

**AN OVERVIEW OF REFUGEE STATUS DETERMINATION AND THE RIGHTS OF
REFUGEES IN KENYA**

The protection envisaged under the 2006 Refugees Act

Paper prepared for Refugee Studies Centre Workshop on Refugee Status Determination and
Rights in Southern and East Africa

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1. Introduction

- Outline

This paper details the workings of Refugee Status Determination (RSD) and the protection of refugee rights in Kenya, beginning with a broad outlook on the development of refugee law in Kenya and then critiquing the current laws and practices in place that affect the success or failure of RSD and the protection of refugee rights.

- Country Profile

Kenya is situated in East Africa and is bordered by Tanzania to the south, Uganda to the east, Sudan to the north-east, Ethiopia to the north and Somalia to the north-west. Kenya has a population 38,610,097¹ and is predominantly an agricultural based economy.

Kenya's refugee experience dates back to the early 70s, when it played host to many Ugandans displaced by the political coups of the time. The next wave came in 1992 from Somalia following the toppling of the then Siad Barre government. Soon after, Ethiopians fled the collapse of the then unity government and the SPLA/M struggle in southern Sudan displaced more refugees. This was soon followed by the Rwandan genocide in 1994 which forced thousands of Rwandese into exile in Kenya and the decade-long conflict in the Democratic Republic of Congo (DRC) involving not only the Kinshasa government and various Congolese rebel factions but also a whole range of regional governments, both of which caused further heavy inflows of Congolese refugees into Kenya.

Kenya is currently hosting over 400,000² officially registered refugees and asylum seekers. Many more are not registered. The population of refugees and asylum seekers in Kenya is mainly from Somalia, Ethiopia, Sudan, Burundi, DRC, Eritrea, Rwanda and Uganda. The majority of the refugees in Kenya live in two designated camps, located in Turkana District (Kakuma Refugee Camp) and Garissa (Dadaab Refugee Camp). An estimated over 46,000³ registered refugees and asylum seekers live in Nairobi and other urban areas in the country. The largest single nationality of refugees in Kenya is from neighbouring Somalia. They mainly reside in the Dadaab camps and urban centres in Kenya.

Somali refugees remain the largest single nationality of refugees in Kenya. Although the majority reside in Dadaab camp, a large number live in Eastleigh, Nairobi. The Government at the start of 2007 closed the Kenya/Somalia border following the flare up of conflict in Mogadishu and due to security concerns posed by the fleeing Islamic Courts Union militia. The border remains officially closed but Somali refugees continue to trickle in through unofficial routes due to the continuing volatile situation in Somalia. The closure of the border has led to increased harassment of asylum seekers and refugees of Somali origin in Kenya.

Kenya was until August 2010 governed by the 1963 Constitution, which relied heavily on English common law though making accommodations for customary law and Islamic law in matters of a personal nature. There were no specific references to refugees until the Miscellaneous Amendment Act No. 6 of 1972 amended the Immigration Act to introduce refugee protection and refugees as a category of permits an alien could obtain.⁴

¹ 2009 population census results, Kenya.

² September, 2010 UNHCR statistics.

³ IRC March 2010 report: Hidden and exposed urban refugees in Kenya.

⁴ Section 5(3), Immigration Act Cap. 172 of the Laws of Kenya. Class M permits refugees a legal right to remain in Kenya, to work, engage in trade, business and other occupations.

After ten years of redrafting, Kenya enacted the Refugees Act 2006 which manages the reception, entry and protection of refugees in Kenya. It also takes precedence over the Immigration and Aliens Restriction Acts under the principle *lex posterior derogate priori*, allowing later law to repeal or to amend earlier law.

Kenya has been a party to international treaties and conventions relating to human and refugee rights however because of its dualist jurisdiction, this has often meant that though a convention has been ratified, it may take a while to be enacted and this invariably will dependent on political will and interest. The conventions and treaties have now been fully domesticated via section 16 of the Refugees Act, which is to the effect that every recognised refugee and every member of his family living in Kenya shall be entitled to the rights and be subject to the obligations contained in the international conventions to which Kenya is party. However, even where international law has been enacted, its interpretation with regard to national law has been arbitrary and unpredictable.

Though the 2010 Kenyan Constitution does not make specific provisions with regard to refugees and asylum seekers, its provisions on citizenship may be of benefit to refugees where Kenyans for example can confer citizenship to refugees through marriage (see Refugee Rights p. 8). The Constitution of Kenya also offers a number of protections to refugees via Chapter IV which guarantees the fundamental rights and freedoms of all person and groups. The factual situation in respect of refugee rights in Kenya is grim. They face numerous difficulties and their human rights are often breached.

Customary law is recognised as a possible recourse for refugee women (as well as Kenyan women) though often it does not favour women as much as common law would.⁵ Refugees and asylum seekers are subject to the rules of their communities or clans and sub-clans and this may work both in their favour and against them. A good example is the Somali community, which goes to great lengths to protect women and support the vulnerable. But by the same community laws women are discriminated against. For instance women who bear children out of marriage and may be treated as outcasts.

