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COMPARATIVE STUDY OF REFUGEE MANAGEMENT:
CASE STUDY OF KENYA AND TANZANIA

By:

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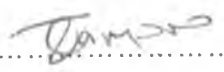
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Declaration

This dissertation is my original work. It has not been, and is not currently being submitted for a degree in any other University.

Jane Njeri Kanyoro –Mwaura

Signature: 

Date: 27th January 2005

This dissertation has been submitted for examination with my knowledge as a University supervisor.

Dr Makumi Mwagiru

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Signature: 

Date: 28 January 2005

Dedication

Lillian Wanjiku Kanyoro (Late) my beloved mother and Late Rhoda Nyambura Kanyoro my grandmother who brought me up

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..... And I sigh for the road not taken.....

What other road could I have taken? This intellectual road taken rather late in life has been rough, full of ups and downs. However, I have had a lot of people to encourage me all the way.

My supervisor, Makumi Mwangi, a difficult man to please, but fair and a professional. He tirelessly marked every single mistake even punctuation marks.

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Special gratitude to my sister Margaret Nyambura Kanyoro for her daily prayers.

”

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Abstract

This study is concerned with describing, explaining, examining and comparing the nature of Refugee Management in Kenya and Tanzania. It proceeds from the premise that studies on refugee management are done by scholars who reside outside the refugee generating and hosting states. Their studies are abstract and intellectual and lack the human aspect of refugee management. They concentrate on humanitarian assistance, theories on refugee management, and emphasize is on international refugee law and how it is used in refugee management. The scholars do not focus on the individual states, domestic law and how to harmonize it to interpret the wider international law. There is a need to focus on individual state's domestic law and how effective or ineffective it is in refugee management. Economic, political and social issues that impact strongly on refugee management also need to be brought into focus.

The study therefore adopts the world systems theory to explain how interactions between states, refugees, and law can be effectively used to manage refugees. The study investigates the various legal regimes in Tanzania and Kenya to see to what extent they address the issue of refugees. The issues discussed include a comparison of refugee management in both countries and how international refugee law impacts on both states. It has been established that while Tanzania has put some mechanism in place to manage refugees, they do not measure up to the expected international standards. In Kenya the situation is worse since no proper mechanisms are put in place.

The general conclusion is that both states need to examine the current policies on refugee management and address the plight of refugees in a way that both the refugee and the host state will benefit. Another conclusion is that international refugee law should be applied according to national interests of a state.

CHAPTER ONE

REFUGEE MANAGEMENT.

The movement of refugees across international borders is not dictated by choice but by need (Nobel P (ed) 1987) Refugees are victims of circumstances that they did not create or desire. The world must therefore, address the issues that create and keep on creating refugees, that is, address the root cause of conflicts in states, and solve refugees problems. Issues that create refugees include, war, discrimination, persecution and intolerance, which inevitably lead to violent conflicts. (Smyser W, R 1987 The victims of dysfunctional conflicts flee their homes to seek peace and security. Nevertheless, there are international legal instruments like the 1951 Convention Relating to the Status of Refugees (UNHCR 1993) and its Protocol of 1967, (Ibid) which are a response to the development of the international refugee regime after the Second World War. The 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa adds to the existing instruments reflecting the African context. These and others like the 1981 African Charter on Human and Peoples Rights are responses of international law to an emerging legal issue especially if viewed in the context of international human rights.

The principle of *non-refoulement*, and other instruments of international law require states to observe this crucial aspect of international law regardless of whether or not they are signatories to certain treaties and conventions. Therefore, refugee-generating states should Not view the granting of asylum as an unfriendly act as all states are bound by the law of natural justice to grant refuge. However, refugees themselves have contributed to unrests in their home-states by taking up arms in the safety of the state of refuge.

One principle of customary international law is that states must protect their nationals when in the country and abroad. However, states sometimes fail to do this and act oppressively towards their own nationals through atrocities, which the state is unwilling or unable to control. (UNHCR 1993). In view of this there is need for concerted efforts to the observances of international obligations.

While international law seeks to regulate the behavior of governments, it is governments that draft and vote for each piece of international legislation. Therefore, the governments must monitor their own compliance with international law and the extent to which it is respected by other governments. Yet, the very nature of politics makes it inevitable that the same governments seek to circumvent these obligations and often flout them in pursuit of national interests. (Morgenthau H.J 1995)

These legal instruments are significant in their specifications that relate to the facilitation, encouragement and sustained efforts towards the recognition and integration of refugees. These include the facilitation of refugee travels to enhance free movements across borders as specified in Article 28 of the 1951 Convention Relating to the Status of the Refugees.

The principle of the *unity of the family* is also considered an essential right for every refugee. Another consideration is the provision of welfare services, moral, legal and material. Governments are charged to collaborate with other inter-governmental bodies to look into the welfare of refugees. This upholds the dignity of the refugee and gives them morale to persevere. On the basis of the principle of *non-refoulement* here is need for governments to receive refugees in their territories and to act in a true spirit of international cooperation to enable refugees to get asylum and the possibility of

resettlement. In refugee management and integration cannot be overemphasized since it is the principle actor.

The 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa underlies the confidence of Africa's belief that the refugee problems could be solved within a few years. However, today, political instability widespread war and internal conflicts have produced more internal conflicts than the wars of self-determination. Today the main sources of refugees are brutal civil wars and guerrilla conflicts. (Africa Confidential Vol 31)

Kenya and Tanzania have become host states of many refugees. They have become the preferred destinations for many asylum seekers from Sub-Saharan Africa and other parts of Africa because of perceived political stability. These two states are among the few where governments do not change through the barrel of a gun. The reasons for refugee mobility are manifold and include, war, discrimination, persecution, intolerance, ethnic violence, and poor governance among others. In 2002, Africa hosted 6.3 million of the world's 22.3 million refugees, (UNHCR 2002) most of who where hosted by Kenya. Tanzania is also another significant host country in the region. Both Kenya and Tanzania therefore share common challenges in refugee crises and management. However, unlike Tanzania that has evolved some legal mechanisms for refugee management, Kenya has only a Bill that is yet to be turned to law. An issue of concern emerges on how to assess the implementation of international conventions, how practical they are and to what extent they are practiced in any particular state. Of special concern are initiatives related to recognition and integration of refugees through legislation. In the Kenyan case, is it a question of reversed roles? The study is based on the argument

that the government has transferred the responsibilities of refugee management to the UNHCR and to other non- governmental organizations. This is mainly due to lack of legal mechanisms to effectively address the refugee problem.

This study analyzes the content and the context of the processes involved in recognition and integration of refugees as one of the UNHCR's recommended durable solutions to the refugee problem. The UNHCR is charged with protecting and assisting refugees through durable solutions, which include voluntary repatriation, local integration and third country resettlement. Together with UNHCR the host states are charged with the task of recognizing the social and humanitarian nature of the problem of refugees.

STATEMENT OF THE PROBLEM

The recognition and integration of refugees into an asylum country remains one of the best solutions to the refugee crises especially in Africa. (Smyser W.R 1987) The best solution is that of preventing refugee hood by effectively monitoring and responding to early warning signs of conflict. This however is unrealistic and hence the need to search for solutions once the refugees seek asylum. States should therefore seek to enhance efforts, which effectively integrate refugees to the national environment, so that they cannot only benefit but also contribute to the overall development of the host countries.

Once seen as a burden to the host state refugees can create friction and lead to unrest especially within the community where the refugees are hosted. On the other hand, giving preferential treatment to refugees over the local people leads to conflict too. Therefore the host countries need to tread carefully lest they be misinterpreted.

Despite the indispensability of the foregoing many governments have ignored, if not neglected, their proper roles as the chief initiators and managers of the crises or any

refugee related problems. The role in enhancing efforts towards recognition and integration of refugees has been transferred to the UNCHR and other NGOs. Tanzania's efforts are modest. Its open door policy for refugees has been relatively dedicated to enhancing the quality of life for refugees. The Refugee Act of 1998 further added incentives to integrate refugees into the overall development process in Tanzania.

In Kenya, the law is currently in the form of the proposed *Refugees Bill, 2000*, which puts more emphasis on the control rather than the integration of the refugees. In Tanzania the government has put in place mechanisms, which cater for refugee management. The whole question of handling an asylum seeker encompasses interplay among legislative, administrative and diplomatic processes. Currently the Kenya government uses the Aliens Act and the Immigration Act as guidelines to manage the refugees.

A person is a refugee whether or not a legal eligibility procedure has already recognized that status. Governments set up status determination procedures, for the purposes of determining that person's legal standing and rights and benefits in accordance with their own legal system. (UNHCR 1996) Further UNHCR offers its advice as part of the agency's mandate to promote refugee law, protect refugees, and supervise the implementation of the 1951 Refugees Convention. (Ibid)

The activities of the UNHCR lead to the question of whether the Kenya government has actually transferred the responsibility of refugee management to UNHCR and other NGOs in the absence of effective legal mechanisms. The problem is that Kenya and Tanzania despite being signatories to the various international legal instruments have failed to provide for mechanisms, which facilitate implementation of the stated

specifications of refugee protection. This study aims to analyze the current situation in practice in Kenya and Tanzania. It also seeks to analyze what international law recommends and finally outline the laws of Kenya and Tanzania in relation to refugees and identify the problems in the practice of refugee management.

OBJECTIVES OF THE STUDY

1. To evaluate the extent of the refugee crises in the region and the effectiveness of relevant legislation.
2. To investigate the factors that influences the proper efforts towards recognition and integration of refugees in Kenya and Tanzania.
3. To critically examine the role of legislation in the process of recognition and integration of refugees in the region.
4. To highlight the current legislation initiatives which deal with integration and recognition of refugees in Kenya and Tanzania.

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JUSTIFICATIONS

The study is timely in the wake of increasing incidences of civil strife in the region. (Mwangiru 1996) Secondly, Kenya and Tanzania have been hosting many refugees in the region for a long time. The study will assess what legislative mechanisms are involved in enhancing efforts towards the recognition and integration of refugees in Kenya and Tanzania.

It will also evaluate the need for well-coordinated and integrated legal and administrative structures to ensure the effective institution of measures and programmes for refugee recognition and integration.

The study will seek to establish and recommend policy guidelines, which will assist both national and international institutions to effectively handle issues on refugee recognition and integration.

The study is invaluable in the current scheme of the east Africa co-operation, where the three East African states are striving to have common political, economic and social policies. It will therefore contribute in the integration as a source of policy.

The study is also timely in the wake of the increasing need for countries to properly focus on the needs and the rights of all individuals. Human rights have become an important issue both nationally and internationally. The recognition and integration of refugees are important issues in this regard.

The study will identify, assess and evaluate the significant concepts embracing the whole question of refugee's recognition and integration in Kenya and Tanzania.

The study is significant in as much as it will delve into the content and the context of the basic elements of refugee protection, recognition and integration into the host countries. The study seeks to shed more light on salient issues in refugee management such as liberties and freedoms, status determination, participation in programs that benefit refugees these includes issues like resettlement, property rights, education, health and voluntary repatriation.

