

UNIVERSITY OF NAIROBI
INSTITUTE OF DIPLOMACY AND INTERNATIONAL STUDIES

“Protecting Refugees: A Critical Analysis of the Kenya Refugee Act, 2006”

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**A Project submitted in partial fulfillment of the requirements for the award of
the degree of Master of Arts in International Studies
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DECLARATION

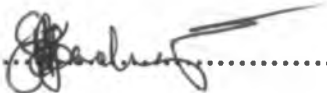
This dissertation is my original work and has not been presented for a degree in any other University.

Signed 

Date 16/11/10

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

Signed 

Date..... (6.11.10)

Mr. Ochieng Kamudhayi

DEDICATION

To the refugees and asylum seekers in Kenya: May this study establish a stepping stone for your pursuit of refuge and enjoyment of refugee rights and freedoms.

To the Government of Kenya: May your hospitality add-value to the lives of refugees in Kenya.

ACKNOWLEDGEMENT

My initial gratitude are to the Almighty God for granting me the strength, good health, wisdom and favour during this entire process. Indeed Great is thy faithfulness.

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Special regards to my family, for their prayers, endurance and encouragement. Steve, your understanding is beyond comprehension. Baby Jakes, thanks for your cooperation and sleeping throughout the night. Elkana, our helper and friend, may God reward you for your faithfulness and commitment.

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Special thanks to Profesor Francis Situma, University of Nairobi, Parklands Campus, for proof-reading my work, especially when I didn't feel like giving it a second glance, and for your insightful contributions in the process.

May God richly reward you all.

ABSTRACT

The situation of refugees is one of the most pressing and urgent problem facing the international community today. The legal instruments, on which refugees can rely to secure international protection globally, are the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol¹. At a regional level, the 1969 OAU Convention embodies the unique circumstances of refugee movements in Africa. The study has examined the concept of international protection tracing it through a historical perspective that informed modern day refugee law and practises. In discussing the historical evolution of international refugee protection, the study observed that the codification of the 1951 Convention and the development of the principles of refugee law, such as the principle of *non-refoulement*, were informed by the unique circumstances that prevailed at a given place and time during both World Wars I and II. Under International law states are obligated to enact national legislation to reflect their commitments at the international level. In reviewing the Kenya Refugee Act, 2006, the study commended Kenya's efforts in developing a refugee specific legislation that largely conforms to the international benchmarks for refugee protection, as stipulated in the 1951 Refugee Convention and its 1967 Protocol, and the 1969 OAU Convention. The study identified some of the immediate needs of the Department of Refugee Affairs as being capacity building, with a focus on human resources development, development of implementations strategies and national policy on refugees, and drafting of necessary regulations and guidelines to guide the entire process. Time is indeed of the essence, if the gains of the Act are to be made useful to refugees and other stakeholders at large.

¹ 606 U.N.T.S. 267, entered into force 4 October 1967. In addition to incorporating the provisions of the 1951 Convention, the 1967 Protocol, (Article 1(2)-(3) eliminated the 1951 temporal limitation and paved the way for the elimination of the geographical limitation, thus ensuring that claimants with a cause of flight beyond the 1951 events in Europe could lodge their claim for consideration as refugees.

LIST OF ABBREVIATIONS & ACRONYMS

DRA	Department of Refugee Affairs
IRO	International Refugee Organization
MIRP	Minister of State in charge of Immigration and Registration of Persons
NGO	Non-Governmental Organization
OAU	Organization of African Unity
RSD	Refugee Status Determination
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNRRA	United Nations Relief and Rehabilitation Administration

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CHAPTER ONE

INTRODUCTION

1.0 Problem Context

This study examines Kenya's commitment to international refugee protection. The study provides a critical appraisal of the Kenya Refugee Act, 2006¹ by discussing the extent to which the Act conforms to the minimum standards of refugee protection, as enshrined in the 1951 UN Convention and its 1967 Protocol, together with the 1969 OAU Convention, which set the benchmarks for refugee protection. Refugees are persons compelled to flee their country of origin or places of habitual residence for reasons beyond their control, and seek refuge in another country. An individual who embarks on such a blind journey is one who has encountered hardships of which their government of origin is either unable or unwilling to offer them protection. In most cases, the would-be protectors are the same entities that cause persecution hence the difficulty to approach for their assistance. The asylum seeker faces the onerous task of demonstrating that he/she is living in fear of being persecuted if returned to their home country. Much persecution is based on race, religion and politics, but there are other reasons². In some Muslim communities, a woman who gets a baby out of wedlock may be subjected to severe punishment (including execution). Homosexuals and lesbian are persecuted in a numbers of countries, especially those in which religion is an integral part of the state. A state of foreign

¹ Kenya Refugee Act 2006, No. 13 of 2006

² 189, U.N.T.S 137, *1951 Convention relating to the Status of Refugees*, entered into force 22 April 1954 (Hereinafter referred to as the 1951 Refugee Convention.)

aggression or generalised violence in either part or whole of a country qualifies one for protection as a prima-facie refugee in Africa, Latin America and parts of Europe³.

Protecting refugees from continued violation of their basic rights or the worst effects of conflict is central to the proper functioning of the international system. The international community assumes the responsibility of ensuring that the basic rights of the asylum seekers, who are no longer protected by their governments, are respected, hence the phrase, “international protection⁴.” International humanitarian, human rights and refugee law provide a strong normative protection framework, although in practice, the domestic policy of the host country dictates the level of government engagement and commitment to its international obligations. Kenya is a party to both the 1951 Convention and its 1967 Protocol, and the 1969 OAU Convention. These are the principle legal instruments for refugee protection. Kenya has also enacted the Kenya Refugee Act 2006 to facilitate implementation at domestic level. This study examines Kenya’s commitment to international refugee protection by critically analysing the degree to which the Kenya Refugee Act 2006⁵ addresses the minimum standards of refugee protection, as enshrined in the 1951 UN Convention and its 1967 Protocol, together with the 1969 OAU Convention. The question to answer in this case is therefore, whether the Kenya Refugee Act 2006, is in tandem with the other international refugee instruments?

1.1 Background to the Research Problem

³ 1001 U.N.T.S. 45, *The Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa*, adopted in 1969, entered into force 20 June 1974 (Hereinafter referred to as the 1969 OAU Convention.)

⁴ UNHCR, *Protecting Refugees, Questions and Answers*, (UNHCR Media Relations and Public Information Service, Geneva, UNHCR/PI/Protecting/Eng1, September 2005) p 1.

⁵ Kenya Refugee Act 2006, No. 13 of 2006

The situation of refugees is one of the most pressing and urgent problem facing the international community. Refugee law has grown in recent years to be a subject of global importance. The legal instruments, on which refugees can rely to secure international protection globally, are the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol⁶. The 1951 Convention provides the internationally recognised definition of the term “refugee” and details refugees’ rights, most important of which is the right to be protected against forcible return, or *refoulement*, to the territory from which the refugee has fled⁷. In appreciating the dynamic causes of flight and in response to the inadequacy in the 1951 Convention definition, regional treaties have additional language that broadens the 1951 Convention refugee definition. The 1969 OAU Convention reiterates the definition found in the 1951 Convention but also covers any persons compelled to leave their country following a state of generalised disturbance or owing to external aggression. Persons fleeing protracted civil disturbance and widespread violence and war in Somalia and Eastern part of the Democratic Republic of Congo are entitled to refugee status in states party to the 1969 OAU Convention. This notwithstanding whether or not they have a well founded fear of persecution. The 1969 OAU Convention is the only legally binding regional refugee treaty that adopted this broader definition of the term refugee.

Similarly, the Cartagena Declaration on Refugees adopted on 22 November 1984, addresses the specific context of mass refugee flows in Central America, Mexico and Panama. Though not binding on states, the Declaration recommends that the definition of refugee in the region should include persons who flee their country ... “because their lives, safety or freedom

⁶ 606 U.N.T.S. 267, entered into force 4 October 1967. In addition to incorporating the provisions of the 1951 Convention, the 1967 Protocol, (Article 1(2)-(3) eliminated the 1951 temporal limitation and paved the way for the elimination of the geographical limitation, thus ensuring that claimants with a cause of flight beyond the 1951 events in Europe could lodge their claim for consideration as refugees.

⁷ Article 33, 1951 Convention.

have been threatened by generalised violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order.⁸

1.2 Statement of the Problem

Kenya is a party to both the 1951 Convention and its 1967 Protocol, and the 1969 OAU Convention. Kenya continues to host a large number of refugees from the region, with recent UNHCR estimates indicating the total number of refugees in Kenya as at end of August 2010 to be over 250,000 refugees⁹. For this reason, Kenya has taken steps to domesticate her international refugee obligations by enacting the Kenya Refugee Act 2006, and establishing the Department of Refugee Affairs, to specifically handle refugee related issues. The Kenya Refugee Act describes the basic rights of protection guaranteed to refugees. A cursory glance at both practice and policy since December 2006 however reveals that the enactment of the Act has neither improved nor changed the refugee response in Kenya and refugees and asylum seekers continue to be subjected and regarded as aliens under the Aliens Restrictions Act¹⁰ and Immigration Act¹¹, hence far from enjoying their internationally recognised rights. Additionally, despite being a signatory to the core international instruments on refugee protection and the enactment of the Kenya Refugee Act 2006, Kenya continues to maintain a tight grip on its border with Somalia amidst the protracted civil instability in Somalia, a direct violation of the right to seek asylum and principle of *non-refoulement*. The heightened levels of insecurity and violent

⁸ Article II, Conclusion 3

⁹ UNHCR, Branch Office for Kenya, Factsheet, 31 August 2009

¹⁰ Aliens Restrictions Act, Chapter 173 Laws of Kenya

¹¹ Immigration Act, Chapter 172 Laws of Kenya

attacks in Somalia has exposed at least 5,000 Somalis, including women and children, to actual danger. Police activities directed at illegal immigrants in Eastleigh estate in Nairobi in August 2009 reflects the failure by the Kenya police to recognise the validity of refugee mandate letters issued by UNHCR in confirmation of their legal status as refugees in Kenya. This action led to the arbitrary arrest and detention of genuine refugees. The police authorities indicated that UNHCR had no authority to legalise the refugees' stay in Kenya. The Kenya government and UNHCR are lead actors in management of refugees. In spite of the Department of Refugee Affairs being mandated under the Kenya Refugee Act 2006 to take over the registration and processing of asylum cases from UNHCR, the department is yet to put its house in order, with refugees being confused as to the actual authorities with whom to register their claim. Additionally, judicial officers working on the advise of immigration authorities, continue to consider asylum seekers and refugees as aliens hence subjecting them to the provisions of the Aliens and Immigration Act, resulting in less than the required standards for treatment of new arrivals in Kenya. These observations typify the disconnect between the Department of Refugee Affairs, Kenya Police, Judiciary and the Immigration authorities.

This study seeks to establish why in spite of there being an established legal framework both at the national (Kenya Refugee Act 2006) and international level (signatory to 1951 UN Convention and 1969 OAU Convention), refugee protection in Kenya is still problematic. Does the Kenya Refugee Act 2006, contain the requisite legislative and institutional framework to support effective management of refugees in Kenya? Do the rights and responsibilities as provided under the Kenya Refugee Act 2006, meet the minimum international standards for refugee protection as stipulated in the 1951 Convention? This study seeks to answer the basic

question of whether the enactment of the Kenya Refugee Act 2006, has added value to protection of refugees in Kenya.

1.3 Objectives of the Research

From the above-stated problem, the objective of the study is two-fold;

1. To establish the extent to which the Kenya Refugee Act, 2006 is in harmony with the international law on refugees, as enshrined in the 1951 Refugee Convention, the 1967 Refugee Protocol and the 1969 OAU Convention.
2. To evaluate the effectiveness of the institutional framework established by the Refugee Act, 2006, in the management of refugee matters in Kenya.

1.4 Literature Review

The literature in this study considers two levels, namely the broad and specific approaches to the subject matter. At the broad level, a review will be done on literature dealing with international refugee protection generally, addressing the historical evolution, development and the debates thereto. This will facilitate the laying of a framework of understanding the linkage between previous historical practises that were largely based on humanitarian grounds, and the modern day practice that involves use of legal instruments to manage refugee affairs. This will include literature on the different refugee definitions, both from a subjective and objective perspective. This literature is useful for this study because it provides a historical conceptualization of the refugee rights regime, and most importantly the contemporary regional

definitions, for instance the 1969 OAU Convention, applicable to Kenya. The second level will consider specific literature dealing with the refugee problem in the African context, with a focus on those applicable to the Kenyan situation. This will be complemented by a review of literature on state responsibility towards refugees, in order to expand the discussion on states' dilemma of guaranteeing refugee rights amidst competing state interests. In this section both published and unpublished literature on the socio-economic impact of refugees in Kenya will be undertaken.

1.4.1 The definition of a Refugee

Chimni provides a historical review of the legislative framework influencing refugee law, both at the international and regional level. He contends that the initiative to define the concept of refugees in a manner consistent with the ideology of the more powerful states set the stage for the development of contemporary international refugee law.¹² Chimni's observations are deemed instrumental to our study as they provide a basis for analysing the refugee definition as enshrined in the Kenya Act. It helps determine whether the law gives clear guidance on its interpretation and the whether provision has been made to ensure consistent application alongside definitions in other statutes, including the Constitution of Kenya. Jackson, while looking at different refugee definitions highlights the fact that individual determination differs from group determination. Each guarantees different rights to persons concerned,¹³ thus the need for stakeholders to differentiate. This literature adds to the evaluation of the refugee definition under the Kenya Act, and will support our analysis as to whether the Act sets out the requisite elements necessary for the consideration of either criterion.

¹² B.S Chimni, *International Refugee Law, A Reader*, New Delhi/London, Sage Publications/Thousand Oaks, [2000], pp. 1-13; 14-18; 27-34; 55-76

¹³ Ivor C. Jackson, *The Refugee Concept in Group Situations*, The Hague (1999), p3

1.4.2 Right to seek and enjoy asylum and States' responsibility towards refugees

Goodwin-Gill reviews the principle of *non-refoulement*, highlighting its historical evolution, its scope and legislative relevance. He relates the principle to specific issues, like admission and non-rejection of asylum seekers at the frontier. His debate concludes with the debates emanating from state views and state practice as regards *non-refoulement*.¹⁴ In his perception, states remain divided over the acceptance of the principle of *non-refoulement* as a rule of *jus cogens* despite their concurrence to international instruments prohibiting such acts. Two views dominate, on the one hand are states that opine that there should be no excuse whatsoever for refusing asylum, while others express that refoulement could be the only way out in the current international environment, where the concept of burden-sharing seems illusive. To the latter, such states should not be deemed at fault, 'since the responsibility for ensuring the conditions necessary for observance of the non-refoulement rested with the international community as a whole¹⁵.' In conclusion, Goodwin observes that it is the State that retains the choice of means as to the methods of implementation of its international obligations, and that application of different procedures and standards will not necessarily result in the breach of international obligations. This study parts ways with the author and asserts that such 'freelance' application of international obligations, informed only by a state's choice and interests, has led to the continued violation of this principle of *jus cogens*, due to lack of consistency, with no state having the capacity to hold the other accountable to its international obligations as each state continues to pursue its own means towards achieving their defined national interests.

¹⁴ Goodwin-Gill, G. *The Refugee in International Law*, Oxford, Oxford University Press, [1998], pp 117-147; 151-155; 167-171; 325-332.

¹⁵ M. Yavuzalp (Turkey) : UN doc. A/AC. 96/SR. 418, para 74 (1987).

Hathaway looking at the theoretical basis for refugee protection critiques the assumption that an enhanced oversight of the Refugee Convention is what is needed to ensure international commitment to refugee law¹⁶. He calls attention to the successes and failures of the six major UN treaty bodies as a reference both for and against particular modes of oversight. Hathaway proposes the adoption of a process to oversee the Refugee Convention through an independent supervisory body. This discussion introduces a global perspective in this area and could help in policy formulation and change the practice of refugee protection in this region. Turk, reviews the ambiguities in the international protection regime for refugees and other persons of concern to UNHCR, by considering the different approaches undertaken by states in defining their refugee obligations. He contends that, '...while some regions have applied a refined treaty-based refugee definition to include all victims of conflict and upheaval, others have not. Instead, they rely on national laws or discretionary ad hoc arrangements, such as temporary protection in situations of large refugee influx'. Turk laments that, 'an internationally non-binding approach contributes to the flexibility of states, but places individuals in an extremely vulnerable position denying them their rights under international treaty law.' Additionally, Turk, touches on the issue of disparities between the responsibilities of UNHCR and the often limited, legally formalized, obligations of states that inhibit effective intervention by UNHCR. In conclusion, the author recommends a multilateral framework and dialogue, based on consensus, which he sees as a predictable and foreseeable system that can allow responsibility-sharing¹⁷. Based on such premise this study looks at instances for formulating such a forum that would ensure standard setting in the

¹⁶ J. C Hathaway, *Who should Watch Over Refugee Law?*, *Forced Migration Review*, Vol 14, [2002], pp 23-26

¹⁷ V. Turk, 'The role of UNHCR in the development of international refugee law', in Nicholson, F. and Twomey, P. (eds), *Refugee Rights and Realities: evolving International concepts and regimes*, Cambridge, Cambridge University Press, [1999] pp 153-174.

application of refugee law and consider monitoring and enforcing compliance under the international refugee regime.

1.4.3 The socio-economic and political challenges of protracted refugee situations

In his study on refugees in Africa, Crisp provides a detailed research on the trends and challenges affecting refugee protection in Africa¹⁸. Some of the challenges highlighted in 2000 by Crisp still hold true today. One such challenge is the issue of local integration that still lacks tangible steps to address the same. A common characteristic of many protracted refugee situations in Africa is the inability of exiled populations to access basic human rights-including rights under the 1951 Convention. Africa's long-term refugees have been provided with a very conditional form of asylum. They are generally (but not always) spared the threat of refoulement. But the right to life has been bought at the cost of almost every other right. In a study on the living conditions of refugees in Kampala and Nairobi, Human Rights Watch¹⁹ observes that tens of thousands of refugees from Ethiopia, the Democratic Republic of Congo, Rwanda, Somalia, Sudan and elsewhere live in dire conditions. They struggle for survival without the legal status or networks of friends and family that citizens have. Some are forced to sleep on the streets, leaving them vulnerable to incidents of insecurity, with neither food nor access to medical attention. The refugees are subjected to harassment, extortion and arbitrary arrest and detention ranging from ordinary criminals, law enforcers or agents from refugees' home countries. The procedures for registration and status determination are fraught with delay and occasional bias. The researchers

¹⁸ Jeff Crisp, *Africa's refugees: Patterns, problems and policy challenges*, Evaluation and Policy Analysis Unit, UNHCR Working Paper no. 28, August 2000.

¹⁹ Human Rights Watch, *Hidden in Plain View: Refugees Living Without Protection in Nairobi and Kampala*, HRW New York, November 2002.

lament that there is little incentive to address their needs because the governments have policies requiring refugees to reside in designated locations, resulting in neglect of refugees in urban centre.

UNHCR²⁰ provides an observation of the changing dynamics in the asylum policy, buttressed by the increasing States' tendency to introduce different measures intended to prevent or deter people from seeking refuge in their territory. The report discusses the evident tension between the right of people to seek and enjoy asylum in another country, and the right of States to regulate arrival and admission of foreign nationals into their territories. The report considers the introduction of temporary measures that could help address the asylum dilemma, focusing primarily on the notion of temporary protection, and insists that states must always respect the human rights of asylum seekers, whatever the validity of their claim to refugee status. The relevance of this background information to this study is that it helps in the formulation and conceptualization of the reasons behind the sudden tendency by governments to deny asylum seekers entry into their territories. The report, however, fails to address the challenges that States experience in dealing with the issue of asylum, especially in protracted refugee situations such as is the trend in Africa and in Kenya, where the cost of asylum continues to significantly impact on the host country. Issues of burden sharing, and especially the role of the international community in providing durable solutions towards protracted refugee situations, is also neglected in the report. This study highlights some of these challenges being faced by Kenya and the UNHCR in addressing asylum issues at national level.

Loescher and Milner while addressing the correlation between the assumption that refugees are indeed a cause of insecurity, hence the need to deter their movements, observe that

²⁰ UNHCR, *The Asylum Dilemma*, in *The State of World's Refugees, 1997-1998: A Humanitarian Agenda*, Oxford, Oxford University Press [1997], pp 243-265.

protracted refugee populations not only constitute over 70% of the world's refugees, but are also a principal source of many of the irregular movements of people around the world today²¹. In response, host governments have enacted policies of containing refugees in isolated and insecure camps, have prevented the arrival of additional refugees and, in extreme cases, have engaged in forcible repatriation. This is the position taken by the Kenya government in denying asylum to Somali nationals fleeing the on-going conflict in Somalia. The Kenya Aliens Restrictions Act embodies the encampment policy, which is now replicated in the Refugee Act 2006. A review of the provisions regarding the encampment policy will be made in this study hence an instrumental reference for this research. The literature review will be further complemented by a review of the Kenyan legislations apposite to refugees and asylum seekers' protection, for instance the Alien's Restrictions Act and the Immigration Act which categorise refugees as aliens and hence punishable as such. It is our proposition that some of these legislations were impositions of the foreign policy during colonial times and there is therefore a need to review them in order to keep in tune with emerging trends and ensure consistency with the Refugee Act 2006.

