international legal instruments form an important basis for refugee protection, these instruments alone cannot guarantee refugee protection.

Emphasis should therefore be placed on other ways of ensuring that this state of affairs does not continue. The idea should be to address the circumstances causing refugee outflows. There is therefore need to emphasise what has come to be known as the root causes approach. Promotion of human rights, democracy, eradication of poverty, strengthening peace building operations and ensuring that perpetrators of wars are brought to book are all means to this end. Above all these, promotion of development in underdeveloped countries should be undertaken. In this scenario, prevention is seen as the better option. Countries without a refugee law should also be encouraged to enact one that translates international refugee law in to its municipal law.

"Everyone has the right to seek and to enjoy in other countries asylum from persecution"

Article 14 of the Universal Declaration of Human Rights.

CHAPTER ONE

THE SCOPE OF T HE STUDY

1.1 Introduction

The basic legal framework for the protection of refugees is provided by the 1951 Convention on the Status of Refugees[1] and its 1967 Protocol.[2] These are complimented by a variety of human rights instruments and norms of international law. Explicit and implicit standards for the protection of refugees can be found in such diverse texts as regional human rights instruments,[3] as well as particular Acts of Parliament of the various sovereign states, which have enacted refugee legal regimes and immigration laws.[4]

The strength of these sources is their focus on the individual who must be protected, whose status needs to be determined, whose rights are at stake, and whose refugee related problems need solving. The question is; does modern international law offer the individual refugee adequate protection? To what extent does domestic law and in this particular case, Kenyan law provide the protection envisaged by international law?

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1 189 UNTS 137; Text also in UNHCR, Collection of International Instruments Concerning Refugees (Geneva 1979) pp. 10. Adopted by the United Nations Conference of Plenipotentiaries on 28th July 1951.

2 Entered in to force on 4th October 1967 in accordance with its Article VIII to take care of new refugee situations, 606 UNTS 267. Text also in UNHCR, Collection of International Instruments Concerning Refugees (Geneva 1979).

3 Such as the 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa: 1001 UNTS 46. Text also in UNHCR, Collection of International Instruments Concerning Refugees (Geneva 1979).

4 Kenya has not yet enacted a refugee law.

Once refugees have crossed borders, they become a concern of international law. Their protection lies in states observing their obligations under international law. African countries have in the past adopted a generous policy towards the receiving and granting of asylum to refugees, although this open door policy has changed in the recent past. The major problem facing these countries as regards refugees is that of assisting and protecting these new populations that keep on flowing in to their territories and on the meagre resources that they have. These countries are among the least developed and are under pressure to provide jobs and other social amenities for their own populations leave alone the refugees that keep flowing in.

Kenya, like many states has acceded to the core international instruments, which deal with the protection of Refugees.[5] A special attempt to offer more protection to refugees on the African continent was made through the 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa.[6] However, the concept of refugee protection in the world faces major shortcomings in that there are still some states that have not ratified the international instruments. Moreover quite a small number of states have so far enacted any national legislation on refugees. Kenya is yet to enact such legislation albeit the fact that the Refugee Bill has remained outstanding since 1994, a revised version having been published in October 2003. As such, the

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5 The 1951 Convention Relating to the status of Refugees and the additional Protocol of 1967.

6 Adopted by the Assembly of Heads of States and Government at its sixth ordinary session in Addis Ababa on 10th September 1969, and entered in to force on 20th June 1974.

concept of refugee protection as envisaged by the international instruments has not been realised.

Generally, international protection has been described as including promotion of the admission of refugees, supervision of the application of international conventions for the protection of refugees and promotion of the execution of any measures calculated to improve the situation of refugees and to reduce the numbers requiring protection. This understanding has to be extended to include development as a way of rooting out human rights abuses. This encompasses the idea of tackling the refugee problem at the roots.

International protection also encompasses the prevention *refoulement*, which is the return of refugees to a country or territory in which their life or liberty may be endangered. The determination of refugee status, the grant of asylum, the prevention of expulsion, the issuance of identity or travel documents and the facilitation of voluntary repatriation are all matters of international protection. Further, the facilitation of family re-unions, the assurance of access to educational institutions, the assurance of the right to work and the benefit of other economic and social rights, as well as the facilitation of naturalisation, are all matters of international protection. Of all these rights, the principle of *non-refoulement* stands as the *sine que non* of the search for permanent solutions. It is my submission that these rights cannot be realised unless development both in the country of origin and the country of

asylum are enhanced, and there is an attempt to limit the doctrine of sovereignty which in the past has been used as an excuse by countries to mistreat aliens.[7]

Effective implementation of human rights standards therefore means much more than legislating against interference with the exercise of human rights. States must also act positively by ensuring the freedom to exercise rights through the creation of favourable conditions for their full enjoyment. Apart from ensuring that development is enhanced and the doctrine of sovereignty is balanced against the needs of refugees, it becomes necessary to provide accessible domestic remedies to redress violations if and when they occur. It is therefore necessary to transform international law into national law by way of statutes.

Post independent Kenya has known mass influxes of refugees from her neighbours. Kenya has been at the top of the major asylum countries in the world although she has a fragile economy and is one of the poorest countries in the world. In this scenario, the thesis seeks to establish how well the Kenyan government has met its obligations under international refugee law and what contribution it has made towards the international efforts to tackle the refugee problems.

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7 The East African Newspaper of 8-14 September 2003. Uganda used the excuse of sovereignty to move refugees closer to the border while UNHCR argued that this action would expose refugees to greater danger. It worth noting

1.2 The Study Problem

As stated above, Kenya is yet to enact a Refugee Act although a Refugee Bill was drafted way back in 1994. The Bill was substantially revised so as to conform more to the international refugee regime and published in October 2003. The said Bill is still pending enactment. In this scenario, the study examines the failure of the Kenyan Legal system to formulate a regime of protection for refugees that is consistent with international law. In the first instance therefore the study will consider whether modern international law offers refugees adequate protection.

1.3 Hypotheses

The study will test the following hypotheses;

a) That although international refugee law offers refugees a whole plethora of rights covering all aspects of life, there are practical difficulties in realising these rights.

b) That Kenyan law in the protection of refugees has fallen short of contemporary international law standards.

c) That international refugee regime has no mechanism and mandate to prevent refugee outflows before they happen and the United Nations High Commissioner for Refugees (UNHCR) is only mandated to act after an outflow has taken place.

d) That the state of the economy of the countries of origin and asylum are key to the refugees' realisation of their full rights under international law.

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that the 1969 OAU Governing the Specific Aspects of Refugee Problems in Africa in its Article 2 requires member

e) That Kenya lacks an institutional, policy and specific legal framework to deal with refugee issues.

f) That Kenya's response to the refugee problem has not been consistent in the absence of such a framework.

g) That the question of sovereignty has remained a major concern in the realisation of refugee rights.

1.4 Objectives of the study

The study seeks to reaffirm the position that although at the international level refugees enjoy substantial rights as set out in the various instruments, there are practical difficulties of implementing international standards at a national level unless and until each country takes the initiative of translating international refugee law in to its own law by enacting a statute that would deal with the refugee question. The objectives of the study are therefore;

a) To delineate the statement of the rights of refugees under international refugee law;

b) To look at the history of international refugee law;

c) To analyse Kenya' s response to the refugee problem;

d) To consider the proposed refugee law in Kenya;

e) To offer suggestions on how refugees would be better protected.

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states to settle refugees at reasonable distances from frontier of their state of origin.

1.5 Study justification

This study is justified on the following grounds; In the first instance it addresses a very important and often neglected area of the domestic implementation of the international refugee regime, that is the manner in which Kenyan law has responded to the challenge of according refugees protection that is consistent with international law. The study seeks to highlight the inadequate protection of refugees in Kenya, and will therefore provide useful information for policy makers to formulate policies that in as much as possible reflect the aspirations of the international refugee regime. Secondly, the study will provide useful knowledge in the area of refugee protection, as it will highlight the limitation of law in solving a social-political problem. It is therefore hoped that it will re-direct the thinking of policy makers towards the search for durable solutions to the refugee problem. Thirdly, for scholars and researchers, the study will add to the body of knowledge and form the basis for further research.

1.6 Research methodology

This study is mainly based on primary and secondary data sources. The 1951 Convention Relating to the Status of Refugees, the 1967 Protocol Relating the Status of Refugees, the 1969 OAU Convention Governing Specific Aspects of Refugee problems in Africa as well as other sources of international refugee law will be examined. Relevant UNHCR materials and records will also be examined. Unstructured interviews will be carried out with Officers of UNHCR as

well as relevant government officers for first hand views on some of the materials.

1.7 Literature review

There is a lot of literature written in this area of refugees. A number of legal scholars have focused their studies principally on the UNHCR Statute and the legal provisions of national and international refugee instruments pertaining to refugee definition, asylum and protection. It is interesting to note that most of these works have not addressed the question of nationalizing international law. Much of the existing literature is descriptive with scholars mainly concentrating on the refugee situations and policies of individual countries. Researchers have focused mainly on European, Cuban and Indo-Chinese refugees and on the resettlement, integration and economic impact of refugees. I will proceed to consider some of the literature reviewed.

Paul Weis[8] has done considerable work on the rights of refugees and the international protection accorded them. In his various works, he sets out the main principles, which have emerged by the practice of states as expressed in the international instruments established and the activities of the international agencies created. His view is that the instruments established, make law *interpartes* only, or are partly not legally binding. He argues that although the international agencies created for the protection of refugees have no means

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8 Weis, P., "The Legal Aspects of the Convention of 28th July Relating to the Problem of Refugees," 30 British Yearbook of International Law, 1953, p.470. See also, Weis, P., "The International Protection of Refugees," 48 American Journal of International Law, 1954, pp.193-221.

of enforcement at their disposal, their establishment marks a new method of international supervision of the rights and interests of individuals.

Guy S. Goodwin-Gill[9] has also done considerable study in the area of refugees. He defines the foundation and the framework of refugee law by concentrating on three core issues; the definition of a refugee, asylum for refugees and refugee protection. He sets out to show that refugees are a class known to and defined by general international law. He further states that certain legal implications follow from the existence of this class. He asserts that the international community besides being responsible in a general sense for finding solutions also has the necessary legal standing to protect refugees. He does not however say whether these measures are adequate or not and neither does he have an African country base. He presents a particularly useful discussion on the principle of *non-refoulement*.

In yet another study,[10] Goodwin-Gill examines the general law relating to refugees and the concept of *non-refoulement* and explains some of the legal implications that flow from the application of *non-refoulement* to persons fleeing from civil strife. He proposes certain standard of response to situations of mass involuntary movements. He opines that the essential moral obligation to assist refugees and to provide them with refuge has over time and in certain

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9 Goodwin-Gill G.S., The Refugee in International Law, 1st edition, Oxford Clarendon Press, 1983. See also, Goodwin-Gill G.S., International Law and the Movement of Persons Between States. Oxford Clarendon Press, 1978.

10 Goodwin-Gill G.S., " *Nonrefoulement* and the new Asylum Seekers" in David A. Martin(ed.) The New Asylum Seekers: Refugee Law in the 1980s, The ninth Sokol Colloquium on International Law. Martinus Nijhoff Publishers, 1986, p.103.

contexts developed into a legal obligation despite the relatively low level of commitment from states. He proposes that what is needed to solve the refugee crisis is a strong framework of humanitarian principles bringing together various common values.[11]

Goodwin-Gill traces the emergence and development of the concept of international protection from the time of the League of Nations, through the period of the IRO in yet another of his works.[12] He examines the practice of states and UNHCR and identifies the integral link between protection and human rights. He also considers the protection concept in the United Nations (UN) practice and compares UNHCR's protection role with that of the International Committee of the Red Cross (ICRC). He concludes that for protection to be truly effective, the objective must be to re-establish the refugee with a community. [13]

Robert Gersony[14] looks at the root causes of refugee flows between Ethiopia and Somalia. He considers the problems of internal displacement, disruption of UNHCR refugee camps, protection issues and the prospects of repatriation. He finds that armed conflicts are the major causes of refugee outflows in Somalia.

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11 *Ibid.* p. 113.

12 Goodwin-Gill G. S., "The Language of Protection," International Journal of Refugee Law, Vol.1 No. 1, 1989, p.6.

13 *Ibid.* p.17.

14 Gersony R., "Why Somalis flee: A synthesis of conflict experience in Northern Somalia by Somali Refugees, Displaced persons and others," International Journal of Refugee Law, Vol 2 No. 1, 1990, p. 4.

Gregg Beyer[15] argues that monitoring and reporting are essential if future refugee flows are to be averted. He identifies some problems of protection such as the narrowness of institutional mandates and the absence of effective bridges between governmental, international and non-governmental agencies. [16]

Toby Mendel considers refugee flows in to Tanzania and the response of Tanzania's authorities.[17] He concludes that Tanzanian law and practice which broadly conform to the 1969 OAU Convention, breach significant obligations imposed by the 1951 Convention and that many of the 1951 Convention's social and political guarantees are largely irrelevant either because no protection is provided to the refugees in Tanzania or refugees in Tanzania are not in a position to make use of the guarantees. [18]

Subrata Chowdhury[19] examines some of the priority issues in refugee law, humanitarian law and human rights law. He also considers international protection versus non-intervention in the domestic affairs of a sovereign state. He argues that intervention must still be within the framework of an international or regional convention, except in cases where gross or consistent

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15 Beyer A. Gregg, "Human Rights monitoring and the Failure of Early warning: A Practitioner's View," International Journal of Refugee Law, Vol 2 No. 1, 1990, p. 56.

16 *Ibid.* p. 72

17 Mendel, D. Toby, "Refugee Law and Practice in Tanzania," International Journal of Refugee Law, Vol 9 No. 1, 1997, pp. 35-59.

18 *Ibid.* p.35.

19 Chowdhury, R. Subrata, "A Response to the Refugee Problems in Post Cold War Era: Some existing and Emerging norms of International Law," International Journal of Refugee Law, Vol 7 No. 1, 1995, pp. 100-18.

patterns of abuse of human rights amount to a threat to or breach of the peace.

The United Nations High Commissioner for Refugees in their various works[20] seek to define the current agenda of refugee protection. In the various articles, they look at the issues that the international community needs to address in its endeavour to protect refugees. The question of asylum is critically looked at with suggestions as to how it can be preserved. It is their submission that the question of protection cannot be looked at outside the broader context of political initiatives to promote peace, human rights and development.

Robert F. Gorman[21] considers the special burden of refugees borne by African countries. He provides general background information on the refugee problem in Africa and describes in detail the Second International Conference on Assistance to Refugees in Africa (ICARA II) in 1982, which sought to increase international attention to the refugee situation in Africa and to increase the assistance given to African countries to bear this special burden.

Again in his work jointly with Gaim Kibreab,[22] Robert Gorman discusses the link between repatriation, aid and development assistance. They proceed

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20 Being the single international body mandated to deal with refugee issues, the UNHCR has researched and written extensively on refugees. Some of their works are considered and are listed in the Bibliography.

21 Robert F. Gorman, Coping with Africa's Refugee burden: A time For Solutions. Martinus Nijhoff Publishers, 1987.

22 Robert F. Gorman and Gaim Kibreab, "Repatriation Aid and Development Assistance" in J.C Hathaway (ed.). Reconceiving International Refugee Law. Martinus Nijhoff Publishers, 1997, pp. 35-51.

on the premise that there is an important connection between flight, return and development and that development is best carried out by the local community. They argue that a regime of temporary asylum and repatriation is only feasible if the international community actively engages in addressing the root causes of refugee outflows and brings diplomatic pressure to bear on warring factions to resolve their disputes. They call for a rethinking of the traditional solutions to refugee problems if the institution of asylum is to be salvaged. Theirs is a general overview on contemporary durable solutions with no reference to any specific country.

B.S. Chimni provides a good introduction to refugee law.[23] He considers in great detail the mandate and functions of the UNHCR and the various definitions of the term refugee. In so doing, he analyses the works of various authors. He also does consider the concept of durable solutions as discussed by various authors. He however does not analyse the laws or case law of individual countries and hence does not consider the nationalisation of international law.

Njogu E. Muthoni[24] considers rudimentarily the rights of a refugee in international law. She further narrows down to consider the rights of a refugee by referring to the relevant provisions of the 1951 UN convention relating to the status of refugees and to other notable international instruments such as the 1967 Declaration on Territorial asylum, the Universal Declaration of Human

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23 B.S. Chimni, (ed.), International Refugee Law: A Reader, Sage Publications India Pvt Limited, New Delhi, 2000.

Rights as well as the 1969 OAU convention on refugee problems in Africa. She does not however state whether the various conventions are adequate or not, neither does she concentrate on refugee issues in Kenya.

Oduge J.A.[25] Observes that although many African countries have ratified the OAU convention, many of these countries have not adjusted their domestic legal regimes to reflect the requirements of international law in the protection of refugees and many times treat refugees just like any other aliens. Oduge however does not zero in on the Kenyan case.

Kirii A. N.[26] considers the refugees' right to work and notes that this right has not been expressly provided for in the Kenyan constitution and that Kenya therefore does not enforce the international law requirements with regard to the right to work. His thesis is restricted mainly to the right to work and does not therefore give a general overview regarding refugee rights.

Mayabi M. N.[27] argues a case for the protection of refugee women. He notes that although Kenya has an open door policy towards refugees, it lacks a proper legislative framework for the protection of refugees. He does not however discuss in any detail the proposed Kenyan law vis-à-vis the international requirements.

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24 Emma M. Njogu, "The Refugee Problem in Kenya," Unpublished Dissertation, University of Nairobi, LL.B, 1993.

25 Oduge, J. A, "Refugees in Africa: Legal, Social and Economic Aspects," Unpublished Dissertation, University of Nairobi, LL.B, 1995.

26 Kirii, A. N, "The Right to Work for Refugees," Unpublished Dissertation, University of Nairobi, LL.B, 2002.

Njuguna Catherine[28] comes closest to discussing the topic at hand. She notes that Kenya has no specific refugee legislation having drafted a Refugee Bill way back in 1994. She considers in detail the criteria for determining refugee status under the international instruments with an emphasis on special groups such as women and children. She sets out the UNHCR policy on women and children and UNCHR's role in the education of refugees. She does not consider the proposed Refugee Bill in detail neither does she state whether the international refugee regime is adequate. She does not also consider the evolution of the international refugee regime.

Kithure Kindiki[29] examines the dilemmas posed by international humanitarian intervention in trouble spots *vis a vis* the question of state sovereignty. He concludes that the evolving world order has led to the legalisation of the principle of humanitarian intervention for the protection of fundamental human rights hence an erosion of the doctrines of state sovereignty and non intervention in a state' internal affairs.

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27 Mayabi, M. N, "Refugees Rights: A Case for Legal Protection of Refugee Women," Unpublished Dissertation, University of Nairobi, LL.B, 2002.

28 Njuguna, N. Catherine, "The Legal Status of Refugees in Kenya," Unpublished Dissertation, University of Nairobi, LL.B, 2001.

29 Kithure Kindiki, Humanitarian Intervention and State Sovereignty in Africa: The changing paradigms in international law, Occasional Paper Series Vol. 1 No. 3, Moi University Press 2003.

Julia Hausermann[30] looks at the failure of the international community to adequately address the root causes of displacement. She argues that the current international framework of refugee protection was designed to deal with the particular problems of refugees displaced by the Second World War and that it was never designed to be an all embracing framework for addressing the problems of displacement in their entirety. She states that refugee problems are but symptoms of other underlying problems. She goes on to consider some of the causes of refuge outflows and the reluctance of the international community to deal with root causes. She calls for greater attention to a root causes approach noting that the enforcement mechanisms for human rights law are notoriously weak.

Carmen Tiburcio[31] examines the rules dealing with the treatment of aliens in the international law arena and analyses the extent to which these rules have been adopted in the domestic arena of various European nations. He defines the status of aliens under international law by identifying the rights granted to aliens and determines whether these rights have been adopted in the domestic legislation of the various nation states. His is a European approach and he does not consider the situation in Africa.

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30 Hausermann Julia, "Root Causes and Displacement: The Legal Framework for International Concern and Action," in Dilys M. Hill (ed.), Human Rights and Foreign Policy: Principles and Practice, Martinus Nijhoff Publishers, 1989, p. 140.

31 Tiburcio Carmen, The Human Rights of Aliens under International and Comparative Law, Martinus Nijhoff Publishers, 2001.

Van Selm-Thorburn[32] considers the concept of refugee protection in Europe and concludes that the evolution of refugee protection in Europe will continue and recommends that its progress should involve the search for a mechanism of short-term protection for those forced to flee conflict. He opines that the mechanism should take in to account the cause of flight and the nature of European co-operation and co-ordination.

Jackson Ivor[33] examines the manner in which the international community has dealt with various refugee groups from the standpoint of the refugee definition. He considers the essential difference that exists in cases where refugee status is determined individually or on a group basis and whether this has any impact on the perception of the refugee problem.

Jennifer Hyndman and Bo Viktor Nylund[34] explore some of the *ad hoc* strategies employed by UNHCR to assist refugees in Kenya. They consider the use and arguable abuse of what they refer to as *prima facie* refugee status[35] as a tool in managing large movements of displaced people who cross an international border into Kenya. They discuss the restricted mobility and entitlements of *prima facie* refugees in Kenya and some of the *ad hoc* strategies employed to assist refugees in Kenya. They conclude by stating that

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32 Van Selm-Thorbun, J., Refugee Protection In Europe: Lessons of the Yugoslav crisis, Martinus Nijhoff Publishers, 1998.

33 Jackson, Ivor C., The Refugee concept in Group Situations, Martinus Nijhoff Publishers, 1999.

34 Hyndman, J. and Nylund, V.B., "UNHCR and the Status of *Prima Facie* Refugees in Kenya," International Journal of Refugee Law Vol. 10 No.1/2, 1998, pp. 22-48.

35 Ibid. p.29. They define this as determination of eligibility based on first impressions, or in the absence of evidence to the contrary.

these measures are in no way long term and that there is need for long-term solutions. They do no consider the proposed Kenyan law neither do they analyse Kenya's response to the refugee problem in detail.

From the foregoing, it is clear that the question of the domestic implementation of international refugee regime vis-à-vis the lack of a legislative framework in Kenya has not been considered in detail. The proposed Refugee Bill in Kenya has also not been considered with any detail and it is this gaps that the author aims to fill. The author therefore will focus on the failure by the Kenyan legal system to provide a regime of protection for refugees that is consistent with international law. The thesis will therefore aim to show that Kenyan law on the protection of refugees in the absence of a refugee specific legislation falls short of contemporary international law standards.

1.8 Chapter outline

Chapter two considers the history and evolution of refugee law through the various conventions, considering the various questions that these conventions seek to tackle.

Chapter three examines the specific attempts by the Kenya Government to deal with refugees. The chapter further considers how Kenya has responded to the international requirements of affording refugees adequate protection.

Chapter four considers the proposed Kenyan refugee law and analyses the Bill's compliance with international law requirements.

Chapter five identifies the challenges of refugee law and offers a few suggestions on how the refugee can be better protected.

I will conclude the thesis in chapter six.

CHAPTER TWO

THE INTERNATIONAL LEGAL REFUGEE REGIME

2.1 Introduction

The Refugee regime is as old as man himself. As such in the early days, there was a well-established, albeit by no means universal tradition of asylum.[1] Owing to his fallen nature, man has always tried to assert his power over his fellow men largely through warfare. Those repelled by such domination are forced to flee if they cannot match his power, hence the emergence of refugees. Looked at globally, refugees are a barometer of the current state of civilisation.[2] The existence of refugees generally indicates a lack of fundamental human rights in the country of origin.[3]

The earliest significant refugee problems were in the so-called great peoples migration in the wake of the fall of Rome.[4] Thousands fled to escape the invading savages from the North. By 900 A.D however, such movements in Europe had more or less ceased and people resettled although only for a short while.[5]

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1 As long as there have been wars, persecution, discrimination and intolerance, there have been refugees. Refugees are of every race and religion and can be found in every part of the world. On this, see UNHCR, A Great Tragedy of Our Time, Oxford University Press, 1992. See also, Grahl Madsen, Territorial Asylum, Almoquisd & Wiksell International, 1983, p. 3.

2 See a report entitled Refugees - Victims of Social Disintegration of the world summit for social development, (Copenhagen Denmark 6 -12 March 1995) p.1.

3 This is because refugees are the ultimate result of social disintegration. They are the last most obvious link in a chain of causes and effects that define the extent of a country's social and political breakdown. *Ibid*, note 2 p.2.

4 Grahl Madsen, The Status of Refugees in International Law Leiden - Sijthoff, The Netherlands, 1967.

5 For an account of the effect of asylum on the naturalisation law of the US, see Grahl Madsen, " The European Tradition of Asylum and the Development of Refugee Law," Journal of Peace Research. 1966, pp. 278-89.

The medieval era saw the re-emergence of forcible removals and rights of religious groups as the church began to split. These were the so-called ethno-religious refugees. Entire religious entities could be uprooted, exiled or deported by secular or religious authorities in an effort to enforce conformity. The world was divided into catholic and Protestant realms, which were diametrically opposed concepts. In 1492 for example Spain expelled some fifteen thousand Jews, while the catholic kingdom of France reviolated the edict of Nantes in 1685 making the lives of four hundred thousand protestants unbearable.[6] The French revolution of 1785 gave the practice of granting asylum a new dimension in that the world no longer divided only into catholic and protestant realms but also in to kingdoms and republics with contrasting political concepts.[7] The aristocratic refugees from France were followed by untold legions of political asylum - seekers of the most diverse political outlooks.[8]

As a result, many became homeless and were separated from their families. Always owing to underdeveloped infrastructure and prolonged severe winters, thousands of refugees would die before reaching their destinations. Those who found refuge found it difficult to be assimilated into new cultures, alien languages and strange lifestyles. Moreover, state frontiers were jealously guarded hence making entry difficult. Nonetheless, the granting of asylum was

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6 Again in 1685, Louis XIV the son of the King of France repealed the edict of Portsdam, whereby French Huguenots were given every facility to establish themselves in his territories. The modern European traditional asylum is soundly based on the writings of the founders of International law, not least Hugo, Grotius and Emmerich de Vattel.

7 Grahl Madsen *Supra* note 5.

8 *Ibid.*

at that time considered honourable hence the refugee problem remained largely insignificant.[9] As such, refugee protection law remained basically a municipal issue with different states having peculiar asylum practices based primarily on humanitarian principles.[10] Refugees were distinguished into three categories *viz*; those who did not want to subject themselves to a new regime established in their home country; the innocently persecuted and the political offenders.[11] The rule that political offenders should not be extradited found legal expression for the first time in the Belgian law on Extradition, 1833, which eventually set an example for similar legislation in other countries such as France, Britain, United States of America and Italy. At that time Africa had not been partitioned and was more or less non-existent in the political world map in as far as established legal systems relating to refugees were concerned. [12]

At the international level, the rule that political persecutees should not be extradited was incorporated in the Belgo - French Extradition Treaty of 1834 and later found its way into other treaties.[13] The Institute of international law in Article 13 of its Oxford Resolutions, 1880, proclaimed that extradition shall not take place for political acts.[14] In 1892 the institute expressed the view that whereas extradition and expulsion are different and mutually independent

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9 Goodwin – Gill, G. S., International Law and the Movement of Persons Between States, Clarendon Press, Oxford, 1978.

10 In Africa, liberal asylum policies have existed, with hospitality towards refugees. This is largely due to the commonly shared and binding historical cultural ties among the African Peoples.

11 *Supra*. Note 4.

12 On the partition of Africa and a readable history on pre-colonial Africa see Walter Rodney, How Europe underdeveloped Africa, Heinemann Kenya Limited, Nairobi, 1989.

13 Hyndman, P., An Appraisal, of the Protection Afforded to Refugees under International Law , Lawasia (NS), 229 pp.79-81.

14 *Ibid.*

measures, a refugee should not by way of expulsion be delivered up to another state that wanted him, unless the conditions set forth with respect to extradition were duly observed.[15] Compared to the situation today it could as well be argued that the refugee population at the end of the eighteenth century was manageable and both the municipal and international legal refugee regimes in place at the time though rudimentary served well to cater for the refugee issues.

In the 19th and 20th centuries there was greater reluctance to admit refugees because of the issue of state sovereignty and the fixed and closed state frontiers. The exercise of exclusive power over a territory by a state is a fundamental axiom of classical international law.[16] More emphasis lay in encouraging nationalism and homogeneity of states. As a result wandering persons of no fixed abode were discriminated against and despised. The ability to find temporary refuge let alone resettlement became difficult. The situation was aggravated by growing secularism and indifference to human suffering and utter disregard for positive religious principles. This was so even where the refugees had deep roots in the host country. Hitler's Third Reich for example deprived some sixty thousand Jews in Germany of their citizenship and eventually deported them. By the 1920's and 1930's the traditional treatment and protection given to refugees had nearly broken down as asylum countries

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15 *Ibid.*

16 Oppenheim L. F. L, International Law, Vol. I, 8th edition, London, Longmans, 1955, p.451

showed great fatigue. The question of state sovereignty of course complicated matters.[17]

The new forms of warfare complicated the situation.[18] Whereas earlier on wars were largely inter - tribal and inter-state, the 20th century experienced two global wars, which displaced more that twenty million people across the world.[19] The wars contributed to the creation of more sophisticated weaponry, which have in turn been used to precipitate civil wars in such countries as Angola, Sudan, Somalia, Rwanda, the former Yugoslavia, Vietnam and Afghanistan.[20] By way of an example, when the United States of America and its allies invaded Iraq in 2003, it was on the basis that Iraq was harbouring weapons of mass destruction.[21]

The refugee problem escalated due to political aggression. Persons suspected of subversive activities aimed at undermining the existing political regimes would find themselves forced to leave their own countries. In the 1960s the communist Fidel Castro Cuban regime expelled over one million capitalist Cubans who fled mainly to the United States of America, their chief sympathiser.[22] Approximately, 1.5 million opponents of the 1917 Russian

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17 Shaw M N , International Law, 2nd edition Grotius Publications Ltd, Cambridge, 1986, pp 12, 25 and 40.

18 The 20th century has seeen complicated forms of warfare ranging from nuclear and biological warfare to landmines with capacity to destroy and annihilate millions.

19 UNHCR, The State of the World's Refugees - in Search of solutions, Oxford University Press, 1995. See the introduction by Sadako Ogata the then High Commissioner at p.1.

20 *Ibid.* p.3.

21 The world has progressively moved from simple weapons such as bows and arrows to sophisticated weaponry such as nuclear weapons.

22 The US Refugee Act (Section 203(a) 7) specifically makes provisions for a yearly quota of refugees from communist dominated countries. Under the quota system, would be refugees from non-communist states, must be victims of

Revolution and its post revolutionary Gulf war had to flee owing to their non-conformist attitude.

Another factor that precipitated the global refugee Crisis was territorial alignment particularly in Europe after the Second World War. When existing territorial sovereignties were partitioned and vested in other governments, some of the subjects who did not support these governments had to leave. The post Cold War partition of defeated Germany saw East Germany being administered from communist Moscow.[23] This triggered the exodus of more than three million Germans towards the west before the Berlin wall effectively sealed them off.[24] Elsewhere in the world, political changes were also creating new refugee movements. Religious fighting in India and the eventual emergence of Pakistan in 1948, created millions of refugees. In the Middle East the establishment of the state of Israel absorbed Jewish refugees from Arab and European states but ironically, it simultaneously produced one of the largest refugee movements of this century in that 750,000 Palestinians were forced out of their homes and into neighbouring countries such as Jordan, Syria, and Lebanon.[25]

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political, racial or religious persecution. Thus over one million Cuban refugees were welcomed and registered by the US authorities in a spectacular efficient 'freedom flight' air lift between 1965-77.

23 On this see generally Vernant Jacques, The Refugee in the Post War World, Yale Press, New Haven, 1953.

24 *Supra* note 4 p. 2.

25 Palestinians in camps continue to occupy the uniquely recognised position of 'Permanent Refugees' under the special protection of the International Community under the Aegis of the United Nations Relief and Works Association - UNRWA. On this see Goodwin – Gill, G. S., The Refugee in International Law , Clarendon Press, Oxford, 1983, pp. 56-70. See also *Supra* note 4. To deal with the human displacement in both Greece and Turkey, half a million Turks were exchanged with a similar number of Greeks moving to the opposite direction, with the League of Nations providing compensation to help both groups reintegrate. This ambitious and controversial scheme took eight years to complete.

2.2 The League of Nations and the Refugee Problem

The escalating number of refugees attracted international response as early as 1917. Large Multitudes of displaced people drew international concern rejuvenating the desire for concerted efforts to quell the problem as no single nation could offer a suitable solution. The immediate upshot of the First World War was the establishment of the League of Nations.[26] Mandated to settle disputes, this therefore offered the first global forum of tackling the refugee problem.[27] In 1921, the Council of the League of Nations decided to appoint a High Commissioner for Russian refugees whose tasks included defining the legal status of refugees, organising their repatriation or allocation to potential resettlement countries, finding refugees employment and undertaking relief work with the aid of philanthropic societies. In 1924 the mandate of the High Commissioner was extended to Armenian refugees and in 1929, to other categories of refugees.[28] During these years, the League of Nations tackled the refugee problem on an *ad hoc* basis as it extended the mandate of the High Commissioner as new refugee situations arose.

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26 Nussbaum Arthur, A Concise History of the Law of Nations. American-Swiss Private International Law, 2nd edition, New York, Oceana publications, 1958.

27 Under Article 23 Members of the League undertook to co-operate in undertaking to secure the just treatment of the native inhabitants and under Article 25 the members of the league agreed to encourage and promote the establishment and co-operation of the duly authorised voluntary national Red Cross Organisation having as its purposes the improvement of health, prevention of disease and the mitigation of suffering throughout the world. For a detailed account of the League's works on the betterment of life for all see F.S. Northedge, The League of Nations - its Life and Times - 1920 – 46, Leicester University Press, 1986.

28 Guy S. Goodwin Gill, *Supra* note 25 p.127.

Initially, little attention was given to the identification and definition of a refugee, as it was upon an individual country to decide who was a refugee or not, depending on her own criteria. However, the League of Nations, defined a refugee as someone outside his country of origin and without the protection of the government of that state and who had not acquired another nationality. This definition remained in force until the 1951 Convention on Refugees whose definition was itself an enhancement of earlier definitions by bodies such as the League of Nations and the International Refugee Organisation (IRO), and the Intergovernmental Committee for European Migration (ICEM). The IRO was set up in 1946 to take over the work of resettlement, care and maintenance of refugees from the United Nations Relief and Rehabilitation Administration (UNRRA) and the Intergovernmental Committee for Refugees (IGCR). ICEM, instituted in 1951 continued the IRO work of promoting migration including that of refugees from Europe. By then a refugee was seen as somebody who, owing to religious persecution or political troubles, seeks refuge in a foreign country. This definition was originally applied to the French Huguenots who came to England after the revocation of the Edict of Nantes in 1685.