HYPOTHESES

1. The less integrated are the efforts of legal and administrative structures, the more the lack of recognition and integration of refugees.
2. Effective recognition and integration of refugees are best achieved when role structures are clearly defined.

3. The higher the number of refugees in a host country, the more the problems related to their recognition and integration.

LITERATURE REVIEW

There is scarcity of literature, which directly examines the issue of refugees and their management in East Africa. Although Kenya has had a substantial experience with the refugees, scholars from outside the continent write most literature on refugees in Africa. However Tanzania is more advanced in refugee literature than Kenya because at the University of Dar- se- Salaam there is a faculty, which undertakes refugee studies. This has contributed to more research papers and presentations in Tanzania. In Kenya almost all literature is from reports of the UNHCR and a few scholars. Therefore a gap exists in literature on refugees in general and specifically in their management in Kenya and Tanzania.

Macharia (Macharia & Cynthia 1999) argues that as a part of broader international law, refugee law aims at protecting the rights of refugees. It lays the groundwork on which international protection is based, and it provides for the UNHCR its mandated role summarized as ensuring that genuine refugees are treated in accordance with standards laid out by international refugee law.

Holborn posits that individual country laws are deficient in proper legal and practical aspects on issues relating to refugee protection. Indeed he observes that: "Nationality is the principal link between the individual and international law. It follows therefore that in the case of refugees, this important link is broken as a refugee lacks the protection of the state of his nationality". (Holborn L. Refugees 1975) He concludes that

this has had far reaching effects that states felt that their obligation to foreigners excluded only those possessing nationality and enjoying the protection of a state. Refugees therefore suffer from a major legal, and by extension, social disability.(Ibid)

Loescher (Loescher, G 1993) argues that admission policies for refugees have been based on political, ethnic and ideological sympathies and that cultural similarity made it relatively easy to integrate refugees into the host countries. This is only practical in the case of the experience of the Western host countries like the USA. Loescher cites the linkage between the foreign policy of a country and admission policies of refugees, where there is a direct linkage for instance for the USA. The refugee policy has consistently demonstrated an anticommunist bias, and this has translated into virtually open-ended blanket admission for individuals fleeing communist countries.” (Ibid)

Currently, the f policy of the USA is based on this on the war against terrorism the scope of the UNHCR action depends on the policies of the host government and on the pressure other countries can be persuaded to bring to bear on the UNHCR’s. (Halder, N 1999)

The funds made available to the UNHCR by donor states depend on how useful these states perceive a particular refugee population to their own Foreign policy. The extent of the UNHCR’s activities and influences are therefore dictated by political needs.

Smyser (Smyser W.R.1987) basically argues that institutional capacity for the management of the refugee crises is below the required standards. He argues that institutions whether international, national or private that have come into being since World Wars I and II have been strained to the maximum by the quantum leap in the magnitude and complexity, and intractability of refugee issues. The institutional structures

are 'inappropriate' he argues. (Ibid) His basic aim though is to cover a number of basic elements of the refugee problem.

Holborn notes that refugee flows in Africa result from civil wars, power struggles (Ibid) and inter-ethnic rivalries among others: She analyses the impact of refugee management institutions and the efforts made through the 1951 UN Convention on protection and resettlement of refugees.

Lomo (Lomo, Zachary 2001) examines the legal framework governing issues of forced migration into Uganda. He delves into the same issues, which analyze the extent to which the legal framework is sufficient in protecting the rights of refugees among others. Mwipopo (Mwipopo, Ernest 2000) maintains that Tanzania is one of the most experienced states in refugees and refugee-related problems. "It has accommodative policies despite having a poor economy. Tanzania has made efforts to provide more than financial resources; it also offers security machinery for the safety and protection of refugees. Also it offers resources to service the management structure established for refugees. Nonetheless, there are costs associated with these humanitarian programmes". Arguing for Tanzania's active role in refugee management, Mwipopo maintains that the Refugees Act of 1998 (i) concretizes the government policy on refugees, which shows that the Tanzanian government is committed to refugee management. Despite this promise of Tanzania for integrating the international and national dimension into a comprehensive legal framework, this analysis but not comparative since it only draws from the experience of Tanzania.

Lomo (Lomo, Zachary 1999) critically analyses refugee law and policy in Uganda. He bases his argument on the principles of the 1951 UN Convention, which

recognize the social and economic rights which refugees, must enjoy. The Convention promotes nationalization and integration of refugees. . He delves into issues related to refugee liberties and freedoms, status determination, local integration among other and issues and concludes Uganda is a state with an unreformed domestic legal framework and that the policy of assisting refugee is limited

Maina, Peter (Maina Peter 2001) analyses the impact of refugees on local administration. He dwells on their impact on the police force, judiciary and other law enforcement agencies. His arguments posit that the increase in refugees in a country has wider legal and institutional implications as these institutions are placed under serious stress and have to work over time in order to be able to maintain law and order. His case study is based on Tanzania's open door policy on refugees. This is a policy whereby all those in flights are allowed to enter the country and stay until their flight is resolved. Tanzania maintains this policy throughout the 1970 and 1980 in the middle of 1970 Tanzania seemed to abandon this policy and espoused a new policy of no more refugees and on at least two occasions crossed it borders to prevent refugees from entering the country.

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Ayol (Ayol Anthony 1992) wrote on the Influence of law and related factors in the integration of refugees in Tanzania. His work provides useful insights on the question of refugee integration in Africa. He identifies the important influences of laws, economic well-being, the attitude of the host community and socio-cultural factors such as language and religion. His major conclusions are that, both local communities, host government and the UNHCR have a significant role to play in any activities related to the integration of refugees and that, the political will of the host is the most deciding factor. His case

study is based on the Tanzania naturalization programme and particularly of refugees from Rwanda and Burundi. His findings suggest that many Tanzanians would not favour integration of refugees in the country. These findings should spur more researchers on this issue of the local integration of refugees. Tensions, which have flared up between refugees and the local communities living around Kakuma in Kenya, could lead to the same conclusion. Both governments in Kenya and Tanzania are to blame as they portray refugees as a security risk.

Dewolf (Dewolf, Shirley 1994) highlights the environmental and institutional contexts within which decisions relating to refugees take place. The arguments are based on the assumptions that the process of decision-making and project implementation facilitates greater consultation and participation of refugees. One of the findings is that local institutions that are best positioned to help refugees ended up being as vulnerable as the people they were serving. The article is useful but only draws practical experiences from Zimbabwe.

Warioba (Warioba Joseph, 1979) examines the gravity of the refugee problem in the continent. He argues that the increasing number of refugees warrant African states to address this problem with seriousness. He examines the diversity between international legal instruments on refugees and national laws. He notes that due to the multiplicity of legal systems in Africa; refugees are handled differently in different countries. He finally underscores the importance of the legal instruments as the guiding torch for the international community. His study acknowledges the dynamic legal systems, which need to be harmonized to adequately address the refugee problem. He appreciates the fact that

refugees will always be a part of the international system and therefore that Africa should put its act together and address this issue.

Kibreab's (Kibreab G 1982) study of the refugee crises in Africa captures the gravity and implications of the crises to both the refugee and the host country since the global community does not exist in isolation. Interesting observations from his analysis are the problems associated with the influx of refugees and how best the integration of refugees can be implemented. While discussing causes of the large number of refugees in Africa, he notes that the refugee problem affects the refugees, the state of asylum, the state of origin and the international community. He links the issues of refugee problems to development where resources are diverted to humanitarian aid. The issue of mass movement of refugees is addressed well by the scholar and the fact that most of what is done for the refugee is humanitarian when they move en-mass, but this is short term. What is needed is a long-term solution, which addresses the dignity of the refugee.

Nedlen (Brian Nedlen 1996) captures the roles of NGOs as partners in providing assistance to refugees. He discusses the nature of NGO-UNHCR partnership and the significance of NGO contribution and how they will continue to make a critical difference in refugee management. He further points out that NGOs can provide services with a more human face, complementing the macro-services provided by the international (UN related) community or governments. He also argues that NGOs can raise issues of policy and practice for the benefit of those affected in international circles and for a and with relevant governments. His works point to the active role of NGOs, although they do not capture exclusive experience of refugee integration and management services in relation to Kenya and Tanzania.

UNHCR Report (UNHCR, Ibid 1993) captures the nature and the extent of the global refugee crises and how governments have been dealing with the problem. It examines the different refugee and development initiatives. These include projects to provide farming, wage earning and income generating opportunities to both refugees and local people, and projects intended to strengthen the physical and social infrastructure of the areas where refugees are in large numbers. Drawing from the experience of Zambia, the findings suggest that despite the apparent clarity of the refugee and development notion, the ultimate objective of this approach remained essentially ambiguous. There are two conflicting aspects the purpose of integration and the purpose of ameliorating the situation of refugees and the local people, then paving way for voluntary repatriation. It simply concludes that in most asylum countries, the latter objective took precedence. In other words, host governments were generally much less interested in allowing refugees to attain full social economic and legal rights enjoyed by the citizens of their country. Instead, they are keen on repatriation of refugees that is, limiting the potential of refugees for integration. The UNHCR report fails to address the fact that most African governments have not adequately addressed the issues of their citizens, be they legal, social or economic. It is therefore difficult for them to address the refugee issues properly.

Nobel (Peter Nobel (ed) 1981) highlights the theoretical and practical dimensions of the refugee crises and its relation to development in Africa. He emphasizes the practical aspects of integrating refugees into the development process. His is a general summary of the experiences in Africa but Kenya lacks as a case study. However before refugees can engage in any meaningful development, a lot of input is needed from a

government and the international community to integrate refugees into a social system.

This is the gap this study attempts to address.

THEORETICAL FRAME WORK

Hoffman says that a theory is a systematic study of observable phenomena, which tries to discover the principle variables to explain behavior and reveal characteristic types of relations among national units. Theory helps us to explain phenomena and make predictions, and in research, to organize knowledge, formulate priorities and select methods of carrying out research. This study will adopt the World Society approach¹ and the interdependency theory.

There have been great debates that pitted realism idealism and behaviorism against each other and realism gains victory. But realism fails to explain other important motivation of state behavior other than power (Morgentahu H. J 1995) contest. (Singer David J 1961)

Interdependence is an off-shoot of the systems theory and it manifests itself when changes in one state produces changes in another state or where one government action are partially determined by what other governments do, (Morgan Patrick M. 1981) This is relevant to our study since refugee significantly influences the foreign policy of the states involved. Interdependency may have either positive or negative effects leading to cooperation or to conflict. Since 1945, scholars of interdependence argue that transactions across international boundaries have increased greatly (Keohane Robert O & Nye Joseph 1972) Individual actors have gained strength in global relationships

resulting to complex interdependence among nations. Interdependence nurtures trans-national and state and non-state actors.

In the 1980's the aspect of regimes (Krasner Stephen D.1982) crept into interdependence, regimes are norms, principles and rules around which actors expectations converge in a given issue.

This study thus hangs on the idea that refugees are a trans-national issue that defy territory refugee flows in East Africa do affect policies and decisions of many states including those of asylum, resettlement and the state of origin Refugee management is supposed to be guided by regimes, conventions and protocols. Refugee problems have become complex and no single state can afford to host them without compromising the needs of their own nationals.

