

UNIVERSITY OF NAIROBI

INSTITUTE OF DIPLOMACY AND INTERNATIONAL STUDIES (IDIS)

**A CRITICAL ANALYSIS OF THE IMPLEMENTATION OF THE 1951
GENEVA CONVENTION ON REFUGEES: A CASE STUDY OF KENYA.**

BY

GAFF AFRICANA COLLECTION

WAINDI BARRACK OLIVER

**A DISSERTATION SUBMITTED TO THE UNIVERSITY OF NAIROBI
INSTITUTE OF DIPLOMACY AND INTERNATIONAL STUDIES IN
PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE
OF MASTERS OF ARTS IN INTERNATIONAL STUDIES**



OCTOBER 2003

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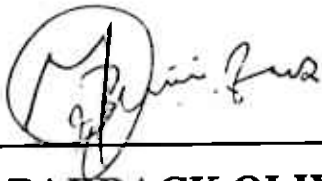
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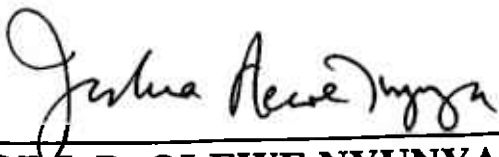


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DEDICATION

To my dear wife Catherine and son Craig. May Almighty God Bless you all the time. Thanks for your continued support and tolerance when deadlines relating to this course and other work commitments kept me from getting home early and consumed weekends and evenings. And, as always, my father and mother remain a source of inspiration.

WAINDI OLIVER

NAIROBI, AUGUST 2003

ACKNOWLEDGEMENT

It is customary, expected and especially appropriate here to acknowledge the efforts of whose assistance has made the completion of this research possible. In this spirit, and with genuine gratitude I would like to express appreciation to:

Prof. Olewe Nyunya my lecturer and principal supervisor without whose cheerful diligence this work might not have progressed this far.

Miss Emma Oketch, my lecturer. I lack words to say thank you for your hawk-eyed attention that ensured that I produce a master piece to be proud of. Certainly without your assistance this research would have been even more tedious than together we found it to be.

Kinuthia Murugu, the Regional Director, World Scout Bureau, Africa Regional Office. Thank you a million times for excusing me to pursue academic demands when I was expected to be on duty. I will never forget this gesture.

Grace Gaya and Mary Matubia, my colleagues at the World Scout Bureau. The amount of energy and dedication you put in the production of this thesis is only a testimony of what friendship can do. May God Bless you all in only His special ways.

To the staff of Institute of Diplomacy and International Studies, Wilminha; Josephine and Mwasya... what a team, keep it up.

Above all I thank God Almighty for giving me the initial thought, the resource, strength and the peace of mind to enable me complete this work. You ARE GOD ALMIGHTY.

WAINDI OLIVER

NAIROBI, AUGUST 2003

Understand that it is not simple, nor easy

Avoiding past memory.

I can't remove my mind

My traditional culture

My sentiment torture

The folktales of my childhood

Never old, never dead

Stamped in my mind

I have normal feelings

I suffer for dignity

Please do not kill my broken heart

Yilma Tafere, Ethiopia

Taken from "Refugees and Forcibly Displaced People" by Amaya Valcarcel and Mark Raper, JSR

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LIST OF ACRONYMS

1. ARA - Aliens Restriction Act
2. AU - African Union
3. EU - European Union
4. ICVA - The International Council For Voluntary Agencies
5. ICCP - International Covenant On Civil And Political Rights
6. IDPs - Internally Displaced Persons
7. IPS - Implementing Agencies
8. JRS - Jesuit Refugee service
9. NGO - Non-government Organisations
10. OAU - Organisation of African Unity
11. TI - Transparency International
12. RSD - Refugee Status Determination
13. UN - United Nations
14. UNESCO - United Nations Educational, Scientific and Cultural
Organisation
12. UNHCR - United Nations High Commissioner For Refugees

ABSTRACT

Not so long ago, the status that the refugee problem has acquired in international politics today was unimaginable. What was viewed as a passing cloud by the international protection regimes until last mid century has buttressed itself amongst us – needing attention. In order to explore the way ahead for refugee protection it is important to situate the various conventions and the refugee protection regime in their present context. What are they and what are their relevance as instruments of protecting refugees?

Many states having realized the urgency and the international nature of the refugee problem have acceded to the 1951 Convention on the Status of Refugees. This is because the existence of the refugee concept and the institution of asylum must depend not only on the will to protect and to abide by international legal obligations but also on issues still considered sovereign. It is difficult to reconcile the recent and abundant evidence of the failure of state responsibility, the increased incidence of violations of the most fundamental of refugee protection, the acknowledged tension between the assistance and protection agenda of UNHCR and the challenge by some government of the authority of treaty bodies deciding on refugee rights with the view that supervision as it now stands – using diplomacy and institutionalized dialogue – is sufficient. It is true that state parties to the 1951 Convention continue to flout obligations under refugee law.

The result of the current deterioration of the refugee regime is that escape from violence and persecution has become more difficult, and refugees who manage to reach a place of relative safety are less likely to be allowed to enter and remain there. Many states have failed to institute measures that discriminate between refugees and other unauthorized migrants. They are subjected to harsh and restrictive conditions, effectively foreclosing

their chances of rebuilding their lives in a new country. The core of the refugee protection is increasingly disregarded. As wars and campaigns of repression continue to target civilian populations, the victims have fewer options for refuge from suffering and death.

The emphasis in this research is to examine the performance of Kenya in refugee treatment since it acceded to the 1951 Convention on Refugees; the 1967 UN Protocol as well as the 1969 OAU Convention on Refugees.

CHAPTER ONE

1. BACKGROUND TO THE REFUGEE PROBLEM

1.0 Introduction

The definition of a refugee remains a highly contentious subject. This is because depending on how one defines it, a refugee have access to political asylum, receive aid and be granted international protection or being left without any officially recognized status or help at all.

However, the most universally accepted definition of a refugee is found in the Article 1A(2) of the 1951 Geneva Convention which states that:-

“...any 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, 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, and is unwilling to return to it”.¹

The term is often popularly understood in far broader terms, however, encompassing persons fleeing war, civil strike, famine and environmental disasters. The original drafters of the Convention confined the definition to persons escaping human rights abuse and also confined it to Europe. This only came to an end in 1967. As of 1999, the Convention and protocol had been signed by 134 countries².

¹ United High Commissioner for Refugees (1988) Handbook on procedures and Criteria for determining Refugee Status. Geneva UN page 11

² ibid

This study uses the definition based on 1951 Geneva Convention on Refugees to mean that Convention together with the 1967 Amendment as well as 1969 OAU Convention on Refugees. This helped to simplify the usage and bring clarity to the study.

Falling outside the conventional definition of refugees and also overlooked by other international bodies are internally displaced persons, people who flee for the same reasons as refugees but who do not cross an international border.

David Kory defines the Internally Displaced Persons (IDP) as “persons who have been forced to flee their homes suddenly or unexpectedly in large numbers, as a result of armed conflict, internal strife, systematic violations of human rights or natural or man-made disasters and who are within the territory of their own country”³

This fact alone therefore makes the Internally Displaced People more vulnerable than the refugees themselves.

The following statistics ⁴ underscores the importance of the IDP’s in the international relations issues of the African continent in particular: -

Of all displaced people in the world 40% are Africans; 60% of Africa’s uprooted people are from four countries (Sudan 4.4 million; Angola 2.5 million; Burundi 1.1 million; DRC 1.6 million); A third of all Africa refugees are seeking asylum in countries that are themselves experiencing armed conflict; 1.2 million African refugees have fled to potentially unsafe asylum countries and one of every nine uprooted people world-wide is a Sudanese.

These statistics prove beyond doubt that IDPs must be looked from the same angle as the refugees themselves.

³ Kory A.D. (1999) Exodus within Borders. Brooking Institutions U.S.A., page 11

Even the UN acknowledges this fact and admits that majority of the IDPs are found in the Horn of Africa where refugees have returned home only to find themselves displaced, along with civilians fleeing war and soldiers who have been immobilized.

It is clear therefore from the foregoing that both are important players in international politics. However, for the purpose of this paper I considered only refugees who cross international borders.

As ever-larger numbers of refugees seek to flee across their borders, questions have arisen to the extent of the burden that countries of asylum can reasonably be expected to sustain. This has also brought a re-examination of UNHCR and other international agencies in their planning, management and funding of their worldwide network of protection and relief programmes.

The complexity of refugees flow has also brought into sharp focus their role in international relations as well as suggested ways of resolving the refugee problems.

1.1. The Research Problem

The fact that large influxes of refugees into the countries of asylum pose multitude of problems which range from security and challenges to the education, public health and environmental structures, the solutions of the refugee problems is a top priority for all the stakeholders like the governments, international relief agencies and in particular United Nations High Commission for refugees.

The complexity involved in settling down the refugees in the countries of asylum has seen a lot of persecutions, human rights violations, and repression. Conflict and natural and human made disasters. However, the 1951 UN Convention on Refugees seeks to ensure that refugees received reasonably human treatment at the hands of whichever country that acts as their host. Therefore this ever growing numbers and frequencies of refugee flows have been accompanied by a growing reticence of states to provide asylum.

The Research Question therefore was: « **TO WHAT EXTENT CAN THE NON IMPLEMENTATION OF REFUGEE LAW LEAD TO A RISE OF REFUGEE ABUSE ? »**

1.2 Research Objectives

1.2.1. Overall Objectives

The research had an overall role of adding to the growing body of the knowledge about the rights and duties of refugees in the countries of asylum especially in the light of the conventions on refugees and stateless persons.

1.2.2. Specific Objectives

Specifically the Research aimed at achieving the following: -

- a) Examining the extent which Kenya has implemented the 1951 UN Convention
- b) Tracing the origin of the refugee problem in Kenya
- c) Looking at the efforts made to contain the refugee problem in Kenya to-date
- d) Critical analysis of confinement policy as a solution to the refugee problem.

1.3 Justification

1.3.1 Academic Justification

Recently many governments all over the world have grown intolerance toward refugees. This problem can be attributed to many factors inter alia diminishing resource based and /or political policies. As a consequence many refugees who seek asylum undergo very inhumane treatment contrary to the international community's role for legal and ethical obligations to protect and aid refugees.

Literature related to the protection of the rights of refugees are hard to obtain and information of how many refugees have their rights abuse is rarely found. This absence of data is replicated internationally as:

“No one knows how many of the world's 15 million refugees suffer from human rights abuse”.⁵ Because refugees are now identified as an important actor in the international arena, more and more research needs to be done so that the rights of the refugee in a host country can be brought to light and countries encouraged to adopt and implement the convention. This paper attempted to fill this gap in the literature.

1.3.2 Policy Justification

Kenya, which is currently hosting 203,500 refugees, is yet to enact national refugee legislation.⁶ This research along with others will go a long way in providing the Kenya government the basis to enact national refugee legislation.

⁵ Carey-wood,, J. Duke, K, Karn, V.Marshall, T (1995) Resettlement of Refugees in Britain. Home Office Research study, London. Page 5

⁶ UNHCR 200 Global Appeal Page 78

The government will also use the information to ensure that the refugee camps in Kenya uphold the rights of refugees within the framework of the convention relating to the status of refugees. This is because Kenya has acceded to the 1951 convention and its 1967 protocol and the 1969 OAU Convention.

1.4 Literature Review

1.4.1 Refugees in General

Many writers have variously attempted to define a refugee. Many definitions have come up for political or economic expediencies.

In to explaining how refugees can be classified, Kunz divided them into three distinct groups, derived from refugees' attitudes towards their displacements.⁷ Those refugees whose opposition to political and social events at home is shared by their compatriots, both refugees and those who remain in home areas, are called majority identified refugees.

Refugees who have left their home areas because of active or latent discrimination against the group to which they belong frequently retain little interest in what occurs in their former countries. These Kunz calls events related refugees.

A third type of refugees includes people who decided to leave their home country for a variety of individual reasons. These self alienated refugees feel alienated from the society not by any active policy of that society, but rather by some personal philosophy.

⁷ Kunz. E. (1980) "the Refugee Experience" Pages 118-135 in *Refugee: The Challenge For the Future*. Academy of the Social Science, Canberra

In the African context, the majority identified category that can be applied to a significant portion of the current refugee population, as well as almost all refugees created in the period of anti-colonial wars. Kunz noted that "... these refugees identify themselves enthusiastically with the nation, though not with its government."⁸

Gerly Van Kessel of Refugee Department in Canada posits in *Forced Migration Review* of April 2001 that the current talk on refugees has failed to acknowledge the nexus between migration and asylum. According to him the biggest question is the manner in which asylum seekers get to western countries. Given the phenomenon of undocumented, improperly documented and uncooperative asylum seekers, how many resort to illegal activities once they enter the country have made the task of decision makers on refugees very complicated.⁹

1.4.2 Background to the Refugee Problem

Mostowitz says that long before any international system was created to assist refugees or to prescribe their protection from forced return in international law, refugees fled and sought protection outside their countries.¹⁰

Broadly speaking, refugees can be found in the earliest literature, wanderers in exiles, seeking asylum. The Bible is replete with such stories for example the human history begins with the expulsion of Adam and Eve from the Garden of Eden.¹¹

⁸ Grahl – Madsen .A. (1996) The Status of Refugees In International Law VI. 1 A.W. Sijthoff, Leiden. Page 30

⁹ Gerry .V. K. (2001) "Global Migration And Asylum" "In *Forced Migration Review*" April 2001, Page 10

¹⁰ Moskowitz .M. (1990) The Roots And Reaches Of United Nations Actors And Decisions. Sijthoff & Noordhoff, Maryland. Page 51

¹¹ Holy Bible Genesis 2:2

The Israelites escaped from slavery in Egypt and wandered through the desert in search of a new home. The Christian birth narrative in the Gospel according to Mathew¹² says that an angel came to Joseph telling him to take the child and his mother and flee to Egypt in order to save the baby from Herod, who subsequently killed all the male children in Bethlehem who were two years or younger.

The theme of escape from persecution is also central to Islam. One of the Islam's central events, the Hegira¹³ from the word for exile "Hijra" marks the flight of the Prophet Mohammed from the persecution in Mecca and Medina in the year 622.

This theme of exile and getting asylum elsewhere is also found in the Eastern religions traditions. In Hindu epic poem, the Ramayana, on the eve of his ascendancy to the throne, the hero, the god Rama banished to the forest to live in exile for fourteen years.¹⁴

Grahl-Madsen .A. also talks for the history of asylum. The idea of asylum can be found in the earliest Anglo-Saxon legal code that of King Etherlbert in 597, which sets penalties for violating a church's offer of sanctuary. In 1887, Alfred the Great's legal code expressly provides that any man who flees to a monastery shall be protected for three days, during which time he may come to terms with those seeking him out.

Refugees movements mark key milestone of American history. The pilgrims who started settlements in New England in the seventeenth century soon after James I abolished sanctuary were themselves refugees fleeing religious persecution in England. The words of poet Emma Lazarus¹⁵ etched on the base of the Statute of Liberty attest to America's traditional welcome to refugees:

¹² ibid Mathew 2:11-18

¹³ Holy Quran

¹⁴ <http://Hinduism.about.com>

¹⁵ Grahl-Madsen (1966) "The European Tradition of Asylum And The Development of Refugee Law" in Journal of Peace Research page 278-289.

***Give me your tired, your poor
Huddled masses yearning to breathe free
The wretched refuse of your teeming shore
Send these homeless, tempest-tossed to me
I lift my lamp beside the golden door.***

The lack of protection from one's government is a key element in the concept of refugee. Examples of recorded refugees influx since the Westphalia Treaty include the one caused by the religious upheaval and civil war of the 17th Century in Britain.

The Balkan wars of 1912-1913 torched off mass exodus of refugees in South Eastern Europe that continued throughout the first world war. In the aftermath of the war the Russian Revolution created 1.5 million refugees; placing enormous strains on European stability.

Other wars which brought refugee influx, included the rise of Nazism in Germany in 1933 and the second world war which displaced an estimated thirty million people.

Modern refugee movements and problems have not been limited to Europe. More than a million Palestinian Arabs fled or were evicted after the partition of Palestine in 1943.¹⁶

The conflicts in Africa since the 1960's have also contributed to big refugee flows throughout the continent.

¹⁶ Time Magazine December 2, 2002

Haberson .J.W. and Rothchild .D.¹⁷ say that although the end of cold war brought lesser tensions internationally – Africa experienced a new wave of refugee.. Ethnic and political divisions continued unabated and created new refugee flows out of Liberia, Somalia, Sierra Leone, Congo, Rwanda, Burundi just to mention a few.

1.4.3 The Refugee Problem In Africa

According to the most recent data available, there are nearly six million refugees in Africa.¹⁸ These refugees fled their home countries that were overtaken by violence and ravaged by famine. The refugees have been forced to settle where they are generally unwanted and have often been left to fend for themselves.

The last four decades have seen many changes in both the size and distribution of the African population. The varied socio-political changes that have occurred in Africa have also led to a large number of regional conflicts and civil wars. These conflicts have displaced millions of people, both within and outside their home countries. By 1995, 5.8 million Africans were displaced outside their countries¹⁹ escaping famine, violence or fear of persecution on ethnic, political or religious grounds. While the United Nations High Commission for Refugees provisionally “does not see the light at the end of the tunnel.”²⁰

Holborn says that during the anti-colonial era in Africa, refugees were often perceived as comrades in struggle against oppression.²¹

¹⁷ Haberson .J.W. and Rothchild .D. (eds) (2000) Africa In World Politics. Oxford University Press, Oxford. Page 52-73

¹⁸ US Committee For Refugees. 1981 to 1996. World Refugee Survey. US Committee For Refugees. Washington page 4

¹⁹ ibid

²⁰ Crisp .J. 1984 Some Comments On the Report Of The UN Technical Team's Report on Uganda. BRC, London page 254

Today, however, where refugees greatly outnumber the local population, are from different ethnic or religious backgrounds, or settle for long periods of time, a great strain can be placed on any welcome they might receive.²²

Many academics have written on the durable solution to refugee problems in Africa. Godwin-Gill²³ says that these solutions are: resettlement to a third country, local integration and voluntary repatriation has increasingly become the solution of choice for governments, NGOs and UN agencies. This increased emphasis and promotion of repatriation, as the ideal solution for African refugees has not been without controversy. Those who have criticised include Harrel-Bond²⁴ and Kibreab.²⁵ They say that, ideally, decisions regarding the resolution of any refugee situation should be made by the refugees themselves.

Kirbeab, however, gives a summary of the literature on Africa and refugees as lacking in both quality and quantity.²⁶ More work needs to be done.

1.4.4 The Refugee Problem in Kenya

UNHCR estimates that Kenya hosted approximately 245,000 refugees at the end of 2001, including an estimated 160,000 from Somalia, some 70,000 from Sudan nearly 5,000 from Ethiopia, more than 5,000 from Uganda and more than 3,000 from other countries.²⁷

²¹ Holborn .L. (1975) Refugees: A Problem Of Our Time. The Work of UNHCR Scarecrow Press, New Jersey page 843

²² Rogge J. & Akol J. (1989) "Repatriation: Its Role In Resolving Africa's Refugee Dilemma". International Migration Review. 22 (2) Page 184-200

²³ Goodwin-Gill .G. (1986) "International Law and The Detention of Refugees And Asylum Seekers". International Migration Review 20(2) page 193-219

²⁴ Harrel-Bond .B. (1985) "Humanitarianism in a Straightjacket." African Affairs 84 (344): Page 3-13

²⁵ Kibreab .G. (1985) African Refugees: Reflections On The African Refugee Problem, Africa World Press, New Jersey. Page 91

²⁶ ibid

²⁷ UNHCR (2002) Community Service Plan Kakuma Sub-Office. UNHCR

Currently Kenya has no refugee law; consequently, the hundreds of thousands of refugees living in Kenya have no legal status. Absent national refugee legislation and adequate financial support for the government refugee eligibility commission, the legal framework for implementation of a refugee assistance programme in Kenya.

Obura A.P.²⁸ says that Kenyan authorities require refugees to live in three designated camps near the village of Dadaab in the country's remote east and in three camps known as Kakuma in Northwest camp.

UNESCO PEER while commenting on the Great Lakes refugees in Nairobi in 2001 gave a detailed origin of the refugees who are living in Kenya.²⁹ The report says that the refugees from Somalia fled from Southern and Central Somalia to Kenya during the early 1990's to escape civil war and famine.

Refugees from Sudan have been brought about by the continued civil war. An average of one thousand new Sudanese refugees came to Kenya each month during 2001. Some seventy thousand refugees from Sudan were in Kenya by the end of 2001.

Refugees from Ethiopia are nearly six thousand. UNHCR granted two hundred and fifty Ethiopian soldiers and university students who sought asylum in Kenya during 2001. UNHCR transferred nearly half of the new refugees to the Dadaab camps, while many chose to remain in Nairobi.

The report ends by talking about the refugees from Tanzania. According to the report, clashes between police and opposition demonstrators on the Tanzania Islands of Pemba and Zanzibar escalated into violence that killed dozens of civilians and forced more than two thousand persons to flee to Kenya in January 2001. Nearly all the refugees fled by boat to the south-eastern Kenyan coastal village of Shimoni.

²⁸ Obura A. (2002) Evaluation of UNHCR Peace Education Programme in Dadaab & Kakuma, Kenya Page 11

The Executive Committee of the programme of the UNHCR in its 46th session in Geneva in 1995 gave a historical background to the Kenyan refugee problem.³⁰

It is said that the first recorded case of refugees in Kenya was in the 1940's when Kenya played host to both Hutu and Tutsi refugees from Rwanda and Burundi, most of whom had integrated into and become part of the Kenyan community. Following this development the Government of Kenya appreciated the difficulties involved in tackling the situation supported in international community's efforts in that regard.

Today the number of refugees in Kenya has dropped substantially owing to voluntarily repatriation and the resettlement of refugees in the third countries. The ones who have benefited mostly are refugees from Somalia and Sudan. The Kenya government was happy at this development as apart from straining the resources to keep the refugees this also gave the refugees a future to look forward to.

Local media has lately been very active in writing and reporting on refugee matters, especially on the human rights abuse of the refugees as well as any development on the legislation of the Refugee Bill.

The East African Standard,³¹ The Daily Nation³² as well as the People daily³³ have contributed positively towards this study.

1.4.5 Causes of Refugees Influx

Many writers in international relations have written variously about the causes of refugee influx. Loscher³⁴ notes that refugee problems can be caused by any of the factors below:

²⁹ Ibid

³⁰ Report by Mr. Larsen (1995) during the Executive Committee of the Programme of the UNHCR in Geneva

³¹ East African Standard April 16, 2003 "Government To Locate Refugees Outside Camps".

³² Daily Nation April 11, 2003 "15 year old Girl Raped in Broad Daylight".

³³ The People Daily Thursday May 1, 2003 "Refugees Protection: Why Kenya Needs To Adopt National Refugee Policy".

³⁴ Loscher (1993) *Beyond Charity*. Macmillan, New York, Page 84

Firstly, wars can cause major refugee problems as Selm-thorburn notes, “World War 1 alone uprooted twelve to twenty million people across Europe”.³⁵

The second cause that is prevalent in Africa especially is the military coups. The coups in Africa have been more often than not accompanied by political disturbances, which consequently trigger off the refugee problem. Immediately after the coup that brought him to power in Uganda, Idi-Amin expelled all the Indians leading to a refugee crisis as most of them fled to Britain and Canada.

Thirdly, refugees problem is caused by human rights violation in one country against a section of its population. An example is the Rwanda genocide. More than 2 million fled Rwanda following the genocide in 1994. There were reported cases of gross and widespread abuse of human rights prior, during and after the genocide. These ranged from murder; rape; confinement amongst others.

These views are also shared by Kory³⁶. He posits further that most human rights abuses go unreported.

Refugees problem can also be brought about by lack of governmental protection leading to an invasion by another country. An example per excellence is the 1994 Chechnya war where a third of the population fled their homes following the Russian invasion at the end of 1994. Because they had not crossed their international border, they were not technically refugees. But Russia agreed to let the UNHCR provide humanitarian assistance.³⁷

³⁵ Selm – Thorburn op cit

³⁶ Kory, opcit

³⁷ Larsen op cit

Daniel S. Papp argues that there are cases where the population has simply “grown so rapidly that land can no longer support the number of people that are present. This in turn can lead to international tension and conflict as refugees seek to move across national boundaries to seek better land or more food.”³⁸ His argument is also supported by Art J.R. & Jervis R³⁹ as well as Loscher.⁴⁰ Another cause of refugee problem is famine. The 1985 Ethiopian famine combined with crop failure and war to produce a very big refugee influx to the neighbouring countries especially Kenya.