However, the global nature of the refugee problem necessitated a much more encompassing definition of a refugee in place of the hitherto piece meal ones. There were attempts to recognise certain groups as refugees. One of such attempts was in the provision of the Nansen passport to refugees. The Nansen passport was a document issued to all recognised refugees as an effort in the assistance and repatriation of around three million

prisoners taken during the First World War and scattered through Russia by revolution and civil war.[29] The Nansen passport was the brainchild of Fridjof Nansen who became the League of Nations High Commissioner for refugees in 1926. The Organisation which Nansen built up formed the foundation stone for all the later international relief work for refugees. The Nansen passport facilitated easier movements to countries of asylum and acted as the identification document, as the mere possession of it by a person entitled him to refugee status and for that matter assistance. With the Nansen passport developed the arrangements relating to the legal status of Russian and Armenian refugees in 1926.[30] These were otherwise called the Nansen refugees. In 1929 the mandate of the High Commissioner for Refugees was extended to other categories of refugees including Assyrians, Assyro Chaldeans, Syrians, Kurdish and Turkish refugees. By a convention relating to the international status of refugees of 28th October 1933 the contracting parties assumed obligations towards Russian and Armenian refugees.[31]

These *ad hoc* arrangements were severely limited in their definitions, scope and mode of operation and often related to victims of civil warfare whereas human displacement was and is a result of a combination of other catastrophes, which include but not limited to warfare. The inter war period marked an unprecedented rise in nationalism in Europe, with states closing

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29 *Supra* note 21 p.1.

30 Guy S. Goodwin-Gill, *Supra* note 25 p.12

31 Agreement Concerning the functions of the representatives of the League of Nations High Commissioner for refugees, 93 LNTS No. 2126.

their borders to nationals of other states, dealing a further blow to the rather fragile refugee regime existing then.[32]

The number of refugees therefore, quadrupled with over six million refugees and displaced persons in Europe alone in 1945.[33] There was therefore a need to evolve a comprehensive regulatory law that would ensure successful settlement of refugees. At the onset, the Nansen protection office of refugees partook of this task but it was wound up in 1938 and the High Commissioner's office was charged with providing political and legal protection, superintending the entry into force of the relevant conventions, co-ordinating humanitarian assistance and assisting governments and private organisations in their efforts to promote immigration and permanent settlement.[34] Though the High Commissioner's office for refugees had a grand agenda, it lacked institutional capacity and an enabling environment under which to realise its noble objectives. This is so, because the League itself had limited resources *vis- a- vis* its needs and therefore lacked adequate institutions to handle the escalating refugee population. Moreover, more Nationalism was on the rise in 1938 and the world was gradually sliding to war.[35]

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32 During the reign of Hitler in Germany over six million people were annihilated in a genocide exercise meant to clear Germany of people of Jewish origin.

33 *Supra* note 21, p.2.

34 League of Nations O J special supplement no.189 (1938)86. Finally, in this period, as a result of the thirty-two nations Evian Conference which met in July 1938 on the initiative of the USA, the intergovernmental Committee on Refugees was established with its functions being defined in a resolution adopted on 14th July 1938. Text in; A Study of Statelessness, 1949, UN doc E/1112 and add 1, 116-118.

35 For an in-depth study on the strengths, weaknesses and reasons of why the league failed see Northedge F.S., The League of Nations - It's Life and Times - 1920 – 46, Leicester University Press, 1986.

In 1938 undeterred by earlier experiences in seeking a solution to the refugee problem, Franklin Delano Roosevelt, the then president of the United States of America invited thirty two governments including Britain, Russia, Germany, Italy and some Latin American countries, to discuss the possibility of formulating a proper refugee law. The attempt was a complete flop as there was no positive response from governments. The reasons floated for this failure were that, not only were governments reluctant to financially support such a project, but they also resented assimilation of aliens in to their countries. Moreover a comprehensive refugee legal regime would have sought to address the refugee issue from the very source, that is the country of origin, which would have meant attacking sovereignty head-on. This was unthinkable at that time.[36]

A similar unsuccessful attempt was made by the Intergovernmental Committee of Refugees. However, in 1943, a conference of forty-four nations convened in Washington DC and this resulted in the signing of a Charter of a new international body – The United Nations Relief and Rehabilitation Administration (UNRRA). This body was set up to assist and eventually repatriate those displaced by the conflict caused by World War II, and specifically the seven million anti-Nazi and anti-farcist victims. Like its predecessors, it had a limited scope of operation and had very few signatories.[37] The body's functions and nature were not articulate nor were states legally bound to comply with its provisions, whose vagueness was abundantly clear. In addition

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[36] See Shaw M N, International Law, 2nd edition Grotius Publications Ltd, Cambridge, 1986, pp.12, 25 and 40.

the charter did not set out a concise definition of a refugee and so persons not strictly refugees were accorded the same status as refugees. UNRRA had power to compel refugees even with valid objections to return to their countries of origin even if doing so would expose them to persecution.[38]

This was a great blow to the principle of *non-refoulement*, by which no refugee with valid objections to returning to their countries of origin should be compelled to do so. This Principle was recognised by the UN in 1946 and is today enshrined in Article 33 of the 1951 Convention Relating to the Status of Refugees and Article 13 of the Covenant of Civil and Political Rights as well as Article 14 of the Universal Declaration of Human Rights (1948).[39] In 1946, the UN created the International Refugee Organisation (IRO) and its Preparatory Commission (PCIRO), which functioned until 1952, when its main functions were taken over by the office of the UNHCR.

The preamble of the IRO Constitution spelled out as its function, repatriation, identification, registration, classification, care and assistance, legal and political protection, transport, resettlements, and re-establishment of persons of concern to the organisation. The IRO like its predecessors was also an *ad hoc* arrangement and had various limitations. It had not been articulated whether the body was to be political or humanitarian and

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37 UNRRA had no signatories from Africa, Asia and Latin America.

38 This remained the position until 1946 when UN adopted resolution 319 (IV) stressing that no refugee or displaced person who had expressed valid objections to returning to his country should be compelled to do so thus laying ground to the right of *non-refoulement* which has grown to the status of a *Jus Cogen.*

governments were unable to co-ordinate the process of granting asylum. Besides, a precise scope of refugee protection had not been formulated. The IRO existed to deal with the aftermath of the Second World War and the immediate consequences of political change until 1952. It is noteworthy that even during the lifetime of IRO, the United Nations General Assembly (UNGA) acknowledged the need for a more encompassing IRO successor organisation, obviously dissatisfied with the potential and efficacy of *ad hoc* arrangements to deal with the escalating problem of refugees which now enjoyed some degree of permanence. Consequently, way back in 1948, the work on drafting a much more comprehensive instrument with a sense of permanence had started, and in 1949, the General Assembly established a High Commissioner's office for Refugees.[40] This office was to facilitate the proper implementation of the Geneva Convention Relative to the Protection of Civilian persons in time of war,[41] which convention required host states not to treat as enemies, aliens and refugees from an enemy state.[42]

The present international refugee legal regime is composed of both universal and regional instruments.[43] These instruments are quite a number and

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39 *Ibid.* See also Resolution 14(1967) on asylum to persons in danger of persecution, adopted by the Committee of Ministers of the European Economic Union on 29th June 1967.

40 The office was formed by virtue of resolution 319(IV) of 3rd December 1949 and is governed by the statute of the office of the UNHCR, which was adopted by the General Assembly on 14th December 1950.

41 Passed on 12th August 1949 - The protocol relating to the Geneva convention in regard to the protection of victims of international conflicts.

42 UNHCR statute, chapter 1 paragraph 1 - Generally, laws regulating the protection of refugees have aimed at voluntary repatriation or assimilation in new national communities, with the latter encompassing either integration in the country of first refuge or settlement in a third state.

43 The major international legal instruments which form the basis for refugee protection are the 1951 convention to which 45 states have acceded and its 1967 protocol which has 46 Accessions in Africa. These instruments are complemented regionally in Africa. There is the 1969 OAU Convention Governing Specific Aspects of Refugees Problems in Africa with

this work aims at pointing out that while these instruments have elaborate provisions on the rights of refugees they are not sufficient to guarantee the well-being of refugees world-wide.[44] The principle instruments, that is, the Statute of the Office of the UNHCR, the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol will be analysed. The discussion will then proceed closer home to analyse the 1969 OAU Convention on Refugee Problems in Africa.

2.3 The Statute of the Office of the United Nations High Commissioner For Refugees

The office of the United Nations High Commissioner for Refugees (UNHCR) replaced the IRO in 1951.[45] The Statute of the Office of UNHCR, adopted by the General Assembly in December 1950[46] outlines the responsibilities of the Office, the most important of which are providing

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42 Accessions and other relevant human rights instruments such as the African Charter on Human and Peoples Rights which has 49 Accessions. These international refugee instruments are reinforced in several countries by national refugee legislation which laws have been promulgated with among other things, the specific objective of incorporating the principles and norms expressed in the international refugee instruments in national legal systems.

44 For a comprehensive coverage of all Refugee Law instruments see, A Collection of International Instruments Concerning Refugees, published by the office of the UNHCR, 1979. See also a detailed account of developments calculated to alleviate the conditions of refugees Grahl Madsen, The Status of Refugees in International Law 2 vols, Aga Khan, 149 Hague Recucil , 1976 1 287-352.

45 See ECOSOC res. 248 (1X) 4, 6thAugust 1949, in which the Economic and Social Council requested governments themselves to provide the necessary legal protection to refugees who were the concern of IRO prior to its termination and which also recommended that the General Assembly decide the functions and organisational arrangements within the frame work of the United Nations necessary for the international protection of Refugees.

46 General Assembly resolutions 319 A (IV) of 3rd December 1949 and 428(V) of 14th December 1950. The office was established as a subsidiary organ of the General assembly under Article 22 of the charter, on a basis similar to that of UN programmes, such as the UNICEF and UNDP.

international protection and seeking permanent solutions for the problems of refugees.[47]

In the statute, the UNGA calls upon governments to co-operate with the High Commissioner by doing eight things namely;

a) Becoming parties to international conventions providing for the protection of refugees and taking the necessary implementation steps provided therein,

b) Entering into agreements with the High Commissioner for the execution of measures calculated to improve the situation of refugees and reducing numbers requiring protection;

c) Admitting refugees to their territories;

d) Assisting the High Commissioner in efforts to improve voluntary repatriation;

e) Promoting the assimilation of refugees;

f) Providing refugees with travel documents and other documents to facilitate their resettlement;

g) Permitting refugees to transfer their assets;

h) Providing the High Commissioner with information concerning the number and conditions of refugees and Laws and regulations regarding them.[48]

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47 See the UNHCR statute generally.

48 General Assembly Resolution 428 (V) of 14 December 1950.

The Statute is divided in to three chapters. Chapter one sets out the general provisions regarding the office of the High Commissioner. The Statute expressly provides that the work of the High commissioner shall be of an entirely non-political character.[49] This is not without reason. Firstly, such an approach would involve warring factions in assisting refugees. Secondly, the office would avoid precipitating further conflicts, and lastly, it would ensure governmental support of all states in securing the protection of refugees. In accordance with the statute, the High Commissioner follows policy directives from the General Assembly and the United Nations Economic and Social Council (ECOSOC).

The Executive Committee of the High Commissioner's Programme (EXCOM),[50] a body currently composed of fifty-one governments, oversees UNHCR's budgets and advises on refugee Protection. It holds an annual session in Geneva every October to approve programmes for the next calendar year and to set the financial target. EXCOM has two sub-committees; the sub-committee of the whole on International Protection,[51] and the sub-committee on administrative and financial matters.[52] When first created, UNHCR was first charged primarily with resettling 1.2 million European refugees left homeless in the aftermath of World War II. At the outset, UNHCR was envisioned, as a temporary office with a projected life span of three years as a result of misplaced optimism that once the massive displacement created by World War II had been cleared up refugees would by and large be a

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49 Chapter I Pragraph 2.
50 Established under General Assembly Resolution 1166 (XII) and ECOSOC Resolution 672 (XXV).
51 Established by the executive committee of UNHCR in 1975.

phenomenon of the past.[53] Today, almost fifty years later, it has become one of the world's principal humanitarian agencies, with headquarters in Geneva, Switzerland and offices in more than one hundred countries.[54]

The functions of the High Commissioner are defined in the Statute in its Chapter two and in its various resolutions subsequently adopted by the General Assembly. The Statute sets out the circumstances under which persons would be considered for protection by the High Commissioner.[55] The Statute goes further and sets out circumstances when any class of persons would cease to qualify for protection. According to the Statute, UNHCR is competent to assist any person who;

> Owing to well-founded fear of being persecuted for reasons of race, religion, nationality or political opinion, is outside the country of his nationality and is unable or owing to such fear or for reasons other than personal convenience is unwilling to avail himself of the protection of that country ...[56]

While this definition, with its emphasis on the individual's persecution, still forms the core of UNHCR's mandate, additional criteria have been progressively introduced to accommodate the evolving nature of refugee flows in recent decades. In typical situations today, UNHCR provides protection and assistance to groups of refugees fleeing combinations of persecution, conflict and widespread violations of human rights. The protection of the High Commissioner as envisaged by the Statute is set out in this Chapter and

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52 Established by the Executive committee in 1980.
53 Chapter I Paragraph 5.
54 See a UNHCR publication, Helping Refugees, (1995), p. 5.
55 Chapter II Paragraph 6.
56 General Assembly Resolution 482 (V) Para 6.

includes promoting the conclusion and ratification of international conventions for the protection of refugees, assisting governmental and private efforts in promoting voluntary repatriation, promoting the admission of refugees, and facilitating the co-ordination of the efforts of private organisations concerning the welfare of refugees, among others.

Chapter three deals with the manner in which the office of the High Commissioner is organized as well as the finances of the office. It provides that the High Commissioner is elected by the General Assembly on the nomination of the Secretary-General. UNHCR is almost entirely funded by voluntary contributions from governments, non-governmental organisations and individuals, with fifteen major donor countries accounting for over 95% of UNHCR's total operating budget.[57]

The UNHCR has had the blessings of state parties to the 1951 Convention and/or the 1967 Protocol Relating to the Status of Refugees who have accorded it authority to involve itself in the protection of refugees. Governments have been called upon by the General Assembly to co-operate with the High commissioner in the performance of his functions concerning refugees falling under the competence of his office.[58]

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57 *Supra* note 54 pp. 20-2. Of the total amount contributed to UNHCR in 1995, ($226,712.155), more than three quarters of the same was contributed by the U.S.A. European Commission, Japan, Netherlands, Sweden and United Kingdom.

58 General Assembly Resolution 428 (V) and 319 (V) of 3rd Dec. 1949.

From the foregoing, it can be argued that by derivation and intentions, UNHCR does enjoy international personality with its personality emanating from the UN as its principal subsidiary organ mandated to address refugees issues. The Statute shows that the office was intended to act on the international plane which standing has been reinforced by successive General Assembly resolutions urging all states to support the High Commissioner's activities.[59] UNHCR with its principle functions of providing international protection and searching for durable solutions to the plight of refugees occupies a central place in the global system. In this system of supervising refugees' well being, UNHCR is expressly ascribed the function of providing protection to refugees with state practice generally reflecting recognition or acquiescence. UNHCR is mandated to ensure that refugees are protected by their country of asylum and assists governments as far as possible in that task. UNHCR is not a supernatural organisation and therefore cannot be a substitute for the protection of the state. UNHCR's main role is to ensure that states are aware of and act on their obligations to protect refugees and persons seeking asylum.

As part of its mandate to promote refugee law, UNHCR offers advice to individual states. The executive committee of the UNHCR sets non-binding policy guidelines that are useful in persuading governments to adopt rapid, flexible, and liberal policies. UNHCR has also produced a hand-book on procedures and criteria for determining refugee status, which is considered an

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59 *Supra* note 56. See also UN Doc/A/AC/96 627.

authoritative interpretation of the 1951 Convention by many states.[60] In addition to UNHCR and its traditional partners such as the Red Cross and the Red Crescent, the question of human displacement has attracted the concern of the political organs of the UN security organisations such as NATO and organisations for security and co-operation in Europe, financial institutions such as the World Bank and regional organisations such as the Commonwealth of independent states, and the OAU. Refugees problems, the world has recognised, are too complex to be resolved by refugee organisations only. In 1980, the UNHCR and the OAU jointly drafted a model refugee legislation that was then widely used in discussions with governments concerning the promulgation of new laws or reform of existing ones. Resulting from this initiative, progressive and protection friendly refugee Acts were passed in Zimbabwe and Lesotho in 1983. These have themselves in turn provided the model, impetus and inspiration for legislation development in many countries, including Malawi and Ghana where, in 1989 and 1992 respectively temporary favourable laws were passed.

2.4 The 1951 Convention Relating to The Status of Refugees

By Resolution 429(v) of 14th December 1950, the UNGA decided to convene a conference of plenipotentiaries to draft a convention on refugees and stateless persons and open it for signature.[61] On 1st January 1951 therefore,

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60 UNGA resolution 319 (V) of 3rd Dec, 1949. See also more recent references to "universal collective responsibility" in UNGA resolutions 35/42 of 25th Nov. 1980 and 39/139 of 14th Dec. 1984 dealing with ICARA II and I.

the conference adopted the Convention Relating to the Status of Refugees.[62] Its basis lay *inter alia* in the recognition of the Universal Declaration of Human Rights (UDHR) as approved in 1948,[63] and which had as its basic principle that all men are entitled to fundamental rights and freedom among them the rights to security,[64] food[65] and shelter.[66] The UN appreciated that refugees were among the most deprived of these rights and that previous enactments had been inadequate in saving the situation. The 1951 Convention therefore, marked a milestone in the field of international refugee protection and has been hailed as the *Magna Carta* of refugees.[67] The convention has two fundamental functions;

a) to provide international minimum standards for recognition and protection of refugees;

b) to promote and facilitate either repatriation of refugees or assimilation in to countries of asylum.[68]

The Convention's goal was to establish within contracting states uniform legal standards to ascertain the status of refugees throughout the world rather than the grand design of universally acceptable solutions.[69] The definition by UNHCR and the 1951 Convention on Refugees was perfectly tailored to the

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61 United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons - Geneva 1951 and Convention Relating to the Status of Refugees UN DOC No. A /CONF.2/108.

62 Entered into force on 22nd April 1954 in accordance with its Article 43.

63 Adopted by the United Nations General Assembly Resolutions 217 (A) (III) of 10th December 1948.

64 *Ibid.* Article 3.

65 *Ibid.* Article 25 (i).

66 *Ibid.*

67 Weis P, "The legal aspects of the Convention of 28th July 1951 relating to the problem of Refugees," 30 British Yearbook of International Law, 1953, p. 8.

68 Hyndman P. An Appraisal of the Protection Afforded to Refugees Under International Law, Lawasia (NS), pp. 219-25.

69 *Ibid.* p. 149.

needs particularly of those who had fled the countries of Eastern Europe, Soviet Union and other communist block countries. These refugees were received and protected from *refoulement*, integrated or resettled mainly in the Western industrialised states. There were indeed other refugee groups during the early years of the UN, most notably in the Indian sub-continent but most of these did not receive similar international attention for various political reasons.[70]

The Convention is divided into seven chapters and contains forty-six Articles, which in detail state the status of the refugee, his rights and freedoms. In its preamble, the Convention restates the UN's principle that all human beings are equal and as such must enjoy fundamental rights and freedoms indiscriminately. Further, that the convention was a new agreement to consolidate previous international agreements relating to the status of refugees, which new agreement sought to extend the scope of and the protection accorded by such earlier instruments.[71]

Article 1 of the Convention deals with the definition of the term 'refugee' and in detail sets out the classes of persons who may fall under the protection of the Convention. These are persons who had been considered refugees under the arrangements of 12th May 1926 and 30th June 1928, or under the Conventions of 23rd October 1933 and 10th February 1938, the protocol of 14th September 1939

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70 On this see Coles G. J. L, Human Rights of Individuals Who are not Nationals of the Country in Which they Live, International Institute of Humanitarian Law/Lan Remo Italy 4 YB, 1985 p. 126.

71 Article 1.

or the constitution of the IRO.[72] The Article then goes on to give its own definition of a refugee as a person who;

> As a result of events occurring before 1st January 1951 and 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.

This definition seems to adequately cover the elements required to be present for a person to be considered a refugee, only that it limits itself to classes of refugees that emerged as a result of the events that occurred before 1951. The Article also sets out circumstances under which the Convention shall cease to apply to any individuals including those who voluntarily re-avail themselves of the protection of their country of origin, those who acquire new nationalities, those whom it is believed had committed a crime against peace, a war crime, or a crime against humanity as well as those already in receipt of assistance from other UN organs.[73] The convention charges refugees to conform to the laws and regulations of their countries of asylum,[74] and in return, the asylum countries are expected not to discriminate against refugees and to fairly treat them as their own nationals in terms of religion.[75]

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72 *Ibid.*

73 Article 1 paragraph C. This is to ensure that only genuine cases are given the requisite protection.

74 Article 2. This provision is to ensure that refugees are not at loggerheads with asylum governments and to ensure peaceful co-existence with the host community.

75 Articles 3 and 4. These are some of the rights that are considered as being essential to any human being.

In its chapter two, the convention discusses the juridical status of refugees.[76] In this section, the personal status of a refugee is discussed and the convention states in part;

> The personal status of a refugee shall be governed by the law of the country of his domicile, or if he has no domicile, by the law of the country of his residence...[77]

The Convention saves the personal rights of refugees such as rights attaching to marriage, which are acquired before such a person became a refugee provided that such rights would normally be respected by the contracting state.[78]

With regard to acquisition of movable and immovable property, the Convention calls upon contracting states to accord refugees treatment accorded to aliens generally.[79] The chapter has provision for the refugee's rights in terms of his access to municipal courts in the country of asylum, right of association in non-political and non-profit making associations and trade unions, and ownership of industrial property. Generally speaking, the Convention requires the state of asylum, to accord refugees, as a minimum, treatment as favourable as possible, but not less favourable than that accorded to aliens generally.

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76 Articles 12-16 (inclusive).

77 Article 12. Asylum countries are not expected to have any special provisions to cater for refugees in this regard.

78 *Ibid.* The idea is not to burden the host country with requirements, which it does not ordinarily provide.

79 Article 13. In this regard refugees are not any different from other aliens and hence no need to have favourable conditions for them.

Chapter three of the Convention discusses gainful employment of refugees in the country of asylum.[80] As regards wage-earning employment, the Convention states in part;

> 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.[81]

With regard to self-employment, the Convention requires states to accord refugees treatment as favourable as possible but not less favourable than accorded to aliens generally, and this also applies to liberal professions where refugees are so qualified. Again the applicable standard in this regard is that applied to aliens generally since in this regard refugees are not different from other aliens.

Chapter four discusses the general welfare of refugees and this includes housing, public education, public relief and social security.[82] The convention calls on contracting states to accord refugees treatment that is not less favourable than that accorded to aliens generally with regard to housing and education other than elementary education.[83] With regard to elementary education, states are called upon to accord to refugees the same treatment accorded to

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80 Articles 17-19 (inclusive).

81 Article 17.

82 Articles 20-24.

83 Articles 21 and 22. The Convention differentiates elementary education from other forms since it is imperative that refugees get basic education.

nationals. This same treatment is expected in matters of labour and social security.[84]

Chapter five provides rights in relation to administrative measures, identity papers, travel documents, transfer of assets, right of movement, as well as providing the important right of *non-refoulement*.[85] This complements Article 1 of the Convention and states;

> No contacting state shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontier 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.

It is worthwhile to note that in the 1951 Convention, *non-refoulement* was interpreted to be limited to those refugees who had already entered the state territory.[86] Subject to conditions applicable to aliens generally, states are called upon to allow refugees the right to choose their place of residence and to move freely within the state territory.[87] Refugees without travel documents are to be issued with identity papers.[88] States are further called upon to issue travel documents to refugees in their territory to enable them travel outside the territory.[89] For purposes of resettlement in another country, states are called upon to allow refugees to transfer their assets.[90] In cases of illegal entry into any country

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84 Article 24. These rights are generally considered as being more important to refugees than those to which the convention calls for treatment of a standard accorded to aliens generally.

85 Article 33.

86 UN DOC A/CONF. 2/5R.

87 Article 26. Practically as we shall see later, this is not always adhered to as refugees are restricted in camps in most countries, with the state using the reason that they are a security concern for the country.

88 Article 27.

89 Article 28. The Convention was interested in making the life of refugees as complete as possible. Sight should however not be lost to the possibility that refugees could use this right to wage war against states of origin.

90 Article 30. This is to help refugees settle down as soon as possible once they are accepted in another country.

by refugees whose life is in danger as provided in Article 1, states are called upon not to impose penalties on such refugees nor to unnecessarily restrict their movements so long as they present themselves to the authorities without delay and show good cause for their illegal entry.[91] States are further urged in this chapter to facilitate the naturalisation and assimilation of refugees.[92] This is foreseen as a way of reducing the numbers of those so-called orbit refugees.[93]

Chapter six provides executory and transitory provisions. In this chapter, national authorities are urged to co-operate with the UN in the application of the Convention and to provide the High Commissioner with statistical data with regard to the condition of refugees, implementation of the Convention and any laws and regulations relating to refugees, which may be in force.[94]

Finally, in chapter seven, dispute settlement is discussed. It is stated that disputes between parties to the Convention be referred to the International court of Justice (ICJ) at the request of one of the parties.[95] The chapter finally talks about the signature, ratification and entry into force of the convention. However, by Article 42 and 44, any contracting state is given the power to make reservations with regard to some articles of the Convention and to denounce

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91 Article 31. The loophole with this provision is that often refugees are not aware of it and until they report to a camp or the authorities arrest them, they may not present themselves for registration.

92 Article 34. This may not be possible in third world countries which are themselves struggling on meagre resources.

93 On refugees in orbit see in particular Melander, Goran, Refugees in Orbit. International Universities Exchange Fund, Geneva, 1978.

94 Articles 35-37. This is in recognition of the role played by UNHCR in the protection of refugees, and to ensure that UNHCR has all the data on refugees.

95 Article 38.

altogether the Convention by notification to the Secretary-General of the UN. This as we shall see later, has greatly affected the weight of this Convention.

Having discussed the provisions of the Convention, it can be noted that the Convention has some limitations, which, coupled with the lack of effective legal sanctions against defaulting states, as well as the principle of state sovereignty, have combined forces to block the realisation of the grand scheme envisaged by the said Convention. The Convention's first objective was to redefine the term 'refugee'. This was of great importance because it was necessary to clearly set out the class of persons who were the subject matter of the convention. The convention therefore had a more detailed approach than the arrangements preceding it. Under article 1(1), persons considered as refugees by the 1926, 1928, 1938 conventions or under the constitution of the International Refugee Organisation (IRO) are the only ones that qualify under this Convention. The second category is that set out under Article 1(2). Under this Article, several observations can be made. Firstly, such persons must be victims of events occurring before 1st January 1951 and must have a well-founded fear of persecution by the state of origin, which persecution must be as a result of race, religion, nationality, membership of a particular social group or political opinion. It is important that any such person be outside his country of origin so that he is not in a position to enjoy the security accorded by that state. Finally, he should, owing to that fear, be unable or unwilling to return to it. This definition sought to distinguish a refugee from a person who voluntarily forfeited the protection of his own country and especially where he had committed war

crimes, crimes against peace or against humanity.[96] Also excluded are persons who take flight out of personal convenience. The importance of someone falling within the ambit of the definition is that he is granted refugee status, which is a condition precedent for aid and protection and also entitlement to the pertinent rights or benefits.[97]

As with other Inter-war arrangements, the objective of the 1951 convention was both to establish certain fundamental rights, such as non-*refoulement* and to prescribe certain minimum standards of treatment. The refugees may be stateless, and therefore as a matter of law, unable to secure the benefits accorded to nationals of his or her country of origin. Alternatively, even if nationality is retained, the refugees' unprotected status can make the obtaining of such benefits a practical impossibility. The Convention consequently proposes, as a minimum standard, that refugees should receive at least that treatment which is accorded to aliens generally. The most favoured nation treatment is called for in respect of the right of association and the right to engage in wage earning employment. This provision is subject to reservations and is not mandatory.[98]

As seen, the Convention provides for the freedom to practice religion, protection of artistic rights and industrial property, access to courts, legal

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96 Article 1.

97 For purposes of preserving and championing national interests over those of aliens and refugees, States have insisted on fairly restrictive criteria for identifying those who are to benefit from refugee status.

98 Article 7, which provides for just treatment for refugee is subjected to Article 42 which provides state parties with power to make reservations in relation to specified articles of the Convention.

assistance, inter alia.[99] National treatment is to be accorded to refugees in relation to the aforementioned rights and freedoms. The concept of what treatment is to be accorded to an alien has remained a controversial issue. The developed states of the West have argued that there exists an international minimum standard for the protection of aliens that must be upheld.[100] Other states have maintained that, all the states need to do is treat the alien or the refugees as it does its own nationals.[101] The international minimum standard of refugee treatment has been resented as an instrument of Western economic domination and interference in Internal affairs.

It has also been argued that the correct treatment to be accorded to an alien or refugee is one that recognises the essential rights of man.[102] Refugees therefore, should ideally enjoy the same rights and guarantees as enjoyed by nationals, which should not in any case be less than the fundamental human rights recognised and defined in international instruments. It is commendable that the relevant instruments do not refer to nationals and aliens specifically but to all individuals within the territory.[103]

It is submitted that although the 1951 Convention has a grand scheme of providing refugees with their rights, it has not achieved much in practice. This is

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99 Articles 4, 14 and 16 respectively.

100 Shaw, Malcom N, International Law , 2nd edition, Grotius Publications Ltd, Cambridge, 1986, p.426.

101 *Ibid.*

102 Year book of the I LC Vol. II p. 173.

103 For example the Constitution of Kenya in section 70 guarantees the fundamental human rights under the Bill of Rights (sections 70 - 83) to all people within the Republic of Kenya, without limiting such guarantee to citizens only. As such, refugees, properly accorded refugee status in Kenya are entitled to the fundamental human rights as enshrined under the Constitution.

because in most of the worst war hit countries, the fundamental human rights are not even guaranteed for their own nationals. State sovereignty has also been interpreted in such a way that host governments would determine the standard of treatment to be accorded to aliens. It is further recognised that there must be some differences as regards the relative rights and obligations of nationals and aliens. Non-nationals do not have political rights and may be banned from employment in certain areas. It is also unquestioned that a state may legitimately refuse to admit aliens or may accept them subject to certain conditions being fulfilled. As a result of the foregoing, the protection envisaged by the 1951 convention has not been realised in practice.

The 1951 Convention suffers from other inadequacies. Article 1 limited the definition of the term refugee by reference not only to a well-founded fear of persecution but also to a dateline.[104] This Limited definition of refugees by reference to not only a well-founded fear of persecution but also to a date line offered states the option of further restricting their obligations to refugees resulting from events occurring in Europe before the critical date (1st January 1951). This is explained by the fact that the international refugee regime was created by the leading Western powers and was acceptable only in so far as the systems served, did not run counter to their particular interests or needs. The 1951 Convention had a eurocentric focus, which aimed to give priority in protection matters to persons whose plight was motivated by pro-Western values. It is

104 It should not be forgotten that the Convention has its origin in the cold war climate of the late1940's and early 1950's, when concern centred on refugees in Europe. Similarly, the very European flavour of many of the provisions can be

noteworthy that those states which have acceded to the 1951 Convention have in majority of cases qualified its essential provisions in an attempt to harmonise its provisions with the respective local laws. Moreover, some states like Kenya are yet to formulate their own municipal refugee laws.

The degree to which states have been prepared to accept and apply benefits and standards of treatment under the 1951 Convention varies. The Convention under article 42 gives countries the power to exclude entirely any obligations under specific articles.[105] Individual states have the right to take measures on grounds of national security against a particular person.[106] This explains why refugees in Kenya for example are sometimes rounded up in refugee centres, which has made it impossible for them to realise their rights under the Convention. The power to take measures against refugees on grounds of national security has given states the excuse to make draconian reservations by designating specific places of residence, either generally, or on grounds of national security, public order or public interest as has happened in Kenya and Tanzania.

Generally, the 1951 Convention lacks effective investigation, adjudication and enforcement procedures and can hardly be considered to offer the same opportunity for judicial or quasi-judicial solutions. The Convention contains no

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readily understood when it is realised that of the twenty six states which participated in drafting and adopting of the Convention, seventeen were from Europe and four more of a Western European/North American disposition.

105 However Articles 1,3,4,16 (i) 33,36-46 inclusive are not subject to reservation by a contracting state. This is because these provisions are at the core of what protection in totality encompasses.

106 The power to take provisional measures on grounds of national security is provided under Article 9.

provisions requiring legislative incorporation or any other formal implementation step. Similarly, nothing is said with regard to the establishment of procedures for the determination of refugee status or otherwise for ascertaining and identifying those who are to benefit from the provisions of the Convention. Although failure to enact legislation necessary to ensure fulfilment of international obligations will not relieve a state of responsibility, specific refuge legislation is important in helping to remove the refugee from the ambit of general law and therefore is a necessary condition of implementation of the Convention. The choice of the means of implementation of both the 1951 Convention and the 1967 Protocol Relating to the status of refugees is left to the states themselves. They may select legislative incorporation, administrative regulations, informal and *ad hoc* procedures or a combination thereof.

It should be noted that persecution, which is a *sine qua non* to granting of refugee status is not defined in the 1951 Convention or in any other international instrument. Articles 31 and 33 of the Convention refer to those whose life or freedom may be threatened but otherwise a wide margin of appreciation is left to states in interpreting this fundamental term. State practice reveals no coherent or consistent jurisprudence. It remains very much a question of the degree and proportion. In this scenario, less overt measures may suffice - those measures guaranteed in a democratic society.[107]

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107 *Supra* note 100.

All in all therefore, it is worthwhile to note that although the 1951 convention purports to offer refugees a whole plethora of rights, practical results have not been fully achieved.

2.5 The 1967 Protocol Relating to the Status of Refugees

To fill the gaps in the 1951 Convention, the General Assembly adopted the Protocol Relating to the Status of Refugees, which entered into force on 4th October 1967. The need to universalise the 1951 convention was as a result of the realization that movements of refugees were by no means a phenomenon confined to world war two and its immediate aftermath. As new refugees emerged in Africa, Asia and Latin America, it became increasingly necessary to adapt the convention to make it applicable to new refugee situations. In 1967 therefore, a Protocol was introduced which expanded the scope of coverage established in the 1951 Convention, hence making the Convention more universal, and by May 1997, over one hundred and twenty states were parties to both the 1951Convention as well as its 1967 Protocol. The Protocol apart from amending the 1951 Convention is an independent instrument and not a revision of the Convention within the meaning of article 45 of the Convention. State parties to the Protocol (which can be ratified or acceded to by a state without becoming a party to the Convention) agree to apply Articles 2 to 34 of the Convention to refugees defined in article 1 thereof as if the 1951 dateline is omitted. While reservations are generally permitted under both the Convention and the Protocol, certain articles namely, those dealing with definition, non-

discrimination, religion and access to courts and *non-refoulement*, are not subject to reservations and are therefore absolutely protected.