World society and human needs theory is a shift from the unit of analysis of the international society (Burton J 1985). The power theory model fails to explain why powerful states prove to be important giants that create problems for smaller states. World society places power in identity groups, which are more cohesive than states.

The World Society Paradigm draws from the pluralist school of international relations Unlike the realist school which concerns itself with interstate relations and views states as the principle actors colliding against each other like "billiard balls" in pursuit of their national interests; (Mongenthau O P) the pluralists hold that states are not necessarily the only actors, neither are they the most important actors in international relations Realism fails to explain other important motivation of state behavior apart from power. (Singer David J) Pluralists hold that boundaries are not the dividing line between the domestic and the international Therefore pluralists explain world politics in terms of

relations and transactions, not only between governments but other actors as well. A major theme in World Society is that non-state actors are significant players in international politics. In this study, individuals, societies and non-governmental organizations will be units of analysis² This will assist in determining their interactions as barriers or as support systems, to integration and management of refugees.

Inter-state relations in World Society are expressed as forming a “cobweb” of relationships, which explains the complexities involved in interactions between refugees, states, international organizations and governments in the refugee integration and management processes.

The World Society approach also holds that desire of man to dominate is not instinctive, and that aggression results from other factors, especially as a learned response in certain environmental conditions. Since these actors engage in transactions for their own interests, they can unite in search for peace in times of conflict. Cooperation, conflict and competition therefore take shape in global politics among actors. This argument provides a framework for analyzing the inter-governmental efforts towards addressing the refugee problem. This brings about the possibility of cooperation and not solely conflicting ideas as Realists could imagine. This cooperation is what has led to the formulation of international regimes, which deals with the refugee problems. This will aid in analyzing the UNHCR and other international instruments on refugees as instruments that provide for the recognition and integration of refugees for effective management.

Interdependence being a major theme in this model, which will also guide this study on the growing relevance of interconnection between states on matters, which affect their respective interests. Transnationalism is therefore a critical variable which will help in explaining the origins, dynamics and processes which cut across nations in the East African region with regard to the refugee problem.

The refugee problem therefore blurs the state boundaries by bringing in many actors together, that is, humanitarian agencies, refugees, mediators, states and other actors.

CHAPTER OUTLINE

Chapter one constitutes the research proposal while, Chapter Two analyses International law and its effect on refugee management and integration. Chapter Three examines the Tanzanian Government and its legislations regarding refugees. The analysis will include the extent to which the Tanzanian government has been effective and the gap there. Chapter four will explore the Kenyan situation, especially the proposed bill on refugees. It also analyses the effectiveness of the current practices and suggests ways in which they can be improved. Chapter five consists of conclusions.

METHODOLOGY AND DATA COLLECTION

The study used both primary and secondary data sources

Secondary Data

This primarily involved library research for both published and unpublished materials like books, journals, periodicals, newspapers, reports and other relevant excerpts, public documents, seminar papers etc. Visits to various libraries and research institutions were part of the search for secondary data

Primary Data

Interviewing is the primary method in this regard. Those that were interviewed included immigration officers, UNHCR officials, legal and administration personnel in relevant ministries and NGO representatives. Two visits to Kakuma Refugee Camp. And one Visit to Daadab Refugee Camp provides first hand knowledge of how refugees are managed in Kenya.

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CHAPTER TWO

Refugee International Law

Throughout the evolution of mankind law and order have played a central role in. Order is necessary and chaos is inimical to a just and stable existence.(Shaw M.N International Law, 1997) The human society has evolved principles framed within a social setting to hold firmly together the social fabrics necessary for human development. The human society therefore spells out what is permissible and what is not. Law is therefore that element which binds together the members of the community together in their adherence to recognize values and standards.

The structures are created by law which is permissible in that it allows people to establish their own legal relations with rights and duties as in creation of contracts; and it is also coercive as it punishes those who infringe the regulations. Therefore law is a code of rules that regulate behaviour and it largely reflects the ideas and preoccupation of a particular society. Man is a social character interacting with all others from the individual level to the international level. This interaction therefore has brought about structures that help to maintain stability and which also act as checks and balances for effective peaceful coexistence.

This has given birth to the universal code of conduct between individual states, called international law. Unlike municipal law, which addresses individuals in a state, the prime subjects of international law are the individual states themselves. International law is regulated by the states themselves and each state has to adhere to the agreement it has agreed to be bound by and other usage widely accepted. In contrast to municipal law, it

has neither a legislature nor a system of enforcement. Besides there is no executive or a governing entity. International law emanates primarily from international treaties which create rules that bind the signatories and by customary rules which are basically state practices recognized by the international community at large, as laying down patterns of conduct that are to be complied with. International Refugee law is therefore part of international law, which aims at protecting the rights of refugees. It basically consists of customary law and international conventions. Refugee jurisprudence lays down the groundwork on which international projections are based. It also provides for an international refugees agency UNHCR whose role may be summarized as ensuring genuine refugees are treated in accordance with the standards laid down by international refugee law. A person from a (Kamanga Khoti International Refugee 2001) foreign country seeking refuge from persecution requires a special form of protection. The standard form of treatment to be accorded to the refugee has been agreed on by the international community through various international instruments. This being the case, the protection of the refugee should be a right and not a privilege by the specific host state. A refugee has a right to protection and to have basic needs, including shelter and security. The state of refuge and asylum seeking is not a new phenomenon; it is as old as mankind.

Historians agree that the refugee phenomenon including international refugee law is a twentieth century creation even though the displacement of populations has been in existence since time immemorial.

INTERNATIONAL REFUGEE LAW.

The problem of world refugees and international displacements is among the most complicated issues before the world community today. Much discussion is taking place at the United Nations as the search continues for more effective ways to protect this particular vulnerable group of people.

International refugee law is part of the broader International law and its aim is to protect the rights of refugees. It consists of international treaties and customary law; together they lay foundation on which international protection is based. It also provides for an international refugee agency, the UNHCR, whose role is to ensure that genuine refugees are treated according to laid out standards and in accordance with international law. Realism and traditional international law presents states as the only actors and subjects of international law. On this basis Holborn therefore argues that nationality is the principal link between the individual and international law (Holborn 1997)

In the case of refugees however this link is broken since they lack the protection of their state. Under traditional international law, states felt they had an obligation to only those foreigners who possess a nationality hence enjoyed the protection of a state¹. Refugees therefore suffer a legal and social problem.

Traditionally this problem was addressed by the issuance of a recognized refugee travel document that allowed refugees to travel legally to other more hospitable states. The first travel document was called the "Nansen passport" named after the Refugee High Commissioner appointed by the League of Nations between 1921 and 1930. However this solution was addressed to refugees in Europe who had the means and

motivation to move from one state of refuge to another and they were welcome since they had knowledge and skill beneficial to other states. However the modern refugee problem cannot be solved by the issuance of a travel document alone. Voluntary repatriation is the preferred long-term solution for the majority of refugees. However, due to the on-going threat of persecution going on in their home countries some refugees cannot repatriate and are also unable to be integrated in the country of first asylum. In those circumstances, resettlement to a third country may be the only option. States like Australia, Canada, Denmark, Finland, New Zealand, Norway, Sweden, the Netherlands and the USA have established annual resettlement quotas. However, these governments target specific nationalities and they prefer educated refugees with strong family and cultural links, and a high likelihood of rapid integration. However, this does not always correspond to the pressing protection cases which UNHCR attempts to resettle (UNHCR 2002). This leaves the sick and illiterate refugees to languish in camps with no hope of resettlement, integration or repatriation because their home country is still at war, so the Kenya government is left with refugees who cannot be productive in any social setting. In fact, they could be a liability to the state if it were not for the assistance of the international community.

This is so especially in the African context where the majority of refugees are from rural areas, are illiterate and have no motivation to seek greener pastures apart from going back to their homeland example Sudanese refugees and Ugandans in Kenya.

The rise of the human rights regime has however challenged the notion of states being the only subject of international law. The refugee problem has put emphasis on the fact that individuals are also subjects of international law.

Various international instruments have been put in place to establish and define standards for treatment of refugees. Some of them include the 1957 United Nations Convention Relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees, and the OAU Refugee Convention of 1969. These instruments shall be discussed in the subsequent sections in this chapter with the aim of analyzing their effectiveness in addressing the refugee problem.

THE UNITED NATIONS REFUGEE CONVENTION

After the two world wars, there was a dire need of solving the resultant refugee problem. In late 1947, the General Assembly of the United Nations created the International Refugee Organization (IRO) whose role was to take over tasks previously undertaken by the United Nations Relief and Rehabilitation Agency. The IRO's mandate was to administer, register, protect, resettle, and repatriate refugees. The IRO achieved a lot between 1947 and 1952 but had its shortcomings as a result of post war political maneuvering and insufficient funding. There was a need for the United Nations to establish a more elaborate body that would handle the refugee problem and would reflect the outlook of world states. It was not until 1951 when the UN Convention Relating to the Status of Refugees was formed.

The 1951 Convention was a landmark in the treatment of refugees. It revolutionized international refugee law by providing international protection to refugees and to seeking durable solutions to their problems.

For the first time in history there was created international legal instrument that had a wider universal appeal and united a large number of states affected directly or

indirectly by the refugee problem. (UNHCR Fact sheet number 20) The Convention Relating to Status of Refugees contains forty articles, which were adopted by the UN in July 1957, which gave significant contributions to emerging international refugee conventions. It was able to consolidate and reinforce various series of multilateral treaties that had previously been in force.

The 1951 Convention description of refugees had a lot of shortcomings limiting n time and scope; For instance, the African refugee status was not well taken care of by the description adopted by the 1951 convention. The argument that a refugee must show well-founded fears of persecution implies that the fear must be rational or reasonable. What is rational or reasonable has no elaborate meaning and may find biases therefore denying the asylum seekers a chance of protection in one country (Macharia, Cynthia to Lomo 1999) In Kenya and Tanzania the determination of who a refugee is, is left to the discretion of the minister responsible for refugee matters without any rules or guidelines. This raises serious questions concerning the possible subjectivity of asylum determination procedures.

The 1951 Convention provides that "Contracting States" shall, issue travel documents to refugees living lawfully in their territories for the purpose of travel outside their territories. A deprivation of conventional travel documents limits refugees' access to economic opportunities outside the host country. This is not forthcoming with most of the governments, as they do not even issue travel documents for genuine cases as those who want to join their families in other countries. The article is limited as compelling reasons of national security or public order are used to deny the travel documents. These concerns are genuine and enshrine International Law. Article 26, provides that hosting

states shall accord to refugees lawfully in their territories the right to move freely within their territories, subject to any regulations applicable to aliens generally in the same circumstances. However, refugees especially in Kenya are viewed as security risks and are confined to camps located in arid areas far away from habitable land and their movements are strictly controlled.

