

Standards of Treatment of Refugees: The Case

Study of Kenya

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Declaration

This project is my original work, and has not been presented for award of degree in any other university.

Signed:.....

Date:..... 4th November, 2008

This project has been submitted for examination with my approval as university supervisor.

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DEDICATION

To my beloved husband Erick Oyoto, children Sasha
Kadzo Oyoto and Jason Sifa Oyoto for their inspirational
love and patience.

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LIST OF ACRONYMS

AU	African Union
CEDAW	International Convention on the Elimination of All Forms of Discrimination against Women
CRC	Convention on the Rights of the Child
CERD	Convention on the Elimination of all Forms of Racial Discrimination
EU	European Union
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
NGO	Non-governmental organization
OAU	Organization of African Unity
OHCHR	Office of the High Commissioner for Human Rights
RCK	Refugee Consortium of Kenya
HRCK	Human Rights Commission of Kenya
UNHCR	United Nations High Commissioner for Refugees
WFP	World Food Programme
GTZ	German Agency for Technical Cooperation

ABSTRACT

Articles 12 - 30 of the 1951 Refugee Convention set out the rights and standards of treatment entitled to refugees once they have been recognized as in the countries of asylum. All refugees must be granted identity papers and travel documents that allow them to travel outside the country.

Refugees must receive the same treatment as nationals of the receiving country with regard to the following rights: Free exercise of religion and religious education; Free access to the courts, including legal assistance; Access to elementary education; Access to public relief and assistance; Protection provided by social security; Protection of intellectual property, such as inventions and trade names; Protection of literary, artistic and scientific work ;and equal treatment by taxing authorities.

Refugees must receive the most favourable treatment provided to nationals of a foreign country with regard to the following rights: The right to belong to trade unions; The right to belong to other non-political nonprofit organizations; and the right to engage in wage-earning employment.

Refugees are accorded the most favourable treatment possible, which must be at least as favourable to that accorded aliens generally in the same circumstances, with regard to the following rights: The right to own property; the right to practice a profession; the right to self-employment, Access to housing and Access to higher education.

Refugees must receive the same treatment as that accorded to aliens generally with regard to the following rights: The right to choose their place of residence; The right to move freely within the country; Free exercise of religion and religious education. Free access to the courts, including legal assistance; Access to elementary education; Access to public relief and assistance; Protection provided by social security; Protection of

intellectual property, such as inventions and trade names; Protection of literary, artistic and scientific work ;and equal treatment by taxing authorities

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CHAPTER ONE

INTRODUCTION TO THE STUDY

The process of developing a body of international law, conventions and guidelines to protect refugees began in the early 20th century under the League of Nations, the predecessor of the United Nations. It ended on 28 July 1951, when a special United Nations conference approved the Convention Relating to the Status of Refugees. The 1951 Convention Relating to the Status of Refugees is the foundation of international refugee law. The Refugee Convention defines the term “refugee” and sets minimum standards for the treatment of refugees spelling out the kind of legal protection, other assistance and social rights of persons who are found to qualify for refugee status.¹

According to the 1951 Convention Relating to the Status of Refugees, a refugee is someone who leaves his/her country of origin owing to “well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group, or Political opinion and is unable or unwilling to avail him/herself of the protection of that country, or to return there, for fear of persecution”²

Initially the 1951 Convention was limited to protecting European refugees because the Convention was drafted in the wake of the Second World War³. As new refugee crises emerged during the late 1950s and early 1960s, it became necessary to widen both the temporal and geographical scope of the Refugee Convention. Thus, a Protocol to the Convention was drafted and adopted in 1967. Together, the 1951 Convention and the 1967 protocol have helped inspire important regional instruments

¹ UNHCR; *The 1951 refugee convention, Questions and answers*, (Geneva, September 2007) p.4

² *ibid* p.6

³ The 1951 Convention definition of a refugee focuses on persons who are outside their country of origin and are refugees as a result of events occurring in Europe or elsewhere before 1 January 1951.

such as the Convention Governing the Specific Aspects of Refugee Problems in Africa and the 1984 Latin American Cartagena Declaration. A total of 147 states have acceded to one or both of the UN instruments.⁴

In international law, customary international law and treaty law, there are standards of treatment for refugees; the standards of treatment spell out the obligation of states in ensuring that refugees are treated in accordance with internationally recognized standards of law.

The international legal framework protecting refugees rests with the 1951 United Nations Convention Relating to the Status of Refugees. Most national legal systems do not contain any specific provision on the automatic or ad hoc incorporation of decisions of international treaties. The treaties are incorporated differently in various countries; There are three theories advanced which guide states in the implementation of international rules within national system: first the monistic view which advocates for the supremacy of municipal law, then the dualistic doctrine which suggests the existence of two distinct sets of legal orders (international law, on one side and municipal legal systems on the other), and finally the monistic theory maintains the unity of various legal systems and the primacy of international law.⁵

However, most countries do not accord primacy to international law in their national legal systems. States may go so far as to thwart the legal import of international prescription by refraining from implementing them at the domestic level⁶.

⁴ UNHCR; *The 1951 refugee convention, Questions and answers*, (Geneva, September 2007) p.5

⁵ Cassese A., *International Law* 2nd ed, (Oxford University Press, New York, 2005) p.213

⁶ *Ibid.* p.214

STATEMENT OF THE RESEARCH PROBLEM

Kenya hosts large scale influxes of refugees, majority who came in the 1990s from Somalia and Sudan. Despite a comprehensive international and regional refugee protection law, of which Kenya is a state party, there has been increasingly less commitment to upholding the basic principle of “non-refoulement”,⁷ as is evidenced by the closure of the Kenya border with Somalia in 2006 at the height of heavy fighting in that country.

Moreover the rights afforded to refugees under the various relevant international conventions are quite often compromised, citing legal difficulties. Refugees are often being rejected at the frontier, or returned to their countries of origin even if the conditions they have fled still persist.⁸

At the root of the current neglect of implementing international refugee legal norms in Kenya are the competing need to uphold standards of treatment of refugees and the legitimate interest of states.⁹

The new law on refugees, Kenya Refugee Act 2006, contains progressive provisions for refugee recognition, protection and management within Kenya. The Act creates both ethical and legal obligations for the country to provide protection to the refugees within Kenya. It borrows heavily and reiterates the standards rights of refugees as recognized in international law.

This study therefore, seeks to assess if the new Refugee Act 2006, provides for standards of treatment of refugees as envisaged by treaty law.

⁷ Article 33 of the 1951 UN Convention Relating to the Status of Refugees.

⁸ Kindiki K., *Refugee Protection in Kenya in the Context of international Law*; Refugee Protection in the Context of National Security; An analysis of the Refugee Act 2006, (Nairobi,2008) p.40

⁹ Mwangi M., *Refugee Protection and the Diplomacy of National Security I Kenya: A Framework fore analysis*, Refugee Protection in the Context of National Security; An analysis of the Refugee Act 2006, (Nairobi,2008) p.22

OBJECTIVES OF THE STUDY

This study aims to find out if Kenya Refugee Act of 2006 and other related Acts meet the standards of protection in accordance with the international Law standards.

LITERATURE REVIEW

General International Refugee Law

The status and treatment of refugees have been matters of concern for the international community and for international lawyers in particular since a relatively early date. International refugee law is the branch of law that deals with the rights and protection of refugees.¹⁰ A combination of international and regional treaties and domestic laws, outline the rights afforded to refugees. Crisp notes that states created and ratified these binding legal instruments with, as he states, the “specific intention of protecting their national interests and addressing their own security concerns.”¹¹

Whilst municipal law is hierarchical or vertical in its structure (meaning that a legislature enacts binding legislation), international law is horizontal in nature. This means that all states are sovereign and theoretically equal. Because of the notion of sovereignty, the value and authority of international law is dependent upon the voluntary participation of states in its formulation, observance, and enforcement. Although there may be exceptions, it is thought by many international academics that most states enter into legal commitments with other states out of enlightened self-interest rather than adherence to a body of law that is higher than their own. As D. W. Greig notes,

¹⁰Ogata Sadako, “A Comprehensive Refugee Policy” statement on the occasion of the Inter-governmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia, London, 9 December 1993

¹¹ Crisp J., “Africa’s Refugees: Patterns, Problems and Policy Challenges,” *New Issues in Refugee research*, Working Paper No. 28, (Geneva, August 2000), p.12.

"international law cannot exist in isolation from the political factors operating in the sphere of international relations".¹²

According to Fernando Teson, positivism provides the most widely accepted epistemological position for the 'realist' theory of international legal obligation.¹³ Modern positivists,¹⁴ acutely aware of the challenge of post-modern jurisprudence represented by 'New Stream' scholars such as Martti Koskenniemi¹⁵ and David Kennedy,¹⁶ have had to elaborate their empirical methodology to accommodate such phenomena as non-derogable 'ius cogens' rules of international law. Philosophically, however, positivism has changed very little since its expression in the work of Vattel. Any challenge made to its presuppositions is met with specious and disdainful objections.¹⁷ Positivism's focus of inquiry and basic premise is the will or consent of states.¹⁸ Customs and treaties are freely entered into by states in pursuit of their national interest. Despite the assertion by legal positivists that their methodology was descriptive and 'objective', it was never value-free. Teson suggests that the underlying justification of the positivist model of international law is in fact a "realist" political theory, based on either a "Hobbesian position that nations are at (potential) war with each other" or on a constitutional democratic liberalism.¹⁹ With the latter, legitimate legal and political authority resides in

¹² D. W. Greig, *International Law*, (Butterworths, 1970) p.207

¹³ Teson F. R., *Realism and Kantianism in International Law* (1992) ASIL Proceedings 113.

¹⁴ Positivists assert that international law is "law" solely because it is based on the consensus of independent sovereign states as law *between* them. Of course all modern positivists have dispensed with the law of nature ideology (i.e. social contract theorizing) that initially inspired them (i.e. Vattel). See, for example, M Byers *Custom, Power and the Power of Rules* (Cambridge: Cambridge University Press, 1999) 166-203.

¹⁵ Koskenniemi '*International Legal Education*' (1986) Harvard International Law Journal 361

¹⁶ D Kennedy '*International Legal Education*' (1986) Harvard International Law Journal 361.

¹⁷ For example, the "disquiet" and unease felt by international lawyers with regard to the 'deviant strands' – 'New Stream' and Feminist legal theorists – is addressed by M Byers *supra* n 66, 45-46, 210-213.

¹⁸ L Oppenheim *International Law: A Treatise*, Vol I, 6th edition, H Lauterpacht (ed) (London: Longmans, 1947) p.92.

¹⁹ Teson FR., '*Realism and Kantianism in International Law*' (1992) ASIL Proceedings 113-114

the 'people', represented by their government.²⁰ Teson argues that normative realism is at the heart of legal positivism and international relations theory. He thus exposes the other side of the realist position: national interests will inevitably, in practice - speciously or blatantly - override universal human rights claims.²¹

According to the influential jurist Lassa Oppenheim, international law is law between and not above states.²² In contrast to municipal law, international law is not based on a "sovereign political authority" but on "common interests"; law defined by customary rules developed over time by the common consent of states.²³

With the rise of positivism and the consequent emphasis upon state sovereignty, treaties and custom assumed dominant position in the exposition of rules in the international system, and the importance of legalistic writings began to decline. Thus, one finds that text books and classic general works in international law as the source of legal literature.

This literature review is based on the positivist school of thought, which distinguishes between international law and natural law and emphasizes practical problems and current state practices. The literature review will examine the connection between state responsibility, alien law, human rights law and the 1951 Geneva Convention; how these are linked in the articulation of International Refugee Law.

²⁰ *ibid*

²¹ *Ibid.* 116-117

²² L Oppenheim *International Law: A Treatise*, Vol I, 6th edition, H Lauterpacht (ed) (London: Longmans, 1947) p.35.

²³ *ibid.* p.11-12.

The 1951 Convention Relating to the Status of Refugees.

Approximately two-thirds of the world's countries are state parties to the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol.²⁴ These remain the principal body of international law for the protection of refugees. Furthermore, the refugee definition and a number of the rights provisions contained in these instruments have been widely incorporated into regional instruments and domestic legislation.²⁵

Widely signed and ratified, the Convention Relating to the Status of Refugees²⁶ lays out the rights afforded to refugees; Signatory states agree to apply international human rights standards and agreements towards refugees and confer other, specific rights²⁷, which reflect the fact that refugees have lost the protection of their home governments.

While the 1951 Convention Relating to the Status of Refugees²⁸ does not contain specific provisions on the treatment of refugees. It remains, nevertheless, an important point of departure for considering standards of treatment for the reception of refugees²⁹. Important elements of the Convention – notably the non-refoulement provision in Article 33 and the prohibition on punishment for illegal entry in Article 31 – are applicable to refugees before a formal recognition of their status. Furthermore, the gradations of

²⁴ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, 7th ed., (Geneva, January 1999).

²⁵ Goodwin-Gill G.S., *The Refugee in International Law*, 2nd edition, (Clarendon Press, Oxford, 1996) P.20-25.

²⁶ <http://www.ohchr.org/english/law/refugees.htm>. UN, *Convention relating to the Status of Refugees* (1951), (Accessed on May 3, 2005).

²⁷ These rights include: non-refoulement, the right not to be forcibly returned, or refouled, to a country in which the refugee has reason to fear persecution (Article 33), the right not to be expelled, except under certain strictly defined conditions (Article 32), Exemption from penalties for illegal entry into the territory of a contracting State (Article 31), the right to employment (Article 17), status under the law (Article 12), the right to housing (Article 21), the right to education (Article 22), freedom of movement within the territory (Article 26), The right to freedom of religion and free access to courts (Articles 4 and 16) and the right to be issued with identification and travel documents (Articles 27 & 28).

²⁸ <http://www.ohchr.org/english/law/refugees.htm>

²⁹ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, 1992) Para. 28.

treatment allowed by the Convention depend on notions such as lawfully staying or merely present in the territory, which in themselves serve as a useful yardstick in the context of defining treatment standards for refugees. At a minimum, the 1951 Convention provisions that are not linked to lawful stay or residence would apply to refugees in so far as they relate to humane treatment and respect for basic rights³⁰.

However, the only refugee rights which have received relatively extensive academic attention are Articles 31–33 of the Geneva Refugee Convention of 1951. Even in the context of its recent Global Consultations on International Protection, UNHCR drew particular attention to only three refugee rights: the rights of non-refoulement (Art. 33), freedom from penalization or detention for illegal entry (Art. 31), and protection of family unity.³¹ Those academic works that do address the full range of refugee rights are all quite dated, including Nehemiah Robinson³², A. Grahl-Madsen³³, and Paul Weis³⁴.

Human Rights Law

International human rights law is also relevant in the context of defining adequate treatment standards for refugees³⁵. The minimum core content of human rights applies to everyone in all situations.

³⁰ Articles 3 (non-discrimination), 4 (religion), 5 (rights granted apart from this Convention), 7 (exemption from reciprocity), 8 (exemption from exceptional measures), 12 (personal status), 16 (access to courts), 20 (rationing), 22 (public education), 31 (refugees unlawfully in the country), and 33 (non-refoulement principle).

³¹ Hathaway C. J., *The Rights of Refugees under International Law*, (Cambridge University Press, Cambridge, 2005) p.2

³² Robinson N., *Convention relating to the Status of Refugees: Its History, Contents and Interpretation* (New York, 1953)

³³ Grahl-Madsen A., *Commentary on the Refugee Convention 1951* (Geneva, 1963, published in 1997)

³⁴ Weis P., *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr. Paul Weis* (Oxford University Press, 1995-posthumously published).

³⁵ ExCom Conclusion No. 82 (XLVIII) on safeguarding asylum, 1997.

James Hathaway and John Dent³⁶ note that the 1951 Refugee Convention provides a full complement of human rights standards for refugees. For example, article 3 of the 1951 Refugee Convention provides that state parties shall apply the provisions of the Convention without discrimination as to race, religion or country of origin of the beneficiary. Article 4 governs freedom to practice religion and religious education. Article 16 provides that a refugee shall have free access to the courts of law on the territory of all contracting states. Articles 17, 18 and 19 govern the granting of access to employment opportunities to refugees; and Article 21 provides that refugees shall be accorded, as regards housing, treatment as favourable as possible as and in any event not less favourable than that accorded to aliens generally in the same circumstances.

