

# **REFUGEES IN KENYA AND THE CONSTITUTIONAL REVIEW PROCESS – The way forward**

**By**

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## **General principles**

A refugee is defined as a person who has fled his or her own country to seek refuge in another country for the safety of his/her life and limb because of a well founded fear of persecution. The definition of a refugee also covers those who are compelled to leave their domicile or place of habitual residence because of among other things, “events seriously disturbing public order in his or her country of origin”.

The main sources of International Law on refugees are the 1951 Refugee Convention, and the OAU Convention of 1969. Kenya acceded to the 1951 Convention but has not ratified it (according to the UNHCR website). The obligations under these documents include not sending a person back to a country where he or she may be persecuted, and in the case of the OAU convention where his or her life is threatened because of the threats to public order which form the basis for refugee status; not discriminating among groups of refugees; the right of refugees to freedom of movement and to work in the country (though a three year limit on the right to work can be imposed to protect the local labour market); the same right to basic education as a national; the duty of refugees to obey the law in the country

where they are received. The OAU Convention adds that members states shall “use their best endeavours” to receive refugees and ensure their settlement.

The 1961 Convention, and indeed the OAU Convention were made in circumstances which are very different from the situation obtaining today. The typical refugee in 1951 was a European who had fled to another European country, alone or with a small family, was perhaps a professional, and was expected to be able to return home within a few years, or to become reasonably well integrated into another country. The influx of huge numbers of people, many subsistence farmers, into countries which were themselves poor, and who might live in camps for many years, without it becoming clear when their situation would be resolved, was simply not imagined, even in Africa in 1969. Nonetheless, the Conventions still set standards of decent treatment for refugees. The fact that refugees may be many, should not obscure the great hardship that some of them have had to endure in order to reach the host country, or the very difficult circumstances in which they live once here.

**N.B.** The term “refugee” does not include “internally displaced persons” (idp). These are persons who have been displaced from their homes as a result of political upheavals, social unrest, clashes between different ethnic communities and other similar disturbances of internal nature that occur within the borders of a country.

### **Mandate of the Commission**

There is no specific reference to refugees in the Review Act nor indeed in the Constitution of Kenya. However, section 3 (b) of the Review Act

defines the objects of the review process as, inter alia, establishing a free and democratic government that enshrines human rights. The Commission is also to ensure that the review process ensures respect for the universal principles of human rights (S. 5 (c) (iii) and that the people of Kenya, in reviewing the constitution, examine and recommend on ways and means of strengthening the observance of Kenya's obligations under International Law.

Kenya is a signatory to almost all the United Nations and OAU conventions on Human Rights and Refugees. Even though Kenya has not domesticated some of these instruments, the human rights provisions in the constitution and customary international law e.g. the Principle of non-refoulement, can be said to afford some recognition to the rights of refugees in Kenya. A person does not lose his basic fundamental rights as a human being by reason only of being a refugee in a country.

Few national constitutions make any specific mention of refugees, even those which had significant numbers of refugees when they were drafted, such as Uganda. Rights under the Fundamental Rights Chapter of a Constitution which are given to 'persons' rather than 'citizens' will apply to refugees, unless there is good reason for not doing so under the limitation provisions. Moreover obligations to implement treaties will also apply to treaties which benefit refugees. The existence of refugees should be born in mind while considering issues like citizenship.

### **The Kenyan Situation**

Since it became independent in 1963 to date, Kenya has been host to refugees fleeing from countries neighboring Kenya as a result of civil war,

political unrest and upheavals that at one time or another obtained in those countries such as Ethiopia, Somalia, Sudan, Uganda and countries in the Great lakes region (Zaire, Burundi, Rwanda). At its peak, during the early 1990s, Kenya was host to the largest refugee population in East and Central Africa when it stood at close to a half a million. Today the refugee population is down to about a quarter of a million due to the voluntary resettlement of some of the refugees and the resettlement of others to third countries – usually in Europe, Australia and the United States. The refugees are today settled in two camps in Kenya – Dadaab in North Eastern Province and Kakuma refugee camp in Rift Valley Province. This followed the closure of other camps in Mombasa, Malindi, Thika, Moyale and Mandera. The U.N.H.C.R, other U.N specialised agencies like UNICEF and other NGOs have assumed the responsibility of providing the basic needs for the refugees in these camps (i.e. food, shelter, water, healthcare, sanitation and education) while the Kenya Government provides the necessary administrative and security back up and generally maintains Law and Order in the camps. According to data available from UNHCR as at the beginning of 2002, there were 239,221 refugees in Kenya of whom 69, 804 were from Sudan, 144, 249 from Somalia and 13, 541 from Ethiopia.

Inspite of hosting large numbers of refugees over a long period of time, the Kenya Government has not to date developed very clear guidelines and policies on how to deal with the refugees in Kenya. Unlike its neighboring countries like Ethiopia, Sudan, Uganda and Tanzania, Kenya neither has any specific legislation dealing with refugees nor a ministry or department of government to deal with refugee affairs. In general the situation is vague, haphazard, ad hoc and unplanned. In most cases the police, immigration

department and the Ministry of Home Affairs are involved in issues dealing with the refugees with no clear definition of the role and functions of each of these departments. The only agency whose role appears clear and consistent is the U.N.H.C.R. which suffers the agony of dealing with the bureaucratic red tape presented by these multiple government organs.