- The Refugee Situation

⁵ Islamic law however can be favourable to women in terms of divorce, dowry being paid to women and inheritance. Though again this would affect more Kenyan women than refugee women.

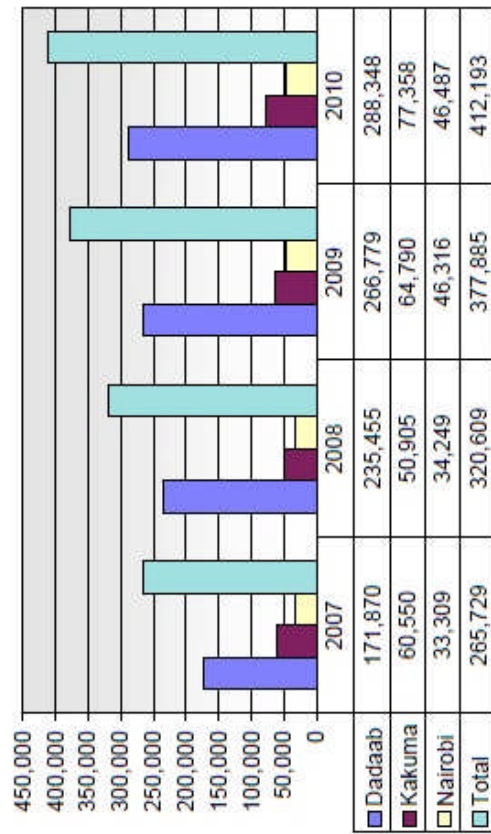
	Total	Dadaab	Kakuma	Nairobi
A. Refugees and Asylum Seekers	412,193	288,348	77,358	46,487
B. Registration	64,228	44,321	8,499	11,408
C. Refugee Status Determination				
1. Applied	15,295	4,632	6,585	4,078
2. Recognized	5,326	2,682	1,397	1,247
3. Rejected	551	10	327	214
D. Voluntary Repatriation 2010	10			
E. Resettlement Submission 2010	5,408			
F. Resettlement Departures 2010	1,841			

Source: UNHCR Statistical Summary of Refugees and Asylum Seekers in Kenya as at September 2010.

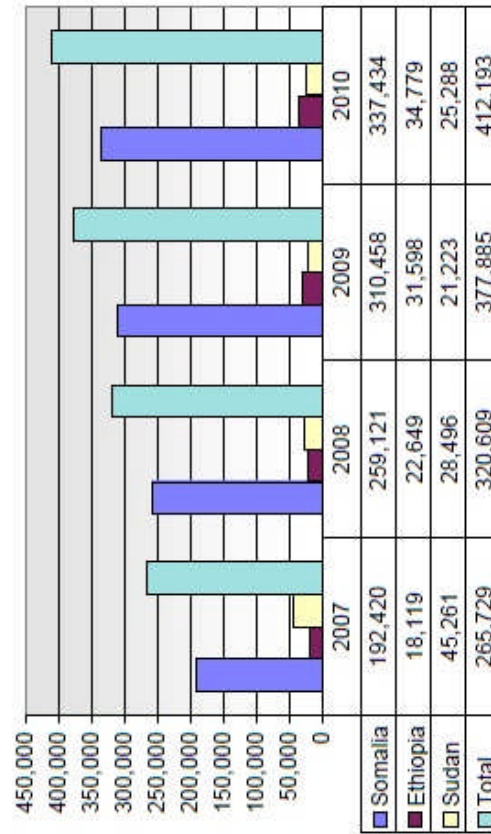
REFUGEES AND ASYLUM SEEKERS IN KENYA BY COUNTRY OF ORIGIN AND LOCATION
September 2010

Country of Origin	2007			2008			2009			2010		
	Dadaab	Kakuma	Nairobi	Total	Dadaab	Kakuma	Nairobi	Total	Dadaab	Kakuma	Nairobi	Total
Somalia	166,716	11,734	13,970	192,420	226,060	15,537	14,524	259,121	252,214	38,133	20,111	310,458
Ethiopia	4,411	4,435	9,273	18,119	8,511	4,698	9,440	22,649	13,728	5,613	12,257	31,598
Sudan	550	42,594	2,117	45,261	635	25,723	2,138	28,496	590	18,409	2,224	21,223
DR Congo	32	768	1,873	2,674	51	898	1,878	2,927	63	1,366	4,598	6,027
Rwanda	23	344	2,131	2,498	26	357	2,141	2,524	19	345	2,266	2,630
Eritrea	55	56	565	675	77	64	638	779	79	84	1,158	1,331
Burundi	4	200	1,066	1,270	14	224	1,075	1,313	17	373	1,202	1,592
Uganda	77	417	2,313	2,807	75	401	2,313	2,789	60	448	2,433	2,941
Other	2	2	1	5	6	3	2	11	9	9	67	85
Total	171,870	60,550	33,309	265,729	235,455	50,905	34,249	320,609	266,779	64,790	46,316	377,885
									288,348	77,358	46,487	412,193

