

**University of Nairobi**

**The Implementation of Refugee Rights in International Law: Case Study of Kenya  
1990 -2006**

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Project submitted in partial fulfillment for the award of a degree in Masters of Arts in  
International Studies, Institute of Diplomacy and International Studies (IDIS), University  
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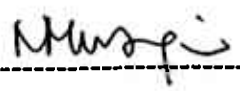
## Declaration

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

Arthur Amaya Andambi -----

Date 12/11/2008

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

Prof. Makumi Mwangi -----

Date 14/11/08

## Acknowledgements

I am first and foremost deeply touched by The Lord God Almighty who gave me life, strength and ideas to pursue this project. To Him goes all the glory for protecting us through turbulent times now and in the future. Secondly I want to pay tribute to my supervisor Prof. Makumi Mwagiru who tirelessly guided me through the chapters with very incisive and challenging ideas. I am sure I have much more to learn from him in pursuit of my academic advancement for the future.

I also want to remember all the officials at the Department for Refugee Affairs who did not hesitate to assist me when I called on them. The office of the United Nations High Commissioner for Refugees was also very useful and in particular Janet Ouma of the Protection Division. Lastly, I would not have done justice if I did not mention officials at the Refugee Consortium of Kenya and the Jesuit Refugee Services who permitted me to use their documentation centers whenever I needed to.

For all of you who assisted me in one way or another, please understand that I cannot possible mention everybody, but do accept my appreciation. In particular refugees who played a role in collection of primary data and my many Christian friends who continuously stood with me in prayer.

**MAY THE LORD BLESS YOU ALL.**

## **Dedication**

**This work is dedicated to all peace loving people in the world and particularly those who express their love to the needy as seen in the instructions contained in Mathew 25: 35.**

## Abstract

This study has investigated the implementation of refugee rights from both an international, regional and national perspective. The international perspective has examined the work of the League of Nations and the United Nations. The purpose of the United Nations High Commissioner for Refugees has also been looked at. The 1951 Geneva Convention Relating to the Status of Refugees and its subsequent Protocol of 1967 have been examined. The contribution of the 1969 OAU Convention on Specific Aspects of Refugee Problems in Africa has also been looked at. Finally, Kenya has been used as a case study and the implementation of refugee rights in Kenya has been examined in detail.

The study has used both secondary and primary data. The secondary data includes published books, Journals, articles and documents. The primary data stems from interviews carried out on refugees in the camps and Nairobi. The simple random sampling method was used to arrive at a sample of 126 refugees. 63 of these were from the camps and an equal number from Nairobi. Those interviewed were men, women and children. Government and UNHCR officials were also interviewed.

The study found out that most of the rights entitled to refugees have not been fulfilled in entirety. Concerning rights that are similar to nationals, the government has made a good attempt to respect them. Those that are same as aliens and the ones which are absolute and specific to refugees have been respected to a lesser extent.

## **List of Acronyms**

<b>AIDS</b>	-	<b>Acquired Immune Deficiency Syndrome</b>
<b>CTD</b>	-	<b>Conventional Travel Document</b>
<b>DC</b>	-	<b>District of Columbia</b>
<b>FGM</b>	-	<b>Female Genital Mutilation</b>
<b>HIV</b>	-	<b>Human Immunodeficiency Virus</b>
<b>IDPS</b>	-	<b>Internally Displaced Persons</b>
<b>KNCHR</b>	-	<b>Kenya National Commission on Human Rights</b>
<b>LWF</b>	-	<b>Lutheran World Federation</b>
<b>MSF</b>	-	<b>Medicins Sans Frontiers (Doctors without Borders)</b>
<b>NCCK</b>	-	<b>National Council of Churches of Kenya</b>
<b>NGOS</b>	-	<b>Non Governmental Organizations</b>
<b>OAU</b>	-	<b>Organization of African Unity</b>
<b>RCK</b>	-	<b>Refugee Consortium of Kenya</b>
<b>RSD</b>	-	<b>Refugee Status Determination</b>
<b>SIDA</b>	-	<b>Swedish International Development Agency</b>
<b>UN</b>	-	<b>United Nations</b>
<b>UNICEF</b>	-	<b>United Nations Children’s Fund</b>
<b>UNHCR</b>	-	<b>United Nations High Commissioner for Refugees</b>
<b>UNRRA</b>	-	<b>United Nations Relief and Rehabilitation Agency</b>
<b>WFP</b>	-	<b>World Food Programme</b>
<b>WW1</b>	-	<b>World War One</b>
<b>WW2</b>	-	<b>World War Two</b>

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# Chapter One

## Introduction to the Study

### Introduction

Kenya, as is expected with most countries which are members of the United Nations has signed and ratified the 1951 Geneva Convention on the Status of Refugees. It has also acceded to the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. These Conventions spell out various rights and freedoms which refugees are entitled to and consequently governments that have signed and ratified them are expected to respect and uphold those rights.

The general concept of refugees has developed over the years and in most cases refugees have been viewed quite negatively with their rights being violated in their countries of asylum. This is not supposed to be the case because reasons emanating from their flight are as a result of their rights being violated in their countries of origin. Many governments view refugees from a political rather than humanitarian angle. Even more specific they are viewed as a security risk and a burden to the economy of the host country.<sup>1</sup> This follows claims that the presence of refugees in some areas has exacerbated crime irrespective of whether the said criminal activities are carried out by refugees or other aliens. The study will by and large look at the general treatment of refugees in relation to their rights.

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<sup>1</sup> Jacobsen K, 'Can Refugees Benefit the State? Refugee Resources and African State building', *The Journal of Modern African Studies*, Vol. 40, No. 4. (Dec., 2002, pp.577-596) p.579

## **Statement of the Research Problem**

The 1951 Geneva Convention on the Status of Refugees calls upon States to uphold certain standards in their treatment of refugees within their territory. These standards are respecting refugee rights which are Civil/Political as well as Socio Economic and Cultural Rights ones. The Civil and Political ones include the right to association and access to courts while the Socio-Economic and Cultural ones include access to decent housing and Education. Kenya as a signatory to the 1951 Geneva Convention on the Status of Refugees is expected to treat refugees in accordance with the provisions of the convention. However Kenya does not seem to be respecting these rights hence leading to a violation of refugee rights which goes against the spirit of the 1951 convention.

## **Objectives of the Research**

- To examine the general implementation of the 1951 Geneva Convention on the Status of Refugees.
- To identify specific weaknesses in government's implementation of refugee rights in accordance with the convention and advice accordingly.

## **Literature Review**

The literature to be reviewed includes books, journals, papers presented at seminars and projects written by other scholars in the refugee field. The aim of reviewing this literature is to analyze the debates and identify the gaps which this project intends to fill. A review of the 1951 Geneva Convention on the Status of Refugees as the main international convention dealing with refugees is given. The 1967 protocol to this Convention is also looked at and finally The Organization of African Unity Convention

on Specific Aspects of Refugee Problems in Africa is also critiqued as the regional instrument in Africa.

The review further looks at the Refugee Act (2006). This was a major feat since Kenya had no domestic legislation governing refugee matters for a long time even though the country shouldered the burden of hosting many refugees.<sup>2</sup> The situation of refugees within the African continent is then addressed as it is the continent with the largest number of refugees who constitute more than 40 per cent of the world refugee population.<sup>3</sup> The specific situation in Kenya is also examined focusing first on general aspects of refugee management in the country. This will show how the country struggled to contain a large influx in the early 1990s. Finally the specific concept of refugees living in urban areas is addressed touching on outside examples and those specifically relevant to Kenya.

### **The 1951 Convention and 1967 Protocol**

The phenomenon of asylum took shape after the Second World War. This was at the creation of the United Nations Organization which also formed many functional organizations among them the United Nations High Commissioner for Refugees (UNHCR) which was established in 1951 vide the 1951 Geneva Convention on the Status of Refugees. This was at a time when many had been displaced and had no specific state that could protect them. The situation then called for international intervention leading to the enactment of this Convention whose mandate is to protect people fleeing their countries of origin and seeking asylum in other countries on grounds of having a well

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<sup>2</sup> See Ogaye N.E.; *Is the Absence of a National Refugee Legislation in Kenya a Contributory Factor to the Plight of Urban Refugees?* M.A Thesis, the Catholic University of Eastern Africa, Hekima College, Dec. 2006.

<sup>3</sup> Adepoju A., 'The Refugee Situation in the Horn of Africa and Sudan', *A Journal of Opinion*, Vol. 12, No. 1/2, (Spring – Summer, 1982 pp. 29-34). p. 29.

founded fear of being persecuted. Because the Convention was enacted at a time when the refugee crisis was more relevant to the European situation, it had a clear European orientation. Its approach was therefore based on events that happened before 1<sup>st</sup> January 1951.<sup>4</sup> This situation was however addressed by the 1967 Protocol to this Convention which deleted the words “As a result of events occurring before 1 January 1951”. To date the 1951 Convention and the 1967 Protocol remain the principle international instruments benefiting refugees.<sup>5</sup>

### **The 1969 OAU Refugee Convention**

Even though the Protocol to the 1951 Convention on the Status of Refugees removed the clause confining the definition of a refugee to events occurring before 1<sup>st</sup> January 1951, it did not address other issues that were relevant to refugee flows in Africa. These included mass flows of refugees as a result of foreign domination, aggression and events affecting either part or the whole of the country in question. Because of this omission, African Heads of State and Government sought to come up with a regional instrument which would address such issues among others. In establishing the 1969 OAU Convention they recognized the refugee definition given by the 1951 Convention of who a “refugee” is. But they also went further and indicated that the definition shall include ‘every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality’.<sup>6</sup>

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<sup>4</sup> Gibney J. M., *The Ethics and Politics of Asylum, Liberal Democracy and the Response to Refugees*, (Cambridge: Cambridge University Press, 2004) p.7

<sup>5</sup> Gill G. G., *The Refugee In International Law*, (Oxford University Press, 1998) p. 20

<sup>6</sup> Article 1(2) of the 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa.

The 1969 OAU Convention also recognizes certain rights that refugees are entitled to such as the right to seek asylum under article II and the right to possess travel documents under article VI. It also has the necessary Cessation Clause under article 1(4) and Exclusion Clause under article 1(5). The Convention also prohibits refugees from using the territory of an asylum country in order to engage in subversive activities against his country of origin under article (III).

### **The Refugees Act (2006)**

Kenya did not have a Refugee Act for all the years until 2006. This is irrespective of the fact that the country had all along sheltered many Refugees.<sup>7</sup> Under Article 3, The Refugee Act (2006) recognizes a refugee to be a person fleeing One country to another as a result of having a well founded fear of being Persecuted. It further recognizes a *prima facie* refugee as a person who '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 is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality'. The former definition is in tandem with the 1951 Geneva Convention on the Status of Refugees while the latter is in agreement with the 1969 OAU Convention on Specific Aspects Governing Refugee Problems in Africa.<sup>8</sup> The Act also spells out circumstances under which a person can be excluded from grant of refugee status. It also spells out under what circumstances the cessation clause can be upheld.

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<sup>7</sup> Ogaye N. E., *Is The Absence of National Refugee Legislation in Kenya a Contributory Factor to The Plight of Urban Refugees*. M.A Thesis, the Catholic University of East Africa, Hekima College. 2006. p. 16.

<sup>8</sup> *Refugees Act* 2006. p. 440.

One major step in the right direction in the Act is the establishment of a refugee department which in essence is projected to take over functions which were performed by UNHCR.<sup>9</sup> The establishment of this department will certainly enable the government fulfill its fundamental role of granting refugee status through the necessary Refugee Status Determination Interviews.

### **The Refugee Situation in Africa**

Africa has over the years hosted most of the world's refugees.<sup>10</sup> This has partly been as a result of the developed countries stemming the flow of refugees into their own countries. Besides these countries are at the forefront in advocating for the confinement of most of the world's refugees to their countries of origin. It has been observed that Africa shelters more than double the number of refugees protected in the whole of Europe, North America and Oceania combined.<sup>11</sup> The other strong undoing for Africa is the fact that most of the countries are economically disadvantaged making it difficult for them to adequately address the plight of refugees.<sup>12</sup> However the greatest problem of refugees within the continent has its history in many years of misrule that have been in place in most of the African countries. This led to people fleeing their countries of origin and seeking asylum in other countries many times as a result of their rights having been violated.<sup>13</sup> East Africa has had its specific measure of challenges as concerns the flow of refugees within the three countries namely Kenya, Uganda and Tanzania. The countries

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<sup>9</sup> Ibid. p. 443.

<sup>10</sup> Hathaway J.C., *Re-conceiving International Refugee Law*, (The Hague, Netherlands: Martinus Nijhoff Publishers, 1997) pp. 88-92.

<sup>11</sup> Ibid., p. xxi.

<sup>12</sup> Ibid., p. 24.

<sup>13</sup> Rutinwa B., *Refugee Claims Based on Violations of International Humanitarian Law: The Victims Perspective*. Paper presented at the East African School on Refugees and Humanitarian Affairs (EASRHA). University of Dar es Salaam. 3<sup>rd</sup> -16<sup>th</sup> September, 2005. p. 497.



of this region are known to have enacted laws which focus on restricting the movement of refugees without addressing the root cause of the problem.<sup>14</sup>

### **Kenya's Experience in Hosting Refugees**

Kenya on its part did not have the experience of taking care of a large number of refugees before 1991. The numbers in the country were quite minimal. Apart from Ugandan refugees who worked in various parts of Kenya as teachers, the government estimated that there were approximately 14,000 other refugees living mainly in and around Nairobi.<sup>15</sup> However in 1991, there was an unprecedented influx of refugees in the country following political upheavals in Somalia and Ethiopia.<sup>16</sup> The Government working in collaboration with UNHCR and aid agencies moved swiftly in the management of such a massive programme. These agencies included the Care International in Kenya, Lutheran World Federation, (LWF) Medicines Sans Frontiers, (MSF) National Council of Churches of Kenya (NCCK) and United Nations Children's Fund (UNICEF). It is estimated that in 1992 and 1993, UNHCR spent US\$40million to establish refugee camps and border sites in Kenya.<sup>17</sup> Because of the sheer volume of refugees that had come into the country, the government in conjunction with UNHCR, was compelled to invoke the *prima facie* status determination principle which means that in the event of a person fleeing from countries that are known to be going through turmoil, then the same shall be recognized as a refugee.<sup>18</sup> This was because the

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<sup>14</sup> Kamanga K., *International Refugee Law in East Africa*. Paper presented at the East African School on Refugees and Humanitarian Affairs (EASRHA), University of Dar es Salaam, 3<sup>rd</sup> -16<sup>th</sup> September, 2005. p. 34.

<sup>15</sup> *Report on Refugees and Undocumented Aliens in Kenya*, File on Refugees Minutes of Meetings at the Ministry of Home Affairs, No. I.S. 115/08 (S). Folio 20. P. ii.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.* p. 51.

<sup>18</sup> *Ibid.* p. 23.

government had neither the expertise nor the staff to tackle such a large number of refugees, the whole process of Refugee Status Determination (RSD), was left to UNHCR.

### **Refugees Living In Urban Areas**

One of the biggest categories of refugees worldwide is those who live in urban areas. In fact in the developed world, most refugees can be said to live in urban areas since the concept of rural set-up does not as such exist there. It however has been observed that refugees who live in urban areas face more problems than their rural counterparts because of the pressing needs of urban dwellers. Gould has observed that:-

Being in general better-educated and more highly skilled than rural refugees, the urban refugees expect to find opportunities in the wage labour market, but face the same difficulties as any international migrants because of nationalist labour policies and job reservation. The economic problems of urban refugees may be compounded by active involvement in political activities that are unwelcome in the country of asylum.<sup>19</sup>

In Kenya, refugees living in urban areas have never been clearly documented by the government. This is because of the prevailing policy that they should be in designated camps.<sup>20</sup> The question of a refugee being rural or urban has not been addressed by either the international or regional convention. The United Nations High Commissioner for Refugees however recognizes refugees who distinctly live in urban areas and attempts to define them through one of its publications as those who have been politically active such as politicians, members of government and students. Naturally, they all do not necessarily

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<sup>19</sup> Gould T.S., 'Refugees in Tropical Africa' *International Migration Review*, Vol. 8, No. 3, International Migration in Tropical Africa. (Autumn, 1974, pp. 413-430) p. 426

<sup>20</sup> Refugee Consortium of Kenya, *Regional Refugee Trends Update* (Nairobi, October, 2000) p. 1

need to have been living in an urban setup before fleeing. It also includes professionals and people with higher education.<sup>21</sup>

### **Justification of the Study**

The refugee field has elicited studies in many areas over the years both in Africa and in other parts of the world. Most of the studies however have tended to focus on general areas as concerns their plight without specifically looking at their rights in relation to international law. One of these studies focuses on the general assistance that United Nations High Commissioner for Refugees extends to refugees.<sup>22</sup> This study looks at provision of basic needs to refugees in Kenya. These include food and non food items. The other study available focuses on the area of conflict and diplomacy from a broader spectrum.<sup>23</sup> It analyses how diplomatic means can be used to stem conflicts which ultimately produce refugees. It therefore looks at solutions aimed at ensuring that refugee influxes are avoided in the country of origin. Another study available concentrates on what assistance refugees living in urban areas are accorded.<sup>24</sup> This study basically focuses on the socio-economic status of refugees.

Based on this, it comes out vividly that the area of refugee rights in accordance with the 1951 Geneva Convention on the Status of Refugees and the 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa has not been adequately addressed. It is important therefore to examine if the rights of refugees living

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<sup>21</sup> *Urban Refugees, a Community Based Approach. Community Service Guidelines*, (UNHCRs Community Service Unit, Geneva, 1996) p. 17.

<sup>22</sup> Aluka V., *African Refugee Problem: A Case Study of UNHCRs Assistance to Refugees in the Horn of Africa*, M.A Thesis, University of Nairobi. September, 2003.

<sup>23</sup> Kamungi M. P., *Refugees, Conflict and Diplomacy*, a Case Study of the Great Lakes Region (1993-1998). M.A Thesis, University of Nairobi, September, 2001.

<sup>24</sup> Wanjiru M. M., *A Christian Approach To The Refugee Problem in Urban Areas: A Case Study of Jesuit Refugee Service With Emphasis on The Mikono Project*, M.A Thesis, University of Nairobi – Department of Religious Studies. July, 2003.

in Kenya have been respected whether they are in camps or towns. These include right to asylum (article 3 of the 1951 Convention on the Status of Refugees), right of association (article 15 of the 1951 Convention on the Status of Refugees), right to public education (article 22 (1) of the 1951 Convention on the Status of Refugees which states, 'The Contracting States shall accord to refugees the same treatment as accorded to nationals with respect to elementary education'). This study is essential as it is intended to verify if these rights and the necessary freedoms within the Convention have been respected. These freedoms include freedom of movement as provided for in article 26 of the convention and the choice to naturalize as provided for in article 34 of the convention which states, 'The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings'. The findings will assist the relevant government authorities dealing with refugees improve on the treatment accorded to refugees.

### **Debates in the Literature**

The literature which has been reviewed has raised fundamental issues to be noted. The review of international instruments such as the 1951 Convention and the 1967 Protocol as observed by Guy Goodwin Gill in "Refugees in International Law" paints a picture espoused by functionalism where international institutions are expected to provide a way for states to overcome problems of collective action. The OAU Convention seems to argue as much. However this functionalist approach has not borne much fruit especially with respect to the refugee crises as numerous peace meetings by nations of the world community have not put a stop to the refugee crisis globally.

The literature on refugees within the African continent gives a perspective that brings to the fore the National Identity Approach Theory. James Hathaway in his book “Re-conceiving International Refugee Law” argues how in an effort to safeguard their nationalism, the developed world stems the flow of refugees into their countries and advocates for them to remain in the developing world.