Research shows that governments violate what it purports to support, for instance respect for human rights in Kenya, yet refugees live in deplorable conditions in camps; in Tanzania the government closing its border to refugees despite being a member of the United Nations. No government can claim to offer freedom of movement to a refugee and choice of a place to reside. The 1951 Convention stipulates that the contracting states should assist refugees in the transfer of their property into the country of exit and out again if they voluntarily repatriate. It also states that refugees have the right to acquire moveable and immovable property and can lease or enter into other contracts relating to both types of property in the host country. Further it stipulates that refugees should engage in economic activities on their own account in agriculture, industry, and established commercial and industrial companies. For instance before, 1991 refugees in Kenya were encouraged to acquire work permits issued free of charge and to engage in any commercial venture of their choice. Integrated refugees in eastern province were given land and with the assistance of UNHCR, turned virgin land into a viable agricultural land. This was possible because the number of refugees was small, the Kenyan economy was vibrant and the population of the country was small.

Looking at article 26 of the Refugee Convention, one can easily detect the difficulty of its implementation. Instead of granting refugees freedom of movement states

criminalize them. For instance, the Ugandan Act is silent on these matters and property brought to Uganda by refugees is confiscated. This is in complete violation of the 1951 Convention and even the rule of natural justice. Section 10 empowers the minister to dispose of the cattle of refugees on entry to Uganda while section 16 empowers the director of refugees or administrative officer or a camp commandant to confiscate a vehicle brought to Uganda and use it for moving refugees or any other stores or equipment for the use of the refugees as a whole (Lomo Ibid) Therefore in Uganda is one state among many that does not honour this article. This deprives the refugee of the opportunity to make a new economic start in a foreign country.

The right to work is also a requirement of the Convention. Section 15 stipulates that employment opportunities at the rate prevailing in the host be offered to refugees. However most of the refugees working in the factories or at the homes of host countries Kenya and Tanzania are rarely rewarded with good salaries if they are allowed to work. For instance in the Kakuma refugee camp a refugee assisting a medical officer is paid Kenya shillings 3000 a month (about US dollars 38). It is not termed as pay since he is working without a permit from the Kenya government. It is an allowance. Most of them are deprived of their salaries and since they are regarded as aliens their ability to seek legal representation is largely reduced.

The 1951 Convention guarantees primary education to the refugees on the same basis as nationals. However, most of the states are not in a position to ensure this either for their nationals or for refugees. Due to the high, the cost of education, the literacy levels in African states are still low. Further, article 28 the UN Convention on the Rights of the Child specifies that states should make education compulsory. Yet education

available, for refugees is handled by non-governmental organizations and UNHCR, not the state. The current universal primary education policy in Kenya does not apply to refugees since it is for nationals. In compliance with international law the state should provide free primary education, develop different forms of secondary education, including general and vocational education, make them available and accessible to every child irrespective of nationality

Refugees rarely enjoy health privileges. The problem they face in accessing health facilities, emanates from their reduced freedom of movement, although in some of the host countries, refugees enjoy better health services than the locals depending on international funding. A case in point is Kakuma refugee camp where the medical services available are far more superior to those accorded to the locals. This is because international organizations like '*medeciens sans frontier*' provide medical services directly to the refugees. However many African refugees would claim to have no access to basic health services due to the large numbers involved. They are not provided adequate food, both in terms of quantity and quality, as the World Food Program assumes that refugees are always able to supply some of their own food through farming. However this is not always possible because of the lack of funds, legal and climate constraints. For example refugee camps situated in Kakuma and Daadab are in arid areas where cultivation is impossible.

Article 33, spells out the principle of *Non refoulement* which provides that refugees should not be expelled or forcefully returned to the frontiers or territories where their lives and freedoms may be threatened, save for where they have been given a fair hearing and their cases examined.

The 1951 Convention was constrained geographically and in time since it did not address all the states that came to be under the umbrella of the United Nations. For instance, the African refugee was not addressed by the time the 1951 Convention since most African states were just colonies by then. All in all, the 1951 convention addressed the problems of the rich, educated urban refugees of the European countries.

THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES

The 1951 convention could only benefit persons who had become refugees as a result of events prior to 1st January 1951. However, the years following 1951 showed that the refugee movement was merely a temporary result of the Second World War and its aftermath. Between 1950 and early 1960's there was a rise in the number of refugees who were not covered by the definition of refugees as laid down by the 1951 Refugee Convention. These refugees were in need of protection, which was not granted to them under the limited timeframe of the 1951 Convention. By 1967, there was a need to extend the application of the Refugee Convention to cover the 14 million people who had become refugees during the time when the convention was being drafted. This was as a result of the events that took place after January 1957. The 1967 protocol was drafted to address the shortcomings of the 1951 Convention. It answered and responded to needs of implementation, which would have rendered the 1951 Convention useless. By 1992 one hundred and eleven countries were members of the 1957 Convention and /or its protocol.

HUMAN RIGHTS AND REFUGEE RIGHTS

The concept of human rights is closely related to the concept of ethics and morality. Asylum seekers and refugees are entitled to all the rights and fundamental freedoms that are spelled out in the international human rights instruments.

The preamble of the Universal Declaration of Human Rights adopted on 10th December 1948 emphasizes the recognition of the inherent dignity of man and the equal and inalienable rights of the human family through freedom, justice and peace in the world. The protection of the refugee must be seen against the broader context of the protection of human rights. The creation of the United Nations and the High Commissioner for Refugees was a major boost to human rights. Both entities share a common goal, which is to guard human interests and dignity and deal directly with the rights of individuals in the territories of states. The UNHCR was formed in order to restore minimum rights to persons after they leave their territories. The link between human rights and refugees give rise to questions on the definition of refugees, rights of asylum seekers who fail to qualify under the 1957 Convention or under the 1967 protocol; the difference between refugees and economic migrants; the link between violation of human rights and movement of refugees.

Protecting refugees and seeking durable solutions to the problems that cause mass flows of refugees fall under the mandate of UNHCR. The international protection includes the prevention of forceful return of refugees, assisting in processing of asylum seekers, providing legal counsel and aid, promoting safety of refugees and assisting in voluntary repatriation or resettlement in third states. In addition, many universally recognized human rights are directly applicable to refugees. These include the right to

life, protection from torture and ill treatment, the right to nationality, the right to freedom of movement, the right to leave any country including ones own, and the right not to be forcefully returned.

Refugees are entitled to the rights and freedoms specified in the Universal Declaration of Human Rights, that states that, no one shall be subject to arbitrary arrest, detention or exile. Also every one has the right to seek and enjoy in another country, asylum from persecution. Most important are the right of nationality and the freedom of movement and residence within the borders of each state, the right to leave and return to his country. But these rights are in themselves controversial and subjects of intense debate, for example freedom of movement is fully granted to refugees but is not practiced because of national security.

THE O.A.U CONVENTION GOVERNING THE SPECIFIC ASPECTS OF REFUGEE PROBLEMS IN AFRICA

The United Nations Convention for Refugees of 1951 originally referred to persons who had achieved that status as a result of events occurring before January 1st of the same year. As mentioned earlier, it was geographically and time limited as it dealt with events that happened in Europe before January 1st 1951. Secondly, the asylum seekers were also limited to those with a fear of persecution for the reason of belonging to a particular race, religion, nationality, public opinion or membership of a particular social group.

The end of colonial rule in Africa led to the birth of new states in Africa, which entered the international political and social systems in the late 1950s. At this time, the 1951 convention and its protocol were coming into force and were widely supported and

accepted. Many of the African states also became members of the convention through succession to these treaties, especially international ones that had been ratified by their colonial masters. This was despite the convention being unable to encompass the African situation of that time. It did not legally encompass the refugees in the African continent for it was based on its limited definition of a refugee in time and geographical coverage. It did not address many particular problems of African refugees. The African problem was crucial and fundamental and had to be addressed hence the need for an alternative legal instrument that could address the key aspects relating to African refugees. There were a growing number of people fleeing wars and internal conflicts in Africa. This led to the adoption of what is generally considered the most comprehensive and inclusive regional regime that addresses the refugee situation in Africa.

The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa was adopted by the OAU Assembly of the Heads of States in September 1969 and subsequently promulgated in June 1976. The African states had started to recognize the need for solutions, for African refugees through the OAU. This necessity was driven by the fact that previous Conventions had not taken African problems into account. There was a need to deal with the huge numbers of refugees being generated as people fought for independence in Africa. Initially the organization of Africa Unity had treated the problem of refugees as an outcome of liberation efforts.

The refugee problem in Africa has therefore been taken to be a foreign policy issue and a diplomatic issue since the dawn of independence. But since the end of the Cold War the problem has been recognized as political as well.

Both the Convention of 1957 and the Protocol of 1967 did not address the problem of refugee management. Although the protocol universalized the problem of refugees, it was not adequately done. The internationalization of refugee jurisprudence in this way did not meet the needs and realities of all members of the international system especially the problems of the Africa Refugee.

The 1969 Organization of Africa Unity Convention on the Refugee was essentially an African response to the foreign policy and diplomatic problems that the refugee issue was creating within the international system. It expanded the definition of a refugee beyond what was provided in the 1957 convention and its protocol in 1967. The OAU felt that "well founded fears of persecution" was not a sufficiently a criterion to cover all the refugee situations in Africa. The term "refugee" was expanded to include all the refugee situations in Africa. The term "refugee" was also expanded to include all persons who owing to external aggression, occupation, foreign domination, or any serious disturbing public disorder in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality. //

In other words, the OAU Convention complements rather than duplicates the 1951 convention. Having looked at the shortcomings of the coverage of the 1951 Convention, the founders of OAU were able to come up with options that would fill the gaps in the previous UN Convention. The other important aspect of the OAU convention was that it regulated the issue of asylum. The OAU encouraged member states to receive and to re-visit and analyze the Convention, secure settlement of those refugees who for

well founded reasons were unable to return to their countries of origin. Above all it stated that receiving refugees was not to be taken as unfriendly act towards neighboring states

The OAU Convention contains an important provision on voluntary repatriation and the prohibition of subversive activities. The article on repatriation is one of the major achievements of the conventions. On the other hand, one of the points that clearly emerged regarding the 1969 OAU Convention on refugees was that governments were more concerned with their own survival rather than the fate of the refugees. This is an issue, which up to now hinders proper management of refugees in Africa. This would explain why it took so long (up to 1979) for various leaders to acknowledge those African governments were responsible for producing refugees in the continent.

First, among the problems that are not solved are inter-state conflicts that turn to be violent. For example, when Kagame and Museveni decided to go against their former ally, Kabila, this brought about violent attacks against the latter supporters. Second is the likelihood of the collapse of a state that creates internal tension that produces refugees. For more than a decade now, Somalia for example, has been in a state of internal wars, giving rise to a constant flow of refugees. African states are to be ruled by self-seekers and autocrats who do not have the interest of their people at heart. This leads to bad leadership, abuse of human rights and hence generation of refugees. The other shortfall of the convention is dependence on external donors to deal with African refugee problems. This explains the reason why African states could do nothing to salvage the situation of Rwanda in 1994 for lack of economic power and political will to solve the problem.