1.5 Theoretical Framework

This research transcends a number of theories whose jurisprudence informs the essence of refugee protection, including, the need to respect refugee rights as human rights, the need to consider states' legitimate interests and the need to ensure that the different systems in refugee management operate in tandem for the greater good of the whole system.

²¹ Gil Loescher and James Milner, *Protracted Refugee Situations: Domestic and International Security Implication*, Routledge; 1 edition [September 22, 2005]

1.5.1 Natural Law Theory

Refugee rights are human rights and need to be respected. Natural Law theory was utilised in the 20th century in the development of human rights as universal principles within the international community. The idea of Natural law, in its simplest form definition, is viewed as a body of moral principles that is common to all humankind and is recognizable by human reason alone. Refugee rights, and specifically the principle of *non-refoulement* falls within the realm of international human rights laws. Natural law theory gives rise to the concept of “natural rights”. According to Locke, certain rights exist as a result of a higher law than positive or man-made laws. Such a higher law constitutes a universal and absolute set of principles governing all human beings in time and space²². For Locke, human beings, in the natural state, are free and equal, yet insecure in their freedom. However, once they enter society, human beings surrender only such rights as are necessary for their security and for the common good. Each individual retains fundamental prerogatives drawn from natural law relating to the integrity of persons and property (natural rights). Locke therefore concludes that natural rights flow from natural law. They are inalienable rights as the rights. These include right to life, liberty and property. This theory enables recourse to a superior type of law and provides a powerful method of restraining arbitrary power²³.

“Human Rights” as a concept refers to the state where human beings have universal or natural rights and status regardless of legal jurisdiction or other localizing factors such as ethnicity or nationality²⁴. Article I of the 1948 Universal Declaration of Human Rights²⁵ states that “all human beings are born free and equal in dignity and rights”. Because they are endowed

²² Shaw M.M., *International Law, Fourth Edition*, (Cambridge University Press, 2000) pp 197

²³ *Ibid* p. 199

²⁴ Freeman Michael. *Human Rights: An Interdisciplinary Approach*, Cambridge Polity, 2002.

²⁵ United Nations General Assembly Resolution 217 A (III) of 10 December 1948

with reason and conscience, they should act towards one another in a spirit of brotherhood. This international guide on the requisite human rights standards also indicates that everyone has a right to “life, liberty and security”. Article 15 of the Declaration provides that everyone has the right to a nationality and forbids the practice of slavery, servitude, torture, inhuman and degrading treatment, arbitrary arrest and detention, freedom of movement, free choice of unemployment, working and living in a healthy environment. There are certain human rights that are internationally recognized as non-derogable, such as the right to life, the right to be free from slavery/servitude, the right to be free from torture and the right to be free from the retroactive application of penal laws. Under international law, unlike other human rights, these non-derogable human rights cannot be limited or pushed aside even during times of national emergency.

Deduced from Locke’s theory of inalienable rights, *refoulement* goes against the very precepts of natural law jurisprudence, as the asylum seeker or refugee is forced to surrender their inherent and inalienable rights such as right to life, liberty and freedom from persecution and torture. *Refoulement* is viewed as the forceful return of persons to places where their life and/or physical security is threatened. Indeed it is a serious violation of an individual’s human rights. Persecution, either by the state or non-state agents, is in itself another element of violation of one’s fundamental human rights and freedoms, as the individual lacks any national protection from his own country of origin where he is a citizen. In spite of being integrated in the United Nations Charter, the co-existence between respect for state sovereignty and respect for human rights has not been easy. For many centuries, the principle of State sovereignty has been regarded as overwhelming and unconditional in international law. States have trumped attempts to limit or even question the absolutism of their sovereign power. Recent thinking however

supports a new perception of modern concept of sovereignty that regards sovereignty as a duty to protect human rights.²⁶ Accordingly, the recognition of individuals as subjects of international duties leading to the individual's recognition as beneficiaries of international rights, hence state accountability for their protection.

The Second World War gave birth to two significant documents: the UN Charter on the one hand which “promotes and encourages respect for human rights and fundamental freedoms for all without distinction.” The Nuremberg Charter on the other hand unequivocally raises the issue of individual accountability for war crimes and crimes against humanity. This dual process of duties in international law and individualization of rights has been rapidly codified in the Genocide Convention, the Geneva Conventions and their additional protocols, and the Universal Declaration of Human Rights, followed by two UN International Covenants—on Civil and Political Rights and on Economic, Social and Cultural Rights. Unfortunately, implementation has been unhurried. Many situations involving systematic human rights violations—in the former Yugoslavia, Somalia, Liberia, Haiti, Rwanda, Timor-Leste, Sierra Leone and recently Sudan—are now viewed by the Security Council as threats to peace. This accumulation of precedents has led to a re-conceptualization of sovereignty, which no longer antagonizes but rather incorporates the concept of human rights. A state cannot pretend absolute sovereignty without demonstrating a duty to protect people's rights. Hoffmann affirms that “The State that claims sovereignty deserves respect only as long as it protects the basic rights of its subjects. It is from their rights that it derives its own. When it violates these rights, ‘the presumption of fit’ between the Government and the governed vanishes, and the State's claim to full sovereignty falls with it.”

²⁶ Vesselin Popovski, *ESSAY: Sovereignty as Duty to Protect Human Rights*, UN Chronicle Online Edition, at <http://www.un.org/Pubs/Chronicle/2004/Issue4> (Accessed 20 July 2010)

The sovereignty of States is no longer a “right to exercise power on a defined territory”. In parallel with respect for human rights, States have a duty to investigate, prosecute or extradite individual perpetrators. Again, if they fail and are unable or unwilling to do so, other States and international courts can step forward instead.

A natural law approach to the study of refugees in Kenya should integrate the norms, standards and principles of the international human rights system. It should show if there is failure by the state to honour its international obligations to refugee protection. National sovereignty for example is no longer an acceptable defence for violation of human rights. Important elements are the recognition that human beings as subjects of international law are holders of rights, equality and equity, standard setting and accountability, empowerment and participation. As such, the human rights based approach should provide a conceptual and normative framework to guide essential development of legislation, policies, programs and processes in the area of refugee protection in Kenya.

1.5.2 Systems Theory

Refugee management demands the inter-relatedness of different entities and stakeholders including governments, international organisations, non-governmental organisations, citizens and refugees, who, together influence the wider refugee rights regime and as such need to be coordinated to ensure greater corporate good as proposed under the systems theory. According to von Bertalanffy²⁷, systems theory states that a system consists of various components or sub-systems which must function together for the system to work and that failure of the sub-system leaves the whole system in jeopardy. As an interdisciplinary theory about the nature of complex

²⁷ Ludwig von B., *Perspectives on General System Theory*, (Newyork: Mc Graw-Hill, 1974)

systems in nature, society and science, systems theory provides a framework by which one can investigate and/or describe any group of objects that work in concert to produce some result. A system from this understanding comprises regularly interacting or interrelating groups of activities. This could be a single organism, any organization or society, or any electro-mechanical or informational artifact. In a general sense, a system refers to a configuration of parts connected and joined together by a web of relationships. Von Bertalanffy, emphasis is that a real system is open to, and interacts with, the environment, and that it can acquire qualitatively new properties through emergence, resulting in continual evolution. Systems theory therefore serves as a bridge for transdisciplinary dialogue between autonomous areas of study and the area of systems science itself. Properly understood, the Systems Theory can be used to develop greater insight into the behavior of complex phenomena and to move closer toward a unity of science²⁸.

The systems framework is fundamental to organisational theory as organisations are complex dynamic goal-oriented processes. A systemic view on organizations is transdisciplinary and integrative²⁹. In other words, it transcends the perspectives of individual disciplines, integrating them on the basis of a common "code", or more exactly, on the basis of the formal apparatus. The systems approach gives primacy to the interrelationships, not to the elements of the system. This study, in looking at the role of UNHCR, the Kenya government and other stakeholders in refugee management, seeks to establish ways and means of complementarity in refugee protection as opposed to operating in a competitive environment that undermine effective co-ordination and service delivery in this field. The systems theory becomes crucial in this aspect as it provides an explanation of the possibilities of these entities working together.

²⁸ Churchman, C.W, *The Systems Approach*, (Newyork: McGraw-Hill, 1968)

²⁹ Ibid

Protracted refugee situations often create regional challenges of identify for instance as generations continue to be born in asylum countries and as refugees continue to stay in one country for prolonged periods of time, issues of citizenship and nationality get mixed up thus creating regional challenges as regards the recognition of such caseloads. The case of the banyamulenge of Congo is worth mentioning in this regard. Refugee flows transcend boundaries and as such the responses by regional partners need to be synchronized to avoid creating a pull factor in one country. Effective response to refugee concerns calls for regional responses that incorporate the concept of burden sharing in order to lessen the burden on one particular country. The systems theory and its connection with organisations therefore call for a concerted effort even across nations in order to maximize the benefits of international protection.

1.5.3 Positivism

This study is further informed by Positivism. The theory of positivism reinforces the authority of a state as defined by the specific rights emanating from the constitutional structure. To the realist, the state is a unitary actor guided by the logic of the national interest hence the need to remain rational³⁰. However this view is disputed by the decision making model in foreign policy theories. State behaviour is also influenced largely by the internal actors and internal processes, like individual groups and organizations that are all important in determining the behaviour of states. The state needs to remain sensitive to internal pressures and internal constraints³¹. In this case, while the Kenya government is pre-occupied with issues of national

³⁰ H. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (New Delhi: Kalyani Publishers, 1995) pp 2-16

³¹ Malcolm N. Shaw, *International Law, Fourth Edition*, Cambridge University Press, 2000 pp 197

security and control of migration flows into the country defined as Kenya's national interests, the handling of these interests impacts other obligations, including its international obligations towards refugee protection. Encapsulated in our problem statement is the dilemma faced by most states when considering the balance between legitimate state interests and the protection of rights and needs of refugees, without doing unnecessary harm to either. Despite States' recognition of the important role played by the 1951 Convention and its 1967 Protocol as landmark legal instruments in the setting of standards for the treatment of refugees globally, the degree of their implementation remains unsatisfactory. From the foregoing theoretical framework, this study points out the minimum standards of protection to be guaranteed to refugees as human beings with inherent rights, and further highlights the challenges encountered by states in the implementation of state obligations towards refugees at both the international and national level.

1.6 Justification of the Research Problem

Prior to the enactment of the Kenya Refugee Act in 2006, refugees in Kenya were subjected to the provisions of the Aliens Restrictions and Immigration Acts. Four years later, refugee protection in Kenya continues to experience similar challenges seen before the enactment of the Act. The two Acts remain in operation alongside the Kenya Refugee Act, resulting in inconsistent application by the law enforcers. This study hopes to review the provisions of these laws and propose ways of streamlining in order to promote a coherent and effective legislative approach to refugee protection in Kenya. Secondly, little study has been done regarding the refugee issue from a legislative perspective. Most studies on refugee issues in Africa were done prior to the enactment of the Act in 2006. This study therefore hopes to fill this

gap by providing an appraisal of the Act since mere drafting of the Act without concerted efforts and political commitment towards ensuring that the provisions therein adequately guarantee and cater for the rights of refugees as described at the international plane, is deemed insufficient.

In discussing the rights and accountability of states in refugee protection, MacMillan and Olsson argue that the pressing challenge today is to stem the tide in the demise of refugee rights as states seek to change their responsibilities to even the most basic of rights, such as the right to seek and enjoy asylum and the requirements of the fundamental principle of *non-refoulement*³². The scholars highlight the distinctive paradox drawn by governments when, on the one hand, they [governments] issue political statements that picture refugees as a threat to host societies and as having too many rights, while at the same time maintain that they are committed to their convention and other human rights responsibilities to refugees. In this regard, the authors have highlighted the case of the refugee situation in the Great Lakes region during the early 1990s to provide an understanding of how refugees' rights reel in the face of geo-political factors and varying commitments to those forcibly displaced. Steiner adds that decade or more of politics and pragmatism has severely undermined the legal and ethical foundations of refugee protection and hence it is a high time states thought of re-aligning their priorities and established ways of rebuilding a credible protection and solutions regime, face to face with the new challenges and even in the aftermath of terror³³. The findings from this study will be important tools and lessons in the enforcement of refugee protection in Kenya.

³² Leanne MacMillan and Lars Olsson, *Rights and Accountability*, Forced Migration Review Vol. 10, pp. 38-41, 1997.

³³ N. Steiner, *Problems of Protection: The UNHCR, Refugee, and Human Rights*, Martinus Nijhoff Publishers, 2003.

1.7 Research Methodology

This research is a social study that seeks to address the extent of the legislative framework for refugee protection in Kenya, that is, the Kenya Refugee Act 2006. The study seeks to elicit the opinions and views of different stakeholders as regards the impact of the enactment of the Kenya Refugee Act 2006 and the value added to refugee protection in the country. The research utilised primary data. The basis for use of primary data is the need to obtain first-hand relevant information and perceptions regarding the Kenya refugee law 2006, which is relatively new in Kenya. Interviews with both stakeholders in refugee management in Kenya, and refugees as persons affected by the legislative framework are carried out. In this regard face-to-face interviews are conducted on people in order to ensure representation of a cross-section of the key refugee stakeholders in the country. Notes are taken that will be later transcribed to form memos for writing. Prior to the actual data collection process, a pilot study was conducted with the interviewer developing a set of questions that were shared with UNHCR Protection Officers for their opinion in relation to the relevance and quality of the questions asked. The Protection Officer guided the interviewer in reviewing the question structure and making it more open-ended in order to obtain more of the interviewees' opinions rather than being specifically restricted to only one issue. The Officer further requested that the questions be reduced from fifteen to five key questions to avoid redundancy and duplication and leave only those that captured the essence of the study. The types of questions ensued from the statement of the problem and the research objectives of this study. A total of twelve face-to-face interviews were conducted. This included interviews with officials at the department of refugee affairs, UNHCR Protection Officers, Officer-in-Charge of Kileleshwa Police Station, and Refugees (both with urban and refugee camp experiences) as the subjects of this study. Judicial officers

and law enforcers (the Kenya police) are directly responsible for interpreting the law as relates to one's presence in the country. Obtaining the opinions, experiences and suggestions of the judicial officers is therefore deemed invaluable in analysing the current challenges in the application of the law and also helpful in shaping the way forward in terms of recommendations. A structured interview with both open and close-ended questions was therefore necessary for this purpose. The NGO representative and UNHCR officers were interviewed to obtain information about their experiences both at the time when there was no specific law on refugees and the status after the enactment of the Refugee Act 2006.

Due to the interviewer's previous interaction with the identified interviewees, scheduling of the interviews was made much faster and in conducted during convenient times at lunch hours. All the people interviewed were receptive. The interviewer was also able to observe the interviewees attitudes and expressions while giving their opinions and in some cases one could sense a lot of frustration with the system due to the current inconsistent nature in the application of the different laws. The academic purpose of the interviews was explained as development of a research project for a Masters of Arts in International Studies, which subject matter directly touched on the interviewees' professional line hence the need to capture their opinions and impressions on the subject matter. The interviewees were also informed that the interviews were completely anonymous with the interviewer committing to sharing the completed work for their reference. The names of all refugees, and specific stakeholders interviewed have been withheld to protect their privacy, security and positions as requested by them.

Content analysis was the method used to analyse the information collected through open-ended questions. In this regard, the key elements in the information given by the persons interviewed were transformed into units that facilitated their description and analysis. The

answers were codified according to the most common responses provided and later classified accordingly into answer categories. This method was very useful to infer objectives and reliable statements based on the data provided by the interviews and based on the context in which they were made. Information obtained therefore provided directions for conceptualizing the refugee concerns in Kenya's legislative framework and will give guidance on the way forward in implementing the law on refugees in Kenya.

Secondary data was also used to complement the study and in this regard a desk/library-based research on both published and unpublished material such as United Nations Publications, Masters of Arts Thesis, Human Rights Reports, International Conventions, Books on International Refugee Law, Periodical and Journals on Refugee Protection and Internet searches was undertaken.

1.8 Chapter Outline

Chapter One provides the introductory remarks of the research study by first setting the broad context of the research study highlighting the international, regional and finally domestic perspectives. The background to the study gives a glimpse into the refugee situation in Kenya, highlighting the genesis to the enactment of the Kenya Refugee Act 2006. This chapter further contains the statement of the problem from which the research objectives have been derived. The theoretical framework that informs our study and the research methodology included herein have been linked to the literature also under review in this chapter.

Chapter Two discusses in detail the legal and institutional framework for refugee protection, beginning with a historical overview of the evolution of the regime globally. The Chapter evaluates the universal standard for refugee protection as enshrined in the 1951 UN Convention

and comments on its relevance and applicability to refugee situation worldwide, 50 years after it was adopted. The Chapter considers other contemporary regional refugee definitions and in particular the 1969 OAU Convention and the 1984 Cartagena Declaration. A review of the rights and obligations of refugees as enshrined in these Conventions is also provided.

Chapter Three considers the national domestic laws and standards for refugee protection and in this regard considers international protection as applied in Kenya. The Chapter begins with a review of refugee policies and practices prior to the enactment of the Kenya refugee Act 2006, and in this regard conducts a comparative analysis of the provisions of the Aliens Restrictions Act and the Immigration Act that formed the domestic framework for refugee management prior to the Refugee Act 2006. The Chapter further reviews the provisions of the Kenya Refugee Act 2006 looking at the rights and obligations therein, elements of the refugee definition as adopted therein, the proposed institutional frameworks and will conclude by highlighting the linkages between the provisions of the Kenya Refugee Act and the universal and regional frameworks.

Chapter Four provides the critical appraisal of the refugee regime in Kenya and will consider both the institutional, legal and transitional challenges for refugee management, following the adoption of the Kenya Refugee Act 2006.

Chapter Five comprises the findings and conclusions. The findings and conclusions are drawn from the analytical framework laid out in preceding chapters, tying this to the research objectives and theoretical framework as states in chapter one.

CHAPTER TWO

HISTORICAL EVOLUTION OF THE INTERNATIONAL REFUGEE REGIME

2.1 Introduction

This Chapter provides a historical background of the refugee regime, tracing it through the temporary juridical and social phases that emerged towards the end of the First World War, followed by signs of a more permanent, individualistic approach introduced between 1939 and 1951. The Chapter examines the salient features of the 1951 Convention and its 1967 Protocol, that were introduced during the latter phase of the refugee evolution. The geographical and time limitations imposed by the 1951 Convention and failure by the 1967 Protocol to amend the definition of a “refugee” , compelled states in Africa, Latin America, Europe and Asia to adopt specific frameworks relevant to the causes of refugee movements in their respective regions. The Chapter reviews the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa¹ and highlights the value-added by this Treaty. The Chapter concludes by noting some of the challenges faced by states in implementing their obligations under the 1951 Convention. Accession to the 1951 Convention and domestication of refugee legislation still remains illusive in most states and where this has been done, diverse challenges persist at as to their actual implementation.

¹ Organization of African Unity, *Convention Governing the Specific Aspects of Refugee Problems in Africa* ("1969 OAU Convention"), 10 September 1969, 1001 U.N.T.S. 45, hereinafter referred to as the 1969 OAU Convention.

2.2 Historical Approaches to the Refugee Definition

Prior to 1951, there were no fixed legal definitions of the term 'refugee'. Instead, countries adopted varying definitions that seemed to serve the interests of the then existing political powers.² Common in the various approaches, practised between 1920 and 1950, was the emphasis on the respect for human dignity, respect for life and physical integrity, freedom of movement and respect for personal and spiritual liberty, for aliens admitted to member states. Refugee agreements entered into between 1920 and 1950 reveal three distinct approaches to the refugee situation, namely, the "ad hoc humanitarian" Phase (1920-1930); the 'transition, shock-absorber' Phase (1930-1939) and the Instrumentalist Protective Phase (1939-1951).