The preamble to the 1967 Protocol states that the UN intended to extend the scope of the1951 Convention, in so far the latter only applied to persons who had become refugees before 1951. This, it stated, was as a result of the UN's realisation that new refugee situations had arisen and that all refugees world-wide should enjoy the protection of the Convention.[108]

The Protocol calls on state parties to co-operate with the UNHCR or any other agency of the UN, which may succeed it, in the exercise of its functions, hence facilitating its duty of supervising the application of the Protocol.[109] The co-operation envisaged includes providing UNHCR with statistical data relating to the conditions of refugees, the implementation of the Protocol and any laws, regulations, and decrees in force relating to refugees. State parties are further expected to communicate any national laws and regulations adopted to ensure the application of the protocol.[110] The Protocol gives the ICJ jurisdiction to hear any disputes between state parties at the request of one of them.[111] The Protocol also provides for reservations to be made or for its total denunciation by state parties.

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108 General Assembly Resolution 2198(XXI) of 16th December 1966 at its 1495th plenary meeting.
109 Protocol Article II.
110 Article III.
111 Article IV.

The Protocol specifically identifies two main areas that need greater focus, namely, the condition of the refugees and the mode of implementation of existing conventions, laws and regulations. The Protocol provides for the settlement of disputes between state parties, which disputes relate to its interpretation, or application, by referring such a dispute to the ICJ[112] However, state parties are at liberty to resort to other modes of dispute settlement. It is important to note that UN specialised agencies can also accede to the Protocol.[113]

It can be noted that although the 1967 Protocol was meant to expand the scope of the 1951 Convention, it did nothing to enhance its implementation machinery, prompting states to formulate regional instruments tailored to tackle problems peculiar to their region. The most significant of these regional instruments for our purposes, was the one adopted by the African Heads of state in 1969. Various other regional treaties and conventions came into effect in an attempt to protect the ever-increasing refugee population.[114]

A number of other instruments were concluded. The UN, upon realising that the 1951 Convention offered little protection to seamen refugees, enacted the **1957 Agreement Relating to Refugee Seamen**. The agreement entered in to force on 27th December 1961 in accordance with its article 16. and was entered

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112 Article IV.

113 Article V.

114 Such instruments include the OAU 1969 Convention on Refugees, the European Convention on Extradition, 1957, and The American Convention on Asylum of 20thFebruary 1928 (Havana).

into by the governments of Belgium, Denmark, France, Germany, Great Britain, Ireland, Netherlands, Norway and Sweden.[115] The Agreement basically saved the provisions of the Convention of 1951, but extended its application to refugees who were serving as seafarers. Like the Convention of 1951, the Agreement only applied to persons who had become seamen refugees as a result of events occurring before first January 1951. Hence in 1973, the contracting parties deemed it necessary to adopt the **Protocol to the Agreement Relating to Refugee Seamen**, which like the 1967 Protocol Relating to the Status of Refugees had the effect of removing the 1951 dateline so as to make it applicable to persons who had become seamen refugees after 1951.[116] Needless to say that these two documents suffered from the same shortcomings that the 1951 convention and its 1967 protocol suffered from. It is not my intention however, to consider these documents in any further detail seeing that they are territorial in application, and the territories to which they apply are not the concern of this thesis.

The **Convention Relating to the Status of Stateless Persons** was adopted by the UN Conference held in New York from 13th to 23rd September 1954. The Convention entered in to force on 6th June 1960 in accordance with its Article 39. The Convention contains six chapters divided in to forty-two articles. As stated in its preamble, the Convention was intended to assure stateless persons the widest possible exercise of their fundamental rights and freedoms as stipulated in the UDHR. The convention recognized that stateless persons who were also refugees

115 The preamble to the Agreement.

were covered under the Convention Relating to the Status of Refugees of 1951 as well as its 1967 Protocol.[117] It therefore sought to cater for those persons who were not covered by the two instruments. As such, I shall not endeavour to delve any deeper into its provisions. As a follow up to this Convention, the UN also adopted the **Convention on the Reduction of Statelessness** on 30th August 1961 which expressed the desire to reduce statelessness internationally.

In April 1959, **The European Agreements on the Abolition of Visas for Refugees** was adopted at Stratsbourg. Its purpose was to facilitate easy travel for refugees residing in European countries without necessarily being required to obtain visas for entering or leaving the host states. The basis of this was that all member states have the responsibility of accommodating the refugee, being a *defacto* stateless person without creating too many obstacles. Beside having left his country under emergency conditions, it was unlikely he had carried all personal documents.

The year 1966 saw the adoption of the **Principles concerning the Treatment of Refugees** by the Asian-African Legal Consultative Committee at its 8th session in Bangkok Thailand. While conforming to the earlier international conventions, it clarified that a person having a possibility of availing himself to the protection of any other state of which he is not a national, is not to be considered a refugee.

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116 Preamble to the Protocol.

117 The Preamble to the Convention.

Concerned, many states began adopting supporting instruments in an effort to reduce the number of refugees requiring protection. The UN adopted the **Declaration on Territorial Asylum** in 1967, recommending states to give asylum to refugees and stateless persons. The Declaration echoed Article 14 of the Universal Declaration of Human Rights, which states;

> Everyone has the right to seek and to enjoy in other Countries, asylum from persecution.

The purpose of the Declaration on Territorial Asylum was to encourage state parties to maintain a liberal attitude towards granting asylum. Persons whom it was felt had committed a crime against peace, a war crime or a crime against humanity were not beneficiaries of the provisions of the instrument.

The Geneva Convention Relative to the Protection of Civilian Persons in Time of War was adopted on 12th August 1949 and entered in to force on 21st October 1950. With regard to refugees, the Convention called upon states not to treat as enemies any aliens exclusively on the basis of their nationality.[118] Further, the Protocol Additional to this Convention called upon state parties to consider as protected persons any stateless persons and refugees.[119]

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118 Article 44.

119 Article 73 of the protocol additional to the Geneva convention of 12 August 1949, and relating to the protection of victims of international armed conflicts.

2.6 OAU Convention of the 10th September 1969 Governing Specific Aspects of Refugee Problems in Africa

A number of regional instruments were also concluded with states looking to tackle problems peculiar to their region. In Africa, the OAU concluded the OAU Convention Governing Specific Aspects of Refugee Problems in Africa.[120] At the inception of the OAU in 1964, there were thousands of refugees across the continent, owing mainly to civil strife caused by the de-colonisation process. The newly independent states of Africa inherited arbitrarily determined boundaries and uncertain economies.[121] The dissolution of colonial empires and the creation of nation states, with the consequent social and economic changes have been some of the major causes of instability and refugee movements in Asia and Africa. Many new states faced acute problems of ethnic minorities, regional discontent, religious hostilities, class conflicts and cultural separation. This situation was aggravated by the easy availability of low cost highly destructive weapons. This enabled such leaders as Siad Barre of Somalia, Mengistu Haile Mariam of Ethiopia to retain power and to suppress demands for self-determination among groups and repress other domestic opposition movements.

This has resulted from political and negative ethnic exploitation and manipulation of the ruling ethnic community by the ruling elite against less

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120 Adopted by the Assembly of Heads of state and Government at its sixth ordinary session (Addis Ababa, 10th September 1969) and entered into force on 20th June 1974 in accordance with Article XI, TEXT. United Nations Treaty series No. 14. 691.

121 On this see generally, Rodney Walter, How Europe Underdeveloped Africa, Heinemann Kenya Limited, Nairobi, 1989.

powerful ethnic communities who may not agree with the policies of the politically dominant ethnic groups in the country.[122] This situation has been prevalent in Africa and therefore it is not surprising that this region of the world has had many wars, hence refugee outflows. Many states have not found an ethnic equilibrium and the monopolistic tendencies of the ruling class have therefore accounted for many refugees.[123]

By 1967, Africa had over one million refugees excluding the internally displaced. The creation of international boundaries saw communities previously independent being forced to form a homogenous society with other communities, a fact they resented. Others like the Somalis were fragmented and remained scattered in different countries. In a continent with few liberal democracies, more governments than ever have sought to enforce authoritarianism or totalitarian orders by coercive means thus producing greater refugee outflows. Domestic instability in African countries has invited foreign intervention and external powers have taken advantage of the unsettled situation. The underlying forces of nationalism, ethnic conflict, foreign intervention, arms sales, incompetent governments and widespread human rights violations combine to propagate refugee outflows in Africa.[124]

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122 On this see Ahmed Nassir M. Abdullahi, "Ethnic clashes, Displaced Persons and the Potential of Refugee Creation in Kenya - A Forbidding Forecast," International Journal of Refugee Law, Vol. 9, 1997, pp.196 - 206.

123 See Ali A. Mazrui, "The African State as a Political Refugee: Institutional Collapse and Human Displacement", International Journal of Refugee Law, OAU/ UNHCR special edition, summer 1996, p. 21.

124 Aibon, Sam Amaize, "Protection of Refugees in Africa," Uppsala, Swedish Institute of International Law, 1978, pp.63-8.

Determined to arrest the escalating refugee population in Africa therefore, African heads of State assembled in Addis-Ababa, Ethiopia in 1969 to formulate a viable solution. This led to the adoption of the OAU Convention Governing the Specific Aspects of Refugee problems in Africa.[125] This Convention was tailored to ensure that it covered a large group of people in refugee like situations by having a comprehensive definition of a refugee.[126] It extended the definition of a refugee to cover persons displaced because of external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of the country of origin or nationality. The Convention was also meant to increase protection and assistance to existing refugees and at the same time encourage a more committed humanitarian approach to solving the problem.

The OAU Convention, which entered into force on 20th June 1974, was divided into fifteen articles, which in detail deal with different aspects of refugee life. In its preamble, the convention expresses the wish of the African Heads of State and Government to find ways and means of alleviating the misery and suffering of the ever increasing number of refugees and providing them with a better life and future. They adopted a humanitarian approach towards the refugee problem. The preamble further expressed the recognition of the Heads

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125 Adopted by the Assembly of Heads of state and government at its sixth ordinary session on 10th September 1969 and entered in to force on 20th June 1974.

126 The definition in the 1969 OAU convention was expanded upon in the Cartagena Declaration of Refugees in Latin America, 1984 by extending the concept of a refugee as applied in Central America stipulating that a massive violation of Human Rights should be considered as a legal basis for an extended definition of 'Refugee'. Thus persons who have fled their country because their life safety and/or liberty have been threatened should also be considered as refugees.

of State that refugee problems were a source of friction among many member states and emphasised the need to work towards the removal of such friction.

The Preamble further states the need to differentiate between genuine refugees and persons fleeing their countries in order to cause subversion from outside. The Preamble further recognized the Convention of 1951 and its 1967 protocol as constituting the basic and universal instruments relating to the status of refugees and re-emphasized the need to accede to the two documents.

In its Article 1, the Convention defines the term 'refugee'. It is worth noting that this definition is broader than the one provided by the 1951 Convention and its 1967 Protocol. The convention as stated above extended the definition of a refugee to include;

> ...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.[127]

On Asylum,[128] the Convention urges member states to use their best endeavours consistent with their legislation to receive refugees and secure settlement for those who are unable to return to their countries of origin.[129] The Convention states that the granting of asylum shall be regarded as a humanitarian act and should not be deemed as an unfriendly act by any member state. This provision is very important since many refugees find refuge in

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127 Article I (2).
128 Article II.
129 *Ibid.*

neighbouring countries even when they are wanted back home to answer criminal charges against them. In such cases, as was the case when Kenya refused to give up some Rwandese nationals, Kenya's act should not be viewed as an unfriendly act by Rwanda. In the spirit of co-operation, any member state which felt burdened by the refugee problem and its continued offering of asylum was encouraged to appeal to other members through the OAU to help alleviate its burden. The Convention requires member states not settle refugees near their frontiers for security reasons. It is noted that many states however do not abide by this requirement, Kenya, Uganda and Tanzania included.

The Convention prohibits refugees from engaging in subversive activities against any member state and binds them to conform with the laws and regulations of their country of refuge.[130] It further provides that no refugee should be discriminated against as regards the provisions of the Convention,[131] and saves the voluntary character of repatriation.[132] The Convention re-emphasised the duty upon states under the 1951 Convention to provide refugees with travel documents for purposes of travel outside the territory. The only exception to this was given as compelling reasons of national security or public order.[133]

In Article VII member states undertake to give the OAU secretariat statistical data on the condition of refugees, measures undertaken to implement the covenant and all the laws and regulations in force relating to refugees.

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130 Article III. This was in a bid to reduce friction between member states over refugee matters.
131 Article IV. This was in a bid to ensure that refugee received similar treatment and there were no inequalities.
132 Article V.

Member states were further enjoined to co-operate with UNHCR.[134] As regards settlement of disputes, the Convention provides that disputes may be referred to the Commission for Mediation, Conciliation and Arbitration of the Organisation of African Unity, at the request of one of the parties to the dispute.[135] The convention finally discusses signature and ratification, entry in to force, amendment and denunciation.[136] At adoption, forty-one African states, Kenya included ratified the convention.

The extended definition of a refugee by the Convention brought international protection to a larger number of people not covered by the 1951 Convention and the 1967 Protocol. This extended definition has particular importance in situations of massive influx where it is generally impractical to examine individual claims for refugee status. The convention broke new ground in many ways in terms of its affirmation that taking in a refugee constituted a humanitarian and not a political act. The Convention also seeks to tackle friction between member states, which arose as a result of the refugee crisis. To this end, it distinguished a person fleeing persecution for offences for which he is not responsible, from one who flees apprehension as a result of committing subversive acts against his country or origin. Member states were called upon to assist each other in the burden of maintaining refugees either by increasing financial support or by taking in some of the refugees. [137]

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133 Article VI. This improves on the provision under the 1951 Convention.
134 Article VIII.
135 Article IX.
136 Articles X- IX.
137 Article II. The proverbial African generosity was hence legislated.

As new problems arose, the OAU formulated supporting instruments to tackle the situation. By 1993 for example, Africa was experiencing an outbreak of horrifying civil wars in the north, south, east and west, more than any other time in history. These were producing refugees in terms of millions. As a result, the 29th Ordinary Session of the Assembly of Heads of State and Government at a meeting in Cairo in June 1993 established a mechanism for prevention, management and resolution of conflict in Africa.

For the first time, more focus was placed on the refugee problems. The leaders resolved to find ways of reducing conflicts through formation of dispute settlement forums to try and negotiate peace accords. This was by the so-called "**Cairo mechanism**". **The Khartoum Declaration on the African Refugee Crisis** was meant to implement the Cairo mechanism. The establishment of the **Cairo Mechanism** was an act of historical significance and of self-empowerment as it was meant to develop a comprehensive refugee strategy, based on African values, designed to meet African needs and buttressed by international solidarity and humanitarian principles.[138]

In addition, the OAU had a subsidiary organ of the Council of Ministers; the OAU Commission of Twenty on Refugees, whose function was to regularly monitor and follow up the refugee situation and make recommendations. In conformity with the Convention, the OAU in 1968 established the Bureau for

Refugees, whose purpose was to inform member states about refugee movements in Africa, their causes and consequences and to educate refugees on matters relating to the resettlement option. It is therefore true to say that Africa has got one of the most comprehensive refugee legal regimes in the World. This notwithstanding, Africa shares the greatest burden of refugees. By January 1995, Africa had 56% of the total displaced persons in the world and had the largest number of civil wars, and yet it was incapable of supporting the victims. Almost every country in Africa hosts or produces large numbers of refugees or persons in refugee like situations. Of the African continent, Rwanda alone produced in 1994 nearly 13 million refugees.

2.7 An Overview of Some of the Limitations of the International Conventions.

A general observation would point to the fact that the conventions were geared to providing greater protection for refugees who were being created as result of the various conflicts afflicting the world. Each was adopted as new problems emerged, mainly to supplement the one before it. It was, and still is, appreciated that successful implementation of these instruments heavily depends on the total commitment and co-operation of all state parties. Generally speaking, considering the international conventions discussed above, it is well settled that they are comprehensive. The bodies set up by the

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138 On this see Forewords by both Sadako Ogata, UNHCR's High Commissioner and Salim Ahmed , the then OAU Secretary- General in a UNHCR publication, Africa's Refugees - Tackling the Crisis, October 1995, pp. 2-3.

conventions to provide international protection and seek permanent solutions to the refugee problem, are well formed and have the backing of nearly all states. To facilitate their functioning, the majority of these agencies act on purely humanitarian basis. At present, there are over 140 such agencies, many of them being regionally based.

It is however evident that there is an apparent absence of a nexus between the conventions, their implementation and their effectiveness. The various conventions are elaborately set out and bear substantial rights for refugees. However, in practical terms, these rights do not seem to trickle down to these populations. So where does the problem lie? Why has the protection of refugees through such elaborate systems of law not been achieved? One of the greatest limitations of international refugee law is the question of sovereignty. Sovereignty as shall be discussed later in this thesis, has greatly been abused by states. In as much as many states have acceded to the international refugee regime, their practices are a far cry from the provisions of the various conventions acceded to and sovereignty has many times been used as the excuse. States many times choose their own selfish interests over the requirements of international law.[139] It is noted that international law relies on the good will of sates to enforce it.

The second hurdle against the realisation of the refugees' rights as provided by international law is the fact that international law is aimed at

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139 Goodwin-Gill, G. S., The Refugee in International Law, 1st ed., Clarendon Press, Oxford, 1983, p.8.

protecting the refugee who has already crossed an international border. The law does not have any provisions for ways and means of preventing any out flows or exoduses. The law cannot do anything to prevent the root causes of refugee outflows and this is a major shortcoming. UNHCR and other agencies can only swing into action after the occurrence of an outflow.

Thirdly, the fact that states can make reservations restricting their obligations under both the 1951 Convention and its 1967 protocol has acted as a stumbling block. Notably also, not all states are party to the international instruments and in Africa, not all states are party to the OAU convention.

The position of the individual under international law causes further problems. Although it is now generally accepted that individuals are directly the subjects of international law as it is enforced by states as part of their municipal law, there are procedural problems. An individual for example has limited *locus standi* before international tribunals. One scholar has expressed the view that;

> The individual does not bear normal responsibility for breaches of obligations imposed by the customary law of nations because most of these obligations can only rest on states and governments and further, he cannot have some claims.[140]

Thus although the international legal regime is moving to a stage where individuals may acquire rights free from the interposition of the state by dilution

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140 See Brownlie, Ian," The Individual Before Tribunals Exercising International Jurisdiction," International Comparative Law Quarterly, Vol. 11, 1962, p.701.

of the institution of the state, the basic position remains that in a state oriented world system, it is only through the medium of the state that the individual may obtain the full range of benefits available under international law, and therefore nationality is the key to such realisation.[141] This is in accordance with the decision in the **Mavrommatis Palestine Concessions case.**[142] where it was held that only states could be parties before the Permanent Court of Justice (P.C.I.J.) The decision's implication was that individuals could not appear before the Court. It was claimed that the individual, whose interests had been affected could be given procedural capacity by having his state of nationality espouse his claim. It was further opined that;

> By taking up the case of its subjects and by resorting to diplomatic action or international proceeding on his behalf a state is in reality asserting its own rights to ensure in the person of its subjects, respect for the rules of international law.

In Practical terms, it is unlikely that the very state, which is causing the refugee to flee, would take up his case before the international court.

Another hurdle that has forestalled the application of the international conventions is the state of the economy of the countries ravaged by the refugee phenomenon. Most of the countries are very poor and are barely able to provide for their own populations. As mentioned earlier, most African countries have maintained an open door policy to refugees in spite of their

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141 Nevertheless modern practice by states does demonstrate that Individuals have become increasingly recognised as participants and subjects of international law. This has occurred primarily but not exclusively through human rights law. The individualistic character of human rights and the global concern to protect the individual whose rights may have been violated by his state of nationality which then cannot be entrusted with the enforcement of such rights or their guarantee account to a great extent for this developments.

142 Jurisdiction, PCIJ Series A No.2, 1924.

meager resources. These refugees impose a special burden on the countries of asylum. It is my submission that unless refugees are made to be self reliant as opposed to relying on handouts from the international community as well as their host countries, the scheme of protection envisaged by the international conventions cannot be realised. One cannot for example say to a poor refugee living in a camp that they have a right to access to courts. The most immediate need for such refugees is food, shelter and clothing. The economic conditions in the country of asylum are hence very instrumental to the enjoyment of the refugees' rights under the international conventions, as was emphasised by the two international conferences on Assistance to Refugees in Africa, (ICARA I and ICARA II).[143] ICARA I in 1980, was called as a result of the view by African states that the international community had not given the refugee problem in Africa due attention.[144] ICARA I had three main aims; to increase international attention to the refugee problem in Africa, to mobilize resources for relief and assistance and to consider assistance to asylum countries to help them cope with the refugee problem.[145] ICARA II however purposed to review the results of ICARA I, as well as consideration for further assistance for refugees and returnees in Africa. ICARA II in 1982, also considered the impact of refugees on national economies of the affected countries.[146] This was as a result of the realisation that the international

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143 ICARA I was convened pursuant to a U.N. General Assembly resolution 35/42 of 25th November 1980, while ICARA II was convened pursuant to General Assembly resolution 37/197 of 18th December 1982.

144 Robert F. Gorman, Coping with Africa's Refugee Burden: A Time for Solutions, Martinus Nijhoff Publishers, 1987, p.15.

145 *Ibid.*

146 *Ibid.*

conventions alone would not resolve the refugee problems. Development assistance to refugees and returnees as well as countries ravaged by the refugee phenomenon needed to go hand in hand.

Lastly, I must mention that another limitation to the achieving of the scheme of protection envisaged by the international conventions lies in the fact that many countries, Kenya included have not, as mentioned earlier translated the international law provisions in to their own municipal laws. As such, refugees who have been given asylum in such countries are often treated like any other alien without being accorded the special rights that they are entitled to under international instruments. Refugees can therefore not claim the rights due to them under the international law regime locally. It must be recognised that refugees are a special type of aliens with specific rights under international law.

This Chapter has attempted to show that the refugee issue as an issue of global concern boasts numerous legislation internationally. The Chapter has particularly demonstrated that on the international scene, refugees boast of a grand scheme of protection. This fact aside, the refugee population has been on a persistent rise. This rise cannot be attributed entirely to there being a *lacuna* in the international legal framework. The chapter has in detail considered the provisions of the international refugee regime and further considered some of their shortcomings and limitations. It is submitted that it would be wrong to think that the most comprehensive global refugee legal regime would eradicate

refugee problems. Having a watertight legal framework is only part of the solution. Other solutions lie in economic development, globalisation of respect for human rights and seeking out the best in economic development, as well as exercising the principle of sovereignty within the necessary confines and not as a cover for human rights abuses. In other words, while the right to asylum must be maintained, greater efforts must be made to tackle refugee problems at their source by restoring peace and prosperity to countries where large numbers have been forced to flee.

CHAPTER THREE

THE REFUGEE PROBLEM IN KENYA

3.1 Introduction

In essence, the question to be answered in this chapter is how well the Kenyan Government has met its obligations under international refugee law and what contribution it has made towards the international efforts to tackle the refugee problem. It is trite law that general international law does not control procedures followed by states domestically towards a decision whether or not to become a party to an international treaty or convention. Once a state has however become a party, international law prohibits such a state from using their domestic legislation or lack of it to avoid the obligations it has assumed internationally under the treaty or convention. The Permanent Court of International Justice (PCIJ) has stressed that failure to enact legislation necessary to ensure fulfilment of international obligations will not relieve a state of responsibility.[1] This is the logical upshot of the assertion that the general duty of a party to a treaty is to ensure that its domestic law is in conformity with its international obligations.[2] In this scenario a state has the duty to ensure that it complies with the requirements of international law.[3] This is also the upshot of the Principle of *Pacta Sunt Servanda* whereby agreements between states are

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1 See Exchange of Greek and Turkish Populations Case, (P.C.I.J. series B, no.10.20).
2 Article 27of the Vienna Convention on the Law of Treaties.
3 The Free zones Case, PCIJ, Series A/B, no.46, (1932), p.167.

to be respected. The absence of a municipal legislation cannot be advanced as a reason for failure to comply with the dictates of international law. Thus the fact that Kenya has not incorporated the international refugee legal regime into her domestic laws is not a reason of her failure to honour her obligations under the international legal refugee regime more so having ratified the same. Being a dualist state however, Kenya is required to enact an enabling statute to incorporate international law in to its municipal law.

Kenya is located next to a politically turbulent region, the Horn of Africa. This region experiences desert conditions. It is here that authoritarianism has mushroomed leading to successive conflicts.[4] The development of authoritarianism in the Horn led to the breakdown of the state of Somalia, civil war in Uganda, Sudan and Ethiopia, while Kenya experienced ethnic clashes that saw some of its population displaced.[5] Consequently, political decay, economic stagnation and social disintegration have been prevalent. The Horn of Africa has therefore been notoriously associated with human displacement, as one writer aptly stated;

> The countries most plagued by dislocated populations are generally situated in the vortex of armed conflicts. The Horn of Africa, a region that encompasses Ethiopia, Sudan, Somalia, Kenya and Djibouti has become synonymous with population displacement, both internal and external. [6]

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4 On this see UNHCR publication, Africa's Refugees - Tackling the Crisis, 11 October 1995, pp. 10 -11. See also Buicha M., Flight and Integration: The Causes of Mass Exodus from Ethiopia and the Problems of Integration in the Sudan, Uppsala, Scandinavian Institute of Human Affairs, 1988. Also, a UNHCR publication, "The Horn of Africa: An Uncertain Future," Refugees, 1990, No.72.

5 In respect to Kenya. see Ahmednassir M. Abdullahi, "Ethnic Clashes, Displaced Persons and the Potential for Refugee Creation in Kenya - A Forbidding Forecast," International Journal of Refugee Law vol. 9, 1990, pp.196 -206.

6 Makau wa Mutua, "The Interaction between Human Rights, Democracy and Governance and the displacement of populations" International Journal of Refugee Law, Special Issue 1995, pp.38.

Since 1960's, famine, drought and war in the Horn of Africa have unleashed enormous waves of human displacement and refugee movements.

In Africa in general and the Horn of Africa in particular, displacement of persons is usually as a result of drought, famine, civil war or the end result of governmental policy.[7] No country in the Horn of Africa has been spared from the agony of human displacement. Post independent Kenya has known mass influxes of people from Uganda, Somalia, Ethiopia, Sudan and Eritrea. Kenya has been at the top quarter of countries offering temporary asylum to refugees.[8]

Kenya itself has a fragile economy and is one of the poorest countries in the world.[9] Against such a background, this chapter aims to trace the efforts made by the Kenyan government to tackle the problem of refugees.

3.2 A Historical Review of the Refugee Problem in Kenya

The very first flow of refugees in Kenya is officially said to have started in 1969 with the arrival of the Sudanese refugees.[10] The Government then called upon the international, national and local agencies to intervene and help it

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7 Robert Gersony, "Why Somalis Flee: A synthesis of conflict experience in Northern Somalia by Somali Refugees, displaced persons and others," International Journal of Refugee Law Vol.2 No. 1, 1990, pp.49.

8 See UNHCR, Kenya - The Birth of a Crisis, May 1992, p. 26.

9 The Daily Nation, 17th April 1998, p.7

10 See Emma M. Njogu, "The Refugee Problem in Kenya," Unpublished Dissertation, University of Nairobi,1993, p. 8.

assist those refugees who numbered around one thousand.[11] This however was only an official acknowledgement of the presence of refugees because before that there were already some Rwandan and South African refugees in Kenya.[12] This phenomenon also marked the official take-off of the activities of the UNHCR in Kenya.[13]

The human displacement in Sudan was a result of the internal civil war between the Islamic northern region and the Christian south.[14] The Sudan People's Liberation Army (SPLA) has been leading the military struggle against the government in Khartoum with its agenda being the creation of a Sudan in which no one race especially a minority race, nor one religious grouping, especially the Islamic fundamentalists are able to dominate political and economic power. The civil war in Sudan continues unabated and therefore there has been a constant flow of Sudanese refugees to North-Western Kenya and most of these are now living in Kakuma refugee camp. By February 2000, 64,254 Sudanese refugees were hosted in Kenyan camps.[15] It is hoped that the on going peace process will once and for all end the civil war in Sudan, so that this country which has remained one of the top ten refugee producing countries in the world can embark on development.[16]

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11 *Ibid.* p.9.

12 *Ibid.*

13 *Ibid.*

14 The people of the Sudan have fought two civil wars within 35 years with the intention of the government of the day being the total destruction of its opponents.

15 Ndege O. Peter, Kagwanja M. Peter, and Odiyo O. Edward, Refugees in Law and in Fact: A Review of the literature and Research Agenda in Kenya, Occassional Paper series Vol. 1 No. 1 of 2002, Moi University Press, 2002, p. 5.

In the 1970's thousands of refugees were created as a result of unrest in Ethiopia after the overthrow of the late Emperor Haile Selasie in 1974.[17] The Mengistu regime perpetrated rebel movements in all parts of the country dedicated to securing either the overthrow of the Government in Addis Ababa or the separation of their region from the rest of the country. The movement for the liberation of Eritrea complicated the situation, with Eritrea managing to secede in 1995.

Violence in Ethiopia under the military regime replaced the monarchy. Fuelling the situation was the continued Eritrean guerrilla secession movements and warfare between Ethiopia and Somalia over the latter's claim to the former's Ogaden area and its nomadic Somali inhabitants.[18] Between 1976-79, the western Somali Liberation Front engaged in armed struggle against Ethiopia and in 1992 more than one million Ogadenian refugees were located in Somalia, Djibouti, Kenya and beyond Africa. As a result, human movement between Ethiopia, Kenya and Somalia was common phenomena. The persistent drought and famine in the Northern Kenya, Southern Ethiopia and Somalia only worsened the situation as the pastoral communities moved in search of pasture and water. It should also be noted that Kenya, Ethiopia and Somalia have common ethnic communities living within their common borders. This *inter alia*, has permitted inflows and outflows between the countries and

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16 *Ibid.*

17 The Mengistu regime in Addis Ababa (up to 1991) utilised all the tools of overt repression against the different nationalities within the country.

thus the Kenyan authorities have not been able to adequately arrest the inflow of people in to the country either in search of refuge as refugees or in search of water and pasture as pastoralists. By 2000, Kenya was hosting slightly under 10,000 Ethiopian refugees. [19]

The overthrow of regime after regime in Uganda resulted in to a lot of human displacement.[20] The assumption of absolute power by Milton Obote and his subsequent overthrow by Idi Amin resulted in unrest and refugee outflows. During the reign of Idi Amin, there were mass killings and expulsion of people of Asian origin.[21] As a result, in Mid 1978, there were around six thousand refugees in Kenya mainly from Uganda.[22] The 1980's saw Uganda become the major source of refuges entering Kenya. For example 4261 out of 8266 refugees living in Kenya by October 1985 were Ugandan.[23] The Ethiopian refugees were second in number followed by the Rwandan refugees.[24] Some of the Ugandan refugees being professionals were easily absorbed in Kenya especially in the teaching profession.[25]

The influx of Somali refugees in Kenya has arisen due to different reasons. Armed conflicts between Somalia and Ethiopia as well as frequent droughts in

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18 The advent of the Ethiopian occupation which began in 1897 totally engulfed the Ogaden territory in 1954. The incompatibility of the occupying culture precipitated and contributed to the droughts, wars, pastoral displacements and famines in the territory.

19 *Supra* note 15 p. 3.

20 Ammii Omara-Ottunu, "Prospects for Democracy in East Africa," Nairobi Law Monthly, No. 42. 1992, pp. 39 - 41.

21 Goodwin-Gill, G.S., International Law and the Movement of Persons Between States, Oxford Clarendon Press, 1978, pp. 212-16.

22 *Supra* note 8.

23 *Ibid.* See also UNHCR publication, Global Refugee Report, (1989), p. 7

24 *Ibid.*

Somalia have combined to send thousands of refugees in to exile.[26] By 2000, Kenya was hosting 141,088 somali refugees.[27] The largest flow of refugees into Kenya has been from Somalia.

Up to early 1990, Kenya had taken care of a small number of refugees and therefore the institutional framework remained small. In March 1990, before the influx of the Somali refugees there were 13,323 refugees, out of whom, 10,110 had full refugee status, 2007 were mandated and 1206 were asylum seekers.[28]

The hitherto manageable situation assumed a new twist in 1991. A combination of civil warfare, drought and famine in Somalia resulted in the daunting proportion of refugees. By July 1991, there were 40,000 refugees. By May 1992, about 2000 refugees from Ethiopia and Somalia crossed the borders in to Kenya daily.[29] At the same time ethnic conflicts in the Rift-Valley and parts of Western Kenya were reported, resulting into the first recognised populations of internally displaced persons in Kenya. This came to be seen as the most serious challenge to individual and community rights in the history of modern Kenya, sending signals of civil strive.[30] By the end of 1992, there had been

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25 *Supra* note 8.

26 *Supra* note 7.

27 *Supra* note 19.

28 See report entitled, Evaluation of the All Africa Conference of Churches Council and World Churches Council Supporting Refugee Programmes in Kenya, June - July 1991.

29 See UNHCR, Kenya - The Birth of a Crisis, May 1992, pp.1.

30 At that time, Kenya exhibited all the signs of an African state on the brink of political turmoil, giving all the distress signals of a state in preparation for civil strife, with the distinct possibility of the breakdown of the institutions of a civil society. On this see Joshua Hammer, "Goodbye Mr. Moi," Newsweek, 11 November 1995, p.4. See also Aloo Ochola, "Civil War Looms in Kenya," Nairobi Law Monthly, No. 43, 1992, pp.24-6.

established sixteen border sites hosting over 427,000 refugees.[31] About 80% of the total number consisted of the vulnerable groups of women and children. This situation was worsened by the displacement of the people in Southern Sudan resulting in weekly arrivals of over 200 refugees in north-western Kenya. By April, 1995 there were 33,000 Sudanese refugees in Kenya.[32]

This sudden influx was mainly due to the political situation having deteriorated in Ethiopia, Somalia and Sudan. Regimes had been overthrown and antagonistic forces waged war against one another for coveted leadership. The killing of the Rwandan and Burundian Presidents and the subsequent overthrow of their governments saw the migration of over 6,000 refugees into Kenya. By 1995, the total number of refugees from Ethiopia Somalia and Sudan stood at 870,000 with Kenya accommodating more than half the number.[33]

By December 1996, the refugee population in Kenya had fallen to around 180,000.[34] This was a result of the programme of voluntary repatriation organised by UNHCR. In March 1993, over 11,000 Somalis and Ethiopians were repatriated. In total 220,000 refugees had been repatriated between 1992 and 1995. Due to this repatriation, some of the camps established in North Eastern Kenya were closed. At the beginning of 1997, Kenya's refugee population

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31 *Supra* note 22.
32 UNHCR, A Profile of Kakuma Refugee Camp, 1997.
33 UNHCR, Refugee by Numbers, 1996.
34 UNHCR, Africa Fact Sheet, 1997.

stood at 165,000.[35] In a Kenya Television Network (KTN) news Bulletin of 9th June 2003, it was reported that the total number of refugees in Kenya stood at 350,000 with 250,000 of these living in camps while 100,000 lived in Kenya's urban centers. 64% of these refugees, it was revealed were from Somalia. This is up from a total of 247,281 refugees in Kenya in 2000.[36]

From this historical review, it is clear therefore that Kenya has had to deal with refugee since independence, albeit in varying magnitudes. It is therefore surprising that up to now, Kenya does not have a refugee specific Act.