TREND BY LOCATION



TREND BY MAJOR COUNTRIES OF ORIGIN



Kenya is one of the largest host nations for refugees with Daadab camp being one of the largest, oldest and most congested refugee camps in the world. More than 350,000 of the 400,000 estimated refugees in Kenya reside in either Kakuma or Daadab, making encampment Kenya's *de facto* policy for refugees. Refugees are permitted the mandate of urban refugee (Section 16(2) though under the proviso that they sustain themselves financially as much less aid is given to urban refugees than to refugees in camps (including the potential to be resettled)). For some refugees, an urban mandate promises greater autonomy, livelihood opportunities, education, relative freedom of movement and more pleasant climatic conditions.⁶ For those who are less able however and who fail to register, they contribute to an invisible population with no legal standing and thus vulnerable to abuse.

VOLUNTARY REPATRIATION FROM KENYA BY COUNTRY OF ORIGIN AS OF JULY 2010						
Country of Origin	Year					Total
	2006	2007	2008	2009	2010	
Sudan	7,482	19,237	9,876	665	1	37,261
Ethiopia	2	1	1	-	-	4
Somalia	2	-	-	-	-	2
Burundi	35	22	8	2	-	65
Rwanda	7	12	-	1	1	21
Uganda	-	1	1	-	-	2
Congo	5	-	-	-	2	7
Mozambique	5	-	-	-	5	10
Other	-	-	-	-	1	1
Total	7,538	19,273	9,884	668	10	37,373

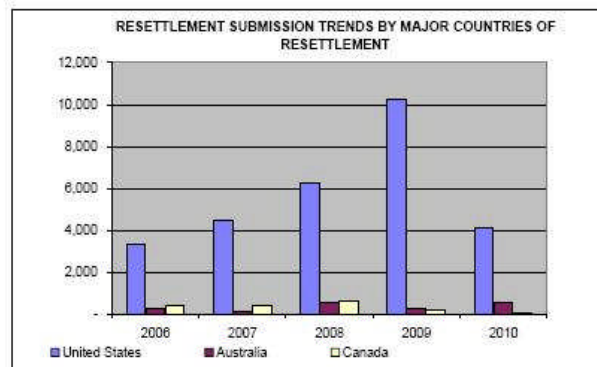
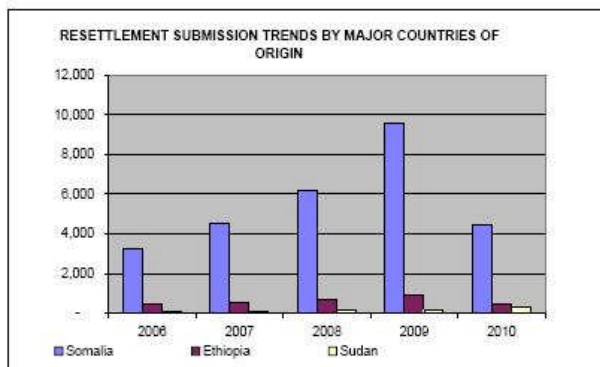
Voluntary repatriation has decreased since 2007, though these trends appear to be in tandem with global trends as conflicts and insecurities continue to remain unresolved.⁷

⁶ Pavanello 2010.

⁷ Global Trends report, UNHCR, 2009.

RESETTLEMENT SUBMISSION BY COUNTRY OF ORIGIN						
Country of Origin	2006	2007	2008	2009	2010	Total
Somalia	3,236	4,549	6,199	9,662	4,418	27,864
Ethiopia	493	521	673	940	429	3,056
Sudan	115	61	130	198	300	804
DR Congo	204	31	173	90	145	643
Eritrea	28	33	73	63	42	239
Uganda	145	6	14	2	13	180
Burundi	6	23	106	22	13	170
Rwanda	44	18	6	28	33	129
Other	1	4	1	9	15	30
Total	4,272	5,246	7,375	10,904	5,408	33,205

RESETTLEMENT SUBMISSION BY COUNTRY OF RESETTLEMENT						
Country of Submission	2006	2007	2008	2009	2010	Total
United States	3,308	4,487	6,239	10,264	4,113	28,411
Australia	230	118	501	271	518	1,638
Canada	382	364	506	161	19	1,622
United Kingdom	230	166	1	8	279	684
Sweden	-	-	-	-	349	349
Netherlands	104	72	1	133	8	318
Other	17	25	36	50	9	137
Denmark	-	-	1	2	110	113
Norway	1	14	-	15	3	33
Total	4,272	5,246	7,375	10,904	5,408	33,205



Resettlement to third countries is regarded as a durable solution to refugee crises, especially in Kenya where integration is not an official option or policy. Besides the opportunity for a better life outside of camps, increased demand and preference for resettlement is brought about by the increased ease of communication with the diaspora, expanded knowledge of entitlements, and the high visibility of resettlement processing within camps.⁸ Jansen argues that the result is an environment that encourages refugees to cheat through claiming insecurity and negotiating vulnerability. Refugees come to believe that resettlement is something that can be actively achieved, rather than a benefit extended only to the most genuinely vulnerable. As the statistics above show only 33,205 of 412,193 refugees in the last five years have been resettled.