International apathy continues to relegate African issues to the bottom when compared to other parts of the world. This has been proved when the Rwanda genocide was happening 1990s while the international community concentrated on the Eastern Europe where there was concern of the fall of communism.

The OAU Charter on Human and People Rights was meant to promote and protect the interest of the rulers and not of the people, who, after continued war become refugees. However, the OAU has laid down a good foundation for legal structures, which is for the good of the states involved. OAU has a role and a very important one to play in management and integration of refugees. In Africa, what needs to be done is for states like Kenya and Tanzania to use the foundation laid down by OAU to formulate viable policies for effective management of refugees.

CHAPTER THREE

Refugee Management in Tanzania

From the early 1960s when the newly independent state of Tanganyika began to be faced with the refugee problem, its policy with regard to admission was one “open door” This is a policy whereby “all those in flight are allowed to enter the country and stay until their plight is addressed”. (Runtinwa B 1999) Tanzania maintained this policy throughout the 1970s and the 1980s. In the mid 1990s Tanzania seemed on the verge of abandoning this policy when it espoused new policy of “No more Refugees”. On two occasions it closed its borders to prevent refugees from entering the country. Currently the Tanzanian government has reiterated its commitment to give asylum. However, its ability depends on UNHCR to cope with the political, economic and ecological impacts of hosting large number of refugees.

The most important component of a refugee protection regime is the issue of asylum procedures. The procedures are convenient to the refugee when accompanied by provisions that guarantee entry and “*non-refoulement*” Although the practice in Tanzania is in conformity with the principle of access; its law is inadequate in this regard.

Municipal laws and policies on refugees in Tanzania have been developed since independence in 1961. At independence Tanzania inherited and made use of colonial laws that included the Repatriation Ordinance (1921) the Expulsion of Undesirables Ordinance (1930), and the War Refugees (Control and Expulsion) Ordinance (1964)⁴. After independence legislations relating to refugees included the Citizenship Act 1961,

the Refugees Control Act (1965), the Extradiction Act (1965) the Immigration Act (1972), the Bill of Rights (1984) and the Refugee Act. The Refugee Act (1998) was the first comprehensive legal and policy framework for Tanzania on refugees. It has dealt with the many provisions relevant to issues of refugees. Such issues include matters of refugee immigration, protection and repatriation. However, the act does not address all aspects of refugee management and especially issues of human rights. It focuses more on the interests of states in particular the interests of Tanzania, than that of the individual refugee.

The Tanzania legal regime meets the internationally recognized standard of fairness, due to its processes and efficiency, especially in procedures, which accord *prima facie* status. However, procedures relating individual to asylum seekers at the individual level do not meet these standards. This is largely due to poor institutional arrangements and resource base and the huge number of people involved. As such, the Tanzania government has to take into account security concerns both at community, regional and national level relating to large influx of refugees from neighboring countries.

In the 1960's there was a large number of refugees flowing into Tanzania. This is attributed to the fact that during this period, Tanzania was the only independent state in the region and hence a refuge for people from Southern Africa, namely, Mozambique, Angola, Southern Rhodesia, South Africa, and others who were struggling against colonialism and racial discrimination. (Wairoba S. J 1979) When other countries in the region started getting independence, the number dwindled. The situation then changed abruptly as problems began in Burundi and the Democratic Republic of Congo, which

⁵meant a new wave of refugees. Currently, Tanzania receives refugees from countries like Burundi, Democratic Republic of Congo, Rwanda, Somalia, Kenya, Sudan, Iran, Ethiopia, Angola, Uganda and Yugoslavia.

Number of Refugees in Tanzania

	Country of Origin	Number of Refugees
1	Burundi	536,141
2	Democratic Republic of Congo	110,076
3	Rwanda	23,677
4	Somalia	2,898
5	Kenya	119
6	Sudan	10
7	Iran	9
8	Ethiopia	6
9	Angola	5
10	Uganda	3
11	Yugoslavia	1
Total		672,945

Figures as at 31st December 2000.

These numbers do not include children born in various settlements and camps and unregistered refugees. These numbers are however not constant, they keep on changing. Some refugees are resettled in third states and others return voluntarily to their countries of origin. (Chris Maina Peter 2001) While Other refugees keep on arriving as more conflicts flare up in neighboring states.

Policy & Practice in Refugee Management

Tanzania has had a substantial experience with refugees. Despite having a poor economy the country has offered more than just financial assistance to refugees. It has offered land for accommodation, fed and housed thousands of refugees, and employed personnel to manage the refugees. It has also offered security machinery for the safety and protection of refugees and the resources to service the management of refugees. Due to the integration of refugees, Tanzania has experienced environmental degradation, insecurity and tension between refugees and local residents. The country has lost property and lives through attacks by refugee bandits, robbers and murderers.

The country has introduced a new legislation, the Refugees Act 1998. The legislation, established, the National Eligibility Committee, whose responsibility is to consider and recommend all applications for refugee status to the minister responsible for refugees ⁶ this committee also considers applications for family reunification and requests for resettlement in Tanzania. A United Nations High Commissioner for Refugees representative is always present at any National Eligibility meeting to assist in decision-making during the consideration of applications. A fund called the Tanzania Refugee Trust Fund has also been introduced to be operated under the Trustees Incorporation Ordinance (Okoth Obbo George 1994) This Fund was introduced to raise funds to be utilized to benefit any refugee or. Group of refugees with the hope that the world community will help ease the country's burden by making generous contribution towards this fund.

The value of preventive measures should be considered when deliberating policies on refugee management. The important component of any policy should include putting

in place measures designed to reduce situations that trigger to massive displacement of people. These should include, promotion of good democratic governance; rule of law, respect for human rights all over the world and economic development measures.

Any policy introduced must strive to maintain support of the ordinary Tanzanian both politically and morally since they are the ones who bear the brunt of refugee pressure.

There is considerable pressure on land, environment, communication, security, education, training, health and employment. Due to this, a policy is needed to guide in the changing circumstances and complexities.

Currently, there is a need for African states to address the refugee problem since the number is ever increasing. Before deciding on a plan of action, the Tanzanian government embarked on research to establish the number and distribution of refugees in the country. The research is not conclusive since some people deliberately refuse to register with immigration officials or they are integrated into their kinsmen living across the border. At the same time statistics do not include children born to refugees while at the camp. The research covered areas in health, education and employment opportunities available for refugees. (Rutinwa B. 2001) The coming of refugees means more work for the law enforcement sector not only for the areas with a large number of refugees but in the whole country. With changes in the security situation, police and other law enforcement teams have to be mobilized to keep peace, law and order. In many cases refugees are armed with weapons. The situation gets worse when the weapons are used to carry out armed robberies on villages and highways. In Tanzania the government decided to introduce a special force in areas where such attacks are common. Villages are well guarded and police escorts are assigned to vehicles prone to attacks on the highways.

Sometimes, within the refugees hosting areas there are attacks by bandits from neighboring countries that are at war. Karen Jacobson identifies security threats involved in refugee crisis as security of relief agency personnel, security of refugees, security threats confronting communities residing in refugee-populated areas and security threats posed by refugees to the host country. (Jacobson K.A 2000) Security threats to local communities and to the state as a whole are great concerns and they contribute to the shifts in law and practice. As influx of refugees can create demographic imbalances. Which contribute to justifiable fears of being overwhelmed socially, culturally and politically. (Kamanga Khoti) Therefore refugee presence in Tanzania has come to be associated with negative development such as rising criminality, environmental degradation, destruction of fragile infrastructure, and diversion of human and financial resources. Local communities also are suspicious of the government local integration policies. Providing land for refugees would dissuade them from returning home, it would also lead to demographic imbalances, which would favour refugees, or even create conditions whereby the refugees would take over the government. (Brahim P.B. Refugee Policy framework, 2000) The UNHCR is charged with the responsibility of ensuring that harmony prevails through educating both the local communities and the refugees.

Consideration of Human Rights has guides the government and other organizations managing the refugee camps. The UNHCR deals with all issues of refugees and this includes ensuring that human rights are observed. The UNHCR is also charged with promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments. UNHCR is also charged with assisting efforts to promote the voluntary repatriation or assimilation within

new national communities, and promoting the admission of refugees to territories of safety. The UNHCR was involved in resettling the victims of the 1994 Rwandan genocide, which affected many of the countries neighboring Rwanda because of the mass movement of refugees. The genocide affected other countries outside Africa too since there were refugees who moved to the USA, Britain and Europe on their own and also through resettlement.

TANZANIA GOVERNMENT LEGISLATION REGARDING REFUGEES.

The oldest procedure for recognition of the refugee's status in post independence Tanzania is by a person or group of persons being so declared by the minister responsible for refugee affairs. The legal basis for this authority was the refugees control Act, 1996 whose section 3 provided that" subject to the provision of subsection (2), the minister may, by the order published in the Gazette, declared any class of persons who are, or who prior to their entry into Tanganyika were, ordinarily residents outside Tanzania to be refugees for the purposes of this Act". A person so declared by the Minister would legally be a refugee under the Act

There are Ministerial Declaration dating back to the 1960s declaring Rwandans, Congolese, Mozambicans, Malawians, South Africans, Namibians, Rhodesians, Ugandans and Burundians, to be entitled refugee status on this basis.(Rutinwa B. 2001 pp15)

The powers to accord refugee status by way of declaration have been retained in the Refugees Act of 1998 under section 4(1)(c) which includes in the category of refugees a person who "belongs to a group of persons which by notice in the Government

Gazette has been declared to be refugees ”. Unlike section 3(2) of the Refugees Control Act, this provision does not expressly say who is to make a declaration of refugee status but it is presumably the Minister for the time being in charge of refugee affair. What might be another difference between the two provision is that while the older one empowered the Minister to declare any class of persons to be refugees virtually for any reason, the new one allows persons to be declared refugees “for reasons set out in paragraph (a) and (b) ” of section 4. These paragraphs reproduce the definition of a refugee under the 1951 UN and the 1969 OAU refugee convention respectively. Thus, the powers of the Minister under the new Act appears to be narrower

Virtually all the old Declaration made under the Refugee Control Act has not been officially repealed. In practice however, only Burundians and Congolese asylum seekers are now recognized as refugee’s status on the basis of Ministerial Declarations. Asylum seekers of other nationality have to be individually screened to determine their status.

Due to the problems that Tanzania has experienced in the attempt to host thousands of refugees, the government introduced a new legislation known as the Refugees Act (1998), which concretizes the government policies on refugees. The act encompasses international principles governing refugee issues; the most important one is that of asylum. This is the right of everyone to seek and enjoy protection from persecution. The type of protection provided should at least satisfy the basic needs of the refugee or a group of refugees in this precarious situation. Embedded in the act is the principle of *non-refoulement* whereby a refugee cannot be returned to a state where he risks persecution. Tanzania’s government’s open door policy conforms to the two principles of right to asylum and *non-refoulement*. However, the issue of protection is not addressed

according to international standards. Instead refugees are often subjected to harassment, which includes forced confinement in camps; and in government's pursuance of national interests, which include national security.

