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**Research Paper Series  
Vol. 1 No. 2004**

**ISSN: 1811-3265**

**Legislating to protect  
Refugees and Asylum Seekers  
in Kenya: A note to the  
Legislator**

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**Moi University Press**

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Moi University Press, Moi University, Eldoret Kenya

Senior Editor	– Tom Ouko
Editor	– John Oluoch
Graphics Artist	– Joseph Juma
Typesetter	– Joyce Majanja

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*“The further backward you look, the further forward you are likely to see.”*  
Sir Winston Churchill, *British Statesman (1874-1965)*

## INTRODUCTION

Studies have shown that Kenya hosts more than 200 000 asylum seekers (or, potential refugees),<sup>1</sup> however the country still lacks comprehensive domestic legislation<sup>2</sup> that would otherwise guarantee the rights promised to asylum seekers by international refugee law treaties. Kenya is signatory to the United Nations Convention relating to the Status of Refugees,<sup>3</sup> (“Refugee Convention”), and its Protocol relating to the status of refugees,<sup>4</sup> (“Refugee Protocol”). But since it follows the monist<sup>5</sup> approach toward treaties, signing of a treaty *per se* cannot be the source of any legal rights, interests, liabilities or

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\* Law lecturer, Faculty of Law, and CRS researcher, Moi University, Eldoret, Kenya and SJD Candidate, The University of Sydney, Australia. E-mail:edwina@keller.law.usyd.edu.au.

- 1 The latest statistics, from the United States Committee for Refugees, indicate that at the end of 2001 Kenya hosted approximately 245 000 refugees.
- 2 See the Immigration Act (Cap 172 Laws of Kenya) and Aliens Restriction Act (Cap 173 Laws of Kenya), which contain pockets of ‘Refugee Law’.
- 3 Done at Geneva on 28th July 1951, 189 U.N.T.S. 137.
- 4 Done at New York on 4th October 1967, 606 U.N.T.S. 267.
- 5 This is contradistinguished with the dualist approach, followed by States like the United States of America and Eritrea. Under this approach treaties are described as ‘self-executing’—they do not need to be incorporated within the municipal legislation to have internal effect. Their provisions are automatically transformed into municipal law upon ratification by the relevant authority, or its duly authorised delegate. In the United States, for instance, treaties are capable of self-executing because of the Supremacy Clause in the Constitution, which declares treaties as the supreme law of the land. Under Article 8 all treaties made under the authority of the United States are binding on all judges in every State. See also Marshall CJ, in *Foster v Neilson* 27 U.S. (2 Pet.) 253 (1829) arguing that

A Treaty is in its nature a contract between 2 Nations, not a legislative act. It ... is carried into execution by the sovereign power of the respective parties to the instrument. In the United States a different principle is established. Our Constitution [Article VI clause 2] declares a treaty to be the law of the land. *It is consequently, to be regarded in courts of justice as equivalent to an act of the legislature*, whenever it operates of itself without the aid of any legislative provision.

(Emphasis added)

For an excellent discussion on self-executing treaties, see Brownlie I, *Principles of Public International Law* (Oxford: Clarendon Press, (5<sup>th</sup> Ed.), 1998) at 50. See also Iwasawa Y, ‘The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis’, (1986), 26 (3) *Virginia Law Journal of International Law*, 627.

duties at the domestic level.<sup>6</sup> Neither can it create any legitimate expectation that decision-makers will follow, or consider, when making decisions. At most, the signing remains a mere show of commitment to the rest of the world, that Kenya agrees in principle with a treaty's goals and ideals. The East African Court of Appeal—Newbold, Duffus and Spry—in *East African Community v Republic*<sup>7</sup> discussed the place of treaties at domestic level. According to the court

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.<sup>8</sup>

Treaties are implemented in Kenyan law by enactment of appropriate domestic legislation. Such rights or obligations can only arise under legislation and not under a treaty. To borrow the words of Lord Atkin in *Attorney General for Canada v Attorney General for Ontario*<sup>9</sup>, 'the making of a treaty is an [Executive act while *the performance of its obligations, if they entail alteration of its existing domestic law, requires legislative action*'].

Often, though, domestic legislation merely repeats a treaty's provisions. However, once a treaty is incorporated into domestic legislation, the enacting legislation has the same legal status as other domestic legislation.

Since 1990, the Attorney General has made futile attempts to write refugee specific legislation. In 2002 the Constitution of Kenya Review Commission (CKRC) made two progressive steps in this regard. In the first place, the Constitution of Kenya draft Bill, (Draft Constitution) sought to constitutionally entrench two fundamental rights that would protect refugees and asylum seekers—right to asylum<sup>10</sup> and prohibition against *non-*

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6 See also Section 3 (1) of the Judicature Act (Chapter 8, Laws of Kenya), 1967, recognising the following as sources of law in Kenya, that courts should apply: Acts of Parliament, the Constitution, Common Law, Doctrines of Equity and Statutes of general application in force in England as at 12th August 1897, and customary law. Since treaties are excluded from this list, their spirit and intention has to be transplanted, by enabling legislation, into the domestic legal framework.

7 (1970) EA 457

8 *Ibid*, at 460.

9 (1937) AC 326 at 347-348.

10 See clause 52(1) of the Draft Constitution.

*refoulement*.<sup>11</sup> Secondly, and equally important, it provided a time frame for passage of appropriate refugee and asylum seekers legislation. Clause 52(3) requires

*Within one year of the coming into force of the Constitution passage of legislation, in compliance within international law and practice, governing refugees and asylum seekers. [Emphasis added]*

On 27<sup>th</sup> October 2002, the then president of Kenya, Daniel Moi, purported<sup>12</sup> to dissolve the CKRC and thereby halting the entire constitutional review process. Even so, the new National Rainbow Coalition, (NARC), government<sup>13</sup> made two promises as regards this process. First, to revive and continue the entire process and second, that Kenya would have a new Constitution by the end of June 2003. In this regard, it remains important to ensure Clause 52 survives the entire review process.

Therefore, as the country braces itself not only for a new Constitution, but also for refugee legislation<sup>14</sup>, key legal instruments that drafters should refer to when drafting refugee legislation, is the Refugee Convention and Refugee Protocol. However, it is not prudent to look at these treaties in their final forms. More importantly, the drafters should understand and appreciate why they read the way they do. Or, why certain provisions were written in them and others omitted. For this reason, an examination of the evolution of the Refugee Convention and its Protocol is a prerequisite. This knowledge and information is bound to guide the drafters to understand and acknowledge the geographic, political, economic, and social factors that shaped up these treaties. Otherwise, one is bound to fall into the trap Coles predicted 15 years ago, thus:

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11 *Ibid*, clause 52(2).

12 I say "purported" because the CKRC as a creature of Parliament—established by the Constitution of Kenya Review Act, 2000, Chapter 3A Laws of Kenya—can only be dissolved, likewise, by legislation. See section 33 of the Act, as amended by The Constitution of Kenya Review (Amendment) Bill, 2002, providing, the CKRC can only be dissolved 'upon the enactment of the Bill to alter the Constitution ...'. No direct provision is made for dissolution by Presidential edict! Neither can this power be inferred.

13 NARC assumed power on 30th December 2002 after garnering an overwhelming majority of votes in the 2002 general elections in Kenya.

14 Positive voices have come from the NARC Government along these lines. Twice, in a span of a week in February 2003, Moody Awori, Home Affairs Minister, whose docket includes refugees, has commented positively on Kenya's need to have a law governing refugees and asylum seekers. See Nation Reporter, *Refugees to move to new camps*, The Daily Nation/Wednesday, February 12, 2003, and Nation Reporter, *Law allowing refugees to seek jobs on the ways*, The Daily Nation/Tuesday, February 18, 2003.

I think that this is particularly important in relation to refugee law because of the tendency at times, particularly among some Eastern European lawyers to see the 1951 Convention [as] a systematic and... comprehensive universal codification of the law. *To see this instrument in this way, however, is to overlook its historical origins and incurs the consequential risk of seeing the refugee problem from an inadequate and even distorted perspective.*<sup>15</sup> [Emphasis added]

This Article is divided into five parts. Part two traces the genesis of refugee protection and assistance to the dying years of the First World War. It argues that initially “international” refugee law and protection in addition to being Euro centric targeted specific categories of trans-European refugees—Russians and Armenians. Further, it demonstrates how from 1920-1930, albeit creating a High Commissioner’s Office, appointing a High Commissioner into the office and creating refugee-mobility through issuance of passports, the refugee problem was seen as a passing cloud. Hence, adoption of the *ad hoc* (or, “Fire-engine”) approach to deal with specific influxes that arose in Europe. Between 1930 and 1939, there is a change of tact from this temporary approach towards a more permanent solution that would substantively address the plight of trans-European refugees. Part three advances arguments that centre on this period. Thus, despite the setback caused by the death of the first High Commissioner, refugee protection moves from the era of target-specific arrangements to all encompassing Conventions. Further progress is also made in terms of refugee rights the Conventions prescribe. Even so, fewer achievements are made regarding states that ratify the Conventions for two reasons: first the rising xenophobia towards asylum seekers in Europe and secondly, political events in Europe, especially the Third Reich, culminating in outbreak of the Second World War.

Part four, while discussing post- Second World War era, argues that this is when concrete steps toward writing a global treaty to protect refugees and asylum seekers are taken. They begin by creation of United Nations, entrenching the High Commissioners Office into a statute, and culminate in passage of an international refugee treaty—Refugee Convention. This part further discusses salient provisions of the High Commissioner’s statute. Part

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15 Coles GJL, *The Basis and Function of Refugee Law*, 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 at 666.

five picks up from part three. It makes two arguments. First, that modern definition of the term “refugee” was shaped by two global events—the holocaust and cold war. Secondly, that rising refugee situation in Europe and elsewhere, in the world, precipitated passage of the Refugee Protocol. Owing to the fact that the Convention only applied to events that arose *before* 1<sup>st</sup> January 1951. In conclusion, part six makes specific legal and policy considerations.

### “FIRE-ENGINE” APPROACH:1920-1930

International refugee protection law is traceable to the dying years of the First World War. Although the allies—France, Britain, Russia and the United States—suffered several setbacks during the war, eventually they won the war. One of these setbacks, and which directly impacted on the refugee equation, was the 1917 politically motivated Bolshevik Revolution in Russia. From this upheaval, almost one million<sup>16</sup> men, women and children who were opposed to the Russian political system, fled from Russia into neighbouring states such as of Bulgaria, Serbia, Poland and Finland seeking refuge and to avert material devastation and famine. Migrants came in from diverse walks of life cutting across the whole strata of society—from academia to common folk. Rubinstein<sup>17</sup> describes it as an emigration akin that of a whole state involving bishops and humble monks; army commanders of the highest ranks and private soldiers; judges and lawyers; professors and students; employers and employees; landowners and peasants; partisans of the old regime and socialists who had fought against it; members of the orthodox church, Catholics, Protestants, Jews, Russians proper, Ukrainians, [and] Tartars.

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16 The exact number of these refugees is debatable: Rubinstein MJL, ‘The Refugee Problem’, (1936) 15 *International Affairs*, 716 at 716 puts it at ‘almost 1 million’; Hathaway JC, ‘Refugee Status: Evolution 1920-1950’, (1984) (33) *International and Comparative Law Journal*, 348 at 350 at, ‘... one and a half million people ...’; and Grahl-Madsen A, *The Emergent Law Relating to Refugees*, 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) 175 at 175, at ‘Around 800 000 ...’, and Skran CM, *Refugees in Inter-War Europe: The Emergence of a Regime* (Oxford: Clarendon Press, 1995) at 37 at ‘863 000’. All the same, what is clear is close to 1 million women, children and men were displaced.