2.2.1 The "ad hoc humanitarian" Phase (1920-1930)

The first phase of refugee evolution, also called the juridical perspective, was characterized by a purely humanitarian approach to the protection of persons who otherwise lacked the protection of their state of nationality.³ Under international law, the State bears the primary responsibility for the protection of its citizens. Refugee status under the juridical regime was granted merely on the basis of the prevailing facts. It was sufficient for one to show that they had lost linkage with their State of nationality either as a result of a subjective fear of persecution for holding opposing political affiliations, or the withholding by the state, of a citizen's diplomatic protection, thereby denying them a chance to travel freely. A case in point during this phase was

² Hathaway, J.C., 'The Evolution of Refugee Status in International Law: 1920-1950', *International and Comparative Law Journal*, Vol 33, (1948) pp. 348-350:349

³ Holborn L.W., 'The Legal Status of Political Refugees, 1920-1938', *American Journal of International Law*, Vol 32, (1938), pp. 680-703:680. The international community at the time did not envisage a permanent refugee situation hence the decade long adoption of temporary case-specific responses. It was this failure to envisage potential refugee situations in future that caused mayhem and panic among European countries following the break out of the Second World War that resulted in an increased influx of refugees from all over the world.

the international response to the early exodus of Russian and Armenian nationals fleeing persecution by the Bolshevik Revolution, and Turkey respectively, between 1917 and 1922.⁴ Prompted by the humanitarian plight and suffering of the Russian refugees, the League of Nations established, in August 1921, a High Commissioner's Office for the protection of Russian refugees. This was intended to be a temporary remedy for the Russian refugees, whose future durable solution lay in either repatriation or resettlement. It however emerged that in addition to being denaturalized by their former government, the Russians had their passports confiscated, hence not able to travel freely.⁵ The Russians were the first beneficiaries of the Russian Refugee Identity Certificate, also called the 'Nansen Passport'.⁶ Although not the equivalent of a national passport, and attaching no obligation on governments to re-admit the bearer, the document gave refugees a legal identity and enabled them to travel internationally. The humanitarian approach adopted for the Russian refugees, was later in 1924, extended to refugees from Armenia and Assyrians and other Christians from the Ottoman Empire in 1928.

To help curb potential abuse to the largely philanthropic system, the League of Nations developed the 1926 Arrangement⁷ for purposes of defining the persons who would qualify for the Nansen Passport. Thus under the 1926 Arrangement, a Russian refugee was defined as;

⁴ Grahl-Madsen, A., 'The Emergent International Law Relating to Refugees', *Institute of Public International Law and International Relations of Thessaloniki*, (Ed) *Refugee Problem on Universal, Regional and National Level*, Vol XIII, (1987), pp.180-245:182

⁵ The Russian Denationalisation Decree, of 15 December 1921, withdrew the right to Russian citizenship and rendered stateless, inter alia: (a) [Those who had] resided abroad uninterruptedly for more than five years, and not having received before the 1st June 1922, foreign passports or corresponding certificates from representatives of the Soviet government, and (b) [Those] who had left Russia after 7 November 1917, without the authorization of the Soviet authorities. Williams J.F., 'Denationalisation', *British Year Book of International Law*, (1927) p. 45, as quoted in Abuya E.O., *Legislating to Protect Refugees and Asylum Seekers in Kenya: A note to the Legislator*, (Moi University: Moi University Press, Research Paper Series, ISSN: 1811-3265, Vol. 1, (2004), p.8.

⁶ Torpey, J.C.V., *The Invention of the Passport: Surveillance, Citizenship and The State*, (Cambridge: Cambridge University Press, 2000), p.122.

⁷ Treaty Series No. 2004, LXXXXIX, p.47

Any person of Russian origin who does not enjoy, or ...no longer enjoys, the protection of the Government of the Union of Soviet Socialist Republics...' An Armenian refugee, on the other hand was defined as 'any person of Armenian origin, formerly a subject of the Ottoman Empire, who does not enjoy, or ... no longer enjoys, the protection of the Government of the Turkish Republic.'⁸

Other key developments during the first ten years of the evolution of the refugee regime were the extension of the Nansen Passport to the Assyrians, Kurds and Turkish that emerged after the 1926 arrangement; the incorporation of the High Commissioner's Office into the League's Secretariat in 1930; informed by the miscalculated perception that the refugee problem was coming to an end; and the succession of the Nansen Office by the Nansen International Refugee Office for Refugees to handle the humanitarian tasks while the League's Secretariat concentrated on the political issues.⁹

From the foregoing discussion, two key issues emerge regarding the linkage between the juridical era and the modern development of refugee law, as codified in the 1951 Convention.¹⁰ The Russian refugees fled primarily due to their divergent political opinions that were not tolerated by the government of the day. The Armenians, on the other hand, faced persecution based on their religious and cultural beliefs. In its universal definition of a refugee, the 1951 Convention borrows largely from these events and calls for both a subjective and objective nexus to be made between the asylum seeker's alleged fear of persecution and five essential reasons for flight. These include political opinion, race, nationality, religion and membership to a particular social group. These elements form the universal definition of a refugee.¹¹

⁸ Pirkko Kourula, *Broadening the edges: refugee definition and international protection revisited*, (The Hague: Kluwer Law International, 1997) pp.49-51

⁹ Op cit, Holborn L.W., p.688.

¹⁰ Abuya E.O., *Legislating to Protect Refugees and Asylum Seekers in Kenya: A note to the Legislator*, (Moi University: Moi University Press, Research Paper Series, ISSN: 1811-3265, Vol. 1 No (2004) p.12.

¹¹ Article 1A (2) of the 1951 Refugee Convention.

Secondly, during the juridical period, it was essential for the asylum seeker to prove that their state of origin was either unwilling or unable to offer them protection, as was the case with the Russian and Armenian refugees. This requirement is also well established under Article 1A of the 1951 Convention definition as a *sine qua non* for a valid claim of international protection. The asylum seeker must prove that his/her state of origin has failed to protect him/her, hence the legitimate need to invoke international protection as a refugee. Additionally, the acquisition of another nationality disqualified one from grant of refugee status under the juridical process. Similarly, under Article 1(C) of the 1951 Convention, a cessation of refugee status will be invoked for anyone who among other things acquires a second nationality, as this denotes national protection. In addition, the Nansen Passport has been cited as the 'beginning of international refugee law.'¹² The passport assisted in the movement of refugees in an 'equitable' manner, to willing states. Likewise, the 1951 Convention recognizes the right of movement of refugees, including authorized travel abroad as per the resettlement criteria.¹³ Such refugees are issued with the Conventional Travel Documents, recognized internationally as official documents of identification and travel.

2.2.2 The 'transition, shock-absorber' Phase (1930-1939)

Prior to the Second World War, the League of Nations realized its inability to permanently rid European countries of the refugee problem as had been previously envisaged. Several wars were fought between 1930 and 1937 in ignorance of the League's call for restraint by States in solving their differences, and for pursuit of global peace and security, after the First World

¹² Skran C. M., *Refugees in Inter-War Europe: The Emergence of a Regime*, (Oxford: Clarendon Press(1955) p.105.

¹³ Article 28, 1951 Refugee Convention

War.¹⁴ The massive refugee flows arising from these wars called for more stringent measures that could then be applied by the international community who had now awakened to the unending refugee problem. Tormented by the protracted Russian refugee situation and shocked by the ever increasing influx of refugees from Armenia, the League members frantically embarked on a search for solutions to address the unexpected plight. State parties, wary of their fragile post-war economies that were threatened by both the international and domestic political and social upheavals, felt incapable of bearing the refugee load any longer.¹⁵ This saw the reluctance and total rejection by some states of any new treaties and arrangements that sought to give refugee status on a humanitarian basis. The situation was aggravated by the rise of the Nazi regime that resulted in an escalation of refugees from Germany. States were also deeply concerned by the lack of accountability and responsibility for the refugee producing states, compelling the League of Nations to consider a more comprehensive binding arrangement that would address the concerns of a majority of states parties, including beyond Europe.

This saw the drafting of the Convention relating to the International Status of Refugees of 1933, also called the Nansen Convention.¹⁶ The Nansen Convention sought to establish a legal basis for the protection of human rights of the "Nansen refugees" and secondly, highlighted the duties and responsibilities of member states regarding refugees.¹⁷ Thirdly, the Nansen Convention, under Article 3(1), required State parties not to expel or return refugees who were lawfully in their territory, save for reasons of national security or public order. This represented the first codification of the principle of *non-refoulement* that was later incorporated in the

¹⁴ For instance, Japan's invasion of Manchuria in 1931 and China in 1937 and Adolf Hitler against the Treaty of Versailles and Locarno Pact in 1937.

¹⁵ Loescher G, 'The Origins of the International Refugee Regime', in '*Beyond Charity: International Co-operation and the Global Refugee Crisis*' (Oxford: Oxford University Press, (1993) pp. 32–55.

¹⁶ Convention of 28 October, 1933 relating to the International Status of Refugees, League of Nations, Treaty Series Vol. CLIX No. 3663.

¹⁷ Articles 1-14, 1933 Statute

subsequent modern day universal and regional frameworks for refugee protection, including the UNHCR Statute of 1950.¹⁸ The minimum standards of refugee rights and duties have also been incorporated in subsequent legislations on refugee protection.

Despite the elaborate enunciation of the evolving refugee regime, states remained lethargic, especially with regard to the requirement to accord refugees social-economic rights comparable to their nationals. Many states failed to append their signature, thus denying the 1933 Convention the requisite universal endorsement.¹⁹ Unlike the 1926 arrangement, the 1933 Convention failed to define the parameters for the determination of refugee status, thus creating a loophole with regard to national application. Subsequent years, however, saw the drafting of a Provisional Inter-Governmental Arrangement concerning the Status of Refugees from Germany in 1936,²⁰ whereby governments were authorized to issue travel documents to Germans and stateless persons coming from Germany. Two years later, this arrangement was adapted into the Convention concerning the Status of Refugees coming from Germany (1938 Convention). Both arrangements sought to provide a better and expanded meaning to the definition of a refugee from Germany. The main contribution of this definition was the relationship it created between a refugee and their state of origin. To qualify under either regime, one had to prove that they had lost protection of their state of origin, an important characteristic that underlies the basic fabric of international refugee protection even today. The provisions of these Conventions were, in 1938 and 1939, respectively, extended to subsequent refugee outflows from the German territories of Austria and Sudetenland.

¹⁸ UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), hereinafter referred to as the UNHCR Statute.

¹⁹ Eight states ratified the Convention: Belgium, Bulgaria; Czechoslovakia; Denmark; France; Great Britain; Italy; Norway. It was signed but not ratified by Egypt. See Beck R.J., 'Britain and the 1933 Refugee Convention: National or State Sovereignty?' *International Journal of Refugee Law*, Vol 11, (1999) pp. 597-624:597,600,603

²⁰ Provisional Inter-Governmental Arrangement concerning the Status of Refugees from Germany, July 4, 1936, 3952 L.N.T.S. 77.

2.2.3 The Instrumentalist Protective Phase: Codification of the 1951 Convention (1939-1951)

The third phase, characterized by individual recognition for refugee status, was largely informed by the events of the Second World War that lasted for six years (1939-1945). The catastrophic events of this war left no doubt that there was an urgent need to address the concerns of the millions of persons displaced during the war. It was during this time that member states reconsidered their commitment or lack of it to the League of Nations, after the League's twin failure to guarantee global peace and security. The United Nations was established in its place in mid-1945, to remedy the failures of the League and cushion future generations from similar suffering caused by both the First and Second World Wars. Subsequently, in December 1946, the International Refugee Organisation (IRO)²¹ was created following the merging of the office of the Inter-governmental Committee on Refugees (IGCR) and the United Nations Relief and Rehabilitation Administration (UNRRA).²² The IRO was designed to assist those persons who could not be repatriated, or who, "in complete freedom and after receiving full knowledge of the facts ...expressed valid objections to returning to [their countries of origin.]" The IRO oversaw the resettlement of displaced Europeans to countries, such as the United States, Canada and Australia.²³ Article 1 of the IRO Constitution²⁴ defined a refugee as:

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

²¹ G.A Res. 8/1, U.N. Doc. Feb. 12, 1946.

²² Op cit, Torpey, p.135.

²³ The Constitution of the IRO, Part 1 (C) (1), quoted in Gallagher D., 'The Evolution of the International Refugee System,' *International Migration Review*, Vol 23, (1989) pp. 579-598:579. Between 1947 and 1951 the IRO resettled close to one million refugees, including 329,000 in the US; 182,000 in Australia; 132,000 in Israel; 123,000 in Canada, and 170,000 in various European states.

²⁴ UN Economic and Social Council (ECOSOC), *Refugees and displaced persons: Resolution of 3 October 1946* (document E/236), 3 October 1946, E/RES/18 (III), available at: <http://www.unhcr.org/refworld/docid/3ae69ef818.html> [accessed 12 September 2010]

were considered refugees before the outbreak of the Second World War, for reasons of race, religion, nationality or political opinion.

The IRO, however, lasted for only five years, and in 1950, it was replaced by the Office of the United Nations High Commissioner for Refugees (UNHCR).²⁵ UNHCR is today the leading global agency for international refugee protection. As defined in its Statute, the office is responsible for protecting and assisting refugees and finding durable solutions through local integration, facilitate voluntary repatriation in consultation with governments and private organizations and resettlement to a third country. This new dimension challenges the existence of the previously purely humanitarian organization by dragging it into the realm of political bargaining with governments, since the grant of asylum to refugees depends largely on the political goodwill of the host country. Article 6(i) and (ii) of the UNHCR Statute views a refugee as, any person who:

(a) had been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928, or under the Convention of 28 October 1933 and February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organisation, or

(b) as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality or political opinion, is outside the country of nationality and is unable or, owing to such fear or for reasons other than personal inconvenience, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, unwilling to return to it.

One can therefore deduce that the formulation in (a) above had the intention of exempting German nationals who sought refuge in Europe, while part (b) is a direct replication of the criteria as had been defined in the IRO Constitution, but with slight additions, including the introduction of the fear of persecution, as a pre-requisite for refugee recognition. Secondly, the definition introduced both a geographical and time limitation, which required one to have been

²⁵ Vide General Assembly Resolution 428 (V) of 14 December 1950.

affected by events occurring in Europe 'before 1 January 1951.' In keeping with the original notion of one day eliminating the refugee menace permanently, member states introduced both an exclusion and cessation clause in the refugee definition, categorizing certain groups of people as not deserving of either continued or grant of refugee protection. The Cessation Clause²⁶ sought to remove from refugee status persons for whom there was a fundamental change in the circumstances that caused their flight, freeing them to either re-avail themselves or re-acquire the protection of their country of nationality. Also included in this category are persons that acquired a new nationality, and hence, enjoyed state protection under the new arrangement. On the other hand, the exclusion clause²⁷ applied, for instance, to persons that had more than one nationality and able to receive protection from the still friendly state, unless one was targeted by the two countries, which would then be a very unique case. Other situations under the exclusion clause include persons in respect of whom there were serious reasons, proved beyond reasonable doubt, for considering that they had committed either war crimes, crimes against peace, crimes against humanity, serious non-political crimes outside their country of refuge prior to admission to that country as a refugee, or being found guilty of acts contrary to the purposes and principles of the United Nations. Such considerations have to be made by a legitimate authority since the repercussions of a bad decision meant that one's safety and security had been compromised through a wrong judgment that ended up denying them the only protection remaining after denial by own state.

UNHCR's effective functioning, especially with regard to the agency's ability to hold states accountable for their obligations towards refugees and to guarantee refugee rights, was however, limited by the same structure that created it. As a subsidiary organ of the United Nations, the

²⁶ UNHCR Statute, Article 6 (a)-(c)

²⁷ UNHCR Statute, Article 7

UNHCR was established vide the 1950 Statute whose legal obligation could only go as far as creating the office and highlighting its functions, but could not hold states accountable for the rights of refugees.²⁸ To remedy this lacuna, states resolved to enter into a universal treaty that would define the international legal status of a refugee and further introduce a legally binding obligation on states to abide by their commitments under the Convention with regard to refugee protection. This saw the birth of the 1951 United Nations Convention relating to the Status of Refugees (1951 Refugee Convention) and states were hopeful that this would eventually create room for uniformity and consistent implementation of the law relating to refugee protection.

2.3 The 1951 Refugee Convention and the 1967 Refugee Protocol

Adopted on 28 July 1951, the 1951 Convention lays the foundation for the regulation of the legal status of refugees globally. The Convention was born out of the realization by States that the refugee issue was not the preserve of a few affected States and that its escalating nature called for international cooperation.²⁹ The Convention provides a wider scope than previous arrangements, agreements and treaties, and embodies the universal standards and principles agreed to by a majority of States with regard to refugee protection. Previous refugee agreements responded to the refugee crises by facilitating the movement of refugees to safe areas. In contrast, the 1951 Convention embodied the principle of *non-refoulement*, the promise not to send people back to persecution, which principle is now considered the core of refugee protection.

²⁸ Chimni B.S, *International Refugee Law, A Reader*, (New Delhi: Sage Publications, 2000) p. 234.

²⁹ Sadako Ogato, former UNHCR High Commissioner (1991-2000); stressing the element of refugee protection as burden sharing, as quoted in OP CIT Abuya E.O., p.44.

Weis³⁰ accurately captures this metamorphosis by stating thus: ‘previous international agreements defined certain rights of refugees. The 1951 Convention contains a comprehensive catalogue of refugee rights. ...andestablishes a formal link between its provisions and the international agency charged with the protection of refugees.’

A significant contribution of the 1951 Refugee Convention was its embodiment of the most widely accepted legal definition of a refugee. In expounding the refugee definition, the Convention envisaged continued international protection for both persons previously deemed as refugees under any of the earlier international agreements on refugees and also introduced criteria for recognition of potential new influxes, beginning with the post-Second World War trans-European refugees.³¹ The Convention also highlighted the applicable geographic and temporal limitations, whose challenges are discussed below when looking at the evolution of the 1967 Refugee Protocol. Adopting the definition in the 1950 UNHCR Statute, Article 1(A)(1) of the 1951 Refugee Convention defines a refugee as; “any person who: (1) Has been considered a refugee under the Arrangement of 12 May 1926 and 30 June 1928 or under the Convention of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organisation’ Article 1A (2) continues to state that the scope of the 1951 Convention shall include any person who;

‘as a result of events occurring before 1 January 1951 and who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable to, owing to such fear, or is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former

³⁰ Weis P., ‘The International Protection of Refugees’, *American Journal of International Law*, Vol 48, (1954), pp.26-57:26

³¹ Erika Feller, ‘The Evolution of the Refugee Protection Regime’, *Journal of Law and Policy*, Vol. 3 (2001) pp. 152-178:168

habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.’

This represented a formal codification of all previous international instruments relating to refugees and the catalogue of circumstances developed by States during the two previous emergency phases. The 1951 Refugee Convention in essence marked the shift from refugee issues to refugee law by placing a definable obligation on signatory states. Beyond this, States were to ratify the 1951 Refugee Convention and incorporate this obligation into their own national laws. Hathaway³² observes, however, that the refugee definition was strategically designed to serve strategic political objectives. He laments that the refugee definition, as formulated, sought to serve the Eurocentric goals of Western states that were desirous of a redistribution of the refugee burden from European shoulders who had for a long time borne the burden of resettling the remaining war refugees, in addition to responding to the influx from the Soviet bloc, without any binding obligation to reciprocate by way of the establishment of rights for, or the provision of assistance to, non-European refugees. It was such thinking that resulted in the amendment of the 1951 Refugee Convention to give it a broader scope as discussed below under the 1967 Protocol. In addition, the liberation wars of the mid 1950s and late 1960s saw an upsurge in the flow of refugees, especially in Africa. As the dates suggest, these events occurred during the post-1951 period and the only existing global treaty for refugee protection covered situations that occurred prior to 1951, hence there was a legal loophole with regard to responding to the new wave of massive displacements. Due to the urgency of the matter, states, informed by previous experience, where it took more than four years to finally reach a consensus on the 1951 Convention, quickly suggested an amendment to the 1951 Convention in order to expand its

³² Hathaway J.C, *The Law of Refugee Status*, (Toronto: Butterworths, (1991), pp 2-6.

definition beyond the previously prescribed time limitation of 1951. This ultimately led to the adoption of the 1967 Protocol relating to the Status of Refugees (1967 Protocol).³³

2.3.1 The 1967 Refugee Protocol and the Refugee Definition

Article 1(2)-(3) of the 1967 Refugee Protocol provides:

For the purpose of the present Protocol, the term 'refugee' shall ... mean any person within the definition of article 1 of the Convention as if the words 'As a result of events occurring before 1 January 1951 and ...' and the words '... as a result of such events', in Article 1A (2) were omitted. The present Protocol shall be applied by the States Parties hereto without any geographic limitation, save that existing declarations made by States already Parties to the Convention in accordance with Article 1B(1)(a) of the Convention, shall, unless extended under Article 1B(2) thereof, apply also under the present Protocol.