Other rights granted to refugees include freedom of movement in the territory of the contracting state (Articles 26 and 31), and facilitating assimilation and naturalization (Article 34). And what is considered the cornerstone of international protection, prohibition of expulsion or return of a refugee (*non-refoulement*) is found in Article 33, which includes prohibiting return from a potential asylum country at its frontiers. Still other provisions include freedom of association with non-political and non-profit-making associations and trade unions (article 15), free access to courts of law (article 16) and provision of administrative assistance by the contracting state authority to allow a refugee to exercise a right under the Convention (Article 25). Article 5 further provides that nothing in the Convention shall be deemed to impair any additional rights and benefits granted by a contracting state apart from the Convention.³⁷ Therefore according to Hathaway and Dent, states parties should consider the rights provisions in the Convention

³⁶ Hathaway C. J. & John A Dent, *Refugee Rights: Report on a Comparative Survey*, (York Lanes Press, Toronto, 1995)

³⁷ Hathaway C. J. and John A Dent, *Refugee Rights: Report on a Comparative Survey*, York Lanes Press, Toronto (1995).

as minimum standards of treatment.

Goodwin-Gill observes that the Convention is an extraordinary 'Bill of Rights' for refugees. Furthermore, many of the rights found in the international refugee instruments such as enjoying non-discrimination and protection from persecution, are in one form or another enshrined in international human rights treaties. For example, the 1966 International Covenant on Civil and Political Rights (ICCPR), the 1966 International Covenant on Social, Economic and Cultural Rights (ICESCR), the 1984 Convention against Torture and the 1989 Convention on the Rights of the Child (CRC). Under the terms of the 1951 Refugee Convention, many of the rights are granted to refugees without restrictions, while others require that state parties provide treatment as favourable as that provided to other foreigners subject to the jurisdiction of the concerned state³⁸.

Although the 1951 Convention provides an impressive array of rights, international human rights instruments such as the ICCPR and ICESCR may provide even broader legal protection than the refugee instruments.³⁹

State Responsibility

Traditionally, the term "state responsibility" referred only to state responsibility for injuries to aliens. It included not only "secondary" issues such as attribution and remedies, but also the primary rights and duties of states, for example the asserted international standard of treatment and the right of diplomatic protection. Early efforts by the League of Nations and private bodies to codify the rules of "state responsibility"

³⁸ Goodwin-Gill S. G., 1993. "Editorial", *International Journal of Refugee Law*, (p. 3).

³⁹ *Ibid.* p.3

reflected the traditional focus on responsibility for injuries to aliens.⁴⁰ The League's 1930 Codification Conference in The Hague was able to reach an agreement only on "secondary" issues such as imputation, not on substantive rules regarding the treatment of aliens and their property.

The laws of state responsibility are the principles governing when and how a state is held responsible for a breach of an international obligation. Rather than set forth any particular obligations, the rules of state responsibility determine, in general, when an obligation has been breached and the legal consequences of that violation. In this way they are "secondary" rules that address basic issues of responsibility and remedies available for breach of "primary" or substantive rules of international law, such as with respect to the use of armed force. Because of this generality, the rules can be studied independently of the primary rules of obligation. They establish the conditions for an act to qualify as internationally wrongful, the circumstances under which actions of officials, private individuals and other entities may be attributed to the state, general defenses to liability and the consequences of liability.

State responsibility is the legal consequences of the international wrongful act of a state; namely the obligation of the wrongdoer, on one hand, and the rights and powers of any state affected by the wrong on the other.⁴¹ International refugee law forms the benchmark for all policy decisions of refugee host states. In addition, it is the measuring stick for how well or poorly states meet their practical obligations in addressing the rights of displaced persons.

State responsibility is the legal consequences of the international wrongful act of a state; namely the obligation of the wrongdoer, on one hand, and the rights and powers of

⁴⁰ Matsui Y., "The Transformation of the Law of State Responsibility" (1993)p.20 *Thesaurus Acroasium* 1.

⁴¹ Cassese A., *International Law* (2nd Ed) (oxford University Press Inc., New York, 2005) p.241

any state affected by the wrong on the other.⁴² International refugee law forms the benchmark for all policy decisions of refugee host states. In addition, it is the measuring stick for how well or poorly states meet their practical obligations in addressing the rights of displaced persons.

To scholars such as Francis Deng, popular responsibility and accountability of governance are not only the measure, but also indeed the pivotal rationale of sovereignty. In other words, the concept of sovereignty cannot be dissociated from responsibility: a state should not be able to claim the prerogatives of sovereignty unless it carries out its internationally recognized responsibilities to its citizens, which consist of providing them with protection and life-supporting assistance.⁴³

The League's 1930 Codification Conference in The Hague showed that there was disagreement on the matter of responsibility, among other things on the issue of responsibility for the treatment of aliens (with some states proposing that aliens should be granted national treatment that is equated to the nationals of the host states, others principally the western countries suggesting that they should instead be treated according to the 'minimum standards' principle, that is, they must be afforded the possibly higher protection deriving from the set of international rules making up the so called 'minimum standards of civilization.'⁴⁴ Host governments are primarily responsible for protecting refugees and are obliged to carry out the 1951 Refugee Convention provisions. UNHCR maintains a 'watching brief,' intervening if necessary to ensure refugees are granted asylum and are not 'refouled'. Since, by definition, refugees are not protected by their

⁴² Cassese A., *International Law* (2nd Ed) (oxford University Press Inc., New York, 2005) p.241

⁴³ Deng F. and Roberta Cohen, *Masses in Flight: The global Crisis of Internal Displacement*, (Brookings Institution Press, Washington D.C. 1998) p.7.

⁴⁴ Cassese A., *International Law* (2nd Ed) (oxford University Press Inc., New York, 2005) p.241

governments, the international community steps in to ensure the individual's rights and physical safety.⁴⁵

International refugee law, however, is tempered by host states' interpretation and implementation of the established laws. Arthur Helton refers to the rights and obligations under international law concerning refugees as "a tapestry of international law comprising refugee, human rights, and humanitarian law."⁴⁶ To study the standards of treatment of refugees, it is important to address the body of laws, which impose obligations on states to protect the rights of displaced persons.

According to Brian Gorlick⁴⁷, it is the legal obligation of states to ensure that human rights are extended to individuals who befall a state's formal jurisdiction or exercise of authority. In the case of refugees, human rights principles are readily applicable as usually there is an identifiable state, as demarcated by a border or territorial crossing, which gives rise to a claim by a refugee to seek human rights protection from that state. He argues that the state must take pro-active steps to ensure compliance by public and private actors in respect of human rights obligations⁴⁸.

Human Rights law and State Responsibility

Each state is responsible for human rights violations occurring in its own territory. In contrast, state responsibilities with regard to citizens of other states are vague and weak. Individuals can claim and enforce rights against their own state. However, non-

⁴⁵ UNHCR, *The 1951 Convention Relating To The Status Of Refugees And Its 1967 Protocol: Signing On Could Make All The Difference*. (Geneva, August 2001) p.3

⁴⁶ Helton A., *The Price of Indifference: Refugees and Humanitarian Action in the New Century* (New York: Oxford University Press, 2002), P.122.

⁴⁷ Gorlick B., Working Paper No.30 New Issues in Refugee Research, *Human Rights and Refugees: Enhancing Protection through International Human Rights Law* (Stockholm, October 2000)

⁴⁸ Ibid. p.11

resident non-citizens can only claim and enforce rights against other states through their own state and under strictly defined conditions.

Along with the requirements to discontinue a wrongful conduct, to provide restitution and to guarantee non-repetition, payment of compensation for injuries inflicted upon any victims in violation of international law constitutes a basic concept of State responsibility.⁴⁹ Article 91 of Additional Protocol I of 1977 to the Geneva Convention of 12 August 1949 provides specifically:

“A Part to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of the armed forces.”⁵⁰

The Draft Articles on State Responsibility, also state in Article I: “Every internationally wrongful act of a State entails the international responsibility of that State.”⁵¹ Therefore, victims of war or violations of international law have traditionally been compensated only through the medium of the State of which they are nationals. This emphasis on States as the medium for compensation has led to the following developments: First, that aliens are in a better position to receive compensation for injuries done to them than nationals, whose own State is understandably disinclined to make a claim against itself. Hence, the State responsibility doctrine under traditional international law has usually been associated with the protection of aliens.⁵² Second, that States retain the discretionary power to press or not to press the claims of their nationals.

⁴⁹ Oliver, “Legal Remedies and Sanctions,” in R. Lillich (ed.), *International Law of State Responsibility for Injuries to Aliens* 61, 71 (1983)

⁵⁰ Article 91 of Additional Protocol I of 1977 to the Geneva Convention of 12 August 1949

⁵¹ Article I, The Draft Articles on State Responsibility

⁵² Louis B. Sohn and Richard Baxter, *Draft Convention on the International Responsibility of States for Injuries to Aliens* Cambridge, Mass, Harvard Law School, 1961, Harvard Law School, *Research in International Law*, “Responsibility of States,” 23 *Am. J. Int’l L. Spec. Supp.* 131-239 (1929).

Indeed, the sum claimed may or may not correspond to actual losses.⁵³ Finally that it is usually only the victors in war that are in a position to claim and obtain compensation for injuries done to their nationals from the vanquished. This despite the fact that the victors themselves may have also committed atrocities against innocent nationals of the defeated States in violation of the law of war.

These shortcomings under the traditional State responsibility doctrine relating to compensation have been remedied by the incorporation of human rights into international law. There is general agreement that an "international wrongful act," for which a State is held internationally responsible, includes specifically action in violation of human rights.⁵⁴

Human rights are defined as "rights which attach to all human beings equally, whatever their nationality"⁵⁵ Hence state responsibility extends to the treatment of nationals as well as aliens. Such extension brings into sharp relief the dichotomy between human rights and governmental rights.

The integration of human rights into International Law and State responsibility has removed the procedural limitation that victims of war or violations of international law could seek compensation only through their own governments, as well as extended the right to compensation to both nationals and aliens. So long as the principle of compensation remains valid, it matters little whether compensation is settled through courts, international organizations, "ex-gratia" payments or diplomatic negotiations.⁵⁶

⁵³ Bishop W.W., *International Law: Cases and Materials* 3rd ed., 1971, p. 749; Statement of Umpire Parker, speaking for the Mixed Claims Commission (United States and Germany) in its Administrative Decision V (1924)

⁵⁴ See discussions in the International Law Commission on the subject of State Responsibility in its yearbooks.

⁵⁵ Waldock, "Human Rights in Contemporary International Law and the Significance of the European Convention," 11 *Int'l & Comp. L. 9*. 3 Supp. 1965)

⁵⁶ *Ibid.*

Customary International Law, State Responsibility and Human Rights Law

International law is designed to make each state responsible for the human rights protection of its own population; this includes litigation for violations targeting another state. For centuries, the notion of “state sovereignty” was used as a shield by oppressive governments. Events taking place within the territorial jurisdiction of a particular state were seen and treated as purely “internal affairs,” and the state was answerable to no one. Since World War II, this conception of sovereignty has changed. However, the notion of sovereignty still serves to protect against some forms of state responsibility, only now it is far more likely that countries will invoke the sovereignty of *another* state in order to remove *themselves* from all responsibility in assisting an outlaw state. As a result, countries have been able to “do” things in the international realm that they would be prohibited from doing domestically.⁵⁷ In some ways, an equally remarkable change in international law and in the notion of state sovereignty has been the enormous growth in the transnational enforcement of human rights.⁵⁸

When it comes to alien law, Plender R. notes that apart from those cases in which an obligation to admit an alien arises by reasons of treaty, there are a few instances in which general international law imposes states special obligations in respect of the admission of defined categories of foreigners.⁵⁹ Aliens who have satisfied a residential qualification, determined by the law of the state in which they have established domiciles, commonly receive by operation of that law, or by formal administrative act, an indefinite right of residence, or are relieved (partially or wholly) from liability to deportation. An

⁵⁷ Lea Brilmayer, *Justifying International Acts* (1989).

⁵⁸ See generally Harold Hongju Koh, *Civil Remedies for Uncivil Wrongs: Combating Terrorism Through Transnational Public Law Litigation*, 22 *Tex. Int'l L.J.* 169 (1987)

⁵⁹ Plender R., *International Migration Law* (2nd Ed), (Martinus Nijhoff Publishers, Dordrecht, 1988) p.160

examination on national laws on this point reveals a certain congruence of practice. Indeed, it would be difficult to find a state in which the power to curtail the alien's right to remain may be exercised without regard to the length of his or her lawful residence.⁶⁰

Dominic McGoldrick observes that, once aliens are permitted to enter the territory of a state party "they are entitled to the rights set out in the Covenant."⁶¹

Debates on Standards of Treatment of Refugees.

National treatment is a debated principle in customary international law, but a vital one to many treaty regimes. Under national treatment, if a state grants a particular right, benefit or privilege to its own citizens, it must also grant those advantages to the citizens of other states while in that country. In the context of international agreements, a state must provide equal treatment to those citizens of other states that are participating in the agreement.

While this is generally viewed as a desirable principle, in custom it conversely means that a state can deprive foreigners of anything of which it deprives its own citizens. An opposing principle calls for an international minimum standard of justice (a sort of basic due process) that would provide a base floor for the protection of rights and of access to judicial process. The conflict between national treatment and minimum standards has mainly played out between industrialized and developing nations, in the context of expropriations. Many developing nations, having the power to take control over the property of their own citizens, wished to exercise it over the property of aliens as well.

⁶⁰ Ibid. p.160

⁶¹ In setting out the specific rights applicable to aliens the Human Rights Committee provided a lengthy description .

Though support for national treatment was expressed in several controversial (and legally nonbinding) United Nations General Assembly resolutions, the issue of expropriations is almost universally handled through treaties with other states and contracts with private entities, rather than through reliance upon international custom.

Few countries deny that a state is obligated to provide foreign nationals with protection, but they disagree over the breadth and character of this protection. Generally, the older and economically developed countries, such as the US, subscribed to the "international minimum standard," according to which the state is obliged to observe certain "universal principles of justice" in the treatment of aliens and their property. Historically this standard has prevailed over the "equality of treatment" or "national treatment" standard in which aliens may demand no more from a state than treatment equal to that which it accords its own nationals. When there is a reasonable basis for the difference, states are not prohibited from distinguishing between citizens and aliens, regardless of whether they adhere to an "international minimum" or "equality of treatment" standard.

National treatment doctrine preaches that aliens are entitled to the same treatment as granted to nationals and nothing else. The adoption of this doctrine without the existence of international patterns to be followed may lead to absurd situations, namely, if nationals could be jailed without prior trial, the same treatment could happen to aliens.

Bouchard argues that the doctrine of equality was purely theoretical and did not work in practice because no state grants absolute equality or is bound to grant it.⁶² In fact,

⁶² Calvo C. M., *Le Droit International Theorique et Pratique*, section 205, p.350

this doctrine of national treatment should be understood as granting the alien the same rights as granted to nationals, with certain exceptions to the law to be established by law.⁶³

The national treatment doctrine is based on Hegel's ideas that municipal law prevails and that there are no such things as international patterns to be followed, is contrary to the core of international law and should not be accepted. By adopting in unrestricted terms the national treatment doctrine, absurd situations such as during World War II, when Germany decided to discriminate against specific races and religions and treated all nationals and aliens alike, will be admitted.⁶⁴

This doctrine is however supported by Calvo, who argues that national states are independent and sovereign and therefore, as a rule, enjoy the right to be free from external interference, whether that interference be diplomatic or by force. He argues further that aliens and nationals be granted equal rights. Calvo is known as an opponent to the whole concept of diplomatic protection. However, an accurate examination of his works shows that he only opposes diplomatic protection in cases where intervention was unfounded. He condemned intervention of one State into another in the following terms:

Aside from political motive, these interventions have nearly always had as apparent pretexts, injuries to private interests, claims and demands for pecuniary indemnities on behalf of subjects... According to strict international law, the recovery of debts and the pursuits of private claims does not justify 'de plano' the armed intervention of governments, and, since European states invariably follow this rule in their reciprocal relations, there is no reason why they should not also impose upon themselves in their relations with nations of the new world.⁶⁵

International human rights law, alien law and refugee law share a common goal in aiming to prevent and relieve suffering, and to protect the rights and freedoms of

⁶³ Borchard E., *The Minimum Standard of Treatment of Aliens*, American Society of International Law- Proceedings 51,56 (1939)

⁶⁴ Tiburcio C., *The Human Rights of Aliens Under International and Comparative Law*, (Martinus Nijhoff Publisher, 2001) p.121

⁶⁵ Calvo C. M., *Le Droit International Theorique et Pratique*, Section 205, para.350

refugees. As such, they complement and reinforce each other, thus providing a comprehensive framework for the standard of treatment of refugees. However, these three bodies of law are different in both applicability and scope. Human rights law is broader and applies to all human beings during times of both peace and war.