This debate seems to have been buttressed by an East African Scholar, Dr. Khoti Kamanga of the University of Dar es Salaam who argues in his paper “International Refugee Law in East Africa” that East African Countries restrict the movement of refugees in an attempt to retain their nationhood thus not welcoming refugees to mingle with their citizens. Finally literature touching on Kenya brings out the realist perspective where Kenya is so concerned with state security and the survival of the state. Here Gill Loescher and James Milner in their book ‘Protracted Refugee Situations-Domestic and International Security Implications’ give an analysis of how Somali refugees in Kenya are viewed as a security risk because of the belief that they could be involved in acts of promoting calls of a bigger Somalia and therefore risk succession of North Eastern Kenya.

### **Theoretical Framework**

In the preceding literature which has been reviewed, debates that have come to the fore fail to focus seriously on the issue of human rights. The functionalists give an attempt of encouraging states to work together without emphasizing the question of human rights particularly as they affect refugees in a host country. The National Identity Approach paints a picture of nationals that are more concerned with their own interests than other people while the realist approach is even more intimidating as it concentrates

on the survival of the states by all means including discriminating certain groups of people.

As relations amongst countries of the world have been solidified by globalization lately, this project will focus on the Globalization Theory which has been credited with having “the impact of the human rights regime on refugee policy” among other issues.<sup>25</sup> This is a fundamental positive step in the world of globalization as countries have had most of their policies being challenged more and more to accommodate respect for human rights. This is even more relevant to refugees since as *human beings* they are entitled to enjoy certain fundamental rights as Samantha & Allison observe:-

The Human Rights idea declares that every human being, in every political society, has ‘rights’: recognized, legitimate claims upon his or her society to specific freedoms and other goods and benefits. They are claims ‘as of right’, not by grace, or love, or charity, or compassion.<sup>26</sup>

Refugees as human beings are in no way exempted from these rights hence the approach the project will take is to investigate if these rights have indeed been respected under international law.

## **Hypotheses**

The following hypotheses will be tested in the study.

1. The government’s implementation of the 1951 Geneva Convention has contributed towards improving the rights of refugees.
2. The government’s implementation of the 1951 Geneva Convention has been wanting hence leading to a violation of refugee rights in Kenya.

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<sup>25</sup> Meyers E., ‘Theories of International Immigration Policy – A Comparative Analysis’, *International Migration Review*, Vol. 34, No. 4, (Winter, 2000, pp. 1245-1282) p 1268.

<sup>26</sup> Power S. & G. Allison, *Realizing Human Rights – Moving from Inspiration to Impact*, (St. Martins Press, New York: 2000) p 5.

## **Methodology of the Research**

The project will be conducted by using both primary and secondary data. As for secondary data, literature that is available on refugee rights will be accessed and analyzed. Various sources will be used such as the University of Nairobi Law Library, The Refugee Consortium of Kenya and the Jesuit Refugee Services documentation centers, the United Nations library in Gigiri and Published Journals. The literature will provide a strong basis to look at what the international perspective of refugee rights is as well as the regional (African) dimension and finally the development of refugee rights in Kenya will be looked at all through the years of the 1990s to 2006.

The primary data will be collected mainly through questionnaires which will be prepared with questions aimed at specifically eliciting responses based on the study objectives and hypotheses. This will be by use of the triangulation method. That is by administering questionnaires and conducting interviews directly. In situations where the researcher cannot interview refugees directly, the questionnaires will be given to assistants preferably those who can easily understand the language spoken by refugees. They will assist in collecting data. The best would be fellow refugees who are literate. This will inevitably break the barrier of suspicion. The research will target refugees of Somali, Ethiopian and Sudanese origin who are the majority in the country and who benefit from the *prima facie* status determination. Kenya has approximately 220,000 Somali refugees, 50,000 Sudanese refugees and 20,000 Ethiopian refugees living in the camps. Refugees of Somali origin are to be found mainly in the Dadaab camps of Garissa District while those of Sudanese and Ethiopian origin are to be found in Kakuma camp situated in Turkana District.

In Nairobi there is an estimation of about 60,000 refugees living there being mainly from the three nationalities already mentioned. The simple random technique will be used to arrive at a representative sample of interest groups. A sample of 126 refugees in total being 63 from the camps and an equal number from Nairobi will be taken. The selection of respondents will be done carefully and diligently in view of the fact that the entire populace of refugees should be seen to have been represented. This will therefore be done to include men, women and the young. The 63 sample size for the camps will therefore target 7 men, 7 women and 7 youths of all the nationalities i.e. from Somalia, Ethiopia and Sudan. The same procedure will be replicated in Nairobi.

It is hoped that with such a sample representing a wide spectrum of individuals from both the camps and Nairobi, accurate results reflecting the feelings of refugees with respect to their rights under international law should be arrived at. In order to strike a balance concerning the study of refugee rights, questionnaires will also be developed for government and UNHCR officials who in essence are charged with the implementation of these rights. The interviews for officials from the governments and UNHCR will be carried out directly.



## **Chapter Outline**

### **Chapter One: Introduction.**

This chapter forms the introduction of the research study by setting out its broad context. This includes the statement of the problem, justification, theoretical framework, literature review, hypotheses and methodology.

### **Chapter Two: International Refugee Rights.**

This chapter will provide the background of the concept on refugee rights as seen from an international angle.

### **Chapter Three: Kenya's Experience in Hosting Refugees.**

This chapter will examine the trend that has taken place in Kenya towards hosting refugees by looking at the challenges experienced and the solutions taken in combating those challenges.

### **Chapter Four: Case Study of Kenya.**

This chapter will examine a specific categorization of rights which refugees are entitled to and how Kenya has implemented them. Primary data collected will also be analyzed.

### **Chapter Five: A Critical Analysis of Refugee Rights.**

This Chapter will present a critical analysis of the issues emerging from the previous chapters.

### **Chapter Six: Conclusions**

This chapter will provide conclusions of the study.

## Chapter Two

### International Refugee Rights

#### Introduction

This chapter will analyze the genesis of the refugee phenomenon from both an international and regional angle. The international perspective focuses on the development of the discourse on refugees from the League of Nations to the United Nations (UN). The regional perspective focuses on the 1969 Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa. In essence the phenomenon of migrants transcends the United Nations or even the League of Nations as displacement and migration patterns have been there time immemorial. People have been migrating and moving from one place to another even though in those days the concept of refugees had not developed as it is now. Looking at one of the oldest books which is the Bible, the children of Israel are seen fleeing to Egypt in search of refuge and residing there for four hundred years under bondage.<sup>1</sup> Later on in the New Testament, Jesus Christ together with His foster parents went to Egypt as refugees for fear of being killed by King Herod who had ordered the death of all children below the ages of two in and around Bethlehem.<sup>2</sup>

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<sup>1</sup> *The Living Bible*, (Colorado: Tyndale House Publishers, Inc. 1995). Genesis, 15:13. p.15.

<sup>2</sup> *Ibid.* Mathew, 2: 13. p. 890.

## **The League of Nations**

As is common in the discourse of refugees and forced migrants, many refugee causing situations are as a result of disagreements, discrimination, disputes, conflicts or outright wars. On this premise people are often caught in such conflicts and are ultimately compelled to leave their place of abode in search of peace or refuge in other areas where it may be more tranquil. As much as the issues warranted attention, the phenomenon of refugees had not been developed fully academically in the earlier days since people dealt with displacements as and when the need arose and there was therefore no specific organization that had been mandated to tackle issues touching on refugees.

Peter Collins observes:-

History, tradition, the great religious books, are full of stories of refugees... stories of men, women and children, in thousands as isolated individuals, fleeing from oppression they could no longer tolerate, from war or revolution in their country of birth. Often they must have disappeared, lost or forgotten; many of them settled in the countries they first came to. This has been as true in the past hundred years for the United States, Australia and New Zealand, as it was for the countries of Europe a few centuries ago.<sup>3</sup>

Indeed apart from the general altercations and friction that have bedeviled mankind, one of the vivid situations which led to the attention towards catering for displaced people was after World War 1 (WW 1). For until the early 1920s the migrations had been at most on a "tribal" basis.<sup>4</sup> Meaning people of different tribes fought and the one which was stronger evicted the other often compelling its people to emigrate and seek for settlement elsewhere. The real beginning of international intervention towards making an attempt to protect the rights of migrants was the aftermath of WW 1. This is

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<sup>3</sup> Collins P., *A Mandate to Protect and Assist Refugees*, (Editions Rencontre, Lausanne, Switzerland. 1971), p. 19

<sup>4</sup> Ibid.

because the numbers of people involved at that time was quite large as was the intensity of their suffering.

Even though there were displacements after W.W.1, those displaced did not have the protection and definition of a refugee as they do today. Therefore the words 'forced migrants' and 'displaced people' are more appropriate than 'refugees' due to the legal connotation which was attached to 'refugees' under the 1951 Convention. In both Europe and Asia Minor especially, very large numbers of people fled their homelands, and passed on from the countries in which they had first found themselves, for fear of persecution, due to race, religion, nationality or political opinion. Because of the concern of the fleeing masses and in a bid to address their glaring rights which had been violated, a few of the governments concerned moved to offer some form of protection in order to alleviate the situation, and on the relief side many charitable bodies of one sort or another organized and distributed relief supplies.<sup>5</sup> The League of Nations which was a prototype of the current United Nations was set up in 1919 whose provisions *inter alia* encompassed the very important tenet of dispute settlement mechanisms. This was a very important feat in the operations of the League as it sought to address the root cause of the problem even before an eruption of war was witnessed and an ultimate influx of forced migrants. Article 12 of the Covenant declared that any dispute likely to lead to a conflict between members was to be dealt with in one of the three ways: by arbitration, judicial settlement or inquiry by the Council of the League.<sup>6</sup> Even though the Covenant does not mention refugees per se, in essence since the League was concerned more with avoiding

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<sup>5</sup> Collins P., *A Mandate to Protect and Assist Refugees*, (Editions Rencontre, Lausanne, Switzerland. 1971), p. 21.

<sup>6</sup> Shaw M.N., *International Law, fifth edition*, (Cambridge: Cambridge University Press, 2005), p.1099.

war, it can be argued that positive results in its efforts would reduce displacement as quite often people are displaced as a result of war.

At that time, most countries in Africa, Asia and South America were under colonialism hence this meant that the League was a Western organization and its efforts did not cover other parts of the world like the United Nations does. This was a major limitation as this position points the fact that the League cannot effectively be referred to as an 'International Organization' for all intents and purposes. In fact it was not just a Western organization but more of a European one since the United States of America powerful as it was chose to stay out of the League when its Senate refused to ratify the Covenant. Even though it had political, structural and legal weaknesses, the League as an initial International organization made a meaningful attempt towards addressing the problem of refugees and forced migrants. This can be seen with the appointment of Fridtjof Nansen as its High Commissioner for Refugees. Indeed its very creation was premised on an attempt to end the perils of war which as we have seen already are prone to causing displacement. It has been argued that the League sought to promote international co-operation, peace and security on the basis of disarmament. Indeed this system worked with regard to relatively minor crises in the Balkans and South America, but failed where European powers or Japan were directly involved. The German, Italian and Japanese aggression in the 1930s, and the Russian invasion of Finland in the Winter War, evoked little meaningful response from the League.<sup>7</sup>

Those weaknesses notwithstanding, the League took a decisive step towards specifically addressing the problem of refugees. Even though there were no elaborate structures like the ones we have within the United Nations today, the crucial steps taken

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<sup>7</sup> Shaw M. N., *International Law, fifth edition* (Cambridge: Cambridge University Press, 2005), p. 1166.

by the League in the appointment of a High Commissioner to specifically address the plight of refugees existing at that particular time cannot be ignored. Peter Collins has clearly stated that:-

Organized international concern for refugees dates from the appointment, in autumn of 1921, of the first League of Nations High Commissioner for Refugees. He was none other than the great explorer Fridtjof Nansen, who had already been acting as the Leagues High Commissioner for the repatriation of prisoners-of-war.<sup>8</sup>

Indeed, even though the League was formed to address issues pertaining to war, it made some effort to address the rights of refugees and displaced persons as they manifested at that point in time. However it was not until the era after the Second World War that the whole spectrum of protection took a fundamental and unprecedented dimension with the onset of the United Nations Organization.

### **The United Nations Organization**

Following the end of the Second World War, the world community was faced with an onerous task to come up with a solution aimed at addressing the critical problem of displacement which had occurred as a result of the war. One of the principal reasons that led to the formation of this world body was for the community of nations to save succeeding generations from the scourge of carnage by promoting peace and eschewing war. Nicholson has very ably argued that war provided the impulse for creating a new organization for peace in the name of the United Nations Organization.<sup>9</sup>

The purposes of the United Nations (UN) are set out in article 1 of the Charter and they include but are not limited to maintaining international peace and security, taking

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<sup>8</sup> Collins P., *A Mandate to Protect and Assist Refugees*, (Lausanne, Switzerland: Editions Rencontre, 1971), p. 21.

<sup>9</sup> Nicholas H. G., *the United Nations as a Political Institution, fifth edition* (Oxford: Oxford University Press, 1975), p. 1.

effective collective measures for the prevention and removal of threats to the peace, and the suppression of acts of aggression or other breaches of the peace. Quite clearly like the League, the United Nations is greatly concerned with peace hence it has encouraged efforts aimed at improving relationships between and among nations through peaceful means such as international dispute settlement mechanisms. The United Nations also develops friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples. In doing so, it hopes to achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian nature. And finally it promotes and encourages respect for human rights and fundamental freedoms for all without distinctions as to race, sex, language, or religion.<sup>10</sup>

The United Nations has thus shown clearly that it is concerned with the destruction of both life and property brought about by the Second World War. The formation of the UN at that time was done by few states owing to the fact that most of the states in Africa, Asia and South America were not yet independent. However over the years with almost all the states being independent, the membership of the UN has grown so much to include virtually all the states that were not members before due to the fact that they were under colonialism at the time of its inception. Over the years, the UN has had a proliferation of many functional organizations mandated to tackle various issues of interest be they related to environmental, children or refugees.

The importance of the UN towards addressing the rights of human beings and by extension those of refugees can be seen even as the Second World War was about to end.

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<sup>10</sup> Shaw M. N., *International Law, fifth edition*, (Cambridge: Cambridge University Press, 2005), pp. 1082-1083.

During this period, many people had lost their lives and a lot of property destroyed. The need to have a world body that would seriously address the needs of the displaced was therefore urgent at that point in time. Collins Peter records:-

As the Second World War drew to a close, it became apparent that an enormous refugee problem, of a size and complexity far exceeding anything with which international administrations had yet been faced, was already arising. Virtually all over continental Europe there were already hundreds of thousands of displaced persons.<sup>11</sup>

The United Nations Relief and Rehabilitation Administration (UNRRA) was a precursor to the United Nations High Commissioner for Refugees (UNHCR) which was later given a clear and specific mandate to cater for the protection of refugees. The former filled an important chapter in the history of international assistance to refugees. The UNRRA was set up in Washington D.C in December 1944, thus coming into existence earlier than the United Nations Organization itself. This paper will now move to give a clear analysis towards the development of UNHCR and its role in protecting the rights of refugees from an international angle. Other UN organs particularly the United Nations Human Rights Commission (UNHRC) will be analyzed as it is the hallmark of human rights issues from an international perspective.

### **The United Nations High Commissioner for Refugees**

The birth of the UNHCR is clearly the demise of the Second World War. At the inception of the UN, many functional organizations were formed in a bid to address various matters that emerged after the war. As a result of massive displacements it was imperative that an organization be formed to address the plight of many who had lost

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<sup>11</sup> Collins P., *A Mandate to Protect and Assist Refugees*, (Lausanne Switzerland: Editions Rencontre, 1971), p. 25.



their homes and livelihoods particularly within Europe and even more important that these people did not have a specific state they could call their own. In a situation where many people were stateless in the true sense of the word as a result of displacement the UNHCR was created vide a statute in 1951. Its mandate was defined as addressing the plight of refugees as it was evident that the community of nations was responsible in a general sense for finding solutions and providing international protection to refugees. The UNHCR had a clear mandate to look at the plight of refugees from a supervisory point of view since the actualization of refugee rights was still within the jurisdiction of states as Guy S. Goodwin-Gill notes:-

The supervisory role entrusted to the High Commissioner by States party to the 1951 Convention relating to the Status of Refugees (Article 35) has likewise provided to the role of the Office in refugee status determination procedures and in monitoring the application of crucial provisions, such as Article 2 (nondiscrimination), Article 31 (non penalization of illegal entry), and Article 33 (*nonrefoulement*).<sup>12</sup>

This observation shows the first necessary and crucial step that was taken by the world community to address the plight and rights of refugees and displaced people. The enactment of the 1951 Geneva Convention on The Status of Refugees however brought about the greatest hallmark. It was passed in Geneva, Switzerland as the main international body mandated to protect the rights of refugees. In its preamble, the convention defines a refugee as ‘a person who a result of events occurring before 1 January 1951 and owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is

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<sup>12</sup> Gill G.G., ‘Refugees: Challenges to Protection’, *International Migration Review*, Vol. 35, No 1 (Spring, 2001, pp. 130-142), p. 131.

outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country'<sup>13</sup>

This convention has arguably been seen as the first and only instrument at the global level which specifically regulates the treatment of those who are compelled to leave their homes because of disturbances within their countries of origin.<sup>14</sup> One of the fundamental purposes that led to the passing of the 1951 Geneva Convention on the Status of Refugees was to ensure for the refugee certain fundamental rights laid down in the Declaration of Human rights of the United Nations. Some of these rights had been recognized by certain governments under certain circumstances. The convention therefore safeguards rights such as those to religious freedom, employment and education.

The Convention has undoubtedly given a detailed provision of the types of rights which receiving countries ought to give to refugees fleeing persecution. As already stated this followed the tenets laid out in the Universal Declaration of Human Rights which emphasizes clearly in its preamble that, 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.'<sup>15</sup> The importance of this Universal Declaration of Human Rights cannot be gainsaid especially as it relates to refugees. Indeed refugee rights ought to be respected from the very onset since they fall within the ambit of 'human beings'. Besides running away for fear of being persecuted, refugees are invariably traumatized and would very well be categorized as vulnerable groups since

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<sup>13</sup> Stedman S. and F. Tanner, *Refugee Manipulation, War, Politics and the Abuse of Human Suffering*, (Brookings Institute Press, Washington D.C, 2003) p. 145.

<sup>14</sup> Feller, E, (et al), *Refugee Protection in International Law, UNHCRs Global Consultations on International Protection*, (Cambridge: Cambridge University Press, 2003), p. 3.

<sup>15</sup> Shaw, M. N., *International Law, Fifth Edition*, (Cambridge: Cambridge University Press, 2005), p. 247.

they are not only outside their countries of origin but are also running away from persecution more often than when they have already lost loved ones and property. In many instances refugees experience double tragedy since they are running away from an environment where they were discriminated upon on either one or more of the factors encapsulated in the convention. Apparently when they arrive in their country of asylum they face further discrimination as is seen in policies adopted by governments to restrict refugees to camps and segregate them hence making it difficult for them to enjoy various rights enjoyed by citizens of those countries. Camps are known to be uninhabitable since conditions in most of them are to say the least deplorable. In a nutshell, they lack even some of the basic necessities required by human beings. In his study of refugee camps, Barry Stein notes:-

One of the most useful descriptions and analyses of refugee camps is a brief essay by H.B.M. Murphy (1955). Murphy notes that although the physical conditions of camps may vary widely, the effects tend to be uniform. The most important characteristics of the camps are: segregation from the host population, the need to share facilities, a lack of privacy, plus overcrowding and a limited, restricted area within which the whole compass of daily life is to be conducted. (Mamdani, 1973)<sup>16</sup>

This observation notwithstanding, the broader tenets of human rights protection envisages a situation where generally refugees will be able to enjoy the kind of protection that is extended to citizens of any given state or aliens generally in the same circumstances. Refugee rights have been emphasized in the convention and these cover both the Civil and Political ones as well as the Economic, Cultural and Social ones. Even though the convention did not give this specific classification, it is clear from the whole array of rights that indeed this was intended to be the case. With respect to Civil and

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<sup>16</sup> Stein N. B., 'The Refugee Experience: Defining the Parameters of a Field of Study', *International Migration Review*, Vol. 15, No. ½, Refugees Today. (Spring-Summer, 1981, pp.320-330), p. 324.