Crummey D.⁴¹ talks of the Algeria refugee problem of the late 1950's. He says that this marked the first modern refugee problem in Africa. Two hundred thousand people fled to Tunisia and Morocco to escape imprisonment and torture at the hands of the French forces.

Bertelsen J.S.⁴² attributed the refugee status of the Palestinian Arabs between 1948 to 1956 to the fact that their leaders had interest that were competitive and not integrated. Disunity amongst them made them easier to manipulate. They had to be resettled to new lands.

1.4.6. Effects of Refugees in the Country of Asylum

Loescher G. says that refugees have some political uses. According to him “the export of refugees can also be used as a bargaining chip in interstate negotiations over trade and bilateral political recognition”.⁴³

³⁸ Papps D.S. (1988) Contemporary International Relations Framework for the Understanding of Macmillan, New York page 510.

³⁹ Art J. R. R & (1985) International Politics: Anarchy, force, Political, Economy And Decision Making. Little Brown & Co. Boston page 101

⁴⁰ Loscher op cit

⁴¹ Crummey .D. (1986) Refugees And International Relation. Oxford University Press, New York Page 293-312

⁴² Bertelsen J. S. (1977) Nonstate Nations In International Politics: Comparative System Analysis. Payer Publishers, New York, Page 27

⁴³ Loscher G. (1993) op cit page 21

Papademetriou D. and Martin P⁴⁴ also agree with him and especially talk of the political importance of the refugees during the cold war. During the cold war refugees from communism were welcomed by countries of the West. Until recently, the West has seen refugees as symbols of foreign policy, to be exploited as part of a continuing propaganda campaign. Infact Loescher posits that refugee and defector became synonymous during the cold war.

Refugee influx may also bring a rich base of professionals. Pam O'Toole⁴⁵ while presenting for BBC 1 in A changing World narrates of how the highest ranking diplomat in South Vietnam when Saigon fell in 1975, Quang Luu escaped to Australia where he rose the ladder to become the head of SBS – Australia's multicultural, multiethnic broadcasting station.

Humanitarian Aid has also been politicised. The practice of using refugees to serve strategic or military objectives has been used widely by small and big countries and even by refugee warrior groups.

These views have been supported by among others Miller⁴⁶ while reviewing the Operation Lifeline Sudan's activities.

Negatively refugees have the following effects: The countries of origin can use its refugees to destabilise other countries. Moskowitz M., Loersche and Lillian R.B. among other agree that in a number of cases the sending countries have armed its citizens in a foreign land to wage animosity. The current problems in Ivory coast, according, to

⁴⁴ ibid

⁴⁵ BBC Magazine, December 2001 Pg. 17

⁴⁶ Miller L.B. (ed) (1986) Dynamics of World Politics Studies In The Resolutions of Conflicts. Prentice Hall Inc. New Jersey Pg 91

president Laurent Gbagbo is a result of the economic refugee from Liberia and Burkina Faso being armed by their Military governments to topple the Ivorian government.

Refugees can also strain the economic resources of a country. In 1991-1992, Bangladesh, one of the world's poorest countries received several hundred thousand fellow Muslims from neighbouring Burma, despite devastating effects of this policy on the country's local economy and environment.

While talking on Statecraft on Nation TV on March 6th 2003, the Minister of Home Affairs under whose docket refugees fall, Mr. Moody Awori⁴⁷ talked of refugees straining further the already strained economic resource base of Kenya.

The Editor of "Marwell Zoological Park"⁴⁸ while analysing the effect of the events of 11th September, 2001 in United States and the subsequent conflict in Afghanistan notes that the greatest environmental impact of the war was as a result of the refugee both in Afghanistan and the countries neighbouring it. This was because the dependency that each refugee camp had on the natural resources in the immediate area greatly outweighs the available resources. A secondary effect of refugee is that mobile species will be driven from suitable habitat into less habitable areas.

Kahler M.⁴⁹ has also argued that refugees more often than not are seen as causes of interstate tension as is seen in the continuous Somalia-Kenya relationship.

UNHCR has also reported cases where refugees have been attacked by the local citizens because of competing for resources. UNHCR 2001 Global Appeal notes for instance notes that there was a chronic problem of rape and violence when refugees went to collect firewood around Kakuma camp.⁵⁰

⁴⁷ Moody Awori as interviewed by Nation TV on 6th March 2003

⁴⁸ Marwell Zoological Park Magazine (September 2002) page 12

⁴⁹ Kahler .M. (1979) Refugees. Oxford University Press, Oxford page 143

1.4.7 UN and Refugee Protection

Goodrich L.M. and Kay D.A.⁵¹ talk first of the advantages the states get from affiliating themselves to international bodies like the UN.

During the past century and a half, while international organisations having been taking form, the world community has been shrinking physically but growing in terms of human interactions. This is even more real now with the globalization impacting the whole world.

Lillich R.B.⁵² posits that the traditional international law predating the UN charter in 1945 was notoriously a law of nation rather than a law of people. The individual was not recognised. He adds that if a state committed a wrong against a refugee, then that wrong was translated into a wrong against the alien's state of nationality. At that point it could be handled by the international law through diplomacy, arbitration or even war.

Under what he refers to as "Vattelian fiction"⁵³ refugee himself had no right, which was cognisable by traditional international law against his country of asylum.

The early international law and how it is related to the refugee is also tackled by William F.⁵⁴ and Taylor P and Grood A.⁵⁵ among others.

⁵⁰ UNHCR 2001 Global Appeal page 79

⁵¹ Goodrich L.M. and Kay D.A. eds (1973) International Organizations: Politics and Process, The university of Wisconsin Press, U.S.A. page 73

⁵² Lillich.R.B. (1984) The Human Rights of Aliens In Contemporary International Law. H.M. Johnson, San Francisco page 121

⁵³ ibid

⁵⁴ William .F. (1934) Culture Survival, Prentice-Hall, New Jersey page 54

Bommett D.W.⁵⁶ clarifies that the development of UNHCR has been, in the main, a response to evident need arising from an international problem. His views are also shared by Kaishoren F.⁵⁷ and Luard E.⁵⁸.

Luard E.⁵⁹ also traces the history of the Diplomatic protection for the refugees. According to him, the diplomatic protection of refugees can be traced to the end of the middle ages where two principal methods had emerged for their protection: Firstly way granting of privileges for alien communities en masse as in the case of the trading communities in the middle far East. Secondly, was the system of licensed reprisals by injured alien's sovereign.

The law of Nation is the first attempt, however, to address the issue of refugees at an international level. Swiss Jurist Emmerich de Vattel gave an international underpinning of the doctrine. It stated that states were entitled to protect their citizens abroad if it so chose. However, it was under no duty, domestically or internationally to do so.

These views are also concurring with the ones written by Greig D.⁶⁰ and also Williams F.⁶¹

The importance of UN through its agency in solving the refugee crisis is dealt with by various authors.

⁵⁵ Taylor .P. and Grood A. (eds) (1988) International Institution At Work. Biddles Ltd, Guildford page 12-17

⁵⁶ Brommett .D. W. (1982) The Law of International Institutions Stevens & Sons, New York page 69-81

⁵⁷ Kaishoren .F. (1987) World Population - Turning The Tide: Three Decades of Progress, Graha and Trotman, London page 111-112

⁵⁸ Luard E. (1979) The United Nations: How It works And What It Does, Macmillan, London Page 40

⁵⁹ ibid

⁶⁰ Greig .D. (1976) Refugees: A Third World Dilemma. Rowman & Littlefield, New Jersey page 62

Roberts A. and Kingsbury B.⁶² have written on the inadequacies inherent in the UN system while admitting that UNHCR has alleviated to a reasonable degree the refugee crisis.

Sir Kenneth Baily in Moskowitz M. said that “the resolutions and conventions made by UN may today look like only a recommendation, or even a mere ‘voeu’. But it is to be remembered that propaganda can create pressure that can create practice and that practice can create law”.⁶³

Crozier B.⁶⁴ is quoted in International Political Science Abstract Volume XXVII, No. 3-4 as saying that UNHCR has more than any other body in the history of mankind done much to improve the lives of refugees.

UNHCR was established on 14th December 1950 by the UN General Assembly. The agency is mandated to lead and co-ordinate international action to protect refugees and resolve refugee problems worldwide.

Hakorirta,⁶⁵ Cohen⁶⁶ and Rutter⁶⁷ while giving the history of the UNHCR also emphasize that the primary purpose of the UNHCR is to safeguard the rights and well being of the refugees in their countries of asylum. It also strives to ensure that everyone can exercise the right to seek asylum and find safe refugees in another state, with the option to return home, voluntarily, integrate locally or to settle in a third country.

⁶¹ Williams .F. op cit

⁶² Roberts .A. and Kingsbury .B. (1996) United Nations, Divided World: The UN Roles In International Relations. Clarendon Paperbacks, Oxford

⁶³ Moskowitz op cit

⁶⁴ Crozier .B. (1999) in International Political Science Abstract Volume XXVII. No. 3-4 page 56-58

⁶⁵ Hakorirta .H. (1991) Refugee Repatriation, Lexington, Books, Massachusetts. Page 117

⁶⁶ Cohen .S. (1995) The Cambridge Survey of World Migration. Home Officer Research Study, London page 2

⁶⁷ Ruttr .S.A. (1990) Refugee Research In Africa: Problem And Possibilities. African World Press, New Jersey

1.4.8 1951 UN Convention on Refugees

Many writers have dwelt on this convention. Weis P.⁶⁸ says that the convention came into being when it was realised that the refugee phenomenon far from fading away or even diminishing had grown enormously. Other writers who have written the same include Akpan M.E.⁶⁹ and Lillich R. B.⁷⁰

Lillich R.B. and Bennet A.L.⁷¹ talks of the specific rights and freedoms. Lillich⁷⁵ differentiate between the two different rights of a refugee. First the basic rights which are laid down in absolute terms and which bear no relations to rights enjoyed by other groups. Secondly he talked of equated right, which is expressed as being equal to rights possessed by other groups of persons.

Roberts and Kingsbury⁷² however say that the convention was not devised to deal with mass exodus. Plano J.C. and Riggs R.E.⁷³ say that even with the inherent flaws in the convention, it is still the only hope of genuine refugee problems solution.

Lillich (1984) and Ferris (1993) describe the flaws that are inherent in the convention. For instance it does not grant refugees an affirmative right to enter the territory of state parties. This is contrary to the League of Nations, whose 1933 convention on refugees provided for such a right.⁷⁴

⁶⁸ Weis .P.(1979) Nationality And Statelessness In International Law. Sijthoff and Noordhoff, Maryland page 46

⁶⁹ Akpan M.E. (1976) Refugee Policy: Canada And the United States. York Lanes Press, Ontario. Page 69

⁷⁰ Lillic opcit page 84

⁷¹ Bennet A.L. 91988) "Documentary Note: Rural Refugees In Africa." International Migration Review 15 (1): 213-218

⁷⁵ ibid

⁷² Roberts And Kingsbury op cit

⁷³ Plano .J. .C. And Riggs .R.E. (1967) Forging World Order

⁷⁴ Lillich E. op cit

The convention also does not resolve the fundamental problems which refugees pose for the international community. For instance, it does not require state hosting refugees to integrate them completely into their social, economic, political and legal fabric.

Lillich goes ahead to say that “in short the refugees convention is clearly not a convention on the reduction of refugee hood”.⁷⁵

Luard E.⁷⁶ and Cassese⁷⁷ have looked at the complex relationship between the convention and the general international law. Cassese (1975) says that the refugee rights of the UNHCR are analogous but all the same their implementation and enforcement must command attention.

According to both Luard and Cassese, the convention is finding its use limited because: firstly, there is doubt of its validity under the general international law; secondly, there is the possibility of conflict between the convention and the municipal and the international law; lastly, there are no punishments meted out to the offending states.

Wijngaert C.V. while examining how to balance the rights of an individual and the international law talks of the principle of non-refoulement.⁷⁸ According to him, this principle operates in the framework of the 1951 convention and the international law in general. It applies to genuine political refugees whom he differentiates from the “de jure refugees”.⁷⁹

⁷⁵ ibid

⁷⁶ Luard .E. op cit

⁷⁷ Cassese .A. (ed) (1975) Current Problems of International Law: Essays On UN Law And On The Law Of Armed Conflict Dott .A. Guiffre Editore, Milan

⁷⁸ Wik ngaert C.V. (1980) The Political Offence Exception to Extradition: the Delicate Problem of Balancing the Rights of the Individual and International Public Order. Kuimer. London page 43

⁷⁹ ibid

The different categories of refugees which can be identified and who not all belong to the 1951 convention can also be found in the works of Grahl Madsen A.⁸⁰ and Davies.⁸¹

Starke J.G.⁸² talks of the difficulty of the universal applicability of the convention. He argues that a refugee entering the territory of a state becomes subject to its laws in the same ways as citizens of that state. He adds, however, that some states deny the refugees basic human rights, which he says is very unfair. His views are also shared by Kalshoren F.⁸³ who adds that the refugees in camp must be treated under the 1951 convention.

Finkelstein L.⁸⁴ emphasize further that the convention has little incentive to inverign against destructive or illegal acts in regard to refugees. Even over a longer term, after the immediate need for action on behalf of the refugees, UNHCR uses the instrument of publicity with great caution. The possibility that the instrument of publicity can be used signify, however, that pressure can be put on governments which abuse the rights of a refugee.

Leiden A.W.S.⁸⁵ and Falk R. A. et al⁸⁶ have both appreciated the fact that the 1951 conventions cannot be policed and hence there is a need to rethink of ways of making sure that states which adopted it follow it for the betterment of the refugees.

⁸⁰ Grahl-Madsen A. op cit page 200

⁸¹ Davies J. (1990) Displaced People And Refugee Studies: A Resource Guide, Hans Zell Publishers, London

⁸² Starke J. G. 1989) Introductions To International Law. Butterwoths London Page 23-25

⁸³ Kalshoren .F. op cit

⁸⁴ Finkelstein .L. (ed) (1987) The Policies In The United Nations System. La Grange, Illinois page 37

⁸⁵ Leiden .A. W. S. o cit page 72

⁸⁶ Falk .R. A. & Deng .S. (1993) Protecting The Dispossessed: A Challenge For The International Community. Oxford University Press, Oxford page 111

1.4.9 Conclusion

From the literature review, it is clear that gaps exist. Taken as a whole, the impression gained from the review of the existing literature on refugee is one in which lists of factors have overcome theoretical rigours. There are abundant typologies but little agreement.

Secondly most of the literature concentrates on refugee situation with little reference to Africa and Asia. Kenya is only mentioned in passing.

Whereas the critique of the 1951 Geneva Convention on refugees is almost unanimous on the gross human rights violation on refugees, there is little literature on the actual human rights violation or suffering.

A lot of the existing literature has also focused on the existing international instruments for addressing the refugee problem without addressing the historical background of refugee problem.

It is the existence of these gaps that this study attempted to address.

1.5.0 Conceptual Framework

While the modern world is divided into roughly two hundred sovereign states, many of the problems we are experiencing are global in scale and cannot be solved by nation states acting alone. Arend Soeteman⁸⁷ talks of one world having many different traditions, very different ideas and states that are organised politically, the universality of human rights, About everything of any importance.

Different developments in our world pose a challenge to legal philosophers. For instance what are the universal rights of the refugees? What is the function of the state in modern world as pertaining to refugees? How should the law deal with global problems like refugee problems?

Consequently the theoretical approach I will use in trying to answer the above problems is pluralism. Benda-Beckmann⁸⁸ says that legal pluralism as a concept merely points to the possibility that there can be more than one legal system in a political organisation. We are confronted with dynamic and changing constellations of legal pluralism everywhere. The way refugees are treated here in Kenya is different from the way they are treated in Britain yet they are supposed to be treated equally under the 1951 UN Convention on Refugees.

According to her therefore these “variations and plurality are a source of considerable legal insecurity and social and political conflict.”⁸⁹ Most refugees are normally thrashed into a new social and legal environment so sudden that they take so long to adjust.

The concept of municipal law and legal pluralism has generated a lot of debate with some countries ignoring the agreed upon conventions citing the conflict with their municipal laws. The crucial issue has been whether or not one is prepared to admit the theoretical possibility of more than one legal order within one socio-political space. If law is linked to the state by definition then there cannot be law other than that made or validated by state. This is the reason many countries where refugees seek asylum do not implement the 1951 convention and no enforcement mechanism from the UN comes in.

⁸⁷ Soeteman .A. (2002) *Law As An Intellectual Stepchild In Social Systems And Legal Process*, H.M. Johnson, San Francisco. Page 127

⁸⁸ Benda-Beckman (1989) *From the Law of Primitive Man to the Sociolegal study of Complex Societies*, Antropologi, Indonesia page 67-67

⁸⁹ *ibid.*

Cassese qualifies further the suitability of plurality as the desirable theoretical approach when he says that most refugees suffer in their countries of asylum because of the conflict of the UN Convention, International Law and the Municipal Law. According to him therefore, the enforceability of the 1951 convention is difficult or impossible because of:⁹⁰

The convention is very ambiguous under the general International Law.

There is a realistic possibility of conflict between the convention and the general International Law. There has been little impact of the charter on the development of International Law.

Consequently refugees have been left to languish in camps as the effect of plurality is still being streamlined.

Different constellations of legal pluralism also shape the relations between the refugees and the state. They will largely define who a refugee is and what rights he has.

However, if the Municipal Law contradicts with the convention as it often does, the individual refugee might resort to one or more institutions for redress or worse still may be confused on which one to go to.

The application of the 1951 UN Convention to the refugees living in Kenya must be tied to Kenyan Law so that it becomes clear which one overrides the other.

⁹⁰ Cassese .A. op cit Page 27

Pluralism will ensure clarity, unification and standardisation and will bring legal certainty to tackle the refugee problem in Kenya while upholding the refugee rights as defined by the 1951 UN Charter on Refugees and the stateless people.

Franker J.⁹¹ says that pluralism is part of the world order theory which is necessary when one looks at the domestic matter like treating the refugees which can potentially assume a sufficiently important international dimension to become an international agenda.

As a conclusion therefore it is right to say that pluralism, as an aspect of world order theory is ideal in assessing the impact of the 1951 Convention on Refugees. It calls for a peaceful transition from the statecentric approach of solving problems to a world order based on participatory and legitimate institutions like the United Nations.

1.5.1 Hypotheses

- Non implementation of refugee law leads to a rise of refugee abuse
- Confinement policy in solving refugee problem is an abuse of human rights.

1.5.2 Methodology

1.5.2.1 Secondary Data Collection Method

This method involved collection and review of information from documented sources such as published materials, unpublished academic papers, journals and print and media. I also consulted various relevant websites.

⁹¹ Frankel J. (4th ed) (1987) *International Relations In Changing world*. Oxford, New York page 73.

In addition to consulting relevant academic and NGO literature, systematic surveys were undertaken of the “official” literature. These included resettlement guidelines, national resettlement policies, relevant international conventions and legal cases.

1.5.2.2 Primary Data Collection Method

Interviews were conducted with a wide range of academics, officials and organisations dealing with refugees in Kenya. This served to contextualise official frameworks, providing a clearer understanding of factors influencing the way they are adopted and operate in practice.

Refugees who are the key informants were interviewed. The guidelines consisted of open-ended questions, which were administered face to face. This design helped in gathering as much information as possible, since in most cases questions were asked with no restrictions.

1.5.2.3 Fieldwork Site

According to the UNHCR estimates Kenya is home to some 213,050 refugees living mainly in two camps: Dadaab in the north-east (Garissa district) and Kakuma in the north-west (Turkana District). In Dadaab, the majority of the refugees are Somalis while in Kakuma, they are mainly Sudanese.

For the purpose of this study, I visited the Kakuma refugee camp. This was because of the resource limitation. Kakuma was ideal because unlike Dadaab, which only hosts Somali refugees, it hosts refugees from Sudan, Uganda, Rwanda, Burundi and Congo.

2.0 CHAPTER TWO

2.1.0 INTERNATIONAL REFUGEE PROTECTION REGIMES

2.1.1 Introduction

In this chapter, I will out-line the refugee protection regime and its key components. I will then portray past developments in the refugee field. I will further examine the 1951 Refugees convention critically and take stock of current protection challenge.

2.1.2 Origins of Refugees

There are many causes of the refugee problem the world over. Firstly, wars have over the years displaced millions of people. For example the Balkans war of the 1912 displaced an estimated 12 million people.¹ Shortly afterwards First World War displaced even more people. In the African context anti-colonial wars uprooted many. Refugees from Namibia in the 1980s, from Angola and Zimbabwe in the 1970s and from Algeria in the 1950s all fled their countries because of the effects of foreign domination.²

Other refugee migrations occur due to discrimination and often outright violence where some people feel that they are unwanted or unsafe in their own homelands. An example of this type of migration are Burundi and Rwandans displaced to each other's country and to Tanzania, Uganda and Zaire, (DRC).

¹ Zolberg .A. et al (1989) *Escape From Violence: Conflict and The Refugee Crisis In The Developing World*. New York, page 112

² Kunz .E. (1980) "The Refugee Experience". Pages 118-135 in *Refugees: The Challenge For the Future*. Academy of the Social Sciences In Australia, Canberra page 44

Self-alienation has also played a part in igniting refugee migration. These have been some cases where individuals or groups of people have been displaced because of philosophical differences between them and governments. For example, upwards of twenty thousand Jehovah's Witness fled from Malawi to Zambia during the late 1960s and early 1970s.³ While the Jehovah's Witnesses were self-alienated, they were subject to discrimination and harassment prior to their decision to flee. Many Ethiopians and Kenyan intellectuals who fled from their government tyranny can also be classified as self-alienated.

Environmental vagaries have also caused massive refugee movements. For example, in 1984 and 1985 many Ethiopians crossed their borders to Kenya and Sudan to escape from the devastating drought, which resulted in one of the worst famine in recent human history.

2.1.3 Pre-World War I Instruments For Refugee Protection

The causes, dimensions and consequences of the forced dislocation of people throughout the human history have always generated broad public concern and significant national and international action.

Refugee problem like a number of other international problems like terrorism, HIV/AIDS, money laundering, drug trafficking, slave trade among others has been seen as a problem needing an international approach to tackle since its consequences go well beyond any national border. This is the basis of needing an international regime.

³ Coles .G. (1985) Voluntary Repatriation: A Background Study Paper Prepared For The Round Table on Voluntary Repatriation, III/UNHCR, SN REMO, PAGE 112

Even long before an organized regime came to being before the World War I, the International Community had attempted to have a unified approach towards the refugee problem.

Grahl-Madsen, one of the foremost authorities in refugee affairs, says that the custom of granting asylum⁴ may be traced along way back. According to him: "Already in the antiquity there was a well-established-albeit by no means universal tradition of asylum."⁵

Biblical teaching encouraged the protection of asylum seekers. In the New Testament, Jesus identifies himself as the stranger, "I was a stranger, and yee took me in"⁶ so that his followers would consider that feeding and clothing any stranger was just like comforting Christ himself.

The Christian Church developed a practice of offering asylum to persons who sought its sanctuary. The principle of Church asylum was affirmed by the Council of Sardis in 347 A.D. and confirmed by the law codes of both Theodosius in the fourth century and Justinian in the sixth century. In 140 A.D. Pope Cratian codified ecclesiastical law on asylum, excluding perpetrators of certain crimes from the Church's protection.⁷

The principle of asylum has a valued place in Islam as well. In the holy Koran, the most sacred site in Islam are the Kaaba and Haram that surrounds it. According to Koran, Abraham established this place when he said "Lord make this place a land of safe asylum."⁸ Therefore it is believed that anybody who took refuge in this place was safe from any harm.

⁴ Asylum in this Research is defined as the protection accorded by a state in its territory or at some other place subject to certain parts of its organs – to an individual who comes to seek it.

⁵ Gahl-Madsen (1946) The Status of Refugee In International Law Volume I, page ii

⁶ Holy bible, Mathew 5: 35-45

⁷ UN doc. A/9621/Add. 1, page 11

⁸ Holy Koran 14: 35-37

Indeed a lot of Islam's approach to asylum is based in the old Arab traditions of hospitality that required the desert Bedouin tribes to provide asylum to any stranger who was unarmed at least for three days.

In the Medieval Europe, asylum is well documented in the works of the founders of International Law, Hugo Grotius and Emmerich de Vattel⁹ who emphasized that political asylum seekers needed to be taken care of and not repatriated back to their governments unless their security was guaranteed.