Cassese Antonio observes that customary international law imposes upon any state the obligation to respect the fundamental human rights of its own nationals or foreigners residing or passing through its territory, as well as stateless persons. The universal declaration of Human Rights establishes the standards that everyone has the 'right to seek and enjoy asylum.' These rules do not provide detailed regulations of how a state must treat individuals. Such regulations can only be found in conventions such as the UN covenant of Civil and Political Rights, the African Charter on Human and People's Rights. Instead customary rules, in addition to imposing certain obligations with regard to foreigners, enjoin any state not grossly and systematically to infringe human rights.⁶⁶

According to James Hathaway, the 1951 Refugee Convention and its Protocol are conceived here not as accords about immigration, or even migration, but as part and parcel of international human rights law. He argues that International refugee law was formulated to serve as a back-up to the protection one expects from the State of which an individual is a national. It was meant to come into play only when that protection is unavailable, and then only in certain situations. Complementing this analysis, the House of Lords more recently affirmed that the fundamental goal of refugee law is to restore refugees to affirmative protection.⁶⁷ The general purpose of the Convention is to enable the person who no longer has the benefit of protection against persecution for a

⁶⁶ Cassese A., *International Law* (2nd Ed) (Oxford University Press Inc., New York, 2005) p.123

convention reason in his own country to turn for protection to the international community.⁶⁸

Therefore, refugee law is a corrective branch of human rights law. Its specific purpose is to ensure that those whose basic rights are not protected in their own country are, if able to reach an asylum state, entitled to invoke rights of substitute protection in any state party to the Refugee Convention.⁶⁹ It is clear that a treatment of refugee law which takes no account whatever of more general human rights norms would clearly present an artificially narrow view of the human rights of refugees⁷⁰.

In addition to the above, Universal Declaration of Human Rights is stated in the 1951 Convention preamble. The Convention affirms "the principle that human beings shall enjoy fundamental rights and freedoms without discrimination". International refugee law instruments also codify a number of specific rights which states are obliged to provide to refugees. In view of rapid developments in the domain of human rights law, which may complement and inform the interpretation of the refugee instruments, the Refugee Convention is very much a living document, which despite its vintage, maintains its relevance in respect of providing a normative framework to address contemporary refugee problems.

However, not all subscribe to this view. In fact, most view the 1951 Refugee Convention as outdated and euro-centric and thereby of limited relevance in dealing with refugee problems in less developed countries. Others like Jackson Ivor belong to the

⁶⁷ Hathaway C. J., *The Rights of Refugees under International Law*, (Cambridge University Press, Cambridge, 2005) p.4

⁶⁸ *Ibid.* p.4

⁶⁹ Hathaway C. J., *The Rights of Refugees under International Law*, (Cambridge University Press, Cambridge, 2005) p.5

⁷⁰ *Ibid.* p.8

school that argues that the origins of the 1951 Refugee Convention are premised on its universal application to all refugee situations.⁷¹

Apart from variances of scope and application in the international treaties, as with any international human rights regime the overriding difficulty is how to enforce the specified rights. In the case of the principal UN human rights treaties there is a system of treaty bodies that play a supervisory and enforcement role in ensuring compliance by state parties with the treaty provisions. Several scholars have argued that the present set-up of ensuring compliance with international human rights standards is unsatisfactory and should be reformed.⁷²

While some critics have argued that refugee situations are fundamentally different from human rights issues and that an increased focus on human rights may, in fact, weaken refugee protection.⁷³ Others like Daniel Warner think that this position is flawed. He argues that in a world where refugee protection is rapidly being eroded and pegged to the lowest common denominator, individuals and groups committed to refugee protection must employ all means possible to uphold the rights of refugees.

Besides the inherent difficulty in defining and assessing the compliance of states with international human rights standards, an underlying aspect of creating legal obligations is the requirement to give effect to and enforce these obligations. As noted by Goodwin-Gill, this can take a variety of forms depending on the nature of the obligation and the approach for implementation adopted by the state. Ensuring that state agents are obliged to respect certain norms may vary from country to country. However, these

⁷¹ Ivor C J., 'The 1951 Convention relating to the Status of Refugees: A Universal Basis for Protection', *IJRL* vol 3, no 3 (1991).

⁷² Alston P. (Ed), *The United Nations and Human Rights: A Critical Appraisal*, (Clarendon Press, Oxford, 1992).

⁷³ Warner D., 'Refugees, UNHCR and Human Rights: Current Dilemmas of Conflicting Mandates', *Refuge*, vol 17, no 6, (Centre for Refugee Studies, York University, Canada, December 1998).

obligations must be implemented in good faith. Thus, with regard to the legal obligations stemming from the 1951 Refugee Convention and the 1967 Protocol the test should be "whether, in light of domestic law and practice, including the exercise of administrative discretion, the state has attained the international standard of reasonable efficacy and efficient implementation of the treaty provisions concerned."⁷⁴ The same test could be employed in respect of the corresponding obligations found in international human rights law.

In this sense, the positive developments in international human rights law and its related mechanisms provide a complimentary body of legal principles which supports refugee protection. As argued in this literature review, international human rights standards and mechanisms have been demonstrated to provide both a practical and analytical tool to enhance the protection of refugees. Although the system is far from perfect, the overall developments are extremely positive. In a world where refugee protection may be compromised by state practice and shortsighted policies, individuals and organizations including UNHCR must take advantage of every means at their disposal to fulfill their fundamental mandate of protecting the world's refugees. The effective realization of the potential contribution of UN human rights mechanisms is a significant step in the right direction.

Despite the more precise language embodied in the international human rights instruments, problems of legal interpretation remain. In commenting on whether a state can be said to have implemented an international legal obligation, Goodwin-Gill has expressed the following view:

... the relative imprecision of the terminology employed in standard-setting conventions; the variety of legal systems and practices of states; the role of

⁷⁴ Ibid. p.240.

discretion, first, in the state's initial choice of means [to enact treaty obligations], and secondly, in its privilege on occasion to require resort to such remedial measures as it may provide; and finally the possibility that the state may be entitled to avoid responsibility by providing an 'equivalent alternative' to the required result⁷⁵

From the point of view of human rights law, refugees have the same rights to life, liberty and security as any other human being, wherever they may find themselves and under whatever status. This essential basis for refugee protection is explained, once again, by Goodwin-Gill who poses the question "what is it in a refugee's claim that requires it to be met?" and answers that: "It is the right of every human being to life, liberty and security which may be jeopardized by breach of the principle of refuge..."⁷⁶

Because of stupendous development in Human rights doctrines in the international community, the rules of treatment of foreigners have largely been absorbed by the rule on Human Rights. Consequently, many international rules tend to protect, more than individuals 'qua' foreign individuals do as such. It follows that there now exists general rules of international law that impose limitations on states even with regard to their own nationals and any other individual subject to their jurisdiction(that is de jure or de facto authority)⁷⁷

THEORETICAL FRAMEWORK

This analysis is based upon a theory of modern positivism, which accepts that international law is most sensibly understood as a system of rules agreed to by states,

⁷⁵ Goodwin-Gill G.S., *The Refugee in International Law*, 2nd edition, (Clarendon Press, Oxford, 1996) p.238.

⁷⁶ Okoth-Obbo G., *Does Refugee Protection In Africa Need Mediation? Track Two*, Vol. 9. No 3 (November 2000) p.3

⁷⁷ Cassese A., *International Law* (2nd Ed) (oxford University Press Inc., New York, 2005) p.122

intended to govern the conduct of states, and ultimately enforced in line with the will of states. What States actually do is the key, not what states ought to do given the basic rule of nature. The positivist approach is derived from the empirical method adopted by the renaissance. It is not concerned with an edifice of theory structured upon deductions from absolute principles, but rather with viewing events as they occurred and discussing actual problems that had arisen. The scientific method of experiment and verification of hypothesis emphasizes this approach.

The theory of international law embraced here is thus in a very real sense a conservative one, predicated on a rigorous construction of the sources of law. Drawing on this theoretical approach, the study identifies those universal rights of particular value to refugees, even as it explains why the rights of refugees are for the most part best defended not by reference to universal custom or general principles of law, but rather by reliance on clear duties codified in treaty law.⁷⁸

JUSTIFICATION OF THE RESEARCH

Academic Justification

Notwithstanding the satisfactory scope of human rights guaranteed to refugees under the international refugee instruments, these provisions are all too commonly ignored by states and other actors as a disproportionate amount of energy and resources⁷⁹ tends to be focused on determining *who* is a refugee.⁸⁰

⁷⁸ Hathaway C. J., *The Rights of Refugees under International Law*, (Cambridge University Press, Cambridge, 2005) p.10

⁷⁹ Hathaway C. J., *Indian Journal of International Law*, vol 39, no 1, (January-March 1999), p.11. 'Keynote Address of Professor James Hathaway at New Delhi Workshop on International Refugee Law',

⁸⁰ Goodwin-Gill S. G., (Ed) *International Journal of Refugee Law*, 1993. p 29.

In recent years, however, governments throughout the industrialized world have begun to question the logic of routinely assimilating refugees, and have therefore sought to limit their access to a variety of rights. Most commonly, questions are now raised about whether refugees should be allowed to enjoy freedom of movement, to work, to access public welfare programs, or to be reunited with family members. In a minority of states, doubts have been expressed about the propriety of exempting refugees from compliance with visa and other immigration rules, and even about whether there is really a duty to admit refugees at all. There is also a marked interest in the authority of states to repatriate refugees to their countries of origin, or otherwise to strip themselves of even such duties of protection as are initially recognized.⁸¹

This research will evaluate and make comparisons between the standards of treatment of refugees in Kenya and those laid out in international refugee law.

Policy Justification

The relevant Government authorities can use the research to ensure that Refugees in Kenya are treated according to the international set standards.

HYPOTHESES

The Kenyan statute law meets the standards of protection of refugees in accordance with the International law standards.

⁸¹ ⁸¹ Hathaway C. J., *The Rights of Refugees under International Law*, (Cambridge University Press, Cambridge, 2005) p.3

The Kenyan statute law does not meet the standards of protection of refugees in accordance with the International law standards.

METHODOLOGY OF THE RESEARCH

This section discusses the research methodology to be used in this study. It will present the research design, data collection methods, research procedures and data analysis methods to be followed in the research process. The main purpose of this study is to find out if the standards of treatment as provided in the Kenya Refugee Act 2006 meet the international law standards in a manner envisaged by treaty law. It is specifically intended to investigate how successful Kenya has been in fulfilling its international obligation in terms of standards of treatment.

Such issues are best investigated through a case study research design; through an exploration of the case study, the standards of treatment of refugees within its borders will be explored. A Case study entails the examination of a single unit such as a person, a small group of people, or a single company in this case the case study will be the Kenya Refugee Act of 2006. However, Case studies are not representative of the whole. This means that the researcher cannot argue that from one case study the results, findings or theory developed apply to other similar case studies.

Primarily, existing documents and desk studies will be used. Therefore, the study will mainly rely on the secondary data collection method; which will involve collection and review from documented sources, which is data collected by others to be "re-used" by a researcher. However, it will seek primary data as a guide to an in-depth understanding of the issues under study.

The secondary data will be obtained from books, journals, articles, and documents sourced from Non-Published/Electronic Sources, Professional Bodies, National Government Sources, the UNHCR and other reliable libraries.

However, Secondary data has various limitations. First, the data was collected for different purpose and may therefore lead to problems of definition and comparability over time. Second, the researcher using secondary data may not be aware of the sources of error or bias. Third, secondary data may have been tampered with; the researcher has no control of the quality of the data or documentation. Forth, the information might lack representativeness. Fifth secondary data may not be readily available and finally data might be outdated.

Secondary data is however provides a basis for comparison. It is fast and easy to use since the data has already been collected. With secondary data, many data collection problems are avoided such as obtrusiveness in primary data collection. The data will then be analyzed and conclusions and recommendations will be drawn from it.

SCOPE AND LIMITATIONS OF THE RESEARCH

The study will focus on a developing country's Refugee Law, particularly in Africa, which have signed onto refugee rights instruments because the continent is unrivalled as home to the largest number of refugees. The Scope of this research will therefore be limited to the Standards of Treatment of Refugees in Kenya.

The study is limited to the boundaries of Kenya; Kenya being the case study. Therefore, only the refugee law in Kenya will be analyzed.

CHAPTER OUTLINE

Chapter One: An Introduction to the Study

This chapter will include an introduction, Statement of the problem, Objectives of the study, Justification of the research, Literature Review, Theoretical Framework, Hypothesis and the Research Methodology.

Chapter Two: Standards of Treatment in International Law.

The second chapter will constitute of a general overview of international refugee law. This chapter will also give a conceptual framework.

Chapter Three: Standards of Treatment in International Refugee Law.

This chapter will focus more on the standards of treatment of refugees in treaties; that refugees should be treated first as nationals, secondly, better than aliens, thirdly as aliens in the same circumstances and finally as aliens.

Chapter Four: A case Study of Kenya

This chapter will comprise of a critical analysis of the Kenyan Refugee act.

Chapter Five: Conclusion

Chapter five will be made of the conclusion. It is also in this chapter that the hypothesis will be tested through the findings of the study. From the conclusion of the study, recommendations will be drawn.

CHAPTER TWO

Standards of Treatment of Aliens in International Law.

Introduction

For a long time customary and treaty provisions on the treatment accorded to foreigners have placed major limitations upon state sovereignty. Although foreigners are under territorial supremacy of the host state and are bound to international rules that confer international rights on their nation state. The relevant international rules are intended to protect life, person and property of foreigners.

National and international courts have held that foreigners may not be subjected to arbitrary treatment and in particular may not be deprived of their property without fair compensation. Two approaches have been advocated, one by developing countries who have argued that it is sufficient to be treated as nationals of the host state, that is they must not be treated differently from nationals. The other approach supported by developed countries is that foreigners must enjoy minimum standards of civilization, regardless of how the citizens of the host country are treated by their own countries, for example, *Hary Roberts v United Mexican States* settled by the United Mexican States Claims Commission in 1926.⁸² It would seem that the later prevailed; however, many states have insisted that their nationals abroad be afforded 'national treatment.'

Origin of Standards of Treatment of Aliens

Most treaties include a minimal standard of treatment (MST) that requires that the host State treat foreign individual or investment in accordance with an indefinable

⁸² Antonio Cassese, *International law*, (2ed), (Oxford University Press, 2005) pg 121

standard such as "fair and equitable" treatment. Traditionally, this type of provision applied only to extreme cases of mistreatment.

The classical monograph on the principle is by A. H. Roth⁸³, "The Minimum Standard of International Law Applied to Aliens", (Leiden, 1949) who defined standards of treatment as "... the international standard is nothing else than a set of rules, correlated to each other and deriving from one particular norm of general international law, namely that the treatment of aliens regulated by the law of nations"

Aliens may be simply defined as foreign nationals; the word alien covers a wide scope of definitions depending as to whether it is an individual of which may be a child, woman, man, an investor, or immigrant whichever the case on one hand or a cooperate entity on the other hand.

The question of protection of foreign nationals is among those issues in international law most closely connected with the different approaches adapted to international relations by the Western and Third World nations. Developing countries, as well as communist countries formally, have long been eager to reduce what they regard as the privileges to capitalist states by international law.⁸⁴ They lay great emphasis upon the sovereignty and independence of states and resent the economic influence of the West. The latter, on the other hand, have wished to protect their investments and nationals abroad and provide for the security of their property.

The origins of the minimum international standard are traced back to colonial times, when imperial powers gave protection to persons and investments that went to the colonies. In the nineteenth century, the positivists' doctrines of state sovereignty⁸⁵ and domestic jurisdiction reigned supreme. Concern also with the treatment of sick and

⁸³ A. H. Roth, *The Minimum Standard of International Law Applied to Aliens*, (Leiden, 1949) p.127

⁸⁴ Shaw N. M., *International Law*, (3rd ed) (Cambridge, Grotus Publications, 1991)p.561

⁸⁵ Shaw N. M., *International Law*, (3rd ed) (Cambridge, Grotus Publications, 1991)p.395

wounded soldiers and with prisoners of war developed as from 1864 in terms on international instruments, while states were required to observe certain minimum standards in the treatment of aliens.

Therefore in its early days, the purpose of the minimum standard rule was the protection of the lives and liberty of aliens in situations of social unrest. It was later argued that the standard encompassed the protection of property and investments against expropriation and economic reform in developing countries. Capital exporting countries also wanted to protect their nationals who invested in other countries outside the colonial context; this led to the development of legal doctrines designed by capital exporting powers to justify pursuing the claims of their nationals or even intervening in the host country if necessary.⁸⁶

Resort to an external, minimum international standard was deemed necessary to advance the interests of States in expanding trade and investment in territories with rudimentary forms of government or where local institutions and legal standards did not provide protection satisfactory to capital exporting States.

The standard of minimum treatment was tied to the international law doctrine of State responsibility for injuries to aliens,⁸⁷ which provided that an injury done to an alien was an injury done to the alien's home State and permitted claims and protection or intervention by the home State when domestic recourse was unavailable or exhausted. The nationality of the alien, which encompassed corporations as well,⁸⁸ was the pivotal

⁸⁶ M. Sornarajah, *The International Law on Foreign Investment*, (CUP), 1994, p. 8-20, 27-37.