Political Rights, the Universal Declaration envisages that every human being will be entitled to rights such as the freedom of thought, conscience and religion, freedom of opinion and expression, the right to peaceful assembly, right to marriage and right to vote. Looking at the convention, we see a replica of some of the rights and freedoms which States are urged to abide by. In article 15 for example the convention clearly spells out the refugees rights to association by stating, 'As regards non-political and non-profit-making associations and trade unions the Contracting States shall accord to refugees lawfully staying in their territory the most favorable treatment accorded to nationals of a foreign country, in the same circumstances'. It is evident from the wording of this provision that this right is not absolute in the sense that it is restricted to refugees and nationals of a foreign country who in more concise terms would be referred to as aliens. In many countries including Kenya, matters pertaining to refugees are put together with those that deal with general immigration issues. This is in itself discriminatory since the objective of the convention was to endeavor and assure refugees the widest possible exercise of the fundamental rights and freedoms enshrined in the Charter of the United Nations and the Universal Declaration of Human Rights.<sup>17</sup> Besides, a refugee can not be seen as simply an alien since reasons leading to their flight are specific based on a well founded fear of being persecuted. This is very different from a person who is an alien since the latter may be on holiday, business or even seeking a better lifestyle hence qualifying as an economic migrant.

The convention has also made an attempt to address the Economic-Social and Cultural rights in a broad manner. The two main rights enumerated are the right to wage

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<sup>17</sup> Feller, E., (et al), *Refugee Protection in International Law, UNHCRs Global Consultations on International Protection*, (Cambridge: Cambridge University Press, 2003), p. 99.

earning employment and education. The importance of these two rights cannot be overemphasized as in essence, education in most cases is a key all over the world to any meaningful success in life. Most countries that host refugees often insist on some good level of education for anybody seeking any gainful employment. Again this brings in the right for a refugee to be employed. In many situations, refugees or even aliens have been discriminated in their quest to get employment. In fact even in situations where they manage to get employed they have been underpaid in comparison to the citizens of the specific country. The need for education is made much more intense because refugees seeking resettlement to third countries are generally required to have good education. The resettling countries such as the United States of America, Canada, Australia and some of the Scandinavian countries more often prefer refugees who have good education. With regard to employment, the convention states:-

The Contracting State shall accord to refugees lawfully staying in their territory the most favorable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage earning employment. In any case, restrictive measures imposed on aliens or the employment of aliens for the protection of the national labor market shall not be applied to a refugee who was already exempt from them at the date of entry into force of this Convention for the Contracting State concerned.<sup>18</sup>

This provision again depicts a situation where this right is restricted to that provided to foreigners living in the country. Refugees have also been recognized by the convention as having a right to education but in this case only elementary education can be accorded as the one given to nationals. The convention clearly observes that any form of secondary or tertiary education accorded to refugees is 'as favorable as possible, and in

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<sup>18</sup> Article 17 of the 1951 Geneva Convention on the Status of Refugees.

any event, not less favorable than that accorded to aliens generally in the same circumstances.'

There are other important rights that the convention does not apparently recognize. The convention does not for instance make reference to very crucial rights like The right to adequate standard of living for one and the family which includes adequate food, clothing and freedom from hunger. Neither does it recognize the right to health.<sup>19</sup> Failure to recognize these rights puts the convention in an awkward position with respect to the entire discourse touching on refugee rights. Concerning the food basket offered by the World Food Programme for example, criticisms have been raised with respect to the quality of the food. Even worse has been the opinion that refugees from the developing part of the world such as Africa and Asia are given food which is of inferior quality than say refugees in Europe. This was more pronounced in the 1990s when Europe experienced a refugee situation in Yugoslavia after many years of relative peace.

However, in general the 1951 Geneva Convention on the Status of Refugees has made a good attempt to incorporate some of the major rights which refugees are entitled to. One shortcoming is that before the 1967 Protocol to the 1951 Geneva Convention came into force, the latter was so European oriented as it focused on 'events occurring before 1<sup>st</sup> January 1951'<sup>20</sup> quite clearly these events took place mainly in Europe and other parts of the developed world where the Second World War was conspicuous. This includes the United States of America and specific countries in Asia like Japan. This omission at that time meant that many of the countries which were under colonialism in Africa and Asia were naturally left out in the implementation of the convention.

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<sup>19</sup> Martin F.F., (et al), *International Human Rights and Humanitarian Law, Treaties, Cases and Analysis*, (New York: Cambridge University Press, 2006), p. 885-886.

<sup>20</sup> Article 1(2) of the *1951 Geneva Convention on the Status of Refugees*.

In an attempt to correct this anomaly, a protocol to the convention was prepared in 1967 whose main aim was to rectify that specific loophole within the Convention. In Article 1 the protocol states *inter alia* that “As a result of events occurring before 1 January 1951 and...” “and the words”...”a result of such events”, in article 1 A (2) were omitted”.<sup>21</sup> Even though this has been a big attempt towards opening up the use of the convention to other parts of the world, there are still areas that some parts of the world particularly in Africa have not identified with. The very definition of a refugee in the convention still gives a picture where they have to be interviewed on an individual basis. As the paper shall argue further, this is not always the case since a number of refugee flows on the African continent are *en masse* therefore necessitating a group or *prima facie* status determination process.

The definition of a refugee does not also give any reference to the sex of the individual. This is a great undoing since many women/girls have been persecuted especially in some African countries merely on the basis of their gender. A case in point is the controversial issue of Female Genital Mutilation (FGM) which is a serious violation of a woman’s privacy yet this is practiced with impunity in many parts of the continent. Early marriages for girls are also on the increase in some communities which value boy’s education more as compared to the girls. Indeed if a young girl is to seek asylum on the basis of either fleeing FGM or early marriage, it would be difficult for any Refugee Status Determination Committee to admit her using the definition contained in the convention. One other grey area that has not been expounded under the Convention is the question of ‘...membership of a particular social group...’ It is not clear what this can be interpreted to mean. In Europe during the Second World War some have claimed that

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<sup>21</sup> Article 1 of the 1967 *Protocol Relating to the Status of Refugees*.

this referred to homosexuals who were persecuted on the basis of their sexual orientation. What of the crippled where in any event the former Ugandan dictator Idi Amin is known to have persecuted them simply because they were physically challenged. It is unlikely that any Ugandan who was physically challenged could be granted asylum solely for that reason. The question of being a member of a particular social group can even mean having certain features which one can do nothing about. The recent persecution of albinos in Tanzania is a case in point where reports have been given of many of them disappearing. The speculation has been that they are abducted and killed by witchdoctors for superstitious reasons. Under normal circumstances, an albino coming from Tanzania has a right then to seek asylum but this is not covered for under the Convention.<sup>22</sup>

The whole international matrix of refugees and forced migrants has complicated the very objective of the convention. This is seen in situation where countries in the developed world restrict the entry of refugees more and more into their territories and expect those in the developing world to open their borders more and more to refugees and asylum seekers. Many countries have imposed visa requirements for travelers while others have even introduced carrier sanctions on vessels discovered transporting people without proper documentation. Some people traveling by sea have been intercepted midway and even killed. The African continent has out of necessity ended up being on the receiving end. Due to poverty that is experienced in many parts of the continent, eruptions of wars have been common place many at times due to competition of scarce resources. Because of the peculiar nature of refugee problems on the continent, African countries developed a regional instrument which addresses refugee matters on the

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<sup>22</sup> Sternberg., R.M, *Refugees and Human Rights-The Grounds of Refugee Protection in the Context of International Human Rights and Humanitarian Law* (Maritius Nijhoff Publishers, The Hague, Netherlands, 2002) p1.



continent. This instrument known as the OAU Convention Governing Specific Aspects of Refugee Problems in Africa will be discussed in the later part of the chapter.

### **A Regional Approach to Refugee Rights**

As observed in the preceding discussion, the 1951 convention's definition of a refugee did not factor in other issues which are relevant in other parts of the world outside the Western World. Over the years the problem of refugees shifted drastically from Europe and started having a greater impact in Africa. Again some of the reasons that lead to flows of displacement in Africa had not been addressed in the 1951 convention. The most important one being that the convention concentrated on an Individual Status Determination Principle. This principle which was more relevant to Europe presupposes a situation where the numbers of asylum seekers are minimal and a panel comprising of government officers and UNHCR would interview each individual. The objective of such an interview would be to verify certain facts as presented by the individual in relation to events occurring in ones country of origin. The interview would attempt to establish if for instance people from a particular tribe are being persecuted in a given country. It would sometimes verify if certain individuals holding a specific political opinion are being persecuted in a given country. Invariably the panel would be in possession of advanced information in the country of origin where refugees come from.

In Africa it was discerned that some flows of people are on mass influx and they occur due to varied factors some of which are natural and others man made. Based on these considerations therefore the OAU Convention Governing Specific Aspects of Refugee Problems in Africa expanded the definition of a refugee to include 'every person who, owing to external aggression, occupation, foreign domination or events seriously

disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality'. This consideration also puts in perspective the tendency by African countries to show good neighborliness by ensuring that those running away from persecution are admitted within their border. The convention clearly states that this gesture of friendship by asylum states should not be construed as an unfriendly act towards the state of origin. Refugees are therefore prohibited from engaging in acts of hostility towards their country of origin from their countries of asylum.

This provision which has been well acclaimed globally was meant to address issues which were peculiar to Africa. Many scholars have observed that the importance of the OAU Convention cannot be gainsaid since Africa is becoming the continent with the largest number of refugees who constitute more than 40 per cent of the world refugee population.<sup>23</sup> Goodwin-Gill makes the same observation in looking at the tenuous manner in which the 1951 Convention was confined only to Europe especially before the coming into force of the 1967 Protocol. The very fact that African Countries saw it fit to extend this definition is proof of the humanitarian nature that these States approached the issue. This is because within the strict sense of the refugee definition, many who need asylum would simply have been viewed as forced migrants and not genuine refugees who need protection as per the 1951 Convention. Gill notes:-

The 1951 Convention and the 1967 Protocol remain the principal international instruments benefiting refugees, and their definition has been expressly adopted in a variety of regional agreements aimed at further improving the situation of recognizes refugees. It forms the basis for article 1 of the 1969 OAU Convention

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<sup>23</sup> Adepaju A., 'The Refugee Situation in the Horn of Africa and Sudan', *A Journal of Opinion*, Vol.12, No.1/2. (Spring-Summer, 1982, pp.21-63) p. 29.

of Refugee Problems in Africa, although it has been realistically extended to cover those compelled to leave their countries of origin on account of external aggression, occupation, foreign domination, or events seriously disturbing public order.<sup>24</sup>

The OAU Convention also prohibits refugees from engaging in any subversive activities against any Member State of the OAU. In essence this is to ensure that relationships within African countries are not in any way compromised because of the presence of refugees. In a bid to ensure that dissidents and criminals do not seek refugee status in countries of asylum, the convention has invoked the exclusion clause which prohibits grant of refugee status to people who include but not limited to those who have committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes or those who have committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee<sup>25</sup>

These provisions are a good pointer to a convention that is geared towards respecting human rights principles as enshrined in the Universal Declaration which encourages the respect of Civil and Political Rights as well as Economic, Social and Cultural Rights. The former include such rights as those to association and freedom of assembly while the later include rights like the right to employment and education. However the general milieu that African countries operate in has always raised suspicion as to their commitment or even ability towards respecting general human rights provisions. Many African countries fall within the category of some of the least developed countries in the world and hence some of their citizens particularly those

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<sup>24</sup> Gill G.G., *the Refugee in International Law, Second Edition*, (Oxford: Oxford University Press, 1998), p. 20.

<sup>25</sup> Article I (5) of the 1969 OAU Convention on Specific Aspects of Refugee Problems in Africa.

residing in rural areas seldom understand human rights concepts. In her analysis, Rhoda

Howard states that:-

I refer for factual examples to select group of sub-Saharan African countries, namely, Nigeria, Kenya and Malawi. In the course of my research on human rights in these countries, I have become aware that they fair quite poorly also if I compare them with developed Western democracies or with their “mother country,” Britain, in the contemporary period.<sup>26</sup>

Indeed if such countries within the African continent can perform quite dismally in respect to the human rights even of its own citizens, how then can they be expected to respect the rights of refugees. This is because countries often feel obliged to respond to the needs of its nationals before addressing those of ‘outsiders’ such as refugees. Indeed many African countries have always cited the fact that they are not economically well endowed hence making it difficult for them to implement particularly the Economic, Social and Cultural rights. They even challenge the expectations from the developed world for an immediate implementation of the civil and political rights but only gradual implementation of the economic, cultural and social rights. Many Africans argue that the latter rights should take priority over the former in their poverty-stricken, underdeveloped countries.<sup>27</sup> It is however evident from developments in the recent past that countries on the African continent are undoubtedly committed towards respect of human rights. This can be seen from the democratization process that has taken place on the continent which has been espoused by most of the countries. Again the civil society has grown tremendously hence persistently raising concerns where human rights are being violated. However as concerns refugees, challenges abound in most of the receiving countries.

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<sup>26</sup> Howard, R., ‘Evaluating Human Rights in Africa: Some Problems of Implicit Comparisons’ *Human Rights Quarterly*, Vol. 6, No. 2. (May, 1984, pp.160-179), pp. 160/1.

<sup>27</sup> *Ibid* p. 162.

Although many of the countries on the continent have been known to open their borders when refugee flows occur, lately there has been some reluctance to keep the borders open in the spirit of 'African Brotherhood'. African host governments have been arguing that refugees present serious economic, environmental and security threats, and that they can no longer afford to keep their borders open or allow refugees to remain for any length of time<sup>28</sup> As is expected, most African countries lament that refugees in general are a strain to their resources. This then leads to most of them confining refugees in designated camps and essentially neglecting those who live in urban areas because of draconian policies of confining refugees in camps. Karen Jacobson notes:-

Host governments complain that refugees compete with locals for scarce resources such as land and jobs. They also overwhelm existing infrastructure such as schools, housing and health facilities. These concerns underpin the state's rationale for keeping refugees in camps.<sup>29</sup>

The above observation notwithstanding, African countries are still known to extend kind open hands towards those fleeing persecution. This has been seen much more in areas where borders demarcate two groups of the same community. Invariably, refugees settle spontaneously in host communities and provide economic inputs in the form of new technologies and skills, entrepreneurship or needed labor.<sup>30</sup>

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<sup>28</sup> Jacobsen, K., 'Can Refugees Benefit the State? Refugee Resources and African State building' *The Journal of Modern African Studies*, Vol. 40, No. 4. (Dec., 2002, pp.577-596) p. 579

<sup>29</sup> Ibid., p.580

<sup>30</sup> Ibid., p. 585

## Chapter Three

### Kenya's Experience in Hosting Refugees

#### Introduction

This chapter will examine the trend that has taken place in Kenya towards hosting refugees. Most refugees in Kenya particularly those of Somali, Ethiopian and Sudanese origin have been recognized by the government on *prima facie* basis as per the 1969 OAU Convention on Specific Aspects of Refugee Problems in Africa. The government treats them as refugees and not asylum seekers since they are not to be interviewed on individual basis to verify their claim as the case would be with asylum seekers from other nationalities such as Uganda, Burundi, Rwanda, Democratic Republic of Congo and others. An analysis of refugees living in urban areas will also be given and ultimately the necessary durable solutions adopted by UNHCR will be looked at.

Kenya acceded to the 1951 Geneva Convention on the Status of Refugees on 16<sup>th</sup> May 1966 and ratified the 1969 OAU Convention on Specific Aspects of Refugee Problems in Africa on 4<sup>th</sup> February, 1993 It has also acceded to the 1967 Geneva Protocol. The country has also enacted The Refugee Act (2006). This chapter will analyze if international expectations have been met in relation to the 1951 Geneva Convention on the Status of Refugees and the 1969 OAU Convention which essentially expanded the definition of the 1951 Convention.<sup>1</sup>

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<sup>1</sup> Gill G.G., *The Refugee in International Law, Second Edition*, (Oxford: Oxford University Press, 1998) p 20.

## **Refugee Status Determination**

The Government of Kenya has handled refugee affairs under different ministries over the years. Until 2005 refugee matters were handled at the Ministry of Home Affairs. Since 2005 they are under the Office of the President. This change has affected the smooth management of refugee matters. However, Kenya had a very small number of refugees before 1991 when there was a large influx following the deposing of President Siad Barre of Somalia and Mengistu Haile Mariam of Ethiopia. It has been observed that in the late 1980s the number of asylum seekers in the country was as small as 14,000.<sup>2</sup> These refugees had come from the neighboring countries of Uganda and Ethiopia following skirmishes which had earlier taken place there. The Kenyan government in a bid to ensure that refugee rights were respected established the Refugee Status Determination Committee based in Nairobi whose mandate was to interview newcomers for grant of refugee status. This Committee comprised representatives from the United Nations High Commissioner for Refugees and the Kenyan Ministry of Home Affairs and the Department of Immigration.<sup>3</sup> This Refugee Status Determination (RSD) Committee interviewed approximately 30 refugees per week both at the UNHCR offices in Nairobi and at the Thika Reception Centre for Refugees. This was possible because the numbers were few. A Human Rights report observes:-

Before 1991, the Kenyan government used an ad hoc administrative refugee status determination (RSD) system to recognize refugees, despite the fact that it lacked domestic laws providing for their rights and status. Asylum seekers were

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<sup>2</sup> Aukot E., *Law, Policy and Practice on Refugees and IDPs in Kenya*, Paper Presented at the East African School on Refugees and Humanitarian Affairs (EASRHA), University of Dar es Salaam, 3<sup>rd</sup> – 16<sup>th</sup> September, 2005. p. 7.

<sup>3</sup> File on Refugee Minutes of Meetings at the Ministry of Home Affairs, File No. I. S 115/08 (S) Folio 20 (Report on Refugees and Undocumented Aliens in Kenya-Nairobi, March 1997) p. ii

interviewed by an Eligibility Committee, made up of representatives from the Ministry of Home Affairs, the Immigration Department, and UNHCR observers.<sup>4</sup>

It is clear from this that the government had taken a major step towards addressing refugee rights. The Committee was suspended in early 1991 upon a large influx from Somalia, Ethiopia and later the Sudan. It is therefore currently not in existence. One of the rights which refugees are entitled to under the 1951 Geneva Convention is the right to seek asylum. States are also expected not to turn back refugees at borders in line with the provisions of the Convention<sup>5</sup>

Kenya admitted refugees fleeing persecution at the border and allowed them to travel to Nairobi since that is where they would be interviewed by the Refugee Status Determination Committee. In most cases refugees traveled to Nairobi spontaneously without assistance where they would register with both the United Nations High Commissioner for Refugees and the Ministry of Home Affairs who were in partnership to ensure that the necessary tenets of the convention are respected. These refugees would then be interviewed so as to determine the credibility of their flight in accordance with the provisions contained in the 1951 Geneva Convention on the Status of Refugees. In the event that refugees were dissatisfied with the interview results, they were entitled to an appeal. Those sitting on the appeal panel were officers senior to those on the first panel. However, the appeal interviews took a very long time subjecting refugees to a lot of anxiety.

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<sup>4</sup> Human Rights Watch, *Hidden in Plains View, Refugees Living Without Protection in Nairobi and Kampala* (New York: Human Rights Watch 2000) p 56.