3.3 Legal And Institutional Responses to the Refugee Problem in Kenya

As pointed out, Kenya does not have a refugee specific law. The existing legal framework comprises two legislative instruments that deal with aliens generally; The Aliens Restriction Act[37] and the Immigration Act.[38] The Aliens Restriction Act defines an alien as a person who is not a citizen of Kenya.[39] This per-se qualifies a refugee to be an alien. The Aliens Restriction Act came in to force on the 18th May 1973 and is purposely tailored to restrict the movement of aliens in Kenya as echoed in its title;

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35 *Ibid.*
36 *Supra* note 19.
37 Chapter 173, Laws of Kenya.
38 Chapter 172, Laws of Kenya.
39 S.1 of the Aliens Restriction Act.

> .... an Act of parliament to enable restrictions to be imposed on aliens and to make such provisions as are necessary or expedient to carry out such restrictions in to effect.

Under this Act, the minister in charge may make an order prohibiting aliens from entering Kenya, embarking in, or leaving Kenya.[40] He can further make orders prohibiting aliens from entering certain areas of the country, or requiring that they reside within certain areas.[41] This seems to be the legal basis for rounding up refugees into camps. The power of the minister in charge at any one time is unlimited and he can make orders on any issue which appears necessary or expedient for the safety of the country.[42] The onus of proving that one is not an alien is on the person himself. In fact, the practice obtaining in Kenya is that to the police, everyone is a potential alien unless an identity card is produced to establish Kenyan nationality.

The long title of the Immigration Act states that it is an Act of Parliament to amend and consolidate the law relating to immigration in to Kenya and for matters incidental thereto and matters connected therewith. The movement of persons is therefore closely regulated by the Immigration Act. The Immigration authorities have the overall responsibility of controlling the borders, which has in reality conditioned them to be enforcement minded and skeptical rather than impartial and sensitive to the special problems of refugees.

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40 S.3.
41 *Ibid.*
42 *Ibid.*

Under the Immigration Act, no person who is not a Kenyan citizen may enter the country without a valid pass.[43] A person other than a prohibited immigrant is required to make an application to the relevant authorities. A person, whose application is denied, can appeal to the minister in-charge, whose decision is final and cannot be questioned. Such a provision to say the least contravenes the applicant's right under the 1951 Convention for an unhindered right to court.[44] In any event the Immigration Act was enacted to regulate visitors like tourists and businessmen voluntarily entering Kenya and not people seeking protection from persecution back home.

The Minister may also by order in writing direct any person whose presence in Kenya is unlawful to be deported to his country.[45] The Immigration Act imposes duties and liabilities to carriers and owners of vessels and aircrafts who may carry illegal Immigrants, who are liable jointly and severally to make good any expenses incurred by the government in respect of transport and maintenance of such a person or persons and his or their removal from Kenya and the amount of such expenses is a civil debt recoverable summarily at the suit of the Minister.[46] Where permission is denied to an applicant, the master of a ship or captain of an aircraft as the case may be is under a duty to secure that such a person is removed from Kenya.[47] This raises the question of *non-refoulement* as it can in some circumstances amount to returning an asylum

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43 S.4(1).
44 S.8(1).
45 S.8(1).
46 S.9(3)b.
47 S.9(3)a.

seeker to a place where such a person is likely to face persecution. It is necessary that such a person is only returned after the proper process of the law as required by Article 13 of the Covenant on Civil and Political Rights.

Generally, a person incapable of supporting himself or his dependants is a prohibited immigrant.[48] Properly construed, such a provision is meant to bar from Kenya immigrants who would have to rely on the government for support. However, as seen earlier, refugees more often than not are not in a position to support themselves and often arrive hungry, naked and in need of medical attention. International law requires that such persons should not be returned to places where they would face persecution as this would be against the principle of *non-refoulement*.

What is clear from both the Immigration Act and the Aliens Restrictions Act is that the existing legal framework pertaining to refugees is restrictive and not appropriate to refugee cases. Refugees in Kenya are therefore categorised as aliens as are stateless persons. In a half-hearted attempt, the Kenya Government in 1972 vide the Immigration Amendment Act No.6 of 1972 sought to recognise refugees as a special category of aliens and thereby provide entry permit class M. The Act provides;

> A person, who is a refugee, that is to say, owing to well founded fear of being persecuted for reason of race, religion, nationality, membership of a particular social group or political opinion is unwilling to avail himself of the protection of his country of his nationality, or who, not having a nationality and being outside the country of his former habitual

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48 S.3(1)(a).

> residence for any particular reason is unable or unwilling to return to such country and any wife or child over the age of thirteen years of such a refugee.

The definition of a refugee aforesaid is similar to the definition found in the 1951 Convention. However, the inclusion of the international law definition of a refugee in an otherwise restrictive Act has not been of much effect as a refugee in Kenya is lumped together in the same category with aliens and stateless persons. In any case, the same Act of Parliament classifies as prohibited immigrants persons who cannot economically support themselves as well as their dependants. Also prohibited are persons who do not pass a medical test under the Act. The contradiction in the Act needs to be cured for the Act to fulfill the requirements of international refugee law.

Decision making by the Ministry's officials is bound to be affected by the fact that determination of refugee status is based on a transcript prepared by a non-specialised officer without the benefit of a personal appearance by the applicant before the decision maker. This is because with the mass influxes of refugees characteristic in Africa, the possibility of individual case examination for refugee status is often not possible. As such, it has been left to the Immigration officer at the port of entry either to allow entry or not. It should be noted that during the influx of the Somali refugees there were many cases where Immigration officials at the ports of entry could simply refuse entry into Kenya and some refugees starved to death in their boats.[49]

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49 UNHCR, Global Refugee report, 1993, p.12. See also Daily Nation. "'Somali Refugees Refused Entry into Kenya," 11 July 1992, p.32.

Further, there appears to be no requirement for providing reasons where an administrative act is of such a nature as to adversely affect the rights of the individual refugee. A person whose application is made to be permitted into Kenya as a refugee, should be informed of the reasons on which a decision is based. There is a strong case for the giving of reasons, as an important element in administrative justice for it is obviously difficult for an asylum seeker or his representative to restate an asylum case when the reasons for refusal are not known.

The law as it stands now offers no right of appeal or access to the court for any asylum seeker, as the Minister's decision is final. It is noteworthy that whether a person is a refugee or not, is a matter of assessing what might happen to the person if returned to their countries of origin. It is widely believed among the circles of agencies such as the ICRC, IRC, Don Bosco, and many others dealing with refugees that it is the right of every asylum seeker to have an independent hearing of his asylum claim when immigration authorities do not agree with the individual that he has a well founded fear of persecution. It opined that the proposed Bill[50] *inter alia* provide for a right of appeal to the courts of law for all asylum seekers where an application is refused by immigration authorities.

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50 Post Chapter 4.

It should be noted that the existing refugee legal framework was intended and to a certain extent is only appropriate for Individual refugee cases. Situations of large-scale influxes of refugees pose problems and characteristics, which are different from those encountered in individual or small group cases. The question of individual eligibility for protection becomes largely theoretical and of little relevance when a great mass of people cross a frontier. In such cases, mass or group determination processes ought to be used. There is no provision for such process in the existing legal framework. It is to a large extent true that without a properly defined legislative framework, refugees have not been placed in the political and legislative agenda of Kenya. As such, Kenya, which has been faced with the problem of mass influxes of refugees for the better part of its post independence history has managed the refugee problem on an *ad hoc* basis.

3.4 Assessment of Kenya's Response With Respect to Some of the Rights Provided under the International Legal Refugee Regime

Kenya ratified the OAU Convention in 1992, while it became a party to the 1951 Convention in 1966 and the 1967 Protocol in 1981.[51] Kenya therefore has a responsibility to ensure that she abides by her international obligations.[52] Chaloka Beyani has argued that the theory of state responsibility rests on a

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51 Hyndman, J and Nylund, V.B., "UNHCR and the Status of *Prima Facie* Refugees in Kenya, " International Journal of Refugee Law Vol 10 No. 1/2 , 1998, p.29.

rather simplistic but complex practical proposition; that is that every state must be held responsible for the performance of its international obligations under the rules of international law.[53]

(a) Right of Asylum

In general, Kenya, having become a party to the 1951 Convention, its 1967 Protocol and the 1969 OAU Convention recognises as refugees, all persons who conform to provisions of Article 1 of the 1951 Convention as extended by article 1 of the 1967 Protocol and the definition under article 1 of the OAU Convention. The recognition of such persons and their claim to asylum is of course subject to safeguards of national security. Likewise, if the presence of the persons is likely to threaten good relations between states or be seen to undermine the government of a foreign state be it the country of origin or any other state, Kenya will often reject the application. In 1995, for example, some Rwandan nationals suspected to have taken part in the 1994 genocide, were turned away when they applied for asylum.[54] Likewise, as in this case, the international Community may influence Kenya's decisions regarding asylum.

Under the Immigration Act, a refugee is entitled to Entry permit class M. However, no regulations have been enforced to restrict or bar the entry of genuine refugees as has occurred in industrialised states. This is so

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52 *Supra.* note 1.

53 Chaloka Beyani, "State Responsibility for the Prevention and Resolution of Forced Population Displacements in International Law," International Journal of Refugee Law, Special Issue, 1995, pp. 131-37.

54 Daily Nation, "UN Turns Away Killing Suspects," November 16, 1995, p.32. For more information in connection with Rwanda's case, see UNHCR, Refugees - Victims of Social Disintegration, March 6-12 1995.

notwithstanding her poor economic conditions so that refugees gain very little in terms of material benefits, compared to those abroad. Likewise, although it is the duty of the government to provide security, often this falls far short of the expectations. In effect, several refugees have been victims of bandit attacks and even attacks from deployed forces. Because Kenya has continued to accept refugees, except in 1992 when she was overwhelmed by the influx of Somali refugees, the result is that she is made to bear a special burden at a time when she can barely meet her own basic needs.[55]

It is difficult to accurately say that a refugee who seeks asylum in Kenya is assured, as provided by the preamble to the OAU Convention, of a peaceful and normal life. Refugees admitted in to Kenya live in camps that are often overcrowded and lack the basic amenities. Certainly, refugee life is not a normal life and Kenya relies heavily on UNHCR and its partner agencies to make this life at least bearable. Pursuant to Article II of the OAU Convention, Kenya has always regarded the grant of asylum as a peaceful and humanitarian act and therefore tries not to be guided by her relations with other states, in determining to whom to grant asylum. She has on the whole adopted a generous attitude towards granting asylum to refugees.

(b) Right to *non-refoulement*

International refugee law is premised on respect for the norm of *non-refoulement*, that is, that refugees should not be returned to the state of origin

55 UNHCR, Refugees - The Birth of a Crisis, May 1992, pp.26-28.

where their lives would be in danger. The prohibition is set out in Article 33(1) of the 1951 Convention which states;

> No contracting state shall expel or return *(refouler)* a refugee in any means whatsoever to the frontier or territories where his life or freedom would be threatened on account of war, religion, nationality, membership of a particular social group or political opinion.

The policy of *non-refoulement* is not only codified in the refugee treaty regime but has also achieved the status of a *jus cogen* and thus binds all states, irrespective of accession to the treaty.

According to a Mr. N. Waweru, Secretary in the Ministry of Home Affairs in-charge of refugee issues, no genuine, well-deserving refugee has ever been expelled from Kenya's territorial boundaries.[56] If the Government is of the view that certain refugees are likely to prejudice her national security or her relations with the country of origin, then she liases with UNHCR to find an alternative asylum country. In 1993 many of the Somalis suspected to have worked in cohorts with the former Siad Barre, President of Somalia had to seek alternative asylum in the Western countries especially USA and Canada.[57]

Kenya has so far conformed with the requirement of Article II(3) of the OAU Convention which states;

> 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 ...

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56 Interview carried out by the writer in the Ministry of Home Affairs which is the Ministry responsible for Refugee affairs in August 2001.

57 *Supra* note 39, p.16.

Agreeably, strict conformity with these provisions has exerted serious environmental, security and economic hardships on Kenya in general and the Government in particular. The large influx of Somali refugees in 1992, for example saw great degradation of the fragile ecology of the North Eastern Province coupled with depletion of water resources and deforestation.

The alternative sought is to encourage international support through UN organisations such as United Nations Development Fund (UNDP), United Nations Environmental Programme (UNEP) and World Food Programme (WFP). Kenya tries as much as possible to provide security to the agencies which help alleviate the crisis. There have been efforts to demand compensation from the international community for these efforts and the International Monetary Fund (IMF) and World Bank try to so compensate by increasing Aid.[58] Kenya was one of the twenty-two African countries invited to make submissions for infrastructural assistance for degradation directly related to the impact of refugees to ICARA II.

(c) Right to Employment

Under Article 17 of the 1951 Convention, Kenya is obliged to create favourable conditions under which persons may engage in wage-earning activities. In this regard, she must provide no restrictive measures as regards

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58 African leaders including former President Moi have raised alarms to the international community calling for help in cases of mass influxes. As such, there is a host of international organisations including WFP, and ICRC among others, working as partners in alleviating refugee problems.

employment. This is especially in cases where the refugee has dependants or has been a resident of Kenya for at least three years.

Provision of employment pre-supposes that there are indeed places and that there is enough money to pay the refugee's salary. The truth is that this is not so. Most of the refugees live idly in camps even though the Government does not object to their working. On the other hand, a refugee must have a work permit if he is to be employed in any sector. This enables Kenya utilise the professionals among the refugees.[59] The Kenya Government's policy of isolating refugees in remote desert camps has hampered refugees' mobility and hence their access to employment opportunities are very restricted.[60]

The law also facilitates acquisition of licenses to set up businesses in any part of the country.[61] Normally, grant or rejection of application for work permits and licenses is discretionary. It is usually very difficult to appeal to a higher authority if the application is rejected. However, Kenya's population is itself unemployed. It would therefore be hard to employ refugees. UNHCR provides material assistance to refugees for self-employment. They are encouraged even within the camps to make handicrafts and goods, which are then sold outside the camps to earn the refugees some little money. However, the wealthy Ethiopian, Eritrean and Somali refugees have found their way to

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59 For example the educated Ugandans were easily absorbed in the government especially as teachers. See *Supra* note 8.

60 *Supra* note 51 at pp.22.

61 Application for trade licenses is done in the ordinary way so long as one has been accorded refugee status and as such lawful stay in the country.

the urban areas where they operate matatus, while others sell imported goods, including clothes and electronics.[62]

(d) Settlement

This is not in the strict sense a function of the asylum state. The only major role Kenya plays is legal recognition of settled persons as well as provision of land upon which the refugees will settle. The UNHCR undertakes the role of resettling refugees on the allotted land. The Commissioner has full authority to decide how this will be done. However, it is important to point out that in general, Kenya discourages settlement of refugees owing to the negative economic and security effects it brings with it. Adoption of this measure is only as a last resort. In many cases, there is not available land to resettle them and the process is very expensive. The Thika Camp was used as a transition point for those refugees who were to be resettled in third countries. Kenya on the whole is not capable of providing resettlement for refugees and as such just facilitates resettlement in third countries. As it is, Kenya has a problem of land for its own populations and hence resettling refugees would be an onerous task.

(e) Access To Courts

Article 16 of the 1951 Convention on Refugees entitles refugees to have free access to courts and also legal assistance in the same way that nationals

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62 Somali refugees operate clothes shops in Nairobi and other major towns while Ethiopian refugees own mainly matatus in Nairobi.

can exercise this right. A refugee has in substance the right to sue the Attorney-General for violations of his rights by Kenya. Usually no legal obstacles are imposed on the realisation of this right. However, there are many technical difficulties. In the first place, majority of the refugees due to high levels of illiteracy, are ignorant of their rights. Secondly, court process is conducted in English and Kiswahili, which most refugees do not understand, and in many cases, there are no readily available interpreters to remedy the situation. The process of litigation is also very expensive and many of the refugees, being poor, cannot afford to bring suits to court. Perhaps the biggest stumbling block is that Kenya has not translated international law provisions into her own municipal laws, thus creating a problem of enforcement. In 1998 a mobile court was set up in Daadab camp but it was not long before it stopped operating. It is important to point out that the Kenyan courts have not been enough for its own population. As such, there is a big backlog of cases. In this scenario, it has not been thought fit to establish courts specifically for refugees. As such many refugees have not been able to litigate for their rights and silently suffer in the camps. There have been cases of destruction of refugees property in the camps, loss of lives, fighting with locals, rape even by security forces, but no compensation has been due to refugees as a result of lack of access to courts. The latest incident has been the fighting going on between refugees at Kakuma refugee camp and the locals in that area in June 2003 as reported in the local media.

f) Right to education

Article 22 of the 1951 Convention provides that contracting states shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education, and treatment as favourable as possible but not less favourable to that accorded to aliens generally in respect to education other than elementary education. It is worthwhile to note that this is one of those rights that is very difficult for Kenya to accord to refugees. This is because much of Kenya's population has itself not had access to elementary education. However, the Government has supported UNHCR's efforts as well as the efforts of other NGOs in this area of refugees to set up elementary schools as well as other training facilities in the various camps set up. UNHCR has set up various schools and provided teachers in the camps. [63] In addition, refugees who are able to fund education or employment training programmes in the cities are permitted to do so pursuant to an agreement between the Kenya Government and UNHCR. [64] Kenya has also recognized the certificates from refugee creating countries in cases where the refugee is capable of affording higher education.

It is worthwhile to note that although little has been achieved in the area of education, the Government is not averse to granting this right. It is however the unavailability of resources that have hindered the realization of this right.

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[63] *Supra* note 47 pp.42.
[64] *Ibid.*

The fact that most refugees are confined in camps has also meant that they do not have access to the normal schools available for elementary education.

g) Freedom to practise religion

Article 4 of the 1951 Convention provides for this freedom and requires that refugees are accorded this freedom on equal footing with nationals. Kenya has generally allowed refugees to practise their own religions. Churches have therefore been set up both in and outside the camps to enable them do so.

h) Freedom of movement

This is provided under Article 26 of the 1951 convention. The biggest hindrance to the realization of this right in Kenya is the fact that most refugees in Kenya are confined in camps. This confinement has been justified on grounds of national security. Movement out of the camps is limited to refugees with protection letters from UNHCR and travel documents from District Officers. This is one of those freedoms that any country would administer jealously because of its potential to cause concerns of public security. This freedom is administered pursuant to the provisions of the Aliens Restriction Act, [65] and the Immigration Act.[66] The Government has power to restrict the movement of persons under the two Acts. This power has been recognized even by the 1951 Convention.

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[65] *Supra* note 37.

[66] *Supra* note 38.

From the foregoing, it is worth noting that in spite of the many difficulties Kenya has faced with regard to maintaining refugees, she continues to adopt or maintain an open door policy towards asylum seekers. There is no intention of limiting the scope of who a refugee is. It is however important to note that the absence of a refugee specific legislation in Kenya has meant that refugees are handled in accordance with the laws relating to aliens generally, that is the Aliens Restriction Act and the Immigration Act. This has had a negative impact on the refugees' realization of their rights as provided by the international instruments because those same rights have not been provided for in any local legislation.

Kenya's lack of economic power and her reliance on donor funds has meant that she can barely provide for her own population. This has meant that most refugees are segregated in camps where living conditions are not desirable by any standard. This has meant that refugees are unable to access their full rights as provided under the international conventions. The social-economic sustainability of refugees has been a challenge for Kenya as was stated by one author;

> In many of the countries, communities which are already having difficulties satisfying their own basic needs are now weighed down with the burden of the thousands of people who flock on completely destitute. In Ethiopia nd Kenya, the number of refugees and returnees from the conflict which was

raging in Somalia ran into thousands. [67]

It is clear that the best protection that refugees ought to receive is that which allows them to create independent livelihoods as opposed to relying on handouts from UNHCR and its partner agencies. [68]

3.5 The Kenya Policy and Institutional Response to the Refugee Question in the Absence of a Comprehensive Refugee Legal Framework

From the outset, it should be stated that Kenya has been hesitant about formulating a well-defined refugee policy during the post-independence history of its existence. Part of the explanation lies in the paradoxes and opportunistic ambivalence that have always been the undercurrents in Kenya's regional politics. By so saying, the author is not positing that the country has been indifferent to the problem. In fact, Kenya together with its African counterparts may well be among the biggest contributors to the UNHCR global budget, if the land they offer for the settlement of refugees was to be quantified.[69] It is clear that Kenya, like many of its global counterparts, does not have a fixed view on the politics of immigration and have at times adopted

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67 Nana-Sinkam S.C., "From Relief and Humanitarian Assistance to Socio-Economic Sustainability, Rehabilitation, Reconstruction and Development with Transformation as the ultimate Solution" International Journal of Refugee Law, Special Issue, 1995, p.187.

68 *Supra* note 51 at p.39.

69 'Problems and Promises for Mission Africa Beyond 2000' A report by the All Africa Conference of Churches, Mombasa November 1991.

unorthodox means to meet the exigencies of a particular situation which has ranged from an open door policy at time to the refusal of entry at other times.

Kenya, being one of the poorest countries, lacks the Institutional capacity to deal with refugee problems especially when refugees enter the country *en masse*. Thus, there are no properly established Government institutions to deal with the problem. Some time back before 1991, Kenya had a refugee status determination committee whose function was to distinguish genuine refugees from immigrant workers. This committee consisted of UNHCR officials and Government Officials. However, the committee was disbanded in 1991 when the number of refugees increased and it became too difficult to screen them. There have been suggestions to re-introduce it to check the number of illegal refugees in Kenya.

The Government's assistance to refugees in Kenya has chiefly been by way of co-operation with UNHCR. Apart from co-operating with UNHCR, the Kenyan government has been at the forefront in search for peace and stability in the Horn of Africa as a durable solution to the refugee problem. This has been by trying to bring warring parties to reconcile in the form of hosting mediation talks. [70]

It should be stated from the outset that it is the Ministry of Home Affairs, which plays a leading role in refugee affairs within the Government. As noted

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70 See post this chapter. In June 2004, a peace pact was brokered in Kenya between the Sudanese warring factions.

elsewhere, in the absence of a specific refugee legislative enactment, the Government's response is to a large extent impulsive. Whereas many a times it has exhibited an open-door policy, at other times it has slammed its doors to asylum seekers thereby contravening the provision of the international refugee legal regime to which it is a signatory. There are even instances when Kenya has allowed its asylum policies to be influenced by a particular regime in power in the country of origin, as has happened in the case of Rwandan refugees.[71]

For many years, Kenya's treatment of refugees has not been consistent. While it has allowed thousands of refugees from neighbouring countries to remain within her borders, It has denied refugee status to many, has used refugees as political scapegoats to draw attention away from domestic problems and has sometimes forcibly repatriated individual refugees.[72] In 1989, for example, several thousand Somali refugees entered Kenya fleeing the civil war in their country. More than 250,000 refugees entered Kenya in September 1989. The Kenya Government denied the refugees even the most basic assistance and some reportedly starved. Some refugees suffered beatings, arrests and other forms of harassment by Kenyan authorities before being forcibly repatriated to Somalia.

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71 *Ibid.*

72 Daily Nation, January 7 1989.

Although as stated elsewhere, Kenya has ratified the international refugee instruments, its lack of compliance with these instruments has been of great concern even to UNHCR, which stated;

> ... the legal protection situation for asylum seekers and refugees in Kenya continued to give cause .... for ... concern .... the government decided to confine asylum seekers to the Thika reception centre (which though built for 320 held 1400 in April 1990) and not to allow Ugandan asylum seekers access to the asylum procedure.... UNHCR was denied access to groups that had reportedly crossed into Kenya to seek refuge.[73]

The Kenyan authorities also frequently deny refugee status to individuals who UNHCR considers to be refugees. In 1989 the government began a programme under which all ethnic Somalis in Kenya had to register and prove that they were either Kenyan citizens or otherwise legally in Kenya. The purpose of the screening, which was only applied to ethnic Somalis, was reportedly to identify undocumented aliens.[74] Those acknowledged as citizens were issued pink identity cards so as to distinguish them from other Kenyans. There were reports however, that many ethnic Somali Kenyans who could not prove their citizenship were denied identity cards. Although it is difficult to establish the exact figure of Somalis who were screened, UNHCR put the figure at 3,500.[75]

In October 1990, following an armed invasion of Rwanda by Rwandan exiles, the then Kenyan President, Daniel Arap Moi issued a directive that all Rwandan refugees must leave Kenya immediately and that Ugandan refugees engaged in "illegal activities" would also have to leave.[76] The reason

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73 UNHCR, World Refugees Yearbook 1991 - The Situation of Refugees in Kenya, pp. 28-31.

74 *Ibid.*

75 *Ibid.*

76 Daily Nation, "Rwanda Refugees Told to Go" October 18, 1990, p.32.

underlying such a directive seems to be the lack of a desire by the Kenyan authorities to offer sanctuary to planners and perpetrators of violence in its neighbouring countries. Further, the Kenyan Government also stated that it would not allow opposition groups to bid their time within her borders and seize power or perpetrate ineffective arbitrary and violent governments in its neighbouring countries. Such an assertion on the part of the Government is rendered nugatory by its response to the Rwandan refugee issue. In Kenya, Rwandan refugees arrived in multitudes after the genocide and change of government in 1994. They felt even more secure in Kenya after the much publicised vow by Kenya's Government that Kenya would not co-operate with the International Tribunal for Rwanda sitting in Arusha, contrary to international law expectations. Kenya's response to the Rwandan issue is greatly attributed to the fact that Kenya held the incumbent Rwandan regime responsible for the assassination of the former President in April of 1994, which led to the termination of diplomatic relations between Kenya and Rwanda, in the same year.

However, regional imperatives have forced the Government to reconsider its stand. Thus Paul Kagame's visit to Kenya in July of 1997, the Kenyan Government was quite receptive to his request to it to hand over to the tribunal genocide suspects who were living freely in Nairobi. Thus, hundreds of Hutus and other refugees were seized and locked up in Police cells. This change of stand can be explained by the feeling that Kenya's lack of co-operation with its neighbours would lead to it being sidelined in regional affairs.

It should be noted that the otherwise harsh treatment occasioned to refugees as enumerated above has been mostly in cases of mass influxes. Reasons for the turn around from the open door policy by Kenya in the 1990's include the following:

a) Pressure exerted by the sheer magnitude on Kenyan resources by the refugees.

b) The impact of refugees on Kenyan security concerns.

c) The economic crisis in the country occasioned by the current global depression.

d) The shrinking international support.

e) Failure of the open door policy in other countries like Tanzania.

It has been stated that the open door policy in the 1980's was not meant to turn Kenya into a permanent place of resettlement. Kenya, already incapable of feeding its own citizens can only provide temporary relief to victims while permanent solutions to the underlying problems are sought through international fora. The closed door policy has been influenced by international precedents whereby double standards exist, under which weaker countries are expected to live up to their humanitarian obligations when major powers do not do so, especially when their own national rights and interests are at stake.[77]

It should be noted that although the Kenyan Government is not directly feeding the refugees, their impact has put a heavy strain on the country's economy and resources. Kenya having only dealt with refugees on a small scale, was forced to go through a quick learning process following the mass influx of refugees. The immediate response was to tighten border control and close its doors. The Government immediately invoked article 1(2) of the 1969 OAU Convention on Refugees under which a member state faced with a refugee problem may appeal directly to other member states and such other member states shall in the spirit of solidarity and international co-operation take steps to lighten the burden on the appealing member state.[78]

Kenya, having sensed its inability either to keep its borders watertight by lack of personnel and the inappropriateness of the action in view of the ravaging war in Somalia, or to feed and shelter the refugees, sent a message of distress to the international community. Kenya, like other countries was of the view that the international community, had to re-affirm its support to refugees and to put in place a credible system, of distributing the burden of refugees equitably. In other words, Kenya's response to the refugee problem especially in case of mass influx was the adoption of the "but for" test. The "but for" test well conversant with tort lawyers has been the logical upshot of dividing resources in the face of an escalating refugee problem. As such, asylum countries especially in the developing world, and not even able to feed their

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77 See generally, Christopher L Avery, "Refugee Status Decision Making - The Systems of Ten Countries, " Stanford Journal of International Law Vol. 19 No.2, 1983, pp. 210-17.

78 This is also provided for under paragraph 4 of the 1951 Convention.

own population find themselves unable to provide for the refugee population. Under this system, any expense which the host country would not have met but for the presence of refugees on its soil should be regarded as the joint responsibility of the international community. It is not up to the government to commit more resources to the welfare of refugees.

In evaluating the Kenya Government's response to the refugee problem, sight should not be lost of the fact that states have a legitimate interest in regulating the movement of people into their territory which is a direct corollary of the concept of state sovereignty and territorial integrity.

Though the inability of the Kenyan Government to take care of refugees is understandable in view of its own escalating poverty, summary rejection and detention of asylum seekers and adamant refusal to co-operate with the international community in search of peace in Rwanda is inconceivable especially coming from a state which has ratified the international refugee legal regime.

By and large this otherwise negative response by Kenya to the refugee problem should not be viewed as exhaustive since earlier on the Government exhibited a multi-dimensional response to the problem. This is especially so as Kenya in the 1980's gave asylum to thousands of Ugandans who were mainly absorbed in the education sector. It is also noteworthy that Ethiopian, Somali and Eritrean refugees in Kenya own more than two hundred matatus plying

some routes in the city of Nairobi. Furthermore, Kenya provides an ideal example of the co-operation between a host country and UNHCR. The government has also played an important role in the search for peace in the region.

All the aforesaid otherwise contrasting responses help to buttress the author's stated view that Kenya lacks a specific policy for tackling the refugee problem.

3.6 Kenya's Co-operation with UNHCR as a Response to the Refugee Problem

Due to the nature and scale of the movements of refugees into Kenya, the administrative and legislative basis which is inherent has proved inappropriate and insufficient to manage refugee flows and alleviate the plight of the displaced. Institutional experience and trained personnel are lacking in Kenya together with efficient border control systems, emergency preparedness, capabilities, reliable information systems, appropriate early warning systems, and adequate financial structures. The financial incapacity of Kenya to handle the refugees in the country has meant that refugees, apart from being allowed into Kenyan soil are not provided for by the Government. Neither can Kenya assure them of security especially when camped along the border due to a shortage of personnel. The situation along the Kenya-Somali border as well as the Ethiopian situation has remained shaky to an extent that

the Government is thinking of issuing guns to Kenyans along those borders to guard themselves against persistent cross border raids.[79]

The adoption of a "but for" test by Kenya has therefore meant that there is a void in terms of Government institutional arrangements to cater for refugees. This void has been filled by the international community through the agency of UNHCR among other international donor agencies. Kenya on its part has collaborated with UNHCR and other donor agencies to an extent that even UNHCR is involved in the refugee status determination process.

There are four categories of refugees in Kenya. These are full status refugees, mandate refugees, non-recognised refugees and asylum seekers. Asylum seekers in Kenya are interviewed by a committee consisting of a government Immigration Officer, a representative from the Ministry of Home Affairs and National Heritage and a UNHCR Protection officer. If the individual is successful after this interview, he has to be cleared by the special branch of the Immigration department before he receives the full refugee status. Asylum seekers who are cleared by the committee but fail to be cleared by the special branch are given the status of mandate refugees. In principle, any asylum seeker who is not successful at the interview has a right to appeal to a second committee consisting of different officials from the UNHCR and the Immigration Department. Asylum seekers who do not pass the interview for the second time are the so-called non-recognised refugees.

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79 Daily Nation, September 5, 1997.

The full status refugees receive an identity card and are entitled to receive a work permit. The mandate refugee receives a protection letter from UNHCR stating mandate refugee status but is not allowed to work in Kenya. The non-recognised refugee is supposed to receive a letter from UNHCR stating that he has not been granted refugee status. It should however be noted that the above-mentioned procedure of processing refugee status only applied when the level of refugees was manageable. When there were mass influxes, the procedure was done away with altogether as it involved a lot of procedures whereas the situation obtaining required a quick response.

Since the 1960's, many organisations assisted refugees through what was known at the time as Joint Refugee Services of Kenya (JRSK). By 1981, this body had become large and complicated, and many organisations funding it thought it was no longer delivering the envisaged services to refugees. By that time, many agencies such as the Kenya Catholic Secretariat (KCS) and the All African Churches Council (AACC) had pulled out of JRSK. The result was the birth of the Karen Agreement, which basically was an understanding between UNHCR and the AACC as major donor parties. The Karen Agreement came to a halt in 1990.

In the 1990's, Kenya experienced refugee inflows of unprecedented proportions. Kenya together with refugee aid agencies was forced to go through a quick learning process. Kenya responded by setting aside some trust

land for camps. UNHCR acted and continues to act as the body through which international aid is channelled. The camps so established were put under different aid agencies by the UNHCR. The Government through the Ministry of Health has provided medicine although the major portion of the medical supplies have been provided by UNHCR.

To beef up security in the camps, a large number of armed forces were deployed to protect the refugees and aid workers against bandit attacks and attacks from warring Somali factions. It is noteworthy that UNHCR has provided equipment to the Kenyan security men involved in maintaining order and security both within and around the camps. For example, since 1992, UNHCR has invested more than Kenya shillings 70 million equipping the Kenyan police in Dadaab and Kakuma with a fleet of 27 Landrover Pick-ups and other trucks with special radios. Police Barracks have been built in the camps and stations constructed.[80]

The Government in collaboration with UNHCR has improved infrastructure in the refugee camps. To alleviate the problem of lack of water in the camps, the Government in conjunction with humanitarian agencies dug many bore-holes. Most of the boreholes sunk by UNHCR are of a permanent nature and can last for up to thirty years. Together with the UNHCR, the Government introduced educational programmes and integrated reproductive services tailored to the particular refugee needs. Women

especially are also able to apply their acquired skills to generate income. Counselling services using Kenyan social workers have been stepped up in the camps. To curb criminal activities in the camps, the Government with donor assistance has set up police camps in all the camps although some have now been closed. Violated victims are encouraged to report the crimes, the stigma notwithstanding. And in an attempt to make refugees self-supporting and skilful, trained personnel from Government institutions train refugees in basic skills such as carpentry.