⁸⁷ *Mavrommatis Palestine Concessions Case* [1929] PCIJ Rpts Ser. A, No.2; *Panevezys-Saldututiskis Railway Case* [1939] Ser A/B, No. 76, *Charzow Factory Case* [1928] PCIJ Rpts Ser. A, No. 17.

⁸⁸ The interests of corporations have had strong impact in the formation of certain areas of international law. A clear example is the freedom of the seas doctrine, designed to further the trading interests of the Dutch East India Company.

fact of this doctrine, later giving rise to problems of nationalities of convenience.⁸⁹ The State of nationality not only owned the investor's claim but could ignore it, pursue it; this is referred to as "diplomatic espousal" or "diplomatic protection"; or settle the claim at its own discretion and could dispose of any money or other benefit it received for the claim as it desired, without the permission of the investor. The only condition other than nationality was that the investor or the home State must have exhausted local remedies in the host State, unless to do so would have been futile.

In their claims, home States and foreign investors were not satisfied with national treatment, which only secured the same treatment afforded to locals because, in their eyes, the governments of the territories receiving the investments were uncivilized, arbitrary, or unable to ensure the rule of law.⁹⁰ Thus the claim by capital exporting States to an absolute minimum below which international law and their diplomatic protection would enter the scene to protect investors. Where the diplomatic muscle of the powerful capital exporting countries would not achieve protection for their investors, for instance, intervention in the domestic affairs of the host State, the use of outright military force was sometimes resorted to.⁹¹

The 1926 decision on the 'Neer Claim' became the landmark case for the international minimum standard. This claim was presented to the US Mexico Claim Commission by the United States on behalf of the family of Paul Neer, who had been killed in Mexico in

⁸⁹ See forthcoming CIEL Brief on Bechtel against Bolivia, where the corporation uses a BIT between Bolivia and The Netherlands to grant jurisdiction to an ICSID arbitral tribunal.

⁹⁰ The distinction between the civilized - uncivilized was central to the positivist international law project of European sovereign states and theorists in the XIXth Century. See A. Angie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law", *Harvard International Law Journal*, 1999, p. 22-34. This distinction found its way to Article 38 (c) of the Statute of the International Court of Justice on the applicable sources of international law, "the general principles of law recognized by civilized nations".

⁹¹ The Drago doctrine, later codified in the Porter Convention of 1907, was the first attempt by Latin American States to challenge this abuse of power by declaring forcible intervention to collect public debts to be illegal. See A. S. Hersley, "The Calvo and Drago Doctrines" (1907) 1 *American Journal of International Law* 26.

obscure circumstances. The claim held that the Mexican Government had shown lack of diligence in prosecuting those responsible and that it ought to reimburse the family. The Commission found that the failure by the Mexican authorities to apprehend or punish those guilty of the murder of the American citizen did not 'per se' violate the international minimum standard on the treatment of aliens. In what has become a classical 'dictum', the Commission expressed the concept as follows:

"the propriety of governmental acts should be put to the test of international standards...the treatment of an alien, in order to constitute an international delinquency should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. Whether the insufficiency proceeds from the deficient execution of a reasonable law or from the fact that the laws of the country do not empower the authorities to measure up to international standards is immaterial"⁹²

Case law points to a number of areas across which the notions of international standards of treatment apply. They include; first, the administration of justice in cases involving foreign nationals, usually linked to the notion of denial of justice⁹³; second, the treatment of aliens under detention, whether aliens are treated in accordance with ordinary "standard of civilization;"⁹⁴ third, full protection and security, which is usually understood as the obligation for the host State to adopt all reasonable measures to physically protect assets and property from threats or attacks which may target particularly foreigners or certain groups of foreigners and forth, although the general 'right of expulsion' by the host State has never been questioned, minimum standards have

⁹² United Nations, reports of International Arbitral Awards, 1926, IV, pp. 60ff.

⁹³ United Nations, *Reports of International Arbitral Awards*, US and Mexico General Claims Commission, *Janes Claim* (1926), IV, p.82

⁹⁴ *Ibid.* p.77

been invoked concerning the way in which it is carried out, which should be the least injurious to the person affected.⁹⁵

The Calvo Doctrine

The Calvo doctrine emerged as the expression of the resistance of Latin American States to the abuse of diplomatic protection and other forms of intervention by Great powers,⁹⁶ having implications in three spheres; national treatment, diplomatic protection, and the exhaustion of local remedies. Invoking the principle of the sovereign equality of States and the principle of equality of nationals and aliens, the Calvo doctrine required that foreigners not be afforded greater rights than locals and those domestic laws apply to, and local courts adjudicate, investment disputes. As Carlos Calvo, a distinguished jurist from Argentina, declared in 1896, "The responsibility of Governments toward foreigners cannot be greater than that which these Governments have towards their own citizens."⁹⁷

Calvo's attempt to limit legal political intervention by western capital exporting countries was ill-fated; numerous international courts and claims commissions ruled that the clause was illegally ineffective, in that it could not deprive states of their rights of protection, since the later derived from international law only. Consequently, the clause was downgraded to a proviso requiring that the exhaustion of local remedies before international diplomatic or judicial action could be initiated.⁹⁸

⁹⁵ United Nations, *Reports of International Arbitral Awards*, 1903, X, p.528.

⁹⁶ See generally, J. Dugard, Special Rapporteur, International Law Commission, *Third report on diplomatic protection, Addendum*, A/CN.4/523/Add.1, 16 April 2002, p. 3.

⁹⁷ . *Le Droit International: Théorique et Pratique*, 5e éd. (Paris 1896), vol. VI, p.231. Translation by D.R. Shea. *The Calvo Clause: A problem of International Law and Diplomacy* (1955), p. 18-9.

⁹⁸ Antonio Cassese, *International law*,(2ed),(Oxford University Press, 2005) pg.33

The essence of standards of treatment is not to displace the primary rule that individuals should look to their state of nationality for protection, but simply to provide a safety net in the event a state fails to meet its basic protective responsibilities.⁹⁹

Source of the Rights of Aliens

The diplomatic protection of nationals abroad arose after the decline of the grant of special letters of reprisal, by which individuals were authorized to engage in self help activities.¹⁰⁰ Such diplomatic methods of assisting nationals abroad developed as the numbers of nationals overseas grew as the consequence of increasing trading activities and thus the relevant state practice multiplied.

It will be noted that refugees are aliens as they fall under the simple definition of the meaning of "alien" as used in this study, however, it goes unnoticed that they fall under a specific category of aliens, hence their recognition has accorded them specific rights under the auspices of Refugee law hence the emergence of a specific international law that caters for their specific needs apart from the other aliens.

The whole structure of international law may need to be re-examined for these position to be arrived at. If it is true that the doctrine of equality is the final test of international responsibility, then the source of responsibility lies in the municipal law. Only when a state denies equality may international responsibility be asserted¹⁰¹.

⁹⁹ Esshak Dankha, Conseil d'Etat of France: Decision No. 42.074 (May 27, 1983, unofficial translation). The existence and the authority of the State are conceived and justified on the grounds that it is the means by which members of the national community are protected from aggression, whether at the hands of fellow citizens, or from forces external to the State

¹⁰⁰ The Mavrommatis Palestine Concessions case, PCIJ, series A, No.2, 1924; 2ILR.p.398

¹⁰¹ Oppenheim L., *International Law*1, (London, Longmann Green & Co. 1937)p.508-509

State Responsibility

Until recently, the theory of the law of state responsibility was not well developed. The position has now changed, with the adoption of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts ("Draft Articles") by the International Law Commission (ILC) in August 2001¹⁰² The Draft Articles are a combination of codification and progressive development. They have already been cited by the International Court of Justice¹⁰³ and have generally been well received.

Article 1 of the international Law Commission's Draft Articles on state Responsibility reiterates the general rule that every internationally wrongful act of a state entails responsibility, while Article 2 emphasizes that every state is subject to the possibility of being held to have committed an internationally wrongful act entailing its international responsibility. These basic reaffirmations on the foundation of state responsibility are reinforced by Article 3 which provides that there is an internationally wrongful act of a state when; first, the conduct consisting of an action or omission is attributable to the state under international law; and second, when that conduct constitutes a breach of an international obligation of the state.¹⁰⁴ It is, of course, international law that determines what constitutes an internationally unlawful act, irrespective of any provisions of municipal law.¹⁰⁵

Although the articles are general in coverage, they do not necessarily apply in all cases. Particular treaty regimes, such as the General Agreement on Tariffs and Trade and the European Convention on Human rights have established their own special rules of responsibility.

¹⁰² http://en.wikipedia.org/wiki/law_of_state_responsibility

¹⁰³ Ibid.

¹⁰⁴ See Yearbook of the ILC, 1979, Vol. II pp.75 *et seq*

¹⁰⁵ Article 4, Yearbook of the ILC 1979 vol.II pp 90 *et seq*

In its note of September 2, 1938, Mexico insisted that municipal law, not international law, was the source of the rights of individuals, including aliens, and sighted Oppenheim:

“It is a well established principle that a state cannot invoke its municipal legislation as a reason for avoiding its international obligation. For essentially the same reason a state, when charged with breach of its international obligation with regard to the treatment of aliens, cannot validly plead that according to its municipal law and practice the act complained of does not involve discrimination against aliens as compared with nationals. This applies in particular to the question of the treatment of the persons of aliens. It has been repeatedly laid down that there exists in this matter a minimum standard of civilization, and that a state which fails to measure up to that standard incurs international liability¹⁰⁶”

The essential characteristics of responsibility hinge upon certain basic factors, First, the existence of an international legal obligation in force as between two particular states; secondly, that here has occurred an act or an omission which violates that obligation and which is imputable to the state responsible, and finally that loss or damage has resulted from the unlawful act or omission.¹⁰⁷

The requirements have been made clear in a number of leading cases. In the ‘Spanish Zone of morocco’ claims¹⁰⁸, Judge Huber emphasized that, “responsibility is the necessary corollary of a right. All rights of an international character involve international responsibility .Responsibility results in the duty to make reparation if the obligation in question is not met”

The general rules relating to responsibility are, as noted, second-level rules in that, while they seek to determine the consequences of a breach of those rules of international law stipulating standards of behavior, they do not in themselves concern the content of the latter principle. a long time customary rules and treaty provisions on the

¹⁰⁶ *Ibid.* p.283

¹⁰⁷ Mosler H., *The International society as a Legal Community* (Dordrecht, 1980) p.157

¹⁰⁸ 2 RIAA.p.615(1923);2 Lerp 157

treatment to be accorded to foreigners have placed a major limitation upon state sovereignty although foreigners are under the territorial supremacy of the host state and are bound to comply with its laws and regulations, they also benefit from a host of rights laid down in international rules that confer international rights on their national state. The relevant international rules are intended to protect the life, person and property of the foreigners. National and international courts have held that foreigners may not be subjected to arbitrary treatment and in particular may not be deprived of their property without fair compensation; they may not be subjected to military conscription.

Nationality is the link between the individual and his state as regards particular benefits and obligations as well as the link between the individual and the benefits of international law. States owe to the international community the duty to accord to their nationals a certain standard of treatment in the matter of human rights, they owe to other States at large, the duty to re-admit its nationals and finally every State is bound by the principle of international cooperation. National systems encompass very many legal subjects: citizens, foreigners residing in the territory of the state, corporate bodies, and state institutions.¹⁰⁹

In conclusion therefore, under international law, states have a duty to respect and ensure respect for human rights law, including the duty to prevent violations, to investigate violations, to take appropriate action against the violators and to afford remedies and reparation to those who have been injured as a consequence of such violations.

¹⁰⁹ Antonio Cassese, *International law*, 2ed, pg 71

Customary international law and treatment of aliens

Custom can be described as the established patterns and behavior that can be objectively verified within a particular social setting. Customary law generally exists where, first, a certain legal practice is observed and second, the relevant actors consider it to be the law.

Prior to the emergence of human rights law, legal norms had developed through the customary exchanges between states over time. Limited coded protection existed for aliens under international law and the variant diplomatic law was generally the custom that was much more practiced which has given rise to the practice of diplomatic immunities and privileges.

Due to this ancient practice, it has long been recognized that the State of nationality is entitled to demand that the host country treat the former's citizens in a manner compatible with the minimum standard set down in customary international law. This right of the country of origin stems from its retention of personal supremacy over expatriate nationals, even though the host State possesses territorial supremacy.¹¹⁰

In the past, the existence of an international minimum standard for the treatment of alien-owned property and investments has been repeatedly challenged. During most of the last century, it has been the object of tension between developed and developing countries, with several countries challenging the existence (or persistence) of a customary norm of an international minimum standard. This tension had implications in several sectors, for example the League of Nations and the UN International Law Commission was unable to reach agreement on a codification of the law of State responsibility for injury to aliens. The work of the UN centre and Commission on Transnational Corporations was equally

¹¹⁰ Oppenheim L., *International Law* Volume 1, Parts 2-4, (Cambridge, 1992), p.903.

impaired by the fundamental differences on issues related to the treatment of foreign property.

The debate continues as to what exactly constitutes the “international minimum standard”. It would appear to at least require that an alien receive equal treatment before the law and in respect of protection of his person and property. However, there is no obligation to accord aliens rights equal to those enjoyed by citizens. Moreover, those duties that do exist are owed to the country of origin and not to the individual alien. The relationship between the alien and the government of their country of origin is complicated. It is therefore unclear how the principle of diplomatic protection could be applied in their case.¹¹¹ For these reasons, in so far as the political rights of aliens are concerned, customary international law on the treatment of aliens appears to be of relevance in the contemporary world setting especially in world trade and investment.

In conclusion, the international minimum standard is a norm of customary international law which governs the treatment of aliens, by providing for a minimum set of principles which States, regardless of their domestic legislation and practices, must respect when dealing with foreign nationals and their property. While the principle of national treatment foresees that aliens can only expect equality of treatment with nationals, the international minimum standard sets a number of basic rights established by international law that States must grant to aliens, independent of the treatment accorded to their own citizens. Violation of this norm engenders the international responsibility of the host State and may open the way for international action on behalf of the injured alien provided that the alien has exhausted local remedies.¹¹²

¹¹¹ The issue of what State, if any, is able to assert a complaint under customary international law regarding treatment of refugees incompatible with the international minimum standard is currently under consideration by the International Law Commission in its study of the law governing diplomatic protection.

¹¹² I. Brownlie, *Principles of Public International Law*, Sixth Edition (Oxford, 2003) p. 502

Human rights law

Alien rights are an integral part of international human rights law. According to the traditional view, a states treatment of its own citizens was regarded beyond the purview of international law¹¹³. Contemporary international law and practice, however, clearly recognizes that the individual is not only a legitimate subject, but is in fact the ultimate object of international law. The basic goal of international human rights law, as F.V. Garcia-Amador has written, “is to ensure the protection of legitimate interests of the human person, irrespective of his nationality. Whether the person is a citizen or an alien is then immaterial: human beings, as such, are under the direct protection of international.”¹¹⁴

The emergence of human rights law over the last fifty years has had a tremendous impact on the position of aliens. In general, human rights law does not distinguish between aliens and citizens. International human rights law contains principles which are relevant to the standard of treatment refugees, they should receive in a country of asylum for example, core civil and political rights, as well as some guidance on procedural standards for determining whether they are entitled to protection from return in the first place.¹¹⁵

States are responsible for respecting and ensuring the human rights of everyone on their territory and subject to their jurisdiction.¹¹⁶ International and regional human rights instruments are therefore relevant to both defining and protecting the integration standards for recognized refugees. In its General Comment No. 15, for example, the

¹¹³ See e.g. Oppenheim, *International law, treatise*:362-69(2d ed, 1912)

¹¹⁴ Garcia-Amador, “Violations of Human Rights and international Responsibility” in L.Sohn & T. Buergenthal, *International Protection of Human Rights* 132 (1973)

¹¹⁵ Mandal R., *Protection Mechanisms Outside of the 1951 Convention (“Complementary Protection”)*. PPLA/2005/02, June 2005. p.(x)

¹¹⁶ General Comment No. 31 established by the Human Rights Committee (HRC), that the scope of the ICCPR is not strictly limited to territory.

Human Rights Committee (HRC) reaffirmed this by stressing that the enjoyment of Covenant rights (ICCPR) is not limited to citizens of States Parties but must be available to all individuals regardless of nationality or statelessness.¹¹⁷ This was also reiterated by UNHCR's Executive Committee (ExCom) in its Conclusion No. 82, where reference is made to the "obligation to treat asylum-seekers and refugees in accordance with applicable human rights and refugee law standards as set out in relevant international instruments."¹¹⁸

While aliens, including refugees, already benefit from the strong protection afforded by the International Covenant on Civil and Political Rights (ICCPR) and its non-discrimination provision with regard to civil and political rights,¹¹⁹ the standards of treatment relative to social and economic rights have not been as clearly and unequivocally defined in relation to aliens.