Refugees should not be penalized for being in a country illegally, as it happens in Tanzania. They should be provided with basic needs such as life, food, shelter, basic sanitation and health facilities. They should be treated with sympathy and not cruelty. They should not be subjected to any form of discrimination on the basis of race, religion, nationality, country of origin or political opinion. They should be housed far from the frontier of their country of origin for the purpose of security.

There are many ways in which refugees break the laws of the host states. For instance, the use of forged passports either from their countries or from the countries of asylum, use of aliases, especially for those refugees who have not registered at the points of entry, lack of identification papers issued by the authority, using forged travel documents and working without permits in countries where work permits are required for aliens. The consequences of these illegal actions for refugees include arrest, remand pending deportation, and arrest pending prosecution, conviction, and deportation among others these consequences result from the failure by refugees to register with immigration officers. In countries where refugees are allowed to work, they are required to get work permits in order to be employed. These permits are issued at no cost through the recommendations of the UNHCR. Once issued, the refugee is free to engage in income generating activities on the same basis as the nationals of the host state.

There are countries that give citizenship to refugees after they have stayed in the country for a certain number of years on application.

Tanzania allows refugees to enter the country with property. However, the Refugee Act provides that the refugees should surrender any weapons they own on arrival to an authorized officer. (Chris Maina Peter) This is because these weapons may be used for various purposes such as conducting armed raids on civilian villages and highways, on fellow refugees and camps and also for training refugees to revolt against their countries of origin. If these weapons are not surrendered, the offence is punishable by up to two years imprisonment (Refugee Act, 1998.11(1)).

THE REFUGEE CONTROL ACT 1966

This is a legislation that gives the minister of Home Affairs the responsibility of declaring any class of persons to be refugees. This is useful in cases of mass movement where not all persons can be screened for the purpose of granting refugee status. The minister can declare any part of the country an area of reception or residence for refugees. Under this legislation, the minister has powers to deport a refugee and order for his detention awaiting deportation. There is need to introduce a new law for refugees because of the problems arising from the Refugees Control Act – 1966. Although the Act was enacted in Tanzania to control the massive influx of refugees, it has nothing to do with the promotion of the welfare of the refugees and the protection of their fundamental rights and freedoms. In other words, the Act only equips the government with legal powers and mechanisms, to control and restrict refugees rather than uphold their legal rights and entitlements (Ibid)

The 1998 Refugee Act established the office of the Commissioner of Refugees who apart from receiving and processing applications for asylum seekers has powers to appoint assistant registrars at various refugee areas. There are sections that allow a

person appointed by the minister to order detention of an asylum seeker or refugee for up to three months. If extradition proceedings are not instituted against the refugee within these three months he has to be released. Applying the Preventive Detention Act – 1962 on the refugee or asylum seeker, may extend the three months. Section 26 allows the minister or competent authority to order the deportation of a refugee whose application has not been successful. Section 26(4) indicates that the minister may not deport a refugee if they are of the opinion that the deportee will be tried and punished on arrival at their home country. Measures taken by the Tanzanian government under this Act only tightens control over the refugee. It gives the government rights over refugees and do not give rights to them. The government argues that it is protecting its citizen. However dealing with refugee's means dealing with people, their lives, their families, their future and their children's future. Therefore, there is reason to establish an office which commensurate with the heavy burden and not just a small section of a ministry.

The refugee problem is real, cannot be avoided and is beyond anyone's control. It is important that governments confront this issue seriously and sincerely with the sole aim of finding a lasting solution. Among other things, they should strive to provide for a humane national legislative regime within their jurisdictions. It is important for new legislation to take into account current developments in the world as far as the refugee problem is concerned.

Looking at refugees and the municipal law in Tanzania, it is clear that the legal mechanisms put into place are inadequate in dealing with refugees. The municipal law even after the enactment of the 1998 Refugee Bill puts emphasis on control on refugees not on granting them rights under the international regime. The international community

on the other hand tends to neglect the African Refugees, especially with regard to funding. On this basis the refugee problems in Africa are not addressed as quickly and as efficiently as those in Eastern Europe. This is despite the fact that the same refugees generate many jobs for the international community

The refugee problem in Africa especially in Tanzania and Kenya is viewed as “temporary.” The assumption is that the situation in the home state will improve and refugees will be repatriated voluntarily. However, problems of governance have to be addressed before this solution can bear fruits. According to an official in the ministry of home affairs, “refugee matters are fluid and hence do not need a standard legal regime to deal with it. Hence there is no need to legislate refugee matters.” The minister in charge of immigration can put in place mechanisms to deal with this problem when the need arises. The UNHCR has nearly 2000 staff members in Africa handling the continent’s 6.3 million refugees and displaced persons. This represent almost one third of the people of concern to UNHCR worldwide. At the end of October 1999 UNHCR had received US\$125 million for emergency operations in Africa. (UNHCR 1999) With this kind of figures it is important to put legal mechanisms in place to deal with refugees. ✓

Conclusion

Tanzania hosts a large number of refugees at a very high cost in terms of security, machinery refugee management structure, and environmental degradation. Tanzania therefore needs help from the international community to cope with a growing refugees population, which is as a result of displacements and gross and persistent violation of human rights taking place in the neighbouring countries. Measures should be designed to reduce situations that trigger off refugee movement. Some of the preventive measures

include the promotion of democratic governance, rule of law and respect for human rights in Africa. Therefore concerted efforts should be made to promote and monitor violations of human rights in Africa. Any policy developed to address the issue of refugees should not ignore the role of economic development as a way of preventing refugee-creating situations in Africa. Deliberate efforts should therefore be made to promote economic development and co-operation.

The newly established East African Community shall therefore harmonize their legal regimes on refugees in order to reduce conflicts on how to deal with refugees. The harmonization should however take into account that the Ugandan government has put into place better mechanisms of refugees management than the other two countries while Kenya has none at all (Kamanga Khoti). According to Khoti Kamanga, Uganda has attempted to integrate Refugees into the labour market specifically in the armed forces. This has contributed to Uganda's allegedly involvement in conflicts in neighbouring countries like Rwanda and Democratic Republic of Congo.

7

CHAPTER FOUR

Refugee Management In Kenya

Having looked at refugee management in Tanzania and the mechanisms put in place to manage refugees in the foregoing chapter, this chapter will analyse the situation in Kenya and gauge to what extent it measures up or not , with Tanzania.

Refugees in Kenya

Currently Kenya hosts over 200,000 refugees living in two major camps, Dadaab and Kakuma. In addition over 12,000 refugees have been granted full refugee status by the government of Kenya and have been allowed to live and work in urban centres throughout the country.

Below is a breakdown of Kenya's refugee population by nationality as at April 2001⁷

KAKUMA refugee camp		DADAAB refugee camp	
Burundi	119	Somali	126,272
Congo	273	Ethiopia	1,892
Eritrea	32	Sudan	976
Ethiopia	2,112	Uganda	38
Liberia	2	Eritrea	94
Rwanda	192	Congo	1
Somalia	12,055	Total	129,909
Sudan	58,883		
Uganda	336		
Others	106		
Total	74,110		

Kenya like every state party to the 1951 Refugee Convention and the OAU Refugee Convention is bound to uphold both treaties. Governments usually accomplish this task by setting up domestic legal frameworks that implement their treaty obligations. Kenya has some legislation that is applicable to asylum seekers and refugees but these do

not fully address the problem of refugees, neither do they help fully implement treaty obligations. And since 1991 Kenya has failed to implement the domestic laws that exist. The Immigration Act(cap 170)⁸ in Kenya, applies to all non-citizens including refugees. The Act provides that all non-Kenyans entering without a valid permit or pass will be deemed illegal and subject to arrest and detention by immigration officers and police. The Act describes the class of entry permits to be issued. Class 'M' is application after vetting and is issued free of charge. Currently it is issued to refugees who are recognized by the government of Kenya. This translates to 1991 since the eligibility committee set up by the government has not been convened since then. A class 'M' permit is issued for two years and does not limit the refugee to any specific employment or employer. The permit is renewable.

As aliens, asylum seekers and refugees are also subject to the provisions of the Aliens Restriction Act (CAP 172) whose aim is to restrict the presence and rights of aliens in Kenya. All sovereign states in the world community have rules and regulations pertaining to the control of aliens in their states and Kenya is not an exception. The Act gives the Minister in charge of immigration the powers to impose restrictions on aliens. These include prohibitions on entry, places of residence and mandatory registration. Aliens who violate such orders are subject to a fine or imprisonment or both. The Act does not distinguish between aliens, asylum seekers and refugees, neither does it address the status and rights of aliens, legal or otherwise.

A Refugee Bill has been drafted and is to be tabled in parliament. However, it has been pending since 1994. This draft bill falls short of international standards since it grants unfitted discretion to a 'minister' (Refugee bill 2000) in charge of refugee matters.

At the same time, it gives control to the state to determine the fate of refugees. It recognizes a state right to security rather than the rights of a refugee in a state of asylum. The draft bill, therefore, recognizes the right of controlled asylum, which confines refugees to specific areas. However, it recognizes individual refugees when it states that asylum seekers are to apply for asylum within a specific period after entering Kenya. It also provides for transit centres for asylum seekers while their applications are being considered.

In 1999, conflicts in Uganda, Somalia and Sudan however brought a large number of refugees to Kenya. Consequently, the number of refugees in Kenya rose from 120,000 (UNHCR 2000) in 1991 to 4000,000 in 1992. The large number of arrivals far outstripped the government's ability to manage them. This compelled the government to request the UNHCR to set up refugee camps. The UNHCR and other NGOs took up the responsibility. These humanitarian agencies however usurped the government's refugee administration completely and eroded the positive pre 1991 refugee management practice which allowed refugees to integrate as was the Badash Refugees Resettlement Scheme of 1976. In addition, refugees were denied class 'M' permits, education and free movement. After UNHCR and its implementing partner, Jesuit Refugee Services took over the refugee status determination procedure from the government of Kenya, things changed. A status determination centre was created in Nairobi. The refugees who apply for refugee status are those who are literate and aim either to live in urban centres or to resettle in a third country. Otherwise, the majority of refugees move from border to camp. On entry at Lokichogio, there is a holding ground where refugees are received and transported with lorries to the camps at Kakuma. Here, they are vetted, registered and

issued with ration cards according to family size. In Daadab, the case is different. There is no central reception of refugees at any border point. The border between Kenya and Somalia is so porous that refugees are expected to make their own way to the camp where new arrivals are advised to report to the protection office for interview and registration. Most refugees in Daadab walk from Somalia to the camps in Kenya. They flee Somalia mainly due to hunger and insecurity not necessarily due to fear of persecution.

They are referred to as mandated refugees, meaning that they have been recognized by UNHCR not the government of Kenya.

According to Human Rights Watch, after a status determination interview, each asylum seeker receive either refugee status and be directed to a camp, or receive permission to reside in Nairobi. Alternatively, the asylum seeker would be rejected and instructed to leave the country. This contradicts the tenets of international law refugee law since refusal of refugee status does not translate to expulsion. According to international law, a refugee is to be assisted to a third state where he will neither be persecuted nor returned to his country of origin unless voluntarily. In 2001, thirty nationals from DRC were refused status and advised to leave Kakuma Refugee Camp. Refugees whose applications are rejected can appeal. However, this is difficult since the UNHCR does not give reasons for refusal of refugee status. Asylum seekers who are recognized as refugees receive a letter from the UNHCR known as "the protection letter". It allows the holder to report to a particular refugee camp.