It should be noted that although most of the camps were and are managed by UNHCR, the Government managed the Thika camp, which was used as a transit centre for those refugees that had to be resettled to third countries. The Kenya Government in 1992 formed a mission comprising of its representatives and those of UNHCR, UNICEF and WFP due to the urgent need at the time to improve the refugee situation in the country. This resulted in marked improvement in refugee camp management, joint logistics, registration, monitoring and reporting.[81]

UNHCR and various NGOs including CARE International, World Vision, World Lutheran Foundation, and many others assist the very needy arrivals with a monthly subsistence allowance. Later, when their refugee status is established, they may even enjoy educational scholarships, vocational training

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80 UNHCR, Information Bulletin: Kenya and the Somalia cross border operation - Finding Solutions November 1996, p.8.

81 *Ibid.* p.3.

and even employment on such income generating programs like sewing, knitting and baking. The Kenya Government in an attempt to make refugees self sufficient has, in conjunction with the IMF and other agencies, set out to give loans at low interest rates to refugees to enable them set up businesses.[82] Such a move is intended to shift the assistance operations of UNHCR progressively towards building self-sustaining local programs.

Collaboration between Kenya, UNHCR and other refugee aid agencies has also been realised in the area of environmental protection and conservation forums. An environmental working group has been established to address environmental concerns in regions which are basically arid or semi-arid. The environmental working group is composed of local and refugee leaders, the government representatives as well as representatives of NGOs and UNHCR. Tree Nurseries have been established while energy saving jikos have been introduced to reduce deforestation. The Kenya Government provides police escort for all refugee movements. UNHCR provides police with radios, vehicles and assists in the construction of police barracks.[83]

The collaboration between UNHCR and Kenya under which Kenya has no significant financial contribution to the refugees' upkeep should be understood from the background of the poverty affecting the country and the subsequent adoption of the 'but for' test whereby the international community

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82 *Ibid.*
83 *Ibid.*

has to bear the burden that the country would not have had to bear were it not for the refugees. However, apart from the trust land the government has set aside for the camps, it's contributions to the crisis can be summed up as follows:

(a) Engagement of extra personnel to provide security, medical and social services to refugees.

(b) Provision of emergency funds to meet additional expenses on essential needs such as drugs, transport, security, salaries and water among others.

(c) Establishment of food stores, water sources, housing and communication facilities.

(d) Provision of additional personnel to guard against potential illegal imports currency, arms, drugs, smuggling and general border security matters.

This chapter has looked at the refugee problem in Kenya. Historically, it has shown that although Kenya has experienced the refugee problem since independence, the situation assumed a new twist in 1991 when the country started experiencing mass influxes for which the country was not prepared institutionally, legally and policy-wise. The Chapter went on to examine the legal response that Kenya has had to the refugee influx by considering the two Acts of Parliament, the Aliens Restrictions Act as well as the Immigration Act. The chapter noted that the two Acts basically assumed that refugees were a

class of persons just like any other alien. It noted that there is lack of a refugee specific piece of legislation in Kenya. The Chapter then went on to consider how Kenya has handled some of the particular rights and freedoms accorded to refugees under the international refugee regime. It was noted that because of the absence of a refugee specific legislation, Kenya's response with regard to some of the rights has been *ad hoc*, and that further because of its economic status it has not been able to do more in this area of refugees. Kenya's co-operation with UNHCR was also considered in response to some of the refugee inflows.

In concluding this Chapter therefore, it is worthwhile to note that what comes out from an evaluation of Kenya's refugee policy and response is that although Kenya has experienced the refugee problem since its independence, there is no specific policy or institutional legal framework that has been put in place to deal with the problem. The sketchy legislative framework in place was and is largely intended to handle individual refugee cases and not the mass influxes the country has experienced. Because of this lacuna therefore, Kenya has fallen short of some of the requirements of the international refugee regime. There is therefore the need for a comprehensive refugee Act to incorporate the international refugee legal regime.

In the absence of a comprehensive refugee law, Kenya has responded differently to the various groups of refugees. On the whole, Kenya's response seems to have shifted from the open door policy to one of turning away

refugees. Kenya's change in policy is largely due to pressing numerous problems both economically and politically. Consequently, refugees in Kenya are normally rounded up in camps near the borders and when conditions back home permit, they are repatriated. The issue of resettlement in Kenya rarely arises.

Kenya, having discovered its lack of legislative capacity to deal with refugees especially in cases of mass influxes drafted a Refugee Bill way back in 1994, the same was revised and gazetted in October 2003, but it is yet to become law. It is this Bill, which forms the subject of discussion in the next chapter.

CHAPTER FOUR

THE REFUGEE BILL 2003: AN APPRAISAL

4.1 Introduction

It is a well-established fact that the success with which any state implements refugee law heavily depends on the degree of its commitment to international law. This commitment in turn manifests itself in various ways, the most important being translation of that law into domestic law, both substantially and procedurally. In a dualist state like Kenya, it is thus not enough that a state has acceded to international conventions. It has been held by the Kenyan Courts that a covenant or treaty cannot be invoked before or enforced by a Kenyan Court since it is not part of the law of Kenya. An enabling Act has to be passed by parliament for the treaty or covenant to have force in Kenya.[1]

Due to political turbulence in the region, Kenya had to take in large numbers of refugees in the early 1990's. A Refugees Bill was therefore hurriedly drafted in 1994, on the heels of the unprecedented influx of refugees into Kenya. The Government realised that because of the great numbers, it had to put refugees into its political and legislative agenda. There was also international pressure on individual states to enact the necessary legislation and regulations to give effect to the 1951Convention and its 1967 Protocol.

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1 Okunda V. R (1970) E.A.L.R 453.

Towards this end, a symposium held in 1994 jointly by OAU and UNHCR in Addis Ababa recommended that all OAU member states enact such legislation to transform international law to domestic or municipal law.[2] This led to the drafting of the Refugees Bill in Kenya but said Bill was not published until October 2003 when the same was substantially revised.

Various reasons have been advanced for the delay in tabling the Bill in parliament. One of these reasons is perhaps the fear on the part of the Government that having such an enactment would amount to turning the country into a permanent place of asylum for refugees.[3] As seen in the preceding chapter, Kenya has instead opted to treat refugee problems as purely humanitarian, to be dealt with on an *ad hoc* basis. It is also suggested that perhaps with the repatriation of most of the refugees and the assumption of the refugee burden by the international community due to the adoption of the *'but for'*[4] test by Kenya, the momentum for the Bill was watered down. Kenya, already unable to meet its public expenditure has not seen the need for institutionalising asylum by having a comprehensive refugee law. The reluctance to enact the refugee law is also partly because the law making process of Kenya like any other state is discretionary and not generally subjected to any external interest as such. By failing to enact a refugee law, Kenya seeks to maintain flexibility in dealing with the refugee problem. Its response to refugee issues is therefore not circumscribed by a legal matrix.

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2 OAU publication, Africa's Refugees : Tackling the Crisis, October 1995, p.5.

3 See Infra Chapter Three.

4 *Ibid.*

4.2 The Refugees Bill, 2003

The Refugee Bill is divided into twenty-three sections and three Schedules. In its preamble, the Bill states that it is an Act of Parliament "to make provision for the recognition, protection and management of refugees and for connected purposes". It then goes on to provide the definitions of terms used.[4] It recognises international conventions in its definition of asylum. The definition of members of a refugee's family is a wide one and includes any spouse, any dependent child under the age of eighteen years as well as any grandparent, parent, brother, sister, grandchild or ward of the refugee who is dependent on the refugees.[5]

The Bill adopts a wide definition of the term refugee and includes the following groups of people[6];

a) those who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political group are outside their country of nationality;

b) those not having a nationality and being outside the country of habitual residence are unable or unwilling for fear of persecution to return;

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4 S.2.

5 *Ibid.* This basically takes care of the idea of the extended family in African societies.

6 S.3. This is basically modelled on the OAU Convention of 1969, which expanded the definition of a refugee under the 1951 Convention and its 1967 Protocol.

c) those compelled to leave their county of habitual residence owing to external aggression, occupation, foreign domination or events seriously disturbing public order;

d) those recognised as refugees under the proposed Bill

e) those considered as being members of any class of persons declared as refugees by the Minister.[7]

The Bill gives the Minister in Charge of refugee Affairs the power to amend or revoke any declaration of recognition of any class of refugees.[8] It also specifies the classes of people who will not be considered for refugee status and these are set out as those who had committed a crime against peace, terrorism, a war crime, or a crime against humanity as defined in any international instrument to which Kenya is a party, those who had committed a serious non-political crime before entry in to Kenya, those who are guilty of acts contrary to the purposes and principles of the UN or the OAU, and those who having more than one nationality had not availed themselves to the protection of one of the other countries of nationality.[9] It further provides circumstances under which persons shall cease to be refugees such as those who voluntarily avail themselves to the protection of their countries of nationality, those who voluntarily re-acquire their former nationalities, those who become citizens of Kenya or acquires the nationality of another country, those who voluntarily re-

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7 S.3 (1) (a) – (e). This gives the Minister responsible discretion to declare certain classes of persons as refugees. The provision is meant to cater for mass influxes of refugees when individual determination may not be practical.

8 S.3 (2).

establish themselves in the country which they left, those whom refugee causing circumstances change and they can therefore no longer justify their refugee status based on those circumstances, those who commit serious non-political crimes outside Kenya after admission to Kenya as well as those who refuse to return to their countries of former habitual residence without being recognised as refugees in Kenya.[10]

The Bill sets out the institutional framework to deal with refugee affairs. It establishes the Refugee Status Determination Committee, whose chairman is to be appointed by the Minister in charge and whose membership shall consist of representatives from the ministries in charge of foreign affairs, local government, justice and constitutional affairs, health, Department of Immigration, Department of Police, as well as a representative from the National Security Intelligence Service. The Committee is further given the power to co-op any person for purposes of advising it.[11] The Committee's object and purpose is set out in this section as that of assisting the Commissioner in matters concerning the recognition of persons as refugees

The Bill also sets up the office of a Commissioner whose office is an office in the Public Service and who is to be the head of the Department of Refugee Affairs.[12] The responsibilities of the Commissioner are set out in the same section

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9 S.4. Again this is to ensure that only deserving cases are accorded refugee status in the country.

10 S.5.

11 S.6.

12 S.7. This will ensure that refugee issues are now centralised under one office.

and include *inter alia* acting as secretary to the Refugee Status Determination Committee, co-ordinating all measures necessary for the promotion of welfare and protection of refugees, formulating policy on refugee matters, liasing with UNHCR and other institutions for the provision of services and facilities to refugees in Kenya, promoting durable solutions for refugees in Kenya, receiving and processing applications for refugee status, registration of all refugees and issuing of identification cards and passes to refugees.

The Bill also establishes the Refugee Appeal Board to decide appeals.[13] Under the section, the Appeal Board is to be made up of a Chairperson who shall be an advocate of not less than ten years standing appointed by the Minister in charge of refugee matters. The Ministers for the time being in charge of foreign affairs, internal security, immigration as well as the Attorney General shall each nominate one person to the Appeals Board. The National Council Of NGOs shall also submit a list of nominees to the Minister who will then appoint one person from that list.

Any person aggrieved by the decision of the Commissioner is given the right under the Bill to appeal to the Appeal Board within fourteen days of receiving the decision. [14] Further, any person aggrieved by the decision of the

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13 S.8.
14 S.9.

Appeal Board is given the right under the Bill to Appeal to the High Court on a point of law. [15]

The Bill provides that an application for refugee status shall be made to any authorised officer within seven days of entry in to Kenya whether lawfully or otherwise.[16] The bill provides that if the authorised officer to whom the application is made is not himself the Commissioner, he shall refer such application to the Commissioner.[17] The Commissioner is required to consider all applications referred to him within three months, during which period he can if he so wishes carry out an investigation or inquiry into such application including having the applicant appear before him for an oral presentation.[18]

The Commissioner is required after considering the application grant refugee status or reject the application and notify the applicant of the decision made within fourteen days.[19] In case of rejection, the applicant is entitled to the reasons for such rejection. [20]

Once the application under section 10 is made, the Bill gives the applicants and their families the right to remain in Kenya until a final decision is

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15 *Ibid.* The right of appeal is given to ensure that no refugees are prejudiced by the decision of one person or one body.

16 S. 10. This may not be practical depending on how the refugee enters the country and whether or not he is aware or is made aware of this requirement.

17 S. 10(4). The provision of a time limit is good in that refugees will know their fate sooner than later and in the case of non-acceptance will have the opportunity to seek refugee status elsewhere before situations in their country of origin change.

18 S. 10(5).

19 S. 10(6).

20 S. 10(6)(b).

made.[21] In the event that an application is rejected, the applicant is allowed to stay in Kenya until all his rights of appeal are exhausted.[22] Where the applicant has exhausted his rights of appeal and is still unsuccessful, he is allowed a further period of stay not exceeding three months while he seeks admission to another country of his choice. [23] The Commissioner may extend this period if he is satisfied that there is reasonable likelihood of the person being admitted to a country of his choice within such extended period.

The Bill goes on to provide that no proceedings for unlawful entry shall be brought or continued against any persons who have made an application for recognition under section 10.[24] The recognised refugees are to be issued with identification cards or passes and permitted to remain in Kenya subject to the provisions of the Bill. [25]

The Bill provides that any member of the refugee's family shall be issued with an identity card in the prescribed form upon attaining the age of eighteen years. [25] Those below the age of eighteen years are issued with passes and are permitted to remain in Kenya as long as the refugee concerned is permitted to remain. [26]

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21 S. 11.
22 S. 11(1)(b).
23 S. 11(1)(c).
24 S. 12. The bill seems to imply that those who will not have made such application will be prosecuted.
25 S. 13.
25 S. 14.
26 *Ibid.*

Recognised refugees and their family members are entitled to the rights and subject to the obligations contained in the 1951 Convention, its 1967 protocol, the OAU Convention and the laws of Kenya.[27] The right to employment is given special mention in the Bill.[28] The Bill gives the Minister the power to set up transit centres for the temporary accommodation of applicants and their families while their applications are under consideration, and refugee camps where recognised refugees shall reside. [29]

The Bill establishes the office of camp manager for every camp set up.[30] The camp manager's duties are also set out in the act and include the general management of the camp in an environmentally and hygienically sound manner, receipt and registration of all asylum seekers, co-ordination of security, protection and assistance for refugees in the camp as well as the protection of vulnerable groups, women and children among others.[31] The Bill provides elaborately for *non- refoulement* and requires the Commissioner to take such steps to ensure that no refugees are returned to places where they are in any danger. [32]

The Bill further provides for the withdrawal of refugee status where persons have ceased to be refugees under the provisions of the Bill or where in the opinion of the Commissioner such persons should not have been granted

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27 S. 15.
28 S. 15(4).
29 S. 15(2).
30 S. 16.
31 *Ibid.*

refugee status.[33] It provides for the giving of reasons for such decision. Recognition of such refugee and members of his family shall cease upon the expiry of seven days.[34]

The Minister is given the power under the Bill to expel any recognised refugees or members of their family on grounds of national security or public order after due consultations with the Minister responsible for matters relating to immigration and internal security.[35] However the Minister is obliged to act in accordance with the due process of the law before ordering such expulsion.[36]

Section 20 gives the Minister the power to gazette authorised officers for purposes of the Bill. Authorised officers under the Bill are empowered to question any refugee or member of his family or take finger-prints, photographs, x-rays or foot-prints, or to search any person or property if there is reasonable grounds to believe that the search is necessary for the prevention, investigation or detection of a contravention of the Bill or a fraudulent statement.[37]

The Bill has a special provision for women and children, [38] and calls for special protection for these two groups. The Commissioner is required to assist

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32 S. 17.
33 S. 18.
34 S. 18(2).
35 S. 19(1).
36 S. 19(2).
37 S. 20.
38 S. 21.

any unaccompanied child to trace the parents or family of such a child. [39] Where however such parents or family cannot be traced, the Bill calls for such child to be accorded the same protection as any other child permanently or temporarily deprived of his family. [40]

The Bill then goes on to set out offences.[41] It will be an offence under the Bill to be unlawfully present in Kenya in contravention of the Bill, to make a false declaration or statement to an authorised officer, to mislead an authorised officer, or to reside outside the designated areas. Such offences will attract a fine not exceeding twenty thousand shillings or to imprisonment not exceeding six months or to both. [42]

Finally, the Minister is empowered to make any regulations for the implementation of the Bill. [43] Such regulations will include but will not be limited to the procedure for applications, procedure for expulsion of refugees, form and issue of identification and travel documents, as well as the protection of women, children, unaccompanied minors, and persons with disabilities, among others.

The First Schedule to the Bill is with regard to the Refugee Appeal Board. It sets out the term of office, the terms and conditions of service of members of

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39 S. 21(3).
40 S. 21(4).
41 S. 22.
42 *Ibid.*
43 S. 23.

the board, circumstances leading to vacancies on the board, staff of the board, conduct of meetings, quorum, as well as how decisions are to be made.

The 1951 Convention Relating to the Status of Refugees, its 1967 Protocol as well as the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa are then set out as appendices in the second and third schedules respectively, having been referred to in section 15(1) of the Bill.

4.3 A Critique on the Proposed Law

The Refugees Bill, 2003, is a tremendous improvement on the Bill that was initially drafted in 1994.[44] It is also a great improvement on refugee legislation from the countries in the region, which mainly are enacted to make provision for the control and administration of refugees.[45] The 2003 Bill in contrast is to make provision for the recognition, protection and management of refugees.[46] Generally the bill contains very comprehensive provisions for the protection of refugees. Needless to say, the Bill is purposely based upon the OAU Convention rather than the 1951 Convention for the simple reason that it is the former instrument that has a more embracing definition of the term 'refugee'. In fact,

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44 See generally the 2003 draft bill annexed hereto. It is imperative to recall that the 1994 bill was basically prompted by the massive influx of Somali refugees in the early 1990's. The result was that the Bill contained some interesting characteristics particularly with respect to its interpretation of certain concepts or principles of international refugee law which can best be described as having been intended to address the special problems arising out of the circumstances of the mass influx faced by the country at the material time.

45 See generally for example, The Malawi Refugee Act, of 1973.

46 See the long title of the Bill.

the definition of the term 'refugee' adopted by the Bill is a replica of the definition contained in the OAU Convention.[47]

By adopting the OAU definition of a refugee, the Bill brings into the ambit of refugee law, persons displaced by events seriously disturbing Public order.[48] It is the author's considered view that these events include drought and famine. Such an interpretation is especially appropriate in the Horn of Africa, which more or less is riddled with desert like conditions. A sizeable human displacement into Kenya from Ethiopia and Somali has over the years been due to famine and drought. The Bill would therefore presumably treat such people, fleeing drought and famine as refugees.

Though the Bill adopts an all embracing definition of the term refugee, its definitive section does not define such vague phrases as 'events seriously disturbing public order,'[49] 'owing to a well founded fear,'[50] serious non-political crime, [51] and 'durable solutions'[52] inter alia. These phrases are also not defined in the 1951 Convention, its Protocol, or the 1969 OAU Convention. It is the author's view that without such definitions persons or institutions charged with administering the provisions of the proposed Act are given unnecessary leeway, which may at times lead to unjustified interpretations. The Bill, coming after international legal regimes should have attempted to improve on these

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47 Article 1 of the 1969 OAU Convention and S.3 of the Bill.
48 S. 3(1)(c).
49 *Ibid.*
50 S. 3(1)(a).
51 S. 5(f).

regimes by interpreting such phrases. This would have had the effect of turning it into an objective law rather than a subjective one in terms of deciding refugee status. Any law should ideally strive for objectivity.

Of interest is Section 3(2), which gives the Minister the power to declare that a person or class of persons are refugees, but he also has the power to revoke or amend such a declaration.[53] This section is somewhat confusing considering that under section 10, it is the Commissioner who after considering applications submitted to him, grants refugee status or rejects applications. It is therefore not clear whether both the Commissioner and the Minister will exercise this power or whether it is intended that the Minister will only make declarations in certain circumstances for example during mass influxes when it would not be practical for the Commissioner to consider all applications. This needs to be clarified to avoid situations where for example the Commissioner rejects an application and the Minister goes ahead and makes a declaration granting refugee status. It is worth noting that the Commissioner under the Bill acts under the general directions of the Minister.[54]

It is also worth noting that there is no obligation on the Minister to make a declaration of refugee status. The Bill uses the word "may" as opposed to the word "shall". It is my considered view that this makes the determination of refuge status more subjective than objective. The desired scenario is one

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52 S. 7(e).
53 S. 3(2).
54 S. 7(3).

where one is declared a refugee once one meets the qualifying criteria, as opposed to leaving it to the whim of the Minister. It is also the author's contention that S.3(2), which gives the minister such power, is rendered nugatory by the proviso thereto as the minister cannot amend or revoke a declaration granting refugee status to a person who has already entered the country before such declaration or a person who meets the qualifying criteria set out in Section 3 (1)(a) – (d).

The provision that a person excluded or exempted from a declaration of refugee status by virtue of being a member of a certain class of persons can still apply for recognition to be a refugee defeats further the ministerial power to exclude and exempt certain persons by a declaration to that effect.[55] This is perhaps a desperate attempt on the part of the Government to comply with the principle of *non-refoulement*. This section is in fact ambiguous to say the least. The Bill therefore contains inconsistencies, which must be corrected if the proposed law is to reflect the international law requirements.

The confusion with regard to the Minister's declarations is made worse when one considers section 17 of the Bill, which is an explicit and faithful incorporation of the principle of *non-refoulement*. This section,[56] stipulates that a person shall not be expelled or returned to a country where the person may be persecuted on account of his race, religion, nationality or membership of a particular social group or political opinion or his life or physical integrity or

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55 S. 3(3).

liberty would be threatened on account of external aggression, occupation, foreign domination or events seriously disturbing public order in part or the whole of the country. What then happens to those who although they meet the criteria of refugee status are however not declared as such by the Minister? Do they then individually start the process of applications to the Commissioner?

The Bill embraces both the classical approach to the principle of *non-refoulement* as reflected in the 1951 Convention,[57] and the wider conception of the principle as embodied in the 1969 OAU Convention.[58] By attempting to incorporate the principle of *non-refoulement* and at the same time giving power to the Minister to amend and/or revoke a declaration granting refugee status, the Bill attempts to do the impossible; to have its cake and eat it. It is my view that the section giving the minister power to amend and/or revoke a declaration granting refugee status together with the proviso thereunder should be amended and/or removed altogether and any irregularity that may have been occasioned at the time of granting refugee status dealt with by section 18.[59] Sight should not be lost of the widely held belief that there are some obligations under international law, which states must comply with when formulating their own law. The principle of *non-refoulement* is regarded by international lawyers as entailing such an obligation.[60] As the Bill stands, it seems to encroach on the principle of *non-refoulement*, which principle is not

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56 S. 17.
57 Article 33.
58 Article I(2) and II(3).
59 Section 18 of the Bill deals with the withdrawal of the recognition of refugees on various grounds therein specified.
60 Goodwin-Gill G. S., The Refugee in International Law, Clarendon Press, Oxford, 1983, pp. 69 – 100.

even subject to the states power of reservation as stated in the 1951 Convention.[61]

I would hasten to add that S. 17 (2) is misplaced and has no relevance in the section. It is not clear what it refers to and what it is meant to achieve.

Under the Bill, a person shall not be accorded refugee status in Kenya if he has committed crimes against peace, terrorism, a war crime, or a crime against humanity as defined in any international instrument to which Kenya is a party, or has committed a serious non-political crime outside Kenya among others.[62] This provision is designed to ensure that persons who having committed crimes in their countries of origin are not shielded by the protection granted, by being accorded refugee status. Although this is a good provision in line with the spirit of international solidarity, it should be noted that most people flee their countries after committing such crimes and the systems of justice in their countries of origin have broken down. It should also be noted that most of these people would not have been tried by any court or tribunal. The Bill cannot therefore affirmatively state the people in question have committed the crimes they are accused off in the absence of any judgement, as this would be against the rules of natural justice.

In such cases, the Bill ought to be amended to provide that persons who are reasonably believed or suspected or accused of having committed such

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61 Article 42.

crimes as enumerated, will not only be refused admission as refugees in Kenya, but will be handed over to their countries of origin on assurance that they will face a fair trial or to an international tribunal mandated to deal with such cases. Such a provision would prevent the possible recurrence of a situation as witnessed in the case of Rwandan refugees when Kenya refused to co-operate both with the international tribunal and the Rwandan government in handing over people suspected of the 1994 genocide. Such a provision would further provide the correct guidelines as opposed to the current practice where the government's response is chiefly determined by the political forces in power in the country of origin. At the height of terrorism in the world, it is commendable that the Bill specifically excludes those who have committed acts of terrorism.

The Bill provides that refugee status will not be granted to persons who, having more than one nationality have not availed themselves to the protection of one of the countries of which they are nationals and who cannot prove a well founded fear of persecution as required under the Act for failure of availing themselves for such protection.[63] This represents Kenya's incapacity to house persons with residential options and demonstrates her commitment not to offer refugee status to non-deserving cases, as this would prejudice the chances of the genuine cases. This, in my opinion is in deed a very good provision.

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62 S. 4(a)-(d).

63 S. 4(d).

The Bill also indicates circumstances under which persons granted refugee status should cease to be refugees.[64] It is worth noting that it recognises the concept of voluntary repatriation in these circumstances. The circumstances set out under which a refugee may loose refugee status are quite comprehensive and adequate in the circumstances. However, S. 5 (i) is in deed misplaced and should not be included here as it refers to recognised refugees under S. 3.

The Bill then proceeds to establish the institutional framework for dealing with refugee affairs.[65] This consists of the Refugee Status Determination Committee.[66] The Commissioner for Refugee Affairs,[67] and the Refugee Appeal Board.[68] The Committee draws its membership from various Government Ministries and Departments. It should be stated that the Committee has no membership from the international community. It is recommended that the Committee should draw membership from the international community and specifically UNHCR whose protection officers, I dare opine, have expertise in the area of refugee status determination. A situation where no membership is drawn from the international community is undesirable considering the crucial role played by the international community through its agencies like the UNHCR. It is submitted that other than representation for the international community as mentioned above, other regional bodies like IGADD, which are

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64 S. 5(a) – (i).
65 S. 6 – 8 and 17.
66 S.6.
67 S.7.
68 S. 8.

charged with the search for durable solutions in the Horn of Africa should also be represented on the Committee.

The Committee is established to assist the Commissioner in matters concerning the recognition of persons as refugees.[69] This is the main committee established under the Bill with the exception of the Appeals Board. It is therefore my submission that more tasks should be allocated to this Committee as opposed to only assigning to it status determination.

It is noted that the Commissioner has quite a number of responsibilities under the Bill. It is my considered view that the tasks assigned to the Commissioner should be assigned to the Committee mentioned above and the Commissioner be established as the Committee's implementer or Chief Officer. It is however commendable that the Bill does set up an Appeal mechanism. It is worth noting that the membership of the Appeals Board is drawn from the same Government Ministries and Departments, albeit a smaller number, as the membership of the Refugee Status Determination Committee. In this circumstances therefore, the Appeals Board is unlikely to be objective in deciding appeals from decisions made by Status Determination Committee. There is a likelihood of bias as members from the same ministry or department are unlikely to contradict each other. It is suggested that the membership of the Appeals Board be drawn from independent sources such as UNHCR and the African Union (AU) as well as the various NGOs.

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69 S. 6(2).

The Bill establishes camp managers for every refugee camp.[70] The functions of the camp manager are also set out in detail. The Bill does not however specify to whom the camp manager shall report in carrying out his duties. Further, the camp manager is not indicated as an authorised person under the Bill yet one of his duties is to receive and register asylum seekers. It is my view that when refugees enter a country, they will most likely be directed to a camp and it will thus be useful if the camp manager is one such authorised person to receive refugee applications. It is also not clear what the qualifications of the camp manager are. It is my view that for a camp manager to be effective he should be properly qualified to be able to understand and implement the applicable laws and the international refugee regime. I would suggest that he should have similar qualifications to those of UNHCR's protection officers.

It is clear that a lot of funds will be required to sustain the institutional framework described above. However, nowhere in the Bill is it mentioned where such funds will come from. Such an institutional framework would go hand in hand with the setting aside of a fund specifically for the purpose of refugee issues.[71]

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70 S. 16.

71 By saying so the author is not loosing sight of Kenya's lack of financial capacity to set up such a fund.

It is commendable that the Bill sets out an appeal procedure.[72] A person aggrieved by the Commissioner's decision under the Bill is given the option to appeal such decision to the Refugee Appeals Board within fourteen days.[73] A further appeal may be made to the High Court but only on a point of law.[74] Subject to the comments made earlier with regard to the constitution of the Appeals Board, the appeals procedure under the Bill is quite elaborate and adequate.

Persons desirous of being granted refugee status will be obliged to make a written application to an authorised officer to that effect within seven days of entering Kenya.[75] It is worth noting that if an application is not made within the prescribed period, the asylum seeker will liable to conviction and a fine not exceeding twenty thousand shillings or to imprisonment for a term not exceeding six months or both.[76] The Bill requires that applications be processed within three months. In the event of rejection of an application, the Bill provides for the giving of reasons to the applicant. This is important since refusal of recognition adversely affects the rights of the individual refugee. A statement of reasons could not only allow an individual to approach other countries, but is also an important element in administrative justice, as well as help the applicant prepare his appeal if he wishes so to do.

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72 S. 9.
73 S. 9(1).
74 S.9(3).
75 S. 10.
76 S. 10(3).

By providing that the applications can be made to a broader class of officers, the Bill recognises the complexities of large refugee mass in-flows. The Bill goes further and provides that in addition to the officers specifically stated, the Minister may by notice in the Kenya gazette appoint any public officers to be authorised officers for purposes of the proposed law.[77] This would go a long way in expediting the refugee determination process in cases of mass inflows. However, this is watered down by the requirement that the authorised officers have to forward the applications received to the Commissioner.[78]

Pending the processing of his application, the refugee applicant and his family will have a right to remain in Kenya and in the event of his application being rejected he will be entitled to stay in Kenya until he exhausts his right of appeal.[79] In the case of the appeal being unsuccessful, a further duration not exceeding three months will be given to an applicant within which to seek admission to a country of his choice. Where an application is rejected on security ground the Minister has drastic powers to take any security precautions he may consider fit.[80] These in my view are very good provisions which are intended to accord the refugee some form of protection while his application is considered.

Although it is not intended that only male refugees can make applications on their own behalf and that of their families, it is interesting to

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77 S. 20(1).
78 S. 10(4)
79 S. 11.

note that the Bill is not gender-neutral. It is my view that the proposed law should provide a gender-neutral language. The Bill in this instance looses sight of the realities of our age where the phenomenon of single families is a common feature.

The Bill further provides that no proceedings in respect of illegal entry can be instituted against any person or member of his family if such a person can show that he has made an application to the appropriate authorities of his desire to be recognised as a refugee within the prescribed period or that his initial application having been rejected, he is yet to exhaust his appeal rights.[81] Otherwise, a prosecution will lie against a person who has illegally entered Kenya under the Alien Restrictions Act, [82] and the Immigration Act.[83] This is important as the provisions are aimed at protecting refugees and setting them aside from ordinary aliens.

On recognition being granted to a refugee applicant, the applicant and members of his family who include his spouse and any of his unmarried children under the age of eighteen years become entitled to the rights under the 1951 Convention and its 1967 protocol as well as the 1969 OAU Convention and will be subject to all laws in force in Kenya. [84] It is also commendable that

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80 S. 11(1)(d).
81 S. 12.
82 Chapter 173, Laws of Kenya.
83 Chapter 172, Laws of Kenya.
84 S. 15.

the international refugee regime is mentioned in this Bill as this has the effect of nationalising this regime as was stated in the case of Okunda V. R. [85]

Upon recognition as a refugee, an applicant together with members of his family of above eighteen years will be issued with an identity card in the prescribed form. [86] A member of the family of the recognised refugee on obtaining the age of majority will be entitled to apply for recognition and so will any person in Kenya by virtue of being a member of the family of a recognised refugee upon the death of the recognised refugee or divorce or legal separation from such a recognised person.[86] The granting of refugee status will entitle such a person so recognised, equal status as regards the right to engage in wage earning employment as generally accorded to people who are not citizens. [87]Such a provision is intended to incorporate Article 17 of the 1951 Convention in to the Country's municipal law. However, this is one of the rights, which the Kenyan Government cannot in my view guarantee in view of the high rate of unemployment among its own population. It is however, understood generally that a refugee has to take his country of asylum as he finds it and cannot demand better treatment than the nationals of that country.

The Bill gives the Commissioner power to withdraw refugee recognition where it is discovered that a refugee ought not to have been recognised as

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85 (1970) E.A.L.R.453.
86 Ss. 13 and 14.
86 S. 14(3).

such in the first place or where one ceases to be a refugee for the purposes of the proposed law.[88] In such a case the Commissioner will advise him accordingly of the decision to withdraw recognition and the refugee and his family will cease to be so recognised within seven days.[89] However, a member of his family may on his own thereafter apply for recognition.

It is my considered view that the seven days notice is too short for the refugee to seek alternative asylum and would suggest that this period be extended to not more than three months as refugees more often than not are not persons of means. I also note that the Commissioner is given the power under the Bill to withdraw recognition *suo motto* and without seeking advice from any body. This can lead to injustice. Further, a refugee whose recognition has been withdrawn is not given the right to appeal to any body. It is my view that this can perpetuate injustice as refugees can have their recognition withdrawn at any time and with no right of appeal. It is proposed that the provisions of the 1994 bill regarding appeal upon withdrawal of recognition be reinstated.[90] and further, that the refugee be given a right of appeal to court or any other independent body, which is not already tainted with the knowledge of his case.

The Minister is given power under the Bill to expel refugees and their families if he considers the expulsion to be necessary or desirable on grounds of

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87 S.15(4).
88 S. 18.
89 S. 18(2).

natural security and public order.[91] Before taking such an action, the Minister is obliged to consult with the Minister responsible for matters relating to Immigration and Internal Security and is required to act with the due process of the law. The Bill does not state what the due process of the law means, neither does it give the refugee a chance to make representations before such expulsion. The draft Bill of 1994 required the Minister to give due consideration to any representation made to him by either the expelled refugee or UNHCR's Representative in Kenya.[92] It is my view that this provision be reinstated. The right of the Country of asylum to expel a refugee is provided under Article 32 of the 1951 Convention where a contracting state can expel refugees on grounds of natural security or public order. However, the refugee in question should be given a chance to submit evidence to clear himself before the Minister. It is also my view that before an expulsion, the matter should be referred to a court or tribunal charged with refugee matters.