Moreover, unlike the ICCPR where rights are subject to immediate and full realization by the State Party, the rights in the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹²⁰ are subject to progressive realization, such that neither nationals nor non-nationals can necessarily expect to benefit fully from these rights. Certainly, non-nationals (as well as nationals) are to benefit from the minimum or core content of the ICESCR rights,¹²¹ but the exact treatment owed to them is not as

¹¹⁷ General Comment No. 15 of the Human Rights Committee (HRC) *The position of aliens under the Covenant: 11/04/86. U.N. Doc. HRI/GEN/1/Rev.1.* (1994). Para. One states: "In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness."

¹¹⁸ ExCom, Conclusion No. 82 (XLVII) of 1997, on Safeguarding Asylum, Para. (vi).

¹¹⁹ International Covenant on Civil and Political Rights (ICCPR) adopted by UNGA Resolution 2200 A (XXI) of 16 December 1966 (entered into force 23 March 1976).

¹²⁰ International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted by UNGA Resolution 2200 A (XXI) of 16 December 1966 (entered into force 3 January 1976).

¹²¹ Committee on Economic, Social and Cultural Rights, General Comment 3, "The nature of States parties' obligations", (Fifth session, 1990), U.N. Doc. E/1991/23, annex III p. 86 (1991), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 p. 14 (2003).

certain, especially in relation to economic rights (notably the right to work) on which article 2(3) specifically provides for the possibility of differing treatment with regard to non-nationals.¹²²

Human rights refer to the basic rights and freedoms which all humans are entitled.¹²³ This is a realm of law with many human rights instruments which are quite significant in determining the inalienable rights of individuals universally.

International law has not fully addressed the issue of aliens in comparison to the world trade institutions which are basing the treatment of aliens in relation economics and investment. However, regional instruments have been promulgated to curb the inadequacy of such issues but more so at the national level, a good example of such national enactments will be the immigration laws within territories. Reciprocity and diplomacy have played more of a role in the matter of determination of aliens due to the well founded traditions of diplomacy over the centuries in comparison to current international law.

In addition to a state's respect of the basic human rights of its citizens, international law today imposes an obligation of states to accord to aliens within their jurisdiction the equal protection of these basic rights.

In conclusion, standards of treatment of aliens are drawn from international human rights instruments and formally recognized international legal norms. They aim to protect and promote respect for the human rights of individuals. The standards protect the rights of aliens by providing them with an effective legal remedy, legal protection, non-discriminatory treatment, and restitution, compensation and recovery. Each State is

¹²² Article 2(3) of the ICESCR provides that: "Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals."

¹²³ Article 1 of the United Nations Universal Declaration of Human Rights.

responsible for ensuring that the rights of its citizens are respected. The need for international protection therefore only arises when this national protection is denied or is otherwise unavailable. At that point, the primary responsibility for providing international protection lies with the country in which the individual has sought asylum. All States have a general duty to provide international protection as a result of obligations based on International law, including international human rights law and customary international law. States that are parties to the 1951 Convention relating to the Status of Refugees and/or its 1967 Protocol have obligations in accordance with the provisions of these instruments

Alien law is a contemporary regime of law that is fast developing in international trade; however, there is need to this new concept developed and perpetualised to have an international specific standard of treatment of aliens, which is mandated in international human rights.

CHAPTER 3

Standards of Treatment in International Refugee Law

Introduction

In chapter two discussed the origin and definition of standards of treatment of aliens in general international law. The chapter also examined three branches of international law namely; aliens law, international human rights law and state responsibility, in relation to standards of treatment of aliens. Chapter four will analyze in detail the different standards of treatment of refugee, specifically as provided in the 1951 United Nations Convention Relating to the Status of Refugees.

Millions of people are today forced to flee their homes because of conflict, systematic discrimination, or other forms of persecution. The core instruments on which they must rely to secure international protection are the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol.¹²⁴

The Convention relating to the Status of Refugees of 28th July 1951 sets out the principles upon which the regime of international protection for refugees is built. It establishes the main rights and obligations of refugees as well as the treatment to which they are entitled by the country of asylum.¹²⁵ In 1967, the convention was strengthened by a protocol that made the provisions of the 1951 treaty applicable to a broader range of refugee situations. The 1967 protocol removes the geographical and time limitations written into the 1951 Refugee Convention.¹²⁶

International human rights law is the basis for refugee law. Article 14 of the Universal Declaration of Human Rights(UDHR) of 10 December 1948 provides that "all

¹²⁴ Feller E., Volker T. and Frances N. (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003)p.(i)

¹²⁵ UNHCR & International Protection, *A Protection Induction Programme* (1st Ed), (Geneva, 2006) p35

¹²⁶ *Ibid.* p.35

persons should have the right to seek and enjoy asylum from persecution in other countries.” While the UDHR is not a binding legal text, some of its provisions have acquired the status of customary international law and have been incorporated into binding international and regional human rights instruments and national laws and constitutions. International human rights apply to all persons, including refugees.¹²⁷

International human rights law complements international protection, particularly with regard to the treatment to which refugees are entitled. These instruments provide specific regulations for the treatment of refugees. Many of refugee protection guidelines draw upon the standards established by international human rights law. These guidelines provide practical advice on how to apply human rights standards to benefit refugees.¹²⁸

The 1951 Convention lays down specific standards for the treatment of refugees in certain areas. However, Article 2 makes it clear that refugees have duties to the country of asylum, including respect for its laws and for measures taken for the maintenance of public order. This merely reflects the general rule that aliens fall within the territorial sovereignty of the host State. The reference to ‘public order’ confirms that the country of asylum is entitled to restrict the activity of refugees (in particular, that of a political nature)¹²⁹ where this is necessary to protect the vital interests of the State.

While the 1951 Convention Relating to the Status of Refugees has developed rules about the treatment of refugees, there are, however, other issues that a refugee is concerned with which are not provided for in this convention. A refugee should therefore derive the legal framework in such issues in other treaties; principally from international human rights law and customary law on State responsibility, neither of which make much

¹²⁷ Ibid. p.38

¹²⁸ UNHCR & International Protection, *A Protection Induction Programme* (1st Ed), (Geneva, 2006)p.38

¹²⁹ Robinson, *Convention relating to the Status of Refugees: Its History, Contents and Interpretation* (1953) p.60.

distinction between the position of aliens (including refugees) and that of citizens. The complex interaction of these fields of law appears to produce four categories into which standards of treatment of refugees may fall.

The first and highest standard of treatment is national treatment. This standard of treatment requires that refugees to be treated the same as nationals in various matters¹³⁰ The second level is most favoured treatment; states are required to accord refugees the same treatment as that which they accord to aliens. The thirds level is treatment not less favourable than aliens in the same circumstances.¹³¹ The final category is same treatment accorded to aliens generally.

The Refugee definition brings about certain obligations to the states parties to the 1951 Convention and, conversely, specific rights refugees are entitled to. Articles 12 - 30 of the Refugee Convention set out the rights which individuals are entitled to once they have been recognized as Convention refugees. Furthermore, the 1951 Convention reserves the possibility for states parties to grant to refugees wider rights than those stipulated therein. The Convention merely sets the minimum standards of treatment.

The Same Treatment as Nationals

This standard of treatment provides that refugees should be accorded the same treatment as that which is accorded to nationals of the state involved. This is found in provisions concerning free exercise of religion and religious education, free access to the courts, including legal assistance, access to elementary education, access to public relief and assistance, protection provided by social security, protection of intellectual property, such

¹³⁰ Mwangi M., *The Doctrinal Basis of Standards of Treatment in International Refugee Law: Kenya's Transformation of the 1951 Refugees Convention*, UNHCR Workshop on International Protection and Refugee Law for Judges and Magistrates (Naivasha, 23-25 April 2008)p.6

¹³¹ Ibid.p.8

as inventions and trade names, protection of literary, artistic and scientific work, equal treatment by taxing authorities.¹³²

According to the 1951 refugee convention, at minimum,

“the Contracting States should accord to refugees the same treatment as is accorded to nationals with respect to elementary education and 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.”¹³³

In the field of education, refugees and indeed non-nationals in general, are granted considerably more generous and better-defined education rights in international and regional human rights instruments than in the 1951 Convention; rights which States must honour as they are bound to apply the most generous applicable standard.

Moreover, many of these human rights instruments have the added advantage of being subject to supervisory and enforcement mechanisms, such as the Committee on Economic, Social and Cultural Rights with regard to rights under the ICESCR, the European Court of Human Rights in the case of rights under the ECHR, and the Inter-American Commission and Court in relation to rights under the American Convention on Human Rights and the San Salvador Protocol.¹³⁴

Provisions contained in various other international instruments such as ILO Conventions,¹³⁵ CEDAW, CERD and the UNESCO Convention against Discrimination in

¹³² Sinha P., *Asylum and International Law* () p.107

¹³³ 1951 Convention relating to the Status of Refugees, Article 22

¹³⁴ The San Salvador Protocol in particular, provides in article 19 (6) that cases of violations (by actions directly attributable to a State Party) of articles 8(a) and 13 (i.e. the right to education) can give rise to the individual complaints procedure under which individuals may lodge complaints before the Inter-American Commission.

¹³⁵ Article 12(f) of the ILO Convention No. 143 provides, for example, that States are to take steps to assist efforts of migrant workers to preserve their national and ethnic identity as well as their cultural ties with their country of origin, including the possibility of children to be given some knowledge of their mother tongue.

Education may also provide certain guarantees in relation to the education of foreigners, and refugees more specifically. In particular, CEDAW seeks to eliminate discrimination against women and ensure that they receive equal treatment with men in all fields, including education.

While refugee status and the related rights under the 1951 Convention do indeed provide refugees with a number of important rights, including certain rights and safeguards which are not necessary with regard to other aliens, it is important that recognized refugees also be granted the broader status and rights allowing them to function as full members of their new community and to integrate locally.

At minimum, the rights correlating to that residence status should meet the minimum standards of treatment in the 1951 Convention and other relevant international and regional Human rights instruments.

As regards to labour legislation and social security, the Contracting States should accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals.¹³⁶

International instruments granting non-nationals and refugees the right to social security include: the 1962 ILO Convention on Equality of Treatment of Nationals and Non-Nationals in Social Security,¹³⁷ which stipulates in article 10 that the Convention is to apply to refugees as well as stateless persons without any condition of reciprocity,¹³⁸

¹³⁶ 1951 Convention relating to the Status of Refugees, Article 24

¹³⁷ ILO Convention concerning Equality of Treatment of Nationals and Non-Nationals in Social Security, No. 118, 1962, entry into force 25 April 1964.

¹³⁸ Dent, J.A., *Research Paper on the Social and Economic Rights of Non-Nationals in Europe*, prepared for the European Council on Refugees and Exiles (ECRE), November 1998, p.69. & Grahl-Madsen, Atle, *Commentary on the Refugee Convention 1951, Articles 2-11, 13-37*, 1963, republished by UNHCR, Division of International Protection, Geneva, 1997, p.91

and the ILO Conventions on the rights of migrant workers, to the extent that refugees may also meet the definition of a migrant worker in those Conventions.¹³⁹

International human rights instruments also provide for certain guarantees in relation to social security and working conditions. The Universal Declaration provides for the right of everyone to social security, public relief, just and favourable working conditions and the right to form or join a trade union.¹⁴⁰ The ICESCR contains similar provisions relating to the right to just and favourable working conditions and the right of everyone to social security, including social insurance.¹⁴¹

Persons requiring additional protection and rights, especially women and children, are also afforded particular attention with regard to social security in international instruments such as ILO conventions, the CRC and CEDAW. Article 26 of the CRC for instance, requires States Parties to recognize and to take measures to achieve the full realization of the child's right to social security, in accordance with their national law, though unfortunately no minimum standards for such benefits are offered. Article 11(1)(e) of CEDAW requires States to ensure that women enjoy the same right to employment-related social security as men, especially with respect to benefits connected to retirement, unemployment, sickness, invalidity, old-age, and other circumstances rendering them incapable of working, as well as paid leave.

Although the granting of national citizenship continues to be a matter solely within the competence of each State, it is the most durable and often the most desirable long-term solution for recognized refugees wishing to end their refugee status and integrate in their host country. Indeed, while refugee status offers certain guarantees,

¹³⁹ These include the ILO Conventions C97 and C143; entitled respectively as: 1949 Convention concerning Migration for Employment, and the 1975 Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers.

¹⁴⁰ Articles 22 to 25 of the Universal Declaration.

¹⁴¹ Articles 7 and 9 of the ICESCR.

refugees continue to be vulnerable in that they lack an effective nationality.¹⁴² From a legal point of view, naturalization represents the objective completion of the integration process into a new society, the right to full legal and diplomatic protection of the State in question, and the acquisition of an effective nationality.

While international instruments do not provide for a right to naturalization as such, they do provide for rights closely linked to it, including the right to acquire a nationality, and women's rights to non-discrimination in relation to their nationality and that of their children. For example, a child's right to acquire a nationality is guaranteed in both the CRC and the ICCPR, with the latter stressing this obligation especially when the child would otherwise be stateless. Article 9 of CEDAW guarantees the equal rights of women and men with regard to the acquisition, change or retention of their nationality. In particular, marriage to a foreigner or the change of nationality by a husband should not automatically change the nationality of the wife, render her stateless or impose on her the nationality of the husband.

The Convention relating to the Status of Stateless Persons¹⁴³ not only guarantees certain social, juridical and economic rights to such persons, but also other important rights, including the right to administrative assistance, freedom of movement, identity papers, travel documents, expulsion, and most relevant here, naturalization. Refugees are thus entitled to and should benefit from these same rights and protection against statelessness.

¹⁴² Grahl-Madsen, Atle, *Commentary on the Refugee Convention 1951, Articles 2-11, 13-37*, (1963, republished by UNHCR, Division of International Protection, Geneva, 1997) p. 245.

¹⁴³ Convention relating to the Status of Stateless Persons of 28 September 1954 (entered into force 6 June 1960).

At minimum, according to the 1951 convention, the Contracting States should accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.¹⁴⁴

Article 25 of the Universal Declaration provides that everyone has the right to a standard of living adequate for health and well-being, including basic medical care and social services, in the event of unemployment, sickness, disability, widowhood, old age, or other circumstances causing a loss of livelihood. Similarly, the ICESCR obliges States to provide assistance to persons who are unable to be self-sufficient, and stipulates the right of everyone to an adequate standard of living, mentioning adequate food, clothing and housing in particular.¹⁴⁵ No definition for measuring what constitutes an “adequate standard of living” is provided, and standards will of course differ between host States depending on their available resources, but the State concerned must show that they have delivered basic assistance to the best of its abilities.

Other relevant international instruments also include CEDAW and the CRC. CEDAW, which applies to women without any distinctions and therefore benefits refugee women, grants them both substantive rights and the right against discrimination in the area of social assistance, adequate living conditions, and equality in access to health facilities.¹⁴⁶ The CRC, which applies to all children without distinction, requires that the State ensure (to the extent possible) the child’s survival and development, and in a separate provision provides for the right of the child to an adequate standard of living, including the mental, spiritual, moral and social aspects of his or her development.¹⁴⁷

¹⁴⁴ 1951 Convention relating to the Status of Refugees, Article 23

¹⁴⁵ Article 11 of the ICESCR.

¹⁴⁶ Articles 12-14 of CEDAW.

¹⁴⁷ Articles 6(2) and 27 of the CRC.

The Most Favourable Treatment Accorded To Aliens

The general rule under 1951 Convention is that it provides for more favorable treatment, states are required to accord refugees the same treatment as that which they accord to aliens generally. Refugees must receive the most favourable treatment provided to nationals of a foreign country with regard to the following rights; the right to belong to trade unions, the right to belong to other non-political nonprofit organizations and the right to engage in wage-earning employment.¹⁴⁸

According to the standards of treatment in the 1951 convention at minimum;

“...the Contracting State should 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”¹⁴⁹.

The Universal Declaration of Human Rights, as well as the International Covenant on Economic, Social and Cultural Rights (ICESCR) include the right of everyone, without distinction, to work and to free choice of employment.¹⁵⁰ This right is further protected by a non-discrimination provision in instruments, which encompasses, amongst other grounds, race, national or social origin, birth or other status.¹⁵¹ In addition, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) offer special protection against discrimination in employment to

¹⁴⁸ Mwagiru M., *The Doctrinal Basis of Standards of Treatment in International Refugee Law: Kenya's Transformation of the 1951 Refugees Convention*, UNHCR Workshop on International Protection and Refugee Law for Judges and Magistrates (Naivasha, 23-25 April 2008)p.7

¹⁴⁹ 1951 Convention relating to the Status of Refugees, Articles 18 and 19

¹⁵⁰ Universal Declaration of Human Rights, article 23, G.A. Res. 217 A(III), of 10 December 1948; and article 6 of the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 A(XXI), of 16 December 1966.