<sup>5</sup> Niklaus Steiner (Et al), *Problems of Protection – The UNHCR, Refugees and Human Rights* (London: Routledge, 2003) p 8.



Those refugees who were granted status were allowed to stay in the country and given a refugee identity card as provided for in the convention which states that 'The Contracting States shall issue identity papers to any refugee in their territory who does not possess a valid travel document'.<sup>6</sup> Not only were refugees given identity documents which allowed them to live, work and travel within the country, but they were also issued with conventional travel documents (CTD) which enabled them travel out of the country when the need arose. This is in tandem with the convention which expects the contracting states to issue refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory save where there are compelling reasons of national security or public order.<sup>7</sup>

Since refugees under the care of the government were quite few, no camps were built at that time. The challenge was to cater for refugees in the urban centres and in this case most that had not been recognized were confined in and around Nairobi. There were many who had been recognized especially Ugandans who were freely working particularly as teachers in other parts of the country. The care for other refugees was provided by the government in collaboration with the UNHCR and NGOs. In essence it was known as a care and maintenance programme since it was not an emergency and the numbers were comparatively quite minimal. In fact one of the most important considerations was to identify refugees who qualified for resettlement to third countries. Records at the Ministry of Home Affairs reveal that:-

Prior to 1989, Kenya had very few refugees, most of them on transit to third countries. During their stay in Kenya, they were accorded assistance and accommodation by religious and Humanitarian Organizations like the Catholic

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<sup>6</sup> Article 27, 1951 Geneva Convention on the Status of Refugees, 1951.

<sup>7</sup> Article 28, 1951 Geneva Convention on the Status of Refugees.

Secretariat, The National Council of Churches of Kenya and the United Nations High Commissioner for Refugees.<sup>8</sup>

Apparently, this was only tenable in as much as the numbers remained minimal. This situation however came to change drastically in 1991 when there was an unprecedented influx of refugees from Somalia and Ethiopia following disturbances in those countries. The situation worsened in 1992 when more refugees came in from Southern Sudan.

### **Prima Facie Status Determination**

Following the breakup of the Siad Barre regime in Somalia in 1991, many refugees crossed into Kenya in search of asylum. The large numbers led to the suspension of the Refugee Status Determination Committee since it was no longer practical to interview them on an individual basis. The government adopted the *prima facie* status determination method under the OAU Convention on Specific Aspects of Refugee Problems in Africa. This makes it mandatory for African governments to admit refugees. The Kenyan government went further and recognized those who were fleeing from countries that were in turmoil as refugees without necessarily subjecting them to an interview. Besides, there arose the challenge of immediately attending to those who had arrived by building shelters, providing food and non-food items. Loescher and Milner have observed that prior to the mass influx of refugees from Somalia in the 1990s, Kenya hosted a relatively small refugee population. They further argue that the situation changed dramatically with the arrival in Kenya in 1991-92 of over 400,000 refugees from

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<sup>8</sup> File on *Refugee Minutes of Meetings* at the Ministry of Home Affairs, File No. I. S. 115/ 08 (S) Folio 20 (Report on Refugees and Undocumented Aliens in Kenya – Nairobi, March 1997). p ii.

Somalia, fleeing civil war, famine and state collapse.<sup>9</sup> Soon after the influx of refugees from Somalia, the government of Mengistu Haile Mariam in Ethiopia was deposed late in 1991 leading to more refugees crossing into Kenya.

As the numbers of refugees increased, the government sought the assistance of UNHCR which is the lead international body charged with the care and protection of refugees. Aid agencies also came to assist in a bid to address the crisis. Since Kenya had no known experience of addressing such a large influx of refugees, UNHCR in collaboration with several aid agencies assisted in addressing the problem by construction of refugee camps in different parts of the country. This was an alien phenomenon since refugees in Kenya had been few in numbers and were confined either in urban areas particularly in Nairobi or working in other parts of the country as was the case of Ugandans who largely worked as teachers. At that time, there was therefore no need to build refugee camps.

The building of refugee camps has in many ways been seen as a direct affront to refugee rights.<sup>10</sup> This is because camps confine refugees and deny them some of the fundamental rights like the freedom of movement. The government of Kenya however was compelled to build camps based on the circumstances at that time. The situation worsened in 1992 when more refugees came in from Southern Sudan following fighting between the southern rebels and the government in the North. More camps and holding centers were therefore constructed to hold all these refugees from Somalia, Ethiopia and Sudan. Most of these camps and holding centres were confined in three main provinces

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<sup>9</sup> Loescher G. & J. Milner, *Protracted Refugee Situations: Domestic and International Security Implications*, (London, Routledge, 2005) p 38.

<sup>10</sup> Hakovirta, H., 'The Global Refugee Problem: A Model and its Application' *International Political Science Review/Revue internationale de science politique*, Vol. 14, No. 1. (Jan. 1993pp.35-57), p. 38.

which are North Eastern, Coast and Rift Valley. This is because they were built in areas that were on the boarder of the countries of origin where refugees were fleeing from.

As a result of so many refugees coming to Kenya, some challenges befell the refugee administration as regards the rights of refugees. Because the government lacked the requisite personnel and experience, it in essence abandoned its obligation of granting refugee's status as required by 1951 Convention. This is particularly relevant to cases that needed to be interviewed as the majority of refugees had been recognized under the *prima facie* principle as observed earlier. The convention does not envisage a situation where the administration of refugee affairs is run by UNHCR and NGOS. Rather this is the sole responsibility of the contracting states which are expected to co-operate with UNHCR or any other agency in the exercise of its functions.<sup>11</sup>

At the height of the influx in 1992, camps were constructed in the Dadaab area of Garrissa District to take care of refugees from Somalia, in Marsabit there was the Walda Camp which hosted refugees from Ethiopia and Refugees from Sudan were put in a camp in Turkana district known as Kakuma. There were other camps and holding centers on the coast with the largest one being the Utange camp. Other holding centers were to be found in several parts of North Eastern province.<sup>12</sup> The building of camps made it very difficult for the government to respect some of the most basic refugee rights such as the right to clean water, education and even adequate shelter. This is because the camps were built in some of the most marginalized parts of the country. Indeed the government adopted an encampment policy meaning that refugees had to stay there where they are provided essentials by UNHCR and NGOs. This makes it difficult for refugees to exploit

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<sup>11</sup> The 1951 *Convention on the Status of Refugees*, Article 35.

<sup>12</sup> File on Refugee Minutes of Meetings, I.S 115/08 (S) (Folio 20 Report on Refugees and Undocumented Aliens in Kenya – Nairobi March, 1997)

their skills and potential as conditions in the camps are too limiting. Indeed there is no opportunity for economic livelihood within the camp environment forcing refugees to trade items such as buckets for food when camp supplies are low. It has been observed that refugees in Kenya are so confined that they have little opportunity for economic activity.<sup>13</sup>

The Convention has various rights which refugees are entitled to such as 'Access to Courts' (Article 16) which states that 'A refugee shall have free access to the courts of law on the territory of all Contracting States'. In most of the refugee camps this right is in principal lacking as they are located in some of the most marginalized and remote parts of the country. Further article 21 of the convention requires states to accord refugees decent housing. It states:-

As regards housing, the Contracting States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favorable as possible and, in any event, not less favorable than that accorded to aliens generally in the same circumstances.

This right is not absolute but the state of shelters in Kenyan refugee camps has however been criticized far and wide. They have simply been viewed as detention camps. The freedom of movement for refugees in the country is curtailed as they are not allowed to leave the camps and travel to other parts of the country. Indeed the idea of having people live in situations of encampment for a long period of time without any hope for durable solutions leads to hopelessness and a lack of access to the rights enshrined in the 1951 Convention.

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<sup>13</sup> Ilse Griek (et al), *Contribution to Sustainable Solutions for Protracted Refugee Situations in the African Region A UNHCR Manual* (Published by UNHCR, Geneva, March, 2006) p. 25.

Many refugees have also been denied identity papers and instead given ration cards for use during meals in the camps. Issuance of travel documents to refugees by the government has also been problematic. Most refugees experience problems when they want to travel outside the country.<sup>14</sup> The violation of these major rights which refugees are entitled to has been well documented in the refugee camps. A manual prepared by The Refugee Consortium of Kenya (RCK) has observed that “camp refugees” often exist in a lawless environment. They lack access to the system of justice, which in turn creates an environment for continued human rights violation with impunity.<sup>15</sup> The general condition of confining refugees to camps has also been associated with the fact that the Kenyan government has abdicated its obligations to UNHCR which at that time took over the registration and management of refugees. This happened because of the supposedly lack of adequate staff and expertise on the side of government. As a result of such violations of refugee rights, most of them left the camps albeit illegally to seek a better life in the urban areas. Many came to Nairobi due to their urbane nature and also because of many of their relatives and friends living in the capital city. However as this research will show in the next segment, the situation has not been any better.

## **Refugees Living in Urban Areas**

The movement of refugees from rural camps to urban areas has been on the increase in many African countries.<sup>16</sup> In Kenya, Nairobi as the capital city received the largest number of refugees fleeing the camps for a ‘better life’ in the city. Because of

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<sup>14</sup> Loescher G. & J. Milner, *Protracted Refugee Situations: Domestic and International Security Implications*, (London, Routledge 2005) p. 41.

<sup>15</sup> Refugee Consortium of Kenya, *Manual on Human Rights and Refugee Protection in Africa: (Workshop Report – Safari Park Hotel, Nairobi, 1-2 July 2002)* p. 5.

<sup>16</sup> Weaver L.J., ‘Sojourners along the Nile: Ethiopian Refugees in Khartoum’. *The Journal of Modern African Studies*, Vol. 23, No.1 (March, 1985. pp. 147-156) p. 147

conditions seen as intolerable in the camps in essence many refugees left for Nairobi hoping that their human rights would be respected more. In fact their departure from the camps is in itself regarded as being illegal by the government. A Human Rights Report observes:-

However, many other refugees chose to leave refugee camps within Kenya to come to Nairobi. Refugees leave camps for one or a combination of several reasons including: inadequate humanitarian assistance, general insecurity and attacks, insecurity for particular individuals, or insufficient educational opportunities or medical care.<sup>17</sup>

The coming of refugees to Nairobi does not seem to have made their situation any better as their human rights continue to be abused. Nairobi has approximately 60,000 refugees according to government and UNHCR records.<sup>18</sup> These refugees have settled in Nairobi where some live with their relatives especially those from Somalia who have Kenyan relatives of Somali origin. Others live with fellow refugees whose status had been recognized as conventional during the period of Refugee Status Determination. Some of those who are economically stable assist their kith and kin who come from the camps. Others find it easier to access relatives abroad while living in Nairobi. Quite clearly this shows that most refugees who are compelled to come to urban centers usually have a specific background as indicated by UNHCR Community Service Unit which makes the observation that urban refugees include but are not limited to people with an urban background in the country of origin, people who have been politically active (politicians, members of government, students), professionals and people with higher education and people with rural backgrounds seeking work or education

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<sup>17</sup> Human Rights Watch, *Hidden in Plains View, Refugees Living Without Protection in Nairobi and Kampala*, (New York: Human Rights Watch, 2000) p 28.

<sup>18</sup> Peter, O. N, (ed), *Refugees in Law and in Fact, a Review of the Literature and the Research Agenda in Kenya. Occasional Paper Series Vol No. 1 2002*, (Moi University Press, Eldoret, Kenya, 2002) p. 1

(including those from camps if conditions there do not allow them to meet their basic needs).<sup>19</sup> The violation of refugee rights in Nairobi has been recorded in various studies carried out on the subject of refugee rights with specific reference to those living in urban areas. In her M.A Thesis on refugees living in Nairobi Ogaye observes:-

From the findings of this research, the plight of refugees living in urban centers to a large extent verges on abuse of human rights. It is true that not all refugees can be hosted in urban areas. This however does not give excuse to host governments, the UNHCR, and the international community to totally neglect the fact that refugees who might choose to reside in urban areas might need some basic decent living conditions.<sup>20</sup>

It has further been observed that refugees living in Nairobi are often unaided by the government and UNHCR hence making it difficult for their children to access basic welfare services including education.<sup>21</sup> This is in direct contravention of article 22 of the Convention which states *inter alia* that ‘The Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education’. Ironically, the plight of refugees living in Nairobi seems to have been exacerbated by UNHCR, the very agency which is charged with caring for them. Instead officials working with the body have been accused of taking bribes from refugees before extending the assistance refugees are entitled to under the convention.

Particular reference has been made to the Protection and Resettlement sections at the UNHCR branch office in Nairobi. The organization had to suspend and investigate some of its officers for alleged corrupt practices. It was premised on the allegation that they only assisted well-to-do refugees at the expense of the poor and needy. The

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<sup>19</sup> UNHCRs Community Service Guidelines, *A Community Based Approach Towards Urban Refugees*, (Geneva: Community Service Unit, 1996) p 17.

<sup>20</sup> Ogaye N.E., *Is the Absence of a National Refugee Legislation in Kenya a Contributory Factor to the Plight of Urban Refugees?* Masters Thesis, The Catholic University of Eastern Africa, (Hekima College, Dec. 2006) p 110.

<sup>21</sup> *Ibid* p 5



seriousness of these claims ultimately led to the sacking of some of the officials who were working with UNHCR at that time.<sup>22</sup>

It has further been observed that the Kenyan government has failed to guarantee to refugees in Nairobi, regardless of their legal status, their most basic human rights. These include: the right to liberty and not to be arbitrarily detained, the right to security of person including protection from torture and other mistreatment. Even more serious is the fact that refugees in Nairobi are most often charged with illegal entry under Kenya's Immigration Act. This is strictly in contravention to article 31 of the Convention which *inter alia* states that 'The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1'. The United Nations High Commission for Refugees has on its part been to blame as far as upholding refugee rights is concerned, even though it is the sole international body charged with the protection of refugee rights globally. This is because in Kenya, UNHCR has been accused of being insensitive to refugee needs instead some of their officials have been alleged to take bribes from wealthy refugees in exchange of services. There are numerous accusations of neglect, bias, harassment, and corruption by UNHCR Branch staff when dealing with refugee issues in Kenya.<sup>23</sup>

## **The Security of Refugees**

More than anything else, security matters have contributed greatly in one way or another towards the violation of refugee rights in Kenya. Article 3 of the Convention

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<sup>22</sup> Human Rights Watch, *Hidden in Plain View, Refugees Living Without Protection in Nairobi and Kampala* (Human Rights Watch: 2000) p. 42.

<sup>23</sup> Refugee Consortium of Kenya, *Regional Refugee Trends Update* (Nairobi: A RCK Publication, October, 2000) p 2.

states clearly that ‘The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin’. In essence no refugee should be targeted in any way on grounds of merely being a refugee. Apparently both the government and the UNHCR who are the principal actors meant to implement the 1951 Convention have fallen short of this provision. Article 35 of the Convention states:-

The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.

The government on its part has been frequently accused of victimizing refugees for security reasons. With particular reference to Somali refugees, the Kenyan government has often regarded them as a security concern because of historical reasons associated with the quest for Kenyan Somalis wanting to succeed and be part of the Republic of Somalia.<sup>24</sup> On arrival in Kenya, Somali refugees were confined to camps close to the border so as to limit the numbers that would travel to urban centres particularly Nairobi. Most of the refugees who find their way to the urban areas are viewed as a security risk particularly those of Somali origin. As a result, they are sometimes rounded up by the security forces and taken back to the camps so as to reinforce the government’s policy that refugees should be in designated camps. This act is in violation of article 26 of the Convention which provides refugees with the right of movement and residence.

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<sup>24</sup> Loescher G. & J. Milner *Protracted Refugee Situations – Domestic & International Security Implications*, (London: Routledge, 2005) p. 40.

Refugees have also been seen as contributing to insecurity by linking their presence with the proliferation of small arms and light weapons. It seems then that the government has vaguely linked the whole issue of refugees to small arms and light weapons without necessarily recognizing other causes like those associated with illegal immigrants. Makumi Mwangi has observed:-

The issue of small arms and light weapons is clearly a problem for the security of Kenya. It is recognized that these small arms enter into Kenya through the porous borders of the country. It is also true that criminals plying their trade in Kenya have in recent years had access to these small arms and light weapons. However, the analysis of this problem proceeds on the basis that it is only refugees entering Kenya who bring in these arms into the country. But a distinction should be made between illegal immigrants and refugees entering the country.<sup>25</sup>

This situation of proliferation of small arms and light weapons has indeed fueled many other problems such as the rise in armed crime which has erroneously been associated with the presence of refugees. As Mwangi has argued, the porous borders in the country could enable any criminal element enter the country. Hence it is discriminatory to assume that crime has gone up due to the presence of refugees. Even more problematic is the fact that most refugees lack proper identity papers which they are entitled to according to article 27 of the Convention. Those who possess some form of identification constantly fall into problems with the police as the latter do not recognize them since the papers are issued by UNHCR. Ironically, the police routinely ignore or destroy the documentation and either threatens the individual with arrest by bringing them to the local police station and detaining them unless a bribe is paid.<sup>26</sup>

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<sup>25</sup> Mwangi M., *Refugee Protection and the Diplomacy of National Security in Kenya: A Framework for Analysis* (Paper Presented in a Workshop on *Refugee Protection in the Context of National Security*, Nairobi, 22-23 November, 2007) p 8.

<sup>26</sup> Human Rights Watch, *Hidden in Plain View, Refugees Living Without Protection in Nairobi and Kampala* (Human Rights Watch: 2000) p. 42.

## **The Refugees Act, (2006)**

Even though Kenya had hosted refugees for a long time as already stated, legislation catering for refugees was passed in 2006. The lack of domestic/municipal law to cater for the welfare of refugees had all along been seen as a serious setback to protecting the rights of refugees. For a country which had acceded to the 1951 Geneva Convention on the Status of Refugees and ratified the 1969 OAU Convention on specific aspects of refugee problems in Africa, it was a daunting challenge that the main principles in these conventions had not been codified in its municipal laws. The enactment of the Refugees Act, (2006) is therefore a major step towards protecting the rights of refugees. The Act in its interpretation of who a refugee is takes cognizance of the 1951 Geneva Convention's definition of a refugee which *inter alia* recognizes 'one who is outside his country of origin owing to a well founded fear of being persecuted for reasons of race, religion, sex, nationality and membership of a particular social group or political opinion'. It also goes further and adopts the definition within the 1969 OAU Convention which *inter alia* states that 'a person shall be a prima facie refugee owing to external aggression, occupation, foreign domination or events seriously disturbing public order in any part or whole of his country of origin'.<sup>27</sup>

In incorporating these two principles within the statute, the Act at least in theory respects both the international and regional instruments governing refugee matters. The Act has gone further and enumerated the circumstances under which a person can be disqualified from grant of refugee status. These include but are not limited to people who

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<sup>27</sup> Section 3 (2), Refugees Act, (2006).

have committed a crime against peace, a war crime or a crime against humanity.<sup>28</sup> The Act also spells out circumstances when the status of a refugee can be revoked on grounds such as the individual re-availing himself of the protection of the country of his nationality and re-acquiring his nationality among other reasons. Before the Act came into force, refugee matters were handled administratively at the Ministry of State for Immigration and Registration of Persons. With the statute in place, a department has been established to solely deal with refugee matters. The department has been given powers by the Act to administer all matters concerning refugees in the country and co-ordinate all activities and programmes relating to refugees.<sup>29</sup> This is essential as it gives clear powers to the department which before only operated as a unit under the administrative structure of the ministry.