Recent shifts in government policy towards refugees

Kenya has been receiving refugees since the 1970s, with the government handing over RSD to the UNHCR in 1991 but resuming responsibility for RSD and the management of refugee rights and protection with the Refugees Act 2006, under the Department of Refugee Affairs in conjunction with the UNHCR.

Given the protracted nature of the refugee crisis, it has become increasingly difficult to sustain a strict encampment policy. The crisis calls instead for the integration of refugees to benefit both national and human rights interests. There is however need for the government to embrace a formal and legal way of local integration so as ensure there is proper tracking mechanisms of those integrated and to streamline it. At the moment refugees of Somali origin even go to the extent of fraudulently acquiring Kenyan IDs so as to enable them do business or access work. Proper integration mechanisms would benefit the government by tapping expertise and investments by refugees. NGOs and other agencies such as RCK, IRC, GTZ and UNHCR have been engaging the government in discussions over how to align its policy with international refugee conventions and protocols, including the rights to documentation, free

⁸ Bram J. Jansen, *Between vulnerability and assertiveness: Negotiating resettlement in Kakuma refugee camp, Kenya*, Oxford University Press on behalf of Royal African Society, 2008.

movement and work. Progress on this front includes proposed amendments to the Refugees Act 2006 and a Draft National Policy on Human Rights, 2010.

The official closure of the Kenya-Somalia border in 2007 following security concerns has hampered education for children coming from Somalia, cross-border trade (thus increasing the price of commodities with goods having to come from further away)⁹ and forced asylum seekers to find alternative and unofficial routes into Kenya, preventing the government from vetting entrants. Closing the border and refusing access to asylum seekers is also likely to escalate the humanitarian situation in Somalia which will spill over into Kenya. The Kenyan government has (in principle) however allowed humanitarian aid to pass through Kenya into Somalia, although there have been individual instances of food convoys and other humanitarian goods being blocked.¹⁰

The related closure of the refugee transit center in the Liboi, 15 kilometers from the border and 80 kilometers from the camps, has also removed the safe house where refugees found initial shelter and from where the UNHCR transported them to camps. Human Rights Watch in its report considers the rampant police abuse of asylum seekers a direct consequence of the closure of the border as well as the transit centre.¹¹

The alien certificate (ID) for conventional and mandate refugees is one positive change in the documentation of migrants as this should allow for better treatment by police, greater access to education, vocational training and small-business opportunities, especially for urban refugees.¹² A large number of urban refugees however continue to remain undocumented in the fear that contact with authorities may result in extortion, *refoulement* or encampment. These fears are not without merit. Human Rights Watch details in the same report details police abuse, which includes but is not limited to extortion, violence and *refoulement* of refugees.¹³

The lack of institutional capacity and the absence of a clear national policy outlining the necessary steps for its implementation undermine the Act and all the potential benefits to all concerned,¹⁴ including the government which could increase its tax base, regularise refugees' contribution to economic growth and enhance safety in refugee communities.

- Availability of information concerning refugee laws and practices

- The UNHCR is responsible for RSD and management of refugee affairs having taken over from the government in 1991 due in large part to the lack of resources following the influx of Somali and Ethiopian refugees.¹⁵ The majority of its aid however as well as the aid of many NGOs is channelled to camps and not to urban refugees.
- The Department of Refugee Affairs (under the Ministry of Immigration and Registration of Persons) was established by the Refugees Act 2006 and has since 2007 shared the responsibility for RSD, interviews and management of refugees.

⁹ http://www.unicnairobi.org/Kenya_somali.asp (2 November 2010).

¹⁰ *Addressing the humanitarian crisis on the Kenya/Somalia border*, Oxfam International (March 2009).

¹¹ "Welcome to Kenya": *Police Abuse of Somali Refugees* (June 2010).

¹² This supports the right to an identity card for every adult refugee Right to (1951 UN Convention (Article 27). The Conclusion of the Executive Committee of UNHCR (EXCOM), in 1993, also reiterated the necessity of the issuing of personal documentation as a device to promote the protection of the personal security of refugees (No.72 (XLIV).

¹³ "Welcome to Kenya": *Police Abuse of Somali Refugees* (June 2010).

¹⁴ Pavanello 2010.

¹⁵ Inflation rates are reported to have risen to more than 50% in 1991. www.indexmundi.com (2 November 2010).

The intention was to take over RSD and management of refugee affairs entirely from the UNHCR but this has not yet been forthcoming.

- Moi University, Refugee Studies Centre promotes teaching, research and outreach activities in the area of forced migration. It collaborates with the Refugee Studies Centre, University of Oxford, the Nairobi Office of UNHCR, United States Agency for International Development (USAID), the British Council and the Ford Foundation.
- Human Rights Watch does extensive research on the status of refugees including reports such as *Hidden in Plain View: Refugees Living without Protection in Nairobi and Kampala*, November 2002 and *From Horror to Hopelessness*, March 2009.
- Oxfam, through Reach Out offers a Refugee Protection Training Project for all NGOs.
- Kenya National Human Rights and Equality Commission.