The 1967 Refugee Protocol amended the 1951 Convention by removing the time and geographical limitation, thereby ensuring that claimants with a cause of flight beyond the 1951 events in Europe could lodge their claim for consideration as refugees.³⁴ The Protocol made the Convention applicable to refugees from other parts of the world, without limitation of date. As an independent legal instrument, state parties may accede to it without being party to the 1951 convention.

Further provisions were made with regard to the grant of refugee status under the 1951 Refugee Convention. Article 1, Clauses C, D, E and F of the 1951 Convention, outline a category of people who are considered as not deserving or no longer deserving of continued international protection. The 1951 Convention ceases to apply to refugees who, after reasonable consideration, it is found that there is a substantial change in their personal circumstances, brought about by the

³³ UN General Assembly, *Protocol Relating to the Status of Refugees*, 30 January 1967, United Nations, Treaty Series, vol. 606, p. 267, available at: <http://www.unhcr.org/refworld/docid/3ae6b3ae4.html> [accessed 12 September 2010]

³⁴ Chimni B.S., p. 4.

refugees' own acts, such as re-availing oneself of the protection of the country of nationality³⁵, or the acquisition of a new nationality³⁶ under which the refugee is now protected. A refugee for whom there is a fundamental change in the circumstances in connection with which they were granted refugee status, shall cease to be recognized as such. Cessation clauses, which are declaratory in nature, acknowledge that international refugee protection is no longer required and operate to withdraw refugee status and bring to an end related rights and benefits. Persons who are receiving protection or assistance from organs or agencies of the United Nations, other than the UNHCR, are equally not protected under the 1951 Convention.³⁷ Certain persons are, however, excluded from the grant of refugee status. Contrary to the cessation clause which concerns itself with cases where the international protection is withdrawn after a fundamental change of circumstance, the Exclusion Clause has to do with cases where the refugee does not deserve the benefits of international protection. As provided under Article 1(F);

The provisions of this Convention shall not apply to any person with whom there are serious reasons for considering that: (a) he has committed crimes against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee or (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

Refugees who commit serious crimes within the territory of the country of refuge are not subject to the exclusion clauses, but to that country's criminal law process and to Articles 32 and 33(2) of the 1951 Convention that permit return of a refugee if there are reasonable grounds for regarding them as a danger to the host country. The primary purpose of the exclusion clauses is to deprive the perpetrators of heinous acts and serious common crimes of international protection and to safeguard the receiving country from criminals who present a danger to that country's

³⁵ Article 1(C) (1-4)

³⁶ Article 1(C) (5-6).

³⁷ Article 1(D).

security. This is in line with maintaining the humanitarian and social nature of the concept of asylum.³⁸ A person excluded from refugee status will not, however, be necessarily expelled from country of asylum and may be protected under relevant municipal and international law that contain provisions against *refoulement*.³⁹

Further distinction should be made between cessation and cancellation, with the latter referring to a situation where it comes to the knowledge of the authorities that the refugee status was obtained through fraudulent means, hence a misrepresentation of material facts. This clearly indicates that had these been known at the time of status determination, the individual would not have been granted refugee status. All the above provisions should be applied in a restrictive manner since a premature or insufficiently grounded application of the cessation, exclusion or cancellation of refugee status could have extremely serious consequences for refugees who may have to stay in host countries illegally and face the threat of being *refouled*.

Other categories exempted from refugee protection are those categorized as economic migrants. As opposed to refugee claimants who flee for reasons of civil and political rights, economic migrants constitute those whose socio-economic rights are at risk. UNHCR views a migrant as 'a person who, for reasons other than those contained in the refugee definition, voluntarily leaves his country in order to take up residence elsewhere. He may be moved by the desire for change or adventure, or by family or other reasons of a personal nature. If moved exclusively by economic consideration, he is an economic migrant, not a refugee.'⁴⁰ However, as

³⁸ Paragraph 5 of the Preamble to 1951 Convention.

³⁹ For instance Article 3(1) of the 1984 Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, contains the provision for non-refoulement and states thus... 'No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.' Such a person need not be a refugee (sic).

⁴⁰ Paragraph 62 of the UN High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*,

experience has proved, it is sometimes very difficult to draw a sharp distinction between what is political and economic, especially when the causes of flight are so inextricably intertwined as to resist any simplistic classification as one or the other. Practical examples are situations such as the one in Somalia, where the economic conditions are the direct result of a political failure to guarantee peace, hence, challenging people's ability to earn a decent living and have access to food, clothing, shelter, jobs or education. In such a case, UNHCR clarifies that:

[T]he distinction between an economic migrant and a refugee is, however, sometimes blurred in the same way as the distinction between economic and political measures in an applicant's country of origin is not always clear. Behind economic measures affecting a person's livelihood there may be racial, religious or political aims or intentions directed against a particular group. Where economic measures destroy the economic existence of a particular section of the population (e.g. withdrawal of trading rights from, or discriminatory or excessive taxation of, a specific ethnic or religious group), the victims may, according to the circumstances, become refugees on leaving the country.⁴¹

Therefore, what might appear at first sight to be primarily an economic motive for departure may in reality also involve a political element, and it may be the political opinions of the individual that expose them to serious consequences, rather than their objection to the economic measures themselves. It is on this basis that states insist on an individual refugee status determination interview for every applicant for purposes of evaluating the motive and circumstances behind their flight.

In addition to defining a refugee, the 1951 Refugee Convention lays down basic minimum standards for the treatment of refugees. The Convention also outlines an analogous list of obligations for host states and responsibilities for refugees. As persons whose fundamental rights have been violated in their country of origin, refugees seek asylum abroad in the hope of

January 1992, available at: <http://www.unhcr.org/refworld/docid/3ae6b3314.html> [accessed 12 September 2010] hereinafter referred to as UNHCR Handbook.

⁴¹ Paragraph 63, UNHCR Handbook

continuing to enjoy their basic human rights. Article 3 of the 1951 Refugee Convention requires that the provisions of the Convention be applied without discrimination as to race, religion or country of origin. Refugee rights recognised under the 1951 Convention include freedom to practice one's religion and religious education of their children consistent with that accorded to nationals;⁴² respect for all rights that are dependant on one's personal status, such as the right to marriage, provided the right in question is one which would have been recognizable by the law of the host state had the person not become a refugee.⁴³ A refugee will have the right to acquire or lease movable and immovable property, in line with the treatment accorded to aliens generally.⁴⁴ Other rights include protection of artistic rights and industrial property similar to that accorded to the nationals of that country;⁴⁵ right of association similar to the most favourable treatment accorded to foreign nationals;⁴⁶ access to courts and right to legal assistance similar to the nationals;⁴⁷ right to engage in wage-earning employment and self employment similar to that accorded to other foreigners generally;⁴⁸ favourable treatment similar to aliens with regard to practicing a liberal profession;⁴⁹ favourable treatment with regard to access to housing, public education, public relief and welfare;⁵⁰ same treatment as nationals with regard to rights under the labour laws and social security,⁵¹ facilitate administrative assistance, for instance, issuance of certifications, with authorities of a foreign country for whom the refugee cannot have recourse;⁵² freedom of movement subject to regulations applicable to aliens generally in the same

⁴² Article 4

⁴³ Article 12.

⁴⁴ Article 13

⁴⁵ Article 14

⁴⁶ Article 15

⁴⁷ Article 16

⁴⁸ Articles 17-18

⁴⁹ Article 19

⁵⁰ Articles 20-23

⁵¹ Article 24

⁵² Article 25

circumstances,⁵³ and right to identification papers and travel documents.⁵⁴ Any taxes imposed on refugees will not be higher than those levied on nationals in similar situations.⁵⁵ The host state shall, in conformity with its laws and regulations, permit refugees to transfer assets that they brought into the host territory, to another country where they have been admitted for resettlement.⁵⁶ Under Article 31, the host state shall not impose penalties, on account of a refugee's illegal entry or presence, if the refugee is coming directly from a territory where his life or freedom was threatened, provided they present themselves without delay to the authorities and show good cause for the illegal entry or presence. The host state is further prohibited from expelling a refugee who is lawfully in their territory, save on grounds of national security or public order.⁵⁷ Any such expulsion must be in pursuance of a decision reached in accordance with the due process of the law. The principle of *non-refoulement* is contained in Article 33, and prohibits contracting states from expelling or returning ("refouler") a refugee to the frontiers of territories where their life or freedom would be threatened on account of religion, race, nationality, membership to particular social group or political opinion. This provision is so fundamental that no reservations may be made to it. The only exception to the principle of *non-refoulement* occurs where there are reasonable grounds for regarding the refugee as a danger to the security of the country or who, having been convicted by a final judgment of a particular serious crime, constitutes a danger to the community of that country.⁵⁸ The contracting state shall, as far as possible, facilitate the assimilation and naturalization of refugees at reduced charges and costs.⁵⁹

⁵³ Article 26

⁵⁴ Articles 27-28

⁵⁵ Article 29

⁵⁶ Article 30

⁵⁷ Article 32.

⁵⁸ Article 33(2).

⁵⁹ Article 34.

On the other hand, under the 1951 Convention, every refugee has duties to the country in which he finds himself, and is required under Article 2 of the Convention, to conform to its laws and regulations as well as to measures taken for maintenance of public order. It is a universally recognised principle that the grant of asylum and the recognition of refugee status have a peaceful, non-political and humanitarian character. It follows, therefore, that refugees, at least for purposes of protection under international instruments, are civilians. Persons actively engaged as combatants in military and armed conflicts benefit from the special protection afforded under applicable international humanitarian law. The Preamble to the 1951 Convention, expresses the 'wish that all states will recognize the social and humanitarian nature of the problems of refugees and will do everything in their power to prevent this problem from becoming a cause of tension between states.'⁶⁰ The promotion and defense of refugee rights is no easy task today with the attitude of states and host communities towards refugees being hardened and hostile. In the majority of cases, refugees are stereotyped as persons devoid of will and resources to rebuild their lives, as opposed to being considered as active participants in remaking their lives. Human rights instruments are particularly useful in this regard as they can be invoked to guarantee the basic rights of refugees in situations where states are not parties to the 1951 Refugee Convention or have entered reservations as permitted by Article 42 of the 1951 Refugee Convention. The next discussion considers the challenges faced by states in implementing the 1951 Refugee Convention hence the blatant violation of refugee rights by some states.

⁶⁰ Paragraph 5, of the Preamble to the 1951 Convention.

2.3.2 Comment on the 1951 Convention: 50 years later

Despite States' recognition of the important role played by the 1951 Convention and its 1967 Protocol as landmark legal instruments in the setting of standards for the treatment of refugees globally, the degree of their implementation remains unsatisfactory.⁶¹ During the last fifty years, the world has undergone significant transformation, with recurring and protracted cycles of violence and systematic human rights violations in many parts of the world generating increased numbers of displacements, thus posing serious challenges to the capacity of States to respond to the contemporary displacement situations. Prolonged disregard for international refugee law by some states has resulted in secondary movements of refugees and asylum seekers in search of a country where their rights are respected. States that would readily accept refugees have been forced to adopt a more restrictive policy, as is the case in the European Union, in order to avoid a pull-factor, resulting in a greater number of refugees looking for protection on their territory.⁶²

Furthermore, despite the uniqueness of UNHCR's supervisory role under Article 35 of the 1951 Convention, and the positive impact of this role in ensuring effective monitoring and reporting on human rights law on protection of refugees, weaknesses of the system still persist. UNHCR continues to grapple with both socio-economic, legal and political and practical obstacles negatively impacting on the implementation of the 1951 Convention and its 1967 Protocol. As regards the socio-economic obstacles, UNHCR continues to raise concern by highlighting such challenges as the inevitable tensions between international obligations and national responsibilities where countries called upon to host large refugee populations, even on a

⁶¹ Loescher G, 'UNHCR at Fifty: Refugee Protection and World Politics', in Niklaus Steiner, Mark Gibney & Gill Loescher, (ed), *Problems of Protection: The UNHCR, Refugees and Human Rights* (, Routledge, 2003).

⁶² Executive Standing Committee, *Progress Report on Informal Consultation on the Provision of International Protection to All Who Need It*, EC/47/SC/CRP.27, 30 May 1997, para.7.

temporary basis, are suffering their own severe economic difficulties, high unemployment, declining living standards, shortages in housing and land and/or continuing man-made and natural disasters. Perceived imbalance in burden-sharing and responsibility sharing and increasing costs of hosting refugees and asylum seekers are additional compounding factors.⁶³

On Legal and policy obstacles to proper implementation of the Convention and Protocol, UNHCR observes:

[T]he clash of, or inconsistencies between, existing national laws and certain Convention obligations; failure to incorporate the Convention into national law through specific implementation legislation; or implementing legislation which defines not the rights of the individuals but rather the powers vested in refugee officials. As to the latter, this means that protection of refugee rights becomes an exercise of powers and discretion by officials, rather than enforcement of specific rights identified and guaranteed by law. Where the judiciary has an important role in protecting refugee rights, restrictive interpretation can also be an impediment to full implementation. Finally, the maintenance of the geographic limitation by some countries is a serious obstacle to effective implementation.⁶⁴

According to UNHCR, challenges on a practical level entail bureaucratic obstacles, including unwieldy, inefficient or inappropriate structures for dealing with refugees, a dearth of manpower generally, or of inadequately trained officials, and the non-availability of expert assistance for asylum-seekers. Finally, there are certain problems at the governmental level, including that the grant of asylum is a political statement and can be an irritant in inter-state relations.⁶⁵

⁶³ Executive Committee of the High Commissioner's Programme, *Sub-Committee of the Whole on International Protection, Implementation of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugee-Some Basic Questions*, EC/1992/SCP/CRP.10, Geneva 15 June 1992, para. 9.

⁶⁴ *Ibid.* para 9.

⁶⁵ Para 10.

A further weakness of the 1951 Convention is that, while strong in its provision of rights, particularly *non-refoulement*, the Convention fails to offer enforcement or accountability mechanisms. Erika Feller, UNHCR Assistant High Commissioner for Protection, notes:

Where is the 1951 Convention weak? It gives voice and force to the rights of refugees. It does not, though, say how States should put it into practice. The Convention regime rests on notions of international solidarity and burden and responsibility sharing, but offers no agreed indicators, much less formulae, for such burden and responsibility sharing. ... If it is clear in terms of rights, it is close to silent about whose responsibility it actually is to protect them in the context of modern displacement situations and population movements.⁶⁶

However, despite the challenges highlighted above, the 1951 Convention has proved its resilience as the cornerstone of the refugee protection regime. As observed by former UNHCR High Commissioner for Refugees, Ruud Lubbers,⁶⁷ the 1951 Convention finds its strength in the fact that:

It has a legal, political and ethical significance that goes well beyond its specific terms. Legal in that it provides the basic standards on which principled action can be based, and political because it provides a truly universal framework within which States can co-operate and share the responsibility resulting from forced displacement. The ethical backing arises from the fact that it is a unique declaration by States of their commitment to uphold and protect the rights of some of the most vulnerable and disadvantaged people.⁶⁸

To usher in the 50th anniversary of the 1951 Refugee Convention, States Parties to the Convention adopted, on December 13 2001, a declaration reaffirming the 1951 Refugee Convention

⁶⁶ Feller E., 'Asylum, Migration and Refugee Protection Realities, Myth and the Promise of Things to Come', *International Journal of Refugee Law*, Vol 18 (3-4) (2006) pp.509-536:509.

⁶⁷ UNHCR High Commissioner from January 1, 2001 – February 20, 2005.

⁶⁸ UN High Commissioner for Refugees, *Refugee Protection: A Guide to International Refugee Law*, (Geneva, December 2001), Forward to the Book on p. 1.

Convention as the primary refugee protection instrument, which as amended by the 1967 Protocol, sets out rights, including human rights and minimum standards of treatment that apply to persons falling within its scope.⁶⁹ The meeting also called on States to consider ways that would strengthen the implementation of the 1951 Convention and/or its 1967 Protocol, including encouraging States to accede to the treaties as far as possible without reservations.

2.4 Contemporary Alternative Refugee Definitions

Notwithstanding the expanded consideration introduced by the 1967 Protocol, the substantive definition of a refugee, was, however never amended. This implied that majority of the refugees emanating from Third World countries, especially African countries that were at the time undergoing a series of liberation wars from colonialism, in addition to migrants prompted to flee as a result of natural disasters and broadly based civil strife and political and economic instability, remained excluded from the Convention definition. The Protocol failed to review the substantive content of the definition it embraced, and very few Third World countries laying claim to the range of rights stipulated in the Convention.⁷⁰ Additionally, Article 1(3) of the 1967 Protocol allows state parties to the 1951 Convention to make reservations to Article 1(2), and in essence retain a geographic limitation. This situation inspired the desire by states to broaden the refugee definition to accommodate emerging refugee situations, majority of which involved massive displacements caused largely by civil conflicts and acts of aggression.

⁶⁹ UN High Commissioner for Refugees, *Declaration of States Parties to the 1951 Convention and or its 1967 Protocol relating to the Status of Refugees*, 16 January 2002, HCR/MMSP/2001/09, available at: <http://www.unhcr.org/refworld/docid/3d60f5557.html> [accessed 12 September 2010].

⁷⁰ Hathaway J.C., 'A Reconsideration of the Underlying Premise of Refugee Law,' *Harvard Journal of International Law*, Vol 31 (1990) pp. 162-164:163.

2.4.1 The 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa

During the discussions on the Refugee Convention in 1951, only four African States were independent: Liberia (1847), Ethiopia, Egypt (1922) and Libya (1951).⁷¹ Only Egypt sent a delegation to the Conference of Plenipotentiaries, with the remaining 25 delegates coming from Europe, America and the Pacific. For this reason, the final draft of the 1951 Refugee Convention lacked a substantive “African” contribution, if at all. The negative omission of not considering the specific circumstances of refugee movements in Africa, made it impossible for the Convention to accurately capture the specific circumstances surrounding the early liberation wars, hence the clamour for a more African-friendly treaty. In appreciating this lacuna, the Assembly of African Heads of State and Government⁷² resolved to finding ways and means of alleviating the misery and suffering of the increasing numbers of refugees in Africa, as well as recognizing the need for a humanitarian approach towards resolving the specific circumstances pertaining to the refugee problem in Africa. Adopted under the auspices of the Organisation of African Unity (OAU), now the African Union, on 20 June 1974,⁷³ was the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, often referred to as the 1969 OAU Convention.⁷⁴ The 1969 OAU Convention is the only legally binding regional refugee treaty that adopted the first broader definition of a refugee, more closely reflecting the realities of Africa during a period of violent struggle for self-determination and national development.

⁷¹ Abuya E.O., p.59.

⁷² The Sixth Ordinary Session of the Assembly of Africa Heads of State and Government, Addis Ababa 6 -10 September, 1969.

⁷³ It was in 1974 that the OAU Convention, drafted in 1969, received the requisite number of ratification hence entered into force as per the provisions of Article 11 that provide that ‘This Convention shall come into force upon deposit of instruments of ratification by one-third of the Member States of the Organization of African Unity.’

⁷⁴ Organization of African Unity, *Convention Governing the Specific Aspects of Refugee Problems in Africa* (“1969 OAU Convention”), 10 September 1969, 1001 U.N.T.S. 45, available at: <http://www.unhcr.org/refworld/docid/3ae6b36018.html> [accessed 12 September 2010]

Article 1(1) of the 1969 OAU Convention reproduces the refugee definition contained in the 1951 Convention, in recognition of the fact that the latter, as modified by the 1967 Protocol, constitutes the basic and universal instrument relating to the status of refugees. The 1969 OAU Convention, however, goes further and embodies the unique aspects of refugee problems in Africa by expanding the universal refugee definition to deliberately include victims of external aggression, occupation, foreign domination or events seriously disrupting public order in either part or whole of the country, whether or not they have been individually affected.⁷⁵ For the first time, the application of the refugee definition, albeit at a regional level, was extended to individuals forced to leave their countries owing to aggression by another state. The 1969 OAU Convention, therefore, marked the beginning of a refugee protection system which directly addressed the causes of mass refugee influxes, by emphasizing objective conditions in the country of origin.⁷⁶

In addition, the language of the 1969 Convention, and the interpretation which has been placed on it in practice, are much more accommodating of large-scale refugee situations than similar interpretations that have taken root around the 1951 Convention.⁷⁷ The 1969 Convention has thus allowed millions of people in need of protection to be covered and helped with greater legal and operational flexibility. A typical example applied in Kenya is in reference to the Somali and Sudanese asylum seekers, who, for a long time have been victims of protracted civil strife. On the face of it, they present a compelling reason for flight, hence the *prima-facie* consideration. Such refugees would only undergo individual determination if they are considered for other durable solutions, such as resettlement to a third country, hence the need to distinguish

⁷⁵ Article 1(2) 1969 OAU Convention

⁷⁶ Rankinh M.B., 'Extending the Limits or Narrowing the Scope' in UNHCR Evaluation and Policy Analysis Unit, *New Issues in Refugee Research*, UNHCR Geneva, 2005), p.5-10: Paper No 113.