By 1540 as the power of the crown grew in England under the Tudors and Stuarts, the parliament abolished church sanctuary for a wide range of crimes like theft, political thuggery among others, but also designated eight cities like Colchester, Portsmouth, Oxfordshire, Hampshire etc. where fugitives could find refuge under James 1, the English parliament abolished sanctuary entirely in 1603-4. Following the religious upheaval and civil war of the seventeenth century where people who were not part of the Church of England were considered misfits and were targeted for violence. The English Parliament followed this in 1708 by allowing foreign protestant refugees seeking refuge in England to naturalize.¹⁰

But the actual practice, on a significant scale may well be 1685 when Louise XI of France repealed the Edict of Nantes.¹¹

⁹ Grahl-Madsen op cit

¹⁰ Hudson J.. (1963) International Legislation Profile Books, London Page 42

¹¹ Grahl-Madsen ibid Page 3

2.1.4 Edict of Nantes In The Development of International Refugee Regime

Sixteenth-century Europe was characterized by intolerance and bloody religious wars. Some countries such as Spain and England, ruthlessly hounded religious minorities. Others, like Germany, adopted the principle of “Cuius regio, eius religio”¹² meaning that the governing a territory decided its religion. Anyone who disagreed with the ruler’s religious choice was forced to leave the area. War was avoided by keeping religions apart, with little or no attempt at religious co-existence.

France chose a different path. Geographically, it lay between northern Europe, which was predominantly protestant, and southern Europe, which was Catholic. By the mid 1500’s, Protestants had become a significant minority in this Catholic country. A series of religious wars accentuated this division. Numerous peace treaties or edicts to pacify the trouble as they were called, failed to bring about peaceful religious co-existence. In 1562 Michel de l’Hospital, French Statesman wrote: “Even he who is excommunicated does not cease from being a citizen.”¹³

France was suffering economically and socially because of the religious wars. In 1598, after France had suffered over 30 years of religious war, King Henry signed the Edict of Nantes.

The Edict of Nantes that Henry signed was made up of four basic texts, including the principal text made up of 95 articles and 56 secret articles dealing with Protestant rights and obligations. Previous peace treaties formed the basic structure of the agreement, providing two thirds of the articles. Unlike previous treaties, however, this edict took along time to prepare. Its exceptional length can be explained by the fact that is sorted out problems blow by blow, giving it the appearance of a do-it-yourself compromise.

¹² http://www.Watchtower.org/library/g/1998/11/22/article_o1.htm

¹³ Grahl-Madsen ibid

The edict granted French Protestants total freedom of conscience. They were also given the status of a respected minority with rights and privileges. One of the articles even assured them of protection against the inquisition when travelling abroad.

Historian Elizabeth Labrousse says that considering the way religious minorities were treated in other countries, the Edict of Nantes was a document of “rare political wisdom.”¹⁴ In reality, however, the edict favored Catholicism, which was proclaimed the dominant religion and was to be restored throughout the Kingdom. Protestants had to pay the Catholic tithe and respect Catholic holidays and restrictions regarding marriage. Protestant freedom of worship was limited to specified geographic areas. Other minorities were not included in the edict. Muslims, for instance were expelled from France in 1610.

The edict is now considered a masterpiece of political diplomacy. Recognizing a religion other than Catholicism opened the way for religious pluralism. It recognized that religion was not the determining factor in loyalty to the state or national identity. In addition, criminal activity, not religious affiliation, became the criterion for legal action. Nikolaus S. says that the edict “marked a decisive moment in the emergence of the modern state.”¹⁵

Some of the paths mapped out by the Edict of Nantes were later adopted by other governments. In time many countries redefined the relationship between religion and politics, putting the State’s authority on a new footing. In France the path that was eventually chosen in 1905 was complete separation of Church and State. It is because of this that the Edict of Nantes is commemorated once a century and transgressed the rest of the time. Learning to lie together in peace and without prejudice was indeed a vital lesson to be learned 400 years ago. But the lesson is still relevant today.

¹⁴ ibid

¹⁵ Nicklaus .S. (2000) Arguing About Asylum: The Complexity Of Refugee Debates In Europe, Martin’s Press, New York Page 375

The edict was however dealt a severe blow in 1685' when Louis XI repealed because he felt that the state needed to have more control on religion. Consequently Huguenots were favoured over the Catholics.

Marquis of Brandenburg a few days later issued his Edict of Postdam,¹⁶ whereby the French Huguenots were given every facility to establish themselves in his territories. At that time, big numbers of Huguenots were also allowed to establish themselves in other non catholic countries like Germany, Denmark, England, Holland, Russia, Sweden, Switzerland and some even went to North America. People moving away from their countries to others needed refugees.

Historians like Niklaus still content that though religion and ethnic differences brought the mass exodus of the population in the Medieval Europe (as seen in the numerous English war), political ideologies (like not supporting the views of the rulers) characterized the refugees from the French Revolution as well as other skirmishes of the eighteenth century like the Franco-Prussian wars.

2.1.5 Other Pre-World War I Attempts To Create An International Refugee Regime

France was the first country to explicitly state that political offenders should not be extradited back to their countries of origin. In 1832 France made recognition explicit in the law concerning foreign refugees residing in France, which defined foreign refugees as "persons residing in France without their own government's protection."¹⁷

The rule that political offenders should not be extradited back to their countries of origin found legal expression for the first time in the Belgian Law on Extradition Treaty of 1834 and later found its way into many other treaties which later gave birth to the 1951 Geneva Convention on Refugees.

¹⁶ ibid Page 395

¹⁷ http://www.refugees.org/news/fact_sheet/refugee_definition.htm

In 1982 the Institute of international law reiterated that refugees could not be returned to their countries of origin unless conditions of extradition (including nobody should be prosecuted for holding a divergent political view) were met. This was meant to protect the refugee from suffering for holding a different view from the establishment.

In the instruments relating to refugees, adopted after this, we find provisions restricting the expulsion of the refugees. This clearly shows that the rule set by the Institute of international law has been firmly established.

International refugee Regime development was not confined to Europe, Latin America also passed a number of laws that related directly to asylum seekers. These included the Montevideo Treaty on International Law of 1884, the Havana Convention on fixing the rules to be observed for refugees, among others.¹⁸ These countries also emphasized the need not to repatriate the refugees who are likely to face charges based on their political beliefs.

2.1.6 Instruments Used For Refugee Protection before The Formation of UNHCR

While refugees are as old a phenomenon as our human nature, generally speaking they were not seen as a responsibility of the international community until the twentieth century.

The new wave of refugee that was seen in the first half of last century was unmatched in the history of refugee phenomenon. The Balkan wars as well as the First World War resulted in millions of refugees which in 1921, the Russian Exodus resulted further millions seeking refuge outside. Second World War resulted in many more people-seeking refuge outside their countries.

Solutions to the refugee problems until the formation of the United Nations High Commission For Refugees were varied and inconsistent. For instance, in 1921, in response to the Russian exodus, the League of Nations appointed the Norwegian explorer Fridtjof Nansen as the first High Commissioner For Refugees. Cognizant of the lack of protection that accompanies lack of documents, Nansen produced documents for Russian refugees, known as Nansen passports, which afforded the refugee recognition and protection.

New refugee movements outside Russia, particularly of Armenians fleeing severe persecution in Turkey, placed similar demands on the High Commissioner to issue more Nansen passports. His office also assisted hundreds of thousands of Greek and Turkish refugees who were displaced in the early 1920s. With Nansen's death in 1930, the office of the high Commissioner lapsed.

For a long time, the League of Nations created a series of ad hoc, temporary offices to manage particular groups of refugees. Obviously these did not lead to any permanent institutions nor broad international agreements. Many non-governmental efforts were similarly very sporadic. In the meantime the number of refugees just continued to rise.

Another reason that led to massive refugee flows was the consolidation of the communist rule in Eastern and Central Europe. The West had a keen political interest in these refugees. They saw that refugees coming to the West from the East demonstrated the superiority of the democracy over communism.

Hudson while giving the regional development of refugee protection talks of the steps that were taken by the Latin American countries.¹⁸ In 1928 the Havana Convention fixed the rules to be observed for Granting of Asylum. In 1934 the Montevideo Treaty

¹⁸ <http://www.refugee.org/news/fact-sheet/refugee-definition.htm>

¹⁹ Hudson L. (1963) *International Legislation*, Profile Books, London, Page 14

on Political Asylum and Refugee laid a foundation that encouraged member states to allow the free movement of refugees and to desist from returning political refugee and to face prosecution.

Globally, however, the international Committee of the Red Cross (ICRC), which was founded half a century earlier to protect and care for captured and wounded members of the armed forces, provided assistance to civilian victims of war and refugees although these two were not yet formally a part of its mandate.²⁰ A significant number of these articles in this declaration talk on the question of territorial asylum. For instance Article 14(i) lays down the right to seek and to enjoy in other countries asylum from persecution. It gave the express recognition to asylum as a human right. This asylum may be granted in different ways and in different contexts.

The two most important organizations which deal with refugees during this period were the International refugee Organization which existed from 1946 to 1952 and the In-governmental Committee for European Migration. These two organizations were charged with the responsibility of taking care of the refugees who were escaping from the various wars like the Second World War.

Falk and Balk, however, summarize this period amply by saying that: "A comprehensive mapping of earlier systems of International League Order on refugee would involve the description of several distinct but overlapping and partial systems."²¹

²⁰ *ibid*

²¹ Falk A. R. and Black C. E. (eds) (1969) The Future Of The International Legal Order Vol. I The Trends And Patterns. Princeton University Press, London Page 3

2.1.7 The Creation Of United Nations High Commission For Refugees

Shortly after the end of the Second World War, the allies persisted in the ad hoc approach of the earlier period, creating separate bodies to deal with refugees in Europe, Palestine and Korea. By 1950, however, multiple crises associated with the mounting confrontation between East and West – the Berlin blockade, the division of Germany, Mao's victory in China, the subjugation of eastern Europe, and the start of the Korean War – as well as the chaotic partition of India, made it clear that the refugee issue would persist past the post war reconstruction phase.

In December 1950 the UN General Assembly voted to establish the UNHCR as a subsidiary organ of the General Assembly, reporting to the General Assembly through its Third Committee and to the Economic and Social Council (ECOSOC). In 1951, an international diplomatic conference adopted the UN Convention relating to the status of refugees. Signatories to the Convention were called upon, in Article 35, to cooperate with UNHCR in the exercise of its function. UNHCR is unique among the subsidiary organs of the General Assembly in having this direct institutional link to an international Convention.

Sadako Ogata laments in *Gaiko* that member states of UN General Assembly, which created the Agency, did so in a hurry without thinking of the future. She says the UNHCR was set up to cater for one million refugees still homeless in the aftermath of the Second World War. It had only 34 staff and a modest budget of US\$ 300,000. Initially it was intended to have a lifespan of only three years.²²

²² Sadako Ogata: March 2001 Issue of *Gaiko Forum* "The United Nations in the New Century"

Ogata again while addressing the delegates at the Royal Institute for international relation in Brussels, in November 1992 explains further that upon its establishment UNHCR's work was mainly of a legal, technical nature to ease entry and integration.²³ The states that signed the convention could only limit their obligation to refugees in Europe.

The life of UNHCR has since then been extended by more than fifty years. Although its mandate still must be renewed every five years by the General Assembly, there is every reason to expect that organization will continue.

Holborn L. notes that the High Commissioner is a kind of International Ombudsman, performing for refugees some tasks which states ordinarily provide for their nationals under the system of diplomatic protection of nationals abroad.²⁴ More specifically he acts in two capacities: first, under a mandate of the UN General Assembly and second, under the 1951 Refugee Convention.

Article 1 of the High Commissioner's Statute entrusts him with two tasks: first providing international protection to refugees and second: "seeking permanent solution for the problems of the refugees."²⁵ These latter tasks include among other things facilitating the voluntary repatriation of the refugees, integration with the local communities of the host country and also organizing for the refugees to go to the third country.

Apart from his mandate from the General Assembly, the high Commissioner has important functions under the 1951 Geneva Convention, the second major mechanism within the UN for the protection of refugees.

²³ Sadako Ogata <http://www.unhcr.ch/cgh-bin/tehis/home>

²⁴ Holborn L. (1956) International Refugee Organization: A Specialized Agency Of The United Nations. Its History And Work 1946-1952, Oxford University Press, Oxford, page 65

²⁵ *ibid*

The statute that established UNHCR mandated it to provide international protection to refugees and to seek permanent solutions to the problem of refugees by working with national governments and, subject to approval of governments with private organizations. Thus right from its inception, the international refugee regime explicitly foresaw a partnership among states, non-states and inter-governmental actors. Infact the first substantial sum of money that UNHCR received was not from a state but from the Ford Foundation, which made a grant of 83.1 million in 1951.²⁶

Shepard Forman is highly critical, he refers to the UNHCR as “the most useful and durable fictions of the past war era in stating that the work of the High Commissioner shall be of an entirely non-political character; it shall be humanitarian and social in orientation.”²⁷ In the tense and polarized climate of the early Cold War years, this was seen as a necessary device to allow the United Nations act on refugee issues. Even so, the Soviet Union and its allies did not sign the Convention or cooperate with UNHCR. On the other hand USA saw the UNHCR as “too European”²⁸ to warrant any support. But it later on supported it bilaterally.

2.1.8 Geneva Convention Relating To The Status Of Refugees

The legal protection of human rights for the refugees at the international level is a concept that developed largely after the Second World War and became institutionalized and internationally accepted following the ratification of 1951 Geneva Convention relating to the status of refugees.

Denmark was the first country that ratified the 1951 Geneva Convention. Fifty years later 140 countries almost, three quarters of all countries in the world were state parties to the 1951 Geneva Convention. New states have also shown enthusiasm to become

²⁶ Shepherd J.F. “Underwriting Humanitarian Assistance: Mobilizing Resources For Effective Action,” Paper prepared For The Centre On International Cooperation, New York, January 1999.

²⁷ *ibid*

²⁸ Nicholson J.F. and Twomey P. (eds) (1999) Refugee Rights And Realities: Evolving International Concepts And Regimes, Cambridge University Press, Cambridge page 511

members. East Timor for example has been studying it with a view to becoming a member.

The convention establishes an accepted definition of a refugee as a person who is outside his or her country of origin and cannot count on the protection of that country owing to a well-founded fear of persecution on specified grounds. It also codifies the obligations of state toward refugees. The most important obligation is not to expel or return a refugee to a territory where his or her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion. Signatories also pledged to promote and safeguard refugee's rights while in asylum in such matters such as education, employment, freedom of movement, access to the judicial system and so forth.

Significantly, the convention does not establish a general right to asylum. States were, and remain, unwilling to compromise their sovereign right to decide who may be admitted to their countries.²⁹ But once a person who qualifies as a refugee somehow gains access to the territory of a state like Kenya that is party to the convention, that person cannot be deported to a place where his or her life or freedom would be threatened. If this is not adhered to, then it constitutes the most fundamental principle on international refugee law, the concept of non-refoulement, the prohibition on forced return of a refugee as stipulated in Article 33.³⁰

2.1.9 General Provisions In 1951 UN Refugee Conventions

In Chapter one the convention defines who a refugee is. It says that the refugee under this provision is considered under the arrangements of May 12, 1926 and June 30, 1928

²⁹ UNHCR Executive Committee Conclusion No. 30 (XXXIV) (1993) "The Problem of Manifestly Unfounded or Abused Applications for Refugee Status of Asylum".

³⁰ *ibid*

and the February 1938, the protocol of September 4, 1939 or the constitution of the International Refugee Organization.³¹

The article also disqualifies refugees who have voluntarily re-availed himself of the protection of the country of his nationality, reacquired his lost nationality; got a new nationality or one who refuses to avail himself to the protection of the country of his nationality.

Article 2 states that every refugee has duties to the country in which he finds himself, which require in particular that he conforms to its laws and regulations as well as to measures taken to maintenance of public order. The rest of the chapter describes both the statutory instruments and the administrative procedures currently operating the determination of the refugees.

Chapter two looks at the asylum determination procedures. It tries to examine the role of the different subjects involved in the asylum determination authority, solicitors and UNHCR.

Chapter three established the basis of the asylum claim. This chapter says that for example refugees or asylum may fill questionnaires so as to ascertain their actual eligibility.

Chapter four assesses the asylum claim. One of the main principles underpinning the determination of a refugee status. It says that the burden of proof lies with the applicant. The applicant must provide the assessor with all the relevant documentation or information.

³¹ Ibid

Paragraphs 195 to 205 of the UNHCR Handbook stipulates that it may be often better for the examiner to use all means at his or her disposal to produce the necessary evidence in support of the applicant's contention.³²

Lillich .R. further talks of the two different types of rights that are stipulated in the convention. Firstly he talks of the basic rights that are common to refugees and stateless persons in all states that have ratified the convention. Secondly, he talks of the equated rights. These rights vary between one host country and another, since those rights are based on whatever rights that host country have chosen to grant the other groups in question.³³

2.1.10 The 1967 Protocol To The 1951 Convention

In 1967 the UN, recognizing the limitation of the original convention regarding the clause, which limited official refugees to people of European origin before the 1951 date, approved a protocol to the convention. The protocol extended the definition of refugee to include all people who have fled their homeland owing to a well-founded fear of persecution. This extension of the convention institutionalized the international refugees protection system, including the UNCHR.

However, whereas the geographical and temporal limits in the convention were removed by the 1967 protocol, states signing the protocol were permitted to retain the geographical limitation to Europe if they chose.

³² Widgren .J. (1990) "International Migration And Regional Stability," in International Affairs, Vol. 66 No. 4, October 1990 Page 34.

³³ Lillich .R.B. (1984) The Human Rights Of aliens In Contemporary International Law. H.M. Johnson, San Francisco Page 67

Cels J. posits further that the adoption of the 1967 protocol clarified further the legal status of the refugee. Other than extending the scope of the earlier convention, it regulates better the rights and obligations of refugees in the receiving countries. An individual granted refugee status is given a whole set of substantial rights.³⁴

On several occasions, the protocol had enabled UNHCR to help categories of people who do not fall within the strict definitions of the legal instruments – such as people who have fled from one part of the country to another, as well as those who have fled due to a combination of natural and political causes such as drought and conflict.

The protocol is generally divided into eleven articles each dealing with a separate thing.

Article one is dealing with the new definition of a refugee as well as removing the geographical limitation. Consequently, a refugee did not have to be a creation of the events that occurred before January 1, 1952.

Article two calls on all the parties to the protocol to undertake to cooperate with the office of the UNHCR to lessen the suffering of the refugees world wide.

Article three calls on all the countries that are party to it to communicate their national policy on achieving the objectives of the protocol.

Article four talks of the settlement of dispute shall be referred to the International Court of Justice at the request of any one of the parties to the disputes involving the refugees.

³⁴ Cels J. "The Refugee Policies of Western European Government: A human Rights Challenge At Our Doorsteps" In Hill D.M. (ed) Human Rights And Foreign Policy Principles And Practice, Macmillan Press, Southampton, page 164-179

Article five talks of the way of accession. Accordingly, accession shall be affected by the deposit of an instrument of accession with the Secretary General of the UN.

Article six gives the federal clause in the case of federal or non-unitary state. It gives the federation the condition of supplying a statement of the law and practice in regard to any particular provision of the convention to be applied in accordance with the protocol.

Article seven gives the states the conditions for reservations and declarations. Any reservations made by the state shall, unless withdrawn, be applicable in relation to their obligations under the 1967 protocol.

Article eight is designed to show ways in which the protocol enters into force. It shall come to force when the deposit of the sixth instrument of accession is made.

Article nine describes ways of denunciation of the protocol by its state parties. This can be done in two states: Firstly a state can denounce it by writing a notification addressed to the Secretary General of UN. Secondly such denunciation shall take effect for the state party concerned one year from the date of which the Secretary General of UN received the notification.

Article ten says that notifications by the Secretary General of UN shall inform the states referred to in Articles five above of the date of entry into force, accessions, reservations and withdrawals of reservations to and denunciations of the protocol.

Article eleven talks of the deposits in the archives of the secretariat, which are five official languages of UN. The languages are Chinese, English, French, Russian and Spanish. The Secretary General then sends the copies to all the state parties.

2.1.11 State Parties With Reservation Toward The 1967 Protocol

Not all countries fully accepted and acceded to the protocol. Some had reservations. From Africa eleven countries had reservations; they were Tanzania, Somalia, Rwanda, Swaziland, Uganda, Malawi, Ethiopia, Ghana, Congo-Brazzaville, Angola, Burundi, Botswana and Cape Verde.

From Europe eight state parties had reservations. They were Israel, Luxembourg, Malta, Netherlands, Portugal, Turkey and the United Kingdom.

China and Republic of Korea were the only two countries that had reservations from Asia. USA on the other hand was the only country from North America to have reservations towards the 1967 Protocol.

2.1.12 Examples of Reasons that States cited in adopting Reservations to the 1967 Protocol

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 1 of the present protocol of any provisions of the convention other than those contained in Articles 1,3,4,16(i) and 33 thereof, provided that 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 applied.³⁵

Angola had its reservation in the protocol's instrument of accession to the protocol. The government of Angola declared, in accordance with Article VII paragraph that it does not consider itself bound by Article IV of the protocol, concerning settlement of disputes relating to the interpretation of the protocol.

³⁵ Grahl-Madsen .A. (1996) op cit page 69

Chile had the reservation because of the article 34, the Government of Chile will be unable to grant to refugees facilities greater than those granted to aliens in general, in view of the liberal nature of Chilean naturalization laws.

The government of China declared that it did not consider itself bound by any Article IV of the protocol regarding the settlement of disputes.

Netherlands adopted the reservation because of the article vii of the protocol. All Reservations made by the Kingdom of the Netherlands upon signature and ratification of the convention relating to the status of refugees, which was signed in Geneva 28 July 1951, are regarded to apply to obligations resulting from the protocol.

For USA the instrument of accession contained the reservation in respect of the application of the convention, in accordance with Article 1 of the protocol.

2.1.13 1969 OAU Convention On Refugees

When it was drawn up, the UN Convention was widely regarded as a Western document that had little or no relevance to the African refugee situation.³⁶ The 1951 Convention and the 1967 Protocol reflected a Euro-American centered perspective of the concept of refugee that was derived following the Second World War.

This perspective viewed refugees as a one-time problem that requires a one-time solution: the 1951 Convention. The UN Convention provided a universal definition's strength lays in the fact that it concentrates on individuals and their rights regarding refugee status and protection.

³⁶ Onyango J. (1986) "Plugging the Gaps: Refugees, OAU Policy And The Practices of Member States In Africa" US Committee For Refugees, Washington. D.C. page 4

However as Godwin-Gill notes, the UN definition has a weakness that can be exploited when migrants have a less well founded "...fear of persecution..." that allows them to be more easily excluded from official recognition and its benefits, should a host nation wish to exclude them.³⁷

One type of migrant who is most likely to be excluded by the UN definition is the so-called economic refugees. Although some refugee migrations do have strong roots in economic factors, people who use the lack of economic opportunities as a reason for claiming refugee status are often denied that status.³⁸

Patron³⁹ argues that this discrimination originates in an abnormal separation of politics from economics and it is peculiar to the developed world, particularly the United States. This separation is then used to justify the position that politically motivated refugees are legitimate, while economically motivated ones are not.

Probably this is why Sylvia Hewlett says that America has a duty it's on unemployed and poor before considering others.⁴⁰

In the years preceding the formation of the OAU in 1963, many African peoples were trying to achieve liberation from European colonial powers. During this period, Africa's refugee population began to grow rapidly. By 1967, it is estimated that one-half million people had been displaced outside their home countries.⁴¹ In this early phase of the post-colonial era, most African refugees were the product of anti-colonial struggles.

³⁷ Goodwin-Gill .G. (1996) "International Law And The Detention Of Refugees And Asylum Seeker" In *International Migration Review* 20 (2) pages 193-219

³⁸ Schuthesis .M. (1984) *Refugees In Africa: The Dynamics of Displacement And Repatriation*. OUP, Oxford, page 113

³⁹ Patron .W. (1993) *Post-War Population Movement In Mozambique* United Nations Departments For Humanitarian Affairs, New York, page 4

⁴⁰ Hewlett S.A. (1981) "Coping With Illegal Immigrants in Foreign Affairs, Winter 1981/82 pages 361-362

⁴¹ Onyango .J. op cit

Apart from the UN Convention, which had deficiencies, no legal instrument officially protected refugees on the continent at that time to show solidarity with people still under the colonial domination, the OAU decided to establish its own wide-reaching refugee policy.