It is unclear who is responsible for ensuring denied asylum seekers or refugees with expired mandates return to their countries of origin.

RCK and the role of civil society in refugee protection in Kenya

- RCK provides legal aid, advocacy and research; referring asylum seekers and refugees to the DRA and UNHCR for RSD, resettlement and other related legal issues (such as drafting letters of appeal), to the police for police reports and protection, to City Council Clinics for free medicals and to other NGOs such as Heshima for shelter, HIAS and Mapendo for counselling and to JRS, Faraja and NARAP for income generating activities. It conducts trainings for paralegals, police, monitors and refugees about the Refugee Act 2006. It advocates for policy developments and the enactment of policies.
- Civil society in the form of NGOs and FBOs provide physical protection, legal protection, provision of food (WHO, WFP, JRS), medicine (City Council Clinics through GTZ, MSF) and shelter (Heshima), and services that enhance access to rights such as education, capacity building and advocacy.

2. International Legal Framework

- International refugee and human rights obligations Kenya has acceded to

International Human Rights and Humanitarian Law

Human Rights Conventions (in effect unless otherwise noted):

- Convention on the Rights of the Child (contains specific provisions with regard to acquisition of nationality, in particular by children who would otherwise be stateless)
- 1966 International Covenant on Civil and Political Rights (not ratified)
- 1966 International Covenant on Economic, Social and Cultural Rights

- 1979 Convention on the Elimination of all forms of Discrimination against Women and its Optional Protocol of 1999
- The Statute of the International Criminal Court of 17 July 1998

International Refugee Rights

- 1951 UN Refugee Convention
- 1967 Protocol relating to the Status of Refugees
- 1969 OAU Convention on Refugees

Regional Human Rights

- 1981 African Charter of Human and Peoples' Rights and its Additional Protocol relating to the Creation of an African Court for Human Rights of 1998
- 1999 African Charter on the Rights and Welfare of the Child
- Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa with a reservation to Article 6, first sentence and sub d of the latter Protocol (every marriage shall be recorded in writing and registered in accordance with national laws, in order to be legally recognized)

Other Regional Legal Arrangements

- East African Community (EAC)
- Common Market for Eastern and Southern Africa (COMESA)

3. Domestic Legal and Policy Framework

Since its enactment in 2007, Kenya's refugees have been regulated by the Refugees Act 2006. Several provisions will be outlined in terms of their importance, potential and practice in reality. The Act does not include the 1951 and the 1969 Conventions that were previously included in the Refugee Bill.

Section 16(1)(a) states that every recognized refugee shall be entitled to the rights and be subject to the obligations contained in the international conventions to which Kenya is party. This would therefore include the 1951 Convention Relating to the Status of Refugees and the 1969 OAU Convention Governing the Specific Aspect of Refugee Problems in Africa.

There appear to be no special arrangements for vulnerable groups such as the disabled, unaccompanied minors and the elderly within the Act, and though UNHCR guidelines make provisions for these groups, the practice of RSD and refugee rights protection has seen otherwise. The Regulations to the Refugees Act make provision for the protection of vulnerable groups.

The Draft National Policy on Human Rights 2010 intends to:

- Establish and empower effective national or issue-specific institutions that deal with human rights;

- Enhance awareness of the human rights standards and mechanisms which will enable everyone, including public servants, to understand how human rights impact on service delivery;
- Improve the level of informed ratifications of international human rights treaties, domestication and effective observance by the government of its obligations;
- Create better linkages between human rights, planning and development;
- Focus on economic, social and cultural rights leading to improved quality of life, particularly among the marginalized and vulnerable groups (towards to achievement of MDGs); and
- Provide a road map towards the realization of human rights respecting state.

Refugee Status Determination

RSD is determined by the Act. Previously, under the Immigration Act applications for refugee status were heard and determined by immigration officers appointed by the minister (Section 5(2)). However, the Immigration Act was silent on steps a claimant is to follow to obtain status (hence many would be considered illegally present in Kenya). It also did not incorporate the refugee definition in the OAU convention regarding acts of aggression and events seriously disturbing public order.

RSD today is conducted solely by the UNHCR. Harrell-Bond and Kagan¹⁶ criticize the ‘judge and jury’ role of the UNHCR as decision-maker and protector of refugees in that it compromises the procedural safeguards and fairness as well as results in the loss of refugees’ trust. The UNHCR has however continually issued comprehensive specific procedural requirements for fair RSD¹⁷ including issuing states more comprehensive advice about standards necessary for a fair and effective RSD procedure.

Harrell-Bond and Kagan however argue that UNHCR fails to follow these guidelines. They detail problems of secret evidence (withholding it from applicants¹⁸ in almost all asylum seeking cases when matters of national security or the security of the organizations or persons providing information had been the only exceptions in the guidelines),¹⁹ reasons for rejection (failing to provide detailed, written reasons²⁰ that could be used in preparing an appeal even when they themselves keep detailed assessments of each case), independent appeals²¹ (different staff members from the safe office working under the same supervisors usually handle the appeals)²² and the right to counsel²³ (some UNHCR offices resist the right to counsel, refuse to accept submissions by lawyers or to speak with lawyers about their clients’ cases or question asylum seekers why they chose to seek legal assistance).