In the absence of specific laws dealing with refugees, the immigration laws as contained in the Immigration Act, Chapter 179 of the Laws of Kenya, are applied to the refugees, even though this is clearly inappropriate as the said Act is intended to regulate the entry into Kenya of persons who voluntarily come from other countries for some specified purpose. Refugees in Kenya basically stay in their designated camps and cannot travel out of that camp except with permission from the local administration and only for some specified cause such as medical treatment or to attend an official UNHCR sanctioned activity in Nairobi. The UNHCR also provides to the refugees ration cards to enable them get their monthly food rations and a letter commonly called, “protection letter” which identifies the person as a refugee who is out of the designated camp for a specified purpose. The situation of the refugees in the camp is very much similar to that of a prison. They are not allowed to come out of the camps without permission to settle in other parts of the country, to inter mingle with the Kenya citizens, to look for work or do business outside the camps. The few lucky ones are those that get employed by NGOs and U.N. agencies who then seek permission for them from the government. However, there are some few refugees who have managed to avoid or leave the camps and live in urban centres like Nairobi and Mombasa. These are mostly the affluent ones who manage to persuade the immigration department to give them some legal status to stay

in the towns either by issuance of the investor or business class visa on their passports (which is renewed regularly) or some resident permit or alien registration permit. There have been allegations of corruption and bribery in the issuance of these visas or permits. There are also a substantial number of refugees who also live in the urban centres without any permit or other recognised legal entry status. These are usually under the mercy of the immigration and police department and they are arrested during regular police “sweeps” or “operations” such as those carried out in Eastleigh, Nairobi and released depending on the whims of the officers in charge of those operations. Few of those arrested are ever taken to court and majority usually buy their way out of the police custody and the same activity is repeated all over again whenever there are “police operations”

There have been widespread complaints made against the police by various political leaders, civil society and Human Rights Organisation, UNHCR and international agencies as a result of their harsh treatment of refugees in Kenya. Police brutality and harassment has featured as one of the major complaints of the people of Kenya. The situation is even worse for the refugees who are much more vulnerable than the Kenyans since they have nowhere to complain to unlike the others – even if this is only in theory! The police have been accused of committing atrocities and gross violations of the basic human rights of the refugees in the camps and in the urban centres of Kenya. The African Rights, a human rights NGO, conducted a study of the refugee situation in Kenya in the early 1990s and published a report prepared by Alex de Waal and Rakiya Omar entitled, “seeking refuge, finding terror – the case of Somali refugees in Kenya” wherein harrowing tales of arbitrary searches, arrest, extra-judicial killings, kidnappings and

disappearances, theft of money, jewellery and rape of women carried out by the Kenyan security forces against refugees are recounted. Regrettably the Kenya Government has not taken any step to address any of the complaints made by or on behalf of the refugees against its security forces, who appear to operate with impunity.

There has been a lot of inconsistency in the conduct and practice of the police and the courts in Kenya when dealing with refugees. When any refugee is arrested, either because he is found outside the camp or without any permit to stay out of the camp, the police and the immigration tend to treat the refugee as any other alien despite his or her status. Such a refugee is either handed over to the UNHCR or sent back to the refugee camp in the first instance or at other times is charged before a criminal court for the offence of being in the country illegally. Where the refugee pleads guilty to such a charge, as is usually the case, the court initially in recognition of the status of the accused, used to order the refugee to be taken back to the refugee camp but in recent times the practice has been to convict the accused and sentence him or her to serve some months in prison in addition to or as an alternative to the payment of a prescribed fine and after the sentence is served or the fine is paid, the accused is ordered to be repatriated back to his or her home country. This repatriation order is usually carried out by the police who escort the convicted refugee up to the No-mans Land in the border and order the person to go over to his or her home country. This repatriation order is usually made by the courts in total violation of the international Law Principle of non-refoulment, which forbids the forceful return of a refugee to his or her home country. The Kenya government does not have any clear policy regulating the status of refugees who have stayed

in the country for long periods of time or for children of refugees born in Kenya who have now attained the age of majority. According to the medical co-ordinator of the UNHCR run hospital in Dadaab refugee camp, the maternity wing of the hospital records an average of 70 births per month. There is no policy in place to allow for the acquisition of citizenship or residence status by refugees regardless of their length of stay. Moreover, those refugees in Kenya who succeed in getting resettlement in a third country such as in Europe, U.S.A, or Australia usually end up getting citizenship status of those countries that they resettle in and any of their children born there get the nationality there. The few refugees that managed to get Kenyan citizenship are often a select group that is either very rich and have substantial business investment in the country or are well connected politically or both. In any case, such a refugee usually gets the citizenship after payment of a substantial amount of money as registration fees in addition to the statutory requirement of the renunciation of his or her previous nationality.