In 1969, the sixth-session of the OAU adopted its own protocol for refugees. The OAU protocol incorporated the 1951 UN Convention on refugees, but expanded the definition of who is a refugee. In addition to including the UN definition of a refugee, the OAU definition includes anyone who: - "... through aggression, occupation, foreign domination, or events gravely disturbing public order in part, or in all of his country of origin, or the country of which he has nationality is obliged to leave his usual place of residence to seek refuge outside his country."⁴²

The intention of the OAU definition was to extend refugee status to persons fleeing colonial domination and anti-colonial warfare. The OAU definition was worded in such a way as to make it easier for a nation to extend immediate protection of refugees status to a large group of people at once who were fleeing colonial oppression. At this time there were only 900,000 who were expected to return home quickly after independence.⁴³

Unlike the UN definition, which places the emphasis on individual's persecution, the OAU definition concentrates on groups of people who are at risk during a conflict.⁴⁴ More recently, the clause providing status for those fleeing events gravely disturbing public orders has provided Africans with the most liberal definition of refugee in the world.

⁴² OAU 1969, Article 1

⁴³ Bakwesegha .C. (1995) "Forced Migration In Africa and The OAU Convention" in Adelman .II. (ed) (1995) African Refugee: Development Aid And Repatriation, York Lanes Press, Ontario Pages 3-20

Article three of the convention prohibits the use of the protection of refugee status in one country as a base for subversive activities against another OAU member state. This provision is in line with the convention's pretext that acceptance of refugees by a state should not be regarded as a hostile act by the state that generated the refugees.

Ideally, the granting of asylum should be a neutral decision, not influenced by inter-state rivalries. In reality subversive activities and sometimes outright hostilities do occur across frontiers. The most recent notable example of refugee using one country as a base for subversion of another occurred in Rwanda in 1990. In November of that year, Rwanda Patriotic Front (FPF), consisting mainly of Rwandan refugees from Uganda, crossed into their homeland and seized the control of the nation.⁴⁵

Article five of the OAU Convention specifically addresses the question of durable solution for the refugees. The Convention assumes that voluntary repatriation should be the ultimate solution for African refugees. Once the conflict that generated the refugees has ended, signatories to the convention must work towards the promotion of voluntary repatriation. Bakwesegha says that explicit provision is made of the refugee themselves to determine the time and manner to return.⁴⁶

The OAU definition of a refugee does not specifically address the economic aspects of refugee migrations. However, the convention's section dealing with "...events seriously disrupting public order..." Does provide a window for the granting of refugee status to some "economic" refugees.

⁴⁴ Holborn .I. (1975) *Refugees: A Problem of Our Time: The Work of UNHCR*. Scarecrow Press, New Jersey, page 189

⁴⁵ Kniddu-Makubuya .I. (1995) "Voluntary Repatriation by Force : The Case of Rwandan Refugees in Uganda" pages 143-158

⁴⁶ Bakwesegha op cit page 11

The OAU Convention, like the UN Convention and Protocol does not provide recognition for internally displaced refugees. Both the OAU and the UN recognize the state's authority to be paramount regarding matters within their own frontiers.

International protection and assistance cannot be officially provided to an internally displaced population without the agreement of an internationally recognized government.⁴⁷

⁴⁷ Schuthesis op cit page 8

3.0 CHAPTER THREE

3.1 A CRITIQUE OF THE 1951 GENEVA CONVENTION ON REFUGEES

3.1.1 Introduction

As the UN Refugee Convention passes its 52nd anniversary the nature and scope of the international refugee regime continues to be a matter of debate.

It is often said, with justice, that the 1951 Convention is the foundation of refugee protection, of the one truly universal instrument setting out the baseline principles on which the international protection of refugees has to be built.

This chapter will attempt to look at the contribution of the Convention as well as its loopholes in addressing the refugee crisis to date.

3.1.2 The Need For An International Refugee Regime

The refugee problem is an international problem that transcends well beyond borders. Its solutions therefore need to be international in approach. An international refugee regime has been necessitated by the need to protect the sanctity of human beings; preservations of human rights, to have a unified and an internationally accepted way of dealing with asylum seekers and finally to deal with the causes of refugee with a view of tackling them at the root.

Many countries who were the prime movers of the formation of UNHCR like Britain have been accused of not taking the resolutions seriously⁴⁸ thereby rendering the regime toothless and punching holes into its credibility.

Koffi Annan, the Secretary-General of UN once said that: “The World is full of problems without passports. Problems across international frontiers including drug, human trafficking, refugees, security crises, the environment, climate change, money laundering and now terrorism are problems that no one country can solve on its own. This range of problems need solutions without visas.”⁴⁹

Falk and Black⁵⁰ echoes Annan’s sentiment by stating that the purpose of “International Law is to devise and maintain a system of order for the global family of nations. According to them also, the problems that transcend national boundaries need an international approach to tackle.

Francis Deng and Dennis McNamara argue that sovereignty constitute a serious constraint in shaping international responses to problems such as refugees and terrorism. This is because it is a barricade against international scrutiny and humanitarian action.⁵¹ An alternative view might argue that the principle of sovereignty is a valuable one for the weak in an international system when powerful states ignore it to further their own interests.

⁴⁸ Beil .D. “The Future World Disorder: The Structural Context of Crises in Foreign Policy Number 27 Summer 1977 page 23.

⁴⁹ <http://www.refugees.org/news/factsheets/refugee.htm>

⁵⁰ Falk A.R. & Black C.E. (eds) (1969) The Future Of The International Legal Order Vol. I: The Trends and Patterns. Princeton University Press, Princeton, Page 2

⁵¹ Deng .F. and McNamara .D. In Black .R. (1988) (ed) Refugee: Environment and Development. Longman Development Studies, London Pages 4-5

The protection that the international regime extends to refugees is a response to the specific needs of people who have good reason to fear that their own government cannot or will not safeguard their rights. It provides a temporary or short-term substitute for national protection, until refugees can either return to their country of origin or form a new and durable relationship with a government that will protect them as permanent legal residents or citizens. Above all, international protection is meant to prevent refugees from being returned against their will to a place where they reasonably fear being persecuted.

For refugees the normal means of international protection is the institution of asylum, by which refugees gain access to the territory of a state that will accord them the same civil and economic rights just as other legal residents without discrimination. This includes such key elements of national protection as physical security, access to the courts in case they are attacked or their rights are violated, and protection against economic exploitation. The International regime for refugee protection ensures that a refugee is no worse off than the citizen or legal migrant in the country of asylum.

Many other writers have emphasized the need to have an international regime or system to solve crisis that go beyond international frontiers.

Clark and Sohn demystify sovereignty by saying that pure nation-state system models needs revision or replacement, even if the alternatives to it are entirely clear. As we have seen in incomplete evidence, global inter-dependence is hardly of such uniform nature that the only logical alternative to the nation-state system is a world-government model of world politics.⁵² Many states however, have not been following the dictates of the international treaties they ratify. This is because to them national interests overrides the

⁵² Clark .S. and Sohn .P. (1967) World Peace Through World Law, 3rd ed, Cambridge university Press, Cambridge, page 187

need to adopt an international regulation. USA and Britain have been constantly accused of turning away millions of refugee seekers. Others like Uganda, Kenya are yet to enact domestic laws to implement the resolutions of the 1951 Refugee Convention clearly therefore sovereignty has hampered the development of international legal regimes on refugees.⁵³

The international regime has provided safety to many millions of refugees since the last century. The number recognized a refugees meeting the terms of the 1951 Convention or otherwise falling within the mandate of UNHCR peaked at about 18 million in 1993, which did not include the nearly 4 million Palestinian refugees who have been assisted by the UN Relief and Works Agency rather than UNHCR since 1948.⁵⁴

At the beginning of the year 2000, the US Committee for Refugees reckoned that there ware some 14.1 million people in need of international protection, counting the Palestinians and many asylum seekers not included in UNHCR figures, if displaced people who remain within the borders of their own countries are added, the figure rises to almost 35 million.⁵⁵

It is important to appreciate that the international regime is bound to possess a decentralized form of legal order that corresponds to its decentralised social and political structures. This is to say that even the International Protection, mechanisms for the refugees must have support of the domestic laws of the various countries that have ratified it.

⁵³ <http://www.unhcr.bg/press/b-arm-06820002-en>

⁵⁴ UNHCR, (1995) The State Of the World's Refugees. In Search of Solutions, Oxford University Press, 1995 Page 1-4.

⁵⁵ US Committee for Refugees (2000) World Refugee Survey, USCR, Washington Page 41

A strong record on international protection arises from three factors: access to protection, quality of protection, and respect for the principle of non-refoulement states. Hosting refugees in large numbers places a considerable burden on the country of asylum. States have been most willing to shoulder this refugee burden when they have had a motive for doing so beyond devotion to refugees protection; support for the political cause in which the refugees are embroiled, sympathy for displaced co-ethnics or co-religionists, a desire to score political points at an adversary's expense, or a need for human resources. Resettlement of European refugees after World War II was relatively easy to arrange, in part because the United States, Canada, Australia and other countries saw the need for an international regime for the protection of refugees.

Throughout Cold War era, the overwhelming majority of refugees accepted into the United States originated from its Cold war adversaries in Eastern Europe, Cuba, and Indochina. Here in Africa and even internationally as well welcomed South African exiles in the apartheid era as a demonstration of their solidarity with the anti-apartheid struggle. In the 1990's Albania welcomed ethnic Albanian refugees from Kosovo at considerable cost and peril to its own security. Indeed Kenya having recognized the importance of the international regime has been receiving refugees often at the expense of its own security.

In situations in which the international regime is weak or absent, however, potential countries of asylum have gone to considerable lengths to deflect refugees and asylum seekers. South East Asian countries in the late 1970's and 1980's drove refugee boats from Vietnam away from their shores and into grave peril on the high seas until Western countries agreed to remove the refugees for resettlement elsewhere. The United States intercepted Haitian asylum seekers in the Caribbean in the 1980s and early 1990s and returned them directly to Haiti, charging that they were economic migrants rather than people fleeing persecution. Also in 1991, Turkey refused to grant entry to hundreds of

thousands of Kurds who massed on its borders under attack from Iraqi government force.⁵⁶

The countries of Western Europe have erected what one analyst described as a 'paper Berlin Wall' of visa requirements, carrier sanctions, and regulations designed to keep unauthorized entrants from eastern Europe and the developing world from claiming asylum in the European Union.⁵⁷

The importance of international regime for the protection of refugees is also seen in the efforts of Western industrialized states. Collectively they have experimented with a series of alternatives to asylum. These include "safe havens" established in northern Iraq and in former Yugoslavia, and temporary admissions, from Bosnia to Germany, for example, that offer less security and stability than traditional asylum status. At the same time, they have realised obstacles to admission and narrowed the interpretation of who qualifies for refugee status. The result of these and other measures is that uncounted numbers of people who have a well-founded fear of persecution are unable to get a place of safety where they may enjoy international protection.

The international community has pursued three kinds of durable solutions for refugees: repatriation, permanent integration into the country of first asylum and resettlement to a third country. Each of the three has at times been viewed as the preferred solution.

The effectiveness of international response to refugee issue has largely depended on the mix of interests, values, capabilities, and engagement that the powerful states have brought to bear on each refugee-producing situation. Since the end of the Cold War, the consensus among the western industrialized states on the purpose and value of the

⁵⁶ Bill Frelick, "The Year In Review" In *World Refugee Survey 1997*. USCR, Washington D.C. Page 14

⁵⁷ *ibid*

traditional methods of refugees protection has eroded, robbing the regime of its coherence.

Lately there has been a move towards a new approach to international protection build around prevention and sparing people the pain of exile. Human rights is an agenda in many international fora. This is tied to closely linked to the treatment that refugees undergo when they seek asylum. The inter-connectedness of the world has made the protection of the refugee a priority.

It is therefore correct to conclude by saying that the agenda for international need to protect refugees is heavily shaped by the crisis of the day and the political interests that powerful states have in it. Long –running refugees situations tend to fall lower on the agenda of policy concern. For instance the decades long wars like the Sudanese civil war do not attract as much attention as the Liberian crisis precipitated by the rebels attack on the Charles Taylor led government.

3.1.3 The Contribution Of The 1951 Geneva Convention In Dealing With The Refugee Crisis

Since its birth in 1951 Geneva Convention on refugees has had numerous ups and downs. The need to address the plight of refugees has been an international agenda for a long time. However, UN through UNHCR has intensified its fight for the refugee rights especially after the ratification of the 1951 Geneva Convention. In its 52nd year since birth the Convention has had numerous successes, albeit, with some shortcoming here and there.

It is therefore often said, with merit, that the 1951 Convention is the foundation of refugee protection. The Convention has a legal, political and ethical significance that

goes well beyond its specific terms: legal in that it provides the basic standards on which principled action can be founded; political in that it provides a truly universal framework within which states can cooperate and share the burden resulting from forced displacement; and ethical in that it is a unique declaration by many states parties of their commitment to uphold and protect the rights of some of the world's most vulnerable and disadvantaged.

Recent developments have probably justified the importance of the 1951 Geneva Convention. For instance in Amman, Jordan, in May 2000, 648 parliamentarians from 124 countries around the world reaffirmed the centrality of the Convention to asylum systems today; EU leaders meeting in Tampere, Finland, followed suit as have the 56 governments members of UNHCR's Executive Committee.⁵⁸

Indeed many countries are still continuing to accede to the Convention and state parties continue to promote accession. Denmark was the first country that ratified the 1951 Geneva Convention. Fifty years later 140 countries, almost three quarters of all countries in the world, were state parties to the 1951 Convention.

The former UNHCR Commissioner, Sadako Ogata⁵⁹ while addressing the Executive Committee in Geneva in the fall of 2000 said that by 2000, UNHCR had helped estimated 50 million people, either to return to their original homes or to resettle in adopted countries where they often rose to position of prominence or became good citizens as doctors, teacher and professional workers.

Since the Convention begun operating in 1951 the original mandate as well as the geographical definitions have evolved with time. This has consequently seen new operational approaches to deal with the ever more complex issues of the refugees.

⁵⁸ Feller .E. (2001) "The Convention at 50" In Forced Migration Review" Page 6

⁵⁹ http://www.digitalnng.org/archive/2000_fall/refugee.htm

According to Sadako Ogata the UNHCR adopted the following approaches in order to succeed.⁶⁰ It helped in searching for international peace and security; resolving refugee problems; protecting refugees; challenges for humanitarian relief and networking and partnership with other organizations like Red Cross.

The 1951 Convention was never, however, conceived only as an instrument or permanent settlement, much less for migration control. It was drafted to become the global, multilateral, standard-setting agreement on how to protect individuals in need of protection. The inability of states to control their borders or to deport aliens with no valid claim to continued residence on their territories should not be blamed on the Convention.

The fact that the mandate of UNHCR has been renewed throughout since its formation is a further proof of its contribution.

Also the 1951 Convention has entrusted UNHCR with supervisory functions to allow it to closely collaborate with state parties to implement the provisions of the Convention. For instance in Western Europe, UNHCR is directly involved in certain national status determination procedures (for example in Spain and France), consulted in the framework of the E.U. harmonization process and associated with the development of refugee-related legislation. UNHCR also remains involved in many of the new member states of the council of Europe, trying to develop asylum systems and standards respectful of the 1951 Convention. This has been done through dissemination and promotion of the 1951 Convention, as well as training for, inter alia, government officials, lawyers and judges in the concerned states.

⁶⁰ Ogata Sadako at http://www.digitalnpg.org/archive/2000_fall/refugee

In recognizing that the refugee problem is universal in character and that creating responses to address many of today's issues is best approached on the basis of multilateral cooperation, UNHCR in October 2000 launched a process "Global Consultation on International Protection".⁶¹ This was a multilateral initiative aimed at promoting the full and effective implementation of the Convention, and at developing new approaches, tools and standards to ensure its continuing vitality and relevance. States worldwide expressed a high level of interest in and support for the global consultation.

It is therefore evident that the 1951 Convention relating to the status of refugees is the cornerstone of the international protection regime. It impacts on the sovereign right to regulate entry across borders but it does so in order to introduce a needed exception for a specified category of people. UNHCR can sympathize with the concerns of states that asylum should not be frivolously resorted to and should not be abused. The Convention itself has safeguards against these risks and states have other means to limit this possibility.

Indeed even the fact that UNHCR has spread its wings to cover not only the Conventional refugees but the Internationally Displaced People (IDPs) as well as further testimony that indeed the 1951 Convention is not obsolete but instead is very dynamic and has continued to alleviate the sufferings of the refugees and internally displaced people alike.

In assessing the contribution of the Convention to the refugees today, it is also important to note that the situation facing refugees today is especially perilous. The result has been a proliferation in technologies of control such as detention and strategies of exclusion that are rapidly undermining and in many cases effectively criminalizing the

⁶¹ Feller .E. (2001) "The Convention at 50" In Forced Migration Review April 2001 Page 6-9

culture of asylum. This is totally different from the time UNHCR was formed where refugees were viewed more as a resource rather than a cost. Firstly, many countries like USA and Britain attracted refugees and made deliberate efforts to particularly get refugees from the communist block to prove their superiority over the block. Secondly some refugees came with unique skills that were first infused into the national fibre of the receiving countries. A case in point are the thousands of Jews who went to the USA creating a wealthy and politically influential groups.⁶²

Consequently, says Lillich, the 1951 Geneva Convention has only become a tool of ensuring that persons who become refugees receive reasonably humane treatment at their (often reluctant) hosts. According to him “the Convention cannot be accused of not eradicating the refugee problem since dealing with the root problem which cause persons to become refugees is more a matter of politics than of law, progress, unhappily, has discouragingly slight in the refugee area.”⁶³

Therefore it is right to conclude that the Convention has contributed a great deal to the refugee problem. However, it is no panacea for all the problems of displacement. Root causes are outside its scope.

3.1.4. The Failures Of The 1951 Geneva Convention

Whereas the Convention has had a reasonable degree of success it has not missed its share of criticism. One such criticism is that the authors of the Geneva Convention did not and could not foresee that, on the other hand, for people seeking to improve their lot the refugee status would constitute the only available ‘asylum door’ to immigration

⁶² Beil ./D. (1977) “The Future World Disorder: The Structural Context Of Crises” In Foreign Policy Number 27 Summer A77 page 321.

⁶³ Lillich .R. B. (1984) The Human Rights Of Aliens In Contemporary International Law, H.M. Johnson, San Francisco page 63

while, on the other, states would attempt to it as an instrument of immigration control. The reasons for this contestation seems to be connected with the increasing number of persons seeking asylum, the increase of immigrants smuggling, the presumption that the majority of asylum seekers are economic migrants not refugees.

Indeed major European powers as well as the United States have constantly viewed asylum seekers from the developing countries not as genuine refugees but as self-seekers aiming to move abroad to secure greener pastures. Consequently there has been a lot of complaints from the asylum seekers saying that they are mistreated contrary to the 1951 Geneva Convention.

Secondly, curiously, one of the feature most associated with refugee crises in the public mind is not mentioned at all in the 1951 Convention or the UNHCR statute: humanitarian assistance to refugees. It was assumed initially that host countries would manage relief needs independently. In the early post war years, material aid to refugees was subsumed under post-war reconstruction and aid to the general populations of devastated Europe.

In the 1950s, the international community did little to assist refugees who fled from China to Hong Kong after the communist victory on the mainland, or for Tibetan refugees fleeing to India. It was not until the 1960's, as UNHCR and other humanitarian organizations became more active in the developing world, that the need to provide material assistance to refugees became inescapable. In the last quarter of the twentieth century and into the twenty-first, humanitarian assistance is one of the dominant forms of response to refugee crises.

Other critics like Loescher, have contended that UNHCR statutes and the 1951 Geneva Convention have moved away from its fundamental core objective of protection, to stressing relief and assistance. They point out to UNHCR management culture accords declining importance to the culture of protection. Protection needs to be restored as

UNHCR's central concern. It is generally believed that UNHCR has deviated from its path under the influence of donor pressure alone. The argument therefore is that UNHCR dependence on donor countries does not make it a suitable organization for exercising that supervisory role. The decision of major donor countries to deny funds is inherently political.⁶⁴ For instance the European Union which as a group contribute substantially to the operations of the UNHCR and other Human Rights activities have made it extremely difficult for asylum seekers especially from the Third World.

Another accusation of the ineffective nature of the 1951 Geneva Convention is that it is still firmly rooted in the context of the Cold War,⁶⁵ the geopolitical consents of the Western allies and the traditions of state sovereignty. The European concept of the neutral and impartial humanitarianism, as embodied in the earlier refugee regimes was grafted onto what was a highly state-centric refugee regime. At the end of the World War II, the Western allies recognized the potential for political disorder that unresolved refugee problems can bring, and they were willing to sacrifice a small part of their prerogatives as sovereign states to manage this element of the dangerous situation in Europe at the end of the war. As the aftermath of the hot war quickly merged into the beginning of the Cold War, the values of a set of humanitarian instruments that were formally designated as non-political yet were adaptable to making political points was appreciated.

This uneasy relationship between humanitarian needs and political objectives has been a constant in the management of refugees crises for the subsequent half-century leading to today. Politically strategic refugees like the Afghanistan (2001) Iraq (2003) as well as the Liberia (2003) are given humanitarian priority over those considered less politically attractive refugees like the ones from Sudan to Kenya or from the Great Lakes Region.

⁶⁴ Loescher .G. (1993) Beyond Charity: International Cooperation And The Global Refugee Crisis, Oxford University Press, Oxford page 217

Given that part of the current chaos in Europe comes from wildly differing interpretations of what constitutes effective protection for refugees, an analysis of the present situation in the EU can provide insight into what a solution might be at global level. One of the main flaws of the 1951 Convention is reflected in the current crisis in the EU. All EU member states are signatories to the Geneva Convention, yet procedures for processing applications and the treatment an asylum seeker can expect differ by country. At present there is a lack of coherence and consistency in interpretation and application. Some countries like Brazil, Libya and France among others have fully ratified and implemented the 1951 Refugee Convention. Others like Uganda, Kenya and Britain are yet to come up with domestic legalisation to implement the resolutions of the 1951 Refugee Convention.

In 1999 the UK recognized 72.5% of asylum applications as genuine, while Germany recognized 13.5%, France 19.3% and the Netherlands 15.6%. This disparity has led to an increase in the phenomenon known as 'asylum shopping,' where, when an applicant claim is rejected in one country, he moves to another in a bid to make a fresh claim.⁶⁶

Alternatively, the asylum seeker does not make his application in the first EU member state that he arrives at but has another destination in mind because of a comparatively better deal accorded there to asylum seeker.

This situation arises from the obligation that the Geneva Convention places on it signatories to give due consideration to any application, no matter how ill founded. This has subsequently led to a large increase in the number of economic migrants claiming asylum because it buys them time. The final result is a huge backlog in the system that undoubtedly delays consideration of genuine cases.

⁶⁶ <http://www.worldlink.co.uk/stories/story> Readers

One Bulgarian Army Newspaper, Slavimir Genchev, says that the Geneva Convention's flaws allow abuses of the system to polarize the debate. Across Europe, asylum and immigration are hot topics, but for all the wrong reasons. According to him, following the 1951 Convention to the letter may have a series of negative impact in the entire international politics.⁶⁷ Asylum has been politicised and in most cases refugee seekers are humiliated and sometimes arrested.

The Convention has also been accused of lacking mechanism to compel a state to comply with its obligations as a signatory. Therefore, UNHCR, other states, and refugee advocates must rely on diplomatic pressure, persuasion, and incentives to encourage reluctant states to implement provisions for international protection. UNHCR assists states to comply by offering training to their officials and mobilizing resources to develop their protection infrastructure. It then monitors compliance and gives feedback to governments on their performance.

The office of the High Commissioner for Refugees has been much criticized for going a long too easily with some of the innovations in refugee protection, such as temporary protection and in-country protection, which have proven in specific instances to be unsatisfactory in filling the commitments of the Refugee Convention. The office is urged by refugee advocates to stand firm on the Convention.

There has even been, in some states like Kenya, a gradual movement away from a right-based approach to refugee protection altogether, with a growing preference by their governments for discretionary forms of protection that provide lesser safeguards and fewer rights to people of refugee concern. The notion of the 'safe country' or the concept of the 'internal flight alternative' rather than serving an evidentiary function within a full refugee status determination process, are coming to constitute the rationale for non-resort to the Convention procedures in the first place.

⁶⁷ Genchev .S. in "Bulgarian Army Newspaper" 06 August 2001, page 11

Hill .M. D. posits that the Convention view refugees as a transitory phenomenon that will someday disappear without political intervention. International officials, therefore, are inclined to avoid raising delicate political concerns when dealing with humanitarian issues for fear of over-stepping their mandate or damaging relations with sensitive governments, many whom would consider political intervention as interference in their internal affairs.⁶⁸ There is a very thin line between politics and the demands of non-political stance from the 1951 Convention.