The staff which is proposed in the Act clearly spells out the independence which the statute intends the department to possess. This is by ensuring that a Commissioner for Refugee Affairs is in charge of the department and is assisted by requisite staff to run the department.<sup>30</sup> The establishment of a Refugee Affairs Committee is also a step in the right direction since the committee shall assist the commissioner in recognizing applicants for grant of refugee status. The composition of the committee is versatile including representation from ministries of Foreign Affairs, Health, and Attorney General's office, Department of Immigration, Police and National Security Intelligence Service.<sup>31</sup> This is a combination of some of the most important government ministries and departments whose work has a bearing on refugee affairs. It is important to note that

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<sup>28</sup> Section 4, Refugees Act, (2006)

<sup>29</sup> Section 6, Refugees Act, (2006)

<sup>30</sup> Section 7, Refugees Act, (2006)

<sup>31</sup> Section 8, Refugees Act, (2006)

the statute recognizes the right of appeal by refugees in the event that they have been denied status by the committee. The Appeals Board which shall be independent is to have members who have vast experience in areas such as refugee law, immigration, national security and foreign affairs. Indeed those sitting on the board are not expected to be serving civil servants and this gives it the independence which it deserves.<sup>32</sup>

In recognizing refugee rights, the Act states that 'every recognized refugee 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 two, shall be subject to all laws in force in Kenya'. This is a clear commitment within the legislation towards respecting refugee rights.<sup>33</sup> The Act further gives the Minister powers to designate certain areas as transit centres or refugee camps in consultation with the host community. The management of all refugee camps and centres has correctly been put in the hands of a government camp administrator which is in tandem with the practice in many other refugee hosting countries. And finally the statute recognizes some vulnerable groups like refugee women and children where the Commissioner shall ensure that specific measures are taken to ensure the safety of refugee women and children in specific areas.<sup>34</sup> In conclusion it is clear that in theory, the Act aims at ensuring that refugee rights are respected but the actual practice on the ground remains to be seen.

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<sup>32</sup> Section 9, Refugees Act, (2006)

<sup>33</sup> Section 16(1), Refugees Act, (2006)

<sup>34</sup> Section 23 (1), Refugees Act, (2006)

## Durable Solutions

In its mandate to safeguard the protection of refugees, UNHCR has adopted three main pillars as solutions towards the refugee problem. These are Voluntary Repatriation, Local Integration and Resettlement to a third country.<sup>35</sup>

Voluntary repatriation is however regarded as the most durable of the three solutions. This is so because it presupposes that returning to their countries of origin in safety and dignity voluntarily is the most appropriate way to tackle the refugee problem. This principle has been adopted by the government of Kenya over the years. At the peak of the refugee problem in 1992, Kenya had about half a million refugees scattered in various camps and holding centers in the country and particularly in the Coastal, North Eastern and Rift Valley parts of the country. However by the end of 2005, Kenya had closed most of the camps and holding centers mainly due to refugees returning to their countries of origin. This left only two main camps namely the Dadaab camps in North Eastern and Kakuma camp in the Rift Valley Province. There were a total of about 230,000 refugees in these camps by the end of 2005.<sup>36</sup> This has been a very encouraging process since refugees are at their best returning to their countries of origin where they can contribute to the development of those countries particularly after the devastation that had occurred at the time of their flight. Further it is solely their right to return to their country of origin as is their right to seek asylum in another country when they are fleeing persecution in their home country. UNHCR and other partners ensure that the return is carried out in safety and dignity.

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<sup>35</sup> Niklaus Steiner (et al), *Problems of Protection – The UNHCR, Refugees and Human Rights*, (London: Routledge, 2003) p. 8-9.

<sup>36</sup> Refugee Consortium of Kenya, *Self Settled Refugees in Nairobi*, (RCK Publication: August – September, 2005) p. 4.

Local integration or naturalization is the second alternative to the refugee problem. This is practical in situations where refugees have lived in their asylum states for a considerably long time and in some cases intermarried with locals. Where refugees have adopted for all intents and purposes the culture of their country of asylum and even stretched to the third or fourth generations, it is usually prudent that they are integrated into that society.<sup>37</sup>

Kenya on its part has not adequately taken steps to naturalize refugees living in the country. One of the reasons is that the immigration laws in Kenya are quite strict hence making it very difficult for refugees to be naturalized. Besides Kenya has always had a policy that refugees should be in designated camps where they are catered for by UNHCR and NGOS.<sup>38</sup> This policy presupposes that it will be easier to transport refugees to their countries of origin once conditions improve there. It has been observed that some refugees living in Kenya are endowed with professional skills such as doctors, lawyers, engineers and the like.<sup>39</sup> These professional refugees in essence could be useful to the society if they are allowed to naturalize. Even though Kenya insists that no foreigner should take up a job which could be filled by a citizen, competition should however be encouraged where both Kenyans and refugees possess the same skills.

Resettlement to a third country is regarded as the third of the three durable solutions. This is however a tedious and most difficult process as very few countries are keen to resettle refugees and those who impose such stringent conditions making it

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<sup>37</sup> Article 34, 1951 Geneva Convention on Refugees.

<sup>38</sup> Aukot E., *Law, Policy and Practice on Refugees and IDPs in Kenya*, Paper Presented at the East African School on Refugees and Humanitarian Affairs (EASRHA), University of Dar es Salaam, 3<sup>rd</sup> – 16<sup>th</sup> September, 2005. p. 14.

<sup>39</sup> Ilse Greik (et al), *Contribution to Sustainable Solutions for Protracted Refugee Situations in the African Region*, A UNHCR Manuel (Published by UNHCR Geneva, March 2006) p. 28.



hard for very needy cases to get the opportunity for resettlement. The country which usually takes the largest number of refugees for resettlement is the United States of America. Others are Canada, Australia and the Scandinavian countries. In most cases these countries look for some of the most productive members of the refugee community. In essence they take people who will be an asset to them. This means that one may have a serious security consideration making it difficult to live in an asylum state but may not qualify for resettlement due to the usage of different criteria by resettling countries.<sup>40</sup> Indeed this has prejudiced the very purpose resettlement was meant to achieve.

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<sup>40</sup> Niklaus Steiner (et al), *Problems of Protection – The UNHCR, Refugees and Human Rights*, (London: Routledge, 2003) p. 9

## Chapter Four

### Implementation of Refugee Rights: Case Study of Kenya

#### Introduction

This chapter will examine the categorization of what the 1951 Convention spells out as rights that refugees are entitled to. The chapter will then proceed to examine if these specific rights have been respected by Kenya both in the camps and urban areas. Kenya has two main camps which are Dadaab in Garissa district and Kakuma in Turkana District. The Dadaab camps hosting approximately 220,000 refugees from Somalia comprise of Ifo, Dagahaley and Hagadera while Kakuma camp hosts approximately 66,000 refugees the majority of which are from Sudan while a sizable number is from Ethiopia. In Nairobi, there are approximately 60,000 refugees according to government and UNHCR estimates.

The chapter will also examine primary data which was collected by interviewing specific interest groups of refugees both in Nairobi and the camps. These are men, women and the youth from three main nationalities which are Somalis, Ethiopians and Sudanese who benefit from *prima facie* refugee status. Primary data collected by interviewing government and UNHCR officials will also be evaluated.

#### Categorization and Implementation of Specific Rights

The 1951 Geneva Convention being the main international instrument and its subsequent protocol of 1967 has various rights which refugees are entitled to.<sup>1</sup> In every respect, an analysis of these rights clearly shows that they do not all give absolute protection for refugees rather they have certain limitations from one right to the other. In

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<sup>1</sup> See Chapter 2

this respect it is important to look at these categories in detail and to what extent these rights offer protection to refugees. The main categories of refugee rights in accordance with the convention are, rights which are the same as those accorded to nationals or citizens of the asylum state; rights similar to those of aliens and nationals of a foreign country; and absolute and specific rights governing refugees.<sup>2</sup>

### **Rights Same as Citizens**

The first category of rights spelt out in the convention is where refugees are entitled to rights same as nationals of the receiving state. The implementation of these rights will be examined both in the refugee camps and in Nairobi being the main urban area where many refugees reside. The first set of rights is the freedom to practice their religion and the religious education of their children as enshrined in article 4 of the convention. This is a fundamental freedom which refugees have been free to enjoy both in the camps and Nairobi. In both Kakuma and Dadaab refugee camps there are several churches and mosques respectively. The mosques are to be found in Dadaab because here there are refugees predominantly from Somalia who in most cases are Muslims while the churches are to be found in Kakuma since refugees residing there are from Southern Sudan and are predominantly Christians.

Interviews carried out on refugees as well as government and UNHCR officials attested to the fact that refugees are enjoying this right both in the camps and urban areas.<sup>3</sup>

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<sup>2</sup> Articles 3-35, 1951 Geneva Convention Relating to The Status of Refugees.

<sup>3</sup> Interviews conducted on refugees in the camps within the month of May and Nairobi within the month of June. Interviews also conducted with Mr. Badu S. Katelo, Under Secretary in charge of refugee protection at the Department of Refugee Affairs on 18<sup>th</sup> September, 2008 and Linnet Opiyo, UNHCR, Protection Officer on 19<sup>th</sup> September, 2008.

The personal status of a refugee as described in article 12 of the convention has by and large been respected in Kenya. In essence refugees are subject to the law of the country and Kenya is no exception. In situations where refugees commit crimes, they will be charged and sentenced in a court of law like a Kenyan citizen. Further Kenya respects the rights of refugees as concerns their marital status or when and whom they choose to marry.<sup>4</sup> Interviews conducted with refugees, government and UNHCR officials revealed that there has been no discrimination whatsoever as concerns the right for refugees to marry a person of their choice. Further, both government and UNHCR officials attested to the fact that refugees are subject to the law of the land as enshrined in article 2 of the convention.<sup>5</sup>

Equally refugees have been accorded equal rights as nationals with regard to artistic rights and industrial property as envisaged by article 14 of the convention. This can be seen in some of the cultural activities in both Kakuma and Dadaab and in urban areas particularly in areas where refugees reside.<sup>6</sup> Refugees are free to engage in designs or models, trade marks and scientific works among others. The government and UNHCR actually attested to the fact that refugees are even encouraged to engage in designs, trade marks and scientific works among other issues. The refugees themselves confirmed this to the extent that even during occasions like World Refugee Day, they invariably have so much to put on display. This enables them not only to promote their culture; it also gives them an opportunity to sharpen their skills in these areas.<sup>7</sup>

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<sup>4</sup> Interviews conducted with refugees, government and UNHCR officials

<sup>5</sup> Ibid

<sup>6</sup> Wanjiru M. M., *A Christian Approach to the Refugee Problem in Urban Areas: A Case Study of Jesuit Refugee Service With Emphasis on the Mikono Project*, M.A Thesis, University of Nairobi, Department of Religious Studies, 2003. p. 122

<sup>7</sup> Interviews conducted on refugees in the camps within the month of May and Nairobi within the month of June. Interviews also conducted with Mr. Badu S. Katelo, Under Secretary in charge of refugee protection

Article 16 of the convention expects asylum states to accord refugees the same rights as those accorded to nationals with respect to accessing justice. This has been very problematic in refugee camps where levels of insecurity abound without the law enforcement agencies such as the police and the courts.<sup>8</sup> The two camps in Kenya that is the Dadaab and Kakuma camps are located in parts of the country where insecurity is rife making it difficult for refugees to live there in safety where camps are congested.<sup>9</sup> Because of this, there have been various incessant incidents of insecurity particularly for refugee women who have severally been raped while going out to search for firewood, water and other essentials. Because of the limitation of security agents and the courts alike, these victims of rape find themselves in a position where they have nobody to turn to. While interviewing officials at the Department of Refugee Affairs and UNHCR, it was revealed that the justice system is challenging and refugees are not able to fully access justice. The UNHCR Protection officer specifically stated that in Dadaab refugees entirely depend on the courts in Garissa which are more than 100 km away and in Kakuma the problem is even more severe since they depend on mobile courts which are usually in session seasonally. The government official on his part indicated that the rate of insecurity cases has reduced because of an introduction of giving refugees firewood and drilling boreholes close to where they reside.<sup>10</sup>

Interviews carried out on refugees both in Kakuma and Dadaab refugee camps indicate that insecurity has been one of the biggest challenges both in the camps and

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at the Department of Refugee Affairs on 18<sup>th</sup> September, 2008 and Linnet Opiyo, UNHCR, Protection Officer on 19<sup>th</sup> September, 2008.

<sup>8</sup> See Chapter 3

<sup>9</sup> Stein, N.B., 'The Refugee Experience: Defining the Parameters of a Field Study', *International Migration Review*, Vol. 15, No. ½, Refugees Today, (Spring – Summer, 1981, pp.320-330) p. 327

<sup>10</sup> Interviews conducted with Mr. Badu S. Katelo, Under Secretary in charge of refugee protection at the Department of Refugee Affairs on 18<sup>th</sup> September, 2008 and Linnet Opiyo, UNHCR, Protection Officer on 19<sup>th</sup> September, 2008.

Nairobi. Although the issue of security was not one of the main questions within the questionnaire, when refugees were asked to give any other information which was not included within the questionnaire, more than 90% of those living in the camps indicated that the problem of insecurity was rife. This though was not the case with refugees living in urban areas.<sup>11</sup>

Wage earning employment has been recognized under article 17 (3). Apparently, under this article, asylum states are expected to give sympathetic consideration to assimilating the rights of refugees. The general right to employment will be tackled more distinctly under rights same as aliens and nationals of a foreign country. The right to elementary education is clearly recognized under article 22 (1) of the convention. In the camps this right is in existence as there are several schools both in Dadaab and Kakuma refugee camps where refugee children attend primary school. Further, the education in those schools is in tandem with the curriculum in Kenya with English being used as the main language of instruction. Refugee children are therefore taught what other Kenyan children are taught in other parts of the country.<sup>12</sup> While refugee children in the camps are offered the required assistance with respect to elementary education, this is not so in urban areas where they are compelled to compete with Kenyan children for the limited opportunities in public schools. Invariably, school authorities favor Kenyan children compared to refugee children at the time of admission.

Interviews carried out on government and UNHCR officials revealed that indeed the refugee rights to education of their children in the camps has been respected where

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<sup>11</sup> Interviews conducted on refugees in the camps within the month of May and Nairobi within the month of June.

<sup>12</sup> Bolesta A., *Refugee Crisis and International Responses, Towards Permanent Solutions?* (Published by Libra Academy of Entrepreneurship and Management: Warsaw, Poland 2005) p. 26

primary education is offered free of charge. The UNHCR further stated that there is proper liaison between their organization and the Ministry of Education in particular the Department of Basic Education. As for Somali refugees many of whom need to go through Islamic classes, this is permitted so that they do not feel restricted to the Kenyan system. There was however concern from UNHCR that some schools particularly in urban areas are discriminatory while admitting students as they favour Kenyan students compared to refugees. UNHCR stated that they have been called upon to intervene several times when a refugee child has been denied admission to a public school for the simple reason that he is a refugee.<sup>13</sup>

Refugees interviewed gave varied responses concerning the implementation of the right to education for their children. For refugees in the camps the response was that their children had access to elementary education. In Kakuma camp for instance, more than 90% of the youths interviewed expressed satisfaction that this right had been guaranteed. In Dadaab camps the numbers were a little lower with approximately 75% indicating that the right to education for their children had been respected. In Nairobi, Somali refugees did not express serious reservations concerning their right to education as did their Ethiopian and Sudanese counterparts where more than 85% felt that their right to education had been violated.<sup>14</sup>

As concerns public relief which is recognized under article 23 of the convention, the Kenyan government cannot be said to have discriminated refugees since in most cases

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<sup>13</sup> Interviews conducted with Mr. Badu S. Katelo, Under Secretary in charge of refugee protection at the Department of Refugee Affairs on 18<sup>th</sup> September, 2008 and Linnet Opiyo, UNHCR, Protection Officer on 19<sup>th</sup> September, 2008.

<sup>14</sup> Interviews conducted on refugees in the camps within the month of May and Nairobi within the month of June.

refugees have been aided by UNHCR and Aid Agencies in a conducive environment where security is provided by the government. Besides, the Ministry of Finance has regularly waived taxes on commodities being imported into the country for humanitarian purposes. Interviews carried out on government and UNHCR officials reveal that refugees have been assisted accordingly in terms of food and other non-food items. This is so because the UNHCR works in collaboration with the World Food Programme to ensure that refugee needs are met.<sup>15</sup> The refugees themselves however feel that the food basket is either not enough or agreeable to their diet. They particularly complained that the supply of dry maize and beans is a challenge to them since they usually get problems cooking the foodstuffs due to lack of fuel.<sup>16</sup>

Rights related to labour legislation and social security are respected by the Kenyan government in as much as a refugee is genuinely employed in a particular firm or organization. Refugees just as nationals are subject to the necessary rights in areas of remuneration including family allowances, overtime arrangements, hours of work and minimum age of employment. Further, their social security is guaranteed in respect of employment injury, occupational diseases, maternity, sickness, disability, old age and death. Finally, article 29 (1) urges contracting states not to impose upon refugees duties, charges or taxes, of any description whatsoever, other or higher than those which are or may be levied on their nationals in similar situations. Indeed the government is not known to have violated this right both in the refugee camps and in the urban areas.

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<sup>15</sup> See Chapter 2

<sup>16</sup> Interviews conducted on refugees in the camps within the month of May and Nairobi within the month of June. Interviews also conducted with Mr. Badu S. Katelo, Under Secretary in charge of refugee protection at the Department of Refugee Affairs on 18<sup>th</sup> September, 2008 and Linnet Opiyo, UNHCR, Protection Officer on 19<sup>th</sup> September, 2008.



## **Rights Similar to Aliens and Nationals of a Foreign Country**

The convention does expect contracting states to accord refugees specific rights similar to Aliens. However this treatment could also be seen to have three categories as argued by Mwangiru. He has stated:-

The 1951 Convention establishes standards of treatment for refugees. These standards of treatment are pegged on the treatment of refugees according to the standard of treatment of aliens. The minimum of these standards require refugees to be treated at least in the same way as aliens are treated generally. Besides this, there are higher standards of the treatment of refugees: that the refugee be accorded the most favourable treatment as is accorded to aliens; and treatment as favourable as possible, but in any event not less favourable than the treatment accorded to aliens generally in the same circumstances.<sup>17</sup>

The set of refugee rights under this category have been implemented in some instances while in others the situation has been wanting. Beginning with article 13, refugees have a right to movable and immovable property. Indeed both in the camps and urban areas the government is not known to have violated this right. With regard to self employment which is recognized under article 18 of the convention, many refugees in particular those living in urban areas have had problems such as not being able to acquire work permits to enable them open businesses more often than not for lack of documentation. Indeed aliens do get work permits for as long as they are properly registered but for a refugee the process was stopped in 1995. This is according to a UNHCR Protection Officer.<sup>18</sup> At the interview the officer expressed dismay that even refugees who have very good education such as professional engineers, doctors or lawyers are unable to engage in any gainful

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<sup>17</sup> Mwangiru M., *The Doctrinal Basis of Standards of Treatment in International Refugee Law: Kenya's Transformation of the 1951 Refugee Convention* (Paper Presented at a UNHCR Workshop on International Protection and Refugee Law for Judges and Magistrates, Naivasha, 23-25 April 2008) p. 5.

<sup>18</sup> Interview conducted with Linnet Opiyo, UNHCR, Protection Officer on 19<sup>th</sup> September, 2008.

employment. Again the responsibility to issue work permits is in the purview of the Immigration Department and not the Department of Refugee Affairs.<sup>19</sup>

In the camps the situation is even worse. In Dadaab refugee camp for example there is such a dependency syndrome that refugees are almost totally unable to engage in any self employment. In Kakuma, the situation is not any different as stated by Eukot that 'the camp is a replica of a Kenyan village, township, city estate, slum and a rural location in the country, which is characterized by many idle youths, joblessness, drug abuse and deprivations among other unpleasant things'.<sup>20</sup> However, UNHCR and government officials indicated that the situation has improved since refugees are given vocational training where they learn some skills such as carpentry and tailoring. The same have helped refugees engage in some form of self employment where they are able to supplement what the UNHCR and aid agencies offer them.<sup>21</sup>

Interviews carried out on refugees in both the camps and Nairobi attest to the challenge they face in their quest to engage in any self employment. Most of the Somali youth in the camps particularly felt that this right had been violated. This is seen in as high as 90% of those interviewed responding likewise. In Nairobi apart from the men, the greater percentage of women and youths complained that this right had been violated. As for the Ethiopian refugees in the camps, the women generally felt that this right had been violated. In Nairobi, the case was different where most of those interviewed be they men,

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<sup>19</sup> Interview conducted with Linnet Opiyo, UNHCR, Protection Officer on 19<sup>th</sup> September, 2008.