17 See Rubinstein, *supra*, note 16 at 716.

Strictly speaking, these were the first major group of trans-European refugees. Protecting them was one of the first major international challenges that faced the League of Nations (League).<sup>18</sup>

Under Article 25 of the Covenant of the League, members undertook to cooperate with national Red Cross Organizations.<sup>19</sup> This provided an anchor, standing and entry point for the president of the International Committee of the Red Cross (ICRC) Mr. Gustave Ador, in 1921, into the League's discussion rooms. Grahl-Madsen<sup>20</sup> writes Article 25

Provided an opening [through which] the President of the ICRC... appealed to the Council of the League of Nations, on the premise that the League was "the only supernational political authority capable of solving a problem [that] is beyond the power of exclusively humanitarian organizations"

Ador highlighted the Russians' general suffering and desolate situation, and made a humanitarian proposal. Although the proposal was narrow and target specific, it was broad and all encompassing to the extent of its applicability. He requested the League to

...appoint a Commissioner of Russian Refugees who could provide... protection for refugees [and] promote their repatriation, resettlement, or integration and co-ordinate the efforts already being undertaken for the material relief of the refugees.<sup>21</sup>

As well as

Identify the need to define the legal position of the Russian refugees ...because it was impossible that, in the 20<sup>th</sup> century, there could be 800 000 men in Europe

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18 The Covenant of the League of Nations created the League after the First World War, in 1919, primarily to promote international co-operation and explore ways of achieving international peace and security. See also the Preamble to the Covenant, Articles 8-14, 16, and 23(d).

19 The purpose of these Red Cross Organizations was improvement of health, prevention of disease and mitigation of suffering throughout the world.

20 *Supra*, note 16 at 1.

21 See Grahl-Madsen A, *supra*, note 16 at 176.

unprotected by any legal organisation recognised by international law.<sup>22</sup>

In response, the League established a legal framework, as a stopgap measure, to protect these refugees, in February 1921. Initially, according to Krenz,<sup>23</sup> this was 'in earnest after the soviet revolution, [and] only in a pragmatic and limited way'. It is also important to note that before 1921, Governments had created temporal inter-governmental agencies to undertake international action on behalf of refugees.<sup>24</sup> 'Temporal' since their lifespan depended on whether or not their original goals and objectives were achieved. If they failed, they would be dissolved and replaced by new ones.

### PROTECTING RUSSIAN REFUGEES: CREATING A HIGH COMMISSIONER'S OFFICE

In the early years of the 20<sup>th</sup> century, the term "refugee" was tailored to suit Russians who had fled because of the Bolshevik revolution. Holborn writes that this term denoted two kinds of persons i.e. 'those who had involuntarily fled from their country for political reasons'.<sup>25</sup> And those who [had] been deprived of [their country's] diplomatic protection, and [had] not acquired the nationality or diplomatic protection of any other state.<sup>26</sup>

It is against this backdrop that two fundamental principles of international refugee law and protection emerged—political reasons as a cause of flight and lack of state protection. In fact, these principles immensely contributed to the shaping of modern refugee law. Border states, upon receipt of the refugees settled them according<sup>27</sup> to peace treaties between them and the Soviet Union, or conventional rules of the right to asylum. Normally they were not granted full citizenship or nationality in third states, primarily due to fear that naturalising them would cause undue strain on the fragile and recovering post-war economies. Despite their displacement, many Russian refugees still

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22 Skran, *supra*, note 16 at 104 quoting the League of Nations, *Official Journal* (Mar-Apr. 1921), 228.

23 Krenz FE, 'The Refugee as a Subject of International Law', (1966) (15) *International and Comparative Law Quarterly*, 90 at 99.

24 See Weis P, 'The International Protection of Refugees', (1954) (48) *American Journal of International Law*, 193 at 208.

25 See Holborn LW, 'The Legal Status of Political Refugees, 1920-1938', (1938) (32) *American Journal of International Law*, 680 at 680.

26 *Ibid*, at 680.

27 *Ibid*, at 682

maintained a tight bond with their parent state, since to them their refugeehood was temporal. Paradoxically, most were reluctant to sever the cord of nationality by becoming citizens of other countries for fear of being branded traitors. Individual third states, on the other hand, adopted their own settlement and relief schemes specific to their economic, political and social framework.

Gradually, need for a more generalised or uniform scheme became imminent<sup>28</sup>—some form of joint action, under the auspices of the League. The Russian Denationalisation Decree, of 15th December 1921, issued by the all Russian Central Executive Committee and the Council of People's Commissars, catalysed this process. This decree withdrew the right to Russian citizenship,<sup>29</sup> and by the same breath rendered stateless, *inter alia*:

- (a) [Those who had] resided abroad uninterruptedly for more than five years, and not having received before the 1<sup>st</sup> June 1922, foreign passports or corresponding certificates from representatives of the Soviet government.
- (b) [Those] who had left Russia after 7 November 1917, without the authorization of the Soviet authorities.

Writing clause (b) into the decree was obviously a mischievous political tactic by the government. Primarily it targeted those who fled from Russia after the Bolshevik revolution “without permission”. Thus by the stroke of a pen, almost a million former Russian citizens were rendered stateless. Their best available alternative lay in the League, where they sought humanitarian assistance. Considering that League members were mainly former allied states, these, now stateless persons had a good chance of receiving assistance from the League. In the recent past, the League had successfully contributed to solving similar problem—repatriating First World War prisoners of war under the directorship of Dr. Fridtjof Nansen, a Norwegian explorer, scientist, and public official.

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28 Perhaps due to the feeling by host Nations that they should not be solely saddled with the Russian refugee burden, more so with the presence of the League. Being the global peace and humanitarian watchdog, it owed a legal and humanitarian obligation to these refugees. After all, Russia, albeit being the refugee-producing nation, was in the side of the allies' team during the war.

29 Williams JF, 'Denationalization', (1927) *British Year Book of International Law*, 45 at 45.



Further to the ICRC's call in May 1921, the Czechoslovakia Government exerted more pressure on the League. It requested the League members to forge a joint front and address the Russian problem as a bloc. Both calls recognised the League's mandate and acknowledged its capability to deal with a problem of this magnitude. In response, the League established a High Commissioner's office, in August 1921, for Russian refugees in Europe and appointed Dr. Fridtjof Nansen its first High Commissioner. Generally, this office was intended to provide humanitarian assistance to former Russian nationals. Regarding "international protection", it had three terms of reference:

First, arrange the coordination of the relief work of the[se] refugees, [secondly] secure a definition of their legal status . . . , and [thirdly consider] a solution through repatriation to Russia, employment in the countries where they were then residing, or emigration to other countries.<sup>30</sup>

The High Commissioner's office was established merely as an emergency measure to assist former Russian nationals, since it was felt that their plight would be resolved finally by repatriation or resettlement in third states.

### **WORKINGS, EXPERIENCE, AND CHALLENGES OF THE HIGH COMMISSIONER'S OFFICE**

Because of his experience and success with World War I prisoners of war, Dr. Nansen was appointed the first High Commissioner for Russian Refugees. Nansen was charged with three main responsibilities. These were to arrange the coordination of relief work for the refugees, seek an appropriate legal definition of the term "refugee" for status determination purposes, and lastly consider a legal and durable solution to the Russian refugee problem through repatriation, employment in third states, or immigration to other states. As we shall see later, from the time of his appointment, the name "Nansen" soon became synonymous with the League's refugee humanitarian functions.<sup>31</sup> During this period in Europe, passports were mandatory for

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30 See Annex 224 to the Minutes of the 13th Session of the Council of the League of Nations Geneva, June 17-28, 1921.

31 See also Grahl-Madsen, *supra*, note 16 at 176 concurring that this name was inextricably linked with the League of Nations activities for refugees throughout the period of the League's existence.

international travel and personal identification. Holborn<sup>32</sup> adds, they were also used to determine special rights and duties both domestically and internationally. In addition to depriving citizenship to its former nationals, the 1921 decree “confiscated” their Russian Passports. This not only rendered them immobile and without a recognised international identification document, it also made them vulnerable and ‘lifeless’!<sup>33</sup>

### “NANSEN” PASSPORT

To counter the effects of the 1921 Decree was an arrangement,<sup>34</sup> following an International Governmental Conference of 5 July 1922 in Geneva, addressing the issue of certificates of identity to Russian refugees.<sup>35</sup> This arrangement laid down a formula for issuance of papers of international identity and travel for Russian refugees—a Russian Refugee Identity Certificate, generally referred to as the ‘Nansen Passport’. The Nansen Passport was a single sheet of paper valid for one year. It ranked at par with other European Passports. By the end of 1922, twenty-four states had agreed to recognise and accept the Nansen Passport. Former Russian nationals used it for identification and international travel. To meet the repatriation role, Nansen entered into negotiations with the Russian Government to allow these refugees to return home.

His efforts bore fruit when the Russian Government gave its guarantee to accord returnees necessary protection and security, notwithstanding the 1921 Decree. The first batch of 771 was repatriated from Bulgaria, to Novorossisk, in 1923. However, this project did not last long mainly because refugees distrusted their Government’s genuineness. These premonitions were confirmed in 1924 when the Russian Government refused to grant authorisation<sup>36</sup> to any more refugees, and subsequently wound up the whole project. Even so, within a span of one year 6000 refugees had been repatriated.

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32 Holborn, *supra*, note 25 at 683.

33 A Russian adage goes: ‘a man without a passport is like a man without a soul’!

34 This was a document containing merely recommendations between states and setting out some “universal” procedures on rights and treatment of Russian refugees within their jurisdictions initially, and other classes of refugees, from Europe, later on.

35 355 L.N.T.S. 238.

36 See Rubinstein, *supra*, note 16 at 718

## EXPANDING THE “NANSEN” PASSPORT—1924 “ARMENIAN” ARRANGEMENT

In July 1924, Europe experienced yet another refugee crisis from Armenian refugees scattered particularly in Syria and Greece. They all sought the High Commissioner’s protection. Hathaway<sup>37</sup> attributes their refugeehood to systematic persecution and massacre by the Turkish Government as a result of its distinctive religion and culture. Historically, this can be traced to February 1915, [when] Turkey commenced a series of mass deportations and indiscriminate killings of Armenians.<sup>38</sup>

Temporary protection was granted by subsequent allied occupation.<sup>39</sup> But, the massacres began again in earnest in October 1921 following the withdrawal of French troops, ... and ensued during 1921 and 1922.<sup>40</sup>

In response, the High Commissioner sent a circular to League member states highlighting the refugees’ plight. He requested the member states to extend the Nansen Passport and its benefits to these Armenian refugees as an emergency measure. Thirty-two members responded positively and vide an Arrangement of May 31 1924 issued Certificates of Identity to Armenian refugees. To the refugees this certificate provided a vehicle for international travel. On the other hand, it was a means through which a state could ascertain accurately the level of its refugee population. Such statistics were not only useful in making and shaping policy, but also during repatriation or resettlement.

With two concurrent systems of determining refugee status in Europe, problems were bound to arise when filtering legitimate Russian or Armenian refugees from those who sought asylum for purely economic reasons. To seal these gaps some states introduced specific administrative measures and decrees,<sup>41</sup> prescribing requirements that applicants seeking asylum had to satisfy. On the League’s side, Nansen convened an Inter-Governmental

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37 Hathaway, *supra*, note 16 at 352.

38 *Ibid*, at 352.

39 *Ibid*, at 352.

40 *Ibid*, at 352.