¹⁵¹ Article 2. (2) of the ICESCR, and article 2 of the Universal Declaration.

women and against discrimination on racial grounds.¹⁵² Thus, in principle, based on their general provisions on employment these human rights instruments guarantee all persons the right to work and grant refugees a higher standard of treatment than the 1951 Convention.

Other international and regional instruments such as ILO Conventions,¹⁵³ the European Social Charter,¹⁵⁴ the European Convention on the Legal Status of Migrant Workers (EMW)¹⁵⁵ and a variety of other regional human rights and refugee instruments, also contain provisions which may under certain circumstance be applicable to refugees and accord them a higher standard of treatment with regard to working rights than the minimum requirements in the 1951 Convention.

In practice though, governments frequently restrict free access to the labour market in the case of non-nationals, and appear to have implicitly been given considerable latitude to differentiate in favour of their citizens in this regard. In the context of developing countries, such restrictions are generally based on a special dispensation allowing them to impose restrictions on the economic rights of non-nationals in order to protect their national economy.¹⁵⁶

The right to hold and express a political opinion or engage in political activities is a right which is protected in international human rights law, and is in many cases, considered by refugees as fundamental to their human dignity.

¹⁵² Articles 11 and 14 of the International Convention on All Forms of Discrimination against Women, G.A. Res. 34/180 of 18 December 1979; and article 5(e)(i) of the International Convention on the Elimination of All Forms of Racial Discrimination, G. A. Res. 2106A (XX) of 21 December 1965.

¹⁵³ The International Labour Organization (ILO) Conventions relating to employment and migration, such as the 1949 and 1975 Conventions, which apply to refugees who fit the definition of a migrant worker (even if their primary objective is protection), establish the principle of equal treatment with nationals with respect to employment and working conditions, after a certain period of work and residence in that country.

¹⁵⁴ European Social Charter, ETS No. 35, of 18 October 1961 (entered into force 26 February 1965).

¹⁵⁵ European Convention on the Legal Status of Migrant Workers, ETS No. 93, of 24 November 1977 (entered into force 1 May 1983)

¹⁵⁶ Article 2(3) of the ICESCR

The principles are laid out in articles 2, 19(3), 21 and 22(2) of the ICCPR, exemplify provisions relating to non-discrimination as well as the strict grounds on which any restrictions to the rights to expression, assembly or association may be permitted.

The ICCPR guarantees in article 19(1) freedom of expression to “everyone”, aliens (including refugees) and citizens alike.¹⁵⁷

Treatment Not Less Favourable than Aliens in the Same Circumstances

Refugees must receive the most favourable treatment possible, which must be at least as favourable to that accorded aliens generally in the same circumstances, with regard to the following rights; the right to own property, the right to practice a profession, the right to self-employment, access to housing and access to higher education¹⁵⁸

At minimum, the standard of treatment as regards housing, the 1951 convention states that;

“...the Contracting States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, should 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.”¹⁵⁹

Both the Universal Declaration on Human Rights and the ICESCR include provisions relating to the right of everyone, without discrimination, to an adequate standard of living, including the specific right to adequate housing.¹⁶⁰

¹⁵⁷ Human Rights Committee General Comment No. 15 (1986) emphasizes that States must ensure that aliens enjoy freedom of expression to the same extent as citizens.

¹⁵⁸ Mwangiri M., *The Doctrinal Basis of Standards of Treatment in International Refugee Law- Kenya's Transformation of the 1951 Refugees Convention*, UNHCR Workshop on International Protection and Refugee Law for Judges and Magistrates (Naivasha, 23-25 April 2008)p.8

¹⁵⁹ 1951 Convention relating to the Status of Refugees, Article 21

¹⁶⁰ Articles 2 and 25(1) of the Universal Declaration of Human Rights, and articles 2(2) and 11(1) of the ICESCR.

The Universal Declaration states that "Everyone has the right to own property alone as well as in association with others ...No one shall be arbitrarily deprived of his property."¹⁶¹ However, the ICCPR and ICESCR do not contain a similar provision, although other provisions such as the prohibition of discrimination, including on the basis of property, may be of relevance.¹⁶² However, given the link in some cases between the right to property and socio-economic rights, such as the right to housing and an adequate standard of living, provisions relating to these rights in various international human rights instruments may also be of relevance.

Refugees should be granted the same standard of treatment as nationals with regard to the general rights and duties related to ownership, other property rights and the legal protection of these rights. To the extent possible, refugees should also be granted the same standard of treatment as nationals or permanent residents, with regard to the right of acquisition of both moveable and immovable property, including land.¹⁶³

Same Treatment Accorded To Aliens

The general rule of the 1951 Convention requires states to treat refugees the same way as aliens are treated generally.¹⁶⁴ This general rule means that unless the convention provides for other standards of treatment, refugees must eventually be treated according to this minimum standard of treatment.¹⁶⁵

¹⁶¹ Article 17 of the Universal Declaration.

¹⁶² Article 26 of the ICCPR provides for example, for guarantees against discrimination and to the equal protection of the law.

¹⁶³ 1951 Convention relating to the Status of Refugees, Article 13

¹⁶⁴ Article 7 (1) 1951 Convention.

¹⁶⁵ Mwangi M., *The Doctrinal Basis of Standards of Treatment in International Refugee Law: Kenya's Transformation of the 1951 Refugees Convention*, UNHCR Workshop on International Protection and Refugee Law for Judges and Magistrates (Naivasha, 23-25 April 2008)p.9

Refugees must receive the same treatment as that accorded to aliens generally with regard to the following rights; the right to choose their place of residence, the right to move freely within the country, free exercise of religion and religious education, free access to the courts, including legal assistance, access to elementary education, access to public relief and assistance, protection provided by social security, protection of intellectual property, such as inventions and trade names, protection of literary, artistic and scientific work and equal treatment by taxing authorities

States should ensure that refugees without a valid travel document are promptly issued with identity papers which are in conformity with relevant standards or requirements in the host State, so that a refugee may prove his or her identity at any moment from the time of entry into the territory of the host State, no matter what their legal status. If a different identity/residency card is issued upon recognition of refugee status (and replaces the former identity card), such papers will also be issued without delay.

According to the 1951 Refugee Convention, at minimum, 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 exclusion from "cautio judicatum solvi."

Rights relating to the administration of justice are guaranteed in many international instruments and include an array of rights and judicial guarantees such as: the functioning and independence of the courts; the right to a fair trial;¹⁶⁶ the right to equality before the law and the courts; rights specific to criminal investigations; and protection and redress for victims of crime or abuse of power.

¹⁶⁶ The right to a fair trial is guaranteed in the ICCPR, articles 9, 14, and 15.

These rights are granted to all persons, and extend therefore to aliens, including refugees. Article 10 of the Universal Declaration states that:

“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charges against him.”

The ICCPR further provides (article 14):

“All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”

The rights in these provisions are broadly related and complementary, but not the same as those stipulated in the 1951 Convention, as they do not specifically provide that everyone has the same right to free and unconditional access to courts of law.¹⁶⁷

Article 26 of the ICCPR provides specifically that:

“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all person equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

At minimum,

“...refugees should at least be granted the same treatment as other aliens generally in the same circumstance, and they should ideally be granted the same rights as citizens or permanent residents. There should be no discrimination against or between refugees¹⁶⁸ as regards the freedom of residence and movement.”¹⁶⁹

Article 13 of the Universal Declaration states that “Everyone has the right to freedom of movement and residence within the borders of each State” and that furthermore, everyone has the right to “leave any country including his own, and to return to his country.”¹⁷⁰

¹⁶⁷ the right to initiate proceedings may be qualified or contingent on certain conditions for aliens.

¹⁶⁸ Discrimination between refugees is prohibited by virtue of article 3 of the 1951 Convention.

¹⁶⁹ 1951 Convention relating to the Status of Refugees, Article 26

¹⁷⁰ Article 13(1) and (2) respectively, of the Universal Declaration.

In article 12, the ICCPR reiterates similar guarantees of freedom of movement and residence for all persons (including refugees) lawfully in the country, but also provides for certain exceptions in 12(3) as follows:

“The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the protection of the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.”

Article 34 of the 1951 Convention relating to the Status of Refugees states that:

“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”¹⁷¹.

The Office of the United Nations High Commissioner for Refugees (UNHCR) Statute contains provisions stipulating as one of the tasks of this Office the protection of refugees by assisting both governments and private organizations in the process of integration of recognized refugees within national communities.¹⁷² In particular, the UNHCR Statute calls upon governments to promote the integration of refugees, especially by facilitating their naturalization.¹⁷³

The Statute of the Office of the United Nations High Commissioner for Refugees calls upon Governments to co-operate with the United Nations High Commissioner for Refugees in the performance of his functions concerning refugees falling under the

¹⁷¹ 1951 Convention relating to the Status of Refugees, Article 34.

¹⁷² Statute of the Office of the United Nations High Commissioner for Refugees, General Assembly Resolution 428 (V) of 14 December 1950, and Annex, (see Chapter II, 8 (c)). Para. 2(e)

¹⁷³ Statute of the Office of the United Nations High Commissioner for Refugees, General Assembly Resolution 428 (V) of 14 December 1950, and Annex, (see Chapter II, 8 (c)).

competence of his Office, especially by promoting the assimilation of refugees, especially by facilitating their naturalization.¹⁷⁴

Specialized instruments provide specific guarantees to such groups as women and children. The CRC includes particular guarantees with regard to the best interests of the child and the child's right to family life, as well as in relation to applications for the purpose of family reunification with his or her parents – specifying that these are to be dealt with in a positive, humane and expeditious manner.¹⁷⁵ Rights of women which are important to issues of family life and family unity are protected in CEDAW and include, the rights of women to non-discrimination in the area of marriage and family life as well as in relation to their children.

In its General Comment on article 23 of the ICCPR, the Human Rights committee stated that “the right to found a family implies, in principle, the possibility to procreate and live together... the possibility to live together implies the adoption of appropriate measures, both at the internal level and as the case may be, in co-operation with other States, to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons.”¹⁷⁶

The majority of the provisions in the 1966 International Covenants on Civil and Political Rights and Economic and Social and Cultural Rights, as well as in other universal human rights instruments, apply to all individuals in the territory of a state, irrespective of their nationality. Thus, non-nationals who are granted relief from removal (whether or not on the basis of the 1951 Convention) are entitled to a core set of rights,

¹⁷⁴ Da Costa R., *Rights of Refugees in the Context of Integration: Legal Standards and Recommendations*, POLAS/2006/02, (June 2006)p.24

¹⁷⁵ Of particular relevance is article 10, as well as articles 8, 9 and 22 of the CRC.

¹⁷⁶ Human Rights Committee, General Comment No. 19 of 1990 (on Article 23), para. 5.

unless an objective reason can be found to distinguish (as opposed to discriminate) them from the population at large.¹⁷⁷

In conclusion international refugee law instruments codify a number of specific rights which states are obliged to provide to refugees. International refugee law also provides a full complement of human rights standards for refugees. The human rights instruments are plentiful, evolving and provide a number of complementary legal standards which can be employed to enhance the protection of refugees.

The positive developments in international human rights law and its related mechanisms provide a complimentary body of legal principles which buttress refugee protection. International human rights standards and mechanisms have been demonstrated to provide both a practical and analytical tool to enhance the protection of refugees.

In this respect, minimum standards laid down in international human rights law for all individuals present within a territory, irrespective of immigration status, is clearly of crucial significance.

The 1951 Convention establishes four standards of treatment of refugees, these standards are pegged on the treatment of refugees according to standards of treatment of aliens, and according to standards of treatment given to nationals of the asylum states.¹⁷⁸ However, the legal framework for standards of treatment which are not provided for in this convention, can be derived from other treaties, namely, alien law, international human rights law and customary law on State responsibility,

¹⁷⁷ *General Comment No. 15* (1986) of the Human Rights Committee in relation to the Position of Aliens under the ICCPR.

¹⁷⁸ Mwagiru M., *The Doctrinal Basis of Standards of Treatment in International Refugee Law: Kenya's Transformation of the 1951 Refugees Convention*, UNHCR Workshop on International Protection and Refugee Law for Judges and Magistrates (Naivasha, 23-25 April 2008)p.5

CHAPTER 4

Treatment of Refugees in Kenya: Case Study

Introduction

Chapter Three examined the standards of treatment for refugees in the 1951 United Nations Convention Relating to the Status of Refugees. This chapter will first assess whether the standards of treatment of refugees provided in Kenya's Refugee Act 2006 and other related statutes, such as the Immigration Act and Aliens Act, meet the international law standards in a manner envisaged by treaty law; and second, assess how successful Kenya has been in responding to international obligations in terms of standards of treatment of refugees.

Kenya, like other African countries, hosts refugees who are fleeing from war, conflicts, and persecution. In Kenya tens of thousands of refugees flock to urban centres when fleeing persecution or conflict in neighboring countries. Magnets of relative stability in a sub-region that is rife with conflict, repression, and insecurity, Kenya hosts refugees who have fled from Burundi, the Democratic Republic of Congo (DRC), Eritrea, Ethiopia, Rwanda, Somalia, and Sudan. Many of these people have been living in Kenya as refugees for over a decade. UNHCR, the main U.N. agency charged with providing protection and assistance to refugees, reported that there were 218,500 refugees living in Kenya 2001,¹⁷⁹ of whom as many as 60,000 were estimated to be in Nairobi.¹⁸⁰ In 2006, according to the United States Committee for Refugees and Immigrants (USCRI), there are 3,176,100 refugees in Africa, 314,600 of these live in Kenya; this constitutes almost 10% of all the refugees in Africa.

¹⁷⁹ UNHCR, *Kenya Annual Statistical Report*, Table III, February 2002. Of the refugees living in Kenya, 137,000 were Somali and 55,000 were Sudanese, and the remainder came from elsewhere in Africa.

¹⁸⁰ Ibid

Refugee Population in Kenya by Nationality in 2006

Origin	Population Of Refugees In Kenya
Somalia	165,900
Sudan	77,200
Ethiopia	27,500
Rwanda	4,600
Uganda	4,400
Democratic Republic of Congo	4,000
Eritrea	3,200
Burundi	2,700

Source: USCRI World Refugee Survey 2006, *Risks and Rights*.¹⁸¹

Kenya ratified the 1951 United Nations Convention Relating to the Status of refugees, the Protocol Relating to the Status of Refugees of 1967 and the 1969 OAU Convention Governing Specific Aspects of Refugee Problems.¹⁸² Kenya, like every Party to the Refugee Convention and the OAU Refugee Convention, is bound to uphold both treaties. Governments usually accomplish this task by setting up a domestic legal framework-such as domestic legislation-that implements their treaty obligations. The Refugee Act 2006 should fully implement Kenya's treaty obligations and thus the standards of treatment of refugees.

The Refugee Act 2006

Prior to December 2006, Kenya did not have a legislation regarding refugees. As such, refugee related matters were adjudicated under the provisions of the Immigration

¹⁸¹ USCRI, World Refugee Survey 2006, *Risks and Rights*. p.73

¹⁸² Refugee Consortium of Kenya & The Refugee Affairs Department of the Ministry of State for Immigration and Registration of Persons, *The Refugee Act 2006: Information Booklet*, (Kenya, 2007) p.7

Act of 1967 and the Aliens Restriction Act of 1973 and the Constitution that avails rights, liberties and freedoms to every person without excluding non-citizens. Despite this, Kenya endeavored to uphold the principle of 'non refoulement'.¹⁸³ Kenya admits refugees into camps while others find their way to major towns, for instance, after the recent renewed political instability in Somalia, Kenya continues to receive refugees at the Dadaab Camps¹⁸⁴. In Nairobi, there is a sizeable number of refugees, mainly from Sudan, Ethiopia, Somalia and Rwanda.

Most of the refugee population lives in two major camps; the Dadaab camps in North Eastern province hosts 80% of the Somali refugee population, predominately from Southern Somalia. Kakuma in the north western part of Kenya has over 85,000 refugees the majority being refugees from Southern Sudan. In addition to this it is estimated that there are almost 100,000¹⁸⁵ refugees and asylum seekers living outside the two camps, most of them live in the capital city, Nairobi while others are scattered in major urban centers in Kenya.