<sup>20</sup> Aukot E., *Law, Policy and Practice on Refugees and IDPs in Kenya: A Critical Analysis in the Light of National and International Human Rights Framework*, (Paper presented at the East African School on Refugees and Humanitarian Affairs, University of Dar es Salaam, 3<sup>rd</sup> – 16<sup>th</sup> September 2005). p 15.

<sup>21</sup> Interviews conducted with Mr. Badu S. Katelo, Under Secretary in charge of refugee protection at the Department of Refugee Affairs on 18<sup>th</sup> September, 2008 and Linnet Opiyo, UNHCR, Protection Officer on 19<sup>th</sup> September, 2008.

women or youths felt that this right had been violated. The Sudanese refugees were not any different since in the camps most of the women and youths felt that this right had been violated. In Nairobi, most of those interviewed in the three categories of men women and youth felt that this right had been violated. This is seen in a response of more than 80% stating so.<sup>22</sup>

Matters pertaining to housing are recognized under article 21 of the convention. As for refugees living in camps the issue is more of shelter than housing.<sup>23</sup> It has been argued that the state of refugee camps is wanting since aliens in the same circumstances would not be living in refugee camps. To that extent then favorable shelter conditions should exist in the camps but this is not the case. Refugees have been confined in camps in the most unproductive parts of the country where they live in tents and have very little access to basic amenities such as clean water, recreational and other facilities.<sup>24</sup>

Most of the refugees interviewed expressed serious reservations particularly as concerns shelter conditions in the camps. For many refugees living in Nairobi the conditions were not any better since they lack any gainful employment and can therefore not afford to live in favourable housing as the case may be. The greater majority (more than 90%) of Somali women in the camps felt that the shelter conditions were bad. In Nairobi however, it is the youth who felt that they had serious problems with shelter. Most of the Ethiopian women in the camps also complained of bad shelter conditions<sup>25</sup>

The government officer in charge of Protection also expressed reservations concerning the type of shelter offered at the camp. He said that the services are too

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<sup>22</sup> Interviews conducted on refugees in the camps and Nairobi in May and June 2008 respectively.

<sup>23</sup> See Chapter 3

<sup>24</sup> Rodger T. Windsor (et al), *World Refugee Survey*, (Published by the U.S Committee for Refugees: Washington D.C, 2001) p 88

<sup>25</sup> Interviews conducted on refugees in the camps and Nairobi in May and June 2008 respectively.

minimal and do not meet the general requirements of favourable shelter. The UNHCR Protection Officer on her part stated as much. She further indicated the general idea of putting refugees in plastic sheeting is based on the feeling that asylum is temporary and that one day refugees will go back to their countries of origin. UNHCR however stated that in order to improve the situation, the organization has introduced a system where they give refugees material to build shelters.<sup>26</sup>

Education for refugees is recognized under article 22 (2) with respect to secondary and tertiary studies. According to UNHCR, efforts have been in place to ensure that refugees have access to both secondary and tertiary education. In Nairobi for instance, refugees are assisted by several Non Governmental Organizations such as the Jesuit Refugee Service and the Windle Charitable Trust. This however is confined to those who are exceptionally bright but are unable to further their education due to lack of funds. UNHCR further indicated that the German government has been able to fund few refugees to access university education both in and out of the country. Emphasis for refugees to pursue secondary and tertiary studies has been confined to Somali girls based on the general discrimination that exists within their communities.<sup>27</sup> However most of the students who make it up to university level are from Southern Sudan.<sup>28</sup> While aliens can take their children to whichever school they choose, refugees are disadvantaged because their problems have a cycle ranging from lack of proper documentation to difficulties in finding employment.

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<sup>26</sup> Interviews conducted with Mr. Badu S. Katelo, Under Secretary in charge of refugee protection at the Department of Refugee Affairs on 18<sup>th</sup> September, 2008 and Linnet Opiyo, UNHCR, Protection Officer on 19<sup>th</sup> September, 2008.

<sup>27</sup> Beyani C., 'The Needs of Refugee Women: A Human-Rights Perspective', *Gender and Development*, Vol. 3, No. 2, (Rights). (June., 1995, pp. 29-35) p. 30

<sup>28</sup> Interview conducted with Linnet Opiyo UNHCR Protection Officer on 19<sup>th</sup> September, 2008.

In the camps the provision for education is even more difficult particularly for refugees who have completed school at the primary level. In the Dadaab camps the problem of very few secondary schools leads to frustration and idleness for students while the few who manage to get chances for admission to secondary schools encounter numerous learning problems such as acute shortage of teachers and learning facilities. In Kakuma camp, they complain that the ratio of pupils to teachers is extremely high. UNHCR guidelines place the pupil to teacher ratio at 40:1 but many teachers have to deal with classes averaging 100 pupils per stream. The office of the UNHCR indeed confessed that there was a problem of enough teachers since the implementing partners do not have enough capacity to provide for the many refugees who require secondary education.<sup>29</sup>

What has been even more frustrating for refugees is when they have secondary education and are unable to proceed with university studies in Kenya since the government does not recognize their certificates. This is clearer in the case of Ethiopian university students who came to Kenya in 1991 hoping to continue with their university education but their hopes were dashed. Aukot has observed:-

Refugees claim for their rights is best captured by the case of the Ethiopian students. Their claim to the right to education became illusionary. They had assumed being students, they would automatically continue their education in Kenya. However, an official at the Ministry of Home Affairs argued, Kenya's education system/quality was different and superior to that of Ethiopia. Therefore, it would not be fair to the Kenyan national to be relegated to pave way for Ethiopian Refugees to attend the universities.<sup>30</sup>

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<sup>29</sup> Interview conducted with Linnet Opiyo UNHCR Protection Officer on 19<sup>th</sup> September, 2008.

<sup>30</sup> Aukot E., *Law, Policy and Practice on Refugees and IDPs in Kenya: A Critical Analysis in The Light of National and International Human Rights Framework*, (Paper Presented at The East African School on Refugees and Humanitarian Affairs, University of Dar es Salaam, 3<sup>rd</sup> – 16<sup>th</sup> September, 2005) p 14.

This type of discriminatory thinking is contrary to the principles of the convention which expects states to recognize foreign school certificates, diplomas and degrees. Finally, article 26 of the convention expects countries of asylum to grant refugees freedom of movement subject to any regulations applicable to aliens in the same circumstances. While there are no known regulations of this nature, many refugees have been arbitrarily arrested by police in Nairobi for either lack of identity papers or the failure on the part of the police to recognize their papers. In this respect, they are unable to move freely within Kenya. Even more problematic are refugees who reside in the camps.<sup>31</sup> They are confined and unable to travel to the urban areas freely since the government restricts their stay within the parameters of the camps. This is one right that refugees have been denied and as already stated it has a bearing on other rights like lack of documentation<sup>32</sup>

The government officer in charge of refugee protection stated that refugees have been having problems in previous years since there was no known document that would enable refugees to move freely. He however indicated that since the Act came into force, the situation has improved a bit since some refugees have been given a movement pass. The UNHCR officials stated as much but indicated that the pass itself is only given in situations where a refugee has to prove that he has a good reason to travel. Again the authorizing agency in this case is the Department for Refugee Affairs.<sup>33</sup>

Refugees interviewed expressed varied opinions concerning their freedom of movement. Refugees of Somali origin did not complain much about their violation of this

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<sup>31</sup> See Chapter 3.

<sup>32</sup> Stein, N.B., 'The Refugee Experience: Defining the Parameters of a Field Study', *International Migration Review*, Vol. 15, No. ½, Refugees Today, (Spring – Summer, 1981, pp.320-330) p. 327

<sup>33</sup> Interviews conducted with Mr. Badu S. Katelo, Under Secretary in charge of refugee protection at the Department of Refugee Affairs on 18<sup>th</sup> September, 2008 and Linnet Opiyo, UNHCR, Protection Officer on 19<sup>th</sup> September, 2008.

right both in the camps and Nairobi as less than 40% stated that this right had been violated. Ethiopian women and youths in the camp felt that this right had been violated. This is seen in more than 90% expressing as much while in Nairobi the men and youths felt that they could not move freely. Sudanese refugees in the camps did not generally express dismay as concerns their freedom to move since less than 30% said that they experienced problems while traveling. In Nairobi the men and women generally stated that they experienced challenges while traveling. In particular they were arrested by police for lack of proper documentation.<sup>34</sup>

As concerns rights that are similar to nationals of a foreign country, the convention has very limited set of rights. Article 15 refers to the right of association which specifically deals with non-political and non-profit making associations and trade unions. Kenya is not known to have violated this right against refugees who reside in the camps or urban areas. Refugees are free to form associations and in the camps this can be seen quite explicitly through the many women groups that exist there.<sup>35</sup> According to article 17 (1), refugees should be accorded the right to wage earning employment. While nationals of a foreign country are freely employed in our private sector particularly, very few refugees can be found in the same fields. This is so because as mentioned earlier, they have problems of documentation and by extension experience difficulties obtaining work permits especially for refugees living in urban areas. As for camp refugees the situation is more dismal since there is the syndrome of dependency on aid agencies with very little or no opportunities for employment.

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<sup>34</sup> Interviews carried out on refugees living in the camps and Nairobi in May & June respectively.

<sup>35</sup> Thomas D.Q., 'We Are Not the World: U.S Activism and Human Rights in the Twenty-First Century', *Signs*, Vol. 25, No. 4, Feminisms, Millennium (Summer, 2000, pp. 1121-1124) p. 1121

## **Absolute and Specific Rights Governing Refugees**

The last set of rights is the one that does not make reference to nationals/citizens, aliens or nationals of a foreign country. These in essence only make reference to refugees. The first right is the one in article 3 which calls on states to apply the provisions of the convention without discrimination as to race, religion or country of origin. Kenya has been known to discriminate against some groups of refugees.<sup>36</sup> The first group of refugees to face this problem was those from Uganda in the early 1990s. Ugandan refugees had been living and working safely in Kenya in the 1980s following prolonged periods of wars in their country. Most of them were absorbed into the education system as teachers. However, with the ascendancy to Power by President Yoweri Kaguta Museveni, the then administration in Kenya targeted Ugandan refugees for repatriation irrespective of whether or not they would be persecuted upon returning to Uganda. This move was premised on the fact that relationships between the two countries had grown frosty following the renegeing by Museveni on a peace deal brokered by President Moi. Secondly the pressure to employ Kenyan citizens to take up jobs being held by Ugandans was too immense.<sup>37</sup>

Somali refugees have also been discriminated and this has very clear historical reasons to it where Kenya generally looks at Somali refugees from a political rather than humanitarian angle. In their response to issues concerning security, Somali refugees who were interviewed attested to the fact that they have been treated in a discriminatory manner particularly with respect to issuance of travel documents. In essence they

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<sup>36</sup> See Chapter 3

<sup>37</sup> Aukot E., *Law, Policy and Practice on Refugees and IDPs in Kenya: A Critical Analysis in The Light of National and International Human Rights Framework*, (Paper Presented at The East African School on Refugees and Humanitarian Affairs, University of Dar es Salaam, 3<sup>rd</sup> – 16<sup>th</sup> September, 2005 p.16



expressed concern over the many questions government officers asked concerning their Kenyan relatives of Somali origin.<sup>38</sup> The government however denied that any group of refugees was discriminated based on their nationality. The UNHCR official could not confirm or deny these claims but admitted to having received such complaints from Somali refugees.<sup>39</sup>

Refugees who do not have a valid travel document are entitled to identity documents under article 28. This has been a big problem for the government to fulfill over the years. Refugees in the camps are mainly documented by the use of ration cards which they use to obtain food and non-food items.<sup>40</sup> Those in the urban centres suffer even more because many do not have any proper form of identification while those who possess letters of identification from UNHCR invariably suffer police arrests since the latter do not recognize them. Travel documents should also be issued to refugees who need to travel outside the country. While some refugees have been issued with travel documents without problems, the majority either in the camps or urban areas have not benefited from this provision. The Department of immigration is in charge of issuing the documents upon a recommendation from UNHCR. This puts the department of refugees in a precarious position since they play no role even though they are in charge of refugee affairs in the country.

Most of the refugees interviewed expressed serious problems concerning issuance of identity documents. Many who live in the camps indicated that their only documentation was a ration card. More than 90% of the Somali men and youth

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<sup>38</sup> Interviews carried out on refugees in the camps and Nairobi in May & June 2008 respectively.

<sup>39</sup> Interviews conducted with Mr. Badu S. Katelo, Under Secretary in charge of refugee protection at the Department of Refugee Affairs on 18<sup>th</sup> September, 2008 and Linnet Opiyo, UNHCR, Protection Officer on 19<sup>th</sup> September, 2008.

<sup>40</sup> See Chapter 3.

interviewed from the camp said that they did not have any other documentation apart from ration cards. As for Somali refugees interviewed in Nairobi, generally most men, women and even youths indicated that they had not been issued with identity documents. Most of the Ethiopian refugees in the camps equally complained of lack of documentation. This is seen in more than 90% of the men, women and youths stating so. In Nairobi the situation was the same with Ethiopian refugees. The Sudanese refugees from the camp and in Nairobi however said that they did not have a serious problem with issuance of identity documents.<sup>41</sup>

Article 31 of the convention urges contracting states not to impose penalties on refugees who are illegally in the country particularly when they are coming directly from a territory where their lives would be threatened. In some situations however refugees have been charged for being in the country illegally under the Immigration Act. Ironically, when the courts encounter a case of this nature they in some cases send the refugees to UNHCR and not to the government department charged with the management of refugee affairs. The UNHCR Protection Officer corroborated that this has happened in some situations.<sup>42</sup>

This practice has in essence violated the rights of refugees leading to complains that UNHCR does not adequately address their needs. Further, refugees who are in the country illegally are not supposed to be expelled or returned back to their countries of origin in case they will be persecuted upon return. This principle of non-refoulment recognized under article 33 is the bane of refugee protection internationally. While Kenya is not known to be in the practice of returning refugees to their countries of origin where

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<sup>41</sup> Interviews carried out on refugees in the camps and Nairobi in May and June 2008 respectively.

<sup>42</sup> Interview carried out with the Ms. Linnet Opiyo, the UNHCR Protection Officer on 19<sup>th</sup> September, 2008.

they will face danger, there are isolated cases where police have admitted to sending refugees back to their countries of origin without an assessment of whether they would face persecution upon return.<sup>43</sup> Interviews carried out on refugees, government and UNHCR officials did not however bring out any evidence of refugees having been returned to their countries of origin where they would face danger.<sup>44</sup>

Finally, article 34 of the convention encourages states to assimilate refugees in their societies as much as possible. This has been one of the biggest challenges for Kenya. As observed earlier, most refugees in Kenya reside in camps where they are catered for by UNHCR and NGOs.<sup>45</sup> In those camps they are isolated and seldom intermingle with the local communities save in situations where they must share services such as health centres and boreholes. The government generally envisages a situation where refugees will return back to their countries of origin once conditions improve there and this is why they put camps close to the border. Even refugees whose parents were born in Kenya do not qualify to be naturalized because of the stringent immigration laws which go back to the third or fourth generation for both parents before one can be naturalized or assimilated. This position has put Kenya in bad light internationally where it is viewed as being averse to local integration or assimilation as one of the viable solutions to the refugee problem.<sup>46</sup>

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<sup>43</sup> Human Rights Watch, *Hidden in Plain View, Refugees Living Without Protection in Nairobi and Kampala*, (New York: Human Rights Watch, 2000) p 50

<sup>44</sup> Interviews conducted on refugees in the camps within the month of May and Nairobi within the month of June. Interviews also conducted with Mr. Badu S. Katelo, Under Secretary in charge of refugee protection at the Department of Refugee Affairs on 18<sup>th</sup> September, 2008 and Linnet Opiyo, UNHCR, Protection Officer on 19<sup>th</sup> September, 2008.

<sup>45</sup> See Chapter 3.

<sup>46</sup> Kamanga K., *International Refugee Law in East Africa: An Evolving Regime*, (Paper Presented at The East African School on Refugees and Humanitarian Affairs, University of Dar es Salaam, September 3<sup>rd</sup> - 16<sup>th</sup> 2005) p. 8.

Both government and UNHCR officials stated that local integration has never been encouraged as a viable option. The government official particularly expressed concern that local integration was not possible since the land available in Kenya is so limited that even the Kenyans themselves do not have enough. He further stated that refugees are supposed to be given jobs that cannot be performed by any qualified Kenyan. In this case he suggested that integration could be considered on a case by case basis but it should be limited to the very needy. He finally clarified that once the regulations to the Refugees Act (2006) are formulated and the Act becomes fully operational, the government will consider this option. The UNHCR official on her part criticized the government's reluctance in assimilating refugees. She said that in spite of the fact that this is a right refugees are entitled to under the convention, the government misses a lot in terms of utilizing refugees who have special skills that could be of benefit to the country<sup>47</sup> The fact that refugees can be of benefit to the host country has been acclaimed in other parts of the world.<sup>48</sup>

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<sup>47</sup> Interviews conducted with Mr. Badu S. Katelo, Under Secretary in charge of refugee protection at the Department of Refugee Affairs on 18<sup>th</sup> September, 2008 and Linnet Opiyo, UNHCR, Protection Officer on 19<sup>th</sup> September, 2008.

<sup>48</sup> Black R., 'Fifty Years of Refugee Studies: From Theory to Policy', *International Migration Review*, Vol. 35, No. 1, Special Issue: UNHCR at 50: Past, Present and Future of Refugee Assistance. (Spring, 2001, pp. 57-78) p. 59.

## Chapter Five

### Critical Analysis of Refugee Rights in Kenya

#### Introduction

This chapter will critically analyze the concept of refugee rights by examining the debates emanating from previous chapters already discussed in the project. A general conclusion of the previous chapters is necessary before a thorough analysis of issues arising is given.

Chapter 2 concluded that the international community made effort towards the protection of refugees and forced migrants in general. This is reflected in the initial work done by the League of Nations in preventing war and more importantly the United Nations Organization. The chapter also showed that the UNHCR has faced financial challenges making it difficult to implement the tenets of the convention adequately.<sup>1</sup> African countries have not been able to respect refugee rights in totality because of abuse of human rights by most of its governments. The difficulty in implementing Cultural and Socio-Economic rights in Africa is mainly because of financial limitations.<sup>2</sup>

Chapter 3 concluded that the experience Kenya has faced over the years in catering for refugees has led to prospects in better management for refugees.<sup>3</sup> It observed that Kenya moved from an individual status determination process to group

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<sup>1</sup> Loescher G, *Beyond Charity, International Co-operation & the Global Refugee Crisis* (Oxford: Oxford University Press, 1996) p. 126

<sup>2</sup> See Chapter 2

<sup>3</sup> See Chapter 3

determination over a short period of time.<sup>4</sup> This observation shows the determination Kenya had in extending to refugees their right to asylum. The chapter also concluded that Kenya had been overwhelmed by security incidents in refugee holding areas.<sup>5</sup> This has undermined valuable efforts in catering for refugees. The chapter also concluded that rather than concentrate on voluntary repatriation and resettlement programmes, the government should consider naturalizing refugees with professional skills.<sup>6</sup>

Chapter 4 concluded that Kenyan government's attempt to respect rights that are same as citizens is commendable.<sup>7</sup> Most rights due to refugees are not violated. Respect for rights same as aliens and nationals of a foreign country is however wanting.<sup>8</sup> In most cases refugee rights are violated in this area. Those rights which are absolute and specific to refugees are also not respected fully.<sup>9</sup> Primary data analyzed throughout the chapter shows a general tendency for the government to be defensive concerning respect for refugee rights. The UNHCR on its part gives a more dialectical and balanced position as far as respect for refugee rights is concerned. The refugees on their part are more emphatic that most of the rights they are entitled to are not respected.