41 See Holborn, *supra*, note 25 at 685.

Conference to curb this diverse development of systems of determination. To him, the best solution was to define a “Russian” or “Armenian” refugee. This was settled vide a 1926 arrangement relating to the issue of identity certificates to Russian and Armenian Refugees.<sup>42</sup>

## **1926 IDENTITY ARRANGEMENT**

The 1926 Arrangement defined a Russian refugee as:

Any person of Russian origin who does not enjoy, or ... no longer enjoys, *the protection of the Government of the Union of Soviet Socialist Republics* ... and who has not acquired another nationality. (Emphasis added)

Skran<sup>43</sup> writes the words ‘Russian origin’ referred to persons from the former Russian Empire—Russia, Ukrain, Jews, Cossack, and Georgia. An Armenian refugee, on the other hand, was:

Any person of Armenian origin, formerly a subject of the Ottoman Empire, who does not enjoy, or ... no longer enjoys, the protection of the Government of the Turkish Republic and who has not acquired another nationality.

These definitions, according to Hathaway,<sup>44</sup> were incorporated in the Intergovernmental Conference ‘in substantially verbatim form’. This paradigm shift from the former ethnic based definition is laudable. It marked the beginning of a new angle of addressing the plight of refugees. However, in terms of numbers, the Arrangement failed to achieve its primary goals—universal applicability and harmonisation of the system—since only 23 member states ratified it. The rest opted to operate under the old regime. Nevertheless, significant achievements were made from the conference. For instance, creation of an income-generating scheme to meet the High Commissioner’s operational overhead—previously met by the League. The scheme was in the form of an annual fee<sup>45</sup> levied through a ‘Nansen Stamp’ payable for the Nansen Passport.

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42 Treaty Series No. 2004, LXXXXIX, P. 47.

43 *Supra*, note 16 at 109.

44 See Hathaway, *supra*, note 16 at 353.

45 See Holborn, *supra*, note 25 at 686.

## “OTHER” REFUGEES

Two years later, an Inter-Governmental Conference, Geneva, extended the 1926 Arrangement. This was Vide a June 30, 1928, arrangement relating to the legal status of Russian and Armenian refugees.<sup>46</sup> Initially, this Conference was intended to draft a Convention covering all classes of trans-European refugees. However, most member states ditched the proposal for fear of saddling themselves with uncertain future legal obligations from this seemingly endless flow of refugee. States instead appeared to prefer dealing with emergencies. Generally, the Conference brought within the League's ambit other categories of refugees that had arisen in Europe, in the previous two years—Assyrians, Assyro-Chaldans, Syrians, Kurds, Turkish,<sup>47</sup> and assimilated refugees. Further, the 1922 Nansen Passport and its attendant travel and identity benefits became available.

However, it made very ambitious recommendations,<sup>48</sup> perhaps explaining why it failed to attract a sizeable number of member states. It sought to bring the High Commissioner's Office at par with Ambassadors. It proposed bestowing upon the High Commissioner, through its local representatives, quasi-consular functions such as issuance of certificates of identity, visas, resident permits, and travel documents to refugees. Secondly, use of law on domicile or residence—where one lacked a place of domicile—to determine personal status of refugees. Thirdly, bestowing upon refugees, rights and duties commensurate to those granted by a state to its nationals, such as: free access to legal assistance, removal of employment restrictions, relaxation of expulsion measures, equal taxation, issuance and renewal of passports and visas, and acceptance of the return clause.<sup>49</sup> Finally, states were urged not to expel refugees within their borders until (an)other state(s) was willing to take them up. Theoretically, the recommendations were laudable. Holborn concurs thus,

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46 League of Nations Treaty Series, Vol. LXXXIX, No. 2005.

47 Jennings RY, 'Some International Law Aspects of the Refugee Question', (1939) *British Year Book of International Law*, 98 at 100 explains that these are those who were subjects of the Ottoman Empire, who under the terms of the Treaty of Lausanne did not enjoy the protection of the Turkish Republic.

See Hathaway, *supra*, note 16 at 356-357 on the final version of the extended refugee definitions. This was almost similar to earlier definitions adopted for a "Russian" and "Armenian" refugee by the 1926 Arrangement.

48 See Holborn, *supra*, note 25 at 687.

49 This Clause provided for the facilitation of the return of a Passport holder to their state of origin. It was introduced to counter the preceding state practice of disallowing refugees' entry into their territories unless their Visas contained this Clause. It served as a guarantee that refugees did not intend to settle permanently in a third state, but would return home once it became conducive for them to do so.

for the first time there was a comprehensive consideration of all aspects of the legal status of refugees.<sup>50</sup>

However, the implementing partners—member states—thought otherwise. In the end, much to Nansen's dismay, only a dismal 12 states ratified it. Its far-reaching recommendations could not be accommodated within the domestic political, economic, and social frameworks of third states.

Between 1925 and 1929, the International Labour Office temporarily undertook the employment, relief and re-settlement functions of the Nansen Office. It left the administrative work in the Assistant Commissioner's docket. In 1930, the High Commissioner's Office was temporarily transferred and incorporated into the League's Secretariat. By then, the League had begun considering steps to limit its activity, hoping<sup>51</sup> a lasting and final solution to the refugee problem would soon be found. Unfortunately, Nansen, the pioneer of refugee law, passed away in May 1930, aged 68 years, before this dream was realised. His death was a big blow to the international refugee crusade. This notwithstanding, some League members went ahead to propose "liquidation" of the Nansen office despite the refugee problem remaining unsolved.

Fortunately, the proposal did not sail through. Instead, a rather interesting two-pronged compromise was arrived at. Firstly, it was decided that the Office be given a maximum ten-year operational lifespan, making it windable by December 31, 1938. Several questions may arise in this regard, three of which are:

- i) Had member states consulted the gods who predicted that within ten years, Europe's refugee problem would be finally solved?
- ii) Was it a ten-year temporary experiment before they sought to explore another alternatives? Or
- iii) Were they giving refugees and refugee influx a ten-year ultimatum to find a permanent solution whereafter, irrespective of the result, the entire project would be abandoned?

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50 Holborn, *supra*, note 25 at 687.

51 See Holborn, *supra*, note 25 at 688.

The League also decided to create an autonomous humanitarian refugee relief organization to succeed the Nansen Office—the Nansen International Office for Refugees—but under its authority and direction. In reality, it was functionally similar to the Nansen Office but operating differently. Like the Nansen Office, it was charged strictly with the humanitarian task relating to maintenance of refugees, their relief, employment, and settlement. Meanwhile, the League's Secretariat retained the legal and political protective functions.

## **FIRST TEN YEARS OF INTERNATIONAL REFUGEE PROTECTION: A COMMENT**

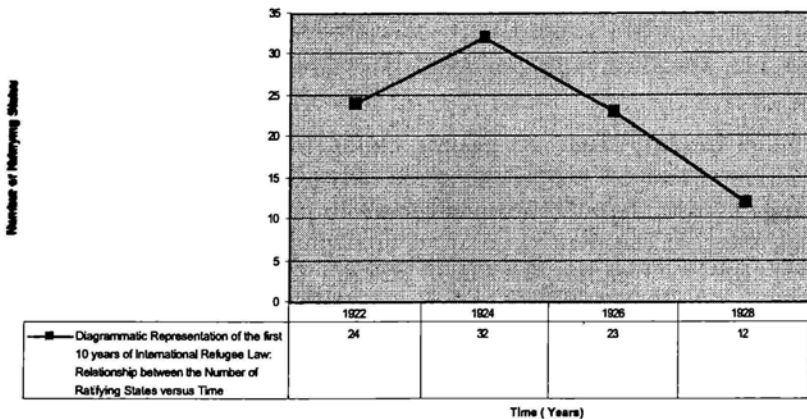
Although initially seen as a passing cloud, modern international legal protection of refugees is traceable to the early post-First World War period. During this time, the only known refugees were political refugees from Russia fleeing the civil war that had erupted following the Bolshevik revolution. Despite the low numbers, the League still saw the need and importance to address their plight from through humanitarian and legal interventions. Overall, this converted them from “political” to “statutory” refugees. The process commenced by establishing a High Commissioner's office, and subsequent appointment of a High Commissioner to run the office. However, on its own, the High Commissioner's office was powerless. Third states had to be involved. Arrangements, prescribing minimum refugee rights, were introduced to firmly embed third states into the entire equation.

The first arrangement of 1922—establishing the Nansen Passport—was ratified by 23 states. A sizeable number then. However, over time it dawned on League members that the refugee problem was not actually the passing cloud it was initially thought to be. With half-finished job of repatriating Russian refugees still in his hands, the High Commissioner received another call from Armenian refugees scattered in Syria and Greece, in 1924. In response, another arrangement was drawn up to protect them, which 32 member States ratified. For purposes of uniformity and harmony, it was decided to fuse the two arrangements and replace them by one covering both classes. Paradoxically, the number of ratifying states that ratified the “fusing” arrangement fell back to the original number of 23. It is here that the first signs of state lethargy, as regards the refugee influx, began to be felt. Since it is only reasonable that all member states, which ratified the 1924 Armenian arrangement, would similarly ratify the new ‘treaty’, which in real terms did not fundamentally introduce any new ideas or concepts. This attitude persisted and in deed escalated gradually over time. Hence, in the last years of the

1920s only 12 states ratified a substantive 1928 arrangement passed to cater for new refugee situations.

The following graph illustrates the decline of interest among the states.

Diagrammatic Representation of the first 10 years of International Refugee Law



Diagrammatic representation of the first 10 years of international refugee law

By extrapolating this line, it can be predicted that by 1934 no state would be willing to ratify any arrangement. Several reasons may be attributed to this: the recovering post-war economies which were unable to effectively bear the refugee load; the political and social upheavals that states faced domestically; or, maybe the rising levels of xenophobia which threatened political survival.

As previously mentioned, an arrangement was a document that contained a set of recommendations to states, requesting them to accord specific rights to refugees within their territory. Unlike law proper, a “contracting” state could choose not to be bound by a latter arrangement proceeding from a previous one, or as we shall see later, enter into one with certain modification(s) tailored to meet specific needs and concerns. Similarly, states could walk out of them by the stroke of a pen. They are close to what the law of contract terms “gentleman’s agreement”, lacking in any force of law, and only entered into solely for humanitarian reasons. For them to apply domestically, their provisions had to be incorporated by passage of relevant municipal legislation.



At most, they were an expression by ‘contracting’ states of their willingness to assist refugees covered by a particular arrangement. Rubinstein best summarises them as:

... powerless to provide a status for refugees. The recommendations remained inoperative; [and] required to be transformed and translated into law by ... AThird] States.<sup>52</sup>

The League applied arrangements in the 1920s on an *ad hoc* basis to alleviate the plight of refugees. It was akin to developing a specific hose for every fire that broke out, but still using the same firefighters. In addition to being ethnic oriented, arrangements were used to meet new or modified mass influxes that periodically emerged. In the 1930s, there was a change of formula from arrangements to conventions—a fire engine for all fires—a paradigm that applies to date.

In terms of content, these arrangements, first, sought to define the term ‘refugee’ for purposes of status determination. Secondly, they provided some form of identity and vehicle for mobility—achieved by the Nansen Passport initially available to Russian refugees, and later expanded to cover other trans-European refugees.

Latently, these arrangements filled the ‘protection-gap’ created when the refugees fled to third states. Thus, a Russian or Armenian refugee was defined as a person who ‘no longer enjoys the protection of their’ state of origin *and* ‘has not acquired another nationality’. Once a refugee acquired “another nationality” by that very fact s/he gained state protection. Similarly, the “comprehensive” Recommendations of the 1928 Inter-Governmental Conference generally sought to bridge this gap. For instance, equating refugee rights to that of locals, suggesting opening up of labour boundaries to refugees, declaring them eligible for taxation at the same rate as nationals, and seeking to perform consular functions such as issuance of passports, permits and visas.