In November 2006, Kenya enacted The Refugee Act 2006, which guides all the actors; the Refugee Affairs Department, the Police, the Immigration Department, other government departments, NGOs, Civil Society Organizations, UN agencies and refugees, on how to handle refugee matters in Kenya.¹⁸⁶ The Refugee Act, believed by many to be potentially the most important milestone in the management of refugee affairs in Kenya.¹⁸⁷

¹⁸³ Kindiki K., *Refugee Protection in Kenya in the Context of International Law*, (Refugee Consortium of Kenya, 2008)p.36

¹⁸⁴ There are three main camps in the Dadaab region; If, Diaghilev and Habanera

¹⁸⁵ Report of the Inter-Agency retreat on Urban refugees organized by UNHCR and RCK at Norfolk hotel in August 2005.

¹⁸⁶ *Ibid.* p.7

¹⁸⁷ www.rckkenya.org/newsletter.html

The Act legislates Kenya's authority for managing refugee affairs, formalizing refugee management as a function of government. Therefore, the Refugee Act is the pre-eminent law in matters relating to refugees, it takes precedence over the Immigration Act and Aliens Restriction Act and creates an institutional framework including relevant offices such as; the Commissioner, department and camp officer; it formalizes administrative processes on how to seek asylum and apply for appeal.¹⁸⁸

The Refugee Act contains the universal definition of a refugee as enshrined in the 1951 convention; the rights of the refugees to undergo a determination procedure and to be documented; special provisions for the protection of categories at risk such as women and children; and most importantly, the provision of non-refoulement. Another prominent feature of the Refugee Act is the recognition of the role of host communities play in hosting refugees, sometimes at the expense of local resources and environment.¹⁸⁹

Refugee Status Determination in Kenya.

Before the enactment of the Refugee Act 2006, there was no government process for recognition, protection and management of refugees. Since 1993¹⁹⁰, the office of the United Nations High Commission for Refugees (UNHCR) has been carrying out the registration and recognition functions on behalf of the government.

According to the Kenya Refugee Act 2006,

“A person shall be a statutory refugee ... if such person, owing to a well-founded fear of being persecuted for reasons of race, religion, sex, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or

¹⁸⁸ Console S. & Eva A., An overview of the Refugee Act 2006 (Refugee Consortium of Kenya, 2008)p.8

¹⁸⁹ Ibid. p.16

¹⁹⁰ USCRI, World Refugee Survey 2006, *Risks and Rights*. p.74

“not having a nationality and being outside the country of his former habitual residence, is unable or owing to a well-founded fear of being persecuted for any of the above reasons is unwilling to return to it.”¹⁹¹

In summary, a refugee in Kenya is a person who, because they cannot find safety in their own country or the country where they had been living, is granted protection in Kenya by the Government until a long-lasting solution is found.

The Refugee Affairs Department, presently in the Ministry of State for Immigration and Registration of Persons, is responsible for assessing all applications for refugee status and granting refugee status to those who qualify for protection in Kenya.¹⁹² The Refugee Affairs Department is responsible for all administration, coordination and management of refugee matters in Kenya.

The Kenya Refugee Act 2006 stipulates that those who come to Kenya seeking protection as refugees must be allowed to do so whether their entry into Kenya was by legal or illegal means. But once they have entered the country, it is their responsibility to make their presence legal by reporting to the Appointed Officers. The Refugee Affairs Department is responsible for setting up Reception Centers where asylum seekers can be received and registered.¹⁹³ The asylum seeker has only 30 days from the day he/she enters Kenya to report his/her presence. If the asylum seeker does not do this, he/she commits an offence and may be arrested, taken to court and fined up to Kshs 20,000, or sentenced to six months in prison, or both the fine and prison.¹⁹⁴

The only way asylum seekers can receive status and protection from the Kenyan government is if they are recognized as refugees by UNHCR. However, since the status

¹⁹¹ Refugee Act 2006, section 3.

¹⁹² Refugee Act 2006, section 6.

¹⁹³ Refugee Act 2006, section 11.

¹⁹⁴ *ibid*

determination process is rife with delays, refugees in Kenya are vulnerable for months at a time before the process is complete.

Expulsion or Return of Refugees (Non Refoulement)

Article 33 of the 1951 refugee convention provides that:

“No contracting state shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontier of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”¹⁹⁵

This principle is reflected in Kenya’s Refugee Act 2006, and is based on the Universal Declaration of Human Rights, which states that everyone has a right to seek and enjoy asylum from persecution.¹⁹⁶

The principle of non refoulement is found in section 18 of the Kenya Refugee Act 2006 and is expressed this way:

“Every refugee and asylum seeker has the right of “non-refoulement,” that is, the right not be refused entry into Kenya when their lives are in danger and not to be forcefully sent back to a place where their lives are in danger.”¹⁹⁷

This principle is today considered as part of international customary law, equally binding under international law, even on states which have not acceded to the 1951 Convention. However, recently the government of Kenya closed its Kenya-Somali border, denying refugee status to about 17,000 Somalis who had fled from clan violence in Gedo Somalia on grounds of national security¹⁹⁸. Kenya has been host to over 150,000 Somali refugees over the last fifteen years of Somalia’s unrest, this is a laudable humanitarian gesture recognized all over the world. It shares a border of well over 600

¹⁹⁵ The Refugee Convention provides in its Article 33

¹⁹⁶ Universal Declaration of Human Rights, Article 14.

¹⁹⁷ Refugee Act 2006, section 18

¹⁹⁸ USCRI, World Refugee Survey 2006, *Risks and Rights*. p.74

km with Somalia. Refusing to allow asylum seekers entry through the known border points will force people to find alternative and unofficial routes into the country, and the government will miss opportunities to vet entrants.¹⁹⁹ Whereas the Kenyan government has the right to control its borders, this right is not absolute and under international refugee law people seeking protection must be allowed entry.²⁰⁰ Closing the border and refusing access to asylum seekers are also likely to escalate the humanitarian situation in Somalia which will spill over into Kenya.

Treatment of Refugees in Kenya and the Refugee Act 2006.

The Same Treatment as Nationals

Refugees are required to receive national treatment in various matters including practice of religion or religious education, access to courts, protection of intellectual property, elementary education, labour laws and social security and also in matters of public relief and assistance.

On public education, article 22 of the 1951 refugee convention provides that at minimum, the Contracting States should accord to refugees the same treatment as is accorded to nationals with respect to elementary education and 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.²⁰¹

¹⁹⁹ Eva Ayer (eayiera@rckkenya.org) is the Advocacy and Senior Programme Officer at the Refugee Consortium of Kenya (www.rckkenya.org).

²⁰⁰ Amnesty International Public Statement AI Index: AFR 32/001/2007 (Public) News Service No: 008 15 January 2007

²⁰¹ 1951 Convention relating to the Status of Refugees, Article 22

In Kenya, both primary and secondary education is provided in the camps. However, refugee youth in Kenya who fled from the Great Lakes region are reluctant to move to the camps because they want to continue their education in French.

As regards to public relief and health care, the 1951 refugee convention provides that at minimum, the contracting state should accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.²⁰²

The Kenya Refugee Act 2006 acknowledges that, “Every refugee is entitled to the rights and bound by the duties as given in the international conventions that Kenya has signed.”²⁰³ This includes the right to public relief and health care.

In Kenya, some refugees with medical problems never consider going to a camp, as they believe they must live close to hospitals and to access to medicines only available in the city. This is true for many HIV-positive refugees, and for refugees with other serious conditions such as physical handicaps, tuberculosis, or heart disease.

UNHCR and camp authorities sometimes send refugees in need of medical care to Nairobi. When a particular refugee cannot be adequately treated in one of the camps, UNHCR and Kenyan government officially recognize that this is a legitimate reason for a refugee to leave the camps and seek treatment in the city.

However, a serious concern of host countries is that, donor countries tend to fund relief in camps, but not public services, such as education and assistance, that even integrated refugees still might require. This could be remedied were donors to agree, at a minimum, to compensate hosts on a *pro rata* basis for all such expenses if they allow refugees their Convention rights.

²⁰² 1951 Convention relating to the Status of Refugees, Article 23.

²⁰³ Kenya Refugee Act 2006, section 16.

There are no permanent courts of law stationed in the camps, however, refugees are served by mobile courts situated in nearby urban centres. For example refugees in Dadaab are served from mobile courts situated in Garissa for one week every month. In urban areas, whether singled out individually or caught up in an immigration swoop, refugees or asylum seekers 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 to freedom in the first days after their detention.²⁰⁴ Eventually, however, some may find themselves charged with violation of encampment policy or immigration violation and brought before a magistrate. Most refugees are often charged with illegal entry under Kenya's Immigration Act.²⁰⁵ Police readily charge refugees with this statutory violation, and even send some back to their countries of origin without an assessment of whether they would face persecution upon return. This is a violation of Kenya's non-refoulement obligation under Article 33 of the Refugee Convention, which is the most fundamental principle of international refugee law and is now an accepted principle of customary international law.²⁰⁶

For legal services required in the status determination process, the Act provides for a Refugee Appeals Board²⁰⁷ which is an independent body that is separate from the Refugee Affairs Department. It has a Chairperson and members who are appointed by the Minister. This allows asylum seekers who have applied and have been refused refugee status in the first instance to file an appeal before the Appeals Board. The Appeals Board

²⁰⁴ Transparency International, *Corruption in Kenya: Findings of an Urban Bribery Survey*, 2001, p. 10.

²⁰⁵ The Immigration Act of Kenya 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

²⁰⁶ "Problems of Extradition Affecting Refugees," ExCom Conclusion No. 17, 1980; The customary international law norm of non-refoulement protects refugees from being returned to a place where their lives or freedom are under threat. International customary law is defined as the general and consistent practice of states followed by them out of a sense of legal obligation. That non-refoulement is a norm of international customary law is well-established.

²⁰⁷ Kenya Refugee Act, Section 9

will listen to the applicant and make a decision on their appeal. The Appeals Board can ask the Commissioner to give more information on the asylum seeker's case, or investigate a case further.

The Most Favourable Treatment Accorded To Aliens

The 1951 Convention provides that states are required to accord refugees the same treatment as other aliens unless the convention provides for more favourable treatment. This standard has much to do with reciprocity which entails states seeking higher standards of treatment for their nationals abroad.²⁰⁸ But since refugees lack nationality, they cannot qualify for treatment accorded on the basis of reciprocity.²⁰⁹ However, in the absence of reciprocity, states shall accord to the refugee rights and benefits beyond those that they were entitled to at the date of entry into force of the convention for that state.

The general rule under the 1951 refugee convention is that, at minimum the Contracting State should 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.²¹⁰ The convention further states in article 17(2), that restrictive measures imposed on the employment of aliens for the protection of the national labour market shall not apply for a refugee who has completed three years of residence, has a spouse of the nationality of the country of residence, or one or more children of the nationality of the country of residence.²¹¹

²⁰⁸ Mwangi M., *The Doctrinal Basis of Standards of Treatment in International Refugee Law: Kenya's Transformation of the 1951 Refugees Convention*, UNHCR Workshop on International Protection and Refugee Law for Judges and Magistrates (Naivasha, 23-25 April 2008) p. 7

²⁰⁹ *ibid*

²¹⁰ 1951 Convention relating to the Status of Refugees, Articles 18 and 19

²¹¹ 1951 Convention relating to the Status of Refugees, Article 17.

As regards to labour legislation and social security, the contracting state should accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals.²¹²

The Refugee Act 2006 provides a lower standard of treatment for refugees when it comes to wage earning employment. According to the Kenya Refugee Act 2006, “Every refugee has the right to wage-earning employment, according to the same limitations applied to persons who are not citizens of Kenya.”

By not providing the exemption standard of treatment to refugees who meet the Article 17(2) criteria, the Act reduces the standard of treatment as laid down in the 1951 Convention²¹³ The Convention’s Article 17(2)(a) requires States Parties to grant refugees the same treatment as nationals regarding employment if they have spent three years in a country of first asylum (see Rights sidebar). Article 7(2) also puts a three-year limit on legislative reciprocity restrictions. Otherwise the Convention specifies no delays in the enjoyment of its rights.

In Kenya, sometimes refugees manage to work as it is legal but the lack of other rights limit their earnings for example lack of freedom of movement. According to Kuhlman, “in fostering self-reliance, guaranteeing people’s rights is more important than providing them with material aid.”²¹⁴ Separate and unequal assistance combined with restrictions on work is a particularly self-defeating mixture. Kenya initially gave businesses run by Somali refugees who arrived in Mombasa in 1991 tax-free status within the camps, although there is no basis for such a privilege in the Convention. This

²¹² 1951 Convention relating to the Status of Refugees, Articles 24

²¹³ Mwangi M., *The Doctrinal Basis of Standards of Treatment in International Refugee Law: Kenya's Transformation of the 1951 Refugees Convention*, UNHCR Workshop on International Protection and Refugee Law for Judges and Magistrates (Naivasha, 23-25 April 2008) p. 11.

²¹⁴ Tom Kuhlman, “Responding to protracted refugee situations: A case study of Liberian refugees in Côte d’Ivoire,” UNHCR EPAU, July 2002 (Kuhlman 2002), p. 39

skewed much of the local market in their favour. At the same time, the government did not allow the refugees work permits, rendering their activities in the in-formal sector illegal. As a result, sectors of the local business community pressured the government to close the camp and move the refugees to the desert camps of Kakuma and Dadaab.²¹⁵

Most of all, camp confinement policies aggravate refugees' near total disempowerment. Many encamped refugees become spectators to their own lives rather than active participants in decision-making. Authoritarian military conditions, camp confinement, and almost complete reliance on international assistance can generate pathological dependency, low self-esteem, and lack of initiative.²¹⁶

The right to earn a living has been successfully enjoyed by refugees living in urban towns in Kenya. None of these refugees would accept to go back voluntarily to his country of origin. On the other hand, those refugees staying in Kakuma and Dadaab camps rarely enjoy any of these rights. Their freedom of movement is restricted, and they depend wholly on food rations.

Treatment Not Less Favourable than Aliens in the Same Circumstances

Refugees are accorded treatment as favourable as possible but not less favourable than aliens in the same circumstances in matters related to self employment and liberal professions, acquisition of movable and immovable property and housing.

The 1951 refugee convention stipulates that at minimum, 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, should accord to refugees lawfully staying in their

²¹⁵ Galileo Verbiage, "Human rights and refugees: the case of Kenya," *Journal of Refugee Studies (JRS)*, Vol. 12, No. 1, 1999 (Verbiage 1999), p. 55.

²¹⁶ Richard Mullica, "Southeast Asian Refugees: Migration History and Mental Health Issues," in A.J. Marcella, et al. (eds.), *Amidst Peril and Pain: The Mental Health and Well-being of the World's Refugees*, 1994, p. 94.

territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.²¹⁷ In section 16, the Kenya Refugee Act 2006, binds Kenya in according the same standard of treatment as the 1951 Refugee convention. It states that, "Every refugee is entitled to the rights and bound by the duties as given in the international conventions that Kenya has signed."²¹⁸

Although the Kenyan government requires that refugees reside in refugee camps, UNHCR reports that it assessed the status of 20,671 refugees in Nairobi only at the end of 2001. This figure errs on the conservative side, and UNHCR acknowledges that the actual number could be as high as 60,000.²¹⁹

Most urban refugees in Kenya live in appalling and overcrowded conditions. Apart from a single secure accommodation center that houses 190 high-risk security cases and a few ad hoc protected houses, UNHCR does not provide housing assistance, and only a few lucky refugees receive some housing assistance from non-governmental or faith-based organizations. Refugees live in some of the worst housing in urban centers. The rooms are almost always located in the poorest and least safe neighborhoods: as one social worker working with refugees in Nairobi explained, "the refugees live in the places that no one else wants."²²⁰

According to UNHCR, providing shelter for the new arrivals is a growing challenge. Owing to the increased number of new arrivals in 2007 and 2008, UNHCR standards in refugee settlements are difficult to adhere to. There are inadequate resources and land to properly allocate refugee families and to assure proper shelter for everyone,

²¹⁷ 1951 Convention relating to the Status of Refugees, Article 21

²¹⁸ Kenya Refugee Act 2006, section 16.

²¹⁹ UNHCR "Kenya Annual Statistical Report," Table III, February 2002

²²⁰ "Seeking Refuge, Finding Terror: The Widespread Rape of Somali Women Refugees in North Eastern Kenya," Africa Watch (now Human Rights Watch/Africa), October 1993, vol. 5, no. 13.

the agency said. Fewer than 25 percent of the families in the camps have private latrines.²²¹

"Now there is minimal sanitation for the new arrivals," Margaret Pacho, a monitoring and evaluation officer with the German Agency for Technical Cooperation (GTZ) in Dadaab, said. "All three camps are rapidly reaching their capacity in terms of space available for new arrivals," said UNHCR.²²²

While Kenyan law does not formally deny refugee the right to own property, most refugees can not own property because they lack identity documents. This exclusion is so pervasive that officials mistakenly perceive that refugees do not enjoy the right to own property.