¹⁶ Barbara Harrell-Bond and Mike Kagan, *The Road Home for Africa’s Refugees, Protecting the Rights of Refugees in Africa: Beginning with the UN Gatekeeper*, Pambazuka News 182, 11 November 2004.

¹⁷ Conclusion 8 (XXVIII), the Executive Committee of the UNHCR (EXCOM), 1977, *The Handbook on Procedures and Criteria for Determining Refugee Status* (UNHCR 1992a) and the background paper, *Fair and Efficient Asylum Procedures*, (UNHCR May 2001) with comments submitted to the Council of Europe in February 2003.

¹⁸ In accordance with a confidential August 2001 memorandum from the Department of International Protection.

¹⁹ UNHCR annotated comments on the amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, COM(2002) 326 final of 18 June 2002, presented by the Commission (commenting on Article 14).

²⁰ UNHCR, *Asylum-Processes: Fair and Efficient Asylum Procedures* (May 2001)

²¹ OAU-UNHCR Guidelines for National Refugee Legislation and Commentary (1980) calls on governments to provide rejected asylum-seekers with access to an independent appeal authority

²² Contrary to the stipulation that the appeal should be to “an authority different from and independent of that making the initial decision.” [UNHCR, *Asylum-Processes: Fair and Efficient Asylum Procedures* (May 2001).]

²³ UNHCR advises that “at all stages of the procedure, including at the admissibility stage, asylum-seekers should receive guidance and advice on the procedure and have access to legal counsel.” Ibid.

There are also the questions of transparency and accountability as UNHCR's RSD operating procedures are generally not released to the public. Harrell-Bond and Kagan propose that on top of reforming RSD procedures, UNHCR and governments should find other ways of recognizing refugee status to eliminate the intensity, burden and high risk of error in RSD such as *prima facie* recognition for cases of mass movements, which the Kenyan government does for Somali migrants.

- Refugee Definition (Broadened)

Section 3(1)(a) adds "sex" as a reason for persecution. Section 3(2) includes the definition of a *prima facie* refugee for refugees recognised under the definition contained in the 1969 OAU Convention. The Section 3(4) exclusion of being a *prima facie* refugee does not preclude inclusion under the 1951 Convention.

Persons who flee from armed conflict without any element of persecution linked to one or more of the 1951 Convention grounds do not qualify for refugee status based on the criteria of that Convention. They may, however, come within the wider category of refugees which includes persons forced to flee due to serious and indiscriminate threats to life, physical integrity or freedom resulting from generalized violence or events seriously disturbing public order.

- Ability to enter Kenya and to seek asylum without fear of prosecution

Section 11(1) of the Refugee Act states that whether an asylum seeker enters lawfully or unlawfully, he is protected from prosecution as an illegal immigrant, as long as he seeks to regularise his presence within 30 days of entering Kenya. Subsection (3) asserts that the illegal entry must not deny the person the opportunity to apply for refugee status. This, with regard to asylum seekers, repeals Section 3 of the Immigration Act which declares any alien who enters Kenya without a valid entry permit or pass to be unlawful. There are no provisions however detailing how to determine that a person has been in the country for less than 30 days.

The Aliens Act had defined 'aliens' as all persons who are not Kenyan citizens, which in essence includes refugees. It required that all aliens report to a registration officer within 90 days of arrival in Kenya (Section 3) and acknowledges refugee applicants in the application form – Form A1, para. 10. The Aliens Act was, however, silent on the procedure of refugee status determination, thus giving the inference that the Immigration Act is the procedural Act.

- Steps of RSD:

- 1) Registration with the UNHCR and/or the Government of Kenya, requesting asylum through a statement setting out the reasons for applying for asylum. The duty is levied on the asylum seeker [Refugee Act Section 11, Regulation (4)]²⁴ to register, disclose information and surrender documents (be fingerprinted etc.)
- 2) Interview (non-adversarial process of information gathering) with a specially trained officer about the reasons which made him/her flee and the reasons which make him/her unable or unwilling to return to his/her country of nationality or habitual residence. Confidentiality, sensitivity to gender, age and diversity are ensured (Regulation 21).

²⁴ 'Shall present himself and apply to be recognized as a refugee'

Interpretation services should be impartial and competent. Due process should be observed and explained to the applicant, the interview transcribed and copies of documents retained.²⁵

The burden of proof rests on the refugee and the threshold is reasonable likelihood which means that there is no necessity for the adjudicator to have to be fully convinced of the truth of each and every factual assertion made by the applicant. The adjudicator needs to decide if, based on the evidence provided (whether oral or documentary) as well as the veracity of the applicant's statements, it is likely that the claim of that applicant is credible.