Regarding the ten-year operational ultimatum issued to the Nansen Office, Rubenstein<sup>53</sup> confesses his inability to grasp the exact meaning of the word “liquidate” that was used to refer to this office. In seeking an answer he writes, rather strongly:

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52 See Rubinstein, *supra*, note 16 at 727.

Were it simply a question of the administrative liquidation of the refugee organisation, it would be easy to understand; the officials would be dismissed [and] ... Office closed. That is quite simple. But can the League of Nations, without compromising itself, effect such liquidation so long as the refugee problem remains unresolved? For eighteen years it has maintained costly and complex organisms; then one day, because it is December, 31<sup>st</sup>, 1938 – it closes the doors of the office and leaves the work unfinished. For my part I think that is impossible. *You cannot liquidate the work without first liquidating the problem. And if it is the problem that we are considering, how can we fix a date in advance for its liquidation?* It cannot be liquidated otherwise than by the return of the refugees to their country of origin- and that return depends upon events which cannot be fixed according to the calendar ... (Emphasis added)

After Nansen's death, the League created an international *autonomous* refugee office, but under its *authority and direction*. The next part evaluates workings of this office.

## **THE SECOND DECADE OF REFUGEE PROTECTION: CONVENTION AND ARRANGEMENT MIX, 1930-1939**

During the first ten years of refugee protection, the parameters used to define, classify, and protect refugees were territorial and ethnic-based. Each treaty addressed a specific group of refugees. Weis<sup>54</sup> argues:

Intergovernmental efforts for the improvement of the legal status of refugees were directed to the conclusion of multilateral treaties *relating to specific groups of refugees as they emerged*. (Emphasis added)

Refugeehood<sup>55</sup> was a matter of fact. An individual seeking refugee status was required to demonstrate that s/he came from a *refugee producing* region. However, this mode of determining status could not be sustained for long because of the escalating number of people seeking refugee status in Europe.

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53 *Ibid*, at 733.

54 Weis, *supra*, note 25 at 194

55 This refers to the condition of being a refugee.

Thus, need for an inclusive definition was necessary to accommodate new arrivals especially from the Third Reich. From the 1930s, the League was forced to change tact and adopt a new *modus operandi*. It opted for a more binding instrument in the form of Convention to replace the earlier arrangements.

### THE NANSEN CONVENTION OF 1933

First in the list was the Convention relating to the International Status of Refugees of 1933, or *Nansen Convention* as it was popularly known. Three observations can be made regarding to this Convention. In the first place, it bestowed legal status, and created obligations upon Nansen passport holders and ratifying States respectively. Secondly, compared to earlier arrangements, it offered several advantages such as, regulating certain points of public international law; securing freedom of access to courts and most favourable treatment with respect to welfare, relief, and taxation; and foreseeing certain modifications on the measures restricting employment.

Thirdly, it is from this Convention that initial signs of the principle of *non-refoulement*<sup>56</sup> become apparent. However, universality of rights and obligations intended originally by the Nansen International Office, was not achieved. Because of xenophobia that was sown and continued to flourish during Nansen's term of office, only 8 states acceded to the Convention. Even then, it was with a lot of reservation, especially regarding employment rights and return of criminal refugees. A fundamental issue the Convention failed to address, despite its "international" character, was the process leading to determination of refugee status.

In the 1930s, Europe experienced another major mass displacement and movement of refugees from Nazi Germany during the reign of Adolf Hitler. Hitler, and the then ruling German National Socialist Party, strived to create a *pure* German state. They envisaged a state exclusively for people with *full*

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56 See Art. 3(1). This doctrine requires State parties not to expel or return refugees who were lawfully in their countries back to their state of origin, save for reasons of national security or public order. Indeed, this provision was subsequently transposed word-for-word in the Statute creating the Office of the United Nations High Commissioner for Refugees, 1950, (see Art 6(1)). See also Arts. 32 of the Refugee Convention and 1 (1) of the Refugee Protocol, whereunder state parties to the Protocol undertook to apply, among others, Arts. 32 of the Refugee Convention.

German blood. Effectively excluded from this category were those whose blood was tainted by an iota of non-German or foreign blood. Initially, non-Germans were segregated, denationalised,<sup>57</sup> and finally forcibly ejected from Germany. Hundreds of thousands<sup>58</sup> of non-Germans, predominantly Jews and non-Aryans, sought asylum in neighbouring states. Internationally, Netherlands brought their plight to the League of Nations Assembly. Germany, then a member of the League, objected to a proposal seeking to bring them under the Nansen International Office. Although coming as a compromise, the League departed from its traditional 1920s emergency measures of arrangements to a more durable solution. It created an autonomous office of the High Commissioner for Refugees (Jewish and others),<sup>59</sup> (Jewish High Commissioner), with its own governing body independent of the League.

### **JEWISH AND OTHERS HIGH COMMISSIONER'S OFFICE**

As the name suggests, the only category of migrants to obviously fall under the protective mandate of the Jewish High Commissioner, Mr. James McDonald, were Jews from Germany. Even so, the High Commissioner had to address at least three concerns. The first two revolved around who was a "Jew". Therefore, he had to define or lay a test(s) to determine who was to be considered Jewish. Secondly, determine status of children born of mixed German and Jewish parents, as well as German nationals married to non-Germans but who had opted to flee with their families. Thirdly, who fell in the "others" category? Since the Convention was passed to protect non-German nationals fleeing from Germany, nationals of the "others" category had to have come from the German state. Since Jews were already catered for by parity of reason this category targeted non-Jewish nationals. Subsequent events, discussed below, addressed these concerns.

Functionally, the terms of reference for McDonald's and Nansen's offices were similar, i.e. negotiating with governments on fundamental refugee concerns such as issuance of passports and other forms of identification documents,

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57 As Holborn writes, *supra*, note 25 at 691, the annulment of their German nationality, was carried out on a large scale and took two principal forms: the revocation of naturalisation on racial grounds, and the withdrawal of nationality on political grounds.

58 *Ibid*, at 698 writing that by 1934 the number of non-Aryan refugees had risen to 800 000.

59 159 L.N.T.S 75.

employment, and re-settlement. Its prime shortfall however lay in its establishment as a compromise office, since league members were reluctant to challenge Germany's expansion at the expense of its neighbours. Overall, McDonald experienced external difficulties as he strived to protect refugees. As Holborn<sup>60</sup> writes

work and resident permits [became] increasingly difficult to procure, ... refugees ... suffered through the exclusion of aliens from employment during [Europe's] economic depression [and] the vicious cycle of unemployment, notice of expulsion, and evasion or entry into another country, both of which led to imprisonment [soon caught up with them].

Because of this, McDonald was not able to achieve as much as Nansen.<sup>61</sup> Notwithstanding this, the population of forced migrants from Germany did not reduce. Instead, it escalated calling upon McDonald's intervention. For instance, the 1935 reunification of Germany with the Saar basin<sup>62</sup> displaced 3300 Saars into France and Luxembourg. Assistance was sought from McDonald under the "others" class. After this influx, McDonald did not last long in office because of external political pressure which forced him out of office. He resigned in December 1935 citing "politically unreliable" persons in Germany, to be succeeded by Sir Neill Malcolm in early 1936. When Malcolm assumed office, the High Commissioner's mandate had been significantly reduced. He was strictly to focus on the legal status and employment of refugees, leaving the traditional humanitarian work of the office to private humanitarian organizations.

Subsequently, two treaties were passed to protect migrants from Germany, both centring on the definition of the term "refugee". Firstly, an Inter-Governmental Arrangement, of 1936, extended identity and international travel documents generally to "refugees from Germany". However, an applicant(s) was required to satisfy four basic requirements

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60 Holborn, *supra*, note 25 at 692.

61 Ibid, at 692.

62 See Annex to the League of Nations Doc. CL 120. 1935.XII.

One, the person(s) [must have previously been] settled [and living] in [Germany], ... [two, they did] not possess any nationality other than German nationality, [they had unwillingly left the German territory], and [finally] in respect of whom it is established that in law of fact, [they] no longer enjoy the protection of the Government of the Reich.<sup>63</sup>

This Arrangement was passed following Nazi Germany's withdrawal of political protection and recognition from its nationals who were not full Germans. During McDonald's tenure, it was not necessary to provide them with any travel documents since they still possessed internationally recognised German passports. Two years later, in 1938, the Convention Relating to the Status of Refugees coming from Germany,<sup>64</sup> ("German Refugee Convention"), expanded this definition to include

- (a) Persons possessing, or having possessed, German nationality and not possessing any other nationality and *who are proved not to enjoy ... the protection of the German Government*; and
- (b) Stateless persons not covered by previous Conventions of Agreements who have left German territory after being established there, and who are proved not to enjoy ... the protection of the German Government (Emphasis added)

Collectively, the 1936 Arrangement and 1938 German Refugee Convention definitions supplemented the 1933 Nansen Convention and also provided useful guidance to the Jewish High Commissioner in its quest to determine who was "Jewish" or "other" refugee. Hathaway adds that this definition

was designed to extend protection both to Germans who had been residing outside Germany for an extended period, and to stateless persons who had been living in Germany.<sup>65</sup>

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63 See Holborn, *supra*, note 25 at 695; and Hathaway, *supra*, note 16 at 363 on this, and further on the Explanatory Notes to the Draft Convention of the 1936 Conference at 364.

64 192 L.N.T.S 59.

65 *Supra*, note 16 at 365.

Excluded from the Convention's mandate were persons who had left Germany for personal convenience for three reasons. First, they still enjoyed diplomatic protection offered by their parent state despite being abroad. Secondly, they had not left the Government of the Reich because of any political reason(s) known to the High Commissioner. And thirdly, their absence was more or less temporal since they were free to return to Reich whenever they so desired.

By late 1930s, the Third Reich was expanding rapidly in Europe at the expense and dilution of the League's power, goodwill, and mandate. Increasing at the same rate was the forced migrant population, majority of whom sought refuge in the neighbouring European states. For instance, the 1938 annexation of Austria and Sudetenland displaced one hundred thousand men, women, and children. In response, the League passed two Council Resolutions in 1938 and 1939. Overall, these resolutions extended benefits of the 1936 Arrangement and 1938 Convention to refugees from German territories formerly known as Austria and Sudetenland.

### **FUSING THE TWO HIGH COMMISSIONERS' OFFICES**

The decision to fuse these two High Commissioners' offices—German and Nansen—appears to have been prompted by an earlier decision of the League's Assembly in 1930, giving the Nansen International office a ten-year lifespan. However, with time, coupled by events on the ground, it dawned on the League that Europe's refugee problem could not be solved within this time frame. Moreover, the Nansen International Office was soon to die a natural death, creating need for a succeeding humanitarian agency. Thus, the League's Assembly mandated the two High Commissioners to explore modalities of establishing a global agency under the League's auspices. It is at this point that initial steps for establishing a global refugee agency were made. As a way forward, the two High Commissioner's offices were fused and one High Commissioner for Refugees—Nansen, and Germany and others—appointed. Sir Robert Emerson was appointed its High Commissioner. In addition to the traditional humanitarian role, Emerson's office regained the legal and political protection roles previously transferred to the League.