The case of refugees in South Asia probably exemplifies the pitfalls of the 1951 Geneva Convention. Since 1947, thirty-forty million people have crossed the border of South Asian states in search of refuge and almost every country has produced and or received refugees.⁶⁹ The region continues to be an area of major refugee flows and against a backdrop of burgeoning social, economic and ethnic tension, the issues relating to these population movements are likely to become more complex. The increase in refugee flows has been accompanied by a growing reticence of states to provide asylum.

Apart from the political and security considerations, receiving states have become increasingly weary of the adverse economic, social and environmental consequences that accompany refugee flows. Present evidence suggests that the number of refugee particularly in parts of the Third World, are likely to increase population explosion coming into conflict with finite resources especially in areas of ecological destruction through deforestation, soil erosion and desertification, international insecurity as well as increased social tensions.

In addition, however, the ever more restrictive asylum policies of a growing number of Western countries have dampened the interest of some countries in the region.

⁶⁸ Hill .M. D. (eds) (1986) Human Rights And Foreign Policy: Principles And Practice. Macmillan Press, Southampton page 132

⁶⁹ Wijeratne .S. .S. (2000) Towards National Refugee Laws In South Asia RMMRU, Dhaka

B.S. Chimni has, therefore, agreed that “South Asian states should refrain from acceding to the Convention as the instrument is being dismantled by the very states which framed the Convention, and that any talk of accession should also be linked to withdrawal of measures that constitute the non-entrée and temporary protection regime.”⁷⁰

Gill Loescher criticizes the performance of the Convention so far but excuses this on the absence of an autonomous resource base for UNHCR and the limited mandates and competencies of the organization continue to limit its response to future refugee crises just as they have done since 1951.⁷¹ UNHCR is consequently not mandated to intervene politically against governments or opposition groups; even here there is clear evidence of human right violations that result in forcible displacement.

In civil war situation, UNHCR staff is often unfamiliar with human rights and humanitarian laws and are uncertain of how governments and opposition groups will react to their interventions using these protection norms. Increasingly, the organization finds itself out of its depth and faced with security and political issues that it has neither the mandate nor the resources to deal with. This is not addressed by the Convention.

Another setback of the Convention is that its success is measured quantitatively – how much relief can be delivered and how quickly. This is to say it is measured on technical standards of aid delivery and in fulfilling the material needs of refugees and threatened populations.

⁷⁰ Chimni .B. S. (1998) *The Law And Politics Of Regional Solution Of The Refugee Problem: The Case of South Asia*, Regional Center for Strategic Studies Colombo, page 12

⁷¹ Loescher .G. *ibid*

3.1.5 The 1951 Geneva Convention: Conclusion

Millar J. B. and Ward R. underscore the importance of an international regime by arguing that Conventions and rules governing international discourse are very important. Governments more than people, need such procedures, for whereas people can normally avoid speaking to or dealing with one another they are so determined, governments in these times of functional interdependence can rarely do so, and usually only to their own disadvantage. This is particularly true with international problems like the refugee problem.⁷²

So if the need to have an international protection regime for the refugees is glaring and obvious, why is it that the performance of the one and truly regime, the 1951 Geneva Convention has been a mixture of failure and success? Clearly the Convention has not failed, the parties to the Convention have. Many state parties after acceding to the Convention either forget or ignore their obligations thereby rendering the Convention largely ineffective.

The future of the refugee concept and the institution of asylum will depend not only on the will to protect and to abide by international legal obligations but also on the will to deal cooperatively with migration, involving issues still considered sovereign. This is what Beil .D. means when he says, "... the nation state has become too small for the big international problems and too big for the small individual problems".⁷³

UNHCR also has an important role to play in convincing states that it is in their own interests to find satisfactory solutions to refugee problems and that they must support the 1951 Convention. As the guardian of international refugee norms, UNHCR has a role to play in reminding liberal democracies of their own identity as promoters of international human rights.

⁷² Millar J. B. and Ward .R. (eds) (1984) Current International Treaties. Croom Helm, London & Sydney Page 130

⁷³ Beil .D. "The Future World Disorder: The Structural Context Of Crises" In Foreign Policy Number 27 Summer 1977 page 340

It is difficult to reconcile the recent and abundant evidence of the failure of state responsibility, the increased incidence of violations of the most fundamental of refugee protection, the acknowledged tension between the assistance and protection agenda of UNHCR and the challenge by some governments of the authority of treaty bodies deciding on refugee rights with the view that supervision as it now stands using diplomacy and institutionalised dialogue – is sufficient. From the records it is obvious that states in all parts of the world continue to flout their obligation under the 1951 Geneva Convention.

All parties involved in refugee protection and assistance must be alert to ensuring that the quality of protection of refugees, whether they be individuals fleeing oppressions and violation of their fundamental rights or those forcibly displaced as part of a mass movement, is not left to whims of individual states.

UNHCR has rightly been criticised for not playing its mandated role in emergencies. It is for the sake of refugees, above all, that UNCR must be present, early and effectively, in emergencies. It is UNHCR's function to promote, to advocate, to oversee, to ensure, to administer, to facilitate, to support and to coordinate, hand in hand with partners – host governments, refugees and those who seek to assist be they individuals, NGOs or third country governments.

In order to succeed fully, the 1951 Geneva Convention needs the support of the donors. All donors need to publicly commit themselves to a global safety net to ensure humanitarian assistance and protection to those refugees in need. An effective burden sharing mechanism should be devised for meeting global humanitarian needs of the refugees within the available resources.

Many writers comment that the 1951 Convention has served the international community well and only needs enforcement and not rewriting. This is why Sadako Ogata said that in spite of its inadequacies, "The Convention is still the clearest symbol for the protection of the refugee rights."⁷⁴

However, Telford J. has an excellent conclusion when he says, "in order for the 1951 Convention to succeed, UNHCR will need fewer convoys and sacks of flour and more leadership in international refugee protection and assistance. UNHCR will need coordinators, strategic planners, technical experts and mature emergency managers with a clear vision of and commitment to their responsibilities towards refugees. Above all, they must have the imagination to carry them out."⁷⁵

⁷⁴ <http://www.unhcr.bg/press/bg-army-060820002-en.htm>

⁷⁵ Telford J. "UNHCR and Emergencies" In *Forced Migration Review* No. 10. April 2001

4.0 CHAPTER IV

4.1 CONFINEMENT POLICY AS A SOLUTION TO THE REFUGEE PROBLEM: A CASE STUDY OF KAKUMA REFUGEE CAMP (KENYA)

4.1.1 A Brief Political History of Kenya

The colonial history of Kenya dates from the Berlin Conference of 1885, when European powers first partitioned East Africa into spheres of influence. In 1895, the UK Government established the East African Protectorate and soon after, opened a voice in government even before it was officially made as UK colony in 1920, but Africans were prohibited from direct political participation until 1944.

From October 1952 to December 1959, Kenya was under a state of emergency arising from the “Mau Mau” rebellion against the British colonial rule. During this time, African participation in the political process increased rapidly. This was attributed to the awareness of the need to liberalise Kenya precipitated by the wave of anti-colonial sentiments echoed throughout the continent.

The first direct elections for African to the legislative council took place in 1957. Kenya became independent on December 12, 1963 and the next year joined the commonwealth. Jomo Kenyatta of Kenya African National Union (KANU) became the first president.

Since independence, Kenya has maintained remarkable stability despite changes in its political system and crisis in neighbouring countries like Uganda, Somalia, Ethiopia and

Sudan. Particularly since the re-emergency of multiparty democracy, Kenyans have enjoyed an increased degree of freedom. Consequently it has been a safe haven for many refugees who are fleeing persecution and political instability from the neighbouring countries like Uganda and Somalia.

4.1.2 The Refugee problem in Kenya

The first recorded case of refugees coming to Kenya was in the 1940's when Kenya played hosts to Hutus and Tutsi refugees from Rwanda and Burundi. They fled due to the ethnic clashes of the early 1940's that claimed thousands. According to the 46th session of the UNHCR in Geneva in 1995, most of these refugees have been integrated into the Kenyan society.⁷⁶

Until 1990, the refugee problem was inconsequential in Kenya, because of the low number the government easily smothered it away, albeit, without any legislative tool. The notable refugees that Kenya handled were the few Ugandans who crossed over during the despotic rule of Idi Amin; the nomadic Ethiopians who were looking for greener pastures during the 1984-1985 infamous drought as well as the "Walking boys"⁷⁷ of Sudan.

Because of the few numbers of the refugees, the government could easily handle it. Those who sought asylum were interviewed by an eligibility committee that included representative of the Ministry of Home Affairs and the immigration supervisory. However, this system which was based on the individual status determination began to come under pressure as the numbers of asylum-seekers increased after the skirmishes in Uganda and later on in Ethiopia and Somalia.

⁷⁶ Report by Mr. Larsen (1995) During the Executive Committee Of The Programme Of The UNHCR In Geneva

⁷⁷ This term was used by writers of refugees issues to refer to the minors who were escaping the Sudanese conflict

The war in Somalia which followed the exit of President Siad Barre resulted in over four hundred thousand refugees crossing over to Kenya. This coupled with the "Walking boys" to lead to the final collapse of the earlier system of individual-based status determination. At this particular time the involvement of foreign aid agencies in refugee matters in Kenya was very negligible compared to other countries.

The Kenya government had to come up with a strategy of attracting sufficient external resources to cope with the material needs of the Sudanese and Somali refugees. The Kenyan government to acquiesce in the conventional approach of putting refugees in camps, and provided the land for these establishments.

Somalis had their camps built around Mombasa and in Dadaab, Ethiopians had their's put up in Mandera while Kakuma camp, located in the Turkana District, was initially set-up to host the thousands of unaccompanied minors who had fled the war in Sudan. This was in total disregard to the statutes of the 1951 Geneva Convention on Refugees.

After setting up the camps, non governmental organisations were contracted to work in partnership with the UNHCR who were the ones administering the camps. Thika was the reception center for the refugees. Thus, the events of the early 1990s marked a significant shift to a new refugee regime in Kenya. On one hand more resources came in while on the other hand the positive aspects of the pre-1991 refugee regime were not preserved. For instance the knowledge and expertise learned in handling refugees was left to go to waste.

Since 1991, when the refugee numbers overwhelmed the existing structure. UNHCR has taken the whole responsibility of refugees setting up a special office in Nairobi which was administered by the Jesuit Refugee Service. It was from this office that asylum seekers received letters which gave them refugee status, the so-called 'protection letters',

and either directed them to particular camps or, in exceptional cases, allowed them to live in Nairobi, or rejected them. Those rejected are considered to be staying in Kenya illegally and are left exposed to the Kenyan Laws.

It has been very sad in that the Kenya authorities have been marginalized in refugee matters and thus lost valuable experience that they had acquired in the past. Resentment has also occurred thereby. Until recently many officials of the government thought that “refugees are UNHCR’s problems”.⁷⁸

However, recently, the government has suddenly and publicly confronted UNHCR. It has taken a drastic decision to refuse to recognize the ‘protection letter’ which UNHCR has been issuing to refugees and announced in the press that refugees appear and hand over these papers to the immigration.

According to the government official position, as a result of the suspension of status determination by its authorized body, Kenya⁷⁹ is now a transit country, where refugees are allowed to remain provided that they receive assistance from UNHCR in camps. This position is not in line with the international legal obligations that Kenya has accepted, since there is no provision in either the OAU or the 1951 Convention that allows a state to declare at some point that it has become a transit country and that it will cease to give refugees any legal recognition.

UNHCR today cares for 213,050 refugees living mainly in two camps in Kenya: Dadaab and Kakuma.⁸⁰ It consequently demanded that refugees appear and hand-over these papers to the immigration. In recent years there have been the following refugee inflows

⁷⁸ Verdirame .G. “Human Rights And Refugees: The Case of Kenya” in Journal Of Refugee Studies Vol. 12, No. 1, 1999. Page 58

⁷⁹ The East African, 7 September 1998 page 11-12

⁸⁰ Vardirame .G. op cit page 58-59

to Kenya. In late January 2001 there was an influx of Tanzanian refugees from Pemba Island into Kenya, following political disturbances on the island. The refugees were temporarily hosted in Shimoni for a period of three and a half months under the care of UNHCR.

In March 2001, there was an influx of Somali refugees from Bula Hawa (South-West Somalia) to the border town of Mandera (North-East Kenya). Initially there were more than 17,000 persons, 10,000 of whom were assisted by UNHCR Kenya to return home. There is still some left who need assistance.

In 2001, Kenya also received a great number of refugees from Ethiopia. Following the university student's demonstration in Addis Ababa, in mid-June 2001, a number of University students and military personnel fled to Kenya. This group of some 253 to date remained in Kenya until 2002.⁸¹

That same year also saw thousands of Sudanese refugees to Kakuma Camp. They were escaping the continued conflict in Southern Sudan. Analysts estimated that the rate of influx was about a thousand refugees per month translating to a population increase of twelve thousand at the Kakuma Camp.⁸²

⁸¹ UNHCR 2002 Global Appeal page 81

⁸² *ibid*

The table below shows the planning figures for the number of the refugees in Kenya:-

Table 1⁸³

Planning Figures

POPULATION	JANUARY	DECEMBER 2002
Somali Refugees	129,500	123,400
Sudanese Refugees	70,000	83,200
Ethiopian Refugees	5,600	4,454
Ugandan Refugees	5,378	5,190
Other Refugees	3,418	3,500
Total	215,050	220,950

Analysis of the Table

There was no marked discrepancy in numbers from January to December, 2002 for the Ethiopians, Ugandans and other refugees. This could be attributed to the fact that the reasons for their fleeing initially had not changed.

On the other hand, Somali Refugees decreased by over six thousand. This could be attributed to high mortality rate as well as others opting to go back.

⁸³ ibid

Sudanese refugees increased by over thirteen thousand. This could be attributed to the increase in the war between the SPLA and the Khartoum Government.

4.2 A Summary Of The Universal Declaration Of Basic Human Rights

Gradually, in the course of social evolution, a consensus from among nations and people that certain practices can no longer be tolerated. Ritual human sacrifice is an example; slavery too, has been largely abandoned; physical torture is widely condemned by most nations. Vestiges of these practices may continue, but those are aberrations that further underscore the fact that the world has turned against these practices. This is the reason, the international community in 1948 had the Universal Declaration of Human Rights.

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law. The General Assembly of the UN proclaimed that every member country must pledge themselves to achieve, in cooperation with the United Nations the promotion of universal respect for an observance of human rights and fundamental freedoms.¹⁰²

Article 1 says that all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

¹⁰² Frank T.M. (1982) Human Rights In Third World Perspective, Volume 3, Oceana Publication, New York, Page 7

Article 2 says that everybody is entitled to his rights and freedom. No distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs.

Article 3 says that everyone has a right to life, liberty and security of person.

Article 4 says that no one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

Article 5 says that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 6 says that everyone has the right to recognition everywhere as a person before the law.

Article 7 says that everybody is equal before the law and are entitled without any discrimination to equal protection of law.

Article 8 says that everyone has the right to an effective remedy by the competent national tribunals for acts violating fundamental rights granted by the law.

Article 9 says that no one shall be subjected to arbitrary arrest, detention or exile.

Article 10 says that everyone is entitled in full equality to a fair and public hearing by an independent tribunal in determination of his rights and obligations.

Article 11 says that everybody charged under a penal code is innocent until proven guilty.

Article 12 says that no one shall have his home, correspondence or privacy subjected to an arbitrary interference.

Article 13 says that everyone has the freedom of movement and residence within the borders of each state.

Article 14 says that everyone has the right to seek and enjoy in other countries asylum from protection.

Article 15 says that everyone has a right to nationality. Nobody should be denied the right to change his nationality.

Article 16 says that mature people of age are free to start family and they are equal in marriage.

Article 17 says that everyone has the right to own property alone as well as in association with others.

Article 18 says that everyone has a right to freedom of thought, conscience and religion as well as the freedom to change religion or belief.

Article 19 says that everyone has the right to expression without any interference.

Article 20 says that everyone has the right to freedom of peaceful assembly and association.

Article 21 says that everyone has the right to take part in the government of his country directly or indirectly.

Article 22 says that everybody has the right to social security and is entitled to realization, through national effort and international cooperation and in accordance with the organisation and resources.

Article 23 says that everyone has a right to work and choose the type of employment he wants to pursue.

Article 24 says that everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article 25 says that everyone has a right to a standard of living adequate for the health, well-being, food, shelter, medical care and other social services.

Article 26 says that everyone has a right to education. Education shall be free, at least in the elementary and fundamental stages.

Article 27 says that everyone has a right to participate in the cultural life of the community to enjoy the arts and to share in scientific advancement and its benefits.

Article 28 says that everyone is entitled to a social and international order in which the rights and freedoms set forth in the declaration can be fully realised.

Article 29 says that everyone has duties to the community in which alone the free and full development of his personality is possible.

Article 30 says that nothing in the declaration may be interpreted as implying for any state, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

4.3 The UNHCR Protection Letter

Currently the only document which refugees can currently obtain for identification and protection in Kenya is the UNHCR Protection Letter. The letter is an A4 size sheet of photocopy paper with a passport-size photo of the asylum-seeker with his/her name and those of other members of the family. Normally it states that the bearer is recognized by the UNHCR as a refugee in Kenya. On the same card the bearer is also instructed to report to one of the existing camps on a given date. However, a number of people have letters which state that they can reside in towns on medical or educational grounds.

However, due to the absence of a proper procedure to confer recognized status on refugees and due to the chronic failures of the Kenyan justice system, the UNHCR protection letters have not offered the refugees with ideal protection. Consequently, refugees have resorted to unorthodox ways like bribery.' And "personal contacts with influential personalities within the government,"⁸⁴ among other ways.

⁸⁴ Verdirame .G. (1988) Final Report To The Ford Foundation. Refugee Studies Programme, Oxford, page 59

4.4 Durable Solutions To The Refugee Problem

The International community has pursued three kinds of durable solutions for refugees: repatriation, permanent integration into the country of first asylum, and resettlement to a third country.

Repatriation is supposed to be as voluntary as possible so that the principle of non-refoulement may be upheld. The original reason for the escape of the refugees should have improved considerably to ensure the safety of the asylum seeker.

Permanent integration has been suggested as the most effective way of containing the refugee problem. This however is easier said than done. This is because very few communities if any will be willing to accommodate foreigners from outside the country. This is much so in the case of Kenya where ethnic animosity is a serious national problem.

During the 1970s and early 1980s Robert Chambers conducted significant research on the process of refugees settlement in Africa.⁸⁵ According to him refugees found it difficult to be integrated into the communities of the receiving countries because of poverty; political incitement, arrest among others.

Kenya on the hand has adopted the position of transit country where it encourages other countries to absorb the refugees. This is why it has been confining the refugees in the camps.

⁸⁵ Chambers R. (1983) Rural Development: Putting The Last First Longman Scientific and Technical, Harlow, U.K. page 386

4.5 Confinement Policy in Kenya

Refugee settlement practices in Kenya have changed substantially over the last thirteen years. The increasing use of refugee camps as places to confine refugees, rather than help them become self-supporting has led to an increased burden being placed on the international community. They have become little more than basic feeding centres for refugees.

Today, refugees in Kenya are confined to camps with little or no opportunity to become self-supporting. The UNHCR maintains these refugees in camps that offer the occupants little in the way of services or economic opportunities.

The shift of emphasis from long-term organized settlement to short-term emergency relief has serious repercussions for the process of voluntary repatriation. Refugees who are without hope in relief camps are increasingly taking risks, such as escaping or getting involved in illegal activities like theft. or are forced into taking risk and are returning home. The voluntary nature of some of these return migrations thus becomes very questionable.

4.5.1 The Establishment Of Kakuma Refugee Camp

In 1991, there was a piece of history that was made when a group of Sudanese boys numbering around 17,000 crossed the border into north-west Kenya, having walked from refugee camps in Ethiopia. Their ages varied from 10 to 17. They ran away after the overthrow of the Mengistu's government, which had supported the Sudan People's

Liberation Front.⁸⁶ They arrived in Kenya in desperate physical condition, having survived attacks by wild animals, lack of food, and hostility of some of the villagers from whom they attempted to seek help along the way. The numbers that died during this mass exodus are unknown.

The response of the UNHCR was to contract an NGO, Lutheran World Federation (LWF), to set up the Kakuma Camp for the boys and take full charge. As the camp grew, the boys remained in special quarters within the camp.

Kakuma Refugee Camp is located in the semi-desert northwest district of Turkana, and the harsh climatic conditions and remoteness of the district have made the local Turkana host community among the poorest in Kenya.

The closure of the thirteen refugee camps due to insecurity to the locals across Kenya since 1992 and the government mandated transfer of Coast province's refugees has turned Kakuma Refugee Camp into a multi-national community with adverse cultural backgrounds providing a home to eight different African's war torn nationalities as well as over 20 ethnic groups from Sudan, Ethiopia, Somalia, Burundi, Rwanda, Congo, Eritrea and Liberia.

The number of refugees in the Kakuma Refugee Camp has increased tremendously in the recent years. For instance it increased 16 percent, from 70,958 to 82,312, during 2000/2001 and the figure was estimated to be 90,000 by December 2002.⁸⁷ This increase can be attributed to the wars that have continued in Somalia and the Great Lakes Region.

⁸⁶ Verdirame .G. (1999) "Human Rights And Refugee: The Case of Kenya" in Journal of Refugee Studies Vol. 12, No. 1, 1999 Page 61

⁸⁷ <http://www.reliefweb.int/w/rwb/nsf/0/08c2e5bcf5c0eccc?>

4.5.2 The Administration Of Kakuma Refugee Camp

UNHCR's primary role in Kakuma is one of supervision and co-ordination, whilst the NGOs, mainly sub-contracted by UNHCR, are in-charge of the delivery of specific service. The Kenyan Government has abdicated its role completely thereby making it difficult for the refugees to benefit from the 1951 Geneva Convention on Refugees.

The funding for programs in the camp has declined in recent years. The United Nations High Commission for Refugees has been unable to constantly reduce the budgets for its implementing partners. As a result, UNHCR has cut substantially its contribution to staff support for their partner agencies.

The NGOs that are operating in Kakuma Refugee Camp include the International Rescue Committee (IRC) which distributes food and is responsible for social services and security; Don Bosco, an Italian NGO, which runs a vocational training centre; and Radda Barnen (Swedish Save the Children) which has been the "lead" agency responsible for providing primary and some secondary education. There are other agencies providing services which are not contracted by UNHCR. Most of the agencies' staff lives in a special compound at the entrance of the camp.

Responsibility for administering the camp has been added to UNHCR and its implementing partners, the NGOs. As far as security matters are concerned, there is a Kenya Police station located just outside the entrance of the camp. Within the camp, LWF has responsibility for security. It employs a number of Kenyans, mainly ex-military personnel, and refugees from the various national groups resident there. They patrol the camp all issues relating to security have to be reported to them.

4.5.3 The Legal System In The Kakuma Refugee Camp

The Kenyan Law being supreme is supposed to be theoretically the one practiced in the camp. However, in reality the management of the Kakuma Refugee Camp has been allowed to establish its own form of courts that are funded by Lutheran World Federation. But Kenyan law assigns no place to customary law in criminal law proceedings.

Many people believe that the best way to settle disputes is through the refugees themselves. However, when they are allowed, as is regularly the case, to exercise judicial powers which go beyond the jurisdiction of informal dispute treatment in Kenya. This has serious consequences. For instance many are the times that refugees have used such systems to settle personal vendetta which in some cases have sparked off fights.

The legal structure also encourages the use of community leaders to preside over the courts. These leaders, however, have been accused of pocketing the fines that they impose and perpetuating the abuse of powers.

Normally when a case comes up at the camp, it is reported to the security who will be depending on its gravity refer it to the UNHCR or the leaders courts. But clearly there is no clear line of division of which authority should handle what Kenya Police only intervenes when it is requested by the UNHCR or other implementing NGOs.

The refugee court metes out its own sentences which can include detention and fines and “in the case of the Dinka community, even corporal punishment.”⁸⁸ Each community has its own ways of meting out punishment to the offenders. However,

⁸⁸ Veerdirane .G. ibid page 63

refugees who are detained by the Kenyan Police are held either in the local police cells or sent to jail in Lodwar, some 100 miles away. There is a District Officer at Kakuma who nevertheless has little to do with the refugees since the government has ceded the functions and control of refugees to UNHCR. He therefore depends on the UNHCR even for transport especially concerning the functions that impact on the camp. Way up in Lodwar, there is the next level of Administration, that of the District Commissioner. He does not get updates of the refugee situation in the camp as regularly as he is supposed to due to lack of transport and poor communication facilities.

Refugees in the camp do not have any public courts nearby. The nearest public courts are in Lodwar, Apart from being very far, for them to go to Lodwar, they need authorisation letters from the UNHCR and the District Officer. Therefore, for all practical purposes, the judiciary is not an option for the refugees.