⁷⁷ Article 1 of the 1969 OAU Convention

them from the group determination and establish their individual profile. A once *prima-facie* refugee can be rejected or excluded from refugee status if there are good reasons to believe that they are not genuine refugees or they could have been involved in acts contrary to the purposes and principles of the United Nations.⁷⁸ Article II(2) of the 1969 OAU Convention provides that the grant of asylum to refugees should be deemed as a peaceful and humanitarian act and should not be regarded as an unfriendly act by any member state. In paragraph 5 of Article II, a refugee who has not received the right to reside in any country of asylum may be granted temporary residence in any country of asylum, within the OAU. Other provisions of the 1969 Convention provide guidance on dual nationality,⁷⁹ cessation,⁸⁰ exclusion,⁸¹ right to asylum,⁸² and prohibition on subversive activities.⁸³ Refugees have an obligation to avoid any activities which might affect the strictly civilian and humanitarian nature of camps and settlements, as well as any activity that is incompatible with regional peace and security.⁸⁴ This is especially relevant in the African context in view of the internationalization of conflict in the region that has resulted in the increased militarization and politicisation of refugee camps. The provisions of the 1969 Convention are also to be applied without discrimination on account of race, religion or political affiliations.⁸⁵ Member states are under obligation to respect the essential voluntary character of repatriation.⁸⁶ Refugees lawfully staying in a host country shall be issued with travel documents.⁸⁷ Article VII-VIII of the 1969 OAU Convention call for the cooperation of national states with the African Union and UNHCR in a spirit of African solidarity and international

⁷⁸ Article 1(4)&(5)

⁷⁹ Article 1(3)

⁸⁰ Article 1(4) (a-g).

⁸¹ Article 1(5) (a-d).

⁸² Article II.

⁸³ Article III.

⁸⁴ Article II (2).

⁸⁵ Article IV.

⁸⁶ Article V.

⁸⁷ Article VI.

cooperation.⁸⁸ Generally, the 1969 OAU Convention sets down a basis for refugee jurisprudence and practice in Africa to develop in a predictable and asylum friendly manner.

A key distinction between the 1951 Convention and the 1969 OAU Convention is as regards the principle of *non-refoulement*. While Article 32 of the 1951 Convention stipulates the exceptions to admission of refugees on grounds of national security, the 1969 OAU Convention clearly prohibits such measures as rejection at the frontier, return or expulsion, which would compel one to return or remain in a territory where his life, physical integrity or liberty would be threatened.⁸⁹ The 1969 OAU Convention further provides that refugees should be settled at a reasonable distance from the frontier of their country of origin, thus strengthening the protection requirement.⁹⁰ The 1969 Convention is also celebrated as the first international instrument that elaborated the principles relating to voluntary repatriation and also defines features of international solidarity and burden-sharing that were not fleshed out in the 1951 Convention. Other regional instruments similar to the 1969 OAU Convention, but not the focus of this study, include the 1984 Cartagena Declaration⁹¹ applicable in Latin America and Recommendation 773 (1976) on the Situation of de facto Refugees in Europe.⁹² Section III of the Cartagena Declaration provides that:

⁸⁸ Articles VII-VIII.

⁸⁹ Article II (1-5).

⁹⁰ Article II (6).

⁹¹ Americas - Miscellaneous, *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, 22 November 1984, OAS/Ser.L./V/II.66, doc. 10, rev. 1, available at: <http://www.unhcr.org/refworld/docid/3ae6b36ec.html> [accessed 12 September 2010], hereinafter referred to as the Cartagena Declaration.

⁹² Council of Europe: Parliamentary Assembly, *Recommendation 773 (1976) on the situation of de facto refugees*, 26 January 1976, 775 (1976), available at: <http://www.unhcr.org/refworld/docid/4720706b2.html> [accessed 12 September 2010]

In view of the experience gained from a massive flow of refugees in the Central American area, it is necessary to consider enlarging the concept of refugee ... Hence the definition or concept of a refugee to be recommended for the region is one which, in addition, to containing the element of the 1951 Convention and the 1967 Protocol, includes among refugees, persons who have fled their countries because their lives, safety or freedom have been threatened by generalized violence., foreign aggression, internal conflicts, massive violation of human rights or other circumstances, which have seriously disturbed public order.

The definition under the Declaration has been regarded as "*the most encompassing definition*" as it expands the definition contained in the 1969 OAU Convention by adding the phrase 'massive violations of human rights' as one of the conditions for grant of refugee status. Besides, it makes use of terminologies not established in any international instrument relating to refugees, such as "generalized violence", "internal conflicts" and ,"massive violations of human rights" thus making use of the broadest language so far regarding the refugees The definition in the Declaration takes into account the political, social and economical factors real to Latin America.

2.5 Conclusion

The foregoing discussion highlights the fact that earlier refugee definitions were largely informed by the regional circumstances prevalent at a given place and time. During the pre-1951 Convention, reference to the status of a refugee was based on the geographical, social and political problems and the individual's mindset with regard to the situation in their country of origin. This notion seems to have been transferred wholly to the 1951 Convention, which might have been directed to the world war victims and not any other person due to the limitations embedded therein. The promulgation of the 1967 Protocol extended consideration of mass influx of refugees experienced elsewhere outside Europe, but failed to make any amendments to the refugee definition, hence failed to accommodate new causes of flight beyond those in the 1951

Convention. The upsurge of contemporary refugee definitions was, therefore, informed by the urgent need for States to protect the large number of people affected by the global challenges of asylum, which included liberation wars in Africa in the 1960s and movements caused due to natural disasters. The major regional instruments, which can be termed as liberal and which allow interpretation include the 1969 OAU Convention and 1984 Cartagena Declaration. The prominent factor in the two instruments is the appreciation of real circumstances affecting their respective regions and the appropriate solutions and, as a result, they reflect the relevance between legal refugee definition and the real experiences of the victims or would be victims. The rapidly changing environmental phenomena, characterized by protracted conflicts, prolonged refugee conditions, refugee fatigue, burden sharing and heightened state of insecurity in most regions, however, allows for further thinking on the effectiveness of the regionalization of refugee laws and protection.

States have in the meantime resorted, though reluctantly, to the enactment of national policies and laws, in which they express the extent to which they can comfortably protect refugees within their territory. Some of the national laws are deemed too restrictive and falling short of the agreed international standards of protection. In Kenya for instance, it was not until December 2006 that a specific legislation on refugees was enacted, albeit having a long tradition of hosting asylum seekers from various regions.⁹³ Kenya has continued to experience a large-scale influx of refugees, mostly triggered by the protracted humanitarian crises in her neighbouring countries. The first steady flow of refugees in Kenya reportedly occurred in 1969, by Sudanese nationals fleeing the civil war in Sudan. In 1988, Kenya hosted around 12,000

⁹³ Holbourne L., *African Hospitality and Open Doors, Refugees: A Problem of Our Time, UNHCR, 1951-1972*, (New Jersey: Scarecrow Press Inc, Metuchen, 1975). Generally, the refugee hosting character in East Africa dates as far back as the 1940s, when Kenya, Uganda and Tanzania, hosted more than 14,000 Polish refugees fleeing the devastation of World War II.

refugees, majority of whom were from Ugandan and lived in Nairobi.⁹⁴ Refugee flows to the East Africa region, peaked in the 90s, with the collapse of the Siad Bare regime in Somalia and civil conflicts in Ethiopia and Sudan. UNHCR records that by 1992, Kenya, which had previously hosted a maximum of 14,500 refugees, was home to more than 400,000 refugees from the three countries. The situation was worsened by the 1994 genocide in Rwanda and political violence that engulfed much of the Great Lakes region at the time, resulting in further massive refugee influxes from Burundi, Rwanda, and Congo. As at the end of April 2010, Kenya was home to an estimated 380,000 registered refugees, majority of whom are from Somalia.⁹⁵ This is besides the estimated 15,000-60,000 urban refugee population in different cities in Kenya. Refugees in Kenya are accommodated in two camps: Dadaab refugee camp in North-Eastern Province and the Kakuma camp located in the Turkana district in the northwest of the country.

Prior to the mass influx of the early 1990s, the Kenya Government Eligibility Committee, conducted individual refugee status determination (RSD) interviews, applying the definitions of the 1951 Convention as contained in Class M of the Kenya Immigration Act, which defined a 'refugee' as any person who had fled their home owing to persecution.⁹⁶ During this period, UNHCR continued to undertake the role of a donor and an observer during eligibility interviews. However, with the mass influx of Somali and Sudanese refugees escaping political crisis in early 1991, UNHCR took over, from the government, the registration and management of refugees and began issuing mandate letters that entitled refugees to assistance in the camps and protection from *refoulement* only. This category of refugees is not allowed to work and is technically

⁹⁴ UNHCR Branch Office for Kenya, UNHCR Annual Report, (unpublished), 2009.

⁹⁵ UNHCR Branch Office for Kenya, UNHCR Factsheet, (Unpublished) , April 2010

⁹⁶ *Immigration Act*, Cap 172 (last amended 1972) [Kenya], No. 25 of 1967; No. 6 of 1972; Cap 172 Laws of Kenya, 1 December 1967.

confined to the refugee camps. Kenya ratified the 1969 OAU Convention in 1992 and this was applied alongside the UNHCR mandate definition.

On 29th November 2006, Kenya's Parliament passed the Refugee Act,⁹⁷ which came into force on 15th May 2007. The law stipulates how the Government intends to manage refugee matters in Kenya and, additionally, sets up procedures for the processing of asylum claims. The Refugee Act also contains a set of minimum standards to be accorded to refugees in Kenya, and further, stipulates the duties of refugees in Kenya. This development, notwithstanding, the situation of refugees in Kenya does not seem to have improved much, with majority of the refugees still residing in refugee camps and have little hope of local integration or other durable solutions to their plight. A review of the refugee practice and policy in Kenya is undertaken in the next Chapter. In particular, the Chapter evaluates the provisions of the Refugee Act 2006 and the institutions established therein, in an attempt to establish whether the Act complies with international standards for refugee protection as provided in the 1951 Convention and the 1967 Protocol.

⁹⁷ *The Refugee Act, 2006* [Kenya], No. 13 of 2006, Nairobi, 30 December 2006, hereinafter referred to as 'The Act.'

CHAPTER THREE

REFUGEE PROTECTION AND MANAGEMENT IN KENYA

3.1 Introduction

This Chapter examines the asylum process in Kenya, starting with a review of the policy and practice prior to the enactment of the Refugee Act, 2006, and compares this with the situation after the enactment of the Act in December 2006. The Chapter will review the salient provisions of the Act, including a discussion on the refugee definition and a look at the rights and obligations of both refugees and the host country under the Act. The Chapter will also discuss the institutional framework established in Kenya, for purposes of implementing the provisions of the Act. The Chapter concludes with some findings on how the different legislative and institutional frameworks can be harmonized to ensure that the new law improves refugee protection in Kenya.

Despite the lack of specific legislation on refugees, Kenya has for a long time pursued asylum policies and practices that reflected the most essential obligations imposed by the refugee Conventions. Kenya generally upheld the principle of *non-refoulement*, as a rule of customary international law and further considered refugees as persons entitled to fundamental rights and freedoms as enshrined in the Constitution of Kenya.¹ The *laissez faire* attitude to admission of asylum seekers and refugees, was however, practised until the early 1990s when the government realized the need to address the increasing challenges posed by the increased influx of refugees from the region, hence the adoption of the Act in 2006.

¹ Chapter V of the then Constitution of Kenya, that was in existence until the 27th of August 2010, when Kenya promulgated a new Constitution.

3.2 Kenya Refugee Policy and Practice pre-December 2006

Kenya has for a long time pursued asylum policies and practices which reflected the most essential obligations mandated in the refugee Conventions despite the absence of specific legislations on the management of the refugee situation. The human rights provisions in Chapter V of the Constitution of Kenya² allowed some recognition of the rights of refugees residing in Kenya. Chapter V of this Constitution dealt with the protection of the fundamental rights and freedoms of all individuals and, by implication, this extended to asylum seekers and refugees.

Section 70 states that;

Every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin or residence or other local connection, political opinions, colour, creed or sex, subject to the respect for the rights and freedoms of others and for the public interest to the right to life, liberty, security and protection of the law amongst others.

By interpretation, the fundamental rights and freedoms are to be accorded to 'persons', rather than 'citizens', hence their application to refugees, unless there was a good reason for not doing so under the limitation provisions. Additionally, related national legislation continued to have a bearing on refugee management in Kenya, and made reference to the control of refugee movements into Kenya. The Immigration Act of 1967³ was passed ideally to govern orderly immigration into Kenya. In its preamble, the Immigration Act intends to 'amend and consolidate the law relating to immigration in Kenya....' And secondly, for 'matters incidental [to] and connected with immigration'. Section 4 of the Immigration Act prohibits non-citizens from entering Kenya unless they are in possession of valid entry permits. One must first apply for, and obtain an entry permit before being allowed entry into the country. Violation of this requirement renders the person's presence in Kenya unlawful.⁴

² In existence until the 27th of August 2010, when Kenya promulgated a new Constitution.

³ The Immigration Act, Chapter 172 Laws of Kenya, (No. 25 of 1967).

⁴ Section 4 (1) – (4), Immigration Act

In the Schedule to the Immigration Act, there is specified a list of the various classes of entry permits to be issued to people who wish to enter Kenya.⁵ Of relevance to refugees is the Class M Permit, which incorporates the refugee definition as provided under the 1951 Refugee Convention, without the time and geographical limitation.⁶ In essence, the section adopts the definition as amended by the 1967 Refugee Protocol. The Immigration Act is, however, silent on the 1969 OAU definition and this is probably because it was not meant to regulate refugee situations per se. One can also conclude that the omission of the 1969 OAU definition was because the Immigration Act was adopted before the enactment of the 1969 OAU Convention. In this respect, the Kenya Immigration Act is deemed unsuitable as a legal reference for handling refugee issues, especially when it contains no definition of the circumstances that inform the majority of the refugee caseload in Kenya. The Immigration Act lacks information how to handle situations of massive refugee influx and does not provide room for *prima facie* recognition on a group basis. The Immigration Act requires one to make an individual application to the Minister and Immigration Officer before being allowed entry into Kenya. The grant of refugee status under the Immigration Act is further extended to the 'wife or child over the age of thirteen years of such a refugee.' Abuya,⁷ observes that such a description is indeed gender insensitive as it assumes that it is only men who will flee persecution, thus rendering the situation of women who flee from similar circumstances difficult to adjudicate. In his opinion, the Act falls short of appreciating present day realities in which mass movements cut across age and sex. Being legislation applicable in Africa, the Act also fails to appreciate the situation of polygamous marriages that is atypical in this region, and by interpretation, an asylum seeker will be required

⁵ Section 5 (1) makes reference to the 13 different Classes of entry Permits (Class A-M) expounded in the Schedule to the Immigration Act.

⁶ Article 1 (A) (2) of the 1951 Refugee Convention.

⁷ Abuya E.O., *Legislating to Protect Refugees and Asylum Seekers in Kenya: A note to the Legislator*, (Moi University: Moi University Press, Research Paper Series, ISSN: 1811-3265, Vol. 1 No (2004) p.12.

to choose one of the wives and child for purposes of recognition under Class M, leaving out the other family members. No guidelines are provided for the status of children below the age of thirteen and this may result in a lot of uncertainty in the application of this provision. In addition, the Act does not contain any provision on the rights and obligations of refugees or the state towards refugees, hence its inadequacy in dealing with refugee specific issues. The Act further vests lots of discretionary powers in the Minister in charge of immigration affairs, to hear the applicant's case and make a decision on whether to issue the permit or not.⁸ The decisions are final and shall not be questioned in any court of law. Such provisions should be repealed and harmonized with those under the Kenya Refugee Act 2006 to allow for consistent handling of refugee issues in Kenya.

In majority of the cases, the provisions of the Immigration Act have been applied alongside those of the Aliens Restriction Act of 1973.⁹ The Aliens Restriction Act serves two purposes, namely, first, it enables certain restrictions to be imposed on aliens, and second, it makes provisions that are necessary or expedient to carry such restrictions into effect.¹⁰ In contrast to the Immigration Act, the Aliens Restrictions Act does not make any direct mention of the term "refugee" but by interpretation one can deduce that the use of the term 'alien' to mean 'any person who is not a citizen of Kenya,'¹¹ would cover asylum seekers and refugees. Under the Act, the Minister may impose from time to time restrictions on aliens, including designated locations of residence.¹² While this is arguably the basis for the refugee encampment policy, no official order has ever been formally made by the government and the section remains an area of

⁸ Immigration Act, Section 5.

⁹ The Aliens Restriction Act, Chapter 173 Laws of Kenya (No. 5 of 1973).

¹⁰ Preamble to the Aliens Restriction Act.

¹¹ Article 2.

¹² Section 3 (1) (c)&(d).

contention, with human rights organisations arguing that this section hinders the refugees' freedom of movement. Refugees are thus caught in a dilemma as to whether they are to proceed as provided under the Immigration Act that requires an entry permit or the Aliens Restrictions Act that pushes them to the camps. Further reference to refugees in the Aliens Restrictions Act can be deduced from the registration process entailed in section 3 of the Act.¹⁵ All aliens are to report to a Registration Officer within 90 days of their arrival into Kenya, where they will be required to complete Form A1-“Form for Registration as Alien.” There are however no guidelines on the procedure for the grant of refugee status under the Aliens Restrictions Act, thus making it, like Immigration Act, inadequate to serve as a reference for refugee management and protection in the country.

The foregoing discussions indicate that the legislation applied prior to the enactment of the Act in December 2006, falls far short of defining a comprehensive refugee framework, and even the provisions that are potentially applicable to refugees, are not consistently implemented. So, for example, while the Aliens Restriction Act requires foreigners to register at designated locations within 90 days of arrival in Kenya, refugees who attempted to do so in the past were turned away by immigration officials and/or officials from the National Refugee Secretariat for lack of infrastructure to handle refugee registration and refugees are still being referred to UNHCR for this purpose. This dilemma has made the management of refugees in Kenya unpredictable and inconsistent, and with the enactment of the Kenya Refugee Act 2006, more confusing as the three pieces of legislation continue to operate in tandem.

¹⁵ Rule 4, paragraph 10 while seeing refugees as aliens requires information such as: “Are you a Refugee in Kenya: Date of Arrival in Kenya: Have you been accepted as a refugee in Kenya? Yes/No.”

In terms of practice, the Government of Kenya had, until 1993, established a refugee determination procedure under which the Government's Eligibility Committee conducted individual refugee status determination (RSD) interviews under the 1951 Refugee Convention.¹⁴ Such persons enjoyed the rights provided for under the 1951 Convention, including being in possession of government-issued Aliens' Identity Cards, which identified them as 'full status' refugees. The Convention refugees are entitled to reside where they wish and, although not automatically granted the right to work, they are free to apply for work permits, which they are generally granted. All Convention refugees that were recognised by the Government of Kenya prior to its discontinuation of RSD in 1993 are required to be registered by the National Registration Bureau.¹⁵ According to UNHCR, the registration of asylum seekers in Kenya complies, in part, with international standards in that it is a continuous process that abides by the fundamental principles of confidentiality and it is, to the extent possible, easily accessible, takes place in a safe and secure location, is conducted in a non-intimidating manner by trained staff, with all relevant information being recorded.¹⁶ Individual identity documents were, however, not issued and UNHCR, instead issued mandate letters of recognition as refugees and referred to camps for further processing and residence. In 1998, the National Eligibility Committee was re-established, chaired by the then Deputy Secretary of the Ministry of Home Affairs, with membership drawn from the Ministry of Home Affairs, Ministry Foreign Affairs, the Office of the President, Immigration and Police Departments, the Attorney General's Chambers, and a representative from UNHCR.¹⁷ The absence of specific legislation governing refugee affairs left

¹⁴ Human Rights Watch, *From Horror to Hopelessness: Kenya's Forgotten Somali Refugee Crisis*, (New York, Human Rights Watch, ISBN: 1-56432-465-6, March 2009)p.46.

¹⁵ Refugee Consortium of Kenya (RCK), "Determining Refugees Status in Kenya: Proposals to Move the Process to the Camps" in *Refugee Insights*, Vol. 5 (April-Sept 2003) p.8.

¹⁶ Anjichi A., Interview with UNHCR Protection Officer (name withheld for confidentiality), UNHCR Branch Office for Kenya, Nairobi, April 2010.