After the First World War, the United States of America remained fairly economically and politically stable. This made it a magnet for those fleeing from advancing Nazi forces. As a lasting solution, President Roosevelt of the United States, proposed a look at the root cause(s) of forced migration, instead of concentrating on protecting refugees once they are in third states. Compared

to previous efforts that addressed the problem from the stem, this step—seeking to cut it from the root—was laudable. In 1938, Roosevelt called a meeting of European Governments in Evian, France, with two issues in mind. Firstly, to immediately assist German and Austrian refugees in Europe, and secondly, create a permanent international organization to protect actual and potential refugees. This Conference gave birth to the Inter-governmental Committee on Refugees, (IGCR), under the Directorship of George Rublee. Rublee was charged with two major tasks. The first was undertake negotiations seeking to improve the prevailing conditions of the refugee exodus and to replace them by *orderly*<sup>66</sup> emigration.<sup>67</sup> Secondly, in conformity with the refugee focus role, approach third states seeking to develop opportunities for permanent settlement. By this time, the final touches to the Second World War picture were being put into place. Most countries in Europe had read the signs of Hitler's actions and were busy marshalling troops to their frontiers to avoid being caught off guard. This made it difficult for Rublee to lead an "orderly migration" of refugees predominantly from Armenia, Russia, Germany, Austria and Spain. Grahl-Madsen also rules out this possibility for almost similar reasons. He attributes it to 'increasing international tension, culminating in the outbreak of the Second World War'.

### SOME OBSERVATIONS ON THE SECOND DECADE OF THE EVOLUTION OF REFUGEE PROTECTION

Two decades later, it appeared there was a genuine desire among global powers to rid Europe of the refugee problem completely. However is also clear that this dream was not going to be realised very soon since it was on a direct collision course with Hitler's ambition to create a purely German state. A major legal achievement made during this period was introduction of the doctrine of *non refoulement*. In fact, reading the 1933 Convention together with the Recommendations of the 1928 IGC, it is rather obvious that the Convention borrowed most of its salient principles from the 1928 IGC.

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66 This was a very tall order for him since from experience forced migration has never been an orderly affair, be it in Africa or Europe. See also International Refugee Organisation, *The Facts About Refugees* (Palais des Nations: Geneva, 1948) at 4.

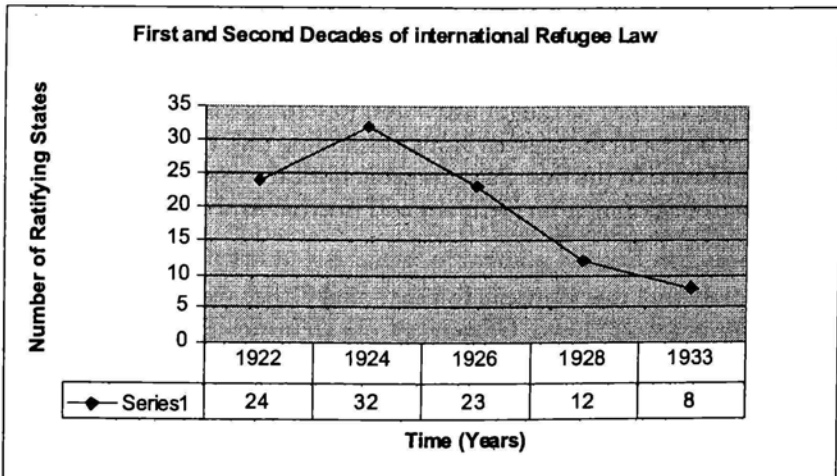
67 See Jennings, *supra*, note 47 at 109.

67 See *supra*, note 16 at 182.



Events in the Third Reich clearly demonstrate the close inter-relationship between the flow of refugees and politics. Political muscling and manipulation takes centre stage, forcing the League to appoint another High Commissioner for German Refugees. Eventually, however, this office is bestowed with similar core roles and responsibilities performed by the current High Commissioner's Office. It is arguable that during Nansen's term, two High Commissioners' offices existed—one for Russians and the other for Armenians. However, this may be excused on grounds that at that time the problem was still at its infancy. Confusion and uncertainty reigned as solutions to the problem were sought. This argument cannot hold this time around since the High Commissioner's office had almost lasted twenty years.

A common problem both High Commissioners' Offices—Macdonald and Nansen—had to address was prevalent xenophobia shown towards refugees. This was manifest through denial of employment opportunities, *refouling* and imprisoning those who evaded or refused to comply with notices of expulsion. Though in terms of achievement, Macdonald's Office achieved even less than the Nansen's Office. For instance, only a dismal eight states ratified the 1933 Nansen Convention, and even then, with a lot of reservation—especially in employment. Graphically if this number was included in the earlier graph,<sup>68</sup> this is what emerges:



Not a very encouraging trend especially to a new High Commissioner.

68 At page 16.

A common characteristic of the 1920s and 1930s is recognition of state protection towards its nationals. This explains why Arrangements and Conventions generally defined the term “refugee” as a national who had lost protection of their *parent state*. Two years before the Nansen Office was to be liquidated, the 1938 German Convention expanded this definition to cover stateless persons. Even so, the core elements—Nationality and State protection—were retained. Additionally, onus was bestowed exclusively upon asylum seekers to *prove* in law that they did not enjoy their parent state’s protection. This was a shift from the earlier model where *Third State determined* refugee status in *law* or *fact*.

During this second decade, initial steps towards creating a universal refugee agency are made. Following Germany’s fallout with the League, the two High Commissioner’s offices are merged into one. In 1938, an IGCR is established under the directorship of Rublee. As mentioned earlier, expectations were quite high on Rublee’s office. For one, he was expected to turn flight exodus into an *orderly* emigration pattern. It is unrealistic to expect someone fleeing for his or her life to observe traffic rules and Regulations. At times of flight, an individual’s prime consideration is safety. Strict observance of rules and regulations is but a secondary consideration unless of course member states that attended this conference attributed a different meaning to the term “orderly”. Rublee’s second role was to approach third states for resettlement purposes. This was suicidal bearing in mind two factors. Firstly, attitude States exhibited towards refugees—as the two graphs depict. Secondly, being the period preceding the outbreak of World War II, most states were busy stocking their armouries lest they be caught unawares. Resettling forced migrants was not a primary matter in the agenda. Notwithstanding this, the IGCR suffered two major setbacks. In the first place, its geographical scope of operation was limited to persons fleeing from Germany and Austria. And secondly, it lacked a strong financial base.

It is not entirely true that Nansen’s International Office was to be liquidated once its ten-year tenure lapsed. Of course, from an institutional point of view this statement may be correct, but not in real terms considering the core functions this office performed, and which the IGCR subsequently inherited. Recalling Rubenstein’s<sup>69</sup> words, whilst referring to the proposed liquidation of the Office,

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69 *Supra*, note 16 at 734.

Whatever the political contingencies of the hour, the League of Nations—our highest International authority, on which so many men and women rest their hopes—cannot be responsible for such betrayal.

The next part examines the Second World War and its impact on international refugee protection.

## **FROM BETRAYAL AND FALL OF THE LEAGUE TO THE SECOND WORLD WAR, 1939-1951**

Notwithstanding the League's covenant clear language restraining members from using violence to resolve disputes, the 1930s proved a dark period for the League in achieving global peace and security. Some individual members chose to pursue their selfish interests at the cost, and in total defiance, of a Covenant that they had so religiously created. For instance, Japan sought to increase its territory by invading Manchuria in 1931 and China in 1937; Mussolini conquered Ethiopia in 1935; while Adolf Hitler tore the Treaty of Versailles and Locarno Pact, in 1937. Further, the Great Depression catalysed fascist empire building. Despite these distractions, no serious thought was given to inject fresh blood and mandate into the League to enable it counter them. Instead, states turned a blind eye and concentrated on protecting themselves against any possible aggression. A picture similar to pre-World War I was gradually developing and it was just a matter of time before the second war finally broke out.

In August 1939, Hitler, intent on realising his dream to conquer the whole of Europe entered into a secret pact with the Soviet Union in Moscow—the German-Soviet Nonaggression Pact. Primarily, the pact sought to divide Poland between them. Poland meanwhile, having gauged Hitler's intentions, approached and received guarantees of military support and protection from France and Britain, lest the Nazis attack them. When the terms of this pact became open, western forces' attempts to restrain Hitler diplomatically failed. The following month, on 1<sup>st</sup> September 1939, Hitler invaded Poland. Great Britain and France, pursuant to their guarantees, responded by declaring war on Germany two days later. Trying to stop this war was a litmus test for the League, which it miserably failed. As Savage<sup>70</sup> writes

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70 See Savage K, *The Story of the United Nations*, (London: Boadly Head, 1966) at 18.

The Second World War changed overnight from a dreadful threat of ghastly reality and the failure of the League of Nations.

The League betrayed states that had looked upon it in earnest to guarantee global peace and security. Where could the millions of Trans-European refugees, who had placed so much faith and trust upon it now turn to! The subsequent discussion will be the impact of the war on international refugee protection.

## **THE SECOND WORLD WAR AND ITS IMPACT ON INTERNATIONAL REFUGEE PROTECTION**

### **Second World War and Creation of the United Nations**

Initially, the Second World War pitted the allies—mainly France, Britain, Russia and United States—against the axis—mainly Japan, Italy and Germany. Later on, the conflict spread to every continent dragging into it men, women, and children. The war, preceded by events in the latter part of the 1930s, plunged the world into a 6-year show of military might, shelling and bombing, destruction of property, human displacement, suffering and misery. It ended in 1945 with the dropping of atomic bombs at Hiroshima and Nagasaki, and the subsequent surrender of the Japanese. In terms of cost, approximately \$ 1 trillion (!) was spent. Whilst in human terms it displaced almost 21 million people. Millions more throughout Europe were rendered homeless<sup>71</sup> due to two primary reasons—some had their houses razed down by air artillery, while others abandoned and fled from their homes in search of peace. Overall, the Second World War caused to humanity untold sorrow and suffering. As Savage describes

Millions of young soldiers, sailors and airmen had been killed in the fighting; untold numbers of men, women and children had died in concentration camps and under enemy fire, and many more were homeless, maimed and hungry. *[All over the world people were praying for peace and security.* (Emphasis added)

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71 See *The World War: World War II: The Human and Material Costs*, Britannica © CD 99 Multimedia Edition © 1994-1999 Encyclopaedia Britannica, Inc. 1. See also generally Kempner RMW, 'The Enemy Alien Problem in the Present War', (1940) (34) *American Journal of International Law*, at 443 on the number of aliens in Europe during the Second World War.

One of the first actions the allies took after the War, was establishing a United Nations<sup>72</sup> (UN), to succeed the League. Events in the 1930s had gradually eroded the League's mandate, so when the UN was established, the League was well onto its deathbed. In the new Document—UN Charter—the people of the United Nations recognised the need to save succeeding generations from the scourge of war that had twice brought sorrow to humanity globally. Further, they reaffirmed their faith to the fundamental human rights of all men and women on earth.<sup>73</sup> The UN inherited two primary functions of the League—maintenance of global peace and security,<sup>74</sup> and promotion of human welfare. Additionally, it was mandated to develop friendly relations among nations based on the principle of equal rights and self-determination,<sup>75</sup> as well as achieve international cooperation in solving international cultural, economic or humanitarian problems.<sup>76</sup>

### Impact of the War on International Refugee Protection

During the Second World War, the IGCR was mainly involved in moving refugees from Germany and axis-occupied territories to safer allied territories. Following the liberation of some parts of Europe, its mandate was extended in 1944, to include protection and assistance of refugees from these territories. By 1946, there were still about a quarter of a million Russian, Armenian, Assyrian, and Saar refugees demanding international care; and also some 110,000 German refugees and 212,000 Spanish refugees, all who remained the concern of the IGCR.<sup>77</sup> However, the UN was not the sole refugee-protecting agency during the Second World War. Concurrent with it was the United Nations Relief and Rehabilitation Administration, (UNRRA), established in 1943 to co-ordinate the repatriation of nationals from the *allied*

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72 On 26th June 1945. On the differences between the League's Covenant and the UN Convention, see Goodrich LM, *The United Nations* (London: Stephens and Sons, 1960) at 24; and Waters M, *The United Nations: International Organization and Administration*, (London: Macmillan, 1969) Chapter 2.