The Bill has special provisions for refugee women and children.[93] The Commissioner is required to take specific measures to ensure the safety of refugee women in designated areas. Although the Bill does not state what these measures are, it is assumed that these will be provided in the regulations as the Minister is given power under the Bill to make regulations for the protection of these groups.[94] This in my view is a good provision considering that

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90 S. 15 of the 1994 draft Bill.
91 S. 20.
92 S. 16(2) of the 1994 draft Bill.
93 S. 21.
94 S.23(2)(j).

women and children in particular have suffered in camps as seen in the previous chapter.

With regard to children, the Commissioner is required to help such children trace their parents or family and if such parents or family cannot be traced, to accord to such child the same protection as any other child permanently or temporarily deprived of his family.[95] The Bill does not however state what this protection will be but again it will be assumed that this will be legislated in the regulations as stated above. It would be desirable for such children to be placed in specified orphanages.

The Bill then sets out offences and the fines and penalties thereto. Finally, it concludes the substantive sections by giving the Minister a discretionary power to make regulations that he may deem fit and necessary for the better carrying out or giving effect to the provisions of the proposed law.[96] It is worth noting that the matters upon which the Minister may make regulations are quite diverse.

It is important to note that the first schedule of the Bill on the Refugee Appeal Board is in contradiction with the substantive section with regard to the term of office of the board members.[97] While the substantive section states that the board members will hold office for a term of four years and shall be eligible

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95 S. 21(4).
96 S. 23.
97 S. 8(5).

for re-appointment for a further term of four years, the schedule states that they shall hold office for a term not exceeding three years. This anomaly needs to be corrected before enactment.

The second and third schedules of the Bill are appendices of the 1951 Convention, its 1967 Protocol and the 1969 OAU Convention respectively. It is commendable that the Bill has appended these documents since they are the core documents of the refugee regime upon which the Bill is premised. They would thus be easily accessible to concerned parties in Kenya such as the refugees themselves.

It is noteworthy that the present Kenyan refugee policy and the proposed law treat the refugee issue as a humanitarian matter and a welfare problem. The proposed law should incorporate as its approach a developmental focus on refugees, seeing them as energetic and resourceful people who can indeed benefit their country of asylum. This is because refugees are a people determined to survive and should be given aid and encouragement in that direction.[98] In order to do this, there is a need to establish a refugee contingency fund in collaboration with the international community. The Bill ought to provide specifically for methods of promoting refugee settlement particularly in rural areas in a manner consistent with the government policy on asylum especially in respect of refugees expected to stay in the country for more than six months. It is our considered view that the

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98 UNHCR, The State of the World Refugees - In Search of Solutions, Oxford University Press, 1995, pp. 143-87.

most meaningful humanitarian assistance that can be made available to refugees is that which enable them realise their own potential and to become independent and self-sufficient.

The Horn of Africa is still politically volatile and there is a near certain possibility of the recurrence of refugee outflows. Urgent action must therefore be taken to have a credible system of information flow and reduction of paper work as well as the setting up of a refugee contingency fund. The proposed law should set up an office to give all the necessary assistance to refugees especially in making their applications. This is because many refugees may either be illiterate or may not be able to communicate in English. In this case therefore, the proposed law should establish the office of an Immigration advisory service to work hand in hand with the UNHCR. The proposed law should also involve more participation from UNHCR in administering it.

To curb environmental devastation, as has been experience in the past, the Bill should provide regulations on how land set aside for refugee camps is to be managed, and consequences of any mismanagement. The Bill should further provide for further representation of the international community. The proposed institutional framework is commendable, but these bodies should involve more international interests, such as UNHCR protection officers. The Bill seems to be protecting the concept of state sovereignty by excluding international representation. But as seen earlier, UNHCR is a non-political body and its officers should not be seen as threatening sovereignty.

This chapter has considered the proposed Refugee Bill in detail. It has further provided a critique of the said Bill so as to make it a good piece of legislation. It has been noted that initially the Refugee Bill was drafted under extreme circumstances and that despite the substantial amendments made to it in 2003, the same still needs further amendments so as to conform to international law. The government should make full steps in transforming international law into its municipal laws instead of leaving the task halfway.

It is also the author's considered view that legislating against international refugee law abuses only does not solve the problems experienced by refugees. This is because even if all countries take the initiative to put in place wonderful pieces of legislation, practical results would be hard to achieve unless those pieces of legislation are accompanied by such measures as trying to stem refugee outflows and having a developmental approach in both refugee producing and asylum countries. There is need also to turn the spotlight on the countries of origin to stem human rights abuses, as this is one of the major causes of refugee outflows. The idea should be prevention of outflows before they happen. If however they do happen, asylum countries should be empowered economically so as to accord refugees their full rights. Therefore, unless Kenya is economically stable to look after its own populations, no matter its will power, it will not be able to accord refugees their full rights. Such rights as the right to employment would be hard to come by. It is such measures that are looked at in the next chapter.

CHAPTER FIVE

FILLING THE GAPS: THE CHALLENGES OF REFUGEE LAW

5.1 An Overview

In this chapter I will consider the measures that would, in together with good pieces of legislation at the national level, alleviate the plight of refugees. From the outset, it should be noted that having made various recommendations for the alleviation of the plight of refugees in the preceding chapters, it is not my intention to repeat the same in this chapter. This chapter will essentially address itself to the necessity of a root causes approach to the refugee problem. This chapter will however not confine itself to what Kenya, as a country that has experienced refugee inflows should do to alleviate the refugee plight. This is because no one country can single handedly tackle the refugee problem. Stemming from its international character, and the resources involved in the search for solutions, the refugee burden falls squarely on the international community. However, it is recognised that Kenya, being a relatively stable country politically, but lying within a politically turbulent region, it has an important role to play in the search for peace in the region.

It is true to a great extent that theoretically, the refugee possesses substantial rights under international law and thus occupies a special position

under it.[1] It is also clear that many states have acceded to both the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol as well as the applicable regional instruments such as the OAU Convention. Many states have also incorporated the international refugee legal regime in to their own municipal laws, while those that have not done so are in the process of so doing. However, as noted in chapter two of this thesis, with all the good will in the world and the best of legal regimes, refugee problems cannot be solved without addressing the root causes of outflows, since as earlier pointed out, the current international regime faces certain limitations in dealing with social problems. The international community must address issues such as human rights violations, abuses of the principle of sovereignty and development both in the country of origin as well as the country of asylum. In her opening speech at the OAU/UNHCR symposium on Refugees and forced population displacements in Africa[2], the then High Commissioner for Refugees, Mrs Sadako Ogata stated thus;

> Clearly today's problems cannot be treated in isolation from the political, social and economic causes which give rise to them. Refugee policies and strategies must therefore address the problems of refugees in both their countries of origin and asylum, thus balancing their protection with the prevention and solution to their problems...Finding solutions to refugee problems is closely linked to other measures aimed at achieving peace and promoting national reconciliation... we must invest in peace and reconciliation, human rights and tolerance for minorities, social progress and economic development.[3]

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1 See Goodwin-Gill, G.S., International Law and the Movement of Persons Between States, Clarendon Press, Oxford, 1978, p.7.

2 Held at Addis Ababa, Ethiopia on 8-10th September 1994.

3 Opening statement found in International Journal of Refugee Law, Special issue, 1995, pp. 13-5.

As stated elsewhere in this thesis, international law does not control the procedures followed by a state in taking the decision whether or not to become a party to a convention, but once a party, such a state cannot use its domestic law to avoid its obligations under international law.[4] Thus the fact that states like Kenya have not incorporated the international refugee legal regime in to their municipal laws does not absolve them from complying with the requirements of international law. In practice however, it has been shown that the treatment of refugees is at variance with the obligations of states under international law.[5]

At times states continue to insist on the supremacy of national law objectives over the restraints of international law in circumstances where national policy and municipal law conflict with international law. A case at hand is when UNHCR was up in arms against the Ugandan Government for contravening the tenets of international law while on the other hand the Ugandan government argued that it had a right to move refugees as it pleased owing to its sovereignty.[6] In this scenario therefore, it is unlikely that the most comprehensive refugee legal regime in a municipal arena would completely solve the refugee problem. Individual countries have come up with municipal refugee laws, which treat the refugee issue as purely humanitarian.

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4 This is the upshot of the principle of *Pacta sunt servanda* which requires agreements between states to be honoured.

5 Goodwin-Gill G.S., " *Nonrefoulement* and the new Asylum Seekers" in David A. Martin(ed.) The New Asylum Seekers: Refugee Law in the 1980s, The ninth Sokol Colloquium on International Law, Martinus Nijhoff Publishers, 1986, p.113.

6 The East African Newspaper 8-14 September 2003.

In the absence of a compliance mechanism of international refugee law, the right of asylum is under siege as countries continue to adopt restrictive asylum measures.[7] The OAU/UNHCR Symposium noted that in may countries the basic principles of refugee protection were not being upheld, as refugees in many instances were arrested and detained without charge while others were returned against their will to places where their lives were in danger.[8]

Moreover, protecting this right of asylum is not easy as countries of first asylum that are often poor grow weary of the needs of refugees.[9] They thus occasionally try to push refugees back across borders. Tanzania has severally done this and as reported in the Daily Nation of 5th September 2003 she expelled some 700 Rwandan refugees back to their home country.[10] The authorities argued that the refugees were a burden to their impoverished economy. Individual countries have slammed their doors to asylum seekers for fear that the influx may become unmanageable. Where states have allowed mass influxes, most have restricted certain rights like the right of movement, work, proper schooling as well as resettlement.[11] In Kenya for example, a large percentage of her population is unemployed while a sizeable proportion of children cannot get proper schooling. In this scenario, job placement and

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7 See Article III of the Addis Ababa Document on Refugees and Forced Population Displacements in Africa which was adopted by the OAU/UNHCR Symposium on Refugees and Forced Population Displacements in Africa on 8-10 September 1994. Reprinted in International Journal of Refugee Law, Special edition, 1995, pp. 308-19.

8 *Ibid.*

9 Nana-Sinkam, S.C., "From Relief and Humanitarian Assistance to Socio-Economic Sustainability, Rehabilitation, Reconstruction and Development with Transformation as the Ultimate Solution" International Journal Of Refugee Law, Special edition, 1995, p. 187.

10 Mendel, D. Toby, "Refugee Law and Practice in Tanzania," International Journal of Refugee Law, Vol 9 No. 1, 1997, p. 51.

schooling of refugees cannot be afforded and therefore the rights remain a luxury and not a priority.

Host governments the world over as well as relief agencies are finding it increasingly difficult to provide adequate assistance to existing refugees. [12] The irony is that more and more refugees are created daily. On the other hand, there has not been enough thought for any long-term solutions to the refugee problem.[13] The recommendations of ICARA II are yet to be realized with donor countries being reluctant to assist.[14]

While the granting of asylum is in theory a humanitarian act, in practice, the willingness of governments to accept refugees is frequently coloured by political, economic and even racial considerations. Thus while the international legal instruments to which most countries subscribe, form an important basis for the provision of protection and assistance to refugees, they are not sufficient to guarantee for the resolution of the refugee problem. The growing emphasis on national, cultural and political homogeneity since world war one has created more refugees than ever before and at the same time has served to restrict their movement.

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11 *Supra* Note 7.

12 *Supra* Note 9.

13 Hausemann Julia, "Root Causes and Displacement: The Legal Framework for International Concern and Action," in Dilys M. Hill (ed). Human Rights and Foreign Policy: Principles and Practice, Martinus Nijhoff Publishers, 1989, p. 140.

14 *Supra* Note 7. The symposium called upon the international community to support host governments.

To many governments, the granting of asylum has become a last possible resort as they struggle to keep as many people who would place a special burden on their resources out. [15] Many countries exclude refugees who may not meet the strict health, language and professional requirements. The dilemma is how governments, which are not immediately responsible for their own economic conditions, can cope effectively with the extra burden. Governments are therefore faced with the predicament of how best to reconcile international humanitarian obligations to refugees with their own domestic obligations. Therefore, a number of governments have introduced more restrictive legislative and administrative practices designed to exclude asylum seekers or to deter them from seeking refugee status. As a result of this heavy burden, African countries have expressed the need for development assistance through fora such as ICARA II.

In a world riddled with armed conflicts, human rights abuses, ethnic rivalry and economic deterioration, the generosity shown by host countries is diminishing.[16] The xenophobia to refugees is best captured by the case of Zaire (now Democratic Republic of Congo) where a law granting asylum to all people in the country in 1972 was amended to replace it with an enactment requiring that to be granted citizenship, one's ancestors must have lived in the country since 1897.[17]

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15 *Supra* Note 10. When Tanzania expelled Rwandan refugees, the authorities argued that the refugees were a burden to their impoverished country.

16 See UNHCR; UNHCR - Questions and answers, 1996.

It should not be overlooked that states and societies have a legitimate interest in regulating the movement of people in to their territory.[18] In furtherance of this interest therefore, governments have introduced measures to control the admission of foreign nationals and this has had some negative consequences for refugees and the institution of asyium. As such, asylum seekers intercepted in international waters can be summarily returned to their country of origin even if they are at the risk of persecution there.[19] Over the years therefore, the policies developed by countries have been clear; to reduce the number of refugees gaining permanent entry by placing obstacles in their path. In other cases such as Kenya, refugees are rounded up in camps where their movements can be monitored and whenever possible, they are repatriated immediately the conditions back in their countries of origin seem to improve.[20]

Refugees especially in cases of mass influxes have also posed a security threat as in some cases warring factions have launched attacks on their countries of origin from their camps. This has created tensions between the host state and the state of origin. Sometimes regimes still in power in the countries of origin have targeted refugee camps. This happened in the case of Kenya and Somalia during the mass influx and in Tanzania by the Burundi Government.

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17 Daily Nation 7th June, 1994, p.17.

18 Article 26 of the 1951 Convention Relating to the Status of Refugees which is a collorally of the concept of state sovereignty.

19 UNHCR; The State of the World Refugees, 1995 - In Search of Solutions, Oxford University press New York 1995, p. 204.

20 Hyndman, J. and Nylund, V.B., "UNHCR and the Status of *Prima Facie* Refugees in Kenya," International Journal of Refugee Law Vol. 10 No.1/2, 1998, p. 38.

In view of the aforesaid, it is true that incorporation of impeccable refugee legislation has not been a guarantee of implementing the refugees' rights as set out under the international refugee regime. Issues surrounding population displacement are often sensitive because they touch on questions relating to citizenship, state succession, state sovereignty, the right to self-determination, secession, the status of international borders, the rights of minorities and the viability of multi-ethnic societies. As such, individual state practices in relation to refugee issues should be viewed against this background. It should also be noted that the mandates of international organisations mandated to deal with refugee problems have not been extended for them to deal with root causes of the refugee problem. As such, they only are able to swing into action after a displacement has occurred. [21]

It is therefore not surprising that where states have reluctantly allowed refugees to penetrate their frontiers, they have adopted a 'but for' test by treating the issue of refugee assistance as a purely international matter. In view of the above, it is true to say that the protection envisaged by the international legal regime has not been realised. Further, there has been back-pedalling by individual countries from their obligations to further their vested interest. But why has this state of affairs arisen? In answering this question the writer would proffer the following statements;

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21 *Supra* Note 13.

i) International refugee law has been circumvented by state sovereignty. There is also inability by the international community to go round the principle of state sovereignty by intervening in trouble spots. Hence the international community is unable not only to prevent human displacements before they happen, but also negotiate settlements after displacements.

ii) Economic fortunes especially in Africa have dwindled and hence the majority of states have been unable to feed their own populations. In such cases therefore, these same countries cannot afford to allow in and care for refugees. In cases where refugees find their way in to these countries, they live in deplorable conditions, and mainly in camps.

iii) The lack of a root-causes approach to the refugee problem has also contributed to this state of affairs. In this scenario, refugee agencies like UNHCR are only mandated to act after displacements take place. There is need for a proactive and wholistic approach, which would stem out conflicts that lead to these displacements.

iv) There is lack of an effective international mechanism to respond to the kind of complex humanitarian crises erupting globally.

v) The international community has not concentrated on the search for durable solutions to the refugee problem.

In view of the above, it is clear that there is a need to deal with the refugee problem from all angles by means of preparedness, prevention and solution. The only approach that incorporates the three angles is the root-

causes approach. This approach as of necessity calls for durable solutions to the refugee problem. It has been stated that a genuinely durable solution means integration of the refugees into society be it in their country of origin, resettlement or asylum[22]. It has been noted that a solution is durable only if it enables refugees and returnees to support themselves and participate in society on an equal footing like the other members of society.[23]

As stated elsewhere, because refugee problems are trans-national, they cannot be resolved by means of unco-ordinated activities in separate countries. The importance of the institution of asylum notwithstanding, the solution to the refugee problem lies in adopting a root-causes approach. This approach requires far-reaching changes internationally and within the UN, which changes will affect fundamental priorities of the organisation. The development of a root-causes approach to the refugee problem basically revolves around balancing accepted principles of national sovereignty and assistance to refugees, and creating more effective warning signs so as to react early to stem outflows. This also entails development assistance to underdeveloped countries as well as having a development dimension in relief assistance and of course the need for political will power to resolve refugee problems. The spotlight also has to be turned to refugee producing countries as opposed to concentrating on the asylum country. This would encourage repatriation where outflows have already happened and prevent any further flows before they happen.

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22 M. L. Zellner, "Development Approaches to Refugee situations," UNHCR Informal Report, 1986.

5.2 Balancing Accepted Principles of National Sovereignty With Assistance to Refugees

Respect for territorial integrity and sovereignty is recognized by the UN Charter, which prohibits intervention by the UN in matters, which are essentially within the domestic jurisdiction of state sovereignty.[24] Further, at the very founding of the now defunct OAU, heads of state agreed that the independent states would have to respect the colonial boundaries as almost sacrosanct.[25] They covenanted that no African State would interfere in the internal affairs of another state, as that would violate the principle of sovereignty.[26] The principle of sovereignty has been agreed upon by member states of the international community to promote stability in the global political system hence the need for states to defend it.[27]

However, sovereignty has been one of the most abused political concepts in the twentieth century. One Author has stated:

> Sovereignty like nationalism has been one of the most abused political concepts in the twentieth century. Unlimited sovereignty not restrained by respect for law and human dignity and freedom, leads to reckless external aggression and domestically to widespread oppression.[28]

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23 *Ibid.*

24 Article 2 paragraph 7.

25 Article 3 of the OAU Charter, adopted on 25th May 1963; 2 ILM 768.

26 *Ibid.*

27 Otto Heronymi, "Evasion of State Responsibility and the Lessons from Rwanda - The Need for a New Concept of Collective Security," Journal of Refugee studies Vol. 9 No. 3, September 1996, pp. 236- 240.

28 *Ibid.* p. 238.

Sovereignty cannot therefore be left unlimited. It must be limited by respect for law, human dignity and freedom.

In order to be effective and acceptable, collective security and state intervention have to be based both on shared values and a minimum of strengths and resources. One of these common values is the belief that war and violence are not the solution to any problem. It is also important that this commitment should include the countries of a region as well as outside powers sharing the same objectives in the development of stable and prosperous democratic societies. Such a process would arguably have forestalled the tragedies in Somalia and Rwanda and is the only one that can provide a ray of hope for success in the horn of Africa and the Great Lakes region today.[29]

It is true that because of the doctrines of territorial integrity and sovereignty the world has seemed to stand by and watch as armed power hungry terrorists arrogate unto themselves the power to decide when innocent and helpless people should die or live. Clearly, it is not enough for any country to say that it is taking care of refugees, that it condemns the killing of innocent people and that it wants the international community to send food supplies to the hungry and suffering. This would be a hypocritical stand. It must as of necessity go further and try and stem refugee outflows before they happen. Peter Anyang' Nyongo' and Justus Abonyo Nyang'aya have argued that a comprehensive refugee policy must seek to prevent the deterioration of

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29 *Ibid.*

conditions to the point where people are coerced to flee. They argue that both the root and the immediate causes of flight must be addressed.[30] They however recognise that the world is divided on the issue of sovereignty. They state:

> One of the biggest obstacles to any comprehensive political solution of the African refugee problem is the issue of sovereignty. The international community is divided and ambivalent in its stance on the limitations imposed by national sovereignty on humanitarian assistance to displaced people in times of conflicts. [31]

The question to be asked is; to what extent can a state violate the fundamental rights of its citizens and still be regarded as a legitimate state? A case at hand is Somalia. It is my view that there must be certain conditions under which members of the international community should be entitled to interfere in the internal affairs of a member state. Interference would be justified when the actions of a state against its own people become the concern of all civilized humanity. It has been argued that intervention must still be within the framework of an international or regional convention except in situations where gross and consistent patterns of abuse of human rights amount to a threat to or breach of the peace.[32] The African Union (AU) member states for example, should establish a Convention giving it the right and capability to mobilize its members to intervene in the affairs of other member states where for example such a member allows genocide against its own citizens, and

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30 Nyongo' P. A, and Nyang'aya J. A., "Comprehensive Solutions to Refugee Problems in Africa: Bilateral, Regional and Mulitilateral Approaches," International Journal Of Refugee Law, Special edition, 1995, p. 167.

31 *Ibid.* p.171.

32 Chowdhury S. Roy, "A response to the Refugee Problems in post Cold War Era: Some Existing and Emerging norms of International Law," International Journal Of Refugee Law, Vo. 7,no. 1, 1995, p.118.

33 *Supra* note 27.

denies them human rights or is totally incapable of dealing with some natural or man-made disasters.[33] This would go a long way in stemming refugee outflows.

Presently, there is widespread evasion of state responsibility and inability of the international community, of neighbouring and other countries to help and create the conditions of lasting peace and reconciliation. For example, despite outbreaks of fighting and large-scale massacres in Rwanda and Burundi, the international community made no serious effort to halt the violence and to try to bring about long-term solutions. The strenuous efforts made in the Great lakes region after civil war broke out in Rwanda in 1990 were not matched by an equal commitment on the part of the UN.[34] Clearly, it is dangerous to dismiss these conflicts and the threat of new ones as purely internal or regional affairs because ultimately they represent a major threat to international order.

In the face of individual countries slamming their doors to asylum seekers, there is therefore the need for intervention in politically and economically decaying countries to avert human displacement right from the start. Dialogue should be enhanced between countries. Dialogue should also be encouraged between warring factions with other countries as mediators. Diplomatic actions can exploit publicity in order to increase pressure on the

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34 Kithure Kindiki, Humanitarian Intervention and State Sovereignty in Africa: The changing paradigms in international law, Occasional Paper Series, Vol. 1 No. 3, 2003, Moi University Press, p.1.

parties concerned. Agreeably, interference in a country's internal affairs is not easy and dialogue facilitated by other countries has often not worked, but this is the only way of encouraging a root-causes approach. Former President Daniel arap Moi admitted that his efforts at dialogue in the Great Lakes region had not borne fruit but promised that IGADD was going to work towards bringing the conflict in Somalia to an end by encouraging dialogue.[35]

Ever since the UN Security Council passed a resolution insisting that the government of Iraq allow immediate access by the international humanitarian organizations to all those in need of assistance,[36] it has become commonplace for analysts to argue that the world is witnessing an erosion of the notion of sovereignty and a declining commitment to the principle of non-interference in the domestic affairs of states. One also needs to look at the conditions given by the United States government to the regimes of Saddam Hussein in Iraq and Charles Taylor in Sierra Leonne respectively. There is greater readiness amongst the world's states to acknowledge that events taking place within a country can constitute a threat to international peace and security,[37] and that how a country treats its nationals ultimately is the concern of the international community.

The solution to the refugee crisis lies not so much in the construction of legal mechanisms but rather in solving the more socio-political conflicts existing

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35 In his address to the nation on 20th October 1997in commemoration of Kenyatta Day.

36 Resolution 688 in 1991.

37 *Supra* note 7 p. 39.

mainly in the states of origin. It has been stated that the traditional approaches to refugee problems have to be complimented by flexible and innovative measures to balance humanitarian needs of refugees with the political interests of the state.[38] It is in these countries that one finds circumstances leading to refugee outflows. There is need to stamp out human rights violations in these countries so as to stop the outward trends. As a corollary to this need, if circumstances leading to refugee outflows already existed then it becomes necessary to protect the populations within their own states, in spite of this being dangerous. This implies that more states should be willing to volunteer peace-keeping forces to be deployed to such zones. Greater attention should be given to approaches that combine political and humanitarian initiatives in an effort to prevent further displacement, restore peace and achieve solutions for people who have been uprooted. In this regard, dispute settlement has played a key role. Industrialized states are increasingly providing funds for this purpose, having realized that conflict is one of the root causes of the refugee crisis.

From the foregoing therefore, it is clear that the question of sovereignty brings complications and has been responsible for causing some of the refugee outflows as well as promoting the attitude of non interference by the international community. A former High commissioner for refugees, Mrs. Sadako Ogata, has stated;

> In practical terms the sovereignty of states remains the basic building block of today's international system. It would be inconceivable for

38 Ogata S., "Refugees: Lessons from the past," The Oxford International Review, Vol 4 No.3, 1993, p.41

> UNHCR to intervene in any area without the cooperation of the authorities concerned,[39]

This therefore means that for a root-causes approach to succeed, there is need to re-look at the principle of sovereignty. In a world such as ours, the time of absolute and exclusive sovereignty has passed. Kenya should do all in her power to encourage this scenario since she has for a long time had to bear the brunt of the refugee outflows in the horn of Africa and the Great Lakes region. She should further intensify her efforts to encourage dialogue between warring factions and in this way the refugee problem would be nipped in the bud.

5.3 Promoting Developments in Underdeveloped Countries

This is also a long-term solution to the problem of refugees. Although underdevelopment alone does not create refugee outflows, poverty, inequality and competition for scarce resources can play an important role in creating conditions in which mass population displacements can take place.[40] As such, there is an indisputable relationship between the development difficulties, which many countries have experienced in the recent years, their propensity to be affected by conflict and mass population displacements.[41] In the same vein, asylum countries that are underdeveloped are not in a position to provide even the basic necessities to the refugee populations that they are made to bear. Kenya is one such example. As stated elsewhere, she cannot

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39 Daily Nation, 22nd May 1995 p.11.

40 *Supra* note 22 p. 143.

41 Robert Gorman and Gaim Kireab, "Repatriation Aid and Development Assistance" in James Hathaway (ed.), Reconceiving International Refugee Law, Martinus Nijhoff Publishers, 1997, p. 37.

> UNHCR to intervene in any area without the cooperation of the authorities concerned.[39]

This therefore means that for a root-causes approach to succeed, there is need to re-look at the principle of sovereignty. In a world such as ours, the time of absolute and exclusive sovereignty has passed. Kenya should do all in her power to encourage this scenario since she has for a long time had to bear the brunt of the refugee outflows in the horn of Africa and the Great Lakes region. She should further intensify her efforts to encourage dialogue between warring factions and in this way the refugee problem would be nipped in the bud.

5.3 Promoting Developments in Underdeveloped Countries

This is also a long-term solution to the problem of refugees. Although underdevelopment alone does not create refugee outflows, poverty, inequality and competition for scarce resources can play an important role in creating conditions in which mass population displacements can take place.[40] As such, there is an indisputable relationship between the development difficulties, which many countries have experienced in the recent years, their propensity to be affected by conflict and mass population displacements.[41] In the same vein, asylum countries that are underdeveloped are not in a position to provide even the basic necessities to the refugee populations that they are made to bear. Kenya is one such example. As stated elsewhere, she cannot

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39 Daily Nation, 22nd May 1995 p.11.

40 *Supra* note 22 p. 143.

41 Robert Gorman and Gaim Kireab, "Repatriation Aid and Development Assistance" in James Hathaway (ed.), Reconceiving International Refugee Law, Martinus Nijhoff Publishers, 1997, p. 37.

feed and educate her own population, leave alone the refugee population within her borders.

People can only remain safe in circumstances where they are allowed to realize their full human potential; to retain their self respect and to enjoy physical security; to meet their material needs; to participate in decision making; and to be fairly governed under the rule of law. [42] This basically means development. There can be no peace and harmony in any given society unless prosperous democratic societies are developed. This in turn is a pre-condition to the containment of human displacement. Relief, rehabilitation and development form part of a single continuous web.[43]

For conflict prevention, resolution and promotion of democracy, the international community must focus on development that is aimed at institution building. The world's most prosperous states have to contribute in terms of resources, such as grants, to the development of other states in order to reap rich rewards in terms of good governance and prevention of refugee movements. Promotion of development should be high priority as peace and economic growth are inextricably linked. Without security, even the most basic productive activities are jeopardized. Without development social and communal tensions are far more likely to arise and to assume a violent form.

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42 *Ibid.* p.46.
43 *Ibid.*

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42 *Ibid.* p.46.
43 *Ibid.*

In an increasingly competitive international market, the world's less developed countries are finding it hard to realise their development needs. This situation, compounded by a massive burden of debt makes it difficult for these states to escape from the vicious cycle of deprivation and displacement. Development assistance has to come in to create conditions in which investment and trade can flourish. The current decline in assistance levels must be reversed and this, combined with an effort to ensure that aid is properly targeted towards activities that meet immediate human priority needs and which also lay the foundation for long term and sustainable growth are certain to enhance development. As such, there is need for a similar reconstruction process in the economically deprived countries like Somalia, Rwanda, Kenya, (just to mention but a few) like the one witnessed in Europe after the second world war through the Marshall initiative and the creation of the Bretton Wood's institution which brought a wide range of benefits to people who had suffered the deprivations of the war and economic recession that had preceded it.

Where displacement has occurred, assistance to the affected should be focused on development. This development should go far beyond providing routine aid and calls for a new mindset to perceive the problems, issues and opportunities generated by the refugee situation. This means that the international refugee problem should be considered from a human rights and developmental perspective. This was one of the recommendations of ICARA II. In fact at that conference, countries affected by the plight of refugees were

invited to submit proposals for development assistance and Kenya was one of the countries that did so. The right to development alongside other human rights of refugees should be given priority.[44] This is because of the fact that the most meaningful humanitarian assistance that can be made available to refugees is that which enables them to realise their own potential to become independent and self-sufficient. The earlier refugees are helped to realize their potential and be productive the better both for themselves and their country of asylum. The world should stop looking at refugees as helpless creatures who must be given handouts and see them as a work force that can be utilized in the development of their asylum or resettlement countries. The major problem here is that the global response generally and Kenya in particular has been more or less humanitarian, lacking in any long term planning. There has been a failure to invest in the future through tackling the problem at the source and this has cost the international community dearly. There is therefore a need for a new policy emphasising a developmental approach which views refugees as energetic and resourceful people who can benefit host governments as a resource for development.

A development oriented strategy towards refugees would meet at least three criteria;

i) It should ensure that refugees and asylum seekers are reasonably housed, clothed, fed and counselled.

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44 UN/Doc/A/AC/96/627, see also U.N.G.A. Resolution 40/144 of 13th December 1985.

ii) It should give refugees education and vocational training which will allow them to compete for jobs and to become successfully self-employed.

iii) It should allow refugees to maintain their identity and to participate in the community thus making a genuine contribution.

It should also be noted that the development focus advocated here should be implemented both in the country of asylum as well as in the country of origin. Development in the country of origin is important so as to encourage the repatriation of refugees. Repatriation has always been regarded as the preferred solution by aid agencies and even the refugees themselves. This development in the country of origin would further avert any future displacements. It should however be noted that emergency relief and humanitarian assistance where displacement has occurred should be given not only to refugees but also to host communities whose social and economic infrastructure suffer serious dislocation as a result of the mass influxes. Prompt and adequate compensation for local communities affected by refugee inflows is not only a right of that particular community but is also necessary to avert pressure on the affected government to repatriate refugees forcibly. This was the case in Tanzania during the peak of the Rwandan refugee outflows.[45] Such compensation would further go a long way in maintaining a harmonious existence between the refugee communities and the local ones. The hostility

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45 Bonventure Rutinwa, "The Tanzanian Government Response to the Rwanda Emergency," Journal of Refugee studies Vol.9 No.3, September 1996, p. 291. See also Daily Nation, Friday, September 5, 2003.

between the local communities in Northern Kenya and the refugee community has generally been fuelled by selective assistance of refugees.

At the global front there is a need to curtail the sale of arms to the various feuding factions in various countries like Somalia, Sudan, Rwanda and Burundi. In this regard, the UN has to give incentives to countries that undertake arms reductions and promote long-term peace buildings measures. This is because wars and human rights abuses that ultimately provoke refugee movements are often rooted in social, economic, and ecological processes requiring concerted efforts to resolve. It is no coincidence therefore that many of the largest population displacements of recent years have taken place in countries where standards of living are stagnant or declining.

Underdevelopment presents a significant obstacle in the search for solutions to the problem of human displacements as refugees cannot easily settle down and lead productive lives in countries where infrastructure either does not exist or has ultimately broken down, the land is not productive and prices of essential commodities are on the upward trend. Therefore, strategies intended to avert or resolve refugee problems cannot be expected to succeed if they fail to address issues of development.

This chapter has considered measures, which would complement international instruments in the resolution of the refugee problem. I have stated that sovereignty must be exercised within the required constraints and in view

of the changing world order so that states do not use it as an excuse for breaching international tenets. I have also noted that development must be encouraged both in the country of origin as well as in the country of asylum as a way of encouraging repatriation where possible and stemming further outflows as well as ensuring that refugees have access to even the most basic requirements I the countries of asylum. Above all, There hence a need to consider and resolve the root causes of refugee outflows in order to reduce the numbers needing protection. Further, countries like Kenya which have not transformed international law in to their own domestic laws should be encouraged to do so.

CHAPTER SIX

CONCLUSION

In concluding this thesis, it is worth noting that over the last few decades, the population of refugees in the entire world has escalated notwithstanding the fact that all the Conventions and Declarations relating to refugees have been comprehensively set out. It emerges therefore that unless drastic measures are taken into reviewing the existing control mechanisms, the situation is likely to get worse. That contemporary refugee law is now under serious threat is not in doubt. From a historical perspective, it is clear that refugee law was never intended to cope with the kind of forced migration taking place today. International politics and modern transportation technology have combined to hasten the migration of a number of refugees within Africa. Some of the largest numbers have fled from some African Countries to other poor developing countries, Kenya included. This clearly aggravates efforts to protect and assist refugees.

I have in this thesis considered the main international refugee instruments namely the 1951 Convention Relating to The Status of Refugees, the 1967 Protocol Relating to the Status of Refugees, as well as the OAU Convention of the 10th September 1969 Governing Specific Aspects of Refugee Problems in Africa. It is clear that these instruments contain substantive provisions aimed at protecting refugees once they have crossed an

international border. The refugee instruments have indeed made significant steps towards the protection of the human rights of refugees.