¹⁷ UNHCR Branch Office for Kenya, 'Annual Report', (unpublished), 2006.

refugees vulnerable to treatment that was not in accordance with internationally recognized protection standards, hence the clamor for a refugee specific piece of legislation. Often times, refugees faced difficult living conditions and their human rights were breached. Potential refugees were usually not allowed into Kenya, while those who had found their way into Kenya fell victim to arbitrary arrests. It also meant that important areas of refugee governance which fell within the state's responsibilities were being carried out by UNHCR, including reception and registration of new asylum-seekers; refugee status determination; maintenance of data on asylum-seeker and refugee population; issuance of documents confirming status; management and co-ordination of the refugee camps; and provision of secure arrangements for critical protection cases.¹⁸ This often resulted in a conflict of interest, where UNHCR was forced to wear two hats, one being that of undertaking the role of a supervisor and advocate for refugee rights, and the other being responsible for activities that would ideally fall within a state's mandate. It was, therefore, hoped that the adoption of specific refugee legislation would act as a catalyst towards effective protection of refugee rights in Kenya, by providing clear guidance on the structures and procedures relevant for this purpose.

3.3 The Kenya Refugee Act, December 2006

The Kenya Refugee Act, 2006 (hereinafter referred to as the Act) has been characterized as the most comprehensive framework for refugee management in Kenya.¹⁹ The Act represents the commitment by the government of Kenya to abide by the established international norms and good practices for refugee management. Kenya is a signatory to the 1951 Convention and the

¹⁸ Refugee Consortium of Kenya (RCK), 'Improving Security and the State of Migration in Kenya'. *Refugee Insights*, Vol. 11 (April-Sept 2006) p.19.

¹⁹ Statement by Honourable Moody Awori, former Vice President of Kenya, introducing the Bill to Parliament for First Reading in September 2003. Kenya Television Network, *Late Night News*, 20 September 2003, 2300hrs.

1969 OAU Convention, and the Act is therefore a domestication of Kenya's international law obligations towards refugees and asylum seekers. The promulgation of the Act arose out of the appreciation that the refugee regime was a distinct subset of forced migrants, with its own attendant rights and obligations, and cannot be categorized within other laws applicable to aliens or migrants generally. The Kenya Refugee Act has a total of 26 sections covering a variety of issues relating to refugees in the country. The Schedule to the Act provides further guidelines on the implementation of specific matters such as the composition and functions of the Refugee Appeals Board.²⁰

3.3.1 The definition of a Refugee under the Act

Unlike the Aliens Restriction Act and the Immigration Act, the Refugee Act provides an elaborate definition of who a refugee is, how refugee status can be acquired and lost, and who is excluded from refugee status under the Kenyan law. The Act, in its definition of a refugee, combines the provisions of Article 1(A)(2) of the 1951 Convention, as modified by the 1967 Protocol and Article 1 of the 1969 OAU Convention, thus ensuring a broader consideration when granting refugee status. A person is recognised as a statutory refugee for the purposes of the Refugees Act if such a person:

- (a) owing to a well founded fear of being persecuted for reasons of race, religion, sex, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself to the protection of that country; or
- (b) not having a nationality and being outside the country of his former habitual residence, is unable or, owing to a well-founded fear of being persecuted for any of the aforesaid reasons is unwilling, to return to it.²¹

²⁰ Schedule to the Act (Sections (1)-(8) developed in reference to Section 9 (6) of the Act.

²¹ Section 3(1)(a) and (b) Kenya Refugee Act, 2006; Articles 1(C)-(F) of the 1951 Convention; Article 1 (3)-(5) of the 1969 OAU Convention.

The Kenya Refugee Act does not include a time or geographical limitation, thus making the grant of asylum more flexible and practical to the situations causing refugee flows in Africa. Similar to the 1969 OAU Convention, the Act specifies, in Section 3(2), the circumstances under which one may be considered a *prima facie* refugee. A person shall be a *prima facie* refugee if such person ‘...owing to external aggression, occupation, foreign domination or events seriously disturbing public order in any part or whole of his country of origin or nationality compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.’ The decision to declare one a *prima facie* refugee is vested in the Minister in charge of refugee affairs. It is clear, therefore, that the Act still envisages group acquisition of refugee status through declaration posted in the national gazette. A typical case is that of Somali refugees who continue to flee civil war in Somalia, whose influx into Kenya has exceeded the camps capacity to bear the caseload, hence a call for the extension of the current Dadaab camp setting.

Furthermore, and in line with the 1951 Convention, the Kenya Refugee Act 2006 lays down the conditions for disqualification from grant of refugee status.²² The exclusion and cessation clauses borrow heavily from the international standards to include such persons as those involved in crimes against peace, war crimes, serious non-political crimes outside Kenya or in Kenya after admission as a refugee, persons with dual nationality and are able to seek refuge in their second country of nationality, or people from places where there is a fundamental [positive-sic] change of the circumstances that forced them to flee in the first place, hence ability to re-avail self of the protection of the country of origin.²³

²² Kenya Refugee Act 2006, Section 4 (a)- (e).

²³ Ibid.

3.3.2 Institutional Structures and Mechanisms

Most of the powers under the Act have been vested in the Minister of State in charge of Immigration and Registration of Persons (MIRP).²⁴ Under section 3(3), the Minister can, by publishing an order in the official Government Gazette, declare any class of persons to be *prima facie* refugees, and may at any time amend or revoke such declaration. This provision takes care of situations of mass movement that is typical of refugee movements in Africa. The same Minister may designate certain places and areas in Kenya to be transit centres for purposes of temporarily accommodating asylum seekers, or a refugee camp for residence by refugees.²⁵ This, to some extent, restricts the refugees' freedom of movement since violation of this order is punishable under the Act. Only under very specific defined circumstances can a refugee live the camps legally to seek, assistance in urban centres. It must, however, be proved that the services sought, for instance, higher education or specialized treatment, cannot be obtained at camp level for one to be issued with a travel document out of the camp. The declaration of designated areas of residence for refugees under the Act is no longer at the discretion of the Minister, since the Act provides that the Minister shall consult with the host community to seek their support in accommodating the refugees.²⁶ In recent times, Kenya has experienced serious opposition by the host community in Dadaab area, North Eastern Kenya, where the government proposed to expand the hosting capacity of the refugee camps. The host communities are fearful that further expansion of the camp will result in heightened insecurity in the area and further fear competition for scarce resources with refugees, in the already marginalised areas. The Act requires the Minister to ensure that the designated areas are maintained and managed in an

²⁴ In Kenya, the designated refugee camps are in 3 in Dadaab (Ifo, Dagahaley and Hagadera) North Eastern Kenya and the Kakuma refugee Camp in Turkana district.

²⁵ The Act, Section 16(2) (a) & (b).

²⁶ The Act, Section 16(2)(a) & (b) of the Act.

environmentally sound manner,²⁷ in response to accusations that camp settings and refugee lifestyles, which include such activities as use of firewood for fuel, have resulted in environmental degradation in the areas around the refugee camps.

Under section 21, the Minister may, in consultation with the Minister responsible for matters relating to immigration and internal security, order the expulsion from Kenya of any refugee or member of his family if found to be in breach of national security or public order. This provision remains discretionary and, in most cases, does not require proof or due process, with some genuine asylum seekers and refugees suffering deportation based on the conviction of the government officer. The Minister further bears the mandate to appoint officers to implement the provisions of this Act.²⁸ The Act establishes a Department for Refugee Affairs (DRA) as a public office within the Ministry of State for Immigration and Registration of Persons (MIRP). The DRA has the responsibility for the administration, coordination and management of issues related to refugees, including developing policies, promoting durable solutions, coordinating international assistance, receiving and processing asylum applications, issuing identity cards and travel documents, and managing refugee camps.²⁹ Section 7 of the Act establishes the office of the Commissioner of Refugees, an office in the public service, to be headed by the Commissioner of Refugee Affairs. The Commissioner is the Secretary to the Refugee Affairs Committee. He or she is to coordinate all measures necessary for promoting the welfare and protection of refugees, including formulating policy on refugee matters in accordance with international standards;³⁰ liaison with United Nations Agencies and any other institutions on the provision of adequate facilities and services for the protection, reception and care of refugees

²⁷ The Act, Section 16(3).

²⁸ The Act, Section 22(1).

²⁹ The Act, Section 6(1) & (2).

³⁰ The Act, Section 7(2) (c).

within Kenya;³¹ promoting durable solutions for refugees granted asylum in Kenya;³² receiving and processing applications for refugee status; managing refugee camps and related facilities,³³ and advising the Minister on how to solicit funds for refugee assistance programmes.³⁴ Though appointed directly by the President, the Commissioner works under the Minister responsible for refugees in executing his functions. For such a heavy laden responsibility, the criteria for appointment of the Commissioner for Refugee Affairs must include strong commitment to the upholding of the human rights of refugees. By incorporating refugee issues specifically within a designated Ministry in contrast to previous practice where this was not clear, one can clearly see the seriousness which the Kenya government attaches to refugee protection through this important recognition of its unique parameters.

Under section 8 of the Act, there is established a Refugee Affairs Committee, responsible for advising the Commissioner for Refugees.³⁵ The main function of the Committee is to 'assist the Commissioner in matters concerning the recognition of persons as refugees', which includes receiving application for asylum and advising on recognition and denial of refugee status and asylum. The Committee has a wide membership drawn from various line ministries, departments and interested stakeholders, including civil society. Section 8 (3) provides that the Committee shall consist of:

- (a) The chairperson who shall be appointed by the Minister;
- (b) One representative from the ministry responsible for provincial administration and internal security;
- (c) One representative from the ministry responsible for refugee affairs;
- (d) One representative from the Ministry of Foreign Affairs;

³¹ The Act, Section 7(2) (d).

³² The Act, Ibid, The Act, Section 7(2) (e).

³³ The Act, Section 7(2) (k).

³⁴ The Act, Section 7(2) (n).

³⁵ Ibid, The Act, Section 8(1)-(5).

- (e) One representative from the ministry responsible for local government;
- (f) A representative of the Attorney General;
- (g) One representative for the Ministry of Health;
- (h) One representative of the Ministry responsible for finance and planning ;
- (i) One representative from the Department of Immigration;
- (j) One representative from the Department of Police;
- (k) One representative from the National Security Intelligence Service; and
- (l) One representative from the Department of National Registration Bureau.

In allowing such an elaborate representation, the Act guarantees that refugee rights shall not be violated through the possible exercise of excessive or abuse of power by one individual, but through the involvement of the various groups, the requisite checks and balances shall be instituted to ensure fair and impartial decision making in the interest of both refugees and the host government. For the first time in Kenya's history, the Refugee Committee will include a representative from the host community.³⁶ The inclusion of various line ministries and a wide range of stakeholders will ensure a comprehensive, all-inclusive approach that will take into account a diverse range of opinions before any decision it taken. Cumbersome as it may sound, the system will also ensure that potential contentious areas, such as security, financial allocations and budgets, health, environmental concerns, gender sensitivity, and security implications, that may be ignored if the refugee issues are only handled by one ministry, are equally taken into account. The inclusion of women as envisaged under Section 8(4) is indeed a positive element considering that a sizeable number of refugees are women. This will create an effective platform for raising the unique vulnerabilities faced by the women and children, and ensure that their issues are mainstreamed into the broader programming of refugee responses. The Commissioner is, under the Act, obliged to ensure specific measures are taken into account to ensure the safety of women and children.

³⁶ The Act, Section 8(5).

including measures for family tracing for unaccompanied minors, in designated areas.³⁷ The Act establishes the Refugee Appeals Board to consider and decide appeals under the Refugee Act.³⁸ The procedure for appeal is as established in section 10 of the Act and allows rejected asylum seekers sufficient time (30 days) to lodge their appeal against the Commissioner's decision. Further grievances are to be brought before the High Court for consideration.³⁹

The foregoing discussion shows a shift from the previous tendency of placing very wide discretionary powers on individual members of the executive arm of the State, by allowing the transfer of powers to various other committees, which are deemed more democratic, fair and desirable than a single person. One can only hope that the triple-tier hierarchy established for the determination of refugee status, will act expeditiously, considering the context in which such applications are made, following the rules of natural justice and grant refugees a fair hearing. In contrast to the High Court where appeals will be based on points of law, the Act is silent on the nature of appeals lodged at the Refugee Appeals Board and fails to expound whether these will be based on points of law or fact, or both law and fact. It is hoped that the envisaged regulations to be developed in the implementation of the Act, will clarify some of these critical issues. There is also urgent need, in line with proposed judicial reforms, to ensure that judicial officers receive continued training on international protection and international law in general, including being acquainted with the Kenya Refugee Act, to ensure proper adjudication of matters before them. There is also an urgent need to increase the capacity of the three levels of refugee status determination to avoid a situation where refugees will be made to wait for longer than is necessary for the hearing of their cases.

³⁷ The Act, Section 23(1) – (4).

³⁸ The Act, Section 9.

³⁹ The Act, Section 10(3).

3.3.3 Rights and Obligations under the Refugee Act, 2006

Upon entry into the country, asylum seekers are required to make their intentions known, by appearing before the Commissioner immediately upon entry or, in any case, within thirty days after their entry into Kenya.⁴⁰ The government is yet to establish official reception centers for such services, with refugees still approaching UNHCR for this purpose. It is this lack of capacity that might hinder the effective implementation of the otherwise well-intentioned refugee provisions. In some cases, asylum seekers have found themselves arrested and detained for illegal entry for their failure to abide by this requirement, which is however only brought to their attention after they are already in custody. This is in direct violation of the provisions of section 11(3) of the Act that prohibits detention or penalization of asylum seekers on account of illegal entry. The Act upholds the same freedom from arbitrary arrest and non-penalisation for illegal entry as enshrined in the 1951 Convention, Article 31. The Act further provides that asylum seekers who have applied for recognition of their status as refugees and every member of their family shall remain in Kenya pending the determination of status.⁴¹ The Act does not, however, provide guidance on where such persons who have fled with no material possessions are to be accommodated. Majority of the asylum seekers end up destitute, with no homes or basic needs, including food and some facing security risks such as abduction from the host country. The designation of conducive reception centres, where refugees can be accommodated and assisted while awaiting their adjudication, will go a long way in guaranteeing the full respect for the institution of asylum. The time limit imposed for the adjudication of asylum claims will help eradicate the misfortune of waiting in anxiety for one's case to be determined.

⁴⁰ The Act, Section 11(1)-(6).

⁴¹ The Act, Section 12(1) & (2).

Specific reference to the rights and duties of refugees in Kenya is provided for under section 16 of the Act, which provides that 'every recognised refugee in Kenya and every member of his family in Kenya, 'shall be entitled to the rights and be subject to the obligations contained in the international conventions to which Kenya is party and shall be subject to all laws in force in Kenya.'⁴² This provision removes the lacuna that previously existed with the lack of a description on the manner of enjoyment of the rights by refugees. Under the Act, refugees shall be entitled to and be subject to the obligations contained in the 1951 Refugee Convention and 1969 OAU Conventions. The obligations under these conventions include not sending a person back to a country where he or she may be persecuted, *i.e non-refoulment*,⁴³ and, in the case of the OAU Convention where his or her life is threatened because of the threats to public order which form the basis for refugee status.⁴⁴ Section 18 of the Act captures well these requirements of *non-refoulement* as read together with the definition under section 3 of the same Act, and impliedly stays the provisions of the Aliens Restrictions Act and the Immigration Act as regards asylum seekers and the refugees. This could be a good starting point for the harmonisation of the three pieces of legislation that have abearing on refugees in Kenya to ensure consistency.

Other refugee rights spelt out in the 1951 Refugee Convention,⁴⁵ to which refugees in Kenya can lay claim to under the Act, include, right to receive the same treatment as nationals with regard to the freedom to exercise of religion and religious education; free access to the courts, including legal assistance; access to elementary education; access to public relief and assistance; protection provided by public security; protection of intellectual property, such as inventions and trade names; protection of literary, artistic, and scientific work; and equal

⁴² Section 16(1)-(4).

⁴³ Article 33.

⁴⁴ Article II (3).

⁴⁵ Articles 12-30 sets out refugee rights.

treatment by taxing authorities. Refugees must receive the most favourable treatment provided to nationals with regard to the right to belong to trade unions as well as the right to belong to other non-political non profit organisations, and the right to engage in wage earning employment. Refugees must receive the most favourable treatment possible, which must be at least as favourable as that accorded to aliens generally in the same circumstances with regard to the right to own property; the right to practice a profession; the right to self employment; access to housing and Access to higher education.

There is however, some concern with regard to the actual enjoyment of some of these rights. For instance, regarding freedom of movement and residence, the Act still requires refugees to reside in designated camps, which infringes their freedom of movement and residence. The Kenya government has, however, shown some flexibility in this regard by allowing camp-based refugees with UNHCR documentation to leave the camp for specified reasons, such as access to higher education, specialized medical care, or security. However, refugees continue to face police harassment as they travel out of the camps, with some police officers declining to honour the UNHCR documentation resulting in continued arbitrary arrest of the refugees.⁴⁶ The confinement of refugees within camps, in areas that are less economically developed, further hinders the utilization of the skills and knowledge that the refugee may have come with due to lack of requisite infrastructure to apply the same. Furthermore, Kenya maintains reservations on the 1951 Convention's right to work to allow protectionist restrictions on refugee employment for four years instead of the three the Convention allows. Section 16(4) of the Act allows refugees employment rights similar to those of aliens generally. Nevertheless,

⁴⁶ Daily Nation, 'Police Arrest 5 Sudanese Refugees in Eldoret', 10 April 2010. The refugees who had UNHCR Mandate Letters were enroute to Nairobi from Kakuma refugee camp for processing of their resettlement cases with UNHCR Nairobi.

most refugees do not enjoy such protection. They also lack documentation to acquire land, bank accounts, vehicles, and other assets.⁴⁷

In addition, the Act subjects refugees to the same wage-earning employment restrictions as other foreigners and calls upon the Commissioner to ensure that refugee economic activities do not have a negative impact upon host communities. In essence, refugees must obtain work permits before being allowed to work in Kenya.⁴⁸ Save for Class M permits that are free, work permits are costly and much as they would be beyond reach of most refugees, this can be one way of generating income for the government of Kenya. In an interview conducted with the former Commissioner for Refugee Affairs, Mr. Peter Kusimba, regarding the purpose of the on-going government refugee registration exercise that began in March 2006, the officer confirmed that:

The (registration) exercise has three key objectives: first, to conduct a baseline survey to find the aggregate figure of refugees living in urban areas, which is currently estimated to be between 15,000 and 60,000. Second, to identify refugees capable of working and doing business in Kenya and give them legal status, that is, 'Class H' permits and licenses and in the process this will also help us identify and weed out illegal aliens involved in business. This will also help the government to earn the much-needed revenue as one 'Class H' Permit goes for Kshs 60,000 and third, for security purposes, it gives an opportunity to the Government to determine the number of people who reside in the country legally and illegally. 'Class M' permits are given to refugees who meet the criteria set in the 1951 Refugee Convention, to their spouses, and to their children over the age of 13 years, while a 'Class H' permit is one that allows refugees to engage in business and are issued at a fee. A person who obtains the 'Class H' permit must be a legal immigrant. If refugees can survive in urban areas on their own they should come to us and their mandate will be changed to read "urban" and not "camp"

⁴⁷ The Mission of U.S. Committee for Refugees and Immigrants, 'Country Report, 'Refugee Protection in Kenya,' 2008, at www.refugees.org, 12 September 2010.

⁴⁸ Ibid

refugees. They will be issued with an alien card that looks like the national identity card for citizens but with a different colour scheme and an alien's inscription on it.⁴⁹

Under the Immigration Act, the Government allowed Class M work permits⁵⁰ to refugees it recognized prior to 1990, but stopped their renewal in 2005. The withdrawal of the permits was done without the offer for an alternative solution for the affected refugees. This lack of a recourse is manifest, for instance, where Kenya does not permit refugees working within the camps, for example language interpreters, to work for gain. Instead, UN and nongovernmental organizations pay them "incentives",⁵¹ with some resorting to non-disclosure of their employment status to avoid possible arrest for working without a permit. Most refugees end up working in the informal sectors, where they are likely to be exploited as they do not fall under any labor legislation. On the issue of public relief and education, camp residents receive free health services, but if refugees use public services outside the camps without a referral, the facilities charge them as foreigners. The Government provides refugees access to primary education, but charges refugees outside of camp settings separately from nationals, including for essential items, like books and uniforms.

The 1951 Refugee Convention requires all refugees to be granted identity papers and travel documents that allow them to travel. This is now reflected in section 14 of the Act, where recognized refugees are to be issued with refugee identity cards or passes in the prescribed form and be permitted to stay in Kenya in accordance with the provisions of the Act. There still exists

⁴⁹ Ayiera E., Interview with Mr Kusimba P, Commissioner for Refugee Affairs, Nairobi, April 2006. Interview posted in, Refugee Consortium of Kenya (RCK), 'Improving Security and the State of Migration in Kenya-The Refugee Bill 2006,' (Nairobi: RCK and The Refugee Department (MSRIP), 2006).