As regards to employment and liberal professions, the Government of Kenya tolerated refugees in camps working, trading and performing other economic activities until 2005. In 2005, the local government banned farming in camps as it conflicted with local pastoralists.

In Kakuma, there is an informal ban on refugees owning livestock other than poultry. NGOs commonly hire refugees, but the UNHCR and the Government of Kenya place a ceiling on their wages. The placing of the ceiling on wages is in contradiction of Article 17(2)²²³

Same Treatment Accorded To Aliens

This general rule means that unless the convention provides for other standards of treatment, refugees must eventually be treated according to this minimum standard of

²²¹ IRIN, Humanitarian news and analysis: <http://www.irinnews.org>

²²² Ibid

²²³

treatment.²²⁴ This is mostly related to administrative assistance to enable refugees exercise their rights, for example the right to travel documents and identity papers, facilitation of assimilation and naturalization of refugees and freedom of movement.

Article 25(1) of the 1951 Refugee Convention states that:

When the exercise of a right by a refugee would normally require the assistance of authorities of a foreign country to whom he cannot have recourse, the Contracting States in whose territory he is residing shall arrange that such assistance be afforded to him by their own authorities or by an international authority.

According to the 1951 refugee convention, States should ensure that refugees without a valid travel document are promptly issued with identity papers which are in conformity with relevant standards or requirements in the host State, so that a refugee may prove his or her identity at any moment from the time of entry into the territory of the host State, no matter what their legal status. If a different identity/residency card is issued upon recognition of refugee status (and replaces the former identity card), such papers will also be issued without delay²²⁵.

Under the new Kenyan Refugee Act, the refugees are entitled to a more permanent identification document that officially recognizes and legitimizes their presence and even enable them to engage in work activities. The Refugee Act 2006 in fact states that “Every refugee and asylum seeker has the right to get identification documents.”²²⁶ In practice implementation is extremely slow putting the refugees at a serious disadvantage because they lack ‘proper’ documents. This exposes them to

²²⁴ Mwangi M., *The Doctrinal Basis of Standards of Treatment in International Refugee Law: Kenya's Transformation of the 1951 Refugees Convention*, UNHCR Workshop on International Protection and Refugee Law for Judges and Magistrates (Naivasha, 23-25 April 2008)p.9

²²⁵ 1951 Convention relating to the Status of Refugees, Articles 27 & 28

²²⁶ Refugee Act 2006, Section 16

harassment by law enforcement agents and also makes it difficult for them to move freely or even legally enter employment contracts.²²⁷

The Police in Kenya routinely stop refugees and asylum seekers to ask for their national identity cards. Since they do not have these cards, asylum seekers only have their UNHCR-issued appointment slips to show, and recognized refugees can show their UNHCR-issued protection letters (also referred to by refugees as their "mandates")²²⁸, some of which refer them to camps. Upon inspection of these documents, the police routinely ignore or destroy the documents and either threatens the individuals with arrest and detention unless a bribe is paid or brings the individual to the local police station.²²⁹

Kenya has adopted policies that require most refugees under UNHCR's mandate to live in designated refugee camps²³⁰. These policies have been decided and are implemented by the government in collaboration with UNHCR. Refugees living in urban areas are violating this requirement.

The Refugee Act 2006 provides that:

"The Minister can select some places in Kenya to be transit centers to serve as temporary accommodation to asylum seekers or set up refugee camps. However, the Minister must discuss the matter with the host communities in that area before setting up a camp or a transit centre."²³¹

The government and humanitarian organizations work together to provide food, shelter, medical assistance, and other basic needs in these camps and transit centers.

²²⁷ Refugee Consortium of Kenya, *Enhancing the Protection of Refugee Women in Nairobi: A Survey on Risk Protection Gaps and Coping Mechanisms of Refugee Women in Nairobi*. (Nairobi, April 2008) p. 19

²²⁸ 1951 Convention relating to the Status of Refugees, Annex: Specimen travel document

²²⁹ Transparency International, *Corruption in Kenya: Findings of an Urban Bribery Survey, 2001*, p. 10.

²³⁰ 'Encampment' is the mode of protection adopted by the Government of Kenya and UNHCR, under which refugees are screened, registered and assigned places of residence in Dadaab or Kakuma.

²³¹ Refugee Act 2006, section 16(2)

In Kenya, refugees are required to reside in Dadaab camps or Kakuma camp. These refugee camps are located in some of the most inhospitable desert areas of the country. The camps are notorious for their extreme heat, lack of vegetation, scorpion infestation, and proximity to Kenya's borders with Somalia and Sudan. In addition, rations in the two camps, Dadaab and Kakuma, have fallen well below UNHCR's and the World Food Programme's (WFP) recommendations. WFP and UNHCR recommend that refugees should receive 2,100 kilocalories per day, although this amount may be reduced when refugees have access to other means of survival.²³² WFP was distributing between 1,400 and 1,600 kilocalories in Kakuma camp and 1,400 in Dadaab in the first four months of 2002.²³³ In February 2002, the WFP lacked the funds and food donations necessary to meet the nutritional requirements of refugees. This lack of food or money to buy it caused the WFP to warn that "almost 220,000 refugees in Kakuma and Dadaab refugee camps in Kenya face malnutrition and a wider humanitarian crisis unless urgent contributions are received."²³⁴

The UNHCR insists that services can only be accessed at the camps. This limits the support and protection that refugees might be able to access from NGOs and other civil society organization such as churches.²³⁵ The reported insecurity at the camps and the lack timely response make refugees resort to and even appear to prefer the insecurity of urban centers (away from the camps) without clear legal status.

The 1951 refugee convention provides that at minimum, "Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of

²³² WFP/UNHCR, *Guidelines for Estimating Food and Nutritional Needs in Emergencies, 1997& The Sphere Project, Humanitarian Charter and Minimum Standards in Disaster Response, 2000.*

²³³ BBC Monitoring International Reports, "Kenya: About 220,000 Refuges Face Malnutrition Threat," February 23, 2002.

²³⁴ Ibid.

²³⁵ UNIFEM and Refugee Consortium of Kenya, *Specific Needs of Women and Children in Dadaab Camp.; An Assessment and Mapping of Responses during Emergencies.*(Nairobi, January 2008)

residence and to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances."²³⁶

The ICCPR provides for the principle of freedom of movement in the following manner:

“Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.²³⁷ This right to freedom of movement can only be restricted as "provided by law" if "necessary to protect national security, public order, public health, or morals, or the rights and freedoms of others."²³⁸

UNHCR's ExCom has also encouraged "States to intensify their efforts to protect the rights of refugees . . . to avoid unnecessary and severe curtailment of their freedom of movement."²³⁹

Therefore, camp confinement policies in Kenya are a violation of freedom of movement, which is a fundamental human right. The fact that freedom of movement and association is only guaranteed for forced immigrants legally residing in the state presents a paradox for some refugees, because in many cases, their status is defined by whether or not they choose to live in designated areas.²⁴⁰

The freedom of movement in camps was further curtailed with the recent ban by the government of Kenya of public service vehicles from transporting commuters across camps and to Garissa Town. The reason given for this ban is security related. The ban has made life more difficult for refugees and increased their dependence on the Government of Kenya, UNHCR and partner agencies.

²³⁶ The Refugee Convention provides in its Article 26

²³⁷ ICCPR, Article 12(1).

²³⁸ ICCPR, Article 12(3).

²³⁹ ExCom General Conclusion on International Protection No. 65 (1991) at (c).

²⁴⁰ Kindiki K., *Refugee Protection in Kenya in the Context of International Law*, (Refugee Consortium of Kenya, 2008).p.49

Since Kenya Refugee Act 2006 acknowledges that, “Every refugee is entitled to the rights and bound by the duties as given in the international conventions that Kenya has signed.”²⁴¹ The Act should also provide for rights to naturalization as stipulated in Article 34 of the 1951 convention which states that:

“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.”²⁴²

Jacobsen describes “de facto integration” as a fairly widespread phenomenon where self-settled refugees become unofficially integrated after they have lived in and been accepted by the community for some time and have attained self-sufficiency. This is not especially burdensome to the host government, as it is largely a matter of simply leaving refugees alone. It does not mean that governments must allocate land to refugees or give them special privileges. With freedom of movement, refugees negotiate with local landowners and employers, trade, and otherwise pursue livelihoods contributing to the local economy’s growth.²⁴³

According to Jacobsen, without the host country’s cooperation it is difficult to help refugees, “local integration can and should be revitalized, with modifications that will make it more acceptable to host governments.”²⁴⁴

On family unity and reunification the Kenya Refugee Act 2006 provides that family members have permission to remain in Kenya with the refugees so long as the members were present in Kenya at the time that refugee protection was granted. The refugees will receive refugee identity cards. Family members over 18 years of age who

²⁴¹ Kenya Refugee Act 2006, section 16.

²⁴² 1951 Convention relating to the Status of Refugees, Article 34.

²⁴³ Karen Jacobsen, “Can refugees benefit the state? Refugee resources and African state building.” *Journal of Modern African Studies*, Vol 40, No. 4, 2002 p.3

²⁴⁴ *ibid*

depend on a refugee and have received refugee status because of him/her shall also receive individual refugee identity cards.²⁴⁵

The 1951 refugee convention does not incorporate family unity in the definition of the term refugee. However, most international instruments dealing with human rights contain provisions for the protection of family; beginning with the Universal Declaration of Human Rights, which states that “the family is a natural and fundamental group unit of society and is entitled to protection by society and state.” Therefore, if the head of the family meets the criteria of the definition, his dependants are normally granted refugee status according to the principle of family unity.

In conclusion, state practice continues to reflect expansive claims to regulate the entry, conditions of residence and expulsion of refugees. Limitations are most obvious, besides strict immigration questions, in regard to employment, property and political rights. To a great extent, potentially absolute powers are restricted by treaty or by the circumstances of particular regional arrangements such as the Organization of African Unity Convention Governing Specific Aspects of Refugee problems in Africa.

The Kenya Refugee Act 2006 deals more on the structure of management on refugee matters than how refugees should be treated in Kenya. However, the treatment of refugees in Kenya is improving under persistent influence of constitutional and human rights doctrines.

²⁴⁵ Refugee Act 2006, Section 14 & 15

CONCLUSION

This study set out to investigate the extent to which the standards of treatment of refugees as provided in the new Kenya Refugee Act 2006 and other related statutes, such as the Immigration Act and Aliens Act meet the international law standards in a manner envisaged by treaty law.

The broad objective of the research was to assess how successful Kenya has been in responding to international obligation in terms of standards of treatment of refugees. The study analyzed the treatment of all aliens generally in international law as well as the treatment of refugees according to international refugee law.

The study is premised on the hypothesis that Kenya statute law meets the standards of protection of refugees in accordance with the international law standards. The objective of this chapter is to draw conclusions from the analysis of the data in relation to the research objectives and hypothesis.

The Refugee Bill 2006 comes in to strengthen the pillars that have already been established by the Immigration Act and other migration laws, and to bring Kenya's refugee management within international standards. Although it is a seemingly low profile piece of legislation, the Refugee Bill seeks to address important national concerns.

However, the shortcomings, lapses and inconsistencies found in the Act can not be ignored. In particular, attention is paid to those which affect the rights and freedoms of a refugee. Control of refugees, primarily through restrictions and prohibitions arguably remains the foremost preoccupation.

From the study it was established that although the Act transforms international Refugee law and regional treaties into Kenyan domestic law, it has not observed all the

standards of treatment in a manner envisaged by treaty law.²⁴⁶ For instance the Bill proposes protection for the local labour and employment market: it subjects refugees to the same restriction as other foreigners when it comes to employment and labour.

The main finding of the study is that even after enactment and commencement of the (Kenya) Refugee Act 2006 that elaborates a legal framework within which refugees can claim and protect their rights, the legal status of refugees remains precarious and their treatment not in accordance to international law standards. Refugees do not yet have proper documentation including permanent identification card that officially recognizes and legitimizes their presence as well as enabling them to engage in different forms of income generation to improve their livelihoods.

All refugees in Kenya are supposed to live in camps sanctioned under Kenya and international law on refugees. In line with Kenya's encampment policy, the bulk of refugee population resides in refugee camps in remote areas acknowledged by UNHCR and the Government of Kenya.

Refugees both in camps and outside them are faced with similar challenges. Outside camps, refugees have to fend for family as there is no organization which provides relief assistance except on very rare occasions in emergency situations. Fending for themselves expose them to unacceptable standards of treatment under refugee law and human rights law²⁴⁷.

Despite the existing protection guidelines refugees in urban areas are still not treated in accordance to international refugee law. As long as the encampment policy is in force, there will always be a challenge of according the minimum standards of

²⁴⁶ Mwagiru M., *The Doctrinal Basis of Standards of Treatment in International Refugee Law: Kenya's Transformation of the 1951 Refugees Convention*, UNHCR Workshop on International Protection and Refugee Law for Judges and Magistrates (Naivasha, 23-25 April 2008)

²⁴⁷ Pitterway Eileen (Dr) & Linda Bartolomei, *From Asylum to Resettlement: Ensuring Effective Protection for Refugee Women at Risk*. (Centre for Refugee Research, Sydney Australia 19..)

treatment in serving what is considered a very sizeable 'illegal' urban population of refugees alongside the 'legitimate' camp refugee population. There is a failure by both the Government of Kenya and the UNHCR in according minimum standards of treatment to urban refugees first by not recognizing them and second by not being able to protect as a result of not recognizing them.

The preferred term for refugee settlements or camps is, euphemistically, "designated areas" (DAs). A refugee may not "reside without authority outside the designated areas specified under section 15(2)"²⁴⁸ It can be argued that this formulation is not compatible with the notion of reasonable restrictions that may be attached to the freedom of movement. Residence in DAs is therefore obligatory and the requirement could, with justification, be interpreted as imposing an obligation to reside in a DA at all times even where legal considerations or professional interests of the refugee dictate otherwise. For instance, a refugee with rare professional credentials is equally condemned to a DA if no permission to reside outside a DA is given.

As a result of non recognition, urban refugees are consigned to low incomes, life in poor informal settlements in urban areas and are unable to afford three meals a day. There is discrimination towards refugees such as practiced by landlords, police as a result of lack of awareness and enforcement of their rights by institutions and people charged with the responsibility.

The main shortcoming of the Refugee Act 2006 is that the act concentrates mainly in providing the structures of management of refugees in Kenya as opposed to providing the standards of treatment for refugees in Kenya. It provides for a refugee camp manager who shall among other things, manage refugee camps to ensure the protection and

²⁴⁸ Kenya Refugee Act 2006, Section 25

physical security of refugees. However, the encampment policy has placed a huge burden on UNHCR and partner agencies since they are expected to meet all refugees' survival and protection needs that fall outside the Government of Kenya security provision.

The current refugee protection approach at the camps in Kenya emphasizes meeting basic needs often without due regard to individual and collective refugee rights and standards of treatment. Such a situation is not necessarily overtly by design but one that has characterized responses to problems related to conflict such as influx of refugees from neighbouring countries. The basic needs approach is basically implemented in a general manner that favours uniform packages that do not always ensure equitable access by some refugees.

Very few support services are designed to empower refugees economically and promote self reliance as services provided are relief-oriented as opposed to addressing empowerment issues that would ensure rights protection in the long run. Coping mechanisms exist for refugees who have vocational and language skills to undertake income generating activities. However, there are far too many constraints limiting the economic participation of refugees, including; inadequate capital, regulatory controls and licensing, a market for products, insufficient organizational and business skills, inadequate language and vocational skills.

The main challenge of accessing justice for refugees is their low status in respective communities and general marginalization that comprises their ability to understand and utilize existing opportunities for justice. Kenyan rights organizations such as the Kenya Human rights Commission largely do not cover refugee rights.

Recommendation

There is need to ensure that refugees are accorded the minimum standards of treatment as provide by international law. The following measures were suggested by Refugee Consortium of Kenya (RCK) in their recent survey on 'Risks Protection Gaps and Coping Mechanisms of Refugee Women in Urban Areas' which are awaiting implementation:

To overcome barriers related to documentation the Government of Kenya should expedite the implementation of its mandate on the new refugee policy, including educating its officers such as administration, security agents and the justice system, and with the UNHCR streamline the refugee status determination process to make it clear, predictable and consistent.

The Government of Kenya should also create awareness for police and other government officials on the refugee policy/act and the rights of refugees to minimize obstacles they face in accessing justice and services.

UNHCR and the Government of Kenya need to come up with explicit guidelines in order to guarantee urban refugees their specific rights such as to a dignified livelihood devoid of harassment, discrimination, mistreatment, violence, and right to freedom of movement, regardless their status.

It is recommended that the government take adequate action to bring to justice perpetrators of human rights abuses against refugees, even when these individuals are government law and order agents.

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