### **Critical Issues to be Analyzed**

While there are many issues that can be drawn from the project under review, it is important to point out some of the critical ones that need analysis. The first issue is the approach Kenya took in determining the status of refugees. The second issue is the

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<sup>4</sup> Adepoji, A 'The Refugee Situation in the Horn of Africa and Sudan', *A Journal of Opinion*, Vol. 12, No.1/2 (Spring-Summer, 1982, pp. 29-34) p. 29.

<sup>5</sup> Loescher G., *Beyond Charity, International Co-operation and the Global Refugee Crisis* (Oxford: Oxford University Press, 1996) p. 126.

<sup>6</sup> See Chapter 3

<sup>7</sup> See Chapter 4

<sup>8</sup> Ibid

<sup>9</sup> Ibid

review of the Refugee Act (2006). The security of refugees in general will also be critically analyzed. Finally, constraints faced by the government in respecting specific refugee rights will be looked at.

## **Kenya's Approach to Refugee Status Determination**

While Kenya made an approach to determining the status of refugees in the late 1980s in recognition of the right to seek asylum by the refugee, the process fell short of known international standards for refugee status determination.<sup>10</sup> The representation by the Ministry of Home Affairs and the department of Immigration alone from the government angle did not reflect a proper representation of government ministries and departments dealing with refugee.<sup>11</sup> The department of police, the Attorney Generals Chambers, the Ministry of Foreign Affairs and even the Directorate of Security Intelligence (DSI) should have been represented on this very vital committee charged with interviewing refugees for grant of status. The importance of these departments cannot be underestimated as seen in their inclusion at the enactment of the Refugees Act 2006.<sup>12</sup> Indeed their omission was a serious oversight and the tenuous nature of the committee cannot be said to have done justice to applicants for refugee status. By interviewing refugees individually, the government attempted to ensure that everybody was heard and given a chance to express himself.<sup>13</sup>

It can however be revealed from the Ministry of Home Affairs that interviews carried out at that time clearly tilted towards favoring refugees who were either wealthy or fairly educated. The very fact that a refugee could not express himself clearly in

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<sup>10</sup> Niklaus Steiner (et al), *Problems of Protection – The UNHCR, Refugees and Human Rights*, (London: Routledge 2003) p. 8

<sup>11</sup> See Chapter 3

<sup>12</sup> Section 8 (1-4), Refugees Act (2006)

<sup>13</sup> See Chapter 3

English disadvantaged the applicant as it compelled him to hire an interpreter who had to articulate his case before the committee. Indeed it is a big oversight for a committee to exist without the services of standing interpreters. It was observed in many instances that refugees unknown to each other came in for interviews at different times and the story which led to their flight was exactly the same. It was revealed later by some refugees who felt that they were economically disadvantaged that the stories were written by refugees who are well versed in English at a price. It was also revealed that the interpreters only assisted those who could afford to pay.<sup>14</sup>

This shortcoming notwithstanding, applicants who went through the interview phase could not be accepted until they were taken through a vetting procedure which was only conducted by the government's security agents. While vetting is important for any government especially concerning refugees or other migrants, it is essential to note that it beats logic to take people through interview procedures and later on as a result of failing the vetting procedure tell them that they do not qualify for grant of status. It could have been practically better to vett before the committee sits and eliminate those who for specific security concerns did not qualify for grant of status. Also the fact that an average of only 30 refugees were interviewed weekly shows that the capacity of the committee was too small subjecting needy cases to wait for too long and in the process suffering through their stay in towns without jobs or any services extended to them<sup>15</sup>

The right to an appeal which the refugees were entitled to was a mockery as the appeal interviews hardly ever took place. In fact the extent to which the rights of refugees were abused by denying them a speedy appeal process is that in the event an applicant

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<sup>14</sup> File on Refugee Minutes of Meetings at the Ministry of Home Affairs, *Report on Refugees and Undocumented Aliens in Kenya*, No. I.S. 115/08 (S). Folio 20 (Dated 17<sup>th</sup> February, 1991) p. iii

<sup>15</sup> See Chapter 3



failed to go through the appeal process, the UNHCR was free to relocate him to a third safe country. Most of the people who waited for appeals in vain were compelled to leave the country. Some ended up returning to their countries of origin where they still faced persecution. The interview period ended with the influx in 1991 which brought many challenges along with it.<sup>16</sup>

The influx known to have taken place with Somalis, Ethiopians and Sudanese entering Kenya in 1991/2 did indeed come with major challenges. The fact that the Kenyan government was faced with a new phenomenon of catering for many refugees is not a reason to have literally abandoned its international obligations to UNHCR and NGOs who directly got involved in catering for refugees by building of camps and many holding centers. The relegation of refugee camps close to border areas is an affront to the very people who need protection from say attacks emanating from their countries of origin.<sup>17</sup> While it would not have been possible to allow many refugees to integrate in Kenya, the government should have at least urgently and selectively welcomed those who had requisite skills and could contribute to building of our nation. This is in view of the fact that refugees can also be of benefit to the host country. Jacobsen has observed:-

These material, social and political resources, which I call 'refugee resources', potentially represents an important state building contribution to the host state. Refugee resources may help develop areas of the country, increase the welfare of citizens, and extend the bureaucratic reach of the state. In order to accomplish this, the state must access and control these resources.<sup>18</sup>

The fact that the government confined refugees in camps wholesome is proof enough that it did not consider this positive aspect which could come out of the refugee

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<sup>16</sup> See Chapter 3

<sup>17</sup> Ibid.

<sup>18</sup> Jacobsen., K 'Can Refugees Benefit the State? Refugee Resources and African State building', *The Journal of Modern African Studies*, Vol. 40, No. 4. (Dec., 2002, pp.577-596) p. 578.

population. The dehumanizing conditions in refugee camps with lack of basic amenities such as water and health services does not add value to upholding refugee rights.<sup>19</sup>

The approach to give *prima facie* or group determination to refugees posed a serious problem to Kenya as concerns settling the large numbers. This type of method which Kenya adopted was on the basis of the circumstances prevailing in the country of origin and thus swiftly replaced the determination by individual interviews.<sup>20</sup> Although this appeared to be the only viable option under the prevailing circumstances at that time, it easily compromised the security of the country since there was no way of vetting who was genuine and who was not. Secondly, by accepting that all those who run away from countries that were in turmoil will be accepted as refugees, the government by and large was agreeing to extend all the rights and freedoms which are enshrined in international and regional instruments to this group of people.

Although the issue of implementation of specific categorization of refugee rights is discussed later in the chapter, suffice it to point out briefly that the challenges of adequately catering for such a large number of refugees in Kenya was not possible. This led to a barrage of accusations by many NGOs that Kenya was not fulfilling its obligations to protect refugees under international law.<sup>21</sup> While in some situations the country performed poorly, it is important to note that the burden that goes with successful implementation is surmounting to a third world country which is limited in the wake of waning resources even within the United Nations High Commissioner for Refugees.<sup>22</sup>

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<sup>19</sup> Adepoju., A 'The Refugee Situation in the Horn of Africa and Sudan', *A Journal of Opinion*, Vol. 12, No. ½ (Spring – Summer, 1982pp. 29-34, pp. 29-34) p. 31.

<sup>20</sup> See Chapter 3

<sup>21</sup> See Chapter 3

<sup>22</sup> Loescher., G *Beyond Charity, International Co-operation & the Global Refugee Crisis*, (Oxford: Oxford University Press, 1996) p. 131.

## Shortcomings in the Refugees Act (2006)

Kenya enacted a municipal refugee law in 2006 which domesticated the international and regional instruments governing refugees.<sup>23</sup> While the Act is an important step in the history of refugee protection by incorporating international and regional treaties, it has some general weaknesses which need to be addressed. Indeed it transforms the two international and regional treaties into Kenyan domestic law, but it has not observed all the standards of treatment of refugees in the manner envisaged by the treaty law.<sup>24</sup>

One clear example is the provision to grant status in accordance with the 1969 OAU Convention on Specific Aspects of Refugee Problems in Africa. In recognizing that some refugees may have to be accepted on *prima facie* basis, the Act gives unfettered powers to the Minister in charge of refugee affairs to revoke or amend the declaration of certain class of persons as *prima facie* refugees.<sup>25</sup> This could in essence deny people a right to refugee status on political rather than legal or humanitarian basis. Dr. Kithure Kindiki has observed the importance of ensuring that there is no political interference in domestic legislation.<sup>26</sup> The establishment of a Refugee Affairs Committee which is to assist the Commissioner in matters concerning the recognition of persons as refugees is also a step in the right direction. However the loading of members on this Committee with representatives from only government ministries and departments is improper. It

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<sup>23</sup> See Chapter 3

<sup>24</sup> Mwangi M., *The Doctrinal Basis of Standards of Treatment in International Refugee Law: Kenya's Transformation of the 1951 Refugee Convention* (Paper Presented in a UNHCR Workshop on International Protection and Refugee Law for Judges and Magistrates, Naivasha, 23-25 April 2008) p. 11

<sup>25</sup> Section 2 (3)(2), Refugees Act (2006)

<sup>26</sup> Kindiki K., *The Implementation of the Kenya National Commission on Human Rights-A Preliminary Comment* in the East African Journal of Human Rights and Democracy (A Publication of the East African Institute in Partnership with SIDA-Nairobi, 2004) p.120

would have been more inclusive. Perhaps to be considered also would be a representative from UNHCR and the refugee community particularly those whose status has already been determined. Most of these had their status determined at the time of the Refugee Status Determination Committee. Some got the opportunity to acquire work permits at that time and they are engaged in different vocations in the country.<sup>27</sup>

The composition of the Appeals Board is just as limited as is the composition of the Committee. There is no mention of UNHCR representation at the Appeals Board.<sup>28</sup> Indeed the decision to grant or not to grant refugee status is solely within the jurisdiction of the State.<sup>29</sup> But in conforming with the provisions of the 1951 Convention, it is important for the Act to reflect the spirit of cooperation that was envisaged by the Convention. The Convention states:-

The Contracting States undertake to co-operate with the office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and still in particular facilitate its duty of supervising the application of the provisions of this Convention.<sup>30</sup>

As can be seen from this, UNHCR needs to be given a chance to perform its supervisory functions as envisaged in the Act. One general assumption in the Act is that refugees are generally well educated and will understand and abide by such rules as 'within thirty days of receiving the decision, appeal to the Appeals Board against the decision'. Most refugees have little education and the greater majority are women and children. The general assumption therefore that refugees will be able to understand the

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<sup>27</sup> See Chapter 3

<sup>28</sup> Section 9 (1-6), Refugees Act (2006)

<sup>29</sup> Power S, and G. Allison, *Realizing Human Rights – Moving from Inspiration to Impact*, (New York: St. Martins Press, 2000) p. 30

<sup>30</sup> Article 35 (1) 1951 Geneva Convention Relating to the Status of Refugees.

mechanisms of appeal without any legal assistance is erroneous. Indeed it would have been better for recognition to be given under the Act that refugees should be entitled to legal assistance from any NGOS or civil society organizations in the asylum state. This would go along way in alleviating the traumatizing situations applicants would face in their endeavor to seek refugee status.<sup>31</sup>

The process of recognizing refugees poses the same challenge. The provision which expects a person to appear before the Commissioner in person immediately or within thirty days negates the fact that one may enter through our porous borders and stay with relatives across the border even for more than thirty days before reporting.<sup>32</sup> Again these people may not even know the provisions of the Act since most likely they may not have read or been informed about the statute. The Act also allows the Commissioner to reject an application and inform an applicant within fourteen days. This period does not take into consideration that the applicant is a refugee and may not even have proper means to receive this decision not less understand it. Again the question of NGOS or civil society groups engaged in refugee rights and advocacy comes in handy here.

The recognition that people may need to stay in Kenya even after their application for refugee status has been rejected is good enough. However, indicating that an applicant whose appeal has been rejected will be allowed reasonable time, not exceeding ninety days, to seek admission to a country of his choice is erroneous.<sup>33</sup> It is interesting to think of a refugee who is emotionally traumatized being simply told to seek an alternative country. Again depending on the gravity of reasons leading to his application being rejected, it would even be more difficult for the individual to be accepted in another

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<sup>31</sup> See Chapter 3

<sup>32</sup> Section 11(1), Refugees Act (2006)

<sup>33</sup> See Chapter 3

country. This is where the office of the UNHCR becomes relevant. As argued earlier the omission of this office in many decision making processes poses a great challenge to the implementation of refugee rights under the Act. UNHCR would keenly look at the reasons leading to a rejection and they would negotiate with any country which could accept such an applicant. This can be done by using their offices in different prospective places.

The statute clearly states that a refugee shall have certain rights and duties. It is here that some of the rights due to refugees have been diluted. With respect to residence, the Act gives the Minister Powers to designate certain areas as refugee camps.<sup>34</sup> This provision is absolute and could be used by the government to seriously restrict the movement of refugees and by extension denying them the freedom of movement enshrined in the 1951 Convention.<sup>35</sup> Although the freedom of movement under the convention is subject to any regulations applicable to aliens under the same circumstances, absolute powers by the minister to confine refugees to camps could clearly violate this freedom. One major weakness in the Act also is that it provides for a lower standard of treatment for refugees with respect to wage earning employment.

Mwagiru has argued that:-

The Act provides that “in respect of wage-earning employment, every refugee or member of his family shall be subject to the same restrictions as are imposed on aliens”. This is a reduction of the standard of treatment laid down in the Convention regarding wage earning employment. Clearly, the Act fails to incorporate the provisions of article 17 of the Convention into Kenyan law. Unless Kenya entered a reservation on this matter at the time of ratifying the convention, this is definitely a breach of this provision of the convention.<sup>36</sup>

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<sup>34</sup> See Chapter 3

<sup>35</sup> Article 26, 1951 Geneva Convention Relating to the Status of Refugees.

<sup>36</sup> Mwagiru M., *The Doctrinal Basis of Standards of Treatment in International Refugee Law: Kenya's Transformation of the 1951 Refugee Convention*, (Paper Presented at a UNHCR Workshop on International Protection and Refugee Law for Judges and Magistrates, Naivasha, 23-25 April 2008) p. 11.

This is a clear indication that refugees would be subjected to a cycle of problems once their right to wage-earning employment is breached as observed by Mwangiru.

Among other things they may not be able to afford good education for their children.

The interview carried out with the government officer in charge of protection revealed that the implementation of the Act still has a long way to go. He indicated that the department still lacks the requisite finances and personnel to implement all the provisions of the Act. He specifically mentioned the difficulty in giving refugees identity papers which would enable them enjoy their freedom of movement as provided for by the convention.<sup>37</sup> In essence, he gave the impression that the government still depends on UNHCR and NGOS to offer major services to refugees. This is a serious situation since the government according to the Act is supposed to be in charge of all the management programmes touching on refugees. The official further indicated that the government is in the process of formulating regulations to the Act. It is expected that they will give clarity on how the government will enforce the Act.<sup>38</sup> It is however challenging to conceive of a law which was enacted almost a year ago having serious problems of implementation.

## **The Security of Refugees**

It can be argued that through generations, people who find themselves in some of the most insecure positions are the ones who have faced wars and turmoil.<sup>39</sup> Refugees are in most cases a result of wars and in some cases serious human rights abuses in refugee producing countries. As has been seen through the issues which have spanned off from

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<sup>37</sup> Feller E., (et al), *Refugee Protection in International Law, UNHCRs Global Consultations on International Protection*, (Cambridge: Cambridge University Press, 2003) p. 220. p.220.

<sup>38</sup> Interview conducted with Mr. Badu S. Katelo, Under Secretary in charge of refugee protection at the Department of Refugee Affairs on 18<sup>th</sup> September 2008.

<sup>39</sup> See Chapter 2

this study, refugees are some of the most vulnerable people particularly once they enter the asylum state. They are usually at the mercy of the receiving state and cannot therefore make a demand of anything which may even be justifiable. In tackling security, it is important to note that this is not just confined to physical security although it is an important component of it. Security is versatile as it also includes food security, education security for future advancements, emotional security, financial security and indeed the security of the family.

With the setting up of the UNHCR, it was thought that refugees would be given the protection they require and hence enjoy the security they are entitled to under international law.<sup>40</sup> However it can be seen that the UNHCR has grown to be so limited in scope and perspective that the countries of asylum have more say on how refugees should be treated than the UNHCR which is charged with protecting them.<sup>41</sup> Beginning with the very argument that refugees as human beings should by and large be treated like other human beings, we can safely say that this has not been so with respect to the way refugees are treated. They do not have security in the sense that the receiving state in most cases views them as foreigners and deals with them cautiously. They decide where they should stay and in most cases will put them in areas that are secluded. Sometimes they are even put in detention centres where their very life is in danger because some of those centres have no facilities. Therefore their physical security in this case is in utter danger. Some of the stringent restrictions seen from the developed countries are testimony to the serious security problems faced by refugees.<sup>42</sup>

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<sup>40</sup> See Chapter 2

<sup>41</sup> Loescher G., *Beyond Charity, International Co-operation and the Global Refugee Crisis*, (Oxford: Oxford University Press, 1996) p. 129

<sup>42</sup> See Chapter 2



Many recipient governments view refugees as a security risk.<sup>43</sup> In Kenya the situation of security for refugees has been one of the major challenges. At the time when the numbers of refugees were minimal, the few refugees who were in the country were confined at the Thika Reception Centre for refugees where facilities were overstretched. Their security at that time was compromised since they were not free to travel and could be accosted any time by police for lack of documentation. In most cases they were either arrested or compelled to bribe their way out of custody. In those days although refugees were given work permits once they had been recognized, their assurance of job security was minimal since invariably the country favored employing nationals to refugees.

The case of Ugandan refugees who were relieved of their teaching jobs in favour of qualified Kenyans shows that their job security was in want.<sup>44</sup> The issue of job security for refugees is a clear challenge as even to date the government officer for refugee protection insists that they can only allow a refugee to do what Kenyans cannot do. Indeed this is a challenge since a refugee can never be said to be secure in his job because once a Kenyan is found, the refugee will have to leave the job.<sup>45</sup>

The policy by Kenya that refugees should be in designated camps has played a major role in impacting negatively at both the emotional and physical security of refugees. The government officer interviewed reiterated that this policy is still in place.<sup>46</sup> The camps are located in places that have very little hope in terms of any body expecting to improve his life or future. From an emotional point of view, refugees loose hope living

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<sup>43</sup> Newman E., and J. Van Selm, *Refugees and Forced Displacement, International Security, Human Vulnerability and the State*, (Hong Kong: United Nations University Press, 2003, pp. 30-66) p. 33

<sup>44</sup> See Chapter 4

<sup>45</sup> Interview conducted with Mr. Badu S. Katelo, Under Secretary in charge of refugee protection at the Department of Refugee Affairs on 18<sup>th</sup> September 2008.

<sup>46</sup> Ibid

in the camps. Some of the people who were settled with families in their countries of origin end up being put in shelters where all they do is to wait for relief food, sit and sleep. There is no hope for their future and hence even the very educated end up feeling that their education is of no value since it cannot secure them any form of employment.