⁵⁰ Schedule to the Act.

⁵¹ The Mission of U.S. Committee for Refugees and Immigrants, Country Report, p.6.

confusion as to which documents take precedence, since UNHCR, the authorized UN agency that handles refugee matters together with the government in Kenya, continues to recognize refugees under its mandate and issues mandate letters in this respect. Most camp based refugees bear refugee identity cards, which are not issued to all refugees. Refugees bearing UNHCR Mandate documents that are recognised by the government, often times find themselves arrested and accused of being in Kenya illegally, resulting in lots of confusion as to what documents actually suffice for grant of refugee status. It is a high time that these processes were streamlined to accord asylum seekers and refugees the right documentation, hence protection from arbitrary arrest and harassment.

3.3.4 Duties of Refugees in Kenya

In return, refugees have a general obligation, both under the international conventions and the Act, to conform to the laws and regulations, as well as measures laid down for maintenance of public law and order in the host country.⁵² Refugees and asylum seekers are to abstain from activities that would cause tension amongst member states, and in particular, refugees have a duty to keep the peace and not be a threat to national security or to the host community, otherwise, the Minister is empowered, under section 21 of the Act, to order the expulsion of such a refugee and members of their family. The 1969 OAU Convention explicitly prohibits engagement in subversive acts that would jeopardise or cause tension among member states.⁵³

⁵² Article 2 of the 1951 Convention, and Section 16(2) of the Kenya Refugee Act, 2006.

⁵³ Article III.

3.4 Conclusion

It is manifest that Kenya has made some remarkable steps towards the protection of refugees by enacting the Refugee Act, 2006. It is now possible for refugees to claim certain rights as spelt out under the Act. Being legal rights under a Kenyan statute, the refugee rights should be upheld and protected within this legal framework. The lack of a legal and institutional framework for the regulation of refugee affairs can no longer be used as an excuse to deny refugees their rights.⁵⁴ In terms of institutional structures for refugee protection, the Act introduces innovative ideas, such as the establishment of the Department of Refugee Affairs, the Officer of the Commissioner for Refugees, the Refugee Appeal Board and gives recourse to the High Court for appeals against the Refugee Board, all of which are aimed at enhancement of the way in which refugee issues are managed in Kenya. By providing a timeframe within which refugee applications are to be received and processed, the Act creates certainty and hope for refugees who would otherwise wait in limbo to know their fate. The challenge, however, lies in ensuring that the responsible officers are well equipped to adhere to this timeframe. A critical review of the provisions of the Act against the international refugee provisions, however, indicates that although the Refugee Act sets out the legal framework governing refugees and establishes the institutions and procedures for implementation, in practice there is still inadequate infrastructure and capacity to ensure its effective implementation. The prevailing situation sees refugees being tossed between the functions of UNHCR and the new government refugee department. The new department lacks adequate capacity to implement its functions, with majority of staff being new to the refugee regime. The multiple documentation process outlined

⁵⁴ Kariuki Muigua, *Protecting Refugees Rights in Kenya: Utilising International Refugee Instruments, the Refugee Act 2006 and the Constitution of Kenya as Catalysts*, at Kariuki Muigai & Co Website, www.kmco.co.ke/articles, last updated 13 September 2010.

in the Refugee Act further creates confusion as to which document supersedes which one, especially in a context where some refugees continue to hold onto the previous Alien Cards or Class M entry permits, which are renewable every year under the Immigration act.

The government, with the assistance of UNHCR and the civil society, is currently in the process of developing requisite regulations for the implementation of the provisions of the Act. Such regulations should be considered carefully to ensure that they guarantee, instead of restricting, access to asylum and other rights attendant thereto. There is further need for adequate funding of the refugee infrastructure to ensure that the country does not lose the gains made during the long arduous 15 year journey to the Act 2006. The enactment of this Act, is therefore, a great milestone in the right direction. What remains is the commitment and political goodwill by all concerned to ensure that refugee rights are realized in the country, in conformity with Kenya's international obligations to refugee protection. In the next Chapter, we analyse some of these observations, in the hope that by highlighting the gaps in the implementation of Act, a renewed enthusiasm will be adopted in enacting relevant regulations and guidelines that will support effective management of refugee affairs in Kenya.

CHAPTER FOUR

A CRITICAL APPRAISAL OF THE KENYA REFUGEE ACT, 2006

4.1 Introduction

This Chapter provides an appraisal of the refugee law and practice in Kenya. It complements the issues discussed in Chapter three. In Chapter three, both the legal and institutional framework for refugee protection has been elaborated, including an elaboration of the various functions by the respective authorities and departments under the Kenya Refugee Act. This chapter seeks to elucidate the effectiveness of the refugee framework in Kenya as enshrined in the Act, in two ways; firstly, through an evaluation of the extent to which the Kenyan law, both before and after the enactment of the Act in 2006, is in harmony with the international law on refugees, and secondly, examine the effectiveness of the institutional framework established by the Refugee Act, 2006, for the management of refugee matters in Kenya. The first issue of the analysis is informed by the fact that international law imposes an obligation on states to ensure that their municipal laws on refugees are in harmony with the 1951 Convention and its 1967 Protocol, together with the 1969 OAU Convention, that set the benchmarks for the protection of refugees and asylum seekers at the international and regional levels, respectively. The second issue is based on the premise that enactment of the Refugee Act, 2006, did not, of and by itself provide a panacea to the refugee problem in Kenya. The Act proposed the establishment of various institutions to support its effective implementation. The Chapter examines whether the establishment of these institutions under the Act has improved the government's ability to protect refugees, or whether it is still business as usual, thus worsening the situation that the Act intended to resolve in the first place. The Chapter concludes by noting

that enactment of the refugee specific law and the establishment of specific structures for handling refugee matters in Kenya elevates refugee issues to an important ministerial level, hence the need to advocate for adequate capacity building by both the government and stakeholders dealing with refugee issues in Kenya

4.2 The Kenya Refugee Act, 2006 and International Refugee Law

4.2.1 Purpose of the Act

The 1951 Convention represents the first international agreement covering the most fundamental aspects of a refugee's life. As discussed in Chapter 3, the Convention spells out a set of basic human rights to be accorded to asylum seekers and refugees, at least in a manner equivalent to freedoms enjoyed by foreign nationals living legally in a given country, and in many cases those of citizens of that state. The Convention recognises the international scope of the refugee situation and the necessity of international cooperation, including burden sharing among states, in tackling the refugee problem. On the other hand, the 1969 OAU Convention is the first regional instrument that provided the broadest definition of a refugee, thus allowing for inclusion of circumstances that were unique to the African context. Likewise, the Kenya Refugee Act, 2006, is the first comprehensive codification of Kenya's international obligations towards refugees, and spells out the minimum standards that Kenya is committed to accord refugees hosted in Kenya.¹ As a signatory to the 1951 Convention, the 1967 Protocol and the 1969 OAU Convention, Kenya has in essence complied with the international obligation that calls for the enactment of domestic legislation to incorporate the member states' responsibilities towards refugees.

¹ The Preamble to the Act indicates its purpose as: 'to make provisions for the recognition, protection and management of refugees and for connected purposes thereto.'

4.2.2 The Refugee Definition

The 1951 Refugee Convention, as modified by the 1967 Protocol, provides the classical refugee definition applicable globally.² In appreciating the changing realities with regard to the causes of population displacements in Africa, the 1969 OAU Convention adopted the first ever broad definition of a refugee, by including such triggers as ‘internal and external aggression,’ ‘foreign domination’ or ‘events seriously disturbing public order.’³ Commendably, the Kenya Refugee Act gives a hybrid definition of who a refugee is, by incorporating both the provisions of Article 1(A)(2) of the 1951 Convention, as modified by the 1967 Protocol, and Article 1 of the 1969 OAU Convention. Under section 3, the Act recognises both the statutory and *prima-facie* refugees. The administrative guidelines for recognition either as a statutory refugee or a *prima-facie* refugee are equally spelt out in the Act.⁴ In this regard, the Act provides a broader framework for consideration of refugee status and ensures that all deserving refugees have an opportunity to be heard. This is particularly important since Kenya has continued to receive and host asylum seekers and refugees from Africa and beyond,⁵ hence the need to have a comprehensive legal framework that addresses the domestic realities. This is indeed a development beyond the 1951 Convention requirement.

In keeping with the provisions of the international instruments, the Act, in section 4, outlines the criteria for disqualification from grant of refugee status, thus ensuring that the asylum system is not abused by persons who do not or no longer deserve international protection.

Persons found guilty of committing such crimes as war crimes, crimes against peace and

² Article 1(A)(2)

³ Article 1

⁴ Section 3, Kenya Refugee Act, 2006

⁵ Kenya has in the past hosted refugees including from Iraq and Palestine.

humanity, serious non-political crimes, shall be excluded from refugee protection.⁶ Likewise, a person shall cease to be a refugee under the Act if found to have either voluntarily reacquired his nationality, re-avails self of the protection of their country of nationality or if there is a fundamental change in the circumstances that triggered their flight in the first place, hence no threat or risk of persecution, in country of origin.⁷ The application of these provisions under the Act calls for due process and fair hearing of the applicant, to establish whether there are any compelling reasons, arising out of previous persecution, that would prevent his safe return to his country of origin.⁸ By including such safeguards in the Act, Kenya expresses its commitment to guaranteeing the dignity and respect of the asylum process and also ensures that only genuine cases are allowed to benefit from international protection.

In terms of procedure for recognition of refugees, the Act comprehensively describes the steps to be followed by an asylum seeker upon entry into Kenya.⁹ Section 11(1) requires the asylum seeker to appear in person before the Commissioner for Refugee Affairs (or their authorised representative (sic)) and declare their intentions for coming to Kenya either immediately or within 30 days after entry into Kenya. The Act does not, however, give directions on the actual location of the authorised officers, hence a high risk of one loosing time as they search for the Commissioner's Office or that of the Commissioner's authorised representative. The Minister, in designating the refugee reception centres and areas of residence, should ensure that such places are within reach and accessibility of the asylum seekers. Prudence demands that some of these reception centres be established at border points with relevant government officers being posted to these areas to facilitate registration at point of entry in order to avoid delayed

⁶The Act, Section 4(a)-(d)

⁷Section 5(a)-(g)

⁸Proviso to Section 5 of the Act.

⁹Section 11(1)-(6).

applications as people travel to the city and back. It is recommended that the draft guidelines envisaged under the Act include directions on the designated locations, which should also be within reasonable reach and access by the asylum seekers.

In a historical move in the refugee regime in Kenya, the Act under, section 11(3), prohibits the detention or penalisation of persons claiming to be refugees in Kenya, merely by reason of illegal entry. In this respect, the Act upholds the freedom from arbitrary arrest and non-penalisation for illegal entry that is enshrined in the 1951 Refugee Convention.¹⁰ This will go a long way into addressing the increasing cases of arbitrary arrests and harassment, perpetuated by police offices including on innocent refugees in Kenya. The practice in the past required serious lobbying by refugee advocates to secure release of genuine asylum seekers that were either charged under the Aliens Restriction Act or Immigration Act.¹¹ A lot of times such release from detention depended on the goodwill of the officers in whose hands the refugees were presented due to lack of a legal bases upon which the adequately charge the genuine refugees. Some officers would release, while others would ignore the international provisions and detain the refugees. A direct provision in the Refugee Act will therefore help streamline the legislative and procedural impediments occasioned in the past. An asylum seeker who, having failed to report to the authorities within the specified time, commits an offence while in Kenya, will be liable on conviction, to a fine not exceeding twenty thousand shillings or to imprisonment for a term not more than six months or both.¹²

¹⁰ Article 31, 1951 Refugee Convention.

¹¹ Cap 172 and Cap 173 Laws of Kenya

¹² Section 11(3), The Act

The Act further specifies the timeframe within which the asylum claims are to be processed,¹³ thus removing the element of anxiety in which refugees have in the past been kept in limbo for an unspecified period of time as they await a decision on their asylum claims. This is another step in the positive direction. Section 16(2) of the Act mandates the Minister in charge of refugee affairs to specify certain areas as designated reception centres or places of residence for refugees. The Act does not, however, indicate the actual locations for such areas and whether these will be within reasonable access by asylum seekers. Oftentimes asylum seekers arrive in Kenya without any belongings and may require temporary accommodation while they await their fate. This issue should be given utmost priority in the proposed regulations for implementing the Act,¹⁴ to avoid relegating asylum seekers and refugees to a life of destitution and hardship.

The principle of *non-refoulement*, a fundamental principle of international refugee law, prohibits the forced return of persons to areas where their life or freedom would be threatened. This is enunciated in Article 31 of the 1951 Refugee Convention. In the same way, the Kenya Refugee Act, under Section 18 provides that:

no persons shall be refused entry into Kenya, expelled, extradited from Kenya or returned to any other country ... if, as a result of such refusal, expulsion, return or other measure, the person is compelled to return or remain in a country where they may be subjected to persecution on account of race, religion, nationality, membership of a particular social group or political opinion; or the person's life, physical integrity or liberty will be threatened on account of external aggression, occupation, foreign domination or events seriously disrupting public order in part or whole of the country.

The inclusion of such a fundamental principle of customary international law goes a long way into strengthening Kenya's commitment to international protection. Actual implementation of these provisions, however, remains a challenge due to the need to balance issues of legitimate

¹³Section 11(5) of The Act requires the Commissioner to consider all applications referred to him within ninety days of the receipt and may, within ninety days make such investigations as he thinks necessary into the application. The Minister will then call the applicant to make an oral presentation. The decision to either grant or deny refugee status shall be communicated to the applicant within 14 days.

¹⁴Section 26.

interests of national security and public order against refugee rights. The Minister has the power to order the expulsion of refugees and any member of their family on the grounds of national security and public order.¹⁵ Kenya maintains an official border closure with Somalia, despite the on-going civil war in large parts of Somalia. This has resulted in many asylum seekers entering Kenya illegally. According to UNHCR, the refugee influx into Kenya from Somalia seems to be on the increase despite the border closure. There have also been reports of refugee women and children and other vulnerable groups falling victim to serious human rights abuses in Somalia as they are unable to access protection legally in Kenya, following the border closure.¹⁶

The Kenya Refugee Act, 2006 contains provisions for the protection of women and children while in designated areas, and requires the Commissioner to ensure that specific measures are taken for their safety.¹⁷ These include undertaking specific steps in tracing the parents of unaccompanied minors for purposes of family re-unification and if not found, providing same protection as any other child permanently or temporarily deprived of his family.¹⁸ This is commendable since experience in the refugee camps has proved that women and children face unique vulnerabilities, including physical insecurity. By providing for such requirements in the Act, there is expectation of better treatment for this special category of refugees.

4.2.3 Rights and Responsibilities under the Kenya Refugee Act 2006

Section 16 of the Act, provides that 'every recognised refugee in Kenya and every member of his family in Kenya shall, 'be entitled to the rights and be subject to the obligations

¹⁵ Section 21.

¹⁶ Human Rights Watch, *From Horror to Hopelessness; Kenya's Forgotten Somali Refugee Crisis*, (Washington, Human Rights Watch, ISBN: 1-56432-465-6, March 2009), p.7.

¹⁷ Section 23.

¹⁸ Section 23(2)-4.

contained in the international conventions to which Kenya is party and shall be subject to all laws in force in Kenya.’¹⁹ Although the Act grants the same package of rights and duties as provided in the 1951 and 1969 OAU Conventions, there still exists some concerns with regard to the actual enjoyment of these rights. For instance, regarding freedom of movement and residence, the Act still requires refugees to reside in designated camps, which infringes on their freedom of movement and residence. The government argues that the requirement for refugees to stay in camps is to ensure proper control of foreigners in the country and also gives them access to basic assistance in a controlled manner. This is however not the case as majority of the refugees still live illegally in urban centres and are able to take care of themselves without government support, so long as they have identification documents. The Kenya government, has shown some flexibility by allowing camp-based refugees with UNHCR documentation to leave the camp for specified reasons, such as access to higher education, specialized medical care, or security. Refugees however, continue to face police harassment as they travel out of the camps, with some police officers declining to honour the UNHCR documentation, resulting in continued arbitrary arrest of the refugees. The confinement of refugees within camps, especially in areas that are less economically developed, further hinders the utilization of the skills and knowledge that the refugee may have come with due to lack of requisite infrastructure to apply the same.

4.2.4 The Institutional Framework for Refugee Protection in Kenya

Chapter 3 of this study discussed the institutional framework under the Refugee Act 2006. It was observed that the Act establishes a Department for Refugee Affairs (DRA) as a public office within the Ministry of State for Immigration and Registration of Persons (MSIRP). The DRA has the responsibility for the administration, coordination and management of issues

¹⁹ Section 16(1)-(4).

related to refugees, including developing policies, promoting durable solutions, coordinating international assistance, receiving and processing asylum applications, issuing identity cards and travel documents, and managing refugee camps.²⁰ The physical establishment of the DRA was completed in 2007 and the offices were then located at Maendeleo House, in Nairobi. In 2010, the DRA office was relocated to James Gichuru Road in Lavington. A visit to the DRA premises confirmed some of the research findings, for instance, the lack of adequate human resource capacity and facilities for the refugee operations. A legal officer interviewed²¹ at the DRA office confirmed that there is currently only two legal officers at the office, which is supposed to take over the full UNHCR operation that has in the past been conducted by more than twelve legal officers at any one time. This is a great impediment to the government's ability to assume its functions entirely. The officer however confirmed that the government is in the process of recruiting more legal officers, but no definite timing was given for this exercise. It should be noted that the department has been in existence for the last four years, and yet no tangible actions seem to have been taken in this regard.

In terms of functions, the DRA continues to work alongside the UNHCR office, both Nairobi and the two refugee camps, in Dadaab and Kakuma, with UNHCR however still undertaking the bulk of the work. The government's capacity only allows it to handle the registration of persons and other less involving responsibilities like issuance of travel passes and travel documents, while UNHCR conducts the Refugee Status Determination interviews. The government functions are conducted together with other line ministries such as the Ministry of Immigration. A maximum of three interviews are conducted by the DRA legal officer, who however recommended the urgent need for further training in refugee issues to help build his

²⁰ Section 6(1)&(2).

²¹ Anjichi T., Interview with Legal Officer, Department of Refugee Affairs, Nairobi, 12 September 2010

capacity to handle more complex cases. The Act is silent on the relevant qualifications for appointment to any of the established offices. It would be prudent if the Commissioner and his protection officers, were persons who showed commitment to the human rights of refugees and, in addition, had some legal background, relevant in interpreting the applicable legislation and make sound judgments. The Act provides for the promulgation of regulations for its better implementation. These should clarify some of the critical issues.

The interviews conducted by DRA at first instance are referred to UNHCR for approval, since unlike UNHCR, which has a Senior Protection Officer for this purpose. Appeals to the DRA decision are also made at UNHCR. The Refugee Appeals Board proposed under the Act, is yet to be established and even then it will consist of representatives who are full time employees in other government departments hence will only be able to sit as regular as possible. This may occasion delay and unnecessary anxiety to refugees awaiting their decisions should the committee fail to adhere by the timelines proposed in the Act. The DRA is also not able to handle other social issues affecting refugees, especially new arrivals who may not have a place to reside while waiting the processing of their cases. Such cases are still referred to UNHCR for assistance. The DRA has only two officers in its Community Services Department hence not able to fully handle this workload.

Section 7 of the Act establishes the Office of the Commissioner of Refugees, an office in the public service, to be headed by the Commissioner of Refugee Affairs. The Commissioner is the Secretary to the Refugee Affairs Committee. He or she is to, among other things, coordinate all measures necessary for promoting the welfare and protection of refugees, including formulating policy on refugee matters in accordance with international standards,²² and advising

²² Section 7(2)(c).

the Minister on how to solicit funds for refugee assistance programmes.²³ Since his appointment four years ago, the Commissioner has initiated several programmes in response to the refugee situation in Kenya and this includes foreseeing the registration and issuances of refugee identity cards that is currently on-going in Eastleigh section in Nairobi. All refugees are required to have the government identity cards and this applies even to those who have been registered and issued with Mandate Refugee Certificates by UNHCR. The Commissioner allows refugee with identity cards and with means to support themselves outside the camps, the opportunity to reside in Nairobi so long as they have the refugee identity cards, which in this case will be clearly indicated 'urban' refugee. In consultation with the department of Immigration, the Commissioner has submitted a proposal for the local integration of some of the refugees who have stayed more than ten years in Kenya and have displayed good conduct.²⁴ For such a heavy laden responsibility, the criteria for appointment of the Commissioner for Refugee Affairs must include persons with a strong commitment to the upholding of the human rights of refugees and with experience of handling refugee issues in a complex environment. The importance of continues training on refugee related issues is inevitable.