Most refugees want their status recognized so that they can apply for resettlement to third countries. However, according to the UNHCR's Resettlement Handbook those who qualify for resettlement with legal and physical protection ought to be survivors of

violence and torture, those with medical needs, women at risk, those seeking family reunification, children and adolescents, elderly refugees and refugees without integration prospects (UNHCR Handbook) The UNHCR then refers the potential case for resettlement to a third government. Currently, governments accepting the highest numbers of refugees from East Africa are the United States, Canada, Australia and Norway. (Human Rights Watch)

Refugee Protection in Kenya

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Kenya has no refugee law, the only place refugees are mentioned in the Immigration Act is where the class 'M' permit is to be issued to refugees to enable them to live and work anywhere. Otherwise, refugee management is pegged on Aliens Restriction Act. Therefore, with no law in Kenya governing refugee management, hundred of thousands of refugees living in Kenya have no legal status. According the UNHCR the absence of the Government's Refugee Eligibility committee has rendered refugee protection ineffective. The Kenya authority required that most refugees live in designated camps located in remote sparsely populated areas close to the refugee generating states. UNHCR in collaboration with the government of Kenya has an encampment policy for asylum seekers and refugees in Kenya. The encampment policy recognizes the right of the Kenyan government to address the economic and security concerns of Kenya that may be compromised by illegal immigrants and other foreigners. Hence the need to contain and control asylum-seekers and refugees in Kenya. The policy requires all asylum seekers and refugees to register with the Kenyan government on arrival. Legal asylum seekers and refugees are required to live in designed areas currently

Daabad and Kakuma. If refugees need to reside outside the camp, they are required to obtain written permission from the government to leave and reside outside the camp. Currently, refugee's children who study outside the camps are issued with pupil's passes to enable them to pursue further education. Refugees and asylum seekers found outside-designated areas without written authority are considered to have broken the laws of Kenya (USCR Refugee Report 2002)

The Kenya government issues documentation to lawful asylum seekers, which includes identity cards, passes and permits with funding from UNHCR. Refugees treasure these documents since they translate into their protection. However, some refugees do not understand the limitations of most of the documents and see identity card as a permit to engage in employment or as a travel document.

The Kenya government should revise and adopt the current Proposed Refugee Bill but first, the Kenya Constitution has to be put into place. The Kenya Draft constitution's Chapter Five addresses the issue of Refugees and Asylum Seekers. Chapter Five Section 52 recognizes the right of asylum and guarantees it in accordance with the provisions of the constitution and international legal instruments. The constitution does not specify whether the right to grant asylum is automatic or lies with the state. In part two, the Draft Constitution states that a person who seeks refuge in Kenya has a right not to be returned or taken to another state where his freedom is in danger.

The Draft Constitution does not address the issues of refugee management nor the rights of refugees. It only emphasizes the principals on non-refoulement and the right of asylum. It also recognizes the fact that Kenya has no domestic legislation to enable it

translate the Refugee International Conventions into practice. However, refugee issues should not be enshrined in a national constitution. To do so, is to recognize that granting refugee status as a permanent issue. However refugee issues are fluid and dynamic and subject to sporadic change. For example, if there were a hint of generalized war in Kenya, refugees would flee to another state. Hence refugee issues should be governed by acts of parliament or regulations and legal notices published from time to time by the government.

Currently, the Kenya government uses a lot of resources on refugee management. There are several arms of the government directly involved in refugee management. The police department provides security in camps; immigration department is the custodian of the legal instruments, just to mention a few. However, there is lack of coordination and lack of information, which makes these different arms of the same government act in contradiction. Therefore, there is a need for thorough training and restructuring to ensure the efficient management of refugees.

2

CHAPTER FIVE

NATIONAL INTEREST AND REFUGEE MANAGEMENT IN EAST AFRICA

Kenya, Tanzania and Uganda occupy about 680,000 square miles. The countries comprise east Africa proper countries and the horn of Africa, east Africa is a major flashpoint of forced migration. For decades, Kenya, Tanzania and Uganda have provided security and refuge for thousands of refugees including those from Burundi, Sudan, Rwanda, South Africa and Somalia among others. They have offered land for resettlement; for example, in Kenya, Ethiopians were settled in Badasa refugee Resettlement scheme in Marsabit in 1976. In 1999 the three east African states hosted almost one million refugees.

Kenya and Tanzania share common and favorable geographical position stability that make them favoured destination for refugees in the Horn of Africa and the Great Lakes regions. However, the massive influx of the refugees and the adherent crime and insecurity caused by extremists among the refugees; economic strain, and environmental degradation have resulted in growing hostility and unwillingness to keep refugees in East Africa. The three East African states adopt some policies that undermine refugees protection which is in violation of international law and reverses the generous asylum tradition for which these states have been respected. This is occurring in politically changed environment where xenophobia and anti-refugee sentiments among East Africa have hardened. Police round-ups, forced camp confinement, police harassment and lack of due process rights have become part of being a refugee in East Africa. This arbitrary harassment to refugees is more common in Kenya and Tanzania than in Uganda. The

Ugandan authorities have been more receptive to refugees as Ugandans have undergone a phase when they were refugees unlike Kenya and Tanzania.

To address East Africa's response to refugee's problems will require an understanding of the relationship between international commitment and domestic law. The legal system in East Africa is essentially dualistic in that for international treaties to become operational at the national level, domestic legislation is crucial. For a treaty to become a part and parcel of the law of the land and consequently capable of being enforced, Parliament must ratify it and enact an enabling legislation. This is what Kenya is trying to do through the current Kenyan draft Constitution.

Refugee law is a branch of international law, which as general rule does not impose obligation or means rather, it imposes obligations of results (Kamanga K 2002 pp.15). As such there is no obligation of states to have procedures for auditing asylum seekers and determining their status provided they live up to their obligations, under the 1951 UN Convention, 1969 OAU Convention and the 1967 Protocol. However, while international law does not impose obligations of means it also requires effective implementation of obligations. This necessitates taking a particular course of action.

Refugee law revolves around two principals, the asylum seeking principal enshrined in article 14 of the Universal Declaration of Human Rights which proclaim that everyone has the right to seek and enjoy asylum. The other principal is that of *non-refoulement* which prohibits rejection at the border or the return of a refugee to a place where his life is in danger. These two principles cannot be properly implemented without having refugee's determination procedures. In the OAU Convention, this process is enshrined in article 6, which provides that "for the purposes of this Convention the contracting state of

asylum shall determine whether the applicant is a refugee". This shifts the responsibility of status from the refugee himself to the state. So even when a refugee is running for safety the host state determines if he is a refugee or not. However, given the difference in legal systems and patterns of refugee flow, it is not possible nor desirable to have uniform refugee admission and eligibility procedures. Every state is unique and all its determination procedures should reflect this uniqueness at the same time refugees who flee for different reasons should be handled as individuals.

Despite this, all processes of refugee management should be guided by fairness. Fairness is incorporated in Human Rights instrument including the Universal Declaration on Human rights and the International covenant on Civil and Political Rights.

Throughout the world, the gap between international legal and humanitarian standards and actual state practices appears to be growing. As a people outside their country of origin, refugees are entitled under international law to protection by the UNHCR and should be protected. One major difficulty inherent in international refugee regime is the difficulty in implementing protection through an international agency when granting asylum remains the prerogative of individual states. Thus the scope of the UNHCR action depends on the policies of the host government. Even the funds made available to the UNHCR by donor state depends on how useful these states perceive a particular refugee population is to their own foreign policy.

The extent of UNHCR activities and influence is delineated by political constraints. As the promoters and guardian of refugee rules, the UNHCR can call attention to the legal obligation of the government that the signatories to the UN Refugee

convention and protocol, but it is limited in its ability to alter action of a government that is determined to violate international standards.

Governments in the Great Lake and the Horns of Africa region have legitimate security concerns. Conflicts in Rwanda, Burundi, Democratic Republic of Congo, Somali, Sudan, Ethiopia and Eritrea have spilled over the region. Reports of cross-border extremist activities, small arms trafficking, recruitment and training of refugees by rebel groups are serious national security concerns that African government must address. Weapons flows, crime and banditry have increased along the border areas of these frontline East African countries in the past few years. However, conditions in the neighboring states are unlikely to improve for refugees to return home.

While national and border security issues are a priority for any government and need to be addressed, long term security interest are best served by implementing mechanisms that uphold the rule of law. Indiscriminate treatment of refugees without due process is neither an effective nor a sustainable security policy. The blanket presumption that refugees pose a security threat has become a justification in Kenya and Tanzania for harassment and infringement of refugees' rights. This presumption and the international community's failure to advocate effectively against it has led to an alarming patterns of deteriorating respect for refugee rights.

However, refugee's rights are infringed everywhere in the world not just in East Africa. No state can afford to let loose foreigners into their orders without control. Refugees then must be assembled somewhere to be processed. This is why UNHCR exists to manage refugees. If refugees were not confined to a specific place or area, UNHCR would not be able to manage them and neither would the government. In

Australia for example refugees from the Asian continent who attempt to land in Australia illegally are rounded up and taken to camps in the central part of the country. Here they are confined and processed

All governments have a right to question foreign nationals who have not followed the requisite legal procedure for residence in their territories.

CHAPTER SIX

CRITICAL ANALYSIS

The problem of refugees is among the most complicated issues before the world community today. The United Nations continues to search for more effective ways to protect and assist these vulnerable groups. While some states call for increased level of participation and coordination among international players, other points to gaps in international legislation and appeal for further standard setting in this area. Everyone is, however, in agreement that the problem is both multinational and global. No solution can be comprehensive in addressing refugee issues, from the causes of exodus to repatriation. The refugee issue is thus a classic example of the interdependence of the international community. It fully demonstrates how the problem of one country can have immediate consequences to other countries. It also demonstrates interdependence between issues.

Asylum seekers and refugees are entitled to all the rights and fundamental freedoms spelt out in international human rights instruments. The protection of refugees must, therefore, be seen in the broader context of the protection of human rights. The creation by the International Community of two separate organizations to deal with human rights and refugees respectively does not mean that these issues are unrelated. Both share the same principle of safeguarding human dignity.

The UHNCR was created to protect refugees and to search for durable solutions to refugee problems. The international community, therefore, recognizes that human rights violations are a major cause of mass exodus. The problem then is to address the cause of the source. At the same time, refugees encounter problems of closed borders and violations of their minimum rights as asylum seekers. These violations include

intolerance, racism xenophobia, and aggression, national and ethnic violence. In some cases, refugees are confined to camps and refused access to courts and legal aid. They are also regularly subjects to attacks and abuse. While refugee-hosting states should maintain their commitment to the protection of refugees and encourage tolerance toward diversity, states of origin of refugees should prevent acts that produce mass exodus of their populations.