73 See Preamble to the UN Charter.

74 *Ibid*, Articles 1 (1), 2 (4), and Chapters 6 and 7.

75 *Ibid*, Article 1 (2).

76 *Ibid*, Article 1 (3). At its birth, the UN had 51 members with four drawn from Africa—Egypt, Ethiopia, Liberia and the Union of South Africa. 20 years later 62 African and Asian States had been admitted into the UN; Kenya became a member on 16th December 1963. One of its global achievements includes receiving the Nobel Peace Prize, in 1988, for international peacekeeping efforts.

77 See Grahl-Madsen, *supra*, note 16 at 182.

countries.<sup>78</sup> However, UN Resolution 71, of August 1945, shifted its focus to include refugee protection. Thus, extending UNRRA aid to *other persons* who had been obliged to leave their country, place of origin or former residence. Read literally, this definition was wide enough to include nationals from former axis states. The arising question then is, was this the drafters' intention?

Vide a July 1946 Directive, an attempt was made to narrow down this definition. This was effected by prescribing a mixed objective and subjective test to limit the number of applicants for refugee status, irrespective of their geographical origin. Under the Directive, asylum seekers were required to establish 'concrete evidence of persecution'<sup>79</sup>—that any reasonable person when faced with a similar persecution environment, would have fled from the persecutors to save his/her life. Alternatively, a reasonable person looking at the flight circumstances would have arrived at only one conclusion—there was a justifiable reason to flee. After the war, in order to avoid duplicity of roles by the two agencies, the UN had two options. Firstly, to merge the two and replace them with one agency. Or, fundamentally change the terms of reference of one of them. The UN General Assembly adopted the first option.<sup>80</sup> It fused the two agencies and in its place created a successor organization in December 1946—the International Refugee Organisation, (IRO).

The IRO was established against a background that there was a genuine and urgent problem of refugees and displaced persons from the eastern bloc, Austria and Germany, which had to be rapidly and positively solved.<sup>81</sup> Thus, its primary<sup>82</sup> role was to facilitate repatriation<sup>83</sup>, re-settlement and re-establishment of refugees and displaced persons returning home from Africa, Middle East and Western Europe, after the Second World War. Its Constitution<sup>84</sup> defined "refugees" as

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78 Now scattered in Europe—mainly Austria, Germany, and Italy—certain parts of Africa, and the Near East.

79 See Hathaway, *supra*, note 16 at 373.

80 Through Resolution 18 UNTS 3.

81 See also Art. 1 (a), Annex 1 of the IRO Constitution.

82 Other tasks included, assisting persons who had been persecuted by the Nazi and Fascist regimes, through rehabilitation, restitution of property and compensation for the losses suffered. See also International Refugee Organization, *The Facts About Refugees* (Palais des Nations: Geneva, 1948) at 20.

83 It is important to realise that the IRO did not force or coerce post World War Two refugees to return home after the war. Instead, it provided country information, especially on the political situation leaving the decision to return upon individuals. Those who chose to return were given transport, whilst those remained in third states were left undisturbed.

84 See Part I, section A, Art. 1. See also the definition of 'displaced persons' in section B of Part I.

- (a) victims of the Nazi or fascist regimes or of regimes which took part on their side in the Second World War, or of the quisling of similar regimes which assisted them against the United Nations, whether enjoying international status as refugees or not;
- (b) persons who were considered refugees before the outbreak of the Second World War, for reasons of *race, religion, nationality or political opinion*. (Emphasis added)

Hathaway,<sup>85</sup> commenting on this definition, argues:

The basic [underlying] notion ... was that an individual who might be described as a victim of recognised state intolerance or as a genuinely motivated political dissident was a refugee until he either did not require or was determined to be unworthy of international protection and assistance.

The Constitution exempted<sup>86</sup>

1. War Criminals, quislings, and traitors.
2. Any other persons who [it] can be shown:
  - (a) to have assisted the enemy in persecuting civil populations of countries, members of the United Nations; or
  - (b) to have voluntarily assisted the enemy forces, [read, the axis], since the outbreak of the Second World War in their operations against the United Nations.

Its protective mandate extended to addressing refugee social issues such as nationality; statelessness and naturalisation; problems of civil status; marriage and divorce; *refoulement*; safeguarding the right to work and social security.<sup>87</sup> However, the IRO's lifespan was quite short. It was wound up after five years to be replaced by the United Nations High Commissioner for Refugees, (UNHCR), in 1950.

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85 See Hathaway, *supra*, note 16 at 376.

86 See Part II (1) and (2) of the IRO Constitution. See also Section D of Part I on how an individual formerly under the IRO's protective umbrella ceases to enjoy protection.

87 See International Refugee Organisation, *The Facts about Refugees* (Palais des Nations: Geneva, 1948) at 20.

## UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES: A GLOBAL REFUGEE PROTECTIVE AGENCY

### Creation of the UNHCR and Redefining the Term “Refugee”

Originally, the term “United Nations” was synonymous with allied States. Today, however, it refers to a global agency established by the UN Charter, primarily to pursue international cooperation in solving global problems of, among others, a humanitarian nature.<sup>88</sup> To meet this objective the UN Charter established six principal operational organs<sup>89</sup>—the General Assembly, Security Council, Trusteeship Council, Economic and Social Council, (ECOSOC), Secretariat, and International Court of Justice, (ICJ). ECOSOC<sup>90</sup> is vested with powers to draft Conventions in respect of matters falling within its ambit, and that of the Charter<sup>91</sup> as delegated by the General Assembly. For instance, promoting observance of human rights and fundamental freedoms,<sup>92</sup> and seeking solutions to international humanitarian problems. It is also mandated to recommend to the General Assembly, as well as call International Conferences on matters falling within its ambit.

Prior to establishing the UNHCR, the French Government flouted a proposal suggesting establishing an Attorney General’s office to guide and protect post Second World War refugees.<sup>93</sup> This Office was to act as an advocate, before a Court of Human Rights in instances where a state breached a refugee’s human rights.<sup>94</sup> Clarke<sup>95</sup> argues that, ‘the main stumbling block’, and subsequent failure of the proposal, was ‘the issue of the individual petition’. UN member states were reluctant to allow individuals to encroach into what they considered their exclusive domain. Even so, these proposed functions are not a far cry from those currently performed by the present High Commissioner.

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88 See Article 1 (3) of the UN Charter.

89 *Ibid*, Article 7(1).

90 *Ibid*, Article 7(1) read together with Chapter X.

91 *Ibid*, Art. 62 (1) and (3).

92 *Ibid*, Art. 1, 62 (2) and the Preamble to the Charter. This role rests squarely on the General Assembly and as delegated to the Economic and Social Council and its subsidiary body the Commission on Human Rights.

93 See Clark RS, *A United Nations High Commissioner for Human Rights* (The Hague: Martinus Nijhoff, 1972) at 39-40.

94 The Court of Human Rights served as an appellate court to the Commission of Human Rights, (CHR). Individuals Petitions were first filed and argued at the CHR.

95 Clark, *supra*, note 94 at 40.



One of the UN's immediate concern was deciding the fate of 21 million refugees now scattered all over the world, millions of homeless, maimed, hungry and sick soldiers, sailors, air personnel, men, women and children. Three proposals were floated.<sup>96</sup> First, that the UN should assume direct responsibility for the refugees. Secondly, establishment of a new specialised agency. Or, thirdly, set up a High Commissioner's Office. Eventually, the third proposal carried the day. The Statute of the Office of the United Nations High Commissioner for Refugees, (High Commissioner's Statute), established the UNHCR in 1950.<sup>97</sup> It was one of the several attempts by the international community during the 20<sup>th</sup> century to provide protection and assistance to refugees.<sup>98</sup> The High Commissioner's Statute<sup>99</sup> mandated the UNHCR not only to provide international protection to refugees falling under the UN scope and mandate, but also to seek a permanent solution for the problem of refugees by facilitating their voluntary repatriation or assimilation, in consultation with Governments and private organizations. Included in the "international protection" package were legal, social, and humanitarian concerns. However, the Statute failed to define or explain what "international protection" means. Even so, an inference can be drawn. It entails:<sup>100</sup>

- (a) promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto;
- (b) promoting, through special agreements with Governments, the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection;
- (c) assisting [in] efforts to promote voluntary repatriation, or assimilation [and resettlement] within new national communities;
- (d) endeavouring to obtain permission for refugees to transfer their assets and especially, those [that are] necessary for their resettlement.

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96 See Salomon K, *Refugees in the Cold War: Toward a New International Refugee Regime in the Early Post-war Era* (Lund: Lund University Press, 1991) at 219. For the debates that ensued, see 219-220.

97 Effected vide General Assembly Resolution 428 (V) of 14 December 1950.

98 UNHCR, *Helping Refugees: An Introduction to UNHCR* (Geneva: Switzerland) at 4.

99 See Art. 1 of the High Commissioner's Statute.

100 *Ibid*, Art. 8.

Three issues abound. Firstly, from a general reading of the High Commissioner's Statute its spirit demonstrates that member states intended it to be free of politics.<sup>101</sup> albeit its politically laden history. Notwithstanding its original intention to serve as a humanitarian organization, it still found itself drawn into politics. This is because forced migration largely depends on the prevailing political environment. Secondly, views of the pre- and post-Nansen era of looking at refugeehood as a passing cloud still persisted. For this reason, the High Commissioner's Office was initially given a 13-year renewable contract, whereafter members could 'determine whether the Office should be continued'<sup>102</sup> or not. Thirdly, for the second time,<sup>103</sup> efforts by the international community to create a statutory comprehensive definition of the term "refugee" arise. Additionally, they outlined exempt persons and drew a list of circumstances where acquired refugee status could be subsequently lost.<sup>104</sup>

Searching for an all-encompassing definition was a laudable shift from earlier ethnic centred definitions. While recognising refugees protected by earlier treaties, UN member states went a mile further and drew up a four-pronged test for determining refugee status. The High Commissioner's statute defined a refugee as<sup>105</sup>

- (i) Any person who has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928, or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization;
- (ii) Any person who, as a result of events occurring before 1 January 1951 and *owing to well-founded fear of being persecuted for reasons of race, religion, nationality or political opinion*, is outside the country of nationality and is unable or, owing to such fear or for reasons other than personal

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101 Reading through the High Commissioner's Statute, the overwhelming control the General Assembly has over the UNHCR is noticeable. This ranges from matters concerning policy (See Art. 3), to its organization and finances (See Chapter III generally).

102 *Ibid*, Art. 5.

103 The first time was immediately after the Second World War vide Part I Art. 1 the IRO Constitution.

104 See Arts. 6 (a)- (f) and 7 respectively.

105 *Ibid*, Art. 6 (i) and (ii).

inconvenience, is unwilling to avail himself (sic) 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 or for reasons other than personal convenience, is unwilling to return to it. (Emphasis added)

Two observations may be made regarding both definitions. In the first place, part (i) effectively exempted German nationals who tried to seek asylum in Europe. Secondly, the four-pronged test—religion, race, nationality and political opinion—prescribed by the second limb of the definition, was entirely borrowed from the IRO Constitution.<sup>106</sup> However, it was with an addition as regards the definition's applicability. Part (ii) introduced an objective test of "fear of persecution" to mark the starting point in the refugee status determination inquiry. And further, it created two limitations—time and geographical. As regards time, the events leading to ones refugeehood had to occur 'before 1 January 1951'. Whilst in geographical terms these "events" were restricted to two places—'Europe' exclusively, in the first place, or 'Europe or elsewhere' in the world, in the second.<sup>107</sup> At the time of acceding or ratifying the Convention, contracting states were required to choose which of the two meanings they preferred. But, there was a catch. Once a state declared its preferred choice, it had to follow it *permanently*. Effectively, this requirement prevented states from oscillating between the two definitions.