For some families the situation is even worse since they are headed by women after the death of the man in war. The women feel that the situation in the camps is dehumanizing as they cannot trust a crowded environment with almost nothing else to be done apart from sit and wait for food. They also fear for their children who apparently have very little to look forward to in the future since the primary education they are given is not promising in any way. The Protection Officer at UNHCR lamented this situation during the interview session.<sup>47</sup>

The question of food security at the camps cannot go unchallenged. Food at the refugee camps is given by the World Food Programme. This has however raised serious problems in the camps as what is distributed is either never enough or poor in quality. Refugees have constantly complained concerning what they are given because they argue it is invariably a combination of maize and beans which does not constitute a balanced diet in any way.<sup>48</sup> Although it has been argued that Kenya cannot afford to give refugees land where they can farm, this is not a good reason to confine them to camps where they have very little to supplement this serious food situation. The UNHCR Protection Officer argued that there is an alternative to this where qualified refugees can be given work

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<sup>47</sup> Interview conducted with Linnet Opiyo, UNHCR Protection Officer on 19<sup>th</sup> September, 2008.

<sup>48</sup> See Chapter 2

permits so that they can seek employment competitively. This would reduce the kind of burden currently experienced in refugee camps.<sup>49</sup>

Another challenge is health security since questions concerning health have been a major problem. Indeed with a poor food basket lacking in the requirements of a balanced diet, the health of refugees is likely to be compromised. What is worse is that the 1951 Geneva Convention did not make mention to refugee health care.<sup>50</sup> This was a serious omission as countries to date subject refugees to a lot of suffering for lack of proper health services. In the camps, there are implementing partners providing health care but the services are limited as confirmed by the government officer in charge of refugee protection.<sup>51</sup> The UNHCR Protection Officer corroborated this and further said that many refugees who are referred to Nairobi are unable to secure specialized care since the organization has to look for funds to cater for major illnesses. This compromises the health of refugees and in some cases leading to deaths which could have been avoided had there been a proper health plan for the refugees.

The general physical security for refugees in Kenya has been a major issue over the years. Because camps are placed close to the boarder, many risky situations emerge. Because of the proximity to the boarder, insurgents either from Somalia on the side of the Dadaab camps or Southern Sudan on the side of Kakuma camps are known to have easily attacked people in the camps. This situation would have been avoided should the government have respected the UNHCR rule of putting camps at least 70 kilometers from

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<sup>49</sup> Interview conducted with Linnet Opiyo, UNHCR Protection Officer on 19<sup>th</sup> September, 2008.

<sup>50</sup> See Chapter 2

<sup>51</sup> Interview conducted with Mr. Badu S. Katelo, Under Secretary in charge of refugee protection at the Department of Refugee Affairs on 18<sup>th</sup> September 2008.

a border area.<sup>52</sup> The argument which is presented by the government that the putting of camps close to the border makes it easy to transport refugees at the time of voluntary repatriation is untenable since the suffering that refugees go through is unwarranted. It is important to note that because of poor security in those camps as well as the question of our porous borders, some militias who pose as refugees have been known to hide weapons in the camps.

These weapons have been used to commit major crimes against refugees and the locals alike. Some of the challenges in the camps include rapes, robberies and murders as observed by the World Refugee Survey:-

Many refugees concurred that poor security was their greatest concern. Refugees suffered murders, robberies, and rapes from armed bandits and foreign militia men who routinely raided Kenya's border areas, as well as violence at the hands of other refugees.<sup>53</sup>

Through the interviews carried out by refugees, most of them attested to the fact that this is the most serious problem they face in the camps since as high as 90% of them complained as much.<sup>54</sup>

Apart from the general security problems which all refugees face, refugees from Somalia are a peculiar group because they face specific security problem as a result of their nationality. It is argued that the government is more cautious with refugees of Somali origin because of their relations with Kenyan Somalis. Refugees of Somali origin are more likely to be arrested than others and this suspicion has its roots in a long history of conflict between the Kenyan state and ethnic Somalis living in Kenya, resulting from

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<sup>52</sup> See Chapter 3

<sup>53</sup> Rodger T. Windsor (et al), *World Refugee Survey*. (Published by the U.S Committee for Refugees: Washington D.C, 2000) p.96.

<sup>54</sup> See Chapter 4

the shifta wars of the 1960s and the 30-year state of emergency in Kenya's North Eastern Province.<sup>55</sup> The situation of insecurity in the Dadaab area has even been more intense with more attacks from bandits who operate from that area with very little check from the Kenyan police. In any event in most cases the police are overwhelmed since the bandits do not only have superior weapons but also know the terrain of the region better than the police.

The lack of security is not just confined to the camps as in urban areas refugees complain of being targeted by police. In most cases they are never secure where they stay since quite often police round them up and sent them to the camps against their will.<sup>56</sup> Many complain that they are so insecure in Nairobi because they can be arrested any time and taken to the police station unless they pay a bribe. Most refugees interviewed expressed disappointment not only with the police but also with government and UNHCR officials who several times intimidate them and demand for bribes before assistance is extended.<sup>57</sup> The fact that those who are meant to assist refugees end up intimidating them is simply appalling.

### **Challenges in Implementing Specific Refugee Rights**

Kenya has endeavored to implement the rights of refugees under the convention as is expected with any country, but three main areas pose challenges in the implementation of the said rights.

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<sup>55</sup> Loescher G. & J. Milner, *Protracted Refugee Situations: Domestic and international security implications* (London: Routledge, 2005) pp. 43-44

<sup>56</sup> See Chapter 3

<sup>57</sup> Interviewed carried out on refugees in Nairobi in June 2008.

The first area concerns rights similar to nationals.<sup>58</sup> While there has been no challenge in the general implementation of these rights, some shortcomings have however been observed. In the area of having access to justice, the government does not take seriously the fact that refugees in the camps will by and large not be covered here. The provision of mobile courts where magistrates appear once in a while is a clear breach of the right to access justice.<sup>59</sup> This is further compounded by the problems in refugee camps especially where refugee women are raped every now and then and the perpetrators of this heinous act can hardly be arrested and apprehended.<sup>60</sup> The right to wage earning employment has also been reflected but it lacks substance and is not categorical. The convention states:-

The Contracting States shall give sympathetic consideration to assimilating the rights of all refugees with regard to wage earning-employment to those of nationals, and in particular of those refugees who have entered their territory pursuant to programmes of labour recruitment or under immigration schemes.<sup>61</sup>

This is subject to interpretation that would not be beneficial to refugees. In Kenya there has not been any *sympathetic consideration* given to refugees. On the contrary, they have been discriminated.<sup>62</sup>

Refugees living in urban areas have faced difficulties as concerns elementary education for their children. The general spirit in Kenyan schools where citizens are considered first before non – citizen has made it difficult for refugee children to benefit from this important provision within the convention. While special schools cannot be

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<sup>58</sup>See Chapter 4

<sup>59</sup>See Chapter 4

<sup>60</sup> Rodger T. Windsor (et al), *World Refugee Survey*, (Published by the U.S Committee for Refugees: Washington D.C, 2000) p. 96

<sup>61</sup> Article 17 (3), 1951 Geneva *Convention Relating to the Status of Refugees*.

<sup>62</sup>Interview conducted with Linnet Opiyo, UNHCR Protection Officer on 19<sup>th</sup> September, 2008.

segregated for refugees, it is important for schools to make provision for refugee children or at the very least allow them to compete with Kenyan children on equal scale.<sup>63</sup>

The second area is implementation of rights similar to aliens and nationals of a foreign country. The convention gives provision concerning self employment.<sup>64</sup> This has by and large not been met since most refugees who have problems acquiring documentation cannot be expected to engage in any gainful self employment. Laws in Kenya cannot give the refugee room to run his own business in a trouble free atmosphere since constant police checks submit him to arrests if not payment of bribes. Under the same article, it is important to note that refugees can in no way be expected to engage in meaningful agriculture because the system of land ownership in the country is so sensitive that even aliens who rightfully own land have been subjected to many problems especially as concerns squatters in parts of the country.

The fact that refugees live in some of the most dehumanizing shelter conditions is proof that there is very little that has been done to respect their right to housing. It is clear from the convention that this right is subject to being regulated by laws to control of public authorities.<sup>65</sup> Be that as it may, it then means that a government can impose any laws it deems fit in order to deny refugees this right. While the problem of documentation and employment would limit the chances for a refugee in an urban centre to afford decent housing compared to an alien under the same circumstances, those in the camps are

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<sup>63</sup> Ibid

<sup>64</sup> See Chapter 4

<sup>65</sup> See Chapter 4

worse off. This is because the dehumanizing shelter conditions in the camps give a refugee no option to decent housing.<sup>66</sup>

Because the convention expects States to provide elementary education as that provided to nationals, refugees have had major challenges accessing secondary and tertiary education. It does not help the refugee child much to get only primary education in this case. The NGOs providing assistance to needy students have limitations and many refugees particularly those who are not economically well endowed miss opportunities to pursue their dreams.<sup>67</sup> The challenge experienced by refugees who have completed secondary education in their countries and are unable to join university in Kenya is even more agonizing. The education system in Kenya should not discriminate against refugees.<sup>68</sup> If need be an initial test can be administered to those who need to join university rather than simply dismiss them on the basis of the system of education in their countries of origin.

As concerns rights similar to nationals of a foreign country, the right to wage earning employment which is to be accorded under article 17 (1) has proved problematic. The sheer lack of jobs for many Kenyans leaving universities has made it difficult for refugees to obtain work permits and seek employment. Rather than the Department of Immigration being too restrictive towards employment of refugees, competition should be permitted freely. Again this issue is best tackled by the department of refugees which is mandated under the Refugees Act (2006) to manage refugee affairs in the country. Incidentally the government officer in charge of refugee protection conceded that the

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<sup>66</sup> Jacobson K., 'Can Refugees Benefit the State? Refugee Resources and African Statebuilding' *The Journal of Modern African Studies*, Vol. 40, No. 4. (Dec., 2002, pp. 577-596) pp. 592/3.

<sup>67</sup> Interview conducted with Linnet Opiyo, UNHCR Protection Officer on 19<sup>th</sup> September, 2008.

<sup>68</sup> See Chapter 4



powers to give work permits is still in the hands of the Immigration Department hence there is very little that the Department for Refugee Affairs can do about the issue.<sup>69</sup>

The third area concerns rights specific to refugees. The provisions of article 3 have not been fully respected. The difficulties which have been faced by Somali refugees particularly while seeking asylum are in breach of this convention. The general caution which the government has taken towards refugees of Somali origin because of past historical problems associated with succession to the greater Somalia has denied some refugees their right to freely seek asylum.<sup>70</sup> It truly is in the interest of any country to be vigilant concerning security matters especially with respect to who enters the country. However a blatant exclusion of a certain group of people defeats the purpose. Refugees are also entitled to travel documents.<sup>71</sup> The very fact that this documents are issued by the Department of Immigration upon recommendation from UNHCR makes it difficult for the Department of Refugees to have control and therefore the government by extension. These documents should be issued jointly by the Department of Refugees and UNHCR for verification purposes. This is because these are the two main players in protectiong refugees nationally and internationally respectively.

The provisions of the conventions under articles 31, 32 and 33 dealing with refugees unlawfully in the country of origin, expulsion and refoulment respectively have been breached to a lesser degree.<sup>72</sup> The only shortcoming has been with police behavior where Kenyan police have returned refugees to their countries of origin without verifying

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<sup>69</sup>Interview conducted with Mr. Badu S. Katelo, Under Secretary in charge of refugee protection at the Department of Refugee Affairs on 18<sup>th</sup> September 2008.

<sup>70</sup> Loescher G. & J. Milner, *Protracted Refugee Situations-Domestic & International Security Implications*, (London,,: Routledge, 2005) p. 40

<sup>71</sup>See Chapter 4

<sup>72</sup>See Chapter 4

whether or not they would face persecution upon return. This problem can more be attributed to lack of information on the side of the police than a government policy. Indeed a proper training of the police in refugee law would improve the situation. Finally, the provision of naturalization has proved one of the most challenging to the Kenyan government. The convention provides that:-

The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.<sup>73</sup>

The government can simply be said to be averse towards this important provision of the convention. Government and UNHCR officials were unequivocal on the question of national integration. They stated that this has never been a viable option towards solving the refugee problem in the country.<sup>74</sup> In fact only voluntary repatriation and resettlement to a third country are practiced in Kenya as the main solutions to the refugee problem. While it would be understandable for the government to restrict the number of refugees who can be naturalized within a particular time frame, it is obviously inconsiderate to close out national integration completely. It has been observed worldwide that refugees can also be of benefit to the country since there are professionals such as doctors, lawyers and engineers within the refugee community.<sup>75</sup> The sooner Kenya realizes what it is missing by failing to tap from this great asset the better it will be for the country.

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<sup>73</sup> Article 34, 1951 Geneva *Convention Relating to the Status of Refugees*.

<sup>74</sup> See Chapter 4

<sup>75</sup> Jacobsen K., 'Can Refugees Benefit the State? Refugee Resources and African Statebuilding' *The Journal of Modern African Studies*, Vol. 40, No. 4. (Dec., 2002, pp.577-596 ) p. 593.

## **Chapter Six**

### **Conclusions**

The conclusions to this study will basically be a reflection of the issues surrounding the implementation of refugee rights in international law. The study aimed to validate if indeed refugee rights are respected in international law and more specifically if Kenya as a signatory to international conventions respects these rights. The study aimed to test the hypothesis whether or not Kenya has implemented the 1951 Geneva Convention on the Status of Refugees. If the convention has been implemented, the study sought to find out how this has positively impacted on refugee rights in Kenya.

Since most refugees flee as a result of wars and abuse of human rights as it can be argued today, a reflection of how societies have fought should be looked at so as to put the issues in clear perspective. Wars between and among societies are as old as mankind and so are movements of people from one place to another. Issues that touch on forced migrants therefore have a long history which predates the United Nations and even the League of Nations. It is accurate enough to point out that this is one issue which principally reflects the development of societies and indeed the relationships between and among states. As early as it can be reflected, people have always moved from one point to another either in search of land in order to expand their territories or when they themselves are being driven out by more powerful intruders.

One of the beginning points of migration can be found in The Bible which is one of the oldest books in existence. Here several incidents of movement are seen whether voluntary or forced. Indeed one conspicuous incident which can be reflected on is the movement of children of Israel to Egypt where they stayed for four hundred years under bondage. It can be argued that they stayed in Egypt as refugees even though the principle of asylum and refugees had not been fully developed at that time. Looking at what developed at that time it is clear that the Israelis stayed under their 'masters' for so long until their condition had to compel them to return to Israel. Under circumstances that obtain in the world today, it can be argued that the Israelis had to return to their country of origin. However, whether this return was voluntary or not is debatable because the pressure that existed at that time compelled them to move back to Israel. Jesus Christ Himself also moved to Egypt when persecution was rife in Israel and later returned when the persecutor had died.

Moving away from Biblical analogy, many wars that were fought in ancient days be it in Europe, Asia or Africa were as a result of struggle for resources. These resources spanned from land, cattle in the case of Africa or even women. In those days kingdoms fought other kingdoms and conquered their territories and subjects alike. Since the question of asylum had not developed, peace mechanisms were invoked for those who were conquered and wanted to surrender or even for those who feared to get into wars. Movements, conquests and wars literally led to the development of some of the modern nations which we see today. These include countries like the United States, Canada, Australia and New Zealand. As societies developed more and more, rules and laws begun

to evolve in order to stem anarchy and despotism that characterized the olden days hence the development of international institutions.

As the study progressed to observe whether or not refugee rights have been respected under international law, a background to the modern refugee problem as the case may be was given. Issues that led to the eruption of World War 1 showed the clear relationship that exists between wars and resources. The greatest resource in modern days is land where many precious minerals lie. The formation of the League of Nations was therefore a beautiful step towards attempting to deal with war which by extension would lead to minimizing forced migrants from one point to another. It is safe to conclude that because of prevailing legal and administrative weaknesses, the League did not adequately stem wars as it had intended to. This came out clearly when it collapsed and thus ushering in World War 2 which brought untold suffering to mankind.

Reflecting on the emergence of the United Nations, it can be said to be the best international body that brought the nations of the world together. This global organization intended for the community of civilized nations to live in peace and dignity. Indeed it came up with many functional organizations including the United Nations High Commissioner for Refugees. Again the purpose of espousing peace and eschewing war was meant to ensure that mankind does not suffer as it happened during World War 2. The United Nations High Commissioner for refugees on its part has come a long way as a body operating within Europe to covering the entire world. In fact UNHCR has changed its attention completely from the developed countries to third world countries. This change of attention reveals that the problem of refugees is growing and affecting regions that are economically disadvantaged. This has put the very care for refugee rights to

question because most of the countries hosting them in the third world have shown their inability to cater for the rights of their very citizens. So then if a country cannot respect the rights of its own citizens, how then is it expected to respect refugee rights. Is it not natural for charity to begin at home, or even more spiritually, doesn't one need to love himself before he can love his neighbour.

Africa has truly been credited for the enactment of the 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa. This is because this convention expanded the narrow definition which was given by the 1951 Convention. In retrospect, it is true that this expansion raised the hopes of refugee protection in Africa but this has not been practical. Many challenges ranging from abuse of human rights to poverty and traditions that do not stand the test of modern times have undermined efforts to respect refugee rights in Africa. It is in Africa that some very clear violations of minority rights are evident. In Tanzania for example the abduction of albinos where they have been killed for supposed use of their body parts by witchdoctors is backwards and a serious violation of the right to life. Women have been mistreated in ways that are unimaginable. The Female Genital Mutilation culture which is practiced by many countries on the continent is a serious violation of women's rights.

Kenya on its part has put up a spirited effort to respect the rights of refugees. The ratification of international and regional instruments has put the country in good light as concerns its determination to respect refugee rights. The domestication of these instruments into municipal law is even more welcoming. However it can be concluded that many of the challenges facing African countries entangle Kenya as well. Some of the clear ones are lack of resources and a growing apathy towards refugees supposedly

because of a growing well educated citizenry which needs to be taken care of. In any event it would be anomalous to bluntly state that Kenya does not respect refugee rights under international law. In retrospect, it is safe to say that most civil and political rights have been respected like the right to religion and assembly. The failure to respect socio-economic rights is probably understandable because one can only give what is available.

Finally it is prudent to look at how the future of refugees and forced migrants is. The world of globalization today expects countries to relate more and more and even as seen from the theoretical framework, refugee rights needs to be respected. But this is more in theory or an on paper principle without the genuine zeal to protect those who are fleeing from persecution. What with the many Western countries that restrict refugees from third world countries and expect the latter to open up its borders to refugees. The many restrictions that have been imposed are simply draconian. These include stringent visa requirements and even carrier sanctions. For Africa the refugee protection regime has simply borrowed from the west lately. Tanzania for example is now asking refugees who were even born there to leave. This is astounding to a country that before welcomed its neighbours who were fleeing persecution and even gave them land to farm. The future of asylum and respect for refugee rights seems to be beautiful on paper. However, in real practice it is bleak as countries are becoming more and more restrictive and averse towards refugees.

In Kenya the situation is not any different. The delay in implementing the Refugee Act (2006) is a case in point. The point the government attempts to make that it takes time to implement such a statute is not convincing. One year since the Act was passed, it is difficult to understand why the Department for Refugee Affairs is still

wanting in resources and staff. It is paradoxical that even when the statute was intended to make the department more independent, it seems to be going back to the olden days of depending on UNHCR and aid agencies. Again the general position that the government has taken concerning naturalizing refugees is not about to change soon. Suspending the issuance of work permits for refugees since 1995 is appalling. The sooner the government realizes that it is more useful to allow those who are qualified to compete with others the better. Rather than let precious human resources idle in refugee camps, a few should genuinely have been permitted to assimilate in the society.

Unless and until the international and regional conventions are fully implemented, it is difficult to say that Kenya truly respects refugee rights. Or more importantly, until the Refugee Act (2006) is fully implemented.



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