Under section 8 of the Act, there is established a Refugee Affairs Committee, responsible for advising the Commissioner for Refugees.²⁵ The main function of the Committee is to 'assist the Commissioner in matters concerning the recognition of persons as refugees,' which includes receiving applications for asylum, advising on recognition and denial of refugee status and asylum. As discussed in Chapter 3, the Committee has a wide membership drawn from various line ministries, departments and interested stakeholders, including civil society. Section 8(3)

²³ Section 7(2)(n).

²⁴ Anjichi T., Interview with UNHCR Protection Officer, UNHCR Branch Office for Kenya, Nairobi, 10 September 2010.

²⁵ Section 8(1)-(5).

provides for the Constitution of the Committee. The Committee which is established on an ad hoc basis, sits every three months and the representatives are also on part time basis as they have other full time responsibilities in their respective ministries. The challenge has however been the failure to get a suitable time when all the representatives can be available thus hindering the effectiveness of this Committee. The purpose of having such an elaborate structure was initially seen as creating an opportunity where exercise of excessive or abuse of power by one individual, could be curbed but such ambitions may be inhibited if the committee fails to create ample time for its activities whenever called upon, leaving the decision making in the hands of only a few. The inclusion of various line ministries and a wide range of stakeholders will, therefore, ensure a comprehensive, all-inclusive approach that will take into account a diverse range of opinions before any decision is taken. In terms of decision making, the Act gives some novel ideas that will help curb the potential for high handedness in handling refugee matters. For instance regarding the decision to disqualify one from refugee status, the Minister is called upon to consult with the Minister for Immigration before taking a final decision. The declaration of a given area as a designated area of residence for refugees under the Act is no longer at the discretion of the Minister, since the Act provides that the Minister shall consult with the host community to seek their support in accommodating the refugees. This will go a long way into helping ease the emerging xenophobic tendencies where host communities oppose expansion or registration of new arrivals and also take into consideration the genuine concerns being raised by host communities.²⁶ Cumbersome as it may sound, the system will also ensure that potential contentious areas, such as security, financial allocations and budgets, health, environmental concerns, gender sensitivity, and security implications, are equally taken into account.

²⁶There is presently on-going tension in Dadaab area, in North Eastern Kenya, between the host community and Somali refugees, over the government's consideration for a third refugee camp to accommodate the increased influx from Somalia.

For the first time in Kenya history, the refugee Committee will include a representative from the host community, hence an initial step in stemming the tensions that persist between refugees and host communities.²⁷ The inclusion of women as envisaged under Section 8(4) is indeed a positive element considering that a sizeable number of refugees are women. This creates an effective platform for raising the unique vulnerabilities faced by the women and children, and ensure that their issues are mainstreamed into the broader programming of refugee responses. Additionally, the Act establishes the Refugee Appeals Board to consider and decide appeals under the Refugee Act.²⁸ The procedure for appeal is as established in section 10 of the Act, and allows rejected asylum seekers thirty days within which to lodge their appeals against the Commissioner's decision. Further grievances are to be brought before the High Court for consideration.²⁹ In contrast to the High Court where appeals will be based on points of law, the Act is however silent on the nature of appeals lodged at the Refugee Appeals Board and fails to expound on whether these will be based on points of law or fact, or both law and fact.³⁰ As discussed above however, the reality is that the Appeals Board is yet to be established due to lack of capacity, and refugee appeals are currently still being handled by UNHCR.

As discussed in Chapter two, prior to the enactment of the Act, Kenya applied the provisions of the Aliens Restrictions Act and the Immigration Act to refugee situations. These Acts remain valid to the Kenyan context and thus create an opportunity for misinterpretation and inconsistent application of the law to innocent asylum seekers in Kenya. The provisions of these

²⁷ Section 8(5).

²⁸ Section 9.

²⁹ Section 10(3).

³⁰ Abuya E.O *Legislating to Protect Refugees and Asylum Seekers in Kenya: A note to the Legislator*, (Moi University, Moi University Press, Research Paper Series Vol. 1 No. 2004, ISSN: 1811-3265, 2004)

Acts should be amended and harmonized with the Kenya Refugee Act ensure their effective implementation.

4.3 Conclusion

No doubt Kenya has taken a commendable step in enacting the Kenya Refugee Act, 2006, in compliance with the international obligations towards refugee protection. The Act represents an ambitious piece of legislation that in addition to incorporating the refugee definition under the international instruments, makes provisions to specific circumstances applicable to the local conditions in Kenya, where majority of the refugee flee due to events seriously disrupting public order. The Act establishes critical institutions to carry out its mandate at the domestic level. The structures envisaged under the Act show a major shift from the previous tendency of vesting wide discretionary powers in individual members of the executive arm of the State, by allowing the transfer of powers to various other committees, which are deemed more democratic, fair and desirable than a single person. There is however an urgent need to ensure that the human resource development and infrastructural capacity requirements of these institutions are adequately provided to support the implementation of the Act. The location of these institutions should be refugee friendly and allow easy access at designated areas, possibly near the ports of entry to ease the inconvenience of travelling long distances, in which case, one may end up losing the much needed time limit for lodging their claim. Effective implementation of the Act, will in essence call for the involvement of both the government and other stakeholders in the field of refugee protection, with the intention of guaranteeing the refugees and asylum seekers on Kenyan soil. enjoy their unique rights as provided. In the next

Chapter, specific recommendations are made with regard to supporting the capacity building and infrastructure development for the implementation of the Refugee Act 2006.

CHAPTER 5: FINDINGS AND CONCLUSION

5.1 FINDINGS

This chapter provides a brief summary of the issues and debates emerging from the discussions developed in the preceding chapters. It concludes with suggested findings and the study hopes that the findings will contribute to a pool of suggestions aimed at improving the functions of the Ministry of State for Immigration and Registration of Persons, the Department of Refugee Affairs and other stakeholders in the field of refugee protection.

Chapter one contains the framework for analysing the subject under review both at the international, regional and at domestic level. In so doing, the chapter provides details on the statement of the research problem, the objectives and justification of the study, the theoretical framework and discusses the research methodology and limitations of the study. The literature review introduces the various views and discussions developed by various scholars into understanding of subject matter.

Chapter two discussed the historical evolution of the refugee regime and how this informed the development of present day international refugee protection regime.

Chapter three discusses Kenya as a case study of the domestication of the refugee obligations and elaborates both the situation before and after the enactment of the Kenya Refugee Act.

Chapter four is a critically appraisal of the Kenya Refugee Act and examines the extent to which the provisions of the Act conforms to international benchmarks for refugee protection, as stipulated in the 1951 Refugee Convention, the 1967 Protocol and the 1969 OAU Convention.

Chapter five contains a summary of all chapters and provides the research findings and conclusion.

The study has achieved the intended objectives, as elaborated in Chapter one, namely;

1. Established the extent to which the Kenya Refugee Act, 2006 is in harmony with the international law on refugees, as enshrined in the 1951 Refugee Convention, the 1967 Refugee Protocol and the 1969 OAU Convention.
2. Evaluated the effectiveness of the institutional framework established by the Refugee Act, 2006, in the management of refugee matters in Kenya.

Despite the enactment of the Kenya Refugee Act four years ago, the provisions of the Act are yet to be implemented fully, with the establishment of some of the institutions, like the Refugee Appeals Board still pending. The status quo for refugees and asylum seekers has seen minimal reforms in terms of management and the guaranteeing of refugee rights and freedoms under the Act and cases of arbitrary arrest and detention of genuine asylum seekers and refugees persist. The Kenyan courts are yet to begin making reference to the Refugee Act, 2006, and magistrates continue to apply the provisions of the Immigration Act and the Aliens Restriction Act in adjudicating cases brought before them. It emerged that the problem lies at the prosecutor level who still make reference to the two Acts when bringing charges against asylum seekers in Kenya. In some instances the cases are referred too late after the person has spent several days in detention, an infringement of their right to asylum.

5.2 The Refugee Definition and obligations under the Act

As discussed in the Chapter four, the enactment of the Kenya Refugee Act came as a relief to majority of the government officials and non-governmental organisations that interact daily with refugee issues. The Act provides a legal framework to base the administrative and legal interventions on behalf of refugees. The Kenya Refugee Act 2006 contains important provisions for the protection of refugees and asylum seekers. The Act contains the Universal

definition of a refugee as enshrined in the 1951 Convention and expounds this with the broadest regional definition as contained in the 1969 OAU Convention. The refugee must also prove under the Act that they are not excludable from refugee status. This aims at securing refugee status without compromising the security of the host country. The Act outlines the rights of asylum seekers to undergo determination procedures for grant of their refugee status and to receive documentation thereto. The special provision for the protection of vulnerable categories such as women and children are clearly highlighted, showing Kenya's commitment to ensuring the safety and security of these categories at risk. The provision of *non-refoulement* is contained in Section 18 and this prohibits the deportation or return of refugees to countries where they fear persecution or harm. The Act generally conforms to the international benchmarks for refugee protection but the full guarantee of such rights can only be seen if the government takes active steps by developing the relevant guidelines for the implementation of the Act.

The Act requires the Minister in charge of refugee affairs to make regulations generally for the better carrying out of the provisions of the Act.¹ The provisions in the Act, including those on the procedures for appeal (whether a consideration of fact or law); formation of committees and the appointment to such committees; procedures for expulsion of refugees; control and regulation of persons who may be required to live within a designated place or area and special measures for the protection of women, children and persons with disabilities, require additional guidance to facilitate their actual implementation. This process is ongoing, albeit at a very slow pace due to lack of capacity at the Department of Refugee Affairs to support this activity. The situation calls for the involvement of multiple stakeholders in the field of refugee protection, to provide their distinct expertise and support the government's efforts in this regard. This observation is supported by both the systems and natural law theories reviewed in Chapter

¹ Section 26 (1)&(2)

one under the theoretical framework for the study. UNHCR and other stakeholders with experience in refugee matters are well positioned to offer guidance and contribute substantially to the formulation of such regulations. Lessons can also be learnt from other countries in the region, like Tanzania, where the country in 2010 developed regulations and granted citizenship to a large number of Burundian refugees who fled to the country in the 1990s. Reference can also be made to the series of ‘‘Conclusions’’ by the Executive Committee² on the international protection of refugees, which represent an important expression of international consensus on varied topics as envisaged under the Kenya Refugee Act. Caution should however be made during this process to ensure that the regulations made are not too restrictive, thus hinder or water down the full enjoyment of the rights guaranteed under the Act.

Under the Act, both the host community and the citizens have a moral and legal obligations *vis-à-vis* the asylum seekers and refugees in Kenya. This responsibility is however often ignored resulting in the xenophobic tendencies and acts of intolerance towards refugees, as is the case in Kenya’s North Eastern province that hosts the Dadaab refugee camp. The Act requires a representative from the host community to be part of the Refugee Affairs Committee. As discussed in Chapter three, the Committee however meets only once in three months and the process is not yet consistent. There is therefore an urgent need for the Department of Refugee Affairs, through its camp officers, to organise continued civic education for both the local community and the refugee population in affected areas, on the need for cohesive co-existence and the promotion of tolerance, peace, harmony and protection of the environment. A public information campaign could be initiated with the aim of strengthening the awareness concerning the moral and legal obligations *vis-à-vis* asylum seekers and refugees and the implications of the

² UNHCR Governing Body established in 1975 for purposes of approving the coming year’s programme and budget. Kenya became a member of the UNHCR Executive Committee in 2003. Opinions by this body constitute ‘soft law’, which is advisory in nature and is crucial in all legal and policy debates on refugees issues globally.

Act. This should be a continuous activity in line with the developments within the department of refugee affairs and not a one-off exercise that only emerges when there is a crisis.

The Institutional Framework and Capacity Building

In setting up the different refugee departments, the Act allows for a broad representation in its various committees, bringing in stakeholders from various line ministries and gender. The inclusion of the host community recognises the role that they play in refugee management in general. The Act calls for sound environmental considerations to be taken into account when settling and managing refugee environments. As highlighted in Chapter four, one of the major impediments to the effective implementation of the provisions in the Act, is the lack of capacity both in terms of human resource, and adequate infrastructure at the established refugee departments. Four years down the line, the Department of Refugee Affairs (DRA) still relies on UNHCR to conduct Refugee Status Determination Interviews and to handle Appeal cases. The Refugee Appeals Board proposed under the Act is yet to be established. Appeals are therefore referred to UNHCR for review and approval. At present, the DRA has limited resources staffed by one legal officer conducting the interviews. The officer however lacks the operational experience on refugee related issues, hence a hindrance to their efficiency. The department is said to be in the process of recruiting more legal officers to support its functions. In the meantime, refugees are torn between UNHCR and the DRA for processing of their claims. A time-based approach in the process of developing the capacity and staffing is therefore necessary to support the much needed transition of responsibilities and institutional anchorage from UNHCR to the government department.

Refugee status determination is a complex process that requires time, experience and dedicated training programmes to reduce the risk of inadvertently denying the only remaining protection to deserving cases. This will require support from both the government and relevant stakeholders, including donors and UNHCR,³ to ensure that the department is well staffed and that the officers are well trained and receive continued refresher courses on international protection and refugee issues. UNHCR could consider offering consultancy services and trainings for the government department, free of charge, in line with its international mandate. The training programmes should be equally extended to judicial and police officers to ensure that refugee rights are protected at all levels. The police and immigration institutions have in the past been criticised for being corrupt, unprofessional and lacking in transparency in the way they handle refugee refugees. Adequate training and awareness raising in this regard is therefore necessary. There is also an urgent need to increase the capacity of the three levels of refugee status determination to avoid a situation where refugees will be made to wait for longer than is necessary for the hearing of their cases. One can only hope that the triple-tier hierarchy established for the determination of refugee status will act expeditiously, considering the context in which such applications are made and that it will follow the rules of natural justice and grant refugees a fair hearing.

Due to the need for specialized training in the refugee field, recruited staff should be allowed to remain within the department without being subject to general transfer policy like other civil servants. The training should therefore be an integral part of the general training programme for the respective public employees, rather than ad hoc activities for only those who at a given time are exposed to refugee related issues. The government should therefore maintain

³ UNHCR Statute mandates UNHCR to assist governments in building capacity and expertise to adequately provide international protection to refugees and seek durable solutions to their problems.

and establish partnerships with UNHCR, the general public and other relevant government departments, agencies and NGOs for provision of technical expertise for training in matters relating to refugee administration and management. In addition, there is an urgent need for the government to reinforce its capacity in the designated refugee camps by securing continuous registration of refugees and participation in the actual refugee status determination at camp level. The National Registration Board responsible for issuance of refugee identity cards still relies on the registration information stored by UNHCR. There is the need for this institution to upgrade its system and establish a database for the storage of basic biometric data of refugees and asylum seekers in Kenya. By undertaking such a basic exercise, this will ensure that government officers acquire direct and immediate knowledge of the refugees and also listen first hand to their problems thus provide guidance for the much needed direction and support to the local authorities and other stakeholders in solving refugee problems. An effective repatriation and integration process for instance requires verified and updated basic registers and refugee determination processes.

Under the Act, both the host community and the citizens have a moral and legal obligations vis-a-vis the asylum seekers and refugees in Kenya. This responsibility is however often ignored resulting in the xenophobic tendencies and acts of intolerance towards refugees, as is the case in Kenya's North Eastern province that hosts the Dadaab refugee camp. The Act requires a representative from the host community to be part of the Refugee Affairs Committee. As discussed in Chapter three, the Committee however meets only once in three months and the process is not yet consistent. There is therefore an urgent need for the Department of Refugee Affairs, through its camp officers, to organise continued civic education for both the local community and the refugee population in affected areas, on the need for cohesive co-existence

and the promotion of tolerance, peace, harmony and protection of the environment. A public information campaign could be initiated with the aim of strengthening the awareness concerning the moral and legal obligations vis-à-vis asylum seekers and refugees and the implications of the Act. This should be a continuous activity in line with the developments within the department of refugee affairs and not a one-off exercise that only emerges when there is a crisis.

5.3 Durable Solutions

Under the Act, the Commissioner is charged with the responsibility of identifying durable solutions for refugees. This is to be conducted under the guidance of the Refugee Affairs Committee. International Refugee law recognises local integration, resettlement and voluntary repatriation as the most common durable solutions. The Act does not however make mention of resettlement as an option for durable solution in Kenya, hence the need to ensure that the envisaged regulations accommodate this important aspect of international law, applicable to persons who are unable to remain in Kenya for approved reasons. The criteria for this category of persons should be clearly spelt out in the regulations. The study established that the Kenya government is in the process of considering a proposal for local integration of a category of refugees made by the Department of Refugee Affairs for the local integration of a group of refugees who are considered to have lived in Kenya for a considerably long time and are of good conduct.⁴ Such a process will require series consideration and identification of a reasonable criteria and structures to ensure that the process is not only manageable, but also sustainable and does not lead to unfulfilled expectations. This should be weighed against the country's own local

⁴ Interview with a Legal Officer at the Department of Refugee Affairs in Nairobi, 13 September 2010. Officer requested to remain anonymous and that the actual details of current proposal be withheld since the idea is yet to be approved by the relevant government departments. This will also ensure security for the targeted refugee population and avoid a flood of would be potential cases.

capacity and ability to provide certain basic rights to its own citizens to avoid undue competition and hostility between the two groups. An all-inclusive, comprehensive approach, involving both refugees and nationals, will contribute largely to the search for sustainable durable solutions in Kenya. In addition, the government and humanitarian actors should shift towards recognizing and supporting the significant contribution to the economy by refugees living in Nairobi. This will enhance the self-reliance of refugees as a means to promote durable solutions and with proper registration systems and fair taxation, this process can also bring revenue to the government as was discussed in Chapter three.

5.4 Observing the non-refoulement principle

The provision on *non-refoulement* as contained in Section 18 of the Act prohibits the deportation or return of refugees to countries where they fear persecution or harm. On the contrary however, Kenya continues to maintain a tight grip on its border with Somalia thus denying entry to persons fleeing violent attacks in Somalia. This not only violates Kenya's obligations in respect to the right of asylum but also exposes a large number of vulnerable people to risks by denying them entry into Kenya. The study observed that the rationale for the border closure, which in this case lies in the desire for Kenya to free itself of armed elements that pose a high risk of insecurity in Kenya and the region, could be solved through more innovative ways that involve cooperation between the relevant line ministries. The government could for instance consider, in collaboration with UNHCR and other refugee organisations, establishing a stronger presence of both security officers and humanitarian workers at the border entry points to facilitate adequate screening and vetting at the point of entry, which processes will guarantee that persons with genuine claims access protection, without compromising the country's national

security. Such a process will simultaneously discourage those who do not qualify for refugee protection from attempting to manipulate the system or remain in Kenya illegally. The continued closure notwithstanding, refugees continue to enter Kenya illegally and in this regard avoid registration hence complicating the legal processes envisaged under the Act for the smooth operation of the entire process. The level of insecurity is also said to be on the increase as foreigners continue to enter the country illegally through other means.

The government of Kenya is also in the process of developing a national policy on refugees. The national policy, which is long overdue, should clearly outline the necessary steps for its implementation. Taking over the refugee responsibilities from UNHCR is a complex process and will require short, medium and long term considerations, as well as coordination and engagement with other Kenyan government department. This will also support long term political commitment once endorsed by the Parliamentarians. Such a strategy should set out the legislative alignment, institutional reforms, training, infrastructure, equipment necessary, linkage with other socioeconomic and political departments, funding issues and transfer processes. The setting aside by the government of a specific budget for the Refugee department is a commendable first step in ensuring that the operational costs for the process are covered in a predictable manner, contrary to the former system of reliance on international aid that sometimes delays. By allocating a specified budget from the public budget to the department of refugee affairs, the government clearly shows its desired ownership and commitment to secure the institutional sustainability for this department. The officers in charge of handling the refugee budget should be well versed with the emergency nature of refugee affairs and also together with the Refugee Affairs Committee, engage in fund raising mechanisms to ensure that the refugee

budget is well funded and sustainable. The national policy under draft should include provisions on the management of this fund.

The essential conclusion of this study is that the enactment of the Refugee Act is indeed a commendable milestone in Kenyan history. Given Kenya's prominence in the promotion of peace and security in the region, it is important that Kenya sets the standards for proper management of populations displaced into her territory. Diverse challenges persist with regard to the actual implementation of the Act, hence the need to take time to design and participate actively in a solid, broadly based initiative to build on the formal commitments enshrined in the Act. Urgently needed is support for the institutional strengthening, including development of systems and procedures, adoption of management tools and skills related to the establishment and preparation of the department of refugee affairs.⁵ This will support the effective and gradual transfer of responsibilities from UNHCR to the government and ensure sustainable management of the process thereafter.

⁵ UNHCR Kenya, *'Capacity Building of the Kenyan Refugee and Asylum System-Institutional Capacity for the Implementation of a new Refugee Bill,'* Project Description, Ref No.46.h.1-5, Nairobi, March 2005

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