4.5.4 Suffering Of The Refugees At Kakuma Refugee Camp

Anna .P. Obura starts narrating the sufferings of the refugees by clarifying that refugees living in Kakuma live in geo-politically the most hostile of the circumstances.⁸⁹ The area is the most remote, arid and developmentally neglected area of the country.

Secondly, within the camps there are inter-ethnic conflicts which at times end up with a great number of fatalities. An example of these conflicts include the June 3 and 4 1996, fight between the two Sudanese tribes, Dinkas and Nuers. Those fights left six members of Dinka ethnic group dead while 40 others from both sides ended up in hospitals in nearby Lokichoggio. Lodwar and Lupiding towns, all in the harsh semi-arid Turkana District.⁹⁰

⁸⁹ Obura .A. P. (2002) Evaluation of UNHCR's Peace Education Programme In Dadaab And Kakuma, Kenya, UNHCR Page 4

⁹⁰ <http://www.reliefweb.int/w/rwb/0/75d2c64883P.OpenDocument>

Another injustice that is rampant in the camp is the collective punishment. The population of Kakuma camp is administered by humanitarian organizations, independently of the government, outside its judicial system, with no checks on powers and, in effect, without legal remedies against abuses. There are two cases that best exemplify the injustice of the collective punishment.

In April 1994 a number of refugees violently destroyed buildings that were constructed to be used for counting refugees. As a punishment food distribution was cut off for 21 days. In 1996, another shelter was violently brought about down by another group refugees. Again food rations were cut off for 14 days.⁹¹ The cutting off of food therefore affected the entire population of Kakuma Refugee Camp including those who had no idea, about the grievances that led to the situation.

It must be noted here that collective punishment is considered so uncalled for in international law that it is an act prohibited even to an occupying power in time of war. No legal justification for the imposition of such measures on the part of a UN agency and in time of peace can be found.

All groups in Kakuma Refugee Camp still heavily remain dependant upon the general ration as their main source of food as there are hardly any realistic alternative sources of food. Lack of good land for agriculture and the locally very unreliable rainfall remain that, except for a minority using waste water from the camp taps, the majority of the refugees cannot access sufficient amount of food.

Except for the tiny minority who were able to establish shops, the vast majority of the population of Kakuma is completely dependant on the rations supplied for their survival. This has been made worse by the shift in the international director flow of

⁹¹ Verdirame .G. ibid page 64

humanitarian assistance. The attention is now focussing on Afghanistan and Iraq. This can be attributed to the little significance that African Affairs are perceived at the international arena. Therefore it might require an African solution through the African Union or various regional bodies.

“There is a high rate of malnutrition in Kakuma,” says Jason Philips, the IRC’s Director in Kenya in testimony before the U.S. Senate subcommittee on oversight of Government Management, Restructuring and the District of Columbia”. This represents a complete abandonment of minimum international humanitarian standards for food assistance.”⁹²

Philips says that the current level of malnutrition, estimated at 17.3%, is a rare that one would expect during a nutritional emergency not in a care and maintenance refugee camp that has been in existence for a decade.⁹³

The importance of developing nutritional emergency in Kakuma is not only important in saving human life but also in significant financial costs to donors – above and beyond the costs of meeting minimum food assistance standards – to treat and rehabilitate the victims of increasing and severe malnutrition.

Reductions in food aid and other nutritional needs for refugees in Kakuma could also be expected to lead to a deterioration of security.

When there have been serious cases of malnutrition at the camp, the reaction of the agencies have been mixed. There have been serious disagreements as to the cause of the high rates of anaemia found among the refugee population at the Kakuma Camp.

⁹² <http://www.thirc.org/index.cfm?section:news@www> ID-1551

Strong evidence that the anaemia is the consequence of poor nutrition was derived by testing all those affected for the causes of blood loss like malaria and blood-sucking intestinal parasite. By comparing a sample of refugees with those of “higher” income, that is those who had the means to buy food, further proof of the link between malnutrition and anaemia is provided.

Sexual exploitation suffered at the camp is yet another of the many sufferings that the refugees undergo. “Here everyone is out to exploit you”,⁹⁴ was the summarized version of what goes on at Kakuma Refugee according to one lady. She cites a host of problems that refugee women face, especially physical abuse and rape which often results in unwanted pregnancies and children of mixed parentage, who are rejected by the women’s communities. Another consequence of the sexual exploitation and the sex-for-survival tactic is the proliferation of a host of Sexually Transmitted Infection (STIs) as well as the HIV/AIDS.

Water is also a serious scarcity at the camp. The water from the taps flows only once a day, and it is common to find long queues mainly of women, children, young boys and girls where fights sometimes erupt as they wait for water. Hand pumps that were spoilt by heavy rains some time ago are yet to be repaired. There is a problem with the flow of water from reservoirs to the taps, mainly because the tanks are scientific and more expensive to maintain. Worse still, but not entirely surprising, a number of waterborne diseases have broken out because of the water being pumped directly from boreholes. The camp administration keeps water in dirt containers and this has resulted in many diseases like typhoid, which is now very common in all communities in the camp.

Many refugees also go out of the camp to look for firewood or water and in the process interact with the local population. These interactions have always been treated with a lot

⁹³ *ibid*

of animosity from the locals who have responded with a wide range of atrocities like beating, rape, torture and at times even death for the refugees. The tension that characterise this relationship stems from the misconception that refugees receive preferential treatment far much better than what the locals get in their own country.

According to Obura, the local population feels caught in a cycle of poverty and neglect. In the hope of preserving some natural resources for themselves in the extremely fragile pastoralist environments, local populations have demanded restrictions on refugee access to fuel wood and a total ban on livestock keeping around Kakuma.⁹⁵

The UNHCR has made gestures to the host populations by providing a water borehole here and a water tank outside the camps but it is the role of national focused agencies and the host government to foster development in the locality. There is evidently a great challenge for hosts, development agencies and UNHCR to collaborate from the start in setting up refugee camps rather than leave the challenge solely to the refugee – focused mandate of the UNHCR as if refugees in the camp exist in isolation from host populations.

The camp management has also been accused of not taking the rights of the minors and other special cases seriously. For instance Verdirame Guglielmo while undertaking a field research in the camp in 1996, found minors and the mentally ill women detained in the two cells in the middle of the camp. They were charged with indiscipline and flogged as a punishment.⁹⁶ When such human rights implications are reported to the agency staff, they dismiss it as the cultural practices of the refugees.

⁹⁴ Njambi Anne: "Looking For A way to get back home" Daily Nation 20th June 2003

⁹⁵ Obura .P. A. ibid page 5-6

⁹⁶ Verdirame .G. ibid page 66

Upon arriving in exile, many refugees have nothing to sell but their own labour. For a long time UNHCR was running an “incentives programme.”⁹⁷ Now it has been withdrawn thereby raising another issue on human rights. Refugees are normally employed with grossly low salaries. This practice is justified on the grounds that to pay refugees on a par with others would require them to have a work permit issued by the Kenyan authorities. Secondly, unfortunately for a refugee seeking to enter the local labour force, a refugee receiving area is usually saturated with other refugees who have a similar goal. The pool of unemployed refugees has had a tendency to force down the average wage of available jobs. Furthermore, in the case of refugee teachers, consideration is also given to the fact that their home countries will not be able to afford high salaries once they repatriate.

Psychological torture is also evident in the camp among the refugees. Idleness breeds a bunch of people with no hope, which in turn leads to depression and great psychological torture.

The effects of displacement on a people’s culture can have significant impacts on the psychological and physical welfare of individual refugees and on the social dynamics within the Kakuma Refugee Camp. When people flee from the threat of death and total dispossession, the things and stories they carry with them is normally all that remains of their distinctive personhood to provide for future continuity.

At the camp, the intra-community dynamics has been evidently difficult. Cultural differences within a refugee population can cause distress. Therefore, the cultural realities must be addressed.

⁹⁷ Incentives refer to the money paid to refugees employed directly by UNHCR or by one of its implementing partners in the camp

According to Waldron and Hasci many refugees at the camp also suffer frequent harassment from the government officials.⁹⁸ They say that this is the main reason many refugees get into corrupt deals to ensure their security.

4.5.5 Typology of Camp Life

For the development of this typology, the broader term social context is more appropriate. The term more clearly refers to the interplay between a variety of social factors that affect the every day lives of refugees living at the Kakuma Refugee Camp. For the discussion of the typology the scope is slightly broadened to external context, which can include factors outside the home area that have a meaningful effect on the confinement policy. What follows is an examination on both contexts and the manner in which they affect refugees in the camp.

4.5.6 Social Context Of Refugees in the Camp Life

The three elements of refugees' social context that are central in terms of the confinement policy: Kinship ties, economic status in exile and security in exile. Together, these three elements form the background of refugees' daily lives in the camps. While in each individual refugee situation, one factor may be more important than the others, the extent to which the refugees have control over their lives in the camp.

For most refugees, the central unit of organisation is the immediate family forming a single productive unit. This family unit becomes even much stronger when people go on exile.

⁹⁸ Waldron .S. and Hasci .N. (1995) Somali Refugees In The Horn of Africa: State Of The Art Literature Review, Nordiska Afrikainstitutet, Uppsala, Sweden, page 68

A survey of Mozambican refugees in Malawi revealed that seventy percent of the refugees in the camps lived in various types of extended families.⁹⁹ The settlement of refugees in nuclear families is frequently used by aid organizations as the basic unit for the distribution of relief aid. In this type of situation, smaller families tend to benefit by receiving a larger per-capita proportion of supplies.

In a camp, the make-up of refugee families is most of the time distorted by the absence of adult male refugees in the home. Female-headed homes are the most common in a refugee camp. According to Martin, it is estimated that at least eighty percent of the refugee population in a refugee camp are women and children.¹⁰⁰

Outside the context of the immediate family comes the extended family or kin. In most camps for refugees the issue of the extended families vary from one society to the other. For instance flights of refugees from Rwanda and Somalia showed the significance of kin relationship while, the refugee flights from South Africa did not reveal the same. This is because in the Rwanda and Somali cases entire families fled while for the case of the South African only men escaped.

Most NGOs working at the Kakuma Refugee camps with the refugees centre their relief and development strategies on two enduring features: the clan and the culture.

Another component of the social context is the economic status.

From the word go the refugees experience difficulties in finding means of supporting themselves. Chambers notes that one characteristic of nearly all refugees is that they are

⁹⁹ Makanya .S. (1992) Mozambican Refugees: Preparing For Repatriation, CIES, Maputo Page 15

¹⁰⁰ Martin .S. (1995) "Return And Reintegration: The Experiences of Refugee And Displaced Women" PP43-62 in Stein .B. et al (eds) (1992) Refugee Repatriation During Conflict: A New Conventional Wisdom, The Center For The Study of Societies In Crisis, Dallas, Page 45

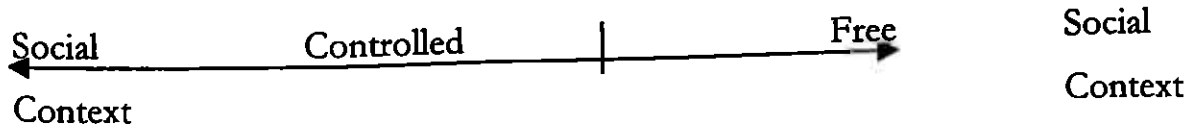
instantly impoverished.¹⁰¹ The refugee frequently have abandoned the tools with which they formerly made their living, as well as the animals upon which they relied for food.

The fact that refugees are confined in the camp without the opportunity to employ their labour is central to the refugees' rights abuse in the confinements policy.

The last component of the social context is the security of the refugee while he is in the camp. Refugees flee their homes because they feel insecure. So when they seek asylum, ideally they should not worry about security. Unfortunately the security of the refugee camp is just as bad as it is in the home country, if not worse. They are alert to any threats that could dislocate them a new.

The social context of the refugees in the camp can be classified as either free or controlled. When, on balance, refugees have control over their own economic, security and family life, the social context can be considered free. On the other hand, when external agencies or forces have the most input into all aspects of the refugees lives, then their social context could be classified as controlled.

Fig 4.1. Social Context



Source: Author (2003)

¹⁰¹ Chamber .R. (1982) "Rural Refugees In Africa: Past Experience, Future Partners". In *Disasters* 6(1): Page 386

4.5.7 External Context of Refugees in the Camp Life

These external elements are those that do not necessarily impact on the refugee life directly but are important in determining a long time solution to the refugee problem.

These external elements include the following: -

Firstly, the situation of the security at home. Most refugees prefer staying in the camps if they feel that the camps offer better security than their own home country. On the other hand most refugees will prefer going back home if the security situation in their countries improve.

Secondly, is the economic conditions back home. The ability of refugees to get their basic needs in the camp or get the same upon their return home is central to their external context. Included in the economic context are such issues as land availability and tenure, cross border economic links and post-repatriation development schemes.

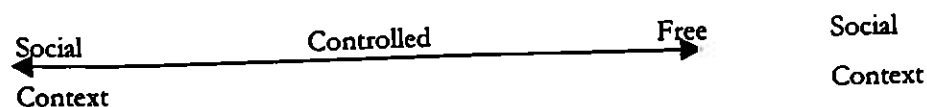
Many refugees at the Kakuma Refugee Camp have opted to go back to their former homeland because they can't meet their basic needs at the camp.

Closely linked to economic conditions at home is the quality of infrastructure in home areas. The conflicts that precipitate refugees' migrations are frequently protracted and destructive to the regional infrastructure. With respect to voluntary repatriation programs, often refugees would consider the roads that they will use to return home. In areas where there has been fighting, bridges and other key road intersections may have been destroyed. In the longer term, the state of schools and health care facilities can be an essential component of the refugees' external context.

The external context is represented by figure 4.2. Like the social context, the external context can either be free or controlled. This measurement is made by an analysis of the entire context, comparing the various components. Refugees whose external context is generally free are provided with an opportunity to resettle them without fear, in the hope

of attaining self-sufficiency in the near future. When the external context is controlled refugees may not be presented with choices to allow them to return home voluntarily from the confinement camps like Kakuma.

Figure 4.2. External Context



Source: Author (2003)

4.6 Conclusion

The political stability in Kenya in relation to the upheavals in the neighbouring countries like Somali, Ethiopia, Sudan and Uganda as well as the Great Lakes Region will ensure that many refugees will still flee to Kenya for safe haven. This implies therefore that Kenya needs to formalise its dealing with the refugees to bring it conformity with the 1951 Geneva Convention on Refugees.

The camps, both Dadaab and Kakuma need to provide basic human rights. The way they are now exposes Kenya as a country that does not see the refugee rights as human rights. There is flagrant abuse of human rights in these refugee camps.

CHAPTER 5

5.0 The 1951 Geneva Convention On Refugees In The Kenyan Context

5.1.Introduction

The complex interplay of socio-economic factors which have led to refugee migrations in Kenya does not affect each migrant in the same manner. The varieties of different refugee migrations are as complex as the situations which can create them. The reasons vary from economical to political. In other cases ecological change can be the cause of mass migration. This latter variation of migration is usually ignored by contemporary definitions.

All these different types of refugees are subject to various international and regional laws. In the Kenyan context, three important legal instruments, two from the United Nations, and one from the Organization of African Unity (OAU), govern the manner in which refugees are defined, what assistance they are able to receive and how they should be resettled. The documents are the 1951 UN Refugee Convention; 1957 Protocol as well as the 1969 OAU Convention. The Right of Refugees to determine how and when they should return home is clearly stated in the 1967 Protocol as well as the 1969 OAU Convention on Refugees. The 1969 Convention in particular has clauses that affect the status of every African refugee in terms of their rights and duties.

When the newly formed United Nations was given the task of looking after the refugees, it drafted in 1951 the Convention Relating to the Status of Refugees, and established the

United Nations High Commission for Refugees. It was amended in 1967 by the approval of the protocol to the convention. The organization for African unity through its sixth session in 1969 adopted its own protocol to reflect the unique nature of its own refugee phenomenon. Kenya has signed and ratified all these instruments. Despite this

fact, Kenya has not taken initiative to implement the requirements of the 1951 Geneva Convention on Refugees.

According to Hyndman and Nyklund "in Kenya the issue is not lack of applicable refugee law on an international level, rather it is the deficiency in the implementation of the international treaties mentioned on a domestic level."¹⁰² Notwithstanding a number of attempts since 1991, the Refugee Bill has not yet been presented in parliament.

5.1 Geneva Convention on Refugees In The Kenyan Municipal Law

Kenya is a signatory of all the major international instruments for the protection of the refugees. However, unlike other countries it has not set up a domestic legal framework such as domestic legislation. To contend with refugees instead with government has some law that is applicable to asylum seekers and refugees,¹⁰³ but nothing that fully implement its treaty obligation.

Kenya's immigration Act applies to all non-citizens, including refugees. The act provides that all non-citizens who enter Kenya without a valid entry permit or pass are unlawfully present and subject to arrest and detention by immigration officers. The Act describes a class of entry permit for individuals generally fulfilling the refugee convention definition (though not the OAU Refugee Convention definition) of a refugee. This definition is called under the Kenya Law as Class M.¹⁰⁴

This provision, if administrative procedures were in place to implement it, would allow asylum seekers to apply for Class M entry permits from Kenyan Immigration Officers at entry points. However, there are no Kenya immigration officers available to hear such

¹⁰² Hyndman J. and Nyklund V. (1998) "UNHCR And The Status Of Refugees In Kenya" *International Journal Of Refugee Law* 10, page 21

¹⁰³ UNHCR (1994) *Guidelines On Refugees Children*, Page 81

¹⁰⁴ Jackson T. (1986) *The Law Of Kenya: An Introduction*, Kenya Literature Bureau, Nairobi, Page 67.

applications either at the border or after an individual enters the country even if one enters lawfully, for example with a tourist visa. As a result, regardless of what the law says, there is no way for a genuine refugee to ask for legal permission to enter or remain in Kenya as a refugee through the use of an entry permit. And erratically speaking, asylum seekers report to UNHCR in order to receive refugee status. Consequently asylum seekers simply enter the country – at which point they are unlawfully present under the Immigration Act, and subject to arrest and detention.

Another provision that refugee in Kenya are subjected to is the Aliens Restriction Act (ARA).¹⁰⁵ It sets out to accomplish what its title implies, that is to restrict the presence and rights of aliens in Kenya. The Minister of Home Affairs under whose portfolio refugees fall may use this act during times of war or emergency to further put restrictions on the refugees. These may range from prohibition to enter Kenya as well as restrict refugees to certain geographical areas. Any refugee who violate such orders are subject to a fine of Ksh. 3,000 and imprisonment not exceeding six months.¹⁰⁶ Although the ARA was passed after Kenya became party on the 1951 Refugee Convention, there are no specific provisions for the status and rights of asylum seekers and refugees.

The draft Refugee Bill which has been debated in Kenya since 1990 falls short of international standards since it affords unfettered discretion at a single minister, that of Home Affairs, in-charge of refugee matters to receive recommendations for refugee status, an eligibility committee, to make the final decision on refugee status and hear appeals. The Bill requires asylum seekers to apply for status within seven days of their arrival, a limitation that is unrealistic. This is against the UNHCR stand that states that

¹⁰⁵ Ibid (see Aliens Restriction Act, Article 3, Paragraph 1)

¹⁰⁶ See UNHCR, Sub-Committee On International Protection, Note On Asylum, August 30, 1979, Paragraph 16

failure to submit an asylum request within a specified period should not lead to the exclusion on the request from consideration.¹⁰⁷

The draft bill also requires refugees to live in refugee camps, without enacting exceptions to the policy in law. Finally, the draft bill does envisage establishing transit centers for asylum seekers while their applications are being considered. This provision, if implemented in accordance with human rights standards, might help to alleviate the incidents of rape and other abuses that have been seen among the refugees in Kenya.

The current government has given indications that the bill will eventually be enacted as law and that the government will work hand in hand with the UNHCR to ensure that the international requirement for treatment of the refugees in Kenya will be achieved without any problem.

5.2.1 Specific Provisions Of The 1951 Convention On Refugees That Kenya Has Not Implemented

According to article 7 of the convention, after three years' residence, all refugees shall enjoy exemption from legislative reciprocity in the territory of the contracting state. This has not been the case in Kenya where refugees have stayed in the camps for the past eleven years without any exemption from reciprocity.

Secondly whereas article 13 allows the refugees to own movable and immovable property, refugees in Kenya have not had this right except for those with connections with powerful individuals in the corridors of power.

¹⁰⁷ Daily Nation April 16, 2003 "Moody Awori: We are guided by The 1951 Geneva Convention And The 1969 OAU Convention".

Article 15 is also not followed by the Kenyan Government in dealing with the refugees. The article says that the refugees shall be accorded favourable treatment that is accorded to nationals of the foreign country in the same circumstances.

Article 16 is also not followed by the government. As was demonstrated in chapter four. The courts that serve the refugees in Kakuma Refugee Camp are so far away in Lodwar Town.

The refugees generally do not have easy access to wage-earning employment as required by the Article 17. Article 18 that demands for self-employment has also not been implemented in Kenya. Most refugees who have skills and talents do not have anything to do since they are barred by the Kenyan Labour Laws to work.

Article 20 says that where rationing system exists, refugees shall be accorded the same treatments as nationals. This is not being followed in Kenya with refugees especially those in the camps. There food rationing is seriously inadequate as shown in Chapter four.

Articles 21 and 22 are also not implemented as refugees in Kenya are not given houses neither do they have access to the free and universal education as is required by the convention.

Article 26 states that refugees have the freedom of movement but this is not the case as is demonstrated in Chapter four. Most refugees are confined in the camps while those who remain in the urban areas are subjected to untold suffering at the hands of the law enforcement officers.

Kenya also has not facilitated the assimilation and naturalization of refugees as is required by Article 34. This should be done by making effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of proceedings.

As Chapter four has demonstrated, the Kenyan Government and in particular the Police are supposed to cooperate with the UNHCR. This has not been the case with many instances that the Police have refused to recognize the UNHCR papers. This is against the Executory and Transitory Provisions found in the article 35.

Article 42 gives any contracting state the provision to air any reservations. Many states like Angola, China and Luxemburg have had their respective reservation yet Kenya has not. Therefore it is a wonder why Kenya has not had meaningful implementation of the 1951 Geneva Convention on Refugees.

Clearly this shows that the non-implementation of the 1951 Geneva Convention on Refugees has had a very negative impact on the human rights of the refugees.

5.2.2 Refugee Status Determination in Kenya

Kenya experienced the first real big influx of refugee in 1991. Before that only a handful of refugees came. Most newly arriving refugees were processed through a reception center established in October 1981 at Thika. Before 1991, the Kenyan government used an ad hoc administrative status determination (RSD) system to recognize refugees, despite the fact that it lacked domestic laws providing for their rights and status.

Post 1991 refugees' status determination in Kenya has been handled by Jesuit Refugee Service (JRS). The status determinations run by JRS were problematic delegation of the

responsibilities of Kenya and UNHCR to an NGO. The refugees did not like this¹⁰⁸ and the government of Kenya also lost the experience it had gained while handling the refugees in the pre-1991 era.

In December 1998 however, JSR said that it was losing its focus on its core business especially in the face of the apathy shown by both the UNHCR and government. It stopped and the task was handed over to the UNCHR in January 1999. JSR said that its core business was never at any time meant to determine the refugee status in Kenya. Instead JSR was created with a mission to accompany, serve, and defend the rights of refugees and forcibly displaced people.

5.2.2.1 UNHCR – Run Status Determination

Since the UNHCR took over, it has determined the status of all the refugees, albeit with some failure. It has been using its own **UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status**. According to this book, applicants for refugee should receive the necessary guidance as to the procedure to be followed. UNHCR, in disregard of its own stand, does not provide applicants with guidance about the process they are about to undergo even after they reach UNHCR's office.

Status determination takes place in Westlands offices of the UNHCR and most refugees just walk because they cannot afford the bus fare. Once they reach they are lined together and taken from one office to another. To be served the refugees are to arrive very early. On 1st July 2003 when the researcher visited there were 201 refugees in the queues that were snaking well outside the UNHCR compounds.

¹⁰⁸ Author's interview with Congolese Refugees on 2a. June 2003 at Kakuma Refugee Camp

On the first visit to the center, refugees are issued with appointment slip which become the only piece of identification for subsequent visit as well as to the Kenyan authorities. Waiting time between procurement of appointment slips and first interview date varies from two to four months.

During the status determination interviews asylum seekers are interviewed by a member of UNHCR's eligibility center staff. Before recommending anybody for a refugee status, the interviewing officer conducts interviews reviews the facts after the interview, sometimes doing additional research or cross-checking information. By the end of 2001, there was a 50% rejection rate.¹⁰⁹ It is difficult to account for the figure because the whole process of status determination is highly subjective.