The 1951 Convention, which deals with the refugee problem in the European context, regulates the rights and obligations of refugees and the country of asylum. This Convention is important in two respects; firstly, in spite of being limited to refugees from Europe, it provides a general definition of a refugee as someone outside their country and unable to return as a result of well founded fear of persecution on grounds of race, religion, nationality, political opinion or membership of a social group. Secondly, it recognises that people who fall within the definition of a refugee should as a minimum benefit from certain rights, which it sets out. This therefore means that states that are party to the Convention bear obligations imposed by the Convention, the most fundamental being the principle of *non- refuolement*. This means that assisting refugees no longer remains a charitable act by states, but an obligation under international instruments. Having ratified/acceded to these instruments, Kenya is therefore obligated to carry out its obligations as specified in the particular instruments. The reality as has been demonstrated in this thesis is a far cry.

The 1967 Protocol extended the scope of the 1951 Convention by dropping the geographical and time limitations from the definition of a refugee. The 1969 OAU Convention went further and extended the definition of a refugee to cover persons displaced because of external aggression, occupation, foreign domination or events seriously disturbing public order in

either part or the whole of the country of origin or nationality. This particular Convention further reflects the aspirations of the African continent on this question of refugees and calls upon state parties to give it a humanitarian approach and to help alleviate each other's extra burdens brought about by refugees.

By ratifying or acceding to these instruments, a country makes a commitment to honour its obligations as set out therein. This commitment should ideally regulate the country's refugee policy. A person granted refugee status is in principle therefore given a whole set of substantial rights under these instruments. In reality however, it is clear that there are practical difficulties for refugees in realizing their rights under these international instruments. One problem faced by asylum seekers before the grant of refugee status, is that the granting of asylum is admittedly a sovereign right of states, which right states have guarded jealously as discussed in this thesis.

I have in detail discussed how Kenya has dealt with asylum seekers by confining them in camps where they are unlikely to enjoy the rights granted under the international instruments. It has been established that Kenya is yet to pass a refugee specific Act albeit having drafted a bill way back in 1994. Being a dualist state, Kenya is required to pass an enabling Act by Parliament for any international treaty or covenant to be invoked or enforced by the Kenyan courts. This means that although Kenya is compelled to comply with the international instruments that it has acceded to or ratified, no refugee can

enforce their rights under these instruments through the Kenyan courts unless and until they are given the force of law domestically by a specific national legislation. There seems to be an absence of political will on the part of the Kenyan government to implement and to adhere to the norms and principles of the international instruments.

Although states have a legitimate interest in controlling access to their territory, it must be stated that they also have international legal obligations to provide protection to those fleeing persecution. People who flee their countries out of fear of persecution join a larger stream of people who leave in search of opportunities for work, education, family re-unions and many other reasons. It is clear that because of the pressure on states to admit these new populations, states are now adopting explicit immigration laws and policies under which immigrants are admitted. On the other hand, it must be remembered that although states have a sovereign right to determine who enters their territory, state parties to the international refugee regime obligate themselves not to return refugees to places where they are likely to face persecution. It is important to note that the Kenyan Immigration Act requires the master of a ship or the captain of an aircraft to ensure the removal of a person who is refused entry in to Kenya presumably for lack of a valid visa or entry permit.[1] Should a person so removed be a genuine asylum seeker, the effect of this section would be *refoulement,* which is against the international instruments to which Kenya is party. This is because such a person being a genuine asylum

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1 S.9 of Cap 172

seeker is no different from a poor refugee who finds his way in to the country. It is suggested that in line with Article 13 of the Covenant of Civil and Political Rights, such a person should only be expelled after the due process of the law. Kenya should set up specialized immigration officers at the ports of entry to deal with refugee issues.

This brings in to focus the problematic concept of sovereignty, which has been one of the biggest stumbling blocks to any comprehensive political solution of the refugee problem. Sovereignty is a concept that would ordinarily justify a state's actions towards individuals within its territory. However, international customary law assigns special protection to aliens. The question of *non-refoulement* automatically therefore limits a country's sovereignty. This is because, in spite of any state having the right to control its borders, the principle of *non –refoulement* requires that refugees are not returned to places where they are likely to face persecution. The question of sovereignty is further limited by human rights considerations, which are applicable to every human being. Kenya for example, cannot treat her nationals they way she deems fit and without consideration for human rights. Kenya has to accord her nationals the inalienable rights that they are entitled to by virtue of being human. This buttresses the assertion that sovereignty cannot be left unlimited and that the time for absolute sovereignty is long gone.

This thesis has established that the international refugee regime has no mandate to prevent refugee outflows before they happen, and that the UNHCR is only mandated to act after an outflow has taken place. The functions of UNHCR as describe earlier encompass providing international protection and seeking permanent solutions to the problems of refugees. The work of UNHCR is entirely humanitarian, social and non-political in nature. Even in cases where UNHCR has worked in countries of origin, it has only done so after an outflow occurs, and only for purposes of protecting returnees. Recognizing this gap, the OAU/UNHCR symposium on refugees recommended in the Addis Ababa document that the OAU members states in collaboration with the relevant inter-governmental organizations should examine all the factors which cause or contribute to conflicts with a view to elaborating a comprehensive plan of action for tackling the root causes of refugee flows. [2] This initiative if implemented seriously, has the potential of greatly reducing refugee numbers. It is my proposal that the international community should adopt some of the recommendations made at that symposium.

This thesis has also demonstrated that the state of the economy of the countries of origin and asylum are key to the refugees' realization of their full rights under international law. Clearly, if the country of asylum is poor and hardly able to cater for its own population, chances of refugees enjoying their rights in such an environment are nil. This is because the government of that

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2 Adopted by the OAU/UNHCR symposium on refugee and Forced Population Displacements in Africa held on 8th to 10th September 1994. Reprinted in the International Journal of Refugee Law, Special Issie, July 1995, 99.303-17

country will be more preoccupied with looking after its own population rather than the refugees. In Kenya for example where there is hardly enough land and jobs for its own population, refugees are confined in camps in arid and semi-arid parts of the country where they can hardly realize their rights. The refugees who find themselves in this situation are also too preoccupied with the softer issues such as food and shelter to even think of any other rights. There are however a number of refugees who can support themselves economically and find their way in to the urban centres where they carry on businesses or find jobs to support themselves, although the latter is very difficult.

One of the weak points in the 1951 Convention is the fact that the Convention seems to envisage the protection of refugee rights in stable economic and political environments in the host countries. Obviously this is not the case in African countries where the political and economic environments are more than often unstable. This is what led to the ICARA II recommendations as discussed in this thesis. Kenya has a big challenge in ensuring that the refugee rights enumerated in the international instruments are enjoyed by refugees. This can be attributed to a combination of political, security, social and economic constraints. For example, the influx of Somali refugees in Kenya led to increased insecurity due to the proliferation of small arms in Kenya. Additionally, the international community's financial and material support to lighten the burden on African host countries has continued to diminish hence the recommendations of ICARA II. Perhaps, the looming poor economic,

political and social situation in Kenya has been one of the factors that have led to the non-implementation of refugee law. As already noted, International law does not make it mandatory for member states to domesticate refugee law. It is however expected that member states should conform to the treaties and conventions they have ratified.

It has also been demonstrated in this thesis that Kenya lacks the institutional, policy and refugee specific legal framework to deal with refugee issues. As a result, Kenya has dealt with refugees in an *ad hoc* manner and sometimes depending on the political considerations at the time. It is hoped that the 2003 bill will finally be enacted so that a framework for dealing with refugee issues is established. It is also hoped that the bill will be strengthened further in line with recommendations made in chapter four of this thesis.

It is not surprising that the 1951 Convention did not contain any specific reference to the responsibilities of the country of origin. This was not one of its goals as it was mainly formulated to provide international standards for the recognition and protection of refugees as well as promoting repatriation or assimilation in to countries of asylum.[3] However, with time, the International community has indeed recognized the importance of throwing the spotlight on the conditions and events that force people to flee their countries of origin. This basically means that the international community is now more committed to tackling the refugee crisis using the root causes approach. This approach

carries with it responsibilities for the country of origin. For this approach to be effective, it is important to identify the main causes of refugee flows. The 1951 Convention identified what is still a major root cause of refugee flows as persecution based on race, nationality, membership of a particular social group, and religious or political beliefs.[4] In other words, one of the main root causes of refugee outflows is persecution based on who the refugee is or what the refugee believes in. This same cause has been picked up in all the subsequent refugee legal instruments, such as the 1967 Protocol as well as the 1967 OAU Convention. It is evident that refugee outflows are also caused by violation of human rights, ethnic tensions as well as economic tensions. Clearly, refugees are merely an outward manifestation of various problems in the country of origin.

The refugee problem can therefore not be solved unless there is a clear strategy envisaged at two levels; a humanitarian response of providing relief assistance and protection to those already displaced, and preventive action to stem further outflows. Preventive action would involve tackling the root causes leading to the outflows and creating circumstances that would encourage people to stay rather than flee. This is a very wide approach as discussed in the previous chapter, but it carries with it responsibilities for the country of origin. The country of origin has to ensure that it eradicates or at least minimizes refugee-causing circumstances. However, should outflows

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3 Hyndman P. An Appraisal of the Protection Afforded to Refugees Under International Law, Lawasia (NS), pp. 219-25.

4 Article 1

occur, the country of origin should be made to participate in the resolution of refugee problems. It is worth noting that the Cairo Declaration of Principles of International Law on Compensation to Refugees[5] clearly states in its first Principle that the responsibility for caring for the world's refugees rests ultimately upon the countries that directly or indirectly force their own citizens to flee and remain abroad as refugees and that the discharge of the obligations of international organizations such as the UNHCR shall not relieve the countries of origin of their basic responsibility.

In this scenario therefore, it is important that the international community should develop a comprehensive strategy buttressed by international solidarity and humanitarian principles to deal with the refugee question. The strategy should most importantly address the underlying causes, which cause people to flee their countries of origin. The strategy should in addition promote voluntary and safe return of refugees as well as protection and assistance to refugees in host countries. The international community should also look for ways of ensuring that countries of origin fully participate in the search for durable solutions to the refugee crisis. It is my submission that while the rights of asylum and *non-refoulement* must be jealously guarded, greater efforts must be made to tackle refugee problems at their source, by restoring peace and development in the countries of origin. Concerted international action is

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5 Reprinted in Chimni, B. S, (ed). International Refugee Law: A Reader, Sage Publications India, Pvt Limited , New Delhi, (2000), P.327

required to protect human rights in countries of origin, as well as establishment of peace keeping operations and promotion of sustainable development.

In this thesis, I have considered the need for a root causes approach to the solution of refugee problems. I have stated that in order for the protection envisaged by the international community to be felt to be effective, it must be accompanied not only by the need for countries like Kenya to enact municipal refugee laws, but also a root causes approach to refugee problems. There is need to implement the recommendations of ICARA II and enhance development both in the country of asylum and the country of origin. Countries must as of necessity commit once more to upholding human rights. I have also stated that the doctrine of sovereignty must be exercised with the necessary limitations so that it is not used as a justification by perpetrators of refugee outflows to curtail any intervention by the international community. Sight should not however be lost to the importance of this doctrine.

In the final analysis therefore, countries like Kenya, which have not enacted municipal refugee laws, should be encouraged to enact them, but simultaneously the international community must overhaul the concept of refugee law so that durable solutions are sought rather than short-term solutions. It is therefore asserted that although Kenya has fallen short of the requirements of international law in her response to the refugee problem, more needs to be done both at her level by enacting a municipal refugee law, but also, more needs to be done at the international level as noted above in order

that durable solutions to the refugee problem are realized. This can only be realized by the use of a root causes approach.

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KENYA GAZETTE SUPPLEMENT

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CONTENT

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THE REFUGEES BILL, 2003

ARRANGEMENT OF CLAUSES

THE REFUGEES BILL, 2003

A Bill for

An Act of Parliament to make provision for the recognition, protection and management of refugees and for connected purposes

ENACTED by the Parliament of Kenya as follows:-

Short title and commencement.

1.(1) This Act may be cited as the Refugees Act, 2003 and shall come into operation on such day as the Minister may by notice in the Gazette appoint.

Interpretation.

2. In this Act, unless the context otherwise requires -

"asylum" means shelter granted by the Government to persons qualifying for refugee status in accordance with the provisions of this Act and in accordance with International Conventions relating to refugee matters specified in section 15;

"asylum seeker" means a person seeking refugee status in accordance with the provisions of this Act;

"authorised officer" includes the Commissioner, Provincial and District Commissioners, District Officers, Immigration Officers and Police Officers at the rank of inspector or above;

"Appeal Board" means the Refugee Appeal Board established under section 8;

"Committee" means the Refugee Status Determination Committee established under section 6;

"country of nationality" in relation to a person who has more than one nationality, means each of the countries of which that person is a national;

"Commissioner" means the Commissioner for refugee affairs appointed under section 7;

"camp manager" means a senior officer in the office or the Commissioner appointed under section 16;

"members of his family", in relation to a refugee, means -

(a) any spouse of the refugee;

(b) any dependent child of the refugee under the age of eighteen years; or

(c) any grandparent, parent, brother, sister, grandchild, or ward of the refugee who is dependent on the refugee.

"Minister" means the Minister for the time being responsible for refugee affairs;

Meaning of "refugee."

3.(1) Subject to this section, a person shall be a refugee for the purposes of this Act if such person -

(a) 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

(b) not having a nationality and being outside the country of his former habitual residence, is unable or, owing to a well-founded fear of being persecuted for any of the aforesaid reasons is unwilling, to return to it; or

(c) owing to external aggression, occupation, foreign domination or events seriously disturbing public order in any 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; or

(d) has been recognized as a refugee under section 10; or

(e) is a member of a class of persons declared to be refugees under subsection (2).

(2) If the Minister considers that any person or class of persons are refugees as defined in paragraph (a), (b), (c) or (d) of subsection (1), the Minister may declare such person or class of persons to be a refugee or refugees, and may at any time amend or revoke such declaration:

Provided that no such amendment or revocation shall affect the right of any person who is -

(a) a member of the class of persons concerned and who entered Kenya before the date of such amendment or revocation to be regarded as a refugee for the purposes of this Act; or

(b) a person such as is referred to in subsection (1) (a), (b), (c) or (d) to be recognized as a refugee for the purposes of this Act.

(3) If the Minister under subsection (2) expressly excludes or exempts any person from a declaration that a class of persons of which that person is a member are refugees, such exclusion or exemption shall not preclude the person concerned from applying under subsection (1) for recognition of their status as a refugee.

Disqual from gr refugee

4. A person shall not be a refugee for the purposes of this Act if such person -

(a) has committed a crime against peace, terrorism, a war crime, or a crime against humanity as defined in any international instrument to which Kenya is a party and which has been drawn up to make provision in respect of such crimes;

(b) has committed a serious non-political crime outside Kenya prior to the person's arrival and admission to Kenya as a refugee;

(c) has been guilty of acts contrary to the purposes and principles of the United Nations or the Organization of African Unity; or

(d) having more than one nationality, had not availed himself of the protection of one of the countries of which the person is a national and has no valid reason, based on well-founded fear of persecution or on a reason referred to in section 3(1)(c) for not having availed himself of its protection.

Cessation of refugee status.

5. A person shall cease to be a refugee for the purposes of this Act if that person -

(a) voluntarily re-avails himself of the protection of the country of his nationality;

(b) having lost his nationality, voluntarily re-acquires it;

(c) becomes a citizen of Kenya or acquires the nationality of some other country and enjoys the protection of the country of his new nationality;

(d) voluntarily re-establishes himself in the country which he left or outside which he remained owing to fear of persecution or for reasons referred to in section 3(1) (c);

(e) can no longer, because circumstances in connection with which he was recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality; or

(f) has committed a serious non-political crime outside Kenya after his admission to Kenya as a refugee;

(g) having lost his nationality, continues to refuse to return to the country of his former habitual residence:

Provided that the provisions of this paragraph shall not apply to a person who-

(i) is a person referred to in section (3) (1) (d); or

(ii) has compelling reasons arising out of previous persecution for refusing to avail himself or so to return as the case may be; or

(h) seriously infringes the purposes and objectives of any International Convention; or

(i) is a person referred to in section 3(1) (c) or is a member of a class of persons declared in terms of 3(2) to be a refugee.

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6.(1) There is established a Committee to be known as the Refugee Status Determination Committee.

(2) The object and purpose for which the committee is established is to assist the Commissioner in matters concerning the recognition of persons as refugees for the purposes of this Act.

(3) The Committee shall consist of -

(a) the chairperson who shall be appointed by the Minister;

(b) one representative from the Office of the President;

(c) one representative from the Ministry for the time being responsible for foreign affairs;

(d) one representative from the Ministry for the time being responsible for local government;

(e) one representative from the Ministry for the time being responsible for justice and constitutional affairs;

(f) one representative from the Ministry for the time being responsible for health;

(g) one representative from the Department of Immigration;

(h) one representative from the Department of Police; and

(i) one representative from the National Security Intelligence Service;

(3) The Committee may co-opt any person for the purpose of assisting or advising the Committee.

Commissioner for Refugee Affairs.

7.(1) There shall be a Commissioner whose office shall be an office in the Public Service and who shall be the head of the Department of Refugee Affairs.

(2) Subject to this section, the functions of the Commissioner shall be to -

(a) act as secretary to the committee referred to in section 6;

(b) co-ordinate all measures necessary for promoting the welfare and protection of refugees and advise the Minister thereon;

(c) formulate policy on refugee matters in accordance with international standards;

(d) ensure, in liaison with the United Nations High Commission for Refugees and other institutions, the provision of adequate facilities and services for the protection, reception and care of refugees within Kenya;

(e) promote as far as possible durable solutions for refugees granted asylum in Kenya;

(f) convene meetings of the Refugee Status Determination Committee;

(g) receive and process applications for refugee status;

(h) implement the decisions of the Committee;

(i) register all refugees;

(j) issue identification cards and passes to refugees;

(k) manage refugee camps and other related facilities;

(l) advise the Minister on the care and welfare of refugees and the rehabilitation of refugee affected areas; and

(m) perform any other duties that may be assigned to the Commissioner under this Act;

(3) In the performance of the functions specified in subsection (2), the Commissioner shall comply with any general directions or instructions that are issued or given to him by the Minister and shall submit monthly reports on his activities to the Minister.

Refugee Appeal Board.

8. (1) There is established a Board to be known as the Refugee Appeal Board to consider and decide appeals under this Act.

(2) The Appeal Board shall consist of -

(a) a chairperson who is an advocate of not less than ten years standing appointed by the Minister;

(b) a nominee of the Minister for the time being responsible for foreign affairs;

(c) a nominee of the Minister for the time being responsible for Internal Security;

(d) a nominee of the Attorney-General;

(e) a nominee of the Minister from the Department of Immigration;

(f) one other member appointed by the Minister from a list of nominees submitted to the Minister by the National Council of Non-Governmental Organizations.

(3) All appointments to the Appeal Board shall be by name and by Gazette Notice issued by the Minister.

(4) The Appeal Board shall be independent in the exercise of its functions under this Act.

(5) A member of the Appeal Board shall hold office for a term of four years and shall be eligible for re-appointment for one further term of four years.

(6) The provisions of the First Schedule shall have effect in relation to the Appeal Board.

Appeals.

9.(1) Any person aggrieved by a decision of the Commissioner under this Act may, within fourteen days of receiving the decision, appeal to the Appeal Board against the decision.

(2) In any appeal under this Act, the Appeal Board may confirm or set aside the decision of the Commissioner and shall cause the appellant concerned to be notified of its decision in the matter in writing:

Provided that, before reaching a decision on any such appeal, the Appeal Board may either -

(a) refer the matter to the Commissioner for further investigation and advice; or

(b) make such further inquiry or investigation into the matter as it deems necessary.

(3) Any person who is aggrieved by the decision of the Appeal Board may within twenty-one days appeal to the High Court on a point of law.

Recognition of refugees.

10.(1) Any person who has entered Kenya, whether lawfully or otherwise, and wishes to remain within Kenya as a refugee in terms of this Act shall make his intentions known by appearing in person before an authorized officer immediately upon his entry or in any case within seven days after his entry into Kenya.

(2) In the case of a person who is lawfully in Kenya and is subsequently unable to return to his country of origin for any of the reasons specified in section 3 (1), he shall, prior to the expiration of his lawful stay, present himself before an authorized officer and apply for recognition as a refugee in accordance with the provisions of this Act.

(3) Without prejudice to the provisions of this section, no person claiming to be a refugee within the meaning of section 3 (1) shall merely by reason of illegal entry be declared a prohibited immigrant or detained or penalized in any way save that any person who after entering Kenya or who is within Kenya fails to comply with subsection (1) commits an offence and shall be liable on conviction to a fine not exceeding twenty thousand shillings or to imprisonment for a term not exceeding six months, or to both.

(4) Any authorized officer to whom an application is made under subsection (1) shall, if he is not himself the Commissioner, refer the application to the Commissioner.

(5) The Commissioner shall consider all applications referred to him under subsection (4) within three months of the application being so referred, and may within the three months make such inquiry or investigation as he thinks necessary into any such application and shall call upon the applicant to make an oral presentation.

(6) After considering the application referred to in subsection (4) the Commissioner -

(a) shall either grant refugee status to the applicant or reject the application; and

(b) shall, within fourteen days, notify the applicant concerned in writing of the decision and in the case of a rejection the applicant shall be informed of the reasons therefor.

Residence in Kenya pe recognit refugee.

11.(1) Notwithstanding the provisions of any other law, any person who has applied under section 10 for recognition of his status as a refugee and every member of his family, may remain in Kenya -

(a) until such person has been recognized as a refugee in terms of that section;

(b) in the event of the application of such person being rejected, until such person has had an opportunity to exhaust his rights of appeal;

(c) where such person has appealed and the appeal has been unsuccessful, he shall be allowed a reasonable time, not exceeding three months, to seek admission to a country of his choice; or

(d) if an application is rejected on security grounds the Minister shall, in relation to the applicant, take any security precautions he may consider necessary.

(2) The Commissioner may, on application made to him by the person concerned, extend the three-months period referred to in subsection (1) (c) if he is satisfied that there is a reasonable likelihood of the person being admitted to a country of his choice within such extended period.

Stay of proceedings.

12. Notwithstanding the provisions of the Cap.172 Immigration Act or the Aliens Restriction Act, no Cap. 173 proceedings shall be instituted or continued against any person or any member of his family in respect of his unlawful presence within Kenya -

(a) if such a person has applied under section 10 for recognition as a refugee, until a decision has been made on the application and, where appropriate, such person has had an opportunity to exhaust his right of appeal under that section; or

(b) if such person has become a refugee.

Residence in Kenya.

13. Every refugee shall -

(a) be issued with an identity card or pass in the prescribed form; and

(b) be permitted to remain in Kenya in accordance with the provisions of this Act.

Provisions relating to the families of refugees.

14. (1) A member of the family of a refugee who has entered Kenya shall, subject to subsection (3) and any other provisions of this Act -

(a) be issued with an identity card in the form prescribed on attaining the age of eighteen years; and

(b) be issued with a refugee identification pass if below the age of eighteen years; and

(c) subject to subsections (2) and (3), be permitted to remain within Kenya for as long as the refugee concerned is permitted to so remain:

Provided that such a dependant has not been excluded under section 3(3).

(2) The Commissioner may grant permission to a dependent member of the family of a refugee upon application to enter and reside in Kenya and such a member shall be entitled to the rights and privileges specified in section 15 for such period as the refugee is entitled to remain in Kenya.

(3) Upon the death of a refugee or upon the refugee's divorce or legal separation from the refugee's spouse, every person who, immediately before such death, divorce or legal separation was within Kenya as a member of the family of such refugee shall be permitted to continue to remain in Kenya in accordance with the provisions of this Act.

(4) Nothing in this section shall prevent a member of the family of a refugee or a person who has under subsection (2) been permitted to continue to remain in Kenya from applying for recognition as a refugee under section 10.

Rights and duties of refugees in Kenya.

15. (1) Subject to this Act, every recognized refugee and every member of his family in Kenya -

(a) shall be entitled to the rights and be subject to the obligations contained in -

(i) the Articles of the Convention Relating to the Status of Refugees of the 28th July, 1951 and the 1967 Protocol thereto, the terms of which are set out in the Second Schedule; and

(ii) the Articles of the Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa of the 10th September, 1969, the terms of which are set out in the Third Schedule; and

(b) shall be subject to all laws in force in Kenya.

(2) The Minister may, by notice in the Gazette, designate places and areas in Kenya to be -

(a) transit centres for the purposes of temporarily accommodating persons who have applied for recognition as refugees or members of the refugees' families while their applications for refugee status are being processed;

(b) refugee camps where refugees shall reside;

(3) The designated areas provided for in subsection (2) shall be maintained and managed in an environmentally sound manner.

(4) Subject to this Act, every refugee and member of his family in Kenya shall, in respect of wage-earning employment, be entitled to the same rights and be subject to the same restrictions, if any, as are conferred or imposed generally on persons who are not citizens of Kenya.

Camp Manager.

16. There shall be a camp manager, for every refugee camp whose functions shall be to -

(a) manage the refugee camp;

(b) receive and register all asylum seekers and submit to the Committee all applications for the determination of their refugee status;

(c) ensure refugees in the camps are issued with refugee identity cards or refugee identification passes;

(d) manage the camps in an environmentally and hygienically sound manner;

(e) co-ordinate the provision of overall security, protection and assistance for refugees in the camp;

(f) issue movement passes to refugees wishing to travel outside the camps; and

(g) protect and assist vulnerable groups, women and children.

Non-return of refugees, their families or other persons.

17. (1) Notwithstanding the provisions of any other law, no person shall be refused entry into Kenya, expelled, extradited from Kenya or returned to any other country or subjected to any similar measure if, as a result of such refusal, expulsion, return or other measure, such person is compelled to return to or remain in a country where -

(a) the person may be subject to persecution on account of race, religion, nationality, membership of a particular social group or political opinion; or

(b) the person's life, physical integrity or liberty would be threatened on account of external aggression, occupation, foreign domination or events seriously disturbing public order in part or the whole of that country.

(2) The Commissioner shall take such steps as he considers necessary to ensure that the provisions of sections (2) and (3) are applied in respect of persons to whom the subsections relate.

Withdrawal of recognition of refugees.

18.(1) If, at any time, the Commissioner considers that there are reasonable grounds for believing that a person who has been recognized as a refugee for the purposes of this Act -

(a) should not have been so recognized; or

(b) has ceased to be a refugee for the purposes of this Act,

the Commissioner shall revoke such recognition and shall notify the person concerned in writing of the decision together with the reasons therefor.

(2) Where the Commissioner has under this section withdrawn the recognition of any person as a refugee, that person shall cease to be a refugee and any member of his family shall cease to be so recognized under this Act on the expiration of seven days after the date on which the Commissioner notifies the person concerned that his recognition has been withdrawn:

Provided that nothing in this subsection shall prevent a member of the family of such a refugee from applying for recognition under section 10.

Expulsion of refugees and members of their families.

19.(1) Subject to subsection (2) and to section 18(1), the Minister may, after consultation with the Minister responsible for matters relating to immigration and internal security, order the expulsion from Kenya of any refugee or member of his family if the Minister considers the expulsion to be necessary or desirable on the grounds of national security or public order.

(2) Before ordering the expulsion from Kenya of any refugee or member of his family in terms of subsection (1), the Minister shall act in accordance with the due process of law.

Authorized officers.

20.(1) The Minister may by notice in the Gazette, appoint authorized officers for the purposes of this Act.

(2) An authorized officer may, for the purposes of exercising his powers and carrying out his duties under this Act -

(a) subject to subsections (3) and (4), search any person or property;

(b) take the finger-prints, foot-prints, photographs, x-rays and other electromagnetic ray photographs of any refugee or member of his family or any person who claims to be a refugee for the purposes of this Act or any member of the family of such person;

(c) question any refugee or member of his family or any person who claims to be a refugee for the purposes of this Act or any member of the family of such person.

(3) No search of any person or property shall be conducted in terms of subsection (2)(a) unless the authorized officer concerned has reasonable grounds for believing that the search is necessary for the prevention, investigation or detection of -

(a) a contravention of the provisions of this Act; or

(b) a fraudulent statement or concealment by a refugee, member of his family or person claiming to be a refugee for the purposes of this Act or any member of the family of such a person, of any fact relevant to his identity or status.

(4) Whenever it is necessary to cause a female to be searched, the search shall be made by a female authorized officer with strict regard to decency.

Provided that where a female officer cannot be found the search may be conducted by another female.

Refugee women and children.

21.(1) The Commissioner shall ensure that specific measures are taken to ensure the safety of refugee women in designated areas.

(2) The Commissioner shall ensure that a child who is in need of refugee status or who is considered a refugee shall, whether unaccompanied or accompanied by his parents or by any other person, receive appropriate protection and assistance.

(3) The Commissioner shall, as far as possible, assist such a child to trace the parents or other members of the family of the refugee child in order to obtain information necessary for the reunification of the child with the child's family.

(4) Where the parents of the child or other members of the child's family cannot be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his family,

Offences

22. Any person who -

(a) is unlawfully in Kenya in contravention of this Act; or

(b) makes any false declaration or statement to an authorized officer; or

(c) knowingly misleads any authorized officer seeking information material to the exercise of any of his powers under this Act; or

(d) having left or been removed from Kenya in consequence of an order made under section 19 of this Act, is found in Kenya while that order is still in force; or

(e) not being a refugee and not having a valid refugee identification document, fails to comply with an order of the Minister to leave Kenya; or

(f) resides without authority outside the designated areas specified under section 15(2),

commits an offence and shall on conviction be liable to a fine not exceeding twenty thousand shillings or to imprisonment for a term not exceeding six months, or to both.

Regulations.

23. (1) The Minister may make Regulations generally for the better carrying out of the provisions of this Act.

(2) Without prejudice to the generality of subsection (1) regulations made under this section may provide for the -

(a) manner and form in which appeals may be made to the Appeals Board;

(b) assignment to the Commissioner of functions relating to the investigation, inspection and supervision of the reception, treatment and welfare of refugees;

(c) formation of committees and the assignment to such committees of functions to be exercised, subject to the direction and control of the Director or any such committee in relation to the reception, treatment and welfare of refugees;

(d) procedure to be followed in applications for recognition of refugee status and the form in which such applications shall be made;

(e) procedure to be followed in the expulsion of refugees;

(f) form and issue of identification and travel documents to refugees and members of their families;

(g) form and issue of identification documents to persons awaiting determination of their status;

(h) control and regulation of persons who are required to live within a place or area designated by notice under section 15(2) and outside such place or area;

(i) form of any order or notice required to be served on any person under section 19 and the manner in which such order or notice may be served; or

(j) protection of women, children, unaccompanied minors, persons with disabilities and other disadvantaged groups.

FIRST SCHEDULE (S.8(6)

REFUGEE APPEAL BOARD

Term of office.

1.(1) A member of the Appeal Board shall hold office for such term, not exceeding three years, as may be specified in the instrument of his appointment.

(2) A member shall be eligible for re-appointment from time to time.

Terms and conditions.

2. The terms and conditions of service of a member, including remuneration, travelling and other expenses to which he is entitled shall be determined by the Minister, with the consent of the Minister for Finance.

Vacancy in member · office of member.

3(1). The office of a member shall become vacant if the

(a) has been absent from three consecutive meetings of the Board without the permission of the chairman;

(b) is unable to discharge the functions of his office by reason of mental of physical infirmity; or

(c) is an undischarged bankrupt; or

(d) is convicted of a criminal offence and sentenced to imprisonment for a term exceeding six months or a fine exceeding ten thousand shillings.

Staff.

4.(1) The Minister may appoint such persons to be members of the staff of the Appeal Board as he considers necessary to assist the Appeal Board in the performance of its functions.

(2) Members of staff of the Appeal Board shall be Public servants.

Meetings.

5.(1) The Appeal Board shall hold such meetings as may be necessary for the performance of its functions under this Act.

(2) The chairman, or in the absence of the Chairman, a member appointed by the members then present shall preside at a meeting of the Appeal Board.

Quorum.

6. A majority of the members for the time being holding office as members of the board shall constitute a quorum at any meeting of the board.

Decisions.

7.(1). A decision supported by a majority of the votes cast at a meeting of he Appeal Board at which a quorum is present shall be the decision of the Appeal Board.

(2) In case of an equal division of votes cast under subsection (1), the Chairperson of the meeting shall have a casting vote.

Rules.

8. Except as expressly provided in this Act or any regulations made thereunder, the Appeal Board shall regulate its proceedings as it deems fit.

SECOND SCHEDULE (Sec.15.(1)(a)(i)

CONVENTION RELATING TO THE STATUS OF REFUGEES

Adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950

entry into force 22 April 1954, in accordance with article 43

Preamble

The High Contracting Parties,

Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,

Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms,

Considering that it is desirable to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and the protection accorded by such instruments by means of a new agreement,

Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation,

Expressing the wish that all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States,

Noting that the United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of refugees, and recognizing that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of States with the High Commissioner,

Have agreed as follows:

CHAPTER I

GENERAL PROVISIONS

Article 1. Definition of the term "refugee"

A. For the purposes of the present Convention, the term "refugee" shall apply to any person who:

(1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 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;

Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfill the conditions of paragraph 2 of this section;

(2) As a result of events occurring before 1 January 1951 and 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.

In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

B. (1) For the purposes of this Convention, the words "events occurring before 1 January 1951" in article 1, section A, shall be understood to mean either (a) "events occurring in Europe before 1 January 1951"; or (b) "events occurring in Europe or elsewhere before 1 January 1951"; and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention.

(2) Any Contracting State which has adopted alternative (a) may at any time extend its obligations by adopting alternative (b) by means of a notification addressed to the Secretary-General of the United Nations.

C. This Convention shall cease to apply to any person falling under the terms of section A if:

(1) He has voluntarily re-availed himself of the protection of the country of his nationality; or

(2) Having lost his nationality, he has voluntarily reacquired it; or

(3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or

(4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or

(5) He can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;

Provided that this paragraph shall not apply to a refugee falling under section A (I) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;

(6) Being a person who has no nationality he is, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence;

Provided that this paragraph shall not apply to a refugee falling under section A (I) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.

D. This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.

When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention.

E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that.

(a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) He has been guilty of acts contrary to the purposes and principles of the United Nations.

Article 2. General obligations

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 maintenance of public order.

Article 3. Non-discrimination

The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.

Article 4. Religion

The Contracting States shall accord to refugees within their territories treatment at least as favourable as that accorded to their nationals with respect to freedom to practise their religion and freedom as regards the religious education of their children.

Article 5. Rights granted apart from this Convention

Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention.

Article 6. The term "in the same circumstances"

For the purposes of this Convention, the term "in the same circumstances" implies that any requirements (including requirements as to length and conditions of sojourn or residence) which the particular individual would have to fulfill for the enjoyment of the right in question, if he were not a refugee, must be fulfilled by him, with the exception of requirements which by their nature a refugee is incapable of fulfilling.