3) Conferring refugee status

Exclusions – undeserving

- Article 1(F) of the 1951 Convention states that:

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

- (a) He/she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) He/she has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) He/she has been guilty of acts contrary to the purposes and principles of the United Nations.

Application of Exclusion

Clauses of the 1951 Convention are to be applied restrictively bearing in mind that the list is exhaustive. Under the Refugee Act 2006 Section 4 'Disqualification from Refugee Status' adds non political crimes committed upon arrival and admission inside Kenya as a refugee. Revocation is to be distinguished from withdrawal of refugee status under Section 20 or revocation and expulsion under 21.

Ability to Appeal

Section 10 stipulates that any decision made by the Commissioner under the Act may be appealed within 30 days to the Appeal Board. This means that each and every negative decision made under the Act can be appealed as of right first the Appeals Board created by the Refugee Act and then to the High Court under normal law.

Refugee cases that have been unfairly dealt with by the legal system may also be taken to the African Commission on Human and Peoples' Rights. The 35th session of the African Commission nominated a Special Rapporteur on Refugees and Displaced Persons in Africa, Mr. Bahame Tom Mukirya Nyanduga.

Cessation of Refugee Status

Refugee status as conceived in international law is, in principle, a temporary status. Once a refugee can safely return and re-establish him or herself in the country of origin or obtains

²⁵ UNHCR Procedural Standards, Handbook on RSD, Regulations to the Refugee Act 2006

full protection as a citizen of another State, international protection is no longer necessary or justified. In such circumstances, refugee status may cease.

Cancellation of Refugee Status

Invalidating refugee status which should not have been issued in the first place, because the person concerned was not eligible for refugee status at the time of the recognition is done in cases where refugee status has been conferred on a person who did not meet the inclusion criteria of the refugee definition, or to whom an exclusion clause should have been applied at the time of the initial determination.

Refugee Rights

Kenya's closure of its borders in 2007 created an exploitative scheme where asylum seekers resorted to smugglers to cross the border and where Kenyan police profited from the desperation and vulnerability of refugees, charging them for illegal immigration, unlawfully detaining or summarily deporting them, all of which is contrary to the Refugee Act²⁶ and international law in general.

Refugees have the same right to work in Kenya as all other aliens. Section 16(4) provides for a right to employment subject to the same restrictions imposed on aliens. It is the *Immigration Act* however that governs the issuance of work permits to non Kenyans. The power to grant a work permit is given to an immigration officer and it is discretionary.

Urban refugees (mandated to reside outside of camps) are legally free to move, to access courts under Kenyan law (including the Refugee Act) and legal advice provided for by refugee rights NGOs. Their right to privacy, family life and non-discrimination is enshrined in the Bill of Rights (Chapter 4 of the recently promulgated Kenyan Constitution) as are economic, social and cultural rights.

The Refugee Act repeals Section 3 of the Aliens Restriction Act which placed restrictions on the entry, residence and movement of aliens in Kenya. For although Section 3(1) conferred this power on the Minister primarily 'when a state of war exists between Kenya and any foreign power or when it appears than an occasion of imminent danger or great emergency has arisen' the Act allowed the Minister to make these restrictions even when such conditions did not exist and failure to comply with a restriction order was a prosecutable offence.

Section 16(2) states that the Minister may designate, in consultations with the host community, transit centres and refugee camps. There is no obligation to reside in camps nor is there a clear reference to the encampment policy. Though, Section 25(f) creates an offence of residing outside the designated areas without authority.

In practice however, Kenya's unofficial policy of encampment prohibits registered refugees in the camps from travelling to other parts of Kenya, unless they have special permission for reasons such as medical appointments or education in Nairobi. Under international law, Kenya must justify any such prohibition as the least restrictive measure necessary to protect national security, public order or public health, which it has failed to do. In 2009, the

²⁶ "Welcome to Kenya: Police Abuse of Somali Refugees," Human Rights Watch, March 2010

authorities allowed only 6,000 of Dadaab's almost 300,000 refugees to travel outside the squalid and overcrowded camp.²⁷

Not all urban refugees are financially self-sufficient and many live in lower-income neighbourhoods. Police in urban areas are also largely unaware of the Refugee Act and therefore constantly harass and discriminate urban refugees. Some refugee communities are even known to collectively produce bribes to keep police harassment at bay.

Many refugees find it difficult to find gainful employment with the Immigration Act requirement of proving that no other Kenyan could do the same work, as well as paying for a work permit which costs a debilitating sum of KSH 50,000.00. Refugees are left to find subsistence in the informal economy, cementing their status as an invisible population and exposing them to abuse. The lack of official papers and the fear of police harassment or detention have invariably resulted in poorly paid jobs and higher charges for rent (as compared to their Kenyan neighbours).

Refugees have the same nominal access as Kenyans to public schools and hospitals in Nairobi though because they do not have a recognised political voice, they are not able to transform their nominal rights into real, exercised rights.

Aid agencies' awareness of urban refugees has not immediately translated into attention to their problems because urban refugees are not officially recognised. The government's encampment policy requires that refugees stay in remote camps. Aid has therefore mainly been concentrated in the camps, with agencies and government alike not keen to do anything in Nairobi that might counter Kenyan policy or attract refugees to the urban area.