Asylum seekers are not given information about the standards against which their cases will be measured, nor are they given a sense of how long the process will take, including how much time it should take to assess their file if they are in need of resettlement. This is very contradictory to UNHCR's own Refugee status Determination Handbook. Those who qualify are given protection letter. However, those who are rejected are never given written information about the reasons for their rejection, apart from pro forma letters indicating that their cases have been rejected for failure to fulfill eligibility criteria.

Others are then recommended for resettlement. UNHCR refers the potential case for resettlement to one of several governments. The governments accepting the highest numbers of refugees from East Africa, the United States, Canada, Australia and Norway.

¹⁰⁹ Author's interview the UNHCR staff on 1 July 2003

5.3 Shortcomings of UNHCR in Serving Refugees in Kenya

5.3.1. Responsibility for Status Determination

UNHCR considers that running the status determination is not its core business. It lacks the capacity to meet guarantees and principles states in its own guidelines on status determination. Insufficient funding is always cited as the reason of not working well in status determination.

5.3.2 Failures of Accessibility and Registration

UNHCR presence in Kenya has been viewed as a blessing by refugees who come to Kenya. However, the truth is that the status determination process is rife with delays thereby making the refugees very vulnerable. Moreover contrary to the widely recognized UNHCR principle that must be among the first to receive protection and assistance, unaccompanied and separated children and women at risk are not being identified by UNHCR when they first appear in the registration sheds. As a result, women and children are waiting for several months to be interviewed by UNHCR, and must fend for themselves before and often after they are seen by the agency.

5.3.3 The Provision of Delays

The appointment slip is a welcome relief for the refugee who seeks to formalize his status. However, the waiting period for interviews is too long and more often than not lacks any protection and assistance guaranteed to them by international law and UNHCR policy.

Many refugees therefore resort to dirty tricks like forging the slips or tampering with the details on the original slip like the date of the appointment' signatories; names among others. Obviously there is a heavy risk involved in such tricks but the refugees are seeing none of this since as far as they are concerned UNHCR is overseeing the delays.

Delays sometimes arise for reasons other than appointment re-scheduling. Sometimes there are no UNHCR-employed interpreters. UNHCR has instituted a policy of only seeing refugees from particular countries of origin on particular days of the week.

All asylum seekers are subject to extremely serious delays in the processing of their claims which leaves them vulnerable to abuse.

5.3.4 The Conflicting Role of UNHCR

The status determination interviews with UNHCR protection staff fall short of its own standards on keeping applicants informed about their rights and the procedures to follow, and on conducting interviews in a manner that allows all the evidence to be considered. The agency has a conflicting role as service provider and status adjudicators. This has caused the refugees to lack confidence in the entire system. Probably this is the last problem that provides the strongest rationale for the Kenyan Government to fulfil its responsibility to conduct status determination.

5.3.5 The Assessment of the Asylum Claim

One of the main principles underpinning this determination process is that the burden of proof lies with the applicant. The applicant must provide the assessor with all the relevant documentation and information regarding the claim. However, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the

assessor. Paragraphs 195 to 205 of the UNHCR Handbook stipulates that it may often be for the examiner to use all means at his or her disposal to produce the necessary evidence seeking refugee in Kenya. It is quite often inaccurately applied, thus resulting in assessments of asylum applications based on assumptions and generalities rather than well-sourced information. Clearly this contradicts the 1951 Geneva Convention.

5.4 Confinement Policy As An Abuse Of Human Rights

As chapter four has shown confinement policy is against both the 1951 Geneva Convention on Refugees as well as the fundamental human rights. Firstly freedom of movement is not practiced, as refugees need clearance from the camp administration.

Secondly there is no practice of Kenyan Law in the camp to exercise justice. Instead arbitrary legal systems made up of the elders or other arbitrators. As has been demonstrated, this has denied many refugees any justice. To make matters worse, the nearest court is in Lodwar town, practically out of reach for the refugees.

Universal declaration of human rights Article 5, nobody is supposed to be subjected to harsh or hostile conditions. However, the Kenyan Government has made it an unwritten policy to host the refugees in the most hostile and harshest conditions of the Kakuma in Turkana District.

The fact that refugees are confined in the camp with no possibility of owning property is also contravening the universal declaration of the human rights Article 17.

Confinement policy also does not offer the refugees employment opportunities as is required by the Article 23 of the universal declaration of the human rights.

Article 25 requires everybody to have access to health, well-being, food , shelter, medical care and other social services. However, Chapter four has shown that refugees are underfed and lack basic needs like adequate water, medication among other things.

Article 26 of the human rights charter also advocates for free basic universal education. However, the reality of the confinement camp is that children do not have access to this right.

5.5 Human and Refugee Rights Abuse Under Kenyan Municipal Law

Refugees in Kenya have had the following protection problems. Firstly they do not have safe housing or they lack housing altogether. Consequently they suffer fear, attacks, robberies and rapes. The failure to identify and better protect these refugees is in direct contravention of Anchor's own policies and procedures.

Even some refugees, especially women and children who are lucky enough to find shelter at the UNHCR "secure" accommodation Center like in Hurlingham or YMCA Shauri Moyo are still fearful about sexual harassment and their overall security, especially after the murder of two Rwandan children who had been living there in April 2002.¹¹⁰ Whereas the matter is before the court of law there are indications that the culprits were fellow refugees or even family members. This problem can be alleviated if the UNHCR had the resources to help the Kenyan Government house all the refugees.

The second problem that refugees undergo in Kenya which also betrays the spirit of the 1951 Geneva Convention is the political targeting by other refugees. The conflict in the Great Lake region for instance is a testimony of complicated ethnic and military alliances that cross borders. Lack of proper security has seen many refugees killed, threatened, abused or harassed.¹¹¹ For instance in August 2001 refugees in YMCA Hostels in Shauri Moyo reported harassment from the staff of UN and the Police officers who were demanding favours like sex and money to ensure their security.

Dawit .S. an Ethiopian refugee who had been a student leader in Addis Ababa, described the ethnic tensions that had developed in exile between him and Oromo refugee. He said "in (the place I was living) there were already other Oromo students and they said I bought my status and started harassing me, saying I was against their tribe. They beat me once while accusing me of these things that was on August 19, 2001."¹¹²

Security agents of the country of origin also come and harass refugees living in Kenya. According to Human Rights Watch, International NGO staff members have been able to trace to the Ethiopian Embassy license plate numbers taken down by refugees who allege that they have been trailed. In addition, the actions of such agents have even been linked to murder: one politically motivated killing by Ethiopian security agents in Nairobi received international press attention in 1992.¹¹³

¹¹⁰ Daily Nation, 27 June 2002, "refugee Kills 2 Children in Nairobi".

¹¹¹ Author's interview with Consolata Linyulu (Hostels Manager) on July 2 2003, Nairobi.

¹¹² Human Rights Watch interview with refugee, Nairobi, Kenya April 5, 2002

¹¹³ Hyndman .J. and Nyklund .V. *ibid* page 21-48

Kenya Police has also been accused of harassment, violence and extortion, and even refusal to respect UNHCR documents. Ishimwe Euloge¹¹⁴ for instance told the author that he has lost thousands of shillings. He is routinely stopped and asked to produce a national identity card or go to jail. Normally he produces the UNHCR-issued appointment slips. Upon inspection of these documents, the police routinely ignore or destroy the documents and either threaten him with arrest and detention unless a bribe is paid. If the first practice is followed, Ishimwe will often try to pay the bribe to avoid arrest. If the second practice is followed, his friends and family must locate their jailed colleague.

The Kenyan Police has a bad reputation among other NGOs as well. For instance Transparency International (TI) an NGO dedicated to curbing both international and national corruption conducted a survey which revealed that the Police Department as the most corrupt. Human Rights Watch has also documented cases in which refugees paid between Ksh. 400 (US\$ 5) and Ksh 4,000 | (US\$ 51) to the Police. UNHCR has also documented cases of refugees in Kileleshwe Police Station who had to pay Ksh. 20,000 (US\$ 256) to be released.¹¹⁵

Since bribery is a major revenue producer for the corrupt members of the police force, and refugees are prime targets for arbitrary arrest. Police are also familiar with the offices that refugees frequent, and stop and arrest refugees on their way to and from UNHCR and NGO offices.

¹¹⁴ Author interview with Mr. Ishimwe (A Rwandese Refugee) on June 30, 2003 Nairobi Kenya

¹¹⁵ Transparency International (2001) Corruption in Kenya: Findings Of an Urban Bribery Survey. Page 10

Kenya Government has also not upheld the non-refoulement policy of the 1951 Geneva Convention. Many refugees have suffered deportation and the problem of refoulement following various charges. For example in 1999 university students from Ethiopia were denied legal status and forced to return.

Whether singled out individually or caught up in an immigration swoop, refugees should be brought before a court twenty-four hours after their arrest, according to Kenyan Law. As a result, most are released or bribe their way out: some are however charged with an immigration violation and brought before a magistrate. Refugees are most often charged with illegal entry under Kenya's immigration Act. Some are sent back to their home countries irrespective of whether or not they are facing persecution.

This is against Kenya's non-refoulement obligation under Article 33 of the Refugee Convention which is the most fundamental principle of international law and is now accepted principle of customary international law. For instance in May 2002 alone the government deported five individuals from Democratic Republic of Congo and Rwanda.¹¹⁶

In the official 2001 statistics obtained from the provincial police of the Nairobi area, the Kenyan Government charged 136 individuals with illegal entry during the year. Of those, seventy-five had been properly turned over to UNHCR, and eight were fined and presumably allowed to stay in Kenya. However thirty-five persons out of this group were repatriated mostly Somalis.

¹¹⁶ Author's interview with Kenyan Police Officer, Nairobi, Kenya July 1, 2003.

Interviews with Police revealed that most Police Officers do not respect UNHCR documents because of the widespread belief that all of these documents are forged. Also it is not a standard procedure to ask the refugee whether or not they will face prosecution when they return to their countries of origin.

Another problem for refugees in Kenya is the fact that the Kenyan Government cannot guarantee their most basic human right. These include: the right to liberty and not to be arbitrarily detained, the right to security of person including protection from torture and other mistreatment, and the right to freedom of movement. It is also failing to take adequate action to bring to justice the perpetrators of human rights abuses against refugees, even when these individuals are the agents of another government.

Refugees are also complaining that UNHCR is failing to identify refugees who are at risk when they first register at the office, in direct contravention of its own policy on refugee women and children, which require immediate identification and attention to such individuals needs.¹¹⁷ Even refugees who face violence and report to the UNHCR do not get much assistance. Even local human rights groups experience problems reaching UNHCR when they try to draw the agency's attention to these problems.

The UNHCR's own policy¹¹⁸ requires that it identifies groups at risk and to respond to security cases this could be improved if it had enough resources and personnel to implement security checks.

¹¹⁷ UNHCR (1995) Guidelines On Prevention And Response To sexual Violence Against Refugees. Page 15 (It requires UNHCR to identify individuals or groups who may be particularly vulnerable to violence e.g. lone female heads of household with disabled family members, or women who are economically successful, and develop appropriate strategies to address their particular protection and assistance problems).

¹¹⁸ UNHCR (1994) Guidelines on Refugee Children, page 81

6.0 SUMMARY, CONCLUSION AND RECOMMENDATIONS

In many respects the situation of refugees in Kenya has changed significantly over the last two decades. While at the mid-1980's refugees were often well received in exile, today's refugees are subjected to increasingly drastic restrictions and sometimes untenable conditions. At the same time, many organizations and the Kenya Government have lost patience with refugees and have sought easy solutions to complex problems. To a large extent the refugees have not had the luxury of receiving protection from the government. The rise in the number of refugees in Kenya has raised fundamental questions on the role of UNHCR and Kenyan Government as far as the refugee protection is concerned. The major thrust of this thesis has been to explore the performance of Kenya as far as the international instruments of refugee protection are concerned.

6.1 Summary Of Research Findings

In the course of researching this thesis every available source on refugees internationally in general and refugees in Kenya in particular has been identified and consulted.¹¹⁹ From the analysis of these varied sources, three major issues have emerged: the need to have an international refugee regime; the need to enforce the requirements of the 1951 Convention on the state parties and finally the need for Kenya to enact a specific law dealing with the refugees. The three issues are closely linked to each other in the Kenya context. While in an ideal situation, refugees should enjoy a decent life in asylum, the thesis has demonstrated that their privileges as defined by the 1951 Geneva Convention are not guaranteed in Kenya.

In Kenya there are two reasons why there is now the conviction that a refugee is an extremely critical national issue. First there is the pressing problem of gaining control of illegal immigration. Kenya is currently experiencing a large illegal or undocumented influx of refugees.¹²⁰

This constitutes of flagrant violation of national sovereignty, as control over entry by non-citizens is one of the two or three universal attributes of a nation-state.

Secondly, there is an increasing concern over the rate of growth and the sheer size of the overall growth of the number of refugees coming to Kenya.

Chapter two provided evidence that there is an international and continental legislative framework for the protection of refugees and returnees. This framework guarantees that the decision to return home shall be made voluntarily by refugees on their own. As refugee migrations become larger and more widespread and as resources for those refugees become scarcer, there is need more than ever before for the state parties to implement the requirements for the 1951 Convention.

Whereas the public face of refugee protection in Kenya has been the 1951 Convention relating to the status of Refugee and the UNHCR, the UNHCR has been much criticized for going along too easily with some of the innovations in refugee protection leading to outright erosion of refugee rights much more so by confining in camps.

The primary aim of this study was to investigate the general situation of refugees in Kenya and to examine the extent to which the 1951 UN Convention on Refugees has

¹¹⁹ See bibliography

¹²⁰ The People Daily, Thursday May , 2003. "Refugee Protection : Why Kenya needs to adopt a National Refugee Policy"

been implemented by Kenya. The absence of any comprehensive literature on this topic provided the rationale for the study.

Chapter four pointed out that Kenya is signatory to the relevant international treaties that espouse a commitment to protection of refugee rights. The chapter also discussed the fact that Kenya has not enacted domestic legislation relating to the status of refugees. Instead the refugees outside the jurisdiction of the UNHCR are handled under the Alien Act.

The study found that for most refugees, the refugees rights enshrined in Kenya legislation is of little effect in reality as most refugees are not granted refugee status by the Kenyan authorities. Because Kenya lacks any formal structure to deal with refugees in its domestic law the government resorted to ad hoc administrative arrangements which by their very nature can be arbitrary and discriminatory according few rights to refugees if any.

The study has further shown that Kenya has yet to de-link refugee issues from its national security concerns and does not share the broad world-view of perceiving them as humanitarian and human rights concerns.

The study therefore confirms that non-implementation of the Convention obligations has contributed to the inadequate protection of the rights of refugees.

The study has also shown that Kenya prefers to house refugees in camps. The expectation that refugees will find all the protection and assistance they need in camps is contradicted by the problems documented in this study confinement has compounded the marginalisation and vulnerability of refugees increasing their risk of suffering human right abuses similar to those documented in the study.

Therefore the study also confirms the second hypothesis that confinement policy is an abuse of human rights of the refugees.

6.2. Conclusion

Despite widespread agreement that more needs to be done to help refugees, the response in Kenya remains inadequate. Hundreds of thousands of refugees continue to suffer in complete contrast to the 1951 Geneva Convention on Refugees. Quite apart from its tragic humanitarian consequences, refugees influx to Kenya has important implications for both human security and the security of state. As the case study of Kakuma Refugee camp showed in chapter four, refugee influx in Kenya has led to many instances of socio-economic systems and community structures breaking down and impeding reconstruction and development for many years. The conscientious responsibility of a state towards the refugees, and the ability of the refugees to realise their right and obligations in accordance with the 1951 Geneva convention on Refugees, provide an indispensable element of stability to life, whether at the personal societal or international level.

Kenya has not performed well in the implementation of the 1951 Geneva Convention on Refugees as demonstrated in both chapter four and five. Generally there is widespread abuse of the rights of the refugees.

6.3. Recommendations

In order for Kenya to effectively implement the 1951 Geneva Convention and to accord the refugees their rights accordingly the following recommendations are made.

6.1.1 Recommendations To The Kenya Government

Firstly, the Kenyan Government should create a domestic legal framework for refugees by revising and adopting its 1994 Refugee Bill so that it fully implements the Kenyan Government's responsibilities under the 1951 Refugee Convention.

In the refugee camps, refugees should be permitted freedom of movement consistent with Article 26 of the refugee convention. Also some refugees need to be allowed to leave the camps on a voluntary basis. These groups include:

- i. Individuals with serious security problems in the camps
- ii. Individuals in need of medical care only available in urban centers
- iii. Individual who have been living in a refugee camp for excessive length of time, such as three years or more, and for whom alternative permanent solutions in the foreseeable future appear unlikely
- iv. Individuals who are in need of educational opportunities
- v. Individuals with family members who are residing legally outside camps

To address the problem of refoulement, the Kenyan Judiciary should institute training for magistrates on international refugee law, particularly on non-refoulement, and develop a standard inquiry during deportation proceedings for determining fear of persecution upon return.

The Police force in Kenya should undergo training to know how to handle individualized refugee status of those in custody and to cooperate and contact the UNHCR offices where appropriate. The Police should allow asylum seekers or refugees in their custody to be transported to UNHCR's offices.

6.3.2 Recommendations to United Nations High Commissioner For Refugees (UNHCR)

It is important that UNHCR adopt the evaluation and policy analysis unit's clear recommendation to re-write and re-issue its 1997 "Policy on Refugees in Urban Areas". The revised policy should avoid generalizations, derogatory depictions or any incorrect assumptions about refugees.

The "Guideline on Refugee Children" should also be revised to address the specific protection and assistance problems facing asylum seekers and refugees in Kenya.

To address the lack of domestic legal framework for refugees, UNHCR should continue to encourage the Kenyan government to adopt domestic refugee legislation. If possible it should assist Kenya in the drafting process to ensure that the laws fully implement all government obligations towards asylum seekers and refugees under refugee and other forms of Human Rights law.

UNHCR also needs to reform its refugee status determination system. It is important that all asylum seekers are provided with written information in a language they understand, the legal standards to be applied as well as a realistic indicative timetable for each stage of the determination process.

UNHCR should also post a notice board indicating by case number as made known to each asylum seeker the progress of processing for each asylum seeker's file. If confidentiality concerns still prevent being able to post individualized tracking systems aligned with each asylum seekers case number, then at least a generalized tracking system should be posted, indicating the progress of all files submitted on a given day.

UNHCR offices seem to be understaffed. Consequently UNCHR should have adequate personnel and resources so that status determinations are fair and efficient, keeping in mind the particular difficulties and needs of applicants.

The problem of secondary movement policies can be solved by UNCHR not applying secondary movement policies to refugee who has been compelled to move because of specific protection or security problems in his or her previous country.

The problem of refoulement can be solved by appointing an officer at UNHCR who will receive notices on asylum seekers or refugees who have taken into the custody of the military or police and may face refoulement, and should respond to these referrals expeditiously.

Camp confinement is not one of the recommended ways of solving a refugee crisis. To address the problems with camp confinement UNHCR should urge the government to provide for exceptions to the camp confinement policies in domestic law or regular, and instead should revise its own policy on refugees.

In order to identify at-risk individuals UNHCR and the Kenyan Government should set up temporary reception sites for asylum seekers and refugees, providing them with safe shelter for sometime initially. UNHCR should then engage the services of an implementing partner NGO to work in the registration sheds to register and adequately identify all unaccompanied and separated children, women heads of household and other individuals in need of specialized care or assistance during their first visit to the office.

In order to address protection and assistance problems faced by refugee children UNHCR should work to ensure access to education for all the greatest extent possible given resource constraints. Also children who are unaccompanied and separated should have separate appropriate housing facilities or separated parts of housing facilities.

Another problem encountered by refugees in Kenya is that of medical referrals. UNHCR should engage the services of an implementing partner NGO to work in the registration sheds at the branch office to examine and treat medical cases on the spot and make same-day referrals. It is also very important that the victims of torture and sexual violence should be identified during their first visit to UNHCR in Kenya through the use of an implementing partner NGO engaged to assist in registering refugees.

To address resettlement delays and inefficiencies UNHCR should put in place resettlement referral officers in Kenya UNHCR officer to prepare files of individuals for resettlement. Also resettlement to the designated resettlement utilizing a standard referral form and applying mutually agreed-upon threshold criteria for referral.

6.3.3 Recommendations To The donor Governments/Agencies

Donor agencies need to link up the financial support with the Human Rights and developments needs. Therefore there is need to fund through the New Partnership for Africa's Development (NEPAD). This is because the first priority areas of NEPAD is peace and security which includes issues such as prevention, management and resolution of conflict.

In tackling the problem of population displacement we need to look beyond humanitarian assistance and develop new approaches. NEPAD offers us a fresh opportunity to effectively address Africa's deepening refugee crisis.

There is also need to boost the physical infrastructure in the refugee camp to boost accommodation and transport and communication facilities. They should then ensure fair treatment of refugees. This can be done by funding training programmes for those people who work with the refugees.

Donor agencies should also seek improvements in UNHCR-run or government-run status determination processes, focusing in particular upon funding programs that seek to: provide information to refugees and increase the transparency of the process; increase trained staff; provide trade interpreters; and improve the quality and efficacy of identity documentation issued to refugees.

6.3.4 Recommendations To Governments in Countries of Resettlement

These countries should allow the personnel of the NGOs to send suggested cases for resettlement at the same time to UNHCR and to embassy staff using the agreed criteria.

If that particular country is interested in a particular case then the UNHCR should expeditiously process the file.

These governments should also deploy particular staff at the embassy to handle matters of resettlement. In particular the governments should put in place expedited referral procedures for high-risk cases.

6.4 Directions For Future Research

While the knowledge base about refugees and the 1951 Refugee Convention has improved significantly over the last decade, several directions for future research emerge from the findings of this thesis. Chapter five identified areas that require additional investigation of their contexts in order to make them relevant to the refugee studies.

The 1951 Refugee Convention needs to be reviewed so as to find out why many state parties are not following its dictates.

Further research is needed in the area of camp confinement policies. In the last decade alone there have been significant growth in refugee numbers resulting into the growth of camps all over Africa. These camps are found in Sierra Leone, Liberia, Angola, Tanzania, Malawi, Uganda, and Kenya. In order to verify the veracity of the thesis conclusion that confinement policy is a policy against human rights of the refugees, more studies could be undertaken about confinement camps outside Kenya. It is possible that the experiences of refugees elsewhere in other camps could be different enough to significantly alter their contexts and the perceptions about confinement policing.

There is a great deal of concern about the role of UNHCR in protecting refugees, especially those at risk of involuntary repatriation. While protection is the key role of UNHCR, the international system embodied in it is not sufficiently empowered to protect all refugees. The realization that moral or political persuasion sometimes have little meaning in complex conflicts has led to the creative use of some institutions, such as UN peacekeeping forces, in roles which they have not been accustomed. The success or failure of these attempts to enforce protection needs to be understood more clearly, particularly with respect to refugees in the camp. Case studies from such complex and long-standing refugee camps like in Tanzania and Malawi could provide additional insights about the dynamics of camps confinement policy.

In the final analysis, the academic knowledge base on refugees in general and the 1951 Refugee Convention has increased greatly since the early attempts. Recently, several significant studies have been presented about all aspects of refugees. The challenge for the future is to improve the linkages between the academics who study the 1951 Convention and the people who work daily with refugees.

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<http://www.unhcr.ch/refworld/legal/instrumen/asylum.htm>

<http://www.unhcr.ch>

APPENDIX 1

Waindi Oliver
P O Box 63070
00200 Nairobi

The Manager
YMCA Shauri Moyo
Nairobi

Dear Sir/Madam

**RE: INTERVIEW ON HUMAN RIGHTS STATUS IN
KAKUMA REFUGEE CAMP**

I am a student at the University of Nairobi at the Institute of Diplomacy and Master of Arts Degree course. As part of my course I am undertaking a research on the extent of the implementation of the 1951 Refugee Convention by the Kenyan Government. I have chosen Kakuma Refugee camp to be my study site.

In order to help me plan the project and evaluate it later on, I would like to ask you some questions. Please try to answer the questions honestly. Do not worry if you are not sure about the answer. All the individual information I collect will be kept confidential, and only information that cannot be linked back to you will be shared outside the research project.

Thank you in advance for your anticipated cooperation.