Article 7. Exemption from reciprocity

1. Except where this Convention contains more favourable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally.

2. After a period of three years' residence, all refugees shall enjoy exemption from legislative reciprocity in the territory of the Contracting States.

3. Each Contracting State shall continue to accord to refugees the rights and benefits to which they were already entitled, in the absence of reciprocity, at the date of entry into force of this Convention for that State.

4. The Contracting States shall consider favourably the possibility of according to refugees, in the absence of reciprocity, rights and benefits beyond those to which they are entitled according to paragraphs 2 and 3, and to extending exemption from reciprocity to refugees who do not fulfill the conditions provided for in paragraphs 2 and 3.

5. The provisions of paragraphs 2 and 3 apply 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.

Article 8. Exemption from exceptional measures

With regard to exceptional measures which may be taken against the person, property or interests of nationals of a foreign State, the Contracting States shall not apply such measures to a refugee who is formally a national of the said State solely on account of such nationality. Contracting States which, under their legislation, are prevented from applying the general principle expressed in this article, shall, in appropriate cases, grant exemptions in favour of such refugees.

Article 9. Provisional measures

Nothing in this Convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.

Article 10. Continuity of residence

1. Where a refugee has been forcibly displaced during the Second World War and removed to the territory of a Contracting State, and is resident there, the period of such enforced sojourn shall be considered to have been lawful residence within that territory.

2. Where a refugee has been forcibly displaced during the Second World War from the territory of a Contracting State and has, prior to the date of entry into force of this Convention, returned there for the purpose of taking up residence, the period of residence before and after such enforced displacement shall be regarded as one uninterrupted period for any purposes for which uninterrupted residence is required.

Article 11. Refugee seamen

In the case of refugees regularly serving as crew members on board a ship flying the flag of a Contracting State, that State shall give sympathetic consideration to their establishment on its territory and the issue of travel documents to them or their temporary admission to its territory particularly with a view to facilitating their establishment in another country.

CHAPTER II

JURIDICAL STATUS

Article 12. Personal status

1. The personal status of a refugee shall be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence.

2. Rights previously acquired by a refugee and dependent on personal status, more particularly rights attaching to marriage,

shall be respected by a Contracting State, subject to compliance, if this be necessary, with the formalities required by the law of that State, provided that the right in question is one which would have been recognized by the law of that State had he not become a refugee.

Article 13. Movable and immovable property

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.

Article 14. Artistic rights and industrial property

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 States, 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.

Article 15. Right of association

As regards non-political and non-profit-making associations and trade unions the Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country, in the same circumstances.

Article 16. Access to courts

1. A refugee shall have free access to the courts of law on the territory of all Contracting States.

2. 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 judicatum solvi*.

3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

CHAPTER III

GAINFUL EMPLOYMENT

Article 17. Wage-earning employment

1. The Contracting States 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.

2. In any case, restrictive measures imposed on aliens or the employment of aliens for the protection of the national labour market shall not be applied to a refugee who was already exempt from them at the date of entry into force of this Convention for the Contracting State concerned, or who fulfils one of the following conditions:

(a) He has completed three years' residence in the country;

(b) He has a spouse possessing the nationality of the country of residence. A refugee may not invoke the benefit of this provision if he has abandoned his spouse;

(c) He has one or more children possessing the nationality of the country of residence.

3. The Contracting States shall give sympathetic consideration to assimilating the rights of all refugees with regard to wage-earning employment to those of nationals, and in particular of those refugees who have entered their territory pursuant to programmes of labour recruitment or under immigration schemes.

Article 18. Self-employment

The Contracting States shall accord to a refugee lawfully in their territory 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 right to engage on his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies.

Article 19. Liberal professions

1. 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 practising 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.

2. The Contracting States shall use their best endeavours consistently with their laws and constitutions to secure the settlement of such refugees in the territories, other than the metropolitan territory, for whose international relations they are responsible.

CHAPTER IV

WELFARE

Article 20. Rationing

Where a rationing system exists, which applies to the population at large and regulates the general distribution of products in short supply, refugees shall be accorded the same treatment as nationals.

Article 21. Housing

As regards housing, the Contracting States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.

Article 22. Public education

1. The Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education.

2. The Contracting States shall accord to refugees treatment as favourable as possible, and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships.

Article 23. Public relief

The Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.

Article 24. Labour legislation and social security

1. The Contracting States shall accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals in respect of the following matters;

(a) In so far as such matters are governed by laws or regulations or are subject to the control of administrative authorities: remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age of employment, apprenticeship and training, women's work and the work of young persons, and the enjoyment of the benefits of collective bargaining;

(b) Social security (legal provisions in respect of employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme), subject to the following limitations:

(i) There may be appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition;

(ii) National laws or regulations of the country of residence may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfill the contribution conditions prescribed for the award of a normal pension.

2. The right to compensation for the death of a refugee resulting from employment injury or from occupational disease shall not be affected by the fact that the residence of the beneficiary is outside the territory of the Contracting State.

3. The Contracting States shall extend to refugees the benefits of agreements concluded between them, or which may be concluded between them in the future, concerning the maintenance of acquired rights and rights in the process of acquisition in regard to social security, subject only to the conditions which apply to nationals of the States signatory to the agreements in question.

4. The Contracting States will give sympathetic consideration to extending to refugees so far as possible the benefits of similar agreements which may at any time be in force between such Contracting States and non- contracting States.

CHAPTER V

ADMINISTRATIVE MEASURES

Article 25. Administrative assistance

1. 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.

2. The authority or authorities mentioned in paragraph I 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.

3. Documents or certifications so delivered shall stand in the stead of the official instruments delivered to aliens by or through their national authorities, and shall be given credence in the absence of proof to the contrary.

4. Subject to such exceptional treatment as may be granted to indigent persons, fees may be charged for the services mentioned herein, but such fees shall be moderate and commensurate with those charged to nationals for similar services.

5. The provisions of this article shall be without prejudice to articles 27 and 28.

Article 26. Freedom of movement

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.

Article 27. Identity papers

The Contracting States shall issue identity papers to any refugee in their territory who does not possess a valid travel document.

Article 28. Travel documents

1 . The Contracting States 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 to 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.

2. Travel documents issued to refugees under previous international agreements by Parties thereto shall be recognized and treated by the Contracting States in the same way as if they had been issued pursuant to this article.

Article 29. Fiscal charges

1. The Contracting States shall not impose upon refugees duties, charges or taxes, of any description whatsoever, other or higher than those which are or may be levied on their nationals in similar situations.

2. Nothing in the above paragraph shall prevent the application to refugees of the laws and regulations concerning charges in respect of the issue to aliens of administrative documents including identity papers.

Article 30. Transfer of assets

1. A Contracting State shall, in conformity with its laws and regulations, permit refugees to transfer assets which they have brought into its territory, to another country where they have been admitted for the purposes of resettlement.

2. A Contracting State shall give sympathetic consideration to the application of refugees for permission to transfer assets wherever they may be and which are necessary for their resettlement in another country to which they have been admitted.

Article 31. Refugees unlawfully in the country of refuge

1. 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 1, 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.

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

Article 32. Expulsion

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. 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.

3. 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.

Article 33. Prohibition of expulsion or return ("refoulement")

1. 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, membership of a particular social group or political opinion.

2. 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.

Article 34. Naturalization

The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.

CHAPTER VI

EXECUTORY AND TRANSITORY PROVISIONS

Article 35. Co-operation of the national authorities with the United Natic

1. The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate

its duty of supervising the application of the provisions of this Convention.

2. In order to enable the Office of the High Commissioner or any other agency of the United Nations which may succeed it, to make reports to the competent organs of the United Nations, the Contracting States undertake to provide them in the appropriate form with information and statistical data requested concerning:

(a) The condition of refugees,

(b) The implementation of this Convention, and

(c) Laws, regulations and decrees which are, or may hereafter be, in force relating to refugees.

Article 36. Information on national legislation

The Contracting States shall communicate to the Secretary-General of the United Nations the laws and regulations which they may adopt to ensure the application of this Convention.

Article 37. Relation to previous conventions

Without prejudice to article 28, paragraph 2, of this Convention, this Convention replaces, as between Parties to it, the Arrangements of 5 July 1922, 31 May 1924, 12 May 1926, 30 June 1928 and 30 July 1935, the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 and the Agreement of 15 October 1946.

CHAPTER VII

FINAL CLAUSES

Article 38. Settlement of disputes

Any dispute between Parties to this Convention relating to its interpretation or application, which cannot be settled by other means, shall be referred to the International Court of Justice at the request of any one of the parties to the dispute.

Article 39. Signature, ratification and accession

1. This Convention shall be opened for signature at Geneva on 28 July 1951 and shall thereafter be deposited with the Secretary-General of the United Nations. It shall be open for signature at the European Office of the United Nations from 28 July to 31 August 1951 and shall be re-opened for signature at the Headquarters of the United Nations from 17 September 1951 to 31 December 1952.

2. This Convention shall be open for signature on behalf of all States Members of the United Nations, and also on behalf of any other State invited to attend the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons or to which an invitation to sign will have been addressed by the General Assembly. It shall be ratified and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. This Convention shall be open from 28 July 1951 for accession by the States referred to in paragraph 2 of this article. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 40. Territorial application clause

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary- General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article 41. Federal clause

In the case of a Federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal legislative authority, the obligations of the Federal Government shall to this extent be the same as those of parties which are not Federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent States, provinces or cantons which are not, under the constitutional system of the

Federation, bound to take legislative action, the Federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of States, provinces or cantons at the earliest possible moment;

(c) A Federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the Federation and its constituent units in regard to any particular provision of the Convention showing the extent to which effect has been given to that provision by legislative or other action.

Article 42. Reservations

1. 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.

2. Any State making a reservation in accordance with paragraph 1 of this article may at any time withdraw the reservation by a communication to that effect addressed to the Secretary-General of the United Nations.

Article 43. Entry into force

1. This Convention shall come into force on the ninetieth day following the day of deposit of the sixth instrument of ratification or accession.

2. For each State ratifying or acceding to the Convention after the deposit of the sixth instrument of ratification or accession, the Convention shall enter into force on the ninetieth day following the date of deposit by such State of its instrument of ratification or accession.

Article 40. Territorial application clause

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary- General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

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(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent States, provinces or cantons which are not, under the constitutional system of the

Federation, bound to take legislative action, the Federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of States, provinces or cantons at the earliest possible moment;

(c) A Federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the Federation and its constituent units in regard to any particular provision of the Convention showing the extent to which effect has been given to that provision by legislative or other action.

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2. For each State ratifying or acceding to the Convention after the deposit of the sixth instrument of ratification or accession, the Convention shall enter into force on the ninetieth day following the date of deposit by such State of its instrument of ratification or accession.

Article 44. Denunciation

1. Any Contracting State may denounce this Convention at any time by a notification addressed to the Secretary-General of the United Nations.

2. Such denunciation shall take effect for the Contracting State concerned one year from the date upon which it is received by the Secretary-General of the United Nations.

3. Any State which has made a declaration or notification under article 40 may, at any time thereafter, by a notification to the Secretary-General of the United Nations, declare that the Convention shall cease to extend to such territory one year after the date of receipt of the notification by the Secretary-General.
Article 45. - Revision

1. Any Contracting State may request revision of this Convention at any time by a notification addressed to the Secretary-General of the United Nations.

2. The General Assembly of the United Nations shall recommend the steps, if any, to be taken in respect of such request.

Article 46. Notifications by the Secretary-General of the United Nations

The Secretary-General of the United Nations shall inform all Members of the United Nations and non-member States referred to in article 39:

(a) Of declarations and notifications in accordance with section B of article 1;

(b) Of signatures, ratifications and accessions in accordance with article 39;

(c) Of declarations and notifications in accordance with article 40;

(d) Of reservations and withdrawals in accordance with article 42;

(e) Of the date on which this Convention will come into force in accordance with article 43;

(f) Of denunciations and notifications in accordance with article 44;

(g) Of requests for revision in accordance with article 45.

IN FAITH WHEREOF the undersigned, duly authorized, have signed this Convention on behalf of their respective Governments.

DONE at Geneva, this twenty-eighth day of July, one thousand nine hundred and fifty-one, in a single copy, of which the English and French texts are equally authentic and which shall remain deposited in the archives of the United Nations, and certified true copies of which shall be delivered to all Members of the United Nations and to the non-member States referred to in article 39.

SCHEDULE

Paragraph 1

1. The travel document referred to in article 28 of this Convention shall be simila the specimen annexed hereto.

2. The document shall be made out in at least two languages, one of which shall b English or French.

Paragraph 2

Subject to the regulations obtaining in the country of issue, children may be inclu in the travel document of a parent or, in exceptional circumstances, of another ad refugee.

Paragraph 3
The fees charged for issue of the document shall not exceed the lowest scale of charges for national passports.

Paragraph 4
Save in special or exceptional cases, the document shall be made valid for the largest possible number of countries.

Paragraph 5
The document shall have a validity of either one or two years, at the discretion of the issuing authority.

Paragraph 6
1. The renewal or extension of the validity of the document is a matter for the authority which issued it, so long as the holder has not established lawful residence in another territory and resides lawfully in the territory of the said authority. The issue of a new document is, under the same
conditions, a matter for the authority which issued the former document.

2. Diplomatic or consular authorities, specially authorized for the purpose, shall be empowered to extend, for a period not exceeding six months, the validity of travel documents issued by their Governments.

3. The Contracting States shall give sympathetic consideration to renewing or extending the validity of travel documents or issuing new documents to refugees no longer lawfully resident in their territory who are unable to obtain a travel document from the country of their lawful residence.

Paragraph 7
The Contracting States shall recognize the validity of the documents issued in accordance with the provisions of article 28 of this Convention.

Paragraph 8
The competent authorities of the country to which the refugee desires to proceed shall, if they are prepared to admit him and if a visa is required, affix a visa on the document of which he is the holder.

Paragraph 9
1. The Contracting States undertake to issue transit visas to refugees who have obtained visas for a territory of final destination.

2. The issue of such visas may be refused on grounds which would justify refusal of a visa to any alien.

Paragraph 10
The fees for the issue of exit, entry or transit visas shall not exceed the lowest scale charges for visas on foreign passports.

Paragraph 11
When a refugee has lawfully taken up residence in the territory of another Contrac State, the responsibility for the issue of a new document, under the terms conditions of article 28, shall be that of the competent authority of that territory which the refugee shall be entitled
to apply.

Paragraph 12
The authority issuing a new document shall withdraw the old document and s return it to the country of issue if it is stated in the document that it should be returned; otherwise it shall withdraw and cancel the document.

Paragraph 13
1. Each Contracting State undertakes that the holder of a travel document issued b in accordance with article 28 of this Convention shall be readmitted to its territor any time during the period of its validity.

2. Subject to the provisions of the preceding sub-paragraph, a Contracting State r require the holder of the document to comply with such formalities as may prescribed in regard to exit from or return to its territory.

3. The Contracting States reserve the right, in exceptional cases, or in cases where refugee's stay is authorized for a specific period, when issuing the document, to l the period during which the refugee may return to a period of not less than th months.

Paragraph 14
Subject only to the terms of paragraph 13, the provisions of this Schedule in no affect the laws and regulations governing the conditions of admission to, tra

through, residence and establishment in, and departure from, the territories of the Contracting States.

Paragraph 15

Neither the issue of the document nor the entries made thereon determine or affect the status of the holder, particularly as regards nationality.

Paragraph 16

The issue of the document does not in any way entitle the holder to the protection of the diplomatic or consular authorities of the country of issue, and does not confer on these authorities a right of protection.

ANNEX

SPECIMEN TRAVEL DOCUMENT

The document will be in booklet form (approximately 15 x 10 centimetres). It is recommended that it be so printed that any erasure or alteration by chemical or other means can be readily detected, and that the words "Convention of 28 July 1951" be printed in continuous repetition on each page, in the language of the issuing country.

(Cover of booklet)

TRAVEL DOCUMENT

(Convention of 28 July 1951)

N° .....

(1)

TRAVEL DOCUMENT

(Convention of 28 July 1951)

This document expires on

.....

unless its validity is extended or renewed.

Name

.....

Forename(s)

.....

Accompanied by

.....child (children).

1. This document is issued solely with a view to providing the holder with document which can serve in lieu of a national passport. It is without prejudic in no way affects the holder's nationality.

2. The holder is authorized to return to

.....

[state here the country whose authorities are issuing the document] on or befor

.....

.....

unless some later date is hereafter specified. [The period during which the h allowed to return must not be less than three months.]

3. Should the holder take up residence in a country other than that which is present document, he must, if he wishes to travel again, apply to the co authorities of his country of residence for a new document. [The old travel d shall be withdrawn by the authority issuing the new document and returne authority which issued it.](1)

(This document contains.....pages, exclusive of cover.)

(2)

Place and date of birth

.....

Occupation.....

Present residence

.....

*Maiden name and forename(s) of wife

.....

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*Name and forename(s) of husband

.....

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Place and date of birth

.....

.....

.....

Name

.....

.....

.....

Children accompanying holder

Forename(s)

.....

.....

.....

Sex

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.....

Des:ription

Height.....

Hair

.....

Colour of eyes

.....

Nose.....

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Shape of face

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Complexion.....

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Special peculiarities

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(1) The sentence in brackets to be inserted by Governments which so desire.

*Strike out whichever does not apply

(This document contains.....pages, exclusive of cover.)

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(3)

Photograph of holder and stamp of issuing authority

Finger-prints of holder (if required)

Signature of holder

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(This document contains.....pages, exclusive of cover.)

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(4)

1. This document is valid for the following countries:

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2. Document or documents on the basis of which the present document is issued:

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Issued at .....

Date .....

Signature and stamp of authority

issuing the document:

Fee paid:

(This document contains.....pages, exclusive of cover.)

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(5)

Extension or renewal of validity

Fee paid: From

.....

To .....

Done at .....

Date.....

Signature and stamp of authority

extending or renewing the validity

of the document:

Extension or renewal of validity

Fee paid:

From .....
To

.....

Done at .....
Date.....
Signature and stamp of authority
extending or renewing the validity
of the document:
(This document contains.....pages, exclusive of cover.)

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(6)
Extension or renewal of validity
Fee paid:
From .....
To

.....

Done at .....
Date.....
Signature and stamp of authority
extending or renewing the validity
of the document:

Extension or renewal of validity
Fee paid:
From .....
To

.....

Done at .....
Date.....
Signature and stamp of authority
extending or renewing the validity
of the document:
(This document contains.....pages, exclusive of cover.)

(7-32)
Visas
The name of the holder of the document must be repeated in each visa.

(This document contains.....pages, exclusive of cover.)

PROTOCOL RELATING TO THE STATUS OF REFUGEES

The Protocol was taken note of with approval by the Economic and Soc Council in resolution 1186 (XLI) of 18 November 1966 and was taken note by the General Assembly in resolution 2198 (XXI) of 16 December 1966. the same resolution the General Assembly requested the Secretary-General transmit the text of the Protocol to the States mentioned in article V there with a view to enabling them to accede to the Protocol

entry into force 4 October 1967, in accordance with article VIII

The States Parties to the present Protocol,

Considering that the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 (hereinafter referred to as the Convention) covers only those persons who have become refugees as a result of events occurring before 1 January 1951,

Considering that new refugee situations have arisen since the Convention was adopted and that the refugees concerned may therefore not fall within the scope of the Convention,

Considering that it is desirable that equal status should be enjoyed by all refugees covered by the definition in the Convention irrespective of the dateline I January 1951,

Have agreed as follows:

Article 1. General provision

1. The States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined.

2. For the purpose of the present Protocol, the term "refugee" shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article I of the Convention as if the words "As a result of events occurring before 1 January 1951 and..." and the words "...as a result of such events", in article 1 A (2) were omitted.

3. The present Protocol shall be applied by the States Parties hereto without any geographic limitation, save that existing declarations made by States already Parties to the Convention in accordance with article 1 B (I) (a) of the Convention, shall, unless extended under article I B (2) thereof, apply also under the present Protocol.

Article 2. Co-operation of the national authorities with the United Nations

1. The States Parties to the present Protocol undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the present Protocol.

2. In order to enable the Office of the High Commissioner or any other agency of the United Nations which may succeed it, to make reports to the competent organs of the United Nations, the States Parties to the present Protocol undertake to provide them with the information and statistical data requested, in the appropriate form, concerning:

(a) The condition of refugees;

(b) The implementation of the present Protocol;

(c) Laws, regulations and decrees which are, or may hereafter be, in force relating to refugees.

Article 3. Information on national legislation

The States Parties to the present Protocol shall communicate to the Secretary-General of the United Nations the laws and regulations which they may adopt to ensure the application of the present Protocol.

Article 4. Settlement of disputes

Any dispute between States Parties to the present Protocol which relates to its interpretation or application and which cannot be settled by other means shall be referred to the International Court of Justice at the request of any one of the parties to the dispute.

Article 5. Accession

The present Protocol shall be open for accession on behalf of all States Parties to the Convention and of any other State Member of the United Nations or member of any of the specialized agencies or to which an invitation to accede may have been addressed by the General Assembly of the United Nations. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 6. Federal clause

In the case of a Federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of the Convention to be applied in accordance with article I, paragraph 1, of the present Protocol that come within the legislative jurisdiction of the federal legislative authority, the obligations of the Federal Government shall to this extent be the same as those of States Parties which are not Federal States;

(b) With respect to those articles of the Convention to be applied in accordance with article I, paragraph 1, of the present Protocol that come within the legislative jurisdiction of constituent States, provinces or cantons which are not, under the constitutional system of the Federation, bound to take legislative action, the Federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of States, provinces or cantons at the earliest possible moment;

(c) A Federal State Party to the present Protocol shall, at the request of any other State Party hereto transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the Federation and its constituent units in regard to any particular provision of the Convention to be applied in accordance with article I, paragraph 1, of the present Protocol, showing the extent to which effect has been given to that provision by legislative or other action.

Article 7. Reservations and declarations

1. At the time of accession, any State may make reservations in respect of article IV of the present Protocol and in respect of the application in accordance with article I of the present Protocol of any provisions of the Convention other than those contained in articles 1, 3, 4, 16(1) and 33 thereof, provided that in the case of a State Party to the Convention reservations made under this article shall not extend to refugees in respect of whom the Convention applies.

2. Reservations made by States Parties to the Convention in accordance with article 42 thereof shall, unless withdrawn, be applicable in relation to their obligations under the present Protocol.

3. Any State making a reservation in accordance with paragraph 1 of this article may at any time withdraw such reservation by a

communication to that effect addressed to the Secretary-General of the United Nations.

4. Declarations made under article 40, paragraphs 1 and 2, of the Convention by a State Party thereto which accedes to the present Protocol shall be deemed to apply in respect of the present Protocol, unless upon accession a notification to the contrary is addressed by the State Party concerned to the Secretary-General of the United Nations. The provisions of article 40, paragraphs 2 and 3, and of article 44, paragraph 3, of the Convention shall be deemed to apply mutatis mutandis to the present Protocol.

Article 8. Entry into Protocol

1. The present Protocol shall come into force on the day of deposit of the sixth instrument of accession.

2. For each State acceding to the Protocol after the deposit of the sixth instrument of accession, the Protocol shall come into force on the date of deposit by such State of its instrument of accession.

Article 9. Denunciation

1. Any State Party hereto may denounce this Protocol at any time by a notification addressed to the Secretary-General of the United Nations.

2. Such denunciation shall take effect for the State Party concerned one year from the date on which it is received by the Secretary-General of the United Nations.

Article 10. Notifications by the Secretary-General of the United Nat

The Secretary-General of the United Nations shall inform the States referred to in article V above of the date of entry into force, accessions, reservations and withdrawals of reservation

to and denunciations of the present Protocol, and of declarations and notifications relating hereto .

Article 11. Deposit in the archives of the Secretariat of the United Nations

A copy of the present Protocol, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, signed by the President of the General Assembly and by the Secretary-General of the United Nations, shall be deposited in the archives of the Secretariat of the United Nations. The Secretary-General will transmit certified copies thereof to all States Members of the United Nations and to the other States referred to in article 5 above.

THIRD SCHEDULE (S.15 (1)(a)(ii)

Convention Governing the Specific Aspects of Refugee Problems in Africa

THE ASSEMBLY OF HEADS OF STATE AND GOVERNMENT AT ITS SIXTH ORDINARY SESSION (ADDIS ABABA, 10 SEPTEMBER 1969)

PREAMBLE

We, the Heads of State and Government assembled in the city of Addis-Ababa, from 6-10 September 1969,

1. Noting with concern the constantly increasing numbers of refugees in Africa and desirous of finding ways and means of alleviating their misery and suffering as well as providing them with a better life and future,

2. Recognizing the need for an essentially humanitarian approach toward solving the problems of refugees,

3. Aware, however, that refugee problems are a source of frict among many Member States, and desirous of eliminating the sou of such discord,

4. Anxious to make a distinction between a refugee who seek peaceful and normal life and a person fleeing his country for the s purpose of fomenting subversion from outside,

5. Determined that the activities of such subversive elements should discouraged, in accordance with the Declaration on the Problem Subversion and Resolution on the Problem of Refugees adopted Accra in 1965,

6. Bearing in mind that the Charter of the United Nations and Universal Declaration of Human Rights have affirmed the princi that human beings shall enjoy fundamental rights and freedc without discrimination,

7. Recalling Resolution 2312 (XXII) of 14 December 1967 of United Nations General Assembly, relating to the Declaration Territorial Asylum,

8. Convinced that all the problems of our continent must be solved the spirit of the Charter of the Organization of African Unity anc the African context,

9. Recognizing that the United Nations Convention of 28 July 1951, modified by the Protocol of 31 January 1967, constitutes the ba and universal instrument relating to the status of refugees and refle the deep concern of States for refugees and their desire to estab common standards for their treatment,

10. Recalling Resolutions 26 and 104 of the OAU Assemblies of He of State and Government, calling upon Member States of

Organization who had not already done so to accede to the United Nations Convention of 1951 and to the Protocol of 1967 relating to the Status of Refugees, and meanwhile to apply their provisions to refugees in Africa,

11. Convinced that the efficiency of the measures recommended by the present Convention to solve the problem of refugees in Africa necessitates close and continuous collaboration between the Organization of African Unity and the Office of the United Nations High Commissioner for Refugees,

Have agreed as follows:

Article 1

Definition of the term "Refugee"

1. For the purposes of this Convention, the term "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.

2. 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.

3. In the case of a person who has several nationalities, the te: country of which he is a national" shall mean each of the countr which he is a national, and a person shall not be deemed lacking the protection of the country of which he is a natior without any valid reason based on well-founded fear, he ha availed himself of the protection of one of the countries of wh: is a national.

4. This Convention shall cease to apply to any refugee if:

(a) he has voluntarily re-availed himself of the protection country of his nationality, or,

(b) having lost his nationality, he has voluntarily re-acquir or,

(c) he has acquired a new nationality, and enjoys the prot of the country of his new nationality, or,

(d) he has voluntarily re-established himself in the country he left or outside which he remained owing to fe persecution, or,

(e) he can no longer, because the circumstances in conn with which he was recognized as a refugee have cea: exist, continue to refuse to avail himself of the protect the country of his nationality, or,

(f) he has committed a serious non-political crime outsi country of refuge after his admission to that country refugee, or,

(g) he has seriously infringed the purposes and objectives Convention.

5. The Provisions of this Convention shall not apply to any person with respect to whom the country of asylum has serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

'c) he has been guilty of acts contrary to the purposes and principles of the Organization of African Unity;

(d) he has been guilty of acts contrary to the purposes and principles of the United Nations.

6. For the purposes of this Convention, the Contracting State of Asylum shall determine whether an applicant is a refugee.

Article 2
Asylum

1. Member States of the OAU shall use their best endeavors consistent with their respective legislation 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.

2. 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.

3. No person shall be subjected by a Member State to measures such as rejection in a territory where his life, physical integrity or liberty

would be threatened for the reasons set out in Article 1, paragraphs and 2.

4. Where a Member State finds difficulty in continuing to grant asyl to refugees, such Member State may appeal directly to other Mem States and through the OAU, and such other Members States shall the spirit of African solidarity and international co-operation ta appropriate measures to lighten the burden of the Member St granting asylum.

5. Where a refugee has not received the right to reside in any country asylum, he may be granted temporary residence in any country asylum in which he first presented himself as a refugee pendi arrangement for his resettlement in accordance with the preced paragraph.

6. For reasons of security, countries of asylum shall, as far as possib settle refugees at a reasonable distance from the frontier of th country of origin.

Article 3

Prohibition of Subversive Activities

1. Every refugee has duties to the country in which he finds himse which require in particular that he conforms with its laws a regulations as well as with measures taken for the maintenance public order. He shall also abstain from any subversive activit against any Member State of the OAU.

2. Signatory States undertake to prohibit refugees residing in th respective territories from attacking any State Member of the OA

by any activity likely to cause tension between Member States, and in particular by use of arms, through the press, or by radio.

Article 4
Non-Discrimination

Member States undertake to apply the provisions of this Convention to all refugees without discrimination as to race, religion, nationality, membership of a particular social group or political opinions.

Article 5
Voluntary Repatriation

1. The essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will.

2. The country of asylum, in collaboration with the country of origin, shall make adequate arrangements for the safe return of refugees who request repatriation.

3. 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.

4. 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.

5. 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.

Article 6
Travel Documents

1. Subject to Article III, Member States shall issue to refugees lawfully staying in their territories travel documents in accordance with the United Nations Convention relating to the Status of Refugees and the Schedule and Annex thereto, for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require. Member States may issue such a travel document to any other refugee in their territory.

2. Where an African country of second asylum accepts a refugee from a country of first asylum, the country of first asylum may be dispensed from issuing a document with a return clause.

3. Travel documents issued to refugees under previous international agreements by States Parties thereto shall be recognized and treated by Member States in the same way as if they had been issued to refugees pursuant to this Article.

Article 7

Co-operation of the National Authorities with the Organization of African Unity

In order to enable the Administrative Secretary-General of the Organization of African Unity to make reports to the competent organs of the Organization of African Unity, Member States undertake to provide the

Secretariat in the appropriate form with information and statistical data requested concerning:

(a) the condition of refugees;

(b) the implementation of this Convention, and

(c) laws, regulations and decrees which are, or may hereafter be, in force relating to refugees.

Article 8

Co-operation with the Office of the United Nations High Commissioner for Refugees

1. Member States shall co-operate with the Office of the United Nations High Commissioner for Refugees.

2. The present Convention shall be the effective regional complement in Africa of the 1951 United Nations Convention on the Status of Refugees.

Article 9

Settlement of Disputes

Any dispute between States signatories to this Convention relating to its interpretation or application, which cannot be settled by other means, shall be referred to the Commission for Mediation, Conciliation and Arbitration of the Organization of African Unity, at the request of any one of the Parties to the dispute.

Article 10

Signature and Ratification

1. This Convention is open for signature and accession by all Member States of the Organization of African Unity and shall be ratified by signatory States in accordance with their respective constitutional processes. The instruments of ratification shall be deposited with the Administrative Secretary-General of the Organization of African Unity.

2. The original instrument, done if possible in African languages, and in English and French, all texts being equally authentic, shall be deposited with the Administrative Secretary-General of the Organization of African Unity.

3. Any independent African State, Member of the Organization of African Unity, may at any time notify the Administrative Secretary-General of the Organization of African Unity of its accession to this Convention.

Article 11

Entry into force

This Convention shall come into force upon deposit of instruments of ratification by one-third of the Member States of the Organization of African Unity.

Article 12

Amendment

This Convention may be amended or revised if any Member State makes a written request to the Administrative Secretary-General to that effect, provided however that the proposed amendment shall not be submitted to the

Assembly of Heads of State and Government for consideration until all Member States have been duly notified of it and a period of one year has elapsed. Such an amendment shall not be effective unless approved by at least two-thirds of the Member States Parties to the present Convention.

Article 13

Denunciation

1. Any Member State Party to this Convention may denounce its provisions by a written notification to the administrative Secretary-General.

2. At the end of one year from the date of such notification, if not withdrawn, the Convention shall cease to apply with respect to the denouncing State.

Article 14

Upon entry into force of this Convention, the Administrative Secretary-General of the OAU shall register it with the Secretary-General of the United Nations, in accordance with Article 102 of the Charter of the United Nations.

Article 15

Notifications by the Administrative Secretary-General of the Organization of African Unity.

The Administrative Secretary-General of the Organization of African Unity shall inform all Members of the Organization:

(a) of signatures, ratifications and accessions in accordance with Article X;

(b) of entry into force, in accordance with Article XI;

(c) of requests for amendments submitted under the terms of Article

(d) of denunciations, in accordance with Article XIII.

IN WITNESS WHEREOF WE, the Heads of African State Government, have signed this Convention.

DONE in the City of Addis Ababa this 10th day of September 1969.

MEMORANDUM OF OBJECTS AND REASONS

The principal object of the Bill is to provide for the recognition, protection and management of Refugees in Kenya. The Bill incorporates the provisions of international instruments dealing with refugee matters to which the Government of Kenya is party and in particular the Convention of 28 July, 1951 Relating To The Status of Refugees and the O.A.U. Convention Governing the Specific Aspects of Refugee Problems in Africa.

Clause 3 defines a refugee in line with the definition of a refugee contained in the 1969 O.A.U. Convention Governing the Specific Aspects of Refugee Problems in Africa. The definition includes a person who 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.

Clause 4 provides the criteria for disqualifying persons from being considered refugees and this includes a person who has committed a crime against peace, terrorism or a crime against humanity.

Clause 5 sets out the condition under which a person shall cease to be a refugee.

Clause 6 establishes the Refugee Status Determination Committee which shall recognize persons as refugees.

Clause 7 creates the Office of the Commissioner of Refugees Affairs who will be responsible for the recognition of refugees, the provision of adequate facilities and service for the reception and care of refugees.

Clause 9 establishes the Refugee Appeal Board to perform the quasi-judicial function of determining appeals arising from the decision of the Commissioner for Refugees.

Clause 10 sets out ways in which a person seeking refugee status can a for recognition as a refugee.

Clause 11 sets out the conditions under which a person can reside in K pending determination of their refugee status.

Clause 13 provides for refugees to be issued with special identity card passes to show the legality of their presence in Kenya.

Clause 14 provides for the protection of the family of a refugee.

Clause 16 provides for a camp manager who will receive and regist refugees and manage designated refugee camps.

Clause 19 provides for the withdrawal of the recognition of a refuge their expulsion from Kenya.

Clause 21 makes specific provision for refugee women and childr vulnerable groups in refugee camps.

Clause 22 sets out offences punishable under the Act.

Clause 23 makes provision for the Minister to make Regulations.

The enactment of this Bill shall not entail additional expenditure of p funds.

Dated the 3rd October, 2003.

S. A. WAK
Attorney-Gen

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