Preventive diplomacy and respect for humanitarian law should prevail as a foundation for addressing the refugee problem.

The 1951 Convention consolidates previous international instruments relating to refugee's and provides the most comprehensive codification of the rights of refugees attempted so far. It lays down basic minimum standards for the treatment of refugees, without prejudice to the granting by states of more favorable treatment. The Convention is to be applied without discrimination as to race, religion or country of origin. It also makes provision for documentation including the issuance of refugee travel documents. Certain provisions of the conventions are considered so fundamental that no reservations may be made to them. These include the definition of the term 'refugee' and the principle of *non-refoulment*.

However the 1969 OAU Convention was also based on a fallacy. The African leaders assumed that the refugee problem in Africa was a result of colonialism and once colonialism ended, the refugee problem would come to an end. It was therefore seen as a temporary matter (Cynthia Macharia 1999). Time and circumstances have proved them otherwise and what came to light is that the refugee problem was not well addressed legally in the OAU Convention. The OAU and its refugee management arm the Bureau

of Refugees has taken the back seat and has left the management of refugees in Africa to the UNHCR. This could be as a result of lack of funding and specialized manpower or lack of political will in the specific states charged with the responsibility.

The 1951 Convention, the 1966 Protocol and the 1969 OAU Convention are the principal international legal instruments established for the protection of refugees and their basic character has been widely recognized internationally on the universal and regional levels. By its stature, the office of the UNHCR is entrusted with the task of promoting international instruments for the protection of refugees and supervising their application under the Convention and the Protocol. Contracting states undertake to cooperate with the office of UNHCR in the exercise of its function to facilitate its specific duty of supervising the application of the provisions of these instruments. In view of the increasing recognition of the basic significance of the convention and the protocol for the protection of refugees and management, it is important for their provision to be known widely by both the refugees and also by those concerned with refugee problems.

There are three kinds of obstacles to the implementation of the international conventions-social-economic; legal and policy; and practice (Ibid Journal of Refugee law). There are tensions between international obligations and national responsibilities where countries are called upon to host large numbers of refugee population, even on a temporary basis. Kenya has been hosting huge numbers of refugees since 1991. Kenya and Tanzania are suffering from severe economic difficulties, high levels of unemployment, declining living standards, and shortage of housing and land. Legal obstacles to proper implementation include the inconsistency between existing national

laws and certain objectives of the Convention; failure to incorporate the Convention into national law through the related organs and the implementation of legislations which define not the rights of the individual refugee, but rather the powers vested in refugee officials. This is evident in the Refugee Bill currently in force in Tanzania and is reflected in the proposed Refugee Bill in Kenya. This leaves the protection of refugees' rights at the discretion powers of government rather than automatic enforcement of specific rights identified and guaranteed by international law. Where the judiciary plays an important role in protecting refugee rights, restrictive interpretations can also be an impediment to full implementation.

At another level, there are bureaucratic obstacles including inefficient structures for dealing with refugees. For example, in Kenya and Tanzania, the Refugee Status Determination Committees Lack adequately trained officials to deal with asylum seekers and refugees. This hampers the effectiveness of these committees. In Kenya, different arms of the government, each enforcing its rules and sometimes conflicting with others deal with refugees. For example a refugee has to deal with the provincial administration, the police, immigration officials and the judiciary. Each arm of the government is regulated by a certain act of parliament and this can create confusion, hence lack of proper management of refugees. At the inter-government level, granting asylum has the potential to create tensions between neighboring states.

State resources and capacity are in most cases limited and public opinion does not always support efforts undertaken on behalf of refugees especially when they come in large numbers. This has been the case in Kenya through the constant conflicts between the Sudanese refugees and the local people in Turkana district. The locals are ignorant of

the role of the government in refugee management and blame the government of taking better care of the refugees than the local community. Surprisingly, there are cases in Kakuma refugee camp where local Kenyans have registered as refugees to enable them get rations meant for refugees. Worse still Turkana women have been married to refugees from Sudan and moved into the camps to live as refugees.

Vulnerable states like Kenya and Tanzania when faced with a mass influx of refugees fear that the refugees might export their conflicts and this could lead to serious conflict between the rights of refugees and the interests of the state. This situation has undermined the traditional granting of asylum in the developing world. Refugee inflows raises fundamental issues of national security and can lead to upsets in the country's ethnic balance.

The UNHCR standard policy is therefore to call for asylum in the country of first arrival. In a situation of large-scale influx, asylum seekers should be admitted to the state in which they first seek asylum and if that state is unable to admit them on a durable basis, it should always admit them on a temporary basis. In all cases, the fundamental principle of *non-refoulement* including non-rejection at the frontier must be scrupulously observed. (UNHCR) However, this principle has been challenged, recently, during NATO strikes, Macedonia closed its borders to refugees. Macedonia used the refugees as a bargaining tool and this forced the other international players like USA to admit 20,000 refugees, World Bank and Norway provided funds while the NATO forces build camps for the refugees. Other states, which agreed to share the Kosovo refugee problems of Macedonia, include Turkey, Albania, Greece and Germany.

Keeping refugees near the region of origin is another controversial issue. On one hand it allows for an easier implementation of the preferred durable solution of voluntary repatriation. However, this can also pose a threat to the state of origin since the refugee camps can be used as recruitment and recuperating camp for soldiers, which may cause havoc in their state of origin.

Refugees vs National Interests

The issue of state security and national interests in refugee management cannot be overemphasized. The 1951 Convention addresses this issue. In Article 9, the contracting state is to make provision or take measures, considered essential to national security. In Article 12(1) it states that the law of the country of residence should govern the personal status of a refugee. Article 26, states that, a state is to accord refugees lawfully in its territories free movement within its territories subject to any regulations applicable to aliens generally. Article 27 also addresses this issue; it states “the contracting states shall issue identification papers to any refugee in their territory who does not possess a valid travel documents.” Article 28(1) allows the contracting states to issue refugees lawfully staying in their territories travel documents unless compelling reasons of national security or public order otherwise requires. Article 30 (1) allows contracting states in conformity with its laws and regulations, to permit refugees to transfer assets Article 31 (1) compels the refugee to present themselves without delay to the authorities and show good cause for their illegal entry. Article 32 (1) obliges contracting states not to expel refugees save on grounds of national security or public order. Article 32(2) allows refugees to submit evidence and appeal if not granted asylum. Article 32(3) grants the contracting states the right to apply internal measures deemed necessary, while Article 33 allows for

refoulement, that is a refugee can be returned or refused entry as long as reasonable grounds exist regarding danger to security of the state or a community of that country.

The 1951 Convention therefore recognizes the right of a state to sovereignty and protection of national interests. Kenya and Tanzania have been accused as viewing refugees as a threat to national security but the 1951 Convention also has recognized that the refugees can pose a threat to sovereignty. The current Tanzanian Refugee Bill and the Kenyan proposed Refugee Bill both put emphasis on the control of refugees. Both legal regimes put the national interests of their state way above the right of a refugee. Mass influx of refugees are often considered to constitute a threat to internal stability in any given country, for example mass influx of Kurds from Iraq to Turkey in 1991 and the closure of Tanzania border to refugees from Burundi in 1995. International protection for refugees should be addressed first before granting asylum because if asylum is the issue, then the state security and sovereignty take precedence.

The whole issue of refugee management is tied closely to the current international human rights and humanitarian Law. States and refugee advocates need to explore new regimes, a viable protection policy, that requires reconciliation and flexibility between the rights of refugees and the interests of the state. Also, the calibre of refugees has changed greatly from poor sick people largely women and children to senior politicians armed militiamen, professionals and businessmen.

Tackling the root causes of wars and internal conflicts involves empowering the people economically. This means addressing the poverty levels in conflict torn states. There is a correlation between refugee generating states and their levels of economic development. Unless this issue is addressed Africa will always generate refugees.

Article 3 of the 1969 OAU Convention is emphatic on prohibition of subversive activities. Every refugee has a duty to the country in which he finds himself which requires in particular that he conform to its laws and regulations and to measures taken for the maintenance of public order. He should also abstain from any subversive activities against any member states of the OAU. States are empowered by Article 3(2) to prohibit refugees residing in their territory from attacking any member state of the OAU in any manner likely to cause tension between member states, and in particular by use of arms, or through the press. This provision has been abused time and again by OAU member states. For example, Tanzania helped topple the Uganda government during Amin's rule in 1978. Also, Uganda has been accused of helping refugees resident in Uganda to topple governments in Rwanda.

International Regimes and Solutions to Refugee Problems

The 1951 Convention proposes solutions to the refugee problems, which include provisions on cessation of refugee status; assimilation and naturalization through Article (1) c and Article 3 (a). The traditional durable solutions include voluntary repatriation, local integration and resettlement in a third country. Voluntary repatriation is the preferred solution. However, it is not always possible due to the political, socio-economic and legal frameworks necessary for voluntary repatriation. In Kenya refugees from Somalia are able to return home after spending many years in exile. UNHCR provides re-integration packages, provide counseling to various refugee groups, verify nationality and guarantee reception back to their state of origin. However, setbacks to

voluntary repatriation of Somali refugees are there. They include renewed fighting and lack of sustained political settlement.

Local integration is for refugees who are unable to return to their respective countries of origin. Its success is dependent on public confidence of the local communities. The challenge is to ensure that they become integral and contributory actors in the development process. In this endeavor the UNHCR provides integration packages, which include support in vocational training, income generating projects, distribution of seeds and basic agricultural tools in addition to legal assistance. However, local integration has its own setbacks the major one being lack of political will of the current governments and lack of resources mainly land.

Resettlement of refugees in a third country strengthens the principal of international cooperation. Currently states offer resettlement places for refugees. These states are Australia, Canada, Denmark, Finland, the Netherlands, United States of America, Argentina, Benin, Brazil, Burkina Faso, Chile, Iceland, Ireland and Spain. The UNHCR recommends resettlement for refugees who have been in Limbo for many years and also for *prima facie* refugees with particular protection needs in countries of asylum; for example the lost boys of Sudan from Kakuma Refugee Camp in Kenya, and the Somali Bantus.

Resettlement of refugees to third countries can also be blamed for the constant flow of refugees from Somalia and Sudan into Kenya. Sometimes non-eligible people are resettled. Kenyan-Somalis have also gone for resettlement as Somali refugees.

There is need therefore for the UNHCR to streamline the resettlement programmes in Kenya to be transparent and more flexible so as to minimize abuse. The

challenge to refugee hosting states like Kenya and Tanzania is to find ways to integrate refugees to economic development in the country. At the same time, they need to educate their community on the positive role the refugees can play in economic development. To do this, the relevant governments need to identify and review existing laws, policies and practices currently in use relating to the issue of refugees. There is need to identify and assess the constraints and to recommend a refugee policy framework that is in harmony with international legal regimes. Refugee law in East Africa should address issues like employment, formal and informal; type of settlement, both rural and urban; relief and protection issues, issues of surveillance so that refugees do not engage in subversive political and criminal activities, re-allocation, resettlement, repatriation, education and health. The role of the UNHCR should be clearly defined as opposed to that of the government in Refugee Management.

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