### Loss of Refugee Status

Member states went further and drew a catalogue of circumstances under which acquired refugee status would be lost—the Cessation Clause. These were instances where a refugee no longer required the High Commissioner's protection since the fear of persecution an individual faced initially had completely waned. Or, they had acquired some other form of national protection. These are instances where a person<sup>108</sup>

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106 See Part I, Art. 1(c).

107 *Ibid.*, Article 1 (B) 1.

108 *Ibid.*, Art. 6 (a)-(c). For in depth discussion of these Clauses see UNHCR Handbook, para 118-138.

- (a) has *voluntarily re-availed* themselves of the protection of the country of his nationality;<sup>109</sup>
- (b) having lost his nationality, he has *voluntarily* re-acquired it;
- (c) has acquired a new nationality, and *enjoys the protection* of his new nationality;
- (d) has *voluntarily re-established* themselves in their country of origin, or asylum,
- (e) no longer, because of the circumstances in connection with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;<sup>110</sup>
- (f) being a person who has no nationality s/he is, because of the circumstances in connection with which he has been recognised as a refugee have ceased to exist, able to return to the country of his former habitual residence.<sup>111</sup> (Emphasis added)

Also excluded were “economic refugees”<sup>112</sup> and individuals who were formerly refugees but the circumstances necessitating their refugeehood have now ceased so that presently they are driven by reasons of ‘personal convenience’ in refusing to return to their country of origin.<sup>113</sup>

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109 In the UNHCR language this Clause implies three requirements (See UNHCR Handbook, para 119):

- (a) voluntariness: the refugee must have acted voluntarily;
- (b) intention: the refugee must intend by his action to re-avail himself of the protection of the country of nationality; [and]
- (c) re-availment: the refugee must actually obtain such protection.

110 The word ‘circumstances’ here refers to fundamental changes in the country of origin, which thereby removes the basis of the fear of persecution (See UNHCR Handbook, para 135). A mere change in the facts surrounding the individual refugee’s fear, which does not entail such major changes of circumstances, is not sufficient to activate this Clause. This paragraph does not apply to refugees falling under paragraph (a), who are able to invoke compelling reasons arising out of previous persecution for refusing to avail him/her of the protection of one country of nationality.

111 This paragraph will not apply into situations where a refugee is able to invoke compelling reasons, arising out of previous persecution, for refusing to return to the country of his former habitual residence.

112 Those who “flee” to third states to pursue better economic gains.

113 See High Commissioners Statute Arts. 6 (e) and (f).

## Excluded Refugees

These are individuals eligible for the grant of refugee status, but since they can obtain protection elsewhere they are not granted the status. Generally, the excluding clauses, commonly referred to as “Exclusion Clauses”, prevent individuals seeking asylum from obtaining double international protection. Excluded are<sup>114</sup>

- (a) nationals of more than one country; The rationale here is if they face persecution from one country (ies) for statutory reason(s), they can still enjoy international protection from the other country (ies), where they are nationals. Unlike their refugee counterparts, all is not lost since they still have alternative state protection to fallback upon. For this reason, they do not require the High Commissioner’s international protection. This argument may fail where persecution comes from all corners—the second, third, or fourth country (ies) —but which is a rare situation to find.
- (b) those who were recognised, by the competent authorities, in the country in which they had taken residence, as having the rights and obligations commensurate with to the nationals of that country;

This category of refugees is akin to those in para (a) though this time round, they could have lost their State of origin’s protection, but have equally acquired yet another form of internationally recognised protection. In the end, they still enjoy some form of protection commensurate to what they would have received from their state of origin.

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114 See Arts 1 (D), (E) and (F) of the Refugee Convention and 7 of the High Commissioner’s Statute.

(c) those who continued to receive from the other UN organs and agencies protection and assistance; The idea here is to avoid duplicity in functions and enhance complementariness amongst various UN organs and, or agencies. Especially between the UNHCR and agencies such as United Nations Relief and Works Agency for Palestine Refugees in the Near East,<sup>115</sup> (UNRWA), and the former United Korean Reconstruction Agency, (UNKRA). UNRWA was established<sup>116</sup> in 1949, as a subsidiary organ of the General Assembly to offer services geared towards economic rehabilitation to refugees who fled from Palestine,<sup>117</sup> (Palestine refugees), into neighbouring states, during the first Arab-Israel conflict. Examples of services<sup>118</sup> include food, shelter, education, health care and social services. Meanwhile, Palestine refugees<sup>119</sup> are described as persons whose normal place of residence was Palestine between June 1946 and May 1948, who lost their homes and means of livelihood as a result of the 1948 Arab-Israeli conflict, and ... took refuge in Jordan, Lebanon, the Syrian Arab Republic, the Jordanian-ruled West Bank or the Egyptian-administered Gaza Strip.

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115 Goodwin-Gill GS, *The Refugee in International Law*, 2nd Ed, (Oxford: Clarendon Press, 1996) at 221 partly blames 'political reasons' for the exclusion of UNRWA from the competence of the UNHCR. While according to Takkenberg L, 'The Protection of Palestine Refugees in the Occupied Territories of Israel' (1991) 3 *International Journal of Refugee Law* 414 at 419, in addition to the aim of not duplicating roles, 'the Arab countries [were] reluctant to be confronted with the burden of Palestine refugees as long as the UN was caring for them'. For an evolution and detailed discussion of the UNRWA see Goodwin-Gill *Ibid*, at 220-222; Cervenak CM, 'Gender Based Discrimination and Refugee Status' (1994) 16 *Human Rights Quarterly* 300 at 304-316; Said W, 'The Palestinians in Lebanon: The Rights of the Victims of the Palestine-Israeli Peace Process' (1999) 0 *Columbia Human Rights Law Review* 315 at 318-325; Takkenberg L, 'The Status of Palestinian Refugees in International Law' (Clarendon Press, Oxford, 1998); Plascov A, 'The Palestinian Refugees in Jordan 1948-1957' (Franck Cass: London, 1981); Endresen LC and Øvnsen G, 'The Potential of UNRWA Data for Research on Palestinian Refugees: A study of UNRWA Administrative Data', <http://almashriq.hiof.no/general/300/320/327/ifafo/reports/FAFO176/> (accessed on 17/08/01)\_discussing UNRWA's administrative operations; and Palestinian Refugee ResdarchNet, 'Workshop on The Future of UNRWA Minster Lovell (UK), 19-20 February 2000 in <http://www.arts.mcgill.ca/MEPP/PRRN/prunrwa3.html> (accessEd on 17/08/01)\_discussing UNRWA's future.

116 Vide UN General Assembly Resolution 302 (IV), entitled "Assistance to Palestine Refugees" (8th December 1949).

117 See also the Resolution establishing the UNRWA, which failed to define who a "Palestine refugee" is. Art. 7 merely establish the UNRWA "for Palestine refugees in the Near East".

118 For an in-depth analysis of these services, see Buehrig EH, *The UN and the Palestinian Refugees: A Study in Nonterritorial Administration* (Bloomington: Indiana University Press, 1971), Chaps V-VII.

119 See <http://www.un.org/unrwa/refugees/p1.htm> (accessed on 17/08/01).

Today, this definition has been expanded to include descendants of persons who became refugees in 1948. By 2001, UNRWA catered for 3.8 million<sup>120</sup> registered Palestine refugees in Jordan, Lebanon, the Syrian Arab Republic, the West Bank and the Gaza Strip.<sup>121</sup>

- (d) persons in respect of whom there are *serious reasons* for considering that they have committed (or, bad refugees)
- (i) extraditable crimes,<sup>122</sup> or crimes mentioned in Art. 6 of the London Charter of the International Military Tribunal or the provisions of Art. 14 (2) of the Universal Declaration of Human Rights; Extraditable crimes are, normally, offences that are in the common interest of two or more states to suppress. States can agree under Treaty, or upon the basis of reciprocity, that one state will surrender to another, at its request, a person accused or convicted of a criminal offence, committed against the laws of the requesting state. The purpose of this Clause is two fold. Firstly, protect the community of a receiving state from the danger(s) of admitting a refugee who has committed a serious common crime. And secondly, render due justice to such a refugee. The sub-article prevents fugitives from defeating the course of justice by hiding under the guise of refugees in

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120 See <http://www.un.org/unrwa/> (accessed on 17/08/01).

121 For a bird's eye view of UNRWA refugee camps, see <http://www.us-israel.org/jsource/History/unrwamap.html> (accessed on 17/08/01).

122 For the High Commissioner of Refugees perspective on these crimes, see High Commissioner, *Note on the Problems of Extradition Affecting Refugees*, EC/SCP/14, 27 August 1980.

Third States, which may lack requisite territorial jurisdiction to prosecute them for offence(s) committed in their state of origin. However, the requesting State must be legally competent to try the alleged offence.<sup>123</sup>

Mere suspicion, or unfounded allegations that a person has committed any of these offences, or a combination thereof, and which has made them seek asylum in third states, is not enough. The statute by requiring 'serious reasons for consideration' by a legitimate Investigating agency implies that proper investigations have been conducted, and at least a *prima facie* case established against the asylum seeker. Because of its criminal nature, the normal criminal standard of proof beyond reasonable doubt applies. In practice, this requires an Investigating Body to carry out proper and in-depth investigations before applying for extradition. Through the

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- 123 See Shearer I, *Stärke's International Law* (Sydney: Butterworths, 11th Ed., 1994) at 317; see also Oda S, *The Individual in International Law* in Sørensen M, *Manual of International Law* (Ed) (London: Macmillan, 1968) 470 at 521; and Art.1 of the European Convention on Extradition, 359 U.N.T.S 273, providing for extradition between contracting parties of fugitive offenders wanted by the authorities for the carrying out of a sentence or detention order. Most common extraditable crimes are terrorism (For an in depth analysis see Lambert JJ, *Terrorism and Hostages in International Law: A Commentary on the Hostages Convention 1979* (Cambridge: Grotius, 1990) Part I); political offences; corruption; organised crime; treason; murder of a head of state; crimes against peace (see Art. 6 (a) of the Charter of the International Military Tribunal) such as planning, preparing, igniting or waging a war of aggression or one that violates international agreements; war crimes such as murder, (see Art. 6 (b) of the Charter of the International Military Tribunal), deportation to slavery of civilians or prisoners of war, taking and killing of hostages (see Arts 3 and 4 of the 1983 Hostage Convention adopted by Resolution 34/146 of the General Assembly. For a dissection of this Convention see Lambert JJ, *Terrorism and Hostages in International Law: A Commentary on the Hostages Convention 1979* (Cambridge: Grotius, 1990) Part II), wanton destruction of private property or human places of habitation, or devastation not justified by military necessity; crimes against humanity (see Art. 6 (c) of the Charter of the International Military Tribunal and Art. 7(1) of the International Criminal Court Statute) such as genocide (Internationally recognised under Art. 19 of the UN Convention on the Prevention and Punishment of the Crime of Genocide, 1948, adopted in Decemb@r 9 1948, 78 U.N.T.S 277) torture (see Art. 8 of the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment). The trial of Augusto Pinochet is an example of the application of an Extraditable Treaty to the offence of genocide. For a general discussion of this trial see Brody R and Rather M (Eds), *The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain* (The Hague: Kluwer, 2000) and Woodhouse D, *A Pinochet Case: A Legal and Constitutional Analysis* (Oxford: Hart, 2000). Other offences include extermination and enslavement; non-political crimes (see the Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status: Under the 1951 Convention and the Protocol Relating to the Status of Refugees* (UNHCR, Geneva: 1979) para 151). Whether a crime is political or not depends on the evidence, adduced. The applying State should establish a nexus between the crime and its alleged political purpose and object. See also the Refugee Convention Art. 33 (2), which allows a Third State to refoule a refugee whom it considers, poses a security risk. Finally, the word 'serious' implies that it is in the nature of a capital offence and attracts a very *severe* sentence; or crimes or acts that contravene international peace and security—the prime principles and purposes of the United Nations (see Art. 14 of the Universal Declaration of Human Rights, read together with Art. 1 of the UN Charter. This Clause more or less repeats the crimes outlined in para (a) above).