Refugees migrate to the city nonetheless.²⁸ In Nairobi, they may be escaping forced marriages or clan conflicts that cross the border, as well as the hot, arid climate and lack of economic opportunities in the camps. In a report on water and sanitation, Oxfam indicates that there is a grave lack of basic services and serious public health risks in Dadaab, a situation that will only be aggravated if the camps continue to be inadequately resourced and negotiations with the Kenyan government on allocation of land for decongestion sites remain at an impasse.²⁹ The model of assistance in camps is a partnership of international NGOs operating under the auspices of UNHCR. Partners receive and register new arrivals, and directly provide food, fire wood, shelter, medical care, education, community services and protection.

In Nairobi, refugees live and work side by side with Kenyans, including co-ethnic Kenyans, such as Somali Kenyans and Ethiopian Kenyans. Food and emergency assistance is provided on a one-time basis by mosques and churches, as well as by co-ethnics. There are only two temporary shelters citywide, for refugees and Kenyans alike; accommodation is privately rented, or exchanged for live-in help. The poor find it difficult to access education and medical care due to the cost of transport, books, uniforms, desks and fees. Income-generating activities are possible for those who have access to capital, often along clan lines and trans-nationally but in most cases, urban refugees lack access to such activities.

Some polemic on the new Constitution asserts that the provisions on citizenship may be of benefit to refugees where citizenship rights are concerned. For example with the provision that helps to realize every child's right to acquire a nationality guaranteed under section 11 of

²⁷ <http://appablog.wordpress.com/2010/06/17/kenya-police-abuse-somali-refugees-government-un-donors-should-address-widespread-violence-degrading-detention-extortion-and-policing-failures/> 30/10/10.

²⁸ <http://www.reliefweb.int/rw/rwb.nsf/db900sid/LZEG-6X4MDE?OpenDocument> 30/10/10.

²⁹ Addressing the Humanitarian Crisis on the Kenya/Somalia Border, Oxfam International, March 2009.

the Kenya's Children Act (No. 8 of 2001), the allowance made for dual nationality as a safeguard to prevent statelessness when people seek to change nationalities, the entitlement of every citizen to a passport and any registration or identity documents issued by the State to citizens and restrictions are listed on the grounds for revocation of citizenship.

- Future legislative developments anticipated or under discussion

The Refugees Act attempts to consolidate the law relating to immigration into Kenya and related matters, to balance the basic rights of refugees and the national interests of Kenya. The Act provides a general framework for refugee protection. Substantive issues are to be addressed in the regulations to the Act. Some regulations are out and deal with reception, registration and adjudication of status.

A report by the IRC underlines the importance of regulating employment for refugees as a durable solution, allowing refugees the ability to secure their livelihoods and positively contribute to the local economy. Indeed, some neighbourhoods of Nairobi such as Eastleigh are thriving hubs of informal commerce spearheaded by entrepreneurial refugees. 'Refugees have the potential to be an economic engine in Nairobi,' notes the IRC's Leeson. 'Much more could be done to harness this opportunity by investing in refugee livelihood projects.'

4. Conclusion/Recommendations

The significance of the act is that:

- It domesticates Kenya's international commitment to protect refugees
- The Government acknowledges its responsibility towards the protection and assistance of refugees
- Government actions on refugee matters will now be subject to judicial review
- UNHCR will eventually withdraw from RSD
- UNCHR will continue to support the Government in fundraising and will liaise with the international community, especially regarding resettlement
- UNHCR will maintain an observer and monitoring role for the implementation of the 1951 Convention

Recommendations on legal and institutional reform however need to address:

- A national policy to implement the Act as well as the proposed Regulations, allowing for the DRA to shoulder the responsibilities of RSD
- Improved institutional capacity (such as training of police officers and government departments on refugee rights and documentation to eliminate cases of harassment and discrimination)
- Durable solutions (such as regularising urban refugees), as encampment is not a long-term solution and the Kenyan government therefore needs to promote a more enabling policy environment

- Protection and support for the most vulnerable refugees, particularly women, girls, unaccompanied minors, the sick, disabled and elderly (though the sex inclusion as mentioned above has proved important for RSD and referral for resettlement)
- For the donor community's recognition of urban refugees with targeted policies, programming and coordination among themselves. In Nairobi, UNHCR has created an open coordination forum that enables international and local organisations to exchange information, focus efforts and avoid overlap, and to collaborate in policy advocacy
- Humanitarian aid targeted at communities rather than urban refugees alone. This approach provides an opportunity to create linkages across national and ethnic groups but it also avoids resentment by the host community
- Building the capacity of refugees to address their needs and be their own advocates, especially in urban areas. Urban refugees demand and deserve to engage in civil society. In some communities, refugees may naturally participate in associations, which international agencies can strengthen by providing training, skills, information and other support. Where community groups do not form, we can work to create sustainable organisations by building civil society as a strategy to achieve our objectives.

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