Yours faithfully,

Waindi Oliver

APPENDIX 2

Waindi Oliver
P O Box 63070
00200 Nairobi

Service Provider
Kakuma Refugee Camp
C/O UNHCR – Kenya

Dear Sir/Madam

**RE: INTERVIEW ON HUMAN RIGHTS STATUS IN
KAKUMA REFUGEE CAMP**

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Yours faithfully,

Waindi Oliver

APPENDIX 3

Waindi Oliver
P O Box 63070
00200 Nairobi

The OCPD
Buru Buru Police Station
Nairobi

Dear Sir/Madam

**RE: INTERVIEW ON HUMAN RIGHTS STATUS IN
KAKUMA REFUGEE CAMP**

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Yours faithfully,

Waindi Oliver

APPENDIX 4**Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 U.N.T.S. 45, entered into force June 20, 1974.*****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 and essentially humanitarian approach towards solving the problems of refugees,
3. Aware, however, that refugee problems are a source of friction among many Member States, and desirous of eliminating the source of such discord,
4. Anxious to make a distinction between a refugee who seeks a peaceful and normal life and a person fleeing his country for the sole purpose of fomenting subversion from outside,
5. Determined that the activities of such subversive elements should be discouraged, in accordance with the Declaration on the Problem of Subversion and Resolution on the Problem of Refugees adopted at Accra in 1965,

6. Bearing in mind that the Charter of the United Nations and the Universal Declaration of Human Rights have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,

7. Recalling Resolution 2312 (XXII) of 14 December 1967 of the United Nations General Assembly, relating to the Declaration on Territorial Asylum,

8. Convinced that all the problems of our continent must be solved in the spirit of the Charter of the Organization of African Unity and in the African context,

9. Recognizing that the United Nations Convention of 28 July 1951, as modified by the Protocol of 31 January 1967, constitutes the basic and universal instrument relating to the status of refugees and reflects the deep concern of States for refugees and their desire to establish common standards for their treatment,

10. Recalling Resolutions 26 and 104 of the OAU Assemblies of Heads of State and Government, calling upon Member States of the 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 term "a country of which he is a national" 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 which he is a national 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.
4. This Convention shall cease to apply to any refugee if: (a) he has voluntarily re-availed himself of the protection of the country of his nationality, or,

(b) having lost his nationality, he has voluntarily reacquired it, or, (c) he has acquired a new nationality, and enjoys the protection of the country of his new nationality, or, (d) he has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution, or, (e) he can no longer, because the 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) he has committed a serious non-political crime outside his country of refuge after his admission to that country as a refugee, or, (g) he has seriously infringed the purposes and objectives of this 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 endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality.
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 at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2.
4. Where a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the OAU, and such other Member States shall in the spirit of African solidarity and international co-operation take appropriate measures to lighten the burden of the Member State granting asylum.

5. Where a refugee has not received the right to reside in any country of asylum, he may be granted temporary residence in any country of asylum in which he first presented himself as a refugee pending arrangement for his resettlement in accordance with the preceding paragraph.

6. For reasons of security, countries of asylum shall, as far as possible, settle refugees at a reasonable distance from the frontier of their country of origin.

Article 3

Prohibition of Subversive Activities

1. Every refugee has duties to the country in which he finds himself, which require in particular that he conforms with its laws and regulations as well as with measures taken for the maintenance of public order. He shall also abstain from any subversive activities against any Member State of the OAU.

2. Signatory States undertake to prohibit refugees residing in their respective territories from attacking any State Member of the OAU, 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**Cooperation 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 XII; (d) of denunciations, in accordance with Article XIII.

IN WITNESS WHEREOF WE, the Heads of African State and Government, have signed this Convention.

DONE in the City of Addis Ababa this 10th day of September 1969. As of 06 January 1995

Total Number of States Parties: 41

Most Recent Ratification: Kenya 23 June 1992

CountriesRatification/accession

Algeria 24 May 1974
 Angola 30 Apr 1981
 Benin 26 Feb 1973
 Burkina Faso 19 Mar 1974
 Burundi 31 Oct 1975
 Cameroon 07 Sep 1975
 Cape Verde 16 Feb 1989
 Central African Republic 23 Jul 1970
 Chad 12 Aug 1981
 Congo 16 Jan 1971
 Egypt 12 Jun 1980
 Equatorial Guinea 08 Sep 1980
 Ethiopia 15 Oct 1973
 Gabon 21 Mar 1986
 Gambia 12 Nov 1980
 Ghana 19 Jun 1975
 Guinea 18 Oct 1972
 Guinea Bissau 27 Jun 1989
 Kenya 23 Jun 1992
 Lesotho 18 Nov 1983
 Liberia 01 Oct 1971
 Libyan Arab Jamahiriya 25 Apr 1981
 Malawi 04 Nov 1987

Mali 10 Oct 1981
Mauritania 22 Jul 1972
Mozambique 22 Feb 1989
Niger 16 Sep 1971
Nigeria 23 May 1986
Rwanda 19 Nov 1979
Senegal 01 Apr 1971
Seychelles 11 Sep 1980
Sierra Leone 28 Dec 1987
Sudan 24 Dec 1972
Swaziland 16 Jan 1989
Tanzania 10 Jan 1975
Togo 10 Apr 1970
Tunisia 17 Nov 1989
Uganda 24 Jul 1987
Zaire 14 Feb 1973
Zambia 30 Jul 1973
Zimbabwe 28 Sep 1985

1967 UNHCR PROTOCOL

APPENDIX 5**PROTOCOL RELATING TO THE STATUS OF REFUGEES OF 31
JANUARY 1967****International Instruments**

Asylum

Protocol relating to the Status of Refugees of 31 January 1967

States Parties List

United Nations General Assembly, 16 December 1966

4 October 1967

Preamble

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 1 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 1 of the Convention as if the words "As a result of events occurring before 1 January 1951 and . . . "and the words". . .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 (1)(a) of the Convention, shall, unless extended under Article 1 B (2) thereof, apply also under the present **Protocol**.

Article 2

Co-operation of the national authorities with the United Nations 1. The States

Protocol relating to the Status of Refugees of 31 January 1967

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,

Protocol relating to the Status of Refugees of 31 January 1967

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 force

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 Nations The Secretary-General **Protocol** relating to the Status of Refugees of 31 January 1967

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 reservations 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 V above.

GENERAL ASSEMBLY RESOLUTION 2198 (XXI)

Protocol relating to the Status of Refugees

The General Assembly, Considering that the Convention relating to the Status of Refugees, signed at Geneva on 28 July 1951, 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 date-line of 1 January 1951,

Taking note of the recommendation of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees that the draft **Protocol** relating to the Status of Refugees should be submitted to the General Assembly after consideration by the Economic and Social Council, in order that the Secretary-General might be authorized to open the **Protocol** for accession by Governments within the shortest possible time,

Considering that the Economic and Social Council, in its resolution 1186 (XLI) of 18 November 1966, took note with approval of the draft **Protocol** contained in the addendum to the report of the United Nations High Commissioner for Refugees and concerning measures to extend the personal scope of the Convention and transmitted the addendum to the General Assembly,

1. Takes note of the **Protocol** relating to the Status of Refugees, the text of which is contained in the addendum to the report of the United Nations High Commissioner for Refugees;

2. Requests the Secretary-General to transmit the text of the **Protocol** to the States mentioned in article V thereof, with a view to enabling them to accede to the **Protocol**.

1495th plenary meeting, 16 December 1966.

Protocol relating to the Status of Refugees of 31 January 1967

Angola

Date of accession and entry into force: 23 June 1981

Reservation

In its instrument of accession to the **Protocol**, the Government of Angola declared, in accordance with Article VII paragraph 1, that it does not consider itself bound by Article IV of the **Protocol**, concerning settlement of disputes relating to the interpretation of the **Protocol**.

Botswana

Date of accession and entry into force: 6 January 1969

Reservations

"Subject to the reservation in respect of article IV of the said **Protocol** and in respect of the application in accordance with article I thereof of the provisions of articles 7, 17, 26, 31, 32 and 34 and paragraph 1 of article 12 of the Convention relating to the

Status of Refugees, done at Geneva on 28 July 1951"

Burundi

Date of accession and entry into force: 15 March 1971

Reservations

The instrument of accession to the **Protocol** was made subject to the following reservations with respect to the application of the Articles of the Convention to those refugees covered by the **Protocol**:

"1. The provisions of Article 22 are accepted, in respect of elementary education, only (a) in so far as they apply to public education, and not to private education;

(b) on the understanding that the treatment applicable to refugees shall be the most favourable accorded to nationals of other States.

2. The provisions of Article 17(1) and (2) are accepted as mere recommendations and, in any event, shall not be interpreted as necessarily involving the régime accorded to nationals of countries with which the Republic of Burundi may have concluded regional, customs, economic or political agreements.

3. The provisions of Article 26 are accepted only subject to the reservation that refugees:

(a) do not choose their place of residence in a region bordering on their country of origin; (b) refrain in any event, when exercising their right to move freely, from any activity or incursion of a subversive nature with respect to the country of which they are nationals."

Cape Verde

Date of accession: 09 July 1987

Reservations

Protocol relating to the Status of Refugees of 31 January 1967

In all cases where the 1951 Convention relating to the Status of Refugees grants to refugees the most favorable treatment accorded to nationals of a foreign country, this provision shall not be interpreted as involving the régime accorded to nationals of countries with which Cape Verde has concluded regional customs, economic or political agreements.

Chile

Date of accession and entry into force: 27 April 1972

Reservations

- (1) With the reservation that, with reference to the provisions of article 34, the Government of Chile will be unable to grant to refugees facilities greater than those granted to aliens in general, in view of the liberal nature of Chilean naturalization laws;
- (2) With reservation that the period specified in article 17, paragraph 2 (a) shall, in the case of Chile, be extended from three to ten years;
- (3) With the reservation that article 17, paragraph 2 (c) shall apply only if the refugee is the widow or the widower of a Chilean spouse;
- (4) With the reservation that the Government of Chile cannot grant a longer period for compliance with an expulsion order than that granted to other aliens in general under Chilean law.

China (Peoples' Republic of)

Date of accession and entry into force: 24 September 1982

Reservation

The Government of China declared that it does not consider itself bound by Article IV of the **Protocol** regarding the settlement of disputes.

Congo

Date of accession and entry into force: 10 July 1970

Reservations

The Government of the Congo does not consider itself bound by Article IV of the **Protocol** regarding the settlement of disputes.

El Salvador

Date of accession and entry into force: 28 April 1983

Reservations In its instrument of accession to the above-mentioned **Protocol**, the Government of El Salvador made a reservation to the effect that article IV would not apply in respect of El Salvador.

Ethiopia

Date of accession and entry into force: 10 November 1969

Reservations

Subject to the following reservation in respect of the application, under article 1 of the **Protocol**, of the Convention relating to the Status of Refugees, done at Geneva on 28 July 1951: "The provisions of articles 8, 9, 17 (2), and 22 (1) of the Convention are recognized only as recommendations and not as legally binding obligations"

Finland

Date of accession and entry into force: 10 October 1968

Reservations Subject to the reservations made in relation to the Convention relating to the Status of Refugees, in accordance with article I of the **Protocol**.

Ghana

Date of accession and entry into force: 30 October 1968

Reservations

*"The Government of Ghana does not consider itself bound by Article IV of the **Protocol** regarding the settlement of disputes."*

Guatemala

Date of accession and entry into force: 22 September 1983

Reservations

1. The Republic of Guatemala accedes to the Convention Relating to the Status of Refugees and its **Protocol**, with the reservation that it will not apply provisions of those instruments in respect of which the Convention allows reservations if those provisions contravene constitutional precepts in Guatemala or norms of public order under domestic law.

2. The expression "treatment as favourable as possible" in all articles of the Convention is interpreted as not including rights which, under law or treaty, the Republic of Guatemala has accorded or is according to nationals of the Central American countries or of other countries with which it has concluded or is entering into agreements of a regional nature.

Honduras

Date of accession: 23 March 1992

Reservations

With respect to Article I(1): The Government of the Republic of Honduras does not consider itself bound by those articles of the Convention to which it has entered reservations.

Israel

Date of accession and entry into force: 14 June 1968

Reservations

The reservations made by Israel to the 1951 Convention (see above) are, in accordance with Article VII (2) of the **1967 Protocol**, applicable to its obligations under the latter instrument.

Jamaica

Date of accession and entry into force: 30 October 1980

Reservations

"1. The Government of Jamaica understands Articles 8 and 9 of the Convention as not preventing it from taking, in time of war or other grave and exceptional circumstances, measures in the interest of national security in the case of a refugee on the ground of his nationality;

2. The Government of Jamaica can only undertake that the provisions of paragraph 2 of Article 17 of the Convention will be applied so far as the law of Jamaica allows;

3. The Government of Jamaica can only undertake that the provisions of Article 24 of the Convention will be applied so far as the law of Jamaica allows;

4. The Government of Jamaica can only undertake that the provisions of paragraphs 1, 2 and 3 of article 25 of the Convention will be applied so far as the law of Jamaica allows;

5. The Government of Jamaica does not accept the obligation imposed by Article IV of the **Protocol** Relating to the Status of Refugees with regard to the settlement of disputes."

Luxembourg

Date of accession and entry into force: 22 April 1971

Reservations

The reservation made by Luxembourg to the 1951 Convention (see above) is, in accordance with Article VII(2) of the **1967 Protocol**, applicable to its obligations under the latter instrument.

Malawi

Date of accession and entry into force: 10 December 1987

Declaration

*"The Government of the Republic of Malawi reiterates its declaration on recognition as compulsory the jurisdiction of the International Court of Justice made on 12 December, 1966 in conformity with Article 36 paragraph 2 of the Statute of the Court. In this respect, the Government of the Republic of Malawi regards the phrase "settled by other means" in Article 38 of the Convention and Article IV of the **Protocol** to be those means stipulated in Article 33 of the Charter of the United Nations."*

Malta

Date of accession and entry into force: 15 September 1971

Reservations

The reservations made by Malta to the 1951 Convention (see above) are, in accordance with Article VII(2) of the **1967 Protocol**, applicable to its obligations under the latter instrument.

Netherlands

Date of accession and entry into force: 29 November 1968

Reservation

In accordance with article VII of the **Protocol**, all reservations made by the Kingdom of the Netherlands upon signature and ratification of the Convention relating to the Status of Refugees, which was signed in Geneva on 28 July 1951, are regarded to apply to the obligations resulting from the **Protocol**.

Territorial Application

The Kingdom of the Netherlands accedes to the said **Protocol** so far as the territory of the Kingdom situated in Europe is concerned; and, as from 1 January 1986, for Aruba.

Peru

Date of accession: 15 September 1983

Declaration:

The Government of Peru hereby expressly declares with reference to the provisions of article I, paragraph 1, and article II of the aforementioned **Protocol**, that compliance with the obligations undertaken by virtue of the act of accession to that instrument shall be ensured by the Peruvian State using all the means at its disposal, and the Government of Peru shall endeavour in all cases to co-operate as far as possible with the Office to the United Nations High Commissioner for Refugees.

Portugal

Date of accession and entry into force: 13 July 1976

Declaration:

Protocol relating to the Status of Refugees of 31 January 1967

Upon accession, the Government of Portugal stated the following:

" (1) The **Protocol** will be applied without any geographical limitation.

(2) In all cases in which the **Protocol** confers upon the refugees the most favoured person status granted to nationals of a foreign country, this clause will not be interpreted in such a way as to mean the status granted by Portugal to the nationals of Brazil or to the national of other countries with whom Portugal may establish commonwealth-type relations"

Republic of Korea

Date of accession: 03 December 1992

Reservations

*"The Republic of Korea declares pursuant to article 7 of the **Protocol** that it is not bound by article 7 of the Convention relating to the Status of Refugees, which provides for the exemption of refugees from legislative reciprocity after fulfilling the condition of three years' residence in the territory of the Contracting States."*

Rwanda

Date of accession and entry into force: 3 January 1980

Reservations

The instrument of accession also contains the following reservation to Article IV: "For the settlement of any dispute between States Parties, recourse may be had to the International Court of Justice only with the prior agreement of the Rwandese Republic."

Somalia

Date of accession and entry into force: 10 October 1978

Reservations

*"The Government of the Somali Democratic Republic acceded to the Convention and **Protocol** on the understanding that nothing in the said Convention or **Protocol** will be construed to prejudice or adversely affect the national status, or political aspiration of displaced persons from Somali territories under alien domination.*

It is this spirit, that the Somali Democratic Republic will commit itself to respect the terms and provisions of the said Convention and **Protocol**."

Swaziland

Date of accession and entry into force: 28 January 1969

Declaration

The instrument of accession made the following declaration:

Protocol relating to the Status of Refugees of 31 January 1967

"The Government of the Kingdom of Swaziland deems it essential to draw attention to the accession herewith as a Member of the United Nations, and not as a Party to the said Convention by reason of succession or otherwise."

Reservations

Pursuant to paragraph 1 of Article VII of the **Protocol**, the accession to the **Protocol** by Swaziland was made subject to the following reservations in respect of the application, under Article I of the **Protocol**, of the provisions of the Convention relating to the Status of Refugees:

"(1) The Government of the Kingdom of Swaziland is not in a position to assume obligations as contained in Article 22 of the said Convention, and therefore will not consider itself bound by the provisions therein."

(2) Similarly, the Government of the Kingdom of Swaziland is not in a position to assume the obligations of Article 34 of the said Convention, and must expressly reserve the right not to apply the provisions therein."

Turkey

Date of accession and entry into force: 31 July 1968

Reservations

The instrument of accession stipulates that the Government of Turkey maintains the provisions of the declaration made under section B of Article 1 of the Convention Relating to the Status of Refugees, according to which it applies the Convention only to persons who have become refugees as a result of events occurring in Europe, and also the reservation clause made upon ratification of the Convention to the effect that no provision of this Convention may be interpreted as granting to refugees greater rights than those accorded to Turkish citizens in Turkey.

Uganda

Date of accession and entry into force: 27 September 1976

Reservations

The reservations made by Uganda to the 1951 Convention (see above) are, in accordance with Article VII(2) of the **1967 Protocol**, applicable to its obligations under the latter instrument.

United Kingdom

Date of accession and entry into force: 4 September 1968

Territorial Application

*"In accordance with the provisions of the first sentence of Article VII(4) of the **Protocol**, the United Kingdom hereby excludes from the application of the **Protocol** the following territories for the international relations of which it is responsible: Jersey, Southern Rhodesia, Swaziland."*

Protocol relating to the Status of Refugees of 31 January 1967

*"In accordance with the Provisions of the second sentence of Article VII(4) of the said **Protocol**, the United Kingdom hereby extends the application of the **Protocol** to the following territories for the international relations of which it is responsible: St.*

Lucia, Montserrat."

United Republic of Tanzania

Date of accession and entry into force: 4 September 1968

Reservations

*"The provision of Article IV of the **Protocol** shall not be applicable to the United Republic of Tanzania except within the explicit consent of the Government of the United Republic of Tanzania."*

United States of America

Date of accession and entry into force: 1 November 1968

Reservations

The instrument of accession contained the following reservations in respect of the application of the Convention, in accordance with Article I of the **Protocol**:

"The United States of America construes Article 29 of the Convention as applying only to refugees who are resident in the United States and reserves the right to tax refugees who are not residents of the United States in accordance with its general rules relating to non-resident aliens."

"The United States of America accepts the obligation of paragraph 1(b) of Article 24 of the Convention except in so far as that paragraph may conflict in certain instances with any provisions of title II (old age, survivors' and disability insurance) or title XVIII (hospital and medical insurance for the aged) of the Social Security Act.

As to any such provision, the United States will accord to refugees lawfully staying in its territory treatment no less favourable than is accorded to aliens generally in the same circumstances."

Venezuela

Date of accession and entry into force: 19 September 1986

Declaration

*"In implementing the provisions of the **Protocol** which confer on refugees the most favourable treatment accorded to nationals of a foreign country, it shall be understood that such treatment does not include any rights and benefits which Venezuela has granted or may grant regarding entry into or sojourn in Venezuela has concluded regional or sub-regional integration, customs, economic or political agreements".*

Reservations

The instrument of accession also contains a reservation in respect of Article IV.

Protocol relating to the Status of Refugees of 31 January 1967

APPENDIX 6

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

status of ratifications, reservations and declarations

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,

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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 fulfil 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 (1) 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 fulfil for the enjoyment of the right in question, if he were not a refugee, must be fulfilled by him, with the exception of requirements which by their nature a refugee is incapable of fulfilling.

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 fulfil 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 fulfil 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 1 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 judgement 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 Nations

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 I 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 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.

APPENDIX 7

QUESTIONNAIRE NO. 34

REFUGEE AND THE 1951 REFUGEE CONVENTION IN KENYA

IN DEPTH INTERVIEW WITH UNHCR STAFF IN NAIROBI

- i. Position held _____

- ii. How long have you worked for UNHCR _____

- iii. How often do you get into contact with the actual refugees? Tick one
a) Daily b) Weekly c) Unplanned d) Never

- iv. Are you conversant with the international protection regimes?
(Tick one)
a) Yes b) No

- v. Are you conversant with the legal status of refugees and asylum seekers in Kenya?

vi. Is Kenya implementing the 1951 Refugee Convention resolutions as required?
(Tick one)

vii. If not what do you think is the problem?

viii. What in your view should be done to ensure that all state parties to the 1951 Refugee Convention implement all the resolutions to the convention?

ix. Do you ever get complaints from refugees saying that their rights have been abused? (Tick one)

- a) Yes b) No

x. If so what are the nature of the main complaints?

xi. Do you think UNHCR has succeeded in achieving its objectives in Kenya (tick one)

a) Yes b) No

xii. Give reasons

xiii. Any other comment?

APPENDIX 8**QUESTIONNAIRE NO. 7****REFUGEES AND THE 1951 REFUGEE CONVENTION IN KENYA****INDEPTH INTERVIEW WITH STAFF AT THE IMMIGRATION
DEPARTMENT, MINISTRY OF HOME AFFAIRS**

1. What position are you holding?

2. How long have you worked for the immigration department? (Tick one)

a) Yes b) No

3. Are you conversant with the international regime for the protection of the refugees? (tick one)

a) Yes b) No

4. Are you conversant with an legal instrument to regulate the refugees in Kenya?
(tick one)

a) Yes b) No

5. In the course of your work how often do you get in touch with refugees?

- a) Once in a while
- b) Many times
- c) Most times
- d) Most of the time
- e) Never

6. In your view do you think Kenyan Government has implemented the 1951 Refugee Convention?

7. What in your view can be done to help the government fully implement the 1951 Refugee Convention?

8. Why in your view do you think the government left the administration of the refugees to UNHCR?

9. Should the government get involved in the administration of the refugees?

a) Yes b) No

10. Explain 9 above.

11. What do you think of camp confinement policy in the light of the 1951 Refugee Convention?

12. Any other comments?

APPENDIX 9

QUESTIONNAIRE NO. 253

REFUGEES AND THE 1951 REFUGEE CONVENTION STATUS IN KENYA

**IN DEPTH INTERVIEW WITH A MEMBER OF THE KENYA POLICE -
NAIROBI**

1. Position held in the Police Forces

2. How long have you worked for Kenya Police? _____

3. How often do you get into contact with refugees? (tick one)

4. Do you know the international regime for the protection of the refugees? (tick one)

a) Yes b) No

5. If so briefly explain _____

6. Do you know the Kenyan laws dealing with the refugees? (Tick one)

a) Yes b) No

7. If so, briefly explain. _____

8. How do you identify an alien from a Kenyan? Briefly explain.

9. In your opinion do you think that refugees get the ideal treatment from the police? Tick one

a) Yes b) No

10. Briefly explain number 9.

11. What can the government do to make refugees more comfortable in Kenya?

12. Any other comment?

APPENDIX 10**QUESTIONNAIRE NO. 201****REFUGEES AND THE 1951 REFUGEE CONVENTION STATUS IN KENYA****IN DEPTH INTERVIEW WITH YMCA MANAGEMENT IN NAIROBI**

1. What is your position in the YMCA management?

2. When did YMCA begin getting involved with the refugees?

3. Why do you think YMCA was mandated to handle refugees?

4. How many do you have in your premises at any given time? (Tick one)

- a) 1-100 b) 100-200 c) 201-300 d) Over 300

5. How long on average do they stay within your premises?

- a) 1-6 months b) 6-12 months c) 12-24 months d) Over 24 months

6. What services do you offer the refugees?

7. Do you ever get complaints from the refugees?

a) Yes b) No

8. If so what type of complaints do you receive?

9. Are you conversant with the 1951 Refugee Convention? (tick one)

a) Yes b) No

10. Are you aware of any legislation in Kenya governing refugees in Kenya? (Tick one)

a) Yes b) No

11. Any other comment?



A Sudanese woman and her son waiting for their food rations at Kakuma refugee camp.



Sudanese children getting their firewood and food ratios at Kakuma refugee camp.