There are certain Principles of universal application that are germane to the acquisition of citizenship states by refugees in a host country. Firstly, if there is a right to apply for naturalization after a certain period of residence, then refugees would have the right to apply in the same way as any other resident. Secondly, if birth in Kenya gave an automatic right of citizenship, children born within the country to refugees would be citizens. Under the 1951 convention a refugee who has a child who has the nationality of the country where he or she is resident should not be subject to measures which restrict refugees from employment. A further implication of refugees having Kenyan children is that treaty obligations, and national constitutional



provision, about family rights, including not splitting up families, would come into play.

The Kenya Government has not put in place an appropriate institutional mechanism for the reception of persons claiming asylum or seeking refugee status at any of the ports of entry. Refugees enter the country by air, land or sea. Some board aircrafts and land at airports in Kenya while others come on boats, motor vehicles and even on foot. More often than not it is the police or the Provincial Administration which is first to receive them but the buck finally stops at the UNHCR where these refugees are handed over to. The government has no reception centres or authorised agents to receive the refugees to do any preliminary screening and vetting exercise. There are no transit camps or sites set for holding the said refugees. The exercise of screening, vetting and finally registering the refugees actually ends up being the responsibility of UNHCR which has to camp them.

### **What Kenyans said**

Majority of the people who gave views concerning refugees were understandably those that were affected most by the presence of these refugees in their areas. This was especially the case in the areas where the refugee camps were located such as Dadaab in Garissa and Kakuma in Turkana. Views were also received from some Human Rights Organisations and some Kenyan staff of U.N. and other international aid agencies working with or for the refugees in Kenya. The following is a summary of the views given and concerns raised on the issue of refugees in Kenya:-

- Local communities should be consulted first before the government makes the decision to locate refugee camps in those areas

- Local communities who inhabit the areas where the refugee camps were located made strong and passionate appeals for the relocation of those camps to other parts of the country so that the burden of hosting the refugees is not borne by them alone.
- Local communities complain that the presence of the refugees in their areas, which was already an ecologically fragile area, has placed severe strain on the fragile ecosystem and limited resources of the area.
- Presence of refugees has caused environmental degradation and depletion of natural resources e.g. water and deforestation caused by the big demand for firewood by those on the camps.

**N.B.** This problem is being addressed by UNHCR in collaboration with GTZ through the implementation of programmes meant to save the environment e.g. the introduction of energy saving *jikos* for the refugees, purchase of firewood contracted to locals who must bring it from designated areas and other projects like forestation and aforestation.

- The influx of refugees has led to an increase in the rate of violent crimes in the country, general insecurity, drug trafficking, the smuggling and proliferation of small arms and other illegal weapons and an increase in armed banditry and cattle rustling.
- Complaints by the local people against the UNHCR and other NGOs working in the refugee camps that they do not employ or give adequate chances of employment to the local youths who are unemployed.

**N.B.** These agencies of course deny these allegations and point to the development work they have initiated in the areas to benefit the local people

as proof of their commitment to assist the locals to mitigate their real and perceived losses. This development work is evident in the improvement of the roads network, in the number of secondary and primary schools built, hospital and bore holes drilled for the local people. Indeed, in Dadaab, the development activities of UNHCR is much more evident than that of the Government. Moreover, it is common knowledge that even in the refugee camps, some of the locals have registered themselves as refugees so as to access the free medical care and monthly food ration available therein.

- Clash of cultures, corruption of the morals of the local youth and emergence of immoral activities and other social vices as a result of the presence of the large number of refugees from different countries and the equally large foreign staff and expatriates from other countries working in the refugee camps.
- Lack of a clear government policy on refugees in Kenya.
- Failure by the government to domesticate the refugee conventions and to enact appropriate legislation dealing specifically with refugee affairs in Kenya.

### **Recommendations**

- a. The Kenya Government in making the decision on where to locate refugee camp should also consult the local people in whose area the camp will be located.
- b. Before a refugee camp is located in any particular part of the country proper feasibility study, including an environmental impact assessment study be carried out to assess the capacity and suitability of the area.
- c. As part of safety and security measures the refugee camp should, as

far as possible, be located closer to the border of the country where the influx is being experienced.

- d. The government in consultation with UNHCR should establish or designate certain places as refugee reception or transit centres where the initial and preliminary vetting exercise of the refugees can be done before final status decision is made.
2. The government, must as a matter of urgency, establish a clear policy on how all issues and matters affecting refugees will be dealt with in Kenya. It must also establish a specific institution, authority or department of government which shall be the central or principal body mandated to handle all matters relating to refugees in Kenya.
3. The respect for and promotion of the rights of refugees as guaranteed under International Law or in domestic legislation must be recognized in the constitution under the chapter dealing with Fundamental Rights and duties. The state must also be directed in the constitution under the chapter dealing with directive Principles of State Policy, to ensure the respect for and promotion of the said rights of refugees in Kenya.
4. The government or the state must ensure the enactment of an appropriate refugee law in terms of the provisions of the 1951 U.N. Convention and 1969 OAU Convention on refugees.

**END**