Application *per se*, the applying State avers that based on the evidence at hand, the individual who has been granted refugee or asylum status is not a *bona fide* refugee or asylum seeker, despite meeting all qualifications for the grant of refugee status.<sup>124</sup>

- (ii) a crime against peace, a war crime, or a crime against humanity as defined in the international instruments drawn up to make provision in respect of such crimes;
- (iii) a serious non-political crime outside the country of refuge *prior* to their admission to that country as a refugee; or
- (iv) has been guilty of acts contrary to the purposes and principles of the UN. (Emphasis added)

### TOWARDS GLOBALISATION: THE REFUGEE CONVENTION, 1951, AND ITS PROTOCOL, 1967

The UNHCR was initially established as a temporary humanitarian and social office for refugees, having a lifespan of 13 years. Its mandate extended to protecting and seeking permanent solutions to the global refugee problem through repatriation, resettlement, and or assimilation. However, before undertaking any task it had to observe three basic rules. Firstly, obtain approval from concerned Governments. Secondly, follow Policy Directives the General Assembly or ECOSOC issued.<sup>125</sup> And thirdly, steer clear of politics. The proposed UNHCR mandate comes close to what Maître Rubinstein, a commentator in refugee issues, deemed suitable of such a refugee agency. Fifteen years before its establishment, Rubinstein thought a suitable agency<sup>126</sup>

should not only ensure [refugee] protection, but also facilitate their rational distribution, to foster their settlement, and to create and preserve them in a just and equitable status.

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124 See also the High Commissioners Note on Problems of Extradition Affecting Refugees, *supra*, note 123, Paras 4 and 16-33, on the intercourse between the doctrine of *non refoulement* and extradition of refugees.

125 Both organs are established by Art. 7 of the UN Charter. For a wider discussion of the General Assembly and ECOSOC see Chapters IV and X of the UN Charter.

126 Rubinstein, *supra*, note 16 at 716

Fifty years later Marrus and Bramwell<sup>127</sup> wrote

The office of the UNHCR was established as a subsidiary organ under the UN General Assembly. Accordingly, [its] Statute is not a treaty [that] should be ratified by member States. It is annexed to a resolution, adopted by the General Assembly under the ordinary voting rules of the UN.

Effectively, this means the High Commissioner's statute *per se* neither creates any refugee rights, nor bestow obligations upon states. All it does is create the High Commissioner's office and outline its functions. Therefore, for it to realise its international protective functions it had to be given legislative teeth, without which the only recourse available to the High Commissioner is diplomacy, especially when dealing with sovereign states. Practically, this called for a treaty between the High Commissioner's office and states, requiring states, upon ratification, to accord minimum protective measures to asylum seekers and refugees within their territory. This explains why one of the avenues available to the High Commissioner is promoting the conclusion and ratification of international [refugee] conventions, supervising their application and proposing [their] amendments ....<sup>128</sup>

Through exercise of this mandate, the Refugee Convention (or Refugee *magna carta*) was created in 28<sup>th</sup> July 1951.<sup>129</sup>

Further to the call for the creation of an international refugee agency, Rubinstein had also floated the idea of a binding Convention for all States defining the international status of a refugee. A Convention would solve two main refugee-related problems in Europe. In the first place, it would put to an end the abuses refugees were experiencing generally, and secondly, achieve uniformity in legislation while addressing the plight of refugees. He further argued that since refugees did not have a state to negotiate and conclude Conventions on their behalf, they were deprived of all rights appurtenant to a human being.<sup>130</sup> However, by the time states convened to draft the Refugee

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127 See Marrus MR and Bramwell AC, *'Refugees in an Age of Total War'* (London: Unwin Hyman, 1988) at 9.

128 See Art. 8 (a) of the Statute of the Office of the UNHCR.

129 At the United Nations Conference of Plenipotentiaries, Geneva, on "Status of Refugees and Stateless People".

130 *Supra*, note 16 at 726.

Convention, they had overcome two political fears Rubinstein allayed, fifteen years previously.<sup>131</sup> Firstly, '[exposure] to attack' by its nationals for drafting a Convention to protect and bestow rights to refugees and asylum seekers engaging in this kind of act. And secondly, 'risk of taking [this kind of] initiative without certainty of other states following ...'.

### The Refugee Convention of 1951

The Conference of Plenipotentiaries was important to refugees in three ways. Firstly, it recognised that like any other human being, a refugee is also entitled to fundamental rights and freedoms promised to all world citizens by the UN Charter and Universal Declaration of Human Rights, (UDHR).<sup>132</sup> It would have been unfortunate for the Refugee Convention to fail to provide likewise for refugees. Apart from their status, they are also part of the global fraternity and thus entitled to the fundamental promises entrenched in these Treaties. Specifically, the UDHR recognises

*Everyone* is entitled to all the rights and freedoms set forth in this declaration [such as right to life, protection from arbitrary arrest and torture and freedom of movement, peaceful assembly and association] without distinction of any kind such as race, colour... or other status [for instance, refugee status].<sup>133</sup> (Emphasis added)

And further stresses

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act *aimed at the destruction of any of the rights and freedoms set forth herein*.<sup>134</sup>

(Emphasis added)

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131 *Supra*, note 16 at 727.

132 See, for instance, Article 14 of the UDHR recognising 'everyone's ... right to seek and ... enjoy in other countries asylum from persecution'.

133 See Arts. 2, 3, 5, 9, 13, 14, and 30.

133 *Ibid*, Art. 9.

133 *Ibid*, Art. 5.

133 *Ibid*, Art. 13.

133 *Ibid*, Arts. 14 and 2.

134 *Ibid*, Art. 30.

Similarly, under the UN Charter, peoples of the United Nations were determined to

... reaffirm their faith in the fundamental human rights [and] in the *dignity and worth of the human person* ... [As well as] achieve international co-operation in solving international problems of a ... humanitarian character, and promoting and encouraging respect for all human rights and for fundamental freedoms for all ...<sup>135</sup>

(Emphasis added)

Secondly, the Conference recognised the importance of revising all previous Treaties addressing the plight of refugees,<sup>136</sup> and consolidated them into one Treaty with wider material and personal scope. A diverse refugee protective system would not be desirable in view of the intended *global* Treaty. Two or more parallel systems would be cumbersome, expensive, as well as create inconsistencies, and confusion to applying states. Not to forget that given a choice between two systems, a state would choose one that it finds suitable to its specific needs. Hence, need for a harmonised and uniform determination process. In sum, the Refugee Convention revised, consolidated and replaced all earlier arrangements, agreements and conventions. Today, it constitutes the latest, most far-reaching, and the most universally adhered-to treaty law on the subject.<sup>137</sup> In this regard, Weis<sup>138</sup> argues

Previous international agreements defined certain rights of refugees only. The 1951 Convention contains a comprehensive catalogue of refugee rights. While previous international agreements covered only specific categories of refugees, the 1951 Convention contains a far more general definition of refugees to whom the Convention shall apply. Moreover, the Convention establishes a formal link between its provisions and the international agency charged with the protection of refugees.

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135 See its Preamble and Art. 1(3).

136 Namely the Arrangements of 5 July 1922, 31 May 1924, 12 May 1926, 30 June 1928, and 20 July 1935, and the Conventions of 28 October 1933 and 10 February 1938.

137 As at 1st July 2002, 144 states were parties to the Refugee Convention and or Protocol.

138 In Weis, *supra*, note 25 at 26.

The third issue derives from the pre-Second World War experience. It dawned on member states that the plight of refugees could not be solved by a single state or a select group of states. The burden lay on the global fraternity. As Sadako Ogata, a former High Commissioner, stresses

it is a matter of concern to the international community and must be addressed in the context of international cooperation and burden sharing.<sup>139</sup>

The Refugee Convention in addition to laying a basis for current refugee law and policy, made two other important steps. In the first instance, it defined the term “refugee”<sup>140</sup> and identified three categories of individuals upon whom it would apply. One, those granted refugees status after passing the relevant test(s). Two, those who would have otherwise qualified for refugee status, but due to special considerations they did not—Exclusion clause. And three, ways by which acquired refugee status would be lost—Cessation clause. Secondly, it outlined specific refugee rights and freedoms. It went further and created a corresponding duty upon host states to ensure their realisation. Examples include, right to be treated on the same footing as an alien, right of association,<sup>141</sup> to seek gainful employment,<sup>142</sup> access to courts,<sup>143</sup> housing,<sup>144</sup> education,<sup>145</sup> prohibition of expulsion or return<sup>146</sup> and the freedom of worship<sup>147</sup> and movement.<sup>148</sup> However, on the flip side, refugees were expected to observe host states laws and regulations.<sup>149</sup>

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139 *Ibid.*, at ix; see also Art. 1(4) Refugee Convention.

140 *Ibid.*, Art. 1(1) and (2).

141 *Ibid.*, Art. 15.

142 *Ibid.*, Arts. 17-19 all-inclusive.

143 *Ibid.*, Art. 16.

144 *Ibid.*, Art. 21.

145 *Ibid.*, Art. 22.

146 *Ibid.*, Arts. 31-33 all-inclusive.

147 *Ibid.*, Art. 4.

148 *Ibid.*, Art. 26.

149 *Ibid.*, Art. 2.

One important “partner” the Conference of Plenipotentiaries ignored in its discussions, and thus completely failed to incorporate in the Convention’s final draft, was “refugee-producing” states. Effectively stating they were irrelevant once the cord of nationality was severed with its former nationals—now refugees in third states. The Convention only mentions them when it comes to grant of exemption from reciprocity,<sup>150</sup> in treatment of its nationals who fled to third states seeking refugee status. The negative effects of this omission still haunt the refugee field to date. If a durable solution is to be found for the refugee influx, all relevant players should be included. Does it then come as a surprise that almost half a century after passage of the refugee *magna carta* the global refugee population has continued to escalate?<sup>151</sup>

When the Refugee Convention came into operation in 1951, only four African states were independent—Liberia<sup>152</sup> (1847), Ethiopia,<sup>153</sup> Egypt (1922), and Libya (1951). Despite possessing *standi* to attend international fora, only Egypt sent a delegation to Plenipotentiaries. The other 25 delegates came from Europe, the Pacific, and America.<sup>154</sup> For this reason, it can be argued that the final draft of the 1951 Refugee Convention lacked a substantive “African” contribution, if at all.

### **An Analysis of the Term “Refugee”**

An analysis of the evolution of international refugee protection remains incomplete when two events that shaped it—the holocaust and Cold War—are not discussed. The Refugee Convention recognises two categories of