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Past Reflections, Future Insights: African Asylum Law and Policy in Historical Perspective

EDWIN ODHIAMBO ABUYA*

*Asiyesikia la mkuu huuwajika guu.*¹

Abstract

This article argues that an understanding of the evolution of asylum is an essential ingredient in the search for ideas and perspectives to the plight facing forced migrants. Using Kenya as a case study, the paper evaluates the extent to which procedures used to determine claims for asylum, protection outcomes and entitlements met international human rights and refugee law standards. It is contended that limited resources, porous boundaries and the mass movement of asylum seekers have compromised the level of protection offered to those who seek surrogate protection in African states like Kenya. In conclusion, critics in the area of asylum are challenged to undertake historical studies, as a way towards offering best practise lessons for those involved in the protection of persons forced to flee their home states.

1. Introduction

Since the adoption of the 1951 United Nations ('UN') Convention Relating to the Status of Refugees² ('Refugee Convention'), and its regional counterpart, the African Convention Governing the Specific Aspects of Refugee Problems in Africa³ ('OAU Refugee Convention'), empirical and

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¹ Swahili adage: 'A person who disregards an elder's advice ends up breaking his or her leg' (Author's translation).

² Convention Relating to the Status of Refugees ('Refugee Convention'), 28 July 1951, 189 UNTS 137, entered into force 22 Apr. 1954.

³ African Convention Governing the Specific Aspects of Refugee problems in Africa ('OAU Refugee Convention'), adopted by the Assembly of Heads of State and Government at its Sixth Ordinary Session (Addis Ababa, 10 Sept. 1969), entered into force 20 June 1974.

theoretical studies have produced a wide range of literature on various aspects of refugee protection. Commentators in the area of forced migration have contributed immensely to the current store of information. Generally speaking, literature in this area has been largely based on issues such as: definition of terms such as 'refugee', protection and asylum;⁴ role of institutions like the United Nations High Commissioner for Refugees ('UNHCR'), and its ability to meet its mandate;⁵ refugee entitlements and duties in host states;⁶ detention of asylum seekers;⁷ durable solutions for refugees;⁸ and, more recently, the impact of 9/11 on asylum.⁹

A survey of these accounts, however, shows that the history of asylum at a national level remains an under-researched area. Current writings have focussed mainly on the evolution of the international refugee protection regime.¹⁰ Whilst some studies have been conducted on Africa,¹¹ despite the continent generating and playing host to a vast number of 'people of concern',¹² specific country accounts are rare. The objective of this article is not to address the evolution of Africa's formal refugee protection scheme — that is the subject of a separate article(s). Rather, using Kenya as a case study, this article aims to plug the literature gap on specific country experiences.

⁴ Atle Grahl-Madsen, 'Identifying the World's Refugees', (1983) 467 *Annals of the American Academy* 11; Louise Holborn, *Refugees: A Problem of Our Time* (New Jersey: Scarecrow Press, 1975) chapters 7-11.

⁵ Sadako Ogata, 'The Evolution of UNHCR', (1994) 47 *Journal of International Affairs* 419; Astri Suhrke and Kathleen Newland, 'UNHCR: Uphill in the Future', (2001) 35 *International Migration Review* 284.

⁶ James Hathaway, *The Rights of Refugees Under International Law* (Cambridge: Cambridge University Press, 2005) chapters 4-6; Johanna Schiratzki, 'The Best Interest of the Child in the Swedish Aliens Act', (2000) 14 *International Journal of Law, Policy and the Family* 206.

⁷ Alison Bashford and Carolyn Strange, 'Asylum-Seekers and National Histories of Detention', (2002) 48 *Australian Journal of Politics and History* 509; Galina Cornelisse, 'Human Rights for Immigration Detainees in Strasbourg: Limited Sovereignty or a Limited Discourse?', (2004) 6 *European Journal of Immigration and the Law* 93.

⁸ C.R. Nagel, 'Geopolitics by Another Name: Immigration and the Politics of Assimilation', (2002) 21 *Political Geography* 971; Kallu Kalumiyi, 'Angola: A Model Repatriation Programme?' (2004) 23 *RSQ* 205; Cindy Horst, 'Buufis Amongst Somalis in Dadaab: The Transnational and Historical Logics Behind Resettlement Dreams', (2006) 19 *JRS* 143.

⁹ Savitri Taylor, 'Reconciling Australia's International Protection Obligations with the War on Terrorism', (2002) 14 *Pacifica Review* 121; Carl Levy, 'The European Union After 9/11: The Demise of a Liberal Democratic Asylum Regime?', (2005) *Government and Opposition* 26; Regina Germain, 'Rushing to Judgement: The Unintended Consequences of the USA PATRIOT Act for *Bona Fide* Refugees', (2002) 16 *Georgetown Immigration Law Journal* 505.

¹⁰ Frank Krenz, 'The Refugee as a Subject of International Law', (1966) 15 *ICLQ* 89; Yewdall Jennings, 'Some International Law Aspects of the Refugee Question', (1939) 29 *British Year Book of International Law* 98.

¹¹ Paul Weis, 'The Convention of the Organisation of African Unity Governing the Specific Aspects of Refugee Problems in Africa', (1970) 3 *Revue des Droits de l'homme* 449.

¹² As of 1 Jan. 2006, Africa was host to some 5.2 million (25%) 'persons of concern' to UNHCR. See UNHCR, '2005 Global Refugee Trends: Statistical Overview of Populations of Refugees, Asylum-Seekers, Internally Displaced Persons, Stateless Persons, and Other Persons of Concern to UNHCR', available on the UNHCR website at <http://www.unhcr.ch> (visited 28 Nov. 2006), 104.

What contribution could analysis of the evolution of refugee protection within any particular setting make? Primarily, history gives a reader a perspective on the social and political context from which the concept of refugee protection within a specific setting developed. A historical account can also enable one to appreciate the current challenges facing asylum regimes. Moreover, a historical analysis can provide insights into measures that might be taken to meet the plight of those seeking asylum as refugees. Put simply, the lessons of history serve to remind us from where we came and of the road ahead, as well as the possible consequences of the measures taken.

Historians affirm this view. Eric Hobsbawm, for example, emphasizes that history 'can help us understand what [the] problems [of humanity] are, and what their conditions for their solution must be ...'.¹³ While, according to John Tosh, in an analysis on 'the uses of history', a study of past events 'provides a much-needed perspective on some of the pressing problems of our time'.¹⁴ Law academics have also underpinned the importance of legal history. In his discussion of the development of Australian drug laws, Terry Carney contends that 'contemporary ... strategies ought not to be formulated without first considering the historical record'.¹⁵ A.W.B. Simpson similarly notes that 'it hardly makes sense to study law without first paying some attention' to the past.¹⁶

In the asylum context in particular, Charles Westin maintains that 'one cannot really discuss the trends in refugee policy that apply in the African situation without saying something about the historical ... context'.¹⁷ Liza Schuster, in an article that examines historical lessons in the context of asylum, writes that 'taking a long term perspective on asylum allows us to place developments in the twentieth and twenty-first centuries in a wider context. [This approach] also shows the different benefits — material and ideal — that asylum has conferred on the different asylum-granting bodies'.¹⁸ Failure to consider lessons of history, as Gervase Coles, former Assistant Legal Adviser of the Australian Department of Foreign Affairs, warns, may lead to a 'consequential risk of seeing the refugee problem

¹³ Eric Hobsbawm, *The Age of Extremes: The Short Twentieth Century 1914-1991* (London: Michael Joseph, 1994), 583.

¹⁴ John Tosh, *The Pursuit of History: Aims Methods, and New Directions in the Study of Modern History* (London: Longman, 2002), 52.

¹⁵ Terry Carney, 'The History of Australian Drug Laws: Commercialism to Confusion?', (1980-1981) 7 *Monash University Law Review* 165, 171.

¹⁶ A.W.B. Simpson, 'Legal Education and Legal History', (1991) 11 *Oxford Journal of Legal Studies* 106, 109-110.

¹⁷ Charles Westin, 'Regional Analysis of Refugee Movements: Origins and Response', in Alastair Ager, (ed.), *Refugees: Perspectives on the Experience of Forced Migration* (London: Biddles, 1999) 24-45, 25.

¹⁸ Liza Schuster, 'Asylum and the Lessons of History', (2002) 44 *Race and Class* 40, 41.

from an inadequate and even distorted perspective'.¹⁹ This article seeks to respond to the advice given by these commentators by evaluating the evolution of the refugee protection system in post-independent Kenya.²⁰

Kenya is chosen as an example of an African state for a number of fundamental reasons. Primarily, as the legislative history of the OAU Refugee Convention suggests, Kenya was one of the few states involved in the search for a regional solution for the hundreds of thousands of refugees then scattered over Africa after the wars of independence, which occurred mostly between 1955 and 1965. In addition, the country has had a long experience of refugees and asylum seekers dating back to the 1960s.²¹ Furthermore, owing to political stability and relative calm, Kenya has over the years hosted forced migrants from other African states.²² As of 2 June 2006, it was host to some 270,000 persons of concern from at least eight neighbouring states.²³ Lastly, UNHCR, the international guardian of refugees,²⁴ has maintained a field presence in Kenya since 1969.

Two additional points must also be emphasized. Firstly, although this article focuses on one jurisdiction, its findings have potential to apply broadly because African countries share similar challenges when dealing with forced migrants. Secondly, the analysis in this article is limited to the period dating from 1963, when Kenya attained independence, to 1992. Until 1991 the refugee mandate was placed on the Government. As we shall later see, from 1992 Kenya abrogated its refugee obligations to the UNHCR. By the end of 2006, the UNHCR was still in charge of the entire asylum system. The only meaningful contribution from the Kenyan government being the provision of physical space, albeit in the more remote parts of the country, which the UNHCR uses to construct camps to house refugees and asylum seekers. All other forms of material assistance are provided by the UNHCR.

¹⁹ Gervase Coles, 'The Basis and Function of Refugee Law', in Institute of Public International Law and International Relations of Thessaloniki (ed.), *Refugee Problem on Universal, Regional and National Level*, Vol. XIII, (Institute of Public International Law and International Relations: Thessaloniki, 1987) 655, 666.

²⁰ For an analysis of refugee protection in colonial Kenya, see David Wilkin, 'Refugees and British Administrative Policy in Northern Kenya, 1936-1938', (1980) *African Affairs* 510.

²¹ See Tala Skari and Edward Girardet, 'Urban Refugees: Out of the Public Eye' (1985) 23 *Refugees* 14, describing a 'self-reliance' project which was begun by a group of five Mozambican asylum seekers and their families near Nairobi who arrived in Kenya in the late 1960s, 16.

²² Namely: Uganda, Ethiopia, Sudan, Somalia and Rwanda.

²³ Namely: Burundi, Democratic Republic of Congo, Eritrea, Ethiopia, Rwanda, Somalia, Sudan and Uganda. See UNHCR, above, n. 12.

²⁴ Art. 1 of the Statute of the Office of the United Nations High Commissioner for Refugees ('UNHCR Statute'), adopted by General Assembly resolution 428 (V) of 14 Dec. 1950, sets out the UNHCR mandate as providing 'international protection' to refugees. Note, however, that states hold the principal responsibility for ensuring protection of refugees.

Like Kenya, the UNHCR has assumed the refugee mandate in many African states.²⁵ However, recently there has been increasing pressure on African states to pass domestic legislation that would provide effective surrogate protection to victims of armed conflict and persecution. Under this arrangement the UNHCR's role would be that of a watchdog, as was originally designed. Governments, meanwhile, would take up more responsibility relating to refugee governance. Accordingly, as Kenya braces itself (albeit slowly)²⁶ to resume its role as the primary protector of forced migrants coming to its territory, it remains important to evaluate lessons of history. As a way forward, it is crucial to analyse the historical record, particularly from when the Government took an active part in the management of refugees and asylum seekers. In addition to explaining past challenges, the historical method and case study approach also provides insights on how to resolve current dilemmas. The discussion in this paper will also facilitate an analysis of refugee protection that is based on more than mere speculation. Overall, Kenya offers an opportunity for a historical study into asylum law and policy in Africa, and a unique locus to draw wide-reaching conclusions. Its experience will be of value to other African states that are moving towards assuming their protection obligations.²⁷

This article focuses on the administrative procedures established by Nairobi to assess claims and the nature of protection that was offered to those admitted as refugees. Discussed are three key aspects of any refugee protection system. The first aspect concerns the criteria used for recognising refugees. The second point of interest relates to the mode of assessing asylum claims, and the last deals with the nature of protection which was offered to those who were granted refugee status. Section two provides an overview of the movements of forced migrants into Kenya during the period of focus. In sections three, four and five Kenya's early refugee protection system is evaluated. Initially, the protection regime had two aspects to it — a legislative structure and a practical scheme. Each will be considered in turn. Comparing and contrasting the legal and actual asylum schemes, sections three and four demonstrate that these two systems were at odds. However, under both systems, claimants were required to prove that they were persons to whom Kenya owed protection obligations.

The protection outcomes and entitlements granted to those who satisfied the 'refugee' criteria are evaluated in section five. This section also looks at the extent to which the asylum regime met international

²⁵ See UNHCR, above n. 12, 46-50.

²⁶ The drafting process of Kenya's domestic asylum legislation has been ongoing since the early 1990s.

²⁷ Two African states that have passed domestic refugee-specific legislation are South Africa, Refugees Act 1998, and Tanzania, Refugees Act 1998.

standards,²⁸ particularly those relating to employment, travel, family unity and reunification, health and education needs. It is argued that, although significant steps were made to meet international norms, the rising refugee population together with finite resources and limited opportunities in the local job market drastically affected these measures. This starting point allows this article to anchor its analysis by examining different basic frameworks for a refugee protection system. The analysis also highlights key features of the legal and policy frameworks, which is a necessary precedent to considering how they are applied.

Section six examines some of the reasons that may account for the collapse of the Government's refugee protection regime. Section seven reflects on some of the lessons learnt from history. In conclusion, section eight offers some recommendations that may go towards finding solutions to the plight facing the millions who have been forced to seek shelter as refugees.

2. Forced migrants into Kenya: the reception discourse

After almost 75 years under British rule, Kenya gained its independence on 12 December 1963. Historically, the flow of asylum seekers into Kenya began in the late 1960s. It gathered momentum in the early 1970s owing to political events in Uganda during the reign of the late President Idi Amin. Amin's brutal regime murdered tens of thousands of people in Uganda. In addition, several thousand Asians²⁹ and Africans³⁰ were expelled, or fled, seeking sanctuary in Kenya and other neighbouring states for political and/or economic reasons. These groups were typical of African refugees in terms of the classification of Simon Smith and Joseph Donders:

Nearly all African refugees are either political or economic refugees. The political refugees are in fear of persecution due to differences in political beliefs between them and the leaders of their countries of origin. The economic refugees, fleeing

²⁸ These standards are set by the following treaties, which codify human rights norms: Universal Declaration of Human Rights (UDHR), UNGA Res 217 A, GAOR, 3d Sess., 183 plen. Mtg., art 22 UN Doc. A/810 (1948); International Covenant on Covenant on Civil and Political Rights ('ICCPR'), GA Res. 2200(XXI) UN GAOR, 21st Sess., Supp. No. 16, 52, UN Doc. A/6316 (1966), 999 UNTS 171, entered into force 23 Mar. 1976; International Covenant on Economic, Social and Cultural Rights ('ICESCR'), adopted by UN Gen Ass. on 16 Dec. 1966, 999 UNTS (entered into force 3 Jan. 1976); and the Convention on the Rights of the Child ('CRC'), GA Res. 44/25 of 20 Nov. 1989, 1577 UNTS 3 (entry into force 2 Sept. 1990).

²⁹ In Aug. 1972, Amin gave Asians an ultimatum to leave Uganda within three months. Although Britain admitted most of them, some 6,000 Asians are said to have sought shelter in Kenya. Source of data: Letter dated 30 Mar. 1973 from P.R.N. Fifoot, UK Foreign and Commonwealth Office, to A.B. McNulty, Secretary to the European Commission of Human Rights Council of Europe. See Records of the Foreign and Commonwealth Office, 'Expulsion of United Kingdom Citizens of Asian Origin from Countries in East Africa' (FCO 31/1443 Folio 76).

³⁰ Henry Kyemba, *State of Blood: The Inside Story of Idi Amin's Reign of Fear* (London: Paddington Press, 1977) chapter 9; Jimmy Tindigarukayo, 'Uganda, 1979-85: Leadership in Transition', (1988) 26 *The Journal of Modern African Studies* 607, 613.

their countries because of the lack of food or money to buy it, are often very badly off because of the political strife of their home regions and mother countries.³¹

Because the number of Ugandan refugees was relatively low and most had relatives in Kenya, the forced migrants were easily accepted into Kenyan society. Once they had crossed into the country, the Ugandans settled themselves among local populations in urban and rural areas.

Unfortunately, President Amin's removal from power in 1979 did not put an end to the exodus from Uganda. In fact, President Milton Obote's rule, from 1980 to 1985, displaced even more people than that of Idi Amin. Comparing the two regimes, Abdu Kasozi writes that, whereas under Amin violence 'was like a tide, peaking and subsiding at certain periods', under Obote it was 'always at high tide'.³² It was not until 1986, when President Yoweri Museveni took effective control of the country by military coup that the exodus from Uganda into Kenya decreased significantly. Many Ugandan refugees began returning home. This might explain the reason why, between 1985 and 1986, Kenya's refugee population fell by at least two thousand, as figure 1 (below) shows.

Notwithstanding the restoration of peace and stability in Uganda and the subsequent return of refugees to the country, the statistics show that Kenya's refugee population continued to rise gradually in succeeding years. Between 1986 and 1990 it had doubled. The rise in numbers occurred for many reasons: there was internal war and civil strife in neighbouring states, especially Ethiopia, Somalia and Sudan, as well as a severe drought in Ethiopia in 1985. Figure 1 plots the population trend from 1980 to 1990.

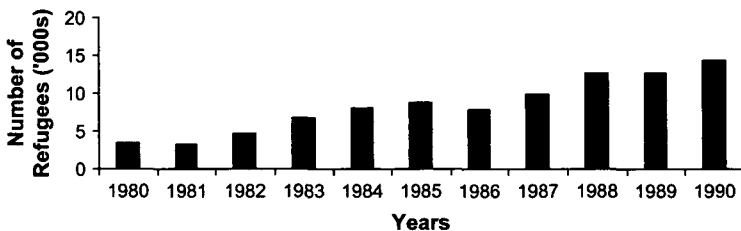


Figure 1. Number of Refugees in Kenya, 1980–1990³³

³¹ Simon Smith and Joseph Donders, *Refugees Are People: An Action Report on the Refugees in Africa* (Eldoret: Gaba, 1985), 4.

³² Abdu Kasozi, *The Origins of Violence in Uganda, 1964 – 1985* (London: McGill University Press, 1994), 145. He describes Obote's regime as a 'terror machine', 147.

³³ Data from UNHCR.

3. The legislative structure: international and domestic frameworks

3.1 Application of international refugee law in Kenya

At independence, Kenya adopted the British approach to international law and the adoption of treaties. As a dualist state, when the Government ratified the Refugee Convention and the 1967 Protocol Relating to the Status of Refugees³⁴ ('Refugee Protocol'), on 16 May 1966 and 13 November 1981, respectively, this action *per se* did not create any rights, duties or obligations on the domestic plane. In Kenya treaties do not apply unless Parliament passes domestic legislation, or amends existing legislation, to incorporate their provisions. Put in another way, the fact that Kenya is a party to a treaty does not of itself create private rights and obligations enforceable by action brought in a Kenyan court. This position is affirmed by the Judicature Act 1967, which excludes treaties as a source 'of law' in Kenya.³⁵ At most, ratification of the refugee treaties was a show of commitment to the international community that Nairobi essentially agreed with the provisions stipulated by these instruments.

This principle has its foundation in the proposition that, in Kenya's constitutional system, the making and ratification of treaties falls within the province of the Executive,³⁶ whereas the making and the alteration of the law are parliamentary functions.³⁷ The East African Court of Appeal³⁸ underlined in *East African Community v. Republic*:³⁹

The provisions of a treaty entered into by the Government of Kenya do not become part of the municipal law of Kenya save in so far as they are made such by the law of Kenya.⁴⁰

However, once a treaty is incorporated into the domestic legal framework the transforming legislation ranks at par and applies in the same way as other pieces of legislation.

³⁴ Protocol Relating to the Status of Refugees ('Refugee Protocol'), 31 Jan. 1967, 606 UNTS 267 (entered into force 4 Oct. 1967).

³⁵ Section 3(1) of this legislation lists the following 'sources of law': Acts of Parliament, the Constitution, Common Law, Doctrines of Equity and Statutes of general application in force in England as at 12 Aug. 1897, and African Customary Law.

³⁶ Constitution of Kenya, section 23.

³⁷ *Ibid.*, sections 30 and 46.

³⁸ The East African Court of Appeal was precursor to the Kenyan Court of Appeal, the highest court in Kenya (P. Newbold, V.P. Duffus, J.A. Spry).

³⁹ (1970) EA 457.

⁴⁰ *Ibid.*, 460.

3.2 Domestic legal framework: the Immigration Act (1967) and the Aliens Restriction Act (1973)

The 1973 Aliens Restriction Act⁴¹ and the Immigration Act of 1967⁴² were the two enactments most relevant to the protection of refugees and asylum seekers in Kenya. While neither incorporated precisely the terms of the Refugee Convention and Refugee Protocol, key elements of these treaties were recognised and incorporated into Kenyan law by reference. The two pieces of legislation shared two common features. Both were shaped by the exodus of Ugandans into Kenya during Amin's reign. The Immigration Act, for instance, was amended to provide for forced migration, as well as (orderly) immigration. The Aliens Restriction Act was passed to govern non-citizens and 'aliens', including refugees, also in direct response to the Ugandan exodus. The second common feature of these Acts is that both had a dual purpose. The preamble to the Aliens Restriction Act stipulates that this piece of legislation was passed to impose specific restrictions on foreigners and more generally to 'make such provisions as are necessary or expedient' to fulfil the restriction objective. Conversely, the Immigration Act was passed to 'amend and consolidate the law relating to immigration' in particular and 'for matters incidental thereto and connected therewith'⁴³ in general.

It should be noted from the outset, firstly, that the Aliens Restriction Act and the Immigration Act are still in the statute books. Secondly, that although this corpus of legislation contained provisions that could have been used to protect refugees and asylum seekers in the early days, generally speaking, they were not so employed. As judicial practice suggests, the two acts were applied exclusively for immigration matters relating to non-citizens and without regard to the protection needs of those involved.⁴⁴ In the context of refugees in particular, the Aliens Restriction Act and the Immigration Act were used sparingly to determine claims for asylum. Let us now look at the salient features of this corpus of legislation.

3.2.1 *The Immigration Act (1967)*

Under the Immigration Act, before a person is allowed entry into Kenya they must first apply for and obtain an entry permit. Section 5 of this Act, read together with its schedule, creates 13 classes of entry permits.

⁴¹ Laws of Kenya, ch. 173.

⁴² *Ibid.*, ch. 172.

⁴³ Preamble to Immigration Act.

⁴⁴ See, for instance: *Mohanlal Shah v. R* (1959) EA 951 and *Chimanlal Patel v. Attorney-General* (1960) EA 388 (on suspected prohibited immigrants); *Somji v. Republic* (1973) EA 386 (on making a false declaration to obtain a Kenyan passport); *Prabhulal v. Republic* (1971) EA 52 (on working unlawfully); *Parbat v. Meghji* (1961) EA 540 (on entry permits); *Attorney-General v. Shiiji Punja* (1961) EA 652 (interpretation of 'child').

Of these, class M acknowledges that a 'refugee' is eligible to apply for an entry permit. Two categories of persons are eligible to apply: any person who meets⁴⁵ the 'refugee' definition and anyone related to the refugee of the first category by marriage or blood. The class M entry permit category defines 'refugee' as any person who has fled their home state owing to persecution:

For reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it; and any wife or child over the age of thirteen years of such a refugee.

The first category of the Class M definition adopts the classical definition of 'refugee' found in article 1(A) of the Refugee Convention as read with article 1 of the Refugee Protocol. This body of law defines the term refugee to mean 'any person who':

[O]wing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

As for the second category of persons, it is clear that use of the term 'anyone' does not create a *carte blanche*. Class M limits this group to 'any wife or child over the age of thirteen years of such a refugee'. It is apparent that Kenya's early refugee system adhered to the principle that if the head of a family met the criteria of the refugee definition, his dependants would normally be granted refugee status according to the principle of family unity.⁴⁶ These limitations sit uneasily with modern trends in migration. The term wife, for example, seems to imply that persons fleeing out of fear of persecution were either exclusively, or primarily, male and that their wife and/or child followed the husband or father, respectively. These presumptions are out of touch with reality. As experience shows, mass movement cuts across classifications of gender and age. In fact, statistical data suggest that women and children constitute a significant majority of asylum seekers.⁴⁷

⁴⁵ The Immigration Act section 15(d) lays the burden of proving refugee status on an applicant.

⁴⁶ Discussed in section 5.3 below.

⁴⁷ UNHCR, above n. 12, 34-45.

The use of 'any' to refer to the 'wife' category in particular encompasses monogamous and polygamous⁴⁸ marriages. This position is consistent with section 3 (4) of Kenya's Interpretations and General Provisions Act, 1956, which reads:

In every written law, except where a contrary intention appears, words and expressions in the singular include the plural and words and expressions in the plural include the singular.

Looking at the tenor and substance of the Immigration Act, there appears to be no direct or implied intention that Parliament had any contrary intention to limit the word 'wife' to its singular. If this were the case it would mean that, in situations of flight, a polygamous male could be forced to choose only one wife, thus abandoning the other(s), in order to be allowed entry into the country. On the contrary, Class M should be interpreted broadly to cover polygamous marriages as well. At a practical level this means that a wife, or wives, of a refugee are also entitled to enter Kenya once their husband's asylum application succeeds. Because the legislation refers to 'any' child,⁴⁹ the same arguments can be applied to those who have more than one child.

The age nominated for children is quite interesting in terms of the ages of children and minors specified by Kenyan⁵⁰ and international⁵¹ laws. Section three of this article, which evaluates practical aspects of the Kenyan refugee regime, discusses these themes further.

Asylum Assessment Procedures

Section 5(2) of the Immigration Act requires applications for refugee status to be heard and determined by Immigration Officers of the Ministry of State in the Office of the President.⁵² Upon satisfaction that an applicant meets the definition of 'refugee', an officer is then required to issue an entry permit. The legislation, however, does not clarify the minimum evidence required in order to 'satisfy' an official. Nevertheless, the Act does provide two indicators. The first indicator can be found in section 11, which created an inquisitorial regime by requiring applicants to:

Answer any question [posed by an Officer] or produce any document in [their] possession for the purpose of ... ascertaining whether [they] ... should be permitted to enter Kenya

⁴⁸ This is a common form of marriage and one that is recognised by domestic law. See, for instance, sections 130(2) and 127(4) of the 1963 Evidence Act. See also, Justice Waiyaki in *Esther Karimi v. Fabian Murugu* HCCC No. 7 of 1973, quoted in Eugene Cotran, *Casebook on Kenya Customary Law* (Nairobi: Nairobi University Press, 1991) arguing that Kenya's 'laws provide for both monogamous and polygamous marriages', 25.

⁴⁹ 'Child' is defined by section 2 of the Children and Young Persons Act 1963 and rule 3 of the Aliens Restriction Act as anyone below the age of eighteen years.

⁵⁰ *Ibid.*

⁵¹ See, e.g., Art. 1 of the CRC defining 'child' as any person 'below the age of eighteen years'.

⁵² Section 10 of the Immigration Act empowers the Minister to appoint these Officers.

Schedule 1 rule 6 then specifies that everyone who wishes to apply for an entry permit should complete form 3. Rule 6, however, sits uncomfortably with the requirements of form 3, which appears to be designed for persons seeking to enter the country for commercial or economic purposes. For example, part II of this form requires applicants for class M entry permits to provide the following details:

- Proposed place of residence/business while in Kenya;
- Profession, trade business or manufacture they wish to engage in;
- Qualifications;
- Previous experience; and
- Capital and income available, sources of income and present locality of capital.

Rule 6 makes it mandatory for every person to complete form 3. An applicant for a class M entry permit must provide his or her personal details, namely: full name, current address, date and place of birth, passport number, nationality and particulars of any child. This implies that the reason for a person's flight is a matter to be determined by an immigration officer during the course of a subjective question and answer session. Even at this stage, it is not enough for an applicant to satisfy an immigration official that he or she is in need of surrogate protection. This is simply a preliminary step. Section 20(1) grants immigration officers 'discretion' to issue, or refuse to issue, an entry permit. Unlike the prevailing system in many formal asylum regimes, the Immigration Act does not require immigration officers to give reasons for their decisions, setting out the grounds upon which a dissatisfied claimant might lodge an appeal with the Minister.⁵³ The system also provides no hint of the points of law or fact that rejected applicants might use for appeal and no indication of the chances of success. In a nutshell, the legislation creates an appellate tier without requiring primary decision-makers to provide reasons for their decisions. Whilst this point is discussed further below,⁵⁴ it is important to note that the Act also fails to define the factors, or considerations, which might guide immigration officials to exercise their discretion. Despite this, one can only surmise that the draftsman intended that discretion be exercised judiciously, not capriciously.

3.2.2 The Aliens Restriction Act (1973)

Although the Aliens Restriction Act does not consider refugees to be a special category of non-citizens, its schedule makes a brief reference of

⁵³ Section 5(3) of the Immigration Act provides for appeals for instances where a person is aggrieved by an Immigration Officer's decision pertaining to an entry permit application.

⁵⁴ Section six.

this category of persons. Section 3, read together with rule 4, requires that all foreigners report to a registration officer within 90 days of arrival in Kenya. This registration process entails completion of form A1 titled 'Form for Registration as an Alien'. Paragraph 10 of this form categorizes refugees as non-citizens. It asks:

If *Refugee* in Kenya:

Date of Arrival in Kenya

Have you been accepted as a refugee in Kenya? Yes/No.

The Aliens Restriction Act is silent on the procedures an asylum seeker might follow in order to be granted refugee status. Therefore, in response to the second question, it makes practical sense to infer that the Immigration Act is the procedural law in this regard. In other words, the Aliens Restriction Act should be read together with the Immigration Act in order to make practical sense of paragraph 10 vis-à-vis refugee matters.

In summary, the Aliens Restriction Act and the Immigration Act provide the barest legal underpinning that Kenya's asylum system might use to determine refugee claims. Figure 2 (see next page) is a graphic representation of the legislative refugee assessment procedures. However, as section four below demonstrates, the practical process was at odds with its legislative counterpart.

4. Comparing and contrasting the legal and practical claim assessment schemes

Before 1991, the Government of Kenya heard and determined refugee claims. Two offices were established within the Ministry of Home Affairs and National Heritage ('Ministry of Home Affairs') to discharge the Government's refugee mandate: a Special Programme of Refugees and an Eligibility Committee. The terms of reference of the Special Programme of Refugees were two-fold. It was required to manage the day-to-day affairs of the assessment regime and dispense the Government's refugee policy. Processing of individual claims, on the other hand, was a function conducted by the Eligibility Committee. In terms of personnel, one official and two assistants were appointed to run the Special Programme of Refugees. The Eligibility Committee, however, was comprised of representatives of the Ministry of Home Affairs, the Immigration Department and UNHCR. Herein lay a key difference between the legal provisions and the situation on the ground.

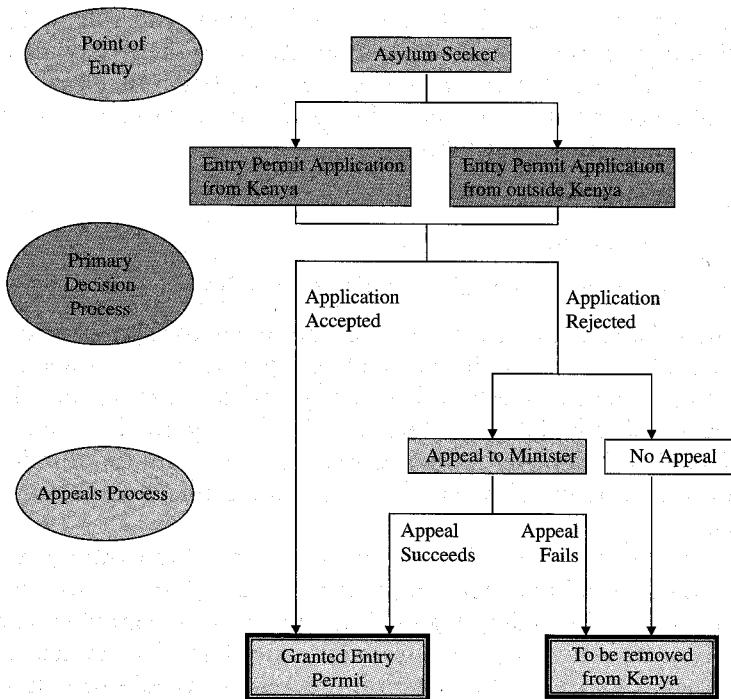


Figure 2. Refugee Status Determination in Kenya: The Legislative Structure.

As noted in section three above, the Immigration Department's refugee mandate derives directly from legislation.⁵⁵ In contrast, the mandate of the Ministry of Home Affairs stemmed from Government policy. In the context of assessment of claims, this framework was bound to, and indeed did, lead to conflict. In particular, it was ambiguous which ministry was to hear refugee applications. Arthur Andambi, an official in the Ministry of Home Affairs Refugee Office, points out:

For a long time the Immigration Department felt it should have a wider say in refugee matters in the absence of specific refugee legislation, since its refugee mandate derived more directly from a legal source.⁵⁶

That said, the Eligibility Committee applied the definition of the Refugee Convention as contained in class M of the Immigration Act. Further to this definition, a wider definition of 'refugee' of the OAU Refugee

⁵⁵ Immigration Act sections 5, 8, 11 and 17; and section 3(1) of the Aliens Restriction Act.

⁵⁶ Arthur Andambi, 'International Human Rights and Refugee Law', 12 (1998), (unpublished manuscript, on file with author).

Convention was employed in practice. Article 1 of the OAU Refugee Convention echoes the definition of 'refugee' within the Refugee Convention, but extends the scope of protection 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.

Therefore, persons fleeing situations of armed conflict could also apply for refugee status. Interestingly, Kenya was by then not party to the OAU Refugee Convention.⁵⁷ Furthermore, its asylum legislative structure did not recognise war and civil strife as causes of flight.

Another difference between the law in the books and actual practice lies in the role of UNHCR in the protection equation. The legal structure was, and still is, silent on this aspect. However, in practice, the mandate of the UNHCR was defined generally as a helping partner.⁵⁸ The agency played a minor general role in overseeing refugees and addressing other refugee-related issues. Later, its function expanded to cover provision of funds to run a refugee Reception Centre, whilst its Protection Officer sat in Eligibility Committee proceedings. In its early stages, UNHCR's Nairobi office was quite small in terms of personnel. It comprised a Representative of the High Commissioner, a Deputy, a Programme Division, a Protection Division and a Social Services Division.

Based on the general composition of the Eligibility Committee it appears that it was comprised of laypersons, as was the case with immigration officials. There is no obvious evidence of members possessing legal qualifications. Incorporating legal persons into the claim assessment system may have benefited the proceedings by introducing a stronger legal basis to the interpretations of refugee and other relevant international human rights treaties. As has been argued previously, the 'complex nature' of the refugee application process 'requires a legal not a lay mind'.⁵⁹ In practice, the Eligibility Committee seems to have operated without formal legal advice or guidance. However, the absence of legal involvement only pertained to the period preceding UNHCR's active participation in Eligibility Committee proceedings. Nonetheless, there is some possibility that the Protection Officer did not possess legal qualifications.

4.1 Refugee status determination process

Before 1991 Kenya did not have refugee camps. Instead, refugees and asylum seekers were hosted at a Reception Centre located in Thika town,

⁵⁷ It ratified the OAU Refugee Convention on 23 June 1992.

⁵⁸ This practise is consistent with art. 8 of the OAU Refugee Convention, which calls on states to 'co-operate with' the UNHCR.

⁵⁹ E. Odhiambo-Abuya, 'The Refugee Bill: Some Preliminary Comments', (2003) 60 *The Lawyer* 5, 7.

approximately 50 kilometres north of Nairobi. The Reception Centre, funded by UNHCR and administered by the Kenyan Government, had the capacity for three to five hundred persons.⁶⁰ The Reception Centre also served a dual purpose. The Eligibility Committee used it to conduct individual asylum interviews twice a week, in addition to the UNHCR Nairobi Office which catered for individuals who were unable to go to Thika. The Reception Centre also housed refugees and asylum seekers whose applications were being processed. Availing registration and residence sites is consistent with the general tenor of Kenya's refugee legislative framework. Whereas rule 4 of the Aliens Restriction Act necessitates that non-citizens register with the authorities within 90 days of entry into Kenya, section 3(1) empowers the Minister to make provision requiring them 'to reside and remain within certain places or districts'.⁶¹ However, the Aliens Registration Act in particular fails to provide specifically for the Thika Reception Centre or the UNHCR Nairobi Office as places of refugee registration or assessment of claims.⁶²

Applicants for refugee status were required to fulfil three procedural requirements. They were required to complete a questionnaire, attend an interview and pass a security test. Rejected applicants had the option to appeal. The entire process is said to have taken some three months.⁶³

4.1.1 Completion of questionnaire

Prospective refugees were required to complete a standard UNHCR questionnaire form and return it to officials of the Ministry of Home Affairs, weeks and sometimes months in advance of the interview. What remains unclear, however, is whether unaccompanied minors – persons under 18 years of age – were entitled to make similar claims. Generally speaking, the questionnaire offered several advantages to both the applicants and the Eligibility Committee. For applicants it provided an opportunity for them to tell their side of the story in detail and in a more relaxed atmosphere. Similarly, it enabled the Eligibility Committee to establish, at face value, whether a claim was genuine or not. Completing the form in advance gave the Eligibility Committee sufficient time to familiarise itself with the claim as well as collect necessary data and information pertaining to the case prior to interviewing claimants. The registration requirements are consistent with similar provisions of the Aliens Restriction Act.⁶⁴ However, a key difference between the legislative

⁶⁰ James Martin, *This is Our Exile: A Spiritual Journey with the Refugees of East Africa* (New York: Orbis Books, 1999), 15.

⁶¹ See also regulation 4 Aliens Registration Act.

⁶² A list of registration centres is set out in the second schedule of the Aliens Registration Act.

⁶³ See Skari and Girardet, above n. 21, 15.

⁶⁴ Para. 10.

scheme and its practical counterpart lay in the contents of the two registration forms. It is apparent that the UNHCR form offered more detail and information than its legal counterpart.

4.1.2 Interview

During the interview, asylum seekers were required to narrate their story orally and to explain why they fled their state of origin. In cases where a claimant and an Eligibility Officer lacked a common language, interpreters were employed to bridge the communication gap. As Chief Justice Mwendwa of the High Court of Kenya underpinned in *Andrea v. R.*⁶⁵

We cannot emphasize too strongly the importance of interpreting the proceedings to the accused in the language which he understands, through an interpreter.⁶⁶

Although *Andrea* was a criminal matter, the words of the court on the subject of interpreters are instructive. Based on oral evidence, and the previously completed questionnaire form, the Eligibility Committee might then ask questions in order to clarify some aspect. Although, in a majority of cases, what they sought to establish was whether an applicant was able to recount the answers previously provided in the questionnaire form.⁶⁷ Consequently, a claimant's success was often measured by his or her ability to recite their stories without flaws. More fundamentally, claimants also had to demonstrate they were victims of persecution or armed conflict. To a large extent this procedure conformed to that contained in the Immigration Act.

The following two points need expanding. International refugee treaties exclude persons who are alleged to have committed certain offences from seeking protection under their terms. Articles 1F and 1(5) of the Refugee Convention and OAU Refugee Convention respectively exclude from protection any asylum seeker who:

- (a) has committed a crime against peace, a war crime, or a crime against humanity.
- (b) has committed a serious non-political crime outside the country of refuge prior to his [or her] admission to that country as a refugee; or
- (c) has been guilty of acts contrary to the purposes and principles of the United Nations.

In contrast, the Immigration Act lacked such an exclusion clause. This meant that if the Act had been interpreted strictly, criminals, spies, terrorists, saboteurs and other such elements could have been granted status

⁶⁵ (1970) EALR 46.

⁶⁶ *Ibid.*, 48 '(Chanan Singh J concurring)'.

⁶⁷ *Andambi*, n. 56 above, 15.

once they met the 'refugee' definition. In practice, however, this was not the case. Rather, all refugee claimants were required to undergo a security test which was aimed at sifting individuals who posed a risk to the country. Further, it appears that, as soon as claimants were granted refugee status, they could remain permanently in Kenya. This is because the legal procedures did not outline any instances where refugee status might be revoked. To put it in another way, the system lacked a cessation clause.⁶⁸

4.1.3 Security vetting

Success at Eligibility Committee level was not the only hurdle a claimant was required to overcome. The Eligibility Committee forwarded all successful applicants to Kenya's intelligence agency, popularly known as the Special Branch. Although this stage is not provided for in the legal process, it was a step in the right direction keeping in mind that most claimants had fled regions ravaged by armed conflict. As is the practice in many asylum assessment regimes,⁶⁹ it was the responsibility of the intelligence agency to examine the backgrounds of all recommended claimants in order to sift out criminals, saboteurs and spies. Unlike the Eligibility Committee, which conducted personal interviews, the Special Branch relied entirely on its intelligence network. Owing to the fact that many claimants were from war-torn states, the Government of Kenya was primarily concerned with investigating foreigners admitted to the country as refugees. Failing to do so might have severely compromised the country's internal security. After vetting the applicants, a list of 'clean' persons, eligible to be granted entry permits, was sent to the Permanent Secretary in the Ministry of Home Affairs. This list was then forwarded to the Eligibility Committee and, finally, the claimant was informed of the outcome.

4.1.4 Appeals

Rejected claimants, like any other category of non-citizens under the Immigration Act, were entitled to appeal against unfavourable decisions.

⁶⁸ Articles 1C of the Refugee Convention and 1(4) OAU Refugee Convention outline at least five instances when a person will be deemed not to require international protection. If:

- he has voluntarily re-availed himself of the protection of the country of his nationality;
- having lost his nationality, he has voluntarily re-acquired it;
- he has acquired a new nationality, and enjoys the protection of the country of his new nationality;
- he has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or
- he can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality.

⁶⁹ For example, in Australia all asylum seekers are required to meet the character requirement before being granted refugee status. See Australian Migration Regulations schedule 2 clauses 447.611, 449.511, 451.611, 785.611, 786.511.

However, unlike under the terms of the legal framework where appeals were directed to the Minister of State in the Office of the President,⁷⁰ in practice, senior officers of the Eligibility Committee heard appeals. Under both regimes, the right of appeal seems to have been undermined by the fact that there was no corresponding duty on decision-makers to provide reasons for decisions. This theme is discussed further in section seven below.

In both law and practice, asylum hearings were held *in camera* and, as such, members of the public were not allowed to attend. Further, in practice, the Eligibility Committee's decisions were not published. As a result, there is no data or information on which to draw concrete conclusions about how appeals were decided. It appears, however, that the Special Branch re-vetted all appellants whose claims were accepted.

4.1.5 Complementary protection

For asylum seekers whose claims were rejected, either at first instance or on appeal, at least in terms of UNHCR protection and assistance, this did not mark the end. UNHCR provided complementary protection, issuing some rejected asylum seekers with a card declaring the holder to have 'mandate' status. According to UNHCR, a mandate refugee refers to a person 'who meets the criteria of the UNHCR Statute ... regardless of whether or not' the host state is party to the refugee international treaties or it has 'recognized' the person as a refugee.⁷¹

Mandate refugees, who were the concern of the UNHCR only, did not receive any form of assistance from the Government of Kenya. The same applied to asylum claimants rejected under the provisions of the legal structure. Nevertheless, organizations and churches such as the National Council of Churches Kenya ('NCCCK') and the Church of the Province of Kenya ('CPK') did not distinguish between mandate and 'full' status refugees. The NCCCK, for example, granted both categories of refugees an equal amount of stipend to support them whilst they looked for employment.⁷² Since mandate refugees were not strictly speaking refugees, they, like other failed applicants, were subject to removal from Kenya. What remains unclear, however, is whether the Government took practical steps to repatriate them. Figure 3 below outlines the procedures that were used in practice to assess asylum claims.

⁷⁰ Section 5(3) of the Immigration Act.

⁷¹ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (Geneva: UNHCR, 1992) ('UNHCR Handbook') para. 16.

⁷² Skari and Girardet, above n. 21, 15.

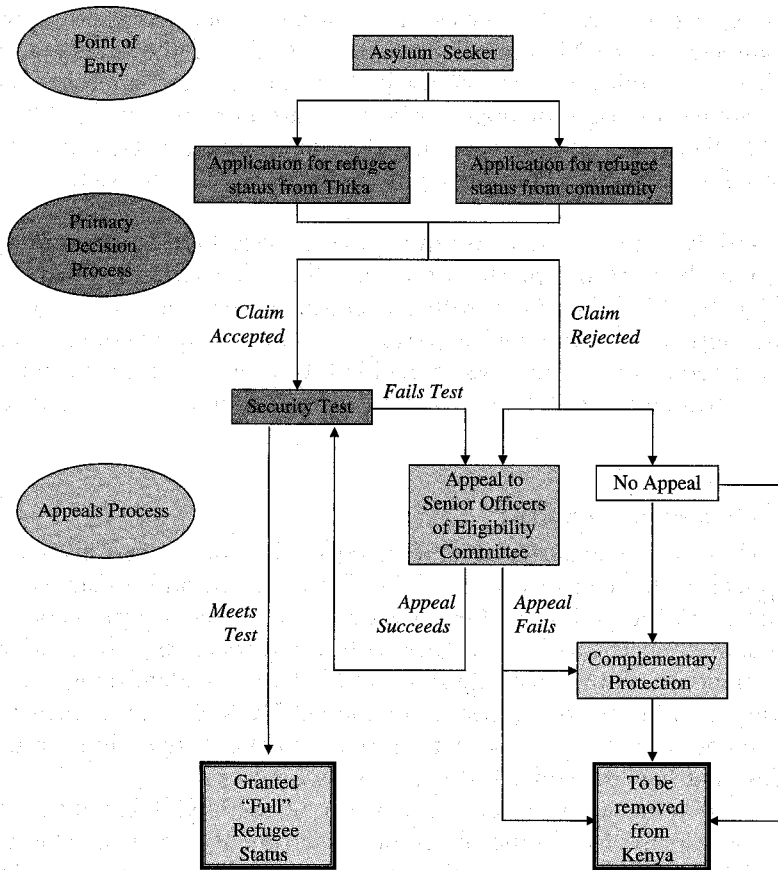


Figure 3. Assessment of Asylum claims in Kenya, 1980–1991: The Practical Scheme.

5. Nature of refugee status and accompanying entitlements

In practice, all successful applicants were issued with an identification card that was jointly signed by the Minister of Home Affairs and UNHCR. It simply declared that a holder was a 'full' status refugee, without any additional information. Whilst the provisions of domestic law were silent on the entitlements due to full status refugees, practice suggests that the rights they were granted to some extent conformed to international norms. Even though the status itself was temporary, refugees, some of whom were accommodated at the Thika Reception Centre, could work,

be reunited with their families, receive medical attention and attend school. More importantly, they were not *refouled*.

5.1 Nature of protection offered

The Thika Reception Centre was established as a temporary transit camp to house refugees and asylum seekers. However, the reality was somewhat different. Owing to the persistent state of civil strife in the refugees' home states, many forced migrants spent several years awaiting repatriation to their home states or resettlement in third states. Some contend that many refugees spent up to four years awaiting resettlement or repatriation.⁷³ This Reception Centre, originally designed to house between 300 and 500 persons, found that, in most instances, it had to admit far more than its carrying capacity⁷⁴ owing to the rising number of claims. As such, many refugees had to reside outside the Reception Centre.

One reason was that practical considerations made it difficult to accommodate the entire refugee population at the Reception Centre. Additionally, in its early stages, Kenya's asylum policy appears to have been lenient. This, therefore, allowed asylum refugees to move freely, reside outside the designated area and, subsequently, integrate into the local community. This state of affairs is consistent with international refugee law, which obligates asylum states to allow refugees 'the right to choose their place of residence' and to 'move freely' within their boundaries.⁷⁵ Notably, article 12 of the International Covenant on Civil and Political Rights (ICCPR), read together with the Refugee Convention, limits the enjoyment of this right where it is 'necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others ...'.

The Reception Centre predominantly housed refugees from Somalia, Uganda, Ethiopia, and Sudan 'in dormitories for single men', 'single women' and 'family units' for those with families.⁷⁶ Many of those housed were waiting for a durable solution to their situation, such as repatriation or resettlement to a third state. However, the rising population, coupled with reduced accommodation space, forced newcomers into inappropriate living conditions. According to James Martin, a Jesuit Refugee Services official, some new comers lived in 'plain mud houses held together by branches'.⁷⁷ Occasionally, church organizations such as CPK provided housing assistance to asylum seekers when the Thika Reception Center

⁷³ Martin, above n. 60, 15.

⁷⁴ For instance, when Martin visited the Reception Centre he found it housing 'more than five thousand people'. Martin, above n. 60, 15.

⁷⁵ Art. 26 Refugee Convention.

⁷⁶ Elizabeth Ferris, 'The Thika Reception Centre', (1986) 30 *Refugees* 41, 41.

⁷⁷ Above n. 60, 16.

was 'full'.⁷⁸ However, other conditions at the Reception Centre were less than ideal, as Martin explains:

The camp itself resembled many of the slums scattered throughout Nairobi, slums I would later know well: wood-and-mud houses, ears of corn roasting over small charcoal fires, open sewers, and trash everywhere. There was severe lack of toilet facilities (enough to accommodate only the original five hundred people) and a resulting foul smell around the camp. But unlike the slums in Nairobi, the Thika camp is bordered by barbed wire and patrolled by Kenyan police officers. Most [refugees] lived in plain mud houses held together by branches. Malnutrition was a major problem, particularly among the children. Because of the large pools of stagnant water in the camp, malaria was also common. Rice was served twice a day, and meat, according to refugees ..., was a rarity. In the entire camp there was only one social worker to cope with an enormous caseload of thousands of people, all with severe problems – hunger, sickness, family worries, resettlement concerns, and fear. She found it difficult to deal with the endless strain of cases [T]here was [also] very little to do [in terms of recreation]. Occasionally, there might be a soccer ball for children to use on a large, barren field, but it was a precious commodity. Most of the men and women ... spent a good deal of time squatting in the doorways of their small homes, waiting. The overall effect of the camp – the poverty, the smell, the halted lives of the refugees – evoked a wave of sadness that passed over me like a physical thing.⁷⁹

In short, the Thika Reception Centre was an '[un]pleasant place', as Tala Skari and Edward Girardet observe.⁸⁰

5.2 Employment, education and health needs

5.2.1 Employment

The Kenyan Government decided which persons to admit as 'refugees'. However, as Elizabeth Ferris, an official of the World Council of Churches ('WCC'), points out, churches and other aid agencies shouldered 'most of the responsibility for the refugees' integration into Kenya life'.⁸¹ The NCCK Refugee Service Unit for instance, assisted refugees search for employment in the domestic market by posting job vacancies on a bulletin board. It also engaged a Job Placement Officer to counsel refugees on 'employment opportunities'.⁸² Churches also provided training in trades such as tailoring, masonry and carpentry, whereupon, after completion, some trainees opted to be self-employed. The assistance the UNHCR offered was also designed to encourage refugees to be self-sufficient.⁸³

⁷⁸ Ferris, above n. 76, 42.

⁷⁹ Martin, above n. 60, 15-17.

⁸⁰ Above n. 21, 15.

⁸¹ Above n. 76, 41.

⁸² Ibid., 42.

⁸³ UNHCR, 'East Africa: Kenya', (1988) *Refugees* (Special Issue) 17, 17.

In 1988, for instance, 60 per cent of its assistance budget was devoted to activities and projects geared towards realising this goal.⁸⁴

This situation is consistent with international refugee and human rights laws, which recognise the importance of encouraging refugees to be self-reliant. Article 17 of the Refugee Convention, for example, requires states to:

Accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment.

Host-states are also required to undertake measures that will facilitate refugees' self-employment.⁸⁵ International human rights laws also recognize the right to work. Article 23 of the UDHR, for example, declares that 'everyone has the right to work'. Recognizing this entitlement, article 6 of the ICESCR requires states to 'take appropriate steps to safeguard this right'.

Employment enables a forced migrant to become a productive member of society. Promoting refugees' access to the labour market was thus a positive step. Describing the right to work as 'one of the most important' entitlements granted to refugees under international refugee law, Nehemiah Robinson argues convincingly that without this entitlement the protection offered by international human rights and refugee laws may to a large extent be rendered 'practically meaningless'.⁸⁶ Indeed, one of the main challenges that refugees inevitably face in their quest to establish a new life in developing world states is lack of jobs and employment opportunities. Employment would give refugees an opportunity to earn an income and therefore reduce the dependency syndrome. Furthermore, employment would also provide refugees with something useful to occupy their time.

Some refugees, particularly those with educational qualifications and professional skills as well as training, found it easier to secure employment in Kenya's private and public sectors than their counterparts who lacked expertise. Tala Skari and Edward Girardet cite the case of an Eritrean refugee in Kenya known only as 'TK', who was formerly an executive in his home state. According to the authors, TK was able to find 'a job as the manager of an import/export firm in Nairobi'⁸⁷ almost immediately. Similarly, some Ugandan teachers, who had been forced to flee the country during Idi Amin's reign, found employment in Kenyan schools.⁸⁸ This

⁸⁴ Ibid.

⁸⁵ Refugee Convention, arts. 18-19.

⁸⁶ Nehemiah Robinson, *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation* (New York: Institute of Jewish Affairs, 1953), 114.

⁸⁷ Above n. 21, 15.

⁸⁸ See Yash Tandon, 'Ugandan Refugees in Kenya: A Community of Enforced Self-Reliance', (1984) 8 *Disasters* 267.

evidence is consistent with empirical research conducted in the United States,⁸⁹ Canada⁹⁰ and New Zealand.⁹¹ In his survey on the participation of female immigrants in the United States labour market between 1970 and 1990, Robert Schoeni found that 'education plays an important role in determining the differences in labor force participation among immigrant groups'.⁹² This evidence corroborates Rainer Winkelmann's claim that:

Immigrants [with] high levels of productivity or skills that are in high demand, ... are more likely to make a significant contribution to economic growth than are immigrants who have difficulty finding employment⁹³

However, cases such as TK's were quite rare in Kenya. It was a 'miracle' for a refugee to find work, as some would have it.⁹⁴ Owing to scarce job opportunities, very few professional refugees were able to secure employment,⁹⁵ let alone find jobs to match their academic qualifications and skills. For example, trained teachers or civilian administrators were forced to do sweeping jobs, if they were lucky.⁹⁶ Differences in language and customs, as well as lack of contacts, may also explain why refugees had difficulty finding jobs. Ultimately, many were forced to rely on the social assistance offered by UNHCR, Church organizations and other aid agencies. NCKK, for example, distributed 'a small allowance to the refugees for six months (for a single person about US\$125 for the first month, then US\$18 for 5 months) while they were looking for work or exploring educational opportunities'.⁹⁷ After that, they were expected to fend for themselves, which was extremely difficult as a UNHCR official explains:

It's a never kind of thing Sometimes the refugees can be very resilient. They seem to get stronger with the pressures they face. But the ones that fall, fall hard. They can reach a threshold where they can no longer cope.⁹⁸

This state of affairs lends support to Winkelmann's proposition that the 'need for social assistance' is higher for immigrants who fail to 'adapt

⁸⁹ Robert Schoeni, 'Labor Market Outcomes of Immigrant Women in the United States 1970 to 1990' (1998) 31 *International Migration Review* 57.

⁹⁰ Peter Li, 'Immigrants' Propensity to Self-Employment: Evidence from Canada', (2001) 35 *International Migration Review* 1106.

⁹¹ Rainer Winkelmann, 'The Labor Market Performance of European Immigrants in New Zealand in the 1980s and 1990s', (2000) 34 *International Migration Review* 33.

⁹² Above n. 89, 66.

⁹³ Above n. 91, 34.

⁹⁴ See, e.g., Yefime Zarjevski, *A Future Preserved: International Assistance to Refugees* (Oxford: Pergamon Press, 1988), 146.

⁹⁵ In 1984, for instance, a mere 'one percent of the refugees found employment', according to Skari and Girardet, above n. 21, 14.

⁹⁶ Skari and Girardet, *ibid.*, 15.

⁹⁷ Ferris, above n. 76, 41.

⁹⁸ See Skari and Girardet, above n. 21, 15.

rapidly to conditions in the [local] labor market'.⁹⁹ In its 1988 Report on Kenya, UNHCR described the situation in the following way:

The difficulties inherent in any integration and self-sufficiency effort in the urban environment, given the amount of unemployment and chronic under-employment in Kenya, render ongoing assistance indispensable for needy refugees, the disabled, and obviously those who have just arrived.¹⁰⁰

This harsh situation was ameliorated to some extent by development assistance offered by agencies such as the International Labour Organization ('ILO'). The ILO operated a grant and loans scheme for those refugees who wished to venture into small-scale income generating activities.¹⁰¹ However, owing to limited resources, the large refugee population and limited employment opportunities, it is reasonable to expect that many refugees spent the better part of the day idle.

5.2.2 Education

Under the terms of international refugee and human rights laws, asylum states are required to facilitate refugees' access to public education. Article 22 of the Refugee Convention mandates states to 'accord to refugees the same treatment as is accorded to nationals with respect to elementary education'. This requirement is consistent with articles 26 and 13 of the UDHR and ICESCR, respectively, which guarantee everyone the right to education. Education is important in the life of a refugee for a number of fundamental reasons. Primarily, access to educational facilities ensures that the chain of learning, which might have been severed during displacement, is continued. In addition to increasing the chances of refugees becoming self sufficient in the future, education also reduces the trauma of being in a foreign country, as well as ensuring that the period spent in asylum is productively utilized.

English and other language courses were offered to assist refugees establish a new life in Kenya. The Kenya Catholic Secretariat ('KCS') administered an educational assistance program that was mainly funded jointly by the UNHCR and WCC. Within this program disadvantaged students were offered scholarships to pursue courses in Kenya's educational institutions. This was designed to elevate underprivileged students from dependency to a level of self-sufficiency. Initially, KCS was able to offer scholarships to many refugees. However, following a rise in the number of applicants, together with finite resources, KCS had more applications than it could support as Ferris explains:

[In 1986], 1,400 refugees are receiving scholarships at all levels – from primary to university education and for vocational training. But the demand is much greater

⁹⁹ Above n. 83, 34.

¹⁰⁰ UNHCR, above n.83, 17.

¹⁰¹ *Ibid.*

than KCS' resources can meet. In 1985, [less than 20 per cent of the] applications ... received ... were accepted for the 1986 academic year.¹⁰²

Lack of financial support was not only bound to impact significantly on the ability of refugees to pursue their academic aspirations but also stood to affect their future prospects. As many refugees came to realize, 'their best hope for a good job and hopeful future lies in education'.¹⁰³ To promote this academic goal, the NCKK Refugee Services Unit posted notices on its bulletin board showing school examination dates in order to assist refugees, especially those who were unable to attend school consistently. Moreover, the KCS organised 'visits' to schools and other institutions of higher learning to assess performance.¹⁰⁴ The Secretariat also provided counselling to those students whose academic performance fell below a set standard.¹⁰⁵

Aside from formal education, informal education was also provided. For example, part of the UNHCR 'principal objectives' for 1988 was to offer vocational training at various levels and language courses (English and Swahili) for Ethiopian, Rwandese and Somali refugees, in particular.¹⁰⁶ Ability to communicate is key to many other aspects of a refugees' life: finding adequate employment, accommodation, dealing with officials and assimilating into their new society.

In sum, the provision of education facilities *per se* was a step in the right direction and one that sits comfortably with the provisions of international refugee and human rights laws. However, owing to the large refugee population and the limited number of educational facilities, ultimately, only a small number of refugees had access to education and language programmes.

5.2.3 Health

Article 23 of the Refugee Convention requires host states to 'accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals'. International human rights laws also recognize this right. Whereas the UDHR¹⁰⁷ and ICESCR¹⁰⁸ provide for the right to medical care, article 12(2) of the ICESCR sets out steps that states can take to realise this entitlement:

- (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
- (b) The improvement of all aspects of environmental and industrial hygiene;

¹⁰² Ferris, above n. 76, 42.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ UNHCR, above n. 83, 17.

¹⁰⁷ Art. 25.

¹⁰⁸ Art. 12(1).

- (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
- (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

As in the case of accommodation, education and employment, church organizations, UNHCR, and other aid agencies provided medical care and attention to meet the physical and the psychological needs of refugees, many of whom had had traumatic experiences. Ferris describes the role played by NCKK, for example:

Counsellors from NCKK meet with the refugees on a regular basis, a medical counsellor deals with health problems Social workers visit those refugees who are sick or disturbed and alone.¹⁰⁹

Once again, the sheer number of refugees and limited resources made it difficult to treat all medical ailments suffered by refugees. Nonetheless, the little that was provided was a positive step and one that was consistent with international laws.

5.3 Family unity and reunification

The family is the basic unit of any society and it is through this institution that new members of any political community are introduced and nurtured. In Africa, this institution is primarily responsible for teaching children cultural and religious values, as well as the skills necessary to become self-supporting adults.¹¹⁰ While formally recognising the important role that a family plays in any political community, international human rights laws have prescribed measures that are designed to keep this unit intact. Commencing with the 1948 UDHR, key international human rights treaties such as the 1976 ICESCR, the 1976 ICCPR and, more recently, the 1990 Convention on the Rights of the Child ("CRC")¹¹¹ have formally underpinned the role of the family in society. As the UDHR, these treaties recognise the family as the natural and fundamental unit of society. These instruments bestow an obligation upon states, as well as society in general, to undertake measures that will safeguard rather than put this institution at risk.¹¹²

The family unit is even more important in times of flight and during resettlement in an asylum state. Considering the chaos of conflict and flight, it is reasonable to expect that family members may be separated temporarily or, sometimes, permanently. At the Conference of Plenipotentiaries, where the Refugee Convention was drafted, the Holy See delegate

¹⁰⁹ Ferris, above n. 76, 41.

¹¹⁰ Sarah Norton-Stall, 'African Refugee Families', (1994) 95 *Refugees* 29, 30.

¹¹¹ Above n. 28.

¹¹² Arts.: 16 UDHR, 10 ICESCR, 23 ICCPR and 2 CRC.

stressed that the 'unity' of a refugee family 'is constantly threatened by a variety of measures relating either to admission to the receiving country, or to other circumstances connected with the refugee's life'.¹¹³ Children, defined generally as any person under the age of 18, seeking asylum may find themselves in exceptionally distressing situations.¹¹⁴ Field data have documented the trauma and anxiety that unaccompanied and separated children face in refugee host states:

Sometimes I cry for my parents, when I see some girls or boys walking with their parents. I can feel that I don't have anybody in this world. I sometimes miss my mother when I am ill or hungry. I miss my father when I am ill or when I need someone to tell me stories. And I miss my sister and brother when I need someone to make fun.¹¹⁵

I was not pleased to leave my country, coming out to a foreign land ... when I don't have anyone to take care of me... I cry nearly every night. I worry all day and all night about this kind of ridiculous life.¹¹⁶

Thus, where members of one family can be located it is desirable that they should be expeditiously reunited in the host state. This is in keeping with Article 10(1) of the CRC, which requires states to deal with applications for family reunification in a 'positive, humane and expeditious manner'. Indeed, the family institution is best poised to ameliorate the trauma of displacement and promote assimilation into the new environment. In a survey that the present author conducted on Kenya's asylum regime,¹¹⁷ Kayihura (a pseudonym), a refugee from Rwanda, highlights the important role a family plays in exile:

When the war broke out in Rwanda, we fled to Tanzania and later Kenya without my father. For almost two years we never saw nor heard any news from him. One day as me, my younger sister, and mum were waiting to see a Non-Governmental Organization representative in Nairobi I went outside to buy some food since I was hungry. To my surprise, I saw somebody who looked like dad. At first I thought I was having hallucinations. But I moved closer and spoke to him. To my great surprise it was dad! I do not have words to express my joy – we hugged, shed tears, kissed and you can imagine the rest for yourself. I took him to where mum and my sister were and it was a very emotional reunion. Unfortunately, dad died

¹¹³ UN General Assembly, 'Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (Item 6 of the agenda)', A/CONF.2/103 (24 July 1951).

¹¹⁴ See generally, Margaret McCallin, (ed), *The Psychological Well-Being of Refugee Children: Research, Practice and Policy Issues* (Geneva: International Catholic Child Bureau, 1996).

¹¹⁵ Beatrice Kollie, 17 year old Liberian refugee in Ghana. Quoted in 'My Family: Excerpts From Essays Written Especially for the International Year of the Family by Refugee Children in Ghana', (1994) 95 *Refugees* 18, 18.

¹¹⁶ Julius Seitua, 17 year old Liberian refugee in Ghana. Quoted in *ibid.*, 19.

¹¹⁷ For the results of this survey, see E. Odhiambo-Abuya: 'Refugee Status *Imlaxaan* in Kenya: An Empirical Survey', (2004) 48 *Journal of African Law* 187; 'Refugees and Their Interpreters: The Kenyan Experience', (2004) 26 *Australian Review of African Studies* 66.

one-and-a-half years later. But, I tell you those were the best years of my family. Now we are not only miles away from home but extremely lonely.¹¹⁸

A reunited family may also be better placed to assess when conditions at home are conducive for repatriation, unlike a dispersed family.

Despite the important role a family is likely to play in the new environments refugees find themselves in, international refugee law is silent on the issue of family reunification. It is simplistic to argue, nonetheless, that family unity and reunification, in instances where members of a family are separated, are entitlements that are not guaranteed to refugees.¹¹⁹ On the contrary, jurisprudence of the rights of the refugee family from various legal sources including soft law,¹²⁰ humanitarian law,¹²¹ state practise,¹²² and, as noted above, human rights law,¹²³ have subsequently filled this gap. This evidence points out that refugee host states are obligated to reunite refugees with family members, once family ties are established.

Kenya's early asylum system seems to have recognized the importance of family unity as it provided for reunification. TK, for example, during an interview with Skari and Girardet, said that he was making plans to bring his family to Kenya. Tom, from Uganda, had already been joined by his wife and children.¹²⁴ In the case of TK, Skari and Girardet note further that 'loneliness' was beginning to enter his life despite his economic affluence in Kenya.¹²⁵ This state of affairs is consistent with research findings reported elsewhere, which suggest that refugees separated from their families experience sadness, depression and loneliness.¹²⁶

5.4 Prohibition from *refoulement*

International refugee and human rights laws decree that any person who has been forced to flee their home states owing to persecution may seek

¹¹⁸ Interview with Kayihura, Kakuma Refugee Camp, Kenya, 25 Jan. 2003.

¹¹⁹ The Australian Federal Government is an example of a refugee-receiving State that has consistently held this view. See (Australia) Department of Immigration and Multi-cultural Affairs (DIMIA), *Interpreting the Refugees Convention-An Australian Perspective* (Canberra: DIMIA, 2002), 190-194.

¹²⁰ See: Recommendation B of the Final Act of the Conference of Plenipotentiaries which adopted the Refugee Convention requiring States to promote family unity; Ex Com Conclusion No. 15 (XXX) 1979 calling on states to 'facilitate' family reunification for 'humanitarian reasons' (para. (e)).

¹²¹ See: Articles 24 and 26 of Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 Aug. 1949, 75 UNTS 287, entered into force 21 Oct. 1950; Art. 74 Additional Protocol I, Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, UNTS 1125, entered into force 7 Dec. 1978, prohibiting occupying powers from separating families.

¹²² According to UNHCR, the family unity principle is 'observed by the majority of States, whether or not [they are party] to the 1951 Convention or the 1967 Protocol'. See UNHCR Handbook, above n. 71, para. 183.

¹²³ Above n.112.

¹²⁴ Skari and Girardet, above n. 21, 14 & 15.

¹²⁵ Ibid. According to the authors, TK was by then living 'in a comfortable house in the suburbs and driv[ing] his own car', 14.

¹²⁶ See, for instance, Everett Ressler, Neil Boothby and Daniel Steinbock, *Unaccompanied Children: Care and Protection in Wars, Natural Disasters, and Refugee Movements* (New York: Oxford University Press, 1988) 153-173.

protection in another state. Article 14 of the 1948 UDHR, for example, guarantees ‘everyone’ ‘the right to seek and to enjoy in other countries asylum from persecution’. However, states are not obligated to admit asylum seekers. At best, the OAU Refugee Convention calls on African States to ‘use their best endeavours consistent with their respective legislations to receive refugees and to secure [their] settlement’.¹²⁷ The *travaux préparatoires* (drafting history) of the Refugee Convention show reluctance by states to provide for the right of entry to asylum seekers. This was seen as an encroachment to or dilution of their sovereignty. Nonetheless, states are prohibited from expelling or returning refugees to territories where they fear for their lives.

The prohibition of the return or expulsion (*‘refouler’*) of refugees’ to states where they fear for their lives is one of the cornerstones of refugee protection. This norm is codified internationally in Articles 32 and 33 of the Refugee Convention.¹²⁸ Article 32 sets constraints on the ability of states to expel a refugee lawfully in their territory:

- (1) The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.
- (2) The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

Article 33 provides for the norm of *non-refoulement*. It prohibits States from:

[E]xpel[ing] or return[ing] (*‘refouler’*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

These provisions are consistent with a proposal made by the Swedish delegate at the Conference of Plenipotentiaries.¹²⁹ The OAU Refugee Convention also contains the *non-refoulement* prohibition. Article 2(3) of this treaty reads:

No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or

¹²⁷ See art. 2(1).

¹²⁸ International human rights laws also recognize the *non-refoulement* principle. For instance, art. 3(1) of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment, GA Res. 39/46 of 10 Dec. 1984, 1465 UNTS 85 (entered into force 26 June 1987), prohibits states from ‘expel[ing], return[ing] (*‘refouler’*) or extradit[ing] a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture’.

¹²⁹ The original Swedish proposal reads: ‘No Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion, or where he would be exposed to the risk of being sent to a territory where his life of freedom would thereby be endangered’. See UN General Assembly, ‘Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (Item 6 of the agenda)’, A/CONF.2/70 (11 July 1951).

remain in a territory where his life, physical integrity or liberty would be threatened ...

The *non-refoulement* principle was not legislatively incorporated into Kenya's early domestic legal framework. Thus, as a dualist state, it was not legally bound to observe this rule. Some claim that the government of Kenya did *refoule* refugees from neighbouring states. For example, discussing the politics of humanitarian assistance in the context of forced migration, Monica Juma alleges that owing to deteriorating economic conditions and escalating insecurity in the country 'in July 1979, some 2,500 Ugandans were picked up in night police swoops and dumped over the border ...'.¹³⁰ Further, she writes that by mid-1982 'acts of *refoulement* had increased dramatically'.¹³¹ This position can be criticised for a number of reasons. The first criticism lies in the fact that the author fails to cite the source of references upon which her assertions are based. In addition, assuming that these events did take place, it is reasonable to expect that such incidents would be reported in local and/or international newspapers. Extensive research of archival databases, regarding refugees in Kenya from 1963 to 1990, show there is no such record. Furthermore, there is very little contemporaneous academic literature to support the claim that there was a dramatic rise in, or incidents of, *refoulement* under Kenya's early refugee protection regime. In short, Juma's position is problematic.

To reiterate, Kenya did not incorporate the *non-refoulement* principle into its legislative framework and, therefore, was not obliged to adhere to it. Moreover, allegations that the government *refouled* refugees in 1979 and mid-1982, using the examples of Juma, are difficult to substantiate. Therefore, it could be argued that Kenya did not *refoule* refugees. There are two reasons that explain this. The first reason lies in the fact that Kenya, a signatory to the international refugee treaties that prohibit *refoulement*, was intent on observing this rule, despite failure by domestic law to recognize this prohibition. A second, and more likely explanation, lies in the assertion that Kenya, primarily due to financial reasons, was unable to meet its refugee obligations. Therefore, even if the government wanted to *refoule* forced migrants, it could not do so because of these constraints. This line of thinking sits comfortably with the assertion advanced by Animesh Ghoshal and Thomas Crowley who state that 'what may appear to be an open migration policy may be nothing more than the inability of the government [of Kenya] to effect any control over'¹³² refugees in its territory.

¹³⁰ Monica Juma, 'The Politics of Humanitarian Assistance: State, Non-State Actors and Displacement in Kenya and Uganda (1989-1998)', unpublished Doctor of Philosophy Thesis, University of Oxford (2000), 132.

¹³¹ *Ibid.*

¹³² Animesh Ghoshal and Thomas Crowley, 'Refugees and Immigrants: A Human Rights Dilemma', (1983) 5 *HRQ* 327, 347.

A third possible explanation lies in an assertion put forward by some who contend that by the early 1980s the principle of *non-refoulement* was so well accepted that it had become a rule of customary international law — that is, law that has evolved from the practice and customs of states. Hence, according to proponents of this school of thought, asylum states were prohibited from returning refugees to areas where they feared for their lives, regardless of whether or not the domestic legal regime contained provisions prohibiting *refoulement*. Commentators like Goldman and Martin, as well as Goodwin-Gill, subscribe to this view. In an article published in 1983, Goldman and Martin claim that the *non-refoulement* prohibition was by then embodied in a number of regional treaties and agreements, in addition to international refugee law. Further, they claim that the norm had ‘received widespread authoritative recognition throughout the world’.¹³³ Accordingly, they conclude, ‘this principle has evolved from a basic humanitarian duty into a general principle of international law that binds all states, even in the absence of an express treaty obligation’.¹³⁴ Goodwin-Gill also draws a similar conclusion. He argues that because this prohibition had ‘established itself as a general principal of international law’ states were bound ‘automatically and independently of any specific assent’.¹³⁵

The first part of the argument advanced by proponents of this school does not pose serious concerns. In support of their position, they cite treaty and soft laws which embodied the *non-refoulement* principle. Whereas Goldman and Martin refer to the 1957 European Convention on Extradition¹³⁶ and the 1966 Legal Principles Governing the Treatment of Refugees Adopted by the Asian-African Legal Consultative Meeting in Bangkok,¹³⁷ Goodwin-Gill mentions the Refugee Convention. However, the incorporation of any principle into a treaty or agreement *per se* is insufficient to translate the principle into a general rule of customary international law.

Elements necessary for the formation of a general rule of customary international law were underpinned by the International Court of Justice in *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Republic of Germany v. The Netherlands)*.¹³⁸ The court argued that state practice

¹³³ Robert Goldman and Scott Martin, ‘International Legal Standards Relating to the Rights of Aliens and Refugees and United States Immigration Law’, (1983) 5 *HRQ* 302, 315.

¹³⁴ *Ibid.*

¹³⁵ Guy Goodwin-Gill, *International Law and the Movement of Persons Between States* (Clarendon Press: Oxford, 1978), 141. See also Guy Goodwin-Gill, ‘Non-Refoulement and the New Asylum Seekers’, (1985-1986) 26 *Virginia Journal of International Law* 897, 901-903.

¹³⁶ Article 3 of the European Convention on Extradition 359 UNTS 273 (Done at Paris, 13 Dec. 1957).

¹³⁷ Article 3, Asian-African Legal Consultative Committee, ‘Principles Concerning Treatment of Refugees’, adopted in Bangkok 8-17 Aug. 1966.

¹³⁸ 41 *ILR* 29.

may give rise to customary international law if it fulfils certain criteria: the practice must be consistent, widely accepted and regarded as obligatory by states.¹³⁹ Notably, these authors identify the correct criteria that a particular practice must meet in order to be accepted as customary international law. However, the claim that by the 1980s the principle of *non-refoulement* had attained customary international law status is questionable, as it is not supported by any evidence of 'widespread authoritative' state practice. Failure to follow through their thesis makes the position taken by Goldman and Martin, as well as Goodwin-Gill, doubtful.

Authors like Grahl-Madsen and Hailbronner challenge the conclusion arrived at by Goldman and Martin, as well as Goodwin-Gill. Grahl-Madsen, for example, notes that although by 1980 domestic legislation prohibited certain states from *refouling* refugees 'and there were a record of some court decisions pointing to the same direction', this was by itself insufficient to constitute 'a basis for contending that the principle of *non-refoulement* had become a 'generally accepted principle'.¹⁴⁰ In an elaborate survey of asylum law and practice of Western European and North American states, published in 1986, Hailbronner demonstrates that state practice did not support the claim that *non-refoulement* had crystallized into a norm of customary international law. Rather, as the title of his article, '*Non-Refoulement* and "Humanitarian" Refugees: Customary International Law or Wishful Thinking', suggests, this principle as customary international law was 'more properly viewed as the product of wishful thinking'.¹⁴¹ Although Grahl-Madsen and Hailbronner fail to discuss the practice in other parts of the world, such as Africa and Asia, their perspective, which is supported by hard evidence, is more persuasive than the view taken by Goldman and Martin, as well as Goodwin-Gill.

6. Collapse of Nairobi's refugee protection regime

Kenya is one of the few African states that has enjoyed peace and political stability since independence. This explains, to a certain extent, why it has over the years attracted forced migrants from neighbouring and nearby states. Unfortunately, the early protection regime could not survive the pressures of political events, the declining Kenyan economy and the rising xenophobia towards forced migrants.

¹³⁹ According to the International Court of Justice: 'Within the period in question ... state practice, including that of states whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; – and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved' (at 72).

¹⁴⁰ Atle Grahl-Madsen, *Territorial Asylum* (Stockholm, Almqvist and Wiksell: 1980), 41.

¹⁴¹ Kay Hailbronner, '*Non-Refoulement* and "Humanitarian" Refugees: Customary International Law or Wishful Thinking?', (1985-1986) 26 *Virginia Journal of International Law* 857, 858.

6.1 Surge in asylum claims

After Siad Barre's regime in Somalia was ousted in January 1991, the victorious forces were unable to fill the leadership vacuum, resulting in turmoil, factional fighting and anarchy. From 1991, there was a mass population movement from Somalia, with many refugees seeking to enter Kenya through the border towns of Liboi and Amuma. In Kenya's migration history, this was the first time the country had experienced a population movement of this magnitude. Subsequently, the Government could neither determine nor regulate the number of asylum seekers entering its territory. By the end of 1992, Kenya hosted almost 300,000 refugee claimants from Somalia.¹⁴² Similarly, in Ethiopia, like in Somalia, the internal conflict that ensued after the overthrow of President Mengistu Mariam on 28 May 1991 caused a mass influx of refugee claimants into Kenya. By 1992, Kenya hosted almost 70,000 Ethiopian asylum seekers.¹⁴³ In contrast to the Somali and Ethiopian experiences, political instability in Sudan was not caused by a military coup. Rather, Sudan had a long history of civil war and internal strife since 1983, which set in opposition the Arab-Muslims against the African-Christians. Whilst many Sudanese nationals had fled to the Democratic Republic of Congo,¹⁴⁴ by 1992 some 22,000 Sudanese nationals had sought sanctuary in Kenya.¹⁴⁵

Table 1
Nationality of Refugees Residing in Kenya by the End of 1992¹⁴⁶

Nationality	Number of refugees
Somalia	285,600
Sudan	22,000
Ethiopia	68,600
Uganda	3,000
Rwanda	2,000
Total	360,600

In summary, by 1991 Kenya, which had previously hosted some 15,000 refugees, was playing host to some 130,000 refugees — an increment of more than eight fold. Just over a year later this figure had shot to almost 400,000.¹⁴⁷ Collectively, events in neighbouring states sent shock waves

¹⁴² See UNHCR, *Statistical Yearbook 2001: Refugees, Asylum-Seekers and Other Persons of Concern—Trends in Displacement, Protection and Solutions*, available on the UNHCR website at <http://www.unhcr.ch> (visited 12 July 2003), 14.

¹⁴³ *Ibid.*, Annex A.7.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ Data from UNHCR, above n.142

¹⁴⁷ *Ibid.*, Annex A.4.

through the asylum system. Ultimately, it became impossible to process claims individually. The system worked whilst numbers were small and manageable¹⁴⁸ but the sudden upsurge in numbers caught the Eligibility Committee totally unawares. What resulted was a refugee assessment system, designed to process a handful of asylum seekers at any one time, making frantic attempts to process the mass influx of claims. The authorities quickly realized that any attempts to process claims individually might overwhelm the entire asylum regime. A practical solution lay in hiring more personnel but, even then, the sheer weight of numbers made this impractical and ultimately impossible. Eventually, Kenya was unable to meet the cost of the deluge of claims and, not surprisingly, its population grew weary to the point of xenophobia towards the fleeing hordes of asylum seekers.

6.2 Declining economy

In 1993, the World Bank published a report describing the declining state of the economy in Kenya:

The Kenyan economy is at a crossroads. Hailed for many years as a success story in Sub-Saharan Africa, the economy in the past three years has begun to decline and to exhibit features characteristic of the troubled economies of the region. Growth has slowed from an average of 5 percent in 1986–90 to an average of 3.8 percent in 1988–1991. In fact the growth rate has fallen every year since 1989, hitting 2.2 percent in 1991 and possibly turning negative in 1992. When the economy was growing at a 5 percent a year, only about 48,000 wage-paying jobs were created annually, against an annual increase in the labour force of almost 400,000 most of whom were educated and aspiring to wage-paying jobs. Today, the unemployment rate in urban areas is at least 20 percent and the average real wage is 45 percent of its level in 1980.¹⁴⁹

The International Monetary Fund ('IMF') and World Bank structural adjustment programs, or conditions that were imposed before resumption of aid to Kenya from 1991, aggravated this decline. Overall, these conditions caused a drastic reduction in cash flow to Kenya's economy, thus forcing the Government to explore alternative sources of funds in order to finance its budget deficit. These fiscal pressures meant that Nairobi could ill afford to hire extra staff to process the additional asylum claims. This, in turn, curtailed the entire refugee protection system.

¹⁴⁸ Christiane Berthiaume, 'Kenya: The Birth of a Crisis', 1992 (89) *Refugees* 26, describes it as a 'tidy programme with few problems', 26.

¹⁴⁹ The World Bank, 'Kenya: Employment Growth for Poverty Alleviation, 14 May 1993', available on the World Bank website at <http://www.worldbank.org> (visited 24 Apr. 2003).

6.3 Xenophobic and anti-refugee attitudes

The weakened state of Kenya's economy and the mass influx of asylum seekers were not the only contributing factors to the collapse of the Government's administrative programme. Other factors included growing xenophobic and anti-refugee attitudes together with outright intolerance of asylum seekers. In Government circles, these attitudes can be traced to 1979 when President Idi Amin of Uganda was deposed. While contributing to a debate in Parliament, which focused on rising crime in Kenya, the then Minister of Health, The Honourable John Osogo, called on the police force 'to mount more efforts in dealing with criminals'. He claimed:

Many Ugandans who were offered the privilege of staying in Kenya as refugees should now be collected and sent home. All should go back, ... Ugandan cars being driven around in Nairobi should be held and ordered back. Whether lecturers at the University or medical doctors practising in Kenya, they should all be sent back to their homes.¹⁵⁰

Anti-refugee discourse developed gradually, reaching unprecedented heights in 1993. The *Manchester Guardian Weekly* attributed the growth in xenophobia to the 'number of Somalis in Kenyan towns and the fact that Somali refugees get food aid while Kenyans have to cope with soaring food prices because of recurrent drought'.¹⁵¹ Sadly, not even the customary African 'open door, open heart' policy could salvage the situation. In January 1993, citing security fears, the Kenyan Government requested that the United Nations help repatriate all refugees 'because of banditry and the strain on the country's resources'.¹⁵² This decision, however, was later rescinded. These reactions support the argument that the African principle of hospitality is inevitably diluted as states receive asylum seekers beyond their resource-capacity.

For these reasons, as a Kenyan Government Official in charge of Refugee Affairs explained:

After 1990, the [Kenyan] Government pulled out [of the refugee status determination process] and gave UNHCR mandate [owing to] the sheer numbers of asylum seekers [which] at one time had reached 450,000. It was not easy admit them individually.¹⁵³

The mass influx led to the suspension of the Eligibility Committee as it was impractical to assess asylum claims on an individual basis.

¹⁵⁰ Associated Press, 'Kenyan Call For Repatriation of Ugandan Refugees', 27 July 1979, available on the LexisNexis website at <http://www.lexisnexis.com.au> (visited 27 June 2001).

¹⁵¹ Ibid.

¹⁵² 'Cash-strapped Kenya Asks UN to Send Home Refugees', *Manchester Guardian Weekly* 31 Jan. 1993, available on the LexisNexis website at <http://www.lexisnexis.com.au> (visited 27 June 2001).

¹⁵³ Interview with Government of Kenya Official, Nairobi, 3 Mar. 2003.

6.4 Introduction of *prima facie* procedures and encampment policy into the asylum landscape

Following this mass influx, UNHCR requested that Kenya, for practical reasons, grant asylum seekers refugee status on a *prima facie* basis. This system of refugee claim assessment is a tool of preliminary decision-making that arose out of necessity and practice. It was established to grant provisional status and protection to large groups of asylum seekers who could not be processed using individual status determination procedures. The UNHCR request to Kenya was initially turned down. The Kenyan Government may have initially interpreted this request to mean that all asylum seekers would be admitted and granted uncontrolled movement rights, particularly those later granted full mandate. Surrounded by civil strife and internal confrontation, Nairobi's main concern was the exportation of the armed conflict from neighbouring states into the country. Moreover, there was also a risk of the general security in Kenya degenerating if the movement of asylum seekers was left unchecked. A 1990 Human Rights Watch Report on Kenya captures this fear:

On October 16, President Moi announced that all Rwandese refugees would have to leave the country. He claimed that Rwandese refugees were using Kenya as a base for subversive activities – a direct reference to the October invasion of Rwanda by rebels based in Uganda. On October 22, he extended the order to Ugandan refugees.¹⁵⁴

It is apparent, therefore, that security is a key concern in the making of a state's asylum policy. Indeed, this factor may, in turn, lead a host state to adopt measures that seek to restrain the movement of refugees and asylum seekers.

Aside from the Eligibility Committee, the Thika Reception Centre, which was originally designed to house a maximum of 500 persons, was also overwhelmed by the sudden mass influx. The Reception Centre was incapable of holding the new arrivals. Nonetheless, a solution had to be found in order to ameliorate the suffering asylum seekers might endure. The Government's wish to limit the movement of and the need for extra space to accommodate asylum seekers and refugees may explain the establishment of refugee camps in Kenya. Some observers contend, however, that the Kenyan policy might have been primarily driven by security concerns rather than issues relating to space. In a commentary that explores the reasons why host states prefer forcing refugees into camps, Richard Black, for example, asserts that the prime consideration for applying this measure is 'likely to be the political and security implications of the pattern of refugee settlements' rather than other questions,

¹⁵⁴ Human Rights Watch, 'Kenya: Human Rights Developments', available on Human Rights Watch website at <http://www.hrw.org> (visited 29 Apr. 2003).

such as those relating to 'accessibility, efficiency and transparency of aid delivery'.¹⁵⁵

As regards determination of claims, it is important to realise that suspension of the Eligibility Committee meant that thousands of asylum seekers would remain in limbo. To avoid this, UNHCR stepped in to seal the protection gap, thus transforming its mandate from passive to active. As some suggest, the UNHCR found itself in the inevitable position of having compromised its role as the protector of refugees by becoming the 'prosecutor' and 'adjudicator'¹⁵⁶ of who is considered to be a refugee. By the end of 2006, Kenya's refugee protection regime fell largely on the UNHCR.

7. What are the lessons learnt from history?

To what extent does Kenya's experience offer insights and perspectives towards meeting the plight facing the hundreds of thousands who have been forced to seek sanctuary outside of their home States? Seven lessons can be learnt from the preceding analysis.

The first lesson relates to the definition of the term refugee, which, according to Kenya's domestic law, refers to persons who have fled their state of origin for reasons of persecution. This narrow definition is out of touch with reality. Experience demonstrates that, in addition to persecution, Africans also flee their home states due to factors such as armed conflict. To put it another way, refugee situations are a direct result of human rights violations. This is demonstrated in the following accounts by forced migrants explaining why they left their homes:

As refugees, we are victims of violence and war. We left our motherland because we are being mistreated in many ways. We ran to get protection in other countries.¹⁵⁷

In Togo, we were not at war, but we were in a war-like situation. When soldiers leave their barracks and start to fire on defenceless people — women and children — they realize that their safety is at stake and they start to flee.¹⁵⁸

Accordingly, it remains crucial for any asylum system, which is serious about protecting those who have been forced to flee their home states, to come to terms with this reality. Kenya's practical refugee scheme recognised the basic factors that forced people to flee their home states in

¹⁵⁵ Richard Black, 'Putting Refugees in Camps', (1998) 2 *Forced Migration Review* 4, 6.

¹⁵⁶ Edwin Odhiambo-Abuya and George Wachira, 'Assessing Asylum Claims in Africa: Meeting or Missing Standards?', (2006) 53 (2) *Netherlands International Law Review* 171, 201.

¹⁵⁷ Mayak A, 'What is a Refugee?' in Naomi Flutter and Carl Solomon, (eds.), *Tilting Cages: An Anthology of Refugee Writings* (Sydney: Naomi Flutter and Carl Solomon: 1995) 10-11.

¹⁵⁸ Gabriel Dosseh, Togolese refugee in Ghana, quoted in Christiane Berthiaume, 'Togo: A Crisis Like No Other', 1993 (93) *Refugees* 24, 25.

search of safety in the country. Subsequently, the reasons for seeking asylum were expanded to cover the new refugee situations. Equally important is the idea of granting complementary protection — persons unable to qualify as refugees under the terms of the legislative system could be protected if they were deemed ‘refugees’ by the practical regime.

The second lesson relates to the procedures for determining asylum claims. The analysis in this article demonstrates the importance of synchronising the legal and practical protection systems in order to clearly identify the proper Government officials responsible for assessing refugee claims. Further, the need to stipulate the qualifications of officials engaged in claim processing, expeditious assessment of refugee applications and the role of domestic as well as international actors, including the UNHCR, has also been underlined. Legal history suggests that other residual procedural questions, such as, for example, those relating to appeals, excluded asylum seekers and the cessation of status also need to be clearly spelt out by law. Otherwise, the failure to address these issues is bound to create conflict at operational level, which sometimes could be to the detriment of those whom the system is designed to protect.

In addition, these findings also highlight the value of having adequate resources for border control and assessment of claims. Many African states, unlike their westernised counterparts, lack adequate resources to feed their nationals, let alone for border control.¹⁵⁹ Yet in order to run an effective refugee protection regime, a solid financial base is a pre-requisite. Otherwise, there is the potential risk that thousands of asylum seekers would remain without surrogate protection. James Elgass makes this point in a commentary on the early United States migration scheme. He asserts that ‘without federal assurances [of full financial support], states would be unable to plan their refugee resettlement programs efficiently’.¹⁶⁰ Therefore, efforts to improve the refugee protection regime must take into account the economic realities in Africa. Unless this reality is embraced, African states may find themselves, like some of their westernised counterparts, trying to legislate to keep out asylum seekers and refugees,¹⁶¹ or asking for the refugee treaties to be rewritten.¹⁶² Some critics would argue that in situations

¹⁵⁹ The author has canvassed this issue in a separate article. See Edwin Odhiambo-Abuya, ‘Revisiting Liberalism and Post-Colonial Theory in the Context of Asylum Applications’, (2006) 24 *Netherlands Quarterly of Human Rights* 193, 209-211.

¹⁶⁰ James Elgass, ‘Federal Funding of United States Refugee Resettlement Before and After the Refugee Act of 1990’, (1982) 3 *Michigan Year Book of International Law* 179, 191.

¹⁶¹ For a discussion of this practise, see E. Odhiambo-Abuya, ‘Refugee Status Determination in Australia: Breaking the Rules?’, (2004) 25 *Liverpool Law Review* 221, 229-235.

¹⁶² See Mary Crock, ‘The Refugee Convention at 50: Mid-life Crisis or Terminal Inadequacy? An Australian Perspective’, in Susan Kneebone (ed.), *The Refugee Convention 50 Years On* (Hants: Ashgate, 2003) 47-89, 52, writing, ‘In early 2001, the [Australian] Coalition government through the Minister of Immigration, Phillip Ruddock, floated the idea of rewriting the [Refugee] Convention, arguing that the instrument is ill suited to modern-day experiences of refugee movements’. See also

where an asylum system is under considerable pressure the African norm of hospitality could salvage the situation. However, in conditions where asylum states are stretched to the limit the level of protection offered is likely to decline as the findings of this piece demonstrate.

Asylum is not about allowing refugees entry into the territory of a host state or offering physical space to house those who have been forced to flee their home states. Rather, the focus should be on meeting the needs of those who claim not to have recourse to protection from their home countries. In the context of protection outcomes, it is important for asylum systems to recognize the porosity of African borders and then to try to amalgamate the international asylum system with the African custom of hospitality. Further, if a humanitarian approach is favoured, host states would need to undertake practical measures to accord refugees, at the very least, internationally recognised entitlements such as rights to work, education, vocational training and family reunion, as well as freedom of movement. However, these attempts must not overlook the historical protection system. Access to these entitlements is crucial for supporting the rights and capacities of refugees to develop life skills and become self-sufficient. As was noted at the drafting of the Refugee Convention, the aim of social and economic assistance should be to enable refugees to assimilate into the new society and become self-reliant:

International agreements on refugees and stateless persons should be aimed at assisting the refugee to build up an economically independent existence as quickly as possible, and to enable [a person] to acquire sources of income so that he [or she] will not be a public charge.¹⁶³

Implementation requires removal of the barriers that deny refugees enjoyment of these entitlements.

Historical experience also demonstrates that joint endeavours in African states, partly by the Government and partly by UNHCR, churches and aid agencies, significantly contribute towards the granting of refugee entitlements prescribed by the international human rights framework and refugee law. Even so, the level of protection stands to be severely undermined by sudden rises in the number of persons in need of succour and diminished financial capacity on the part of service providers, as well as the porosity of African borders. Even though, in the case of Kenya, the UNHCR subsequently filled the protection space left by Nairobi, two

Anthony Richmond, 'Globalization: Implications for Immigrants and Refugees', (2002) 25 *Ethnic and Racial Studies* 707 claiming that the Refugee Convention 'is anachronistic and needs to be replaced', 718.

¹⁶³ United Nations General Assembly, 'Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Proposals Concerning the Draft Convention Relating to the Status of Refugees', statement submitted by the International Confederation of Free Trade Unions, a non-governmental organization in consultative relationship with the Economic and Social Council, A/CONF.2/NGO.5 (6 July 1951).

points need to be emphasised. Firstly, in the refugee protection equation the active participation of the host state remains imperative. In addition, a stable financial base is crucial if persons who flee their home states are to be protected based on internationally accepted standards. Otherwise, when these two ingredients are absent, it is difficult to see how any agency or Government that assumes responsibility can ameliorate the suffering of forced migrants. Put simply, it is insufficient to have merely a will to render humanitarian assistance; equally important is a way of ensuring that the support reaches the persons targeted. The events leading up to the suspension of Kenya's Eligibility Committee demonstrate that that refugee policies in the developing world are largely influenced by the economic capability of the host country to take in forced migrants.

Furthermore, the history of asylum underpins the importance of providing reasons for any refugee application (the right to reasons is expressed in the maxim: *nullum arbitrium sine rationibus*). The main concern in this regard relates to the points that a rejected claimant might advance in order to support his or her appeal. As was noted above, the right to appeal is severely hampered when decision-makers fail to provide reasons for their decisions. The practise of giving reasons for a decision promotes one of the fundamental requirements of due process, namely, the right to be heard¹⁶⁴ (expressed in the maxim: *audi alteram partem*). If a system can afford appeals, it must provide reasons for adverse decisions to make the appeals meaningful.

The yardstick for determining whether an outcome in law satisfies the requirements of a decision is whether the reasons demonstrate clearly that an adjudicator has applied legal principles to the adduced evidence. Justice Keith of the New Zealand Court of Appeal emphasized in *Singh v. Chief Executive Officer Department of Labour*¹⁶⁵ that a statement of reasons should contain the following:¹⁶⁶

- (a) Findings on material questions of fact;
- (b) a reference to the relevant law or legal principles;
- (c) the application of the law as determined to the facts as found.

Therefore, in order to qualify as a decision, an outcome must be accompanied by detailed reasons. However, as the European Court of Human Rights observed in *Van de Hurk v. The Netherlands*, the obligation to provide reasons should not be interpreted 'as requiring a detailed answer to every argument'.¹⁶⁷ Rather, to borrow from common law jurisprudence, the test

¹⁶⁴ Articles 14 and 10 of the ICCPR and UDHR, respectively.

¹⁶⁵ (1999) New Zealand Administrative Reports 258.

¹⁶⁶ *Ibid.*, 263.

¹⁶⁷ (1994) 18 EHRR 481, 502. Note that art. 45 of the European Convention on Human Rights, 4 Nov. 1950, 213 UNTS 222 (entered into force 3 Sept. 1953) requires reasons to be given for judgements and decisions.

is whether a reasonable person is able to understand the statement of reasons to enable him or her to exercise any appeal or review rights. In *R v. Civil Service Appeal Board, ex parte Cunningham*, for example, Lord Donaldson underscored that 'fairness requires a tribunal ... to give sufficient reasons for its decision to enable parties to know the issues to which it addressed its mind and that it acted lawfully'.¹⁶⁸ In summary, the statement that officials in Kenya used to communicate its asylum decisions fell short of satisfying the requirements of such a decision. Commentators¹⁶⁹ and case law¹⁷⁰ have underpinned that the giving of reasons is beneficial on the following grounds:

- Provision of reasons is likely to provide an assurance that a decision has been well thought through rather than arbitrarily handed down by an agency.
- An obligation to give reasons may encourage public confidence in the decision-making process.
- Where a system provides for appeals or review, reasons facilitate this process as they enable an aggrieved party to know why an application was rejected and indicate whether any grounds for appeals or review exist.
- Reasoned opinions promote the principles of natural justice and the duty to accord fairness in decision making.
- Giving of reasons promotes good administration.

Thus, asylum states should adopt policies that incorporate inclusion of reasons for their decisions.

Moreover, if refugee host states in Africa, in particular, are genuinely committed to ameliorating the plight of victims of war and/or persecution, they must undertake practical measures to promote the rights of people who plainly need assistance. The fundamental question is who gains protection? The international refugee treaties, namely the Refugee Convention and the OAU Refugee Convention, may act as a guide. To promote the entitlements due to refugees, states must aim at designing asylum systems that grant refugees and asylum seekers the widest possible human rights as affirmed in the UDHR, international refugee laws and the international human rights framework. To this end, the claim assessment

¹⁶⁸ (1991) 4 All ER 310, 320.

¹⁶⁹ Robert Fisher, 'Improving Tribunal Decisions and Reasons', (2003) *New Zealand Law Review* 517; Geoffrey Flick, 'Administrative Adjudications and the Duty to Give Reasons – A Search for Criteria', (1978) *Public Law* 16; Lord Woolf, Jeffrey Jowell and A.P. Le Sueur, *Principles of Judicial Review* (London: Sweet and Maxwell, 1999), 341-360; William Wade, *Administrative Law* (Oxford: Oxford University Press, 2000), 516-520.

¹⁷⁰ *Mary Donaldson v. Board of Education of the City of North Windwood* 65 NJ 236; *Osmond v. Public Service Board of New South Wales* (1984) 3 NSWLR 447; *Hugh Jordan v. UK* (2003) 37 EHRR 2; *Mavis Baker v. (Canada) Minister of Citizenship and Immigration* (1999) 2 SCR 817.

process must be geared towards applying group determination procedures, for those fleeing from situations of generalised violence and disorder, and individual procedures for those who are excluded from the former categorization. The refugee determination system should also provide for the rights of appeal, or judicial review of decisions, to ensure that the process is independent and conforms to the basic due process guarantees. More emphasis must also be placed on humanitarian aid and security checks to ensure that only genuine asylum seekers are admitted. Overall, these measures have the potential to benefit asylum seekers and refugees, as well as host Governments.

An issue which this article does not address in detail, but which is nonetheless important to the discourse of forced migration, is the role of conflict prevention, management and resolution, which go to the root causes of migration flows. One African adage advises: 'if you want to climb a tree, start at the bottom'. Few would deny that focussing on the root causes, rather than the tragic symptoms, is by far the most effective way of addressing the plight facing those forced to flee their home states. Ongoing situations of armed conflict and civil strife in many parts of the world remain a major obstacle to the repatriation of refugees. As previously cautioned, one must start at the bottom. An approach, which involves evaluating the causes that generate refugees, so as to prevent and or contain the influx at the outset, should be adopted. Failure to do so could cause dire consequences, particularly to displaced persons. Accordingly, mediators in any peace talks must strive to sustain the process to its logical conclusion. They should aim at ensuring warring parties agree to a permanent ceasefire. These kinds of efforts are a reminder that, in order to find a permanent solution to the plight of asylum seekers and refugees, more is needed than merely formal protection systems.¹⁷¹ A recent example in Africa is the peace plan struck in May 2004 between rebels and the Sudanese Government¹⁷² following sustained talks hosted by Kenya under the auspices of the Intergovernmental Authority on Development. This pact was expected to pave the way for the return of some 600,000 Sudanese refugees currently residing in six African countries.¹⁷³ However, the ongoing humanitarian disaster in Darfur, which displaced close to one million

¹⁷¹ E. Odhiambo Abuya, 'Refugees and Internally Displaced Persons: Examining Overlapping Institutional Mandates of the International Committee of the Red Cross and United Nations High Commissioner for Refugees', (2003) 7 *Singapore Journal of International and Comparative Law* 236, 266.

¹⁷² Charles Omondi, 'Sudan Pact to Benefit Kenya', *The Daily Nation* 2 June 2004, available on the website of the Daily Nation (visited 2 June 2004); Henry Owuor, 'New Deal Makes Sudan Peace Dream True', *The Daily Nation* 28 May 2004, available on the website of the Daily Nation (visited 28 May 2004). All of the Daily Nation articles mentioned in this article are available on the website of the Daily Nation at: <http://www.nationmedia.com>.

¹⁷³ Source of data: UNHCR, '2004 Global Refugee Trends', available on the website of the UNHCR, (visited 17 May 2006), Table 4.

people,¹⁷⁴ remains a major obstacle. Moreover, Khartoum's suspected involvement has aggravated the situation.

The need to invest in long-term projects that address peace building and maintenance initiatives is greater in the current climate. Considering that we are now living in a world of terrorism, where fear of the 'other' and threats of war and insecurity are now more imminent than before, it is likely that many host states will continue to deny entry and support to even the most genuine of cases.¹⁷⁵ Since September 2001, and the subsequent global fight against terrorism, asylum seekers have been reclassified as potential terrorists. Further, in order to address their vulnerabilities to terrorism, many governments have tightened their migration and visa regimes. For example, Adel Al-Dahas, an Iraqi asylum seeker, languished in a Kenyan jail for five years (2001 to 2006) because all countries that had been approached to resettle him refused for fear that he could be a security threat.¹⁷⁶ This claim seems to have stemmed from the fact that he worked as an Air Force Engineer during the reign of the late Saddam Hussein.¹⁷⁷

8. Conclusion: the challenge ahead — further research

Using Kenya as a case study, this article has considered the interaction between the asylum legislative framework and its practical application within a particular African setting. As this analysis shows, there is a considerable distance between the law in the statute books and its operation on the ground. A review of the early refugee protection regime seems to suggest that what African states, which adopted laws and regulations from the colonial powers, need is new refugee-specific legislation to address their predicament rather than a simple revision of old laws. Tanzania and South Africa have led the way in this regard.¹⁷⁸

Generally speaking, the evolution of Kenya's asylum protection system demonstrates the challenges African states faced, and continue to face, in their quest to offer sanctuary to those seeking asylum. Historical accounts provide insights and perspectives on the current refugee protection discourse. Accordingly, it is hoped that the points highlighted in this article will challenge and inspire commentators on Africa, and elsewhere, to

¹⁷⁴ UNHCR, 'Chad/Sudan: Director of Operations Visits Ahead of Increased UNHCR Darfur Presence', available on the UNHCR website (visited 18 Aug. 2004).

¹⁷⁵ There is considerable evidence to support this argument, see: Mai Kaneko, 'Beyond "Seclusionist" Japan: Evaluating the Free Aghans/Refugee Law Reform Campaign after September 11', (2003) 21 *Refugee* 34; Evelien Brouwer, 'Immigration, Asylum and Terrorism: A Changing Dynamic Legal and Practical Developments in the EU Response to the Terrorist Attacks of 11.09', (2003) 4 *European Journal of Migration and the Law* 399; Michel Coutru and Marie-Hélène Giroux, 'The Aftermath of 11 September 2001: Liberty v. Security before the Supreme Court of Canada', (2006) 18 *IJLR* 313.

¹⁷⁶ Stephen Muiruri, 'Dilemma Over Terror Suspect', *The Daily Nation* 17 Aug. 2004, available on the *Daily Nation* website (visited 18 Aug. 2004).

¹⁷⁷ *Ibid.*

¹⁷⁸ See above n. 27.

undertake similar studies that probe the evolution of refugee protection within specific settings. Data generated from these studies will not only bridge the current literature gap but the research findings will go a long way towards offering best practise lessons for those involved in refugee protection. Perhaps, through such scholarship, a way forward might be found to meet the plight facing approximately 21 million persons of concern worldwide.¹⁷⁹ For if we ignore the lessons of history (or advice of *mkuu*)¹⁸⁰ do we not risk repeating the same mistakes?

¹⁷⁹ UNHCR, above n. 12, 2.

¹⁸⁰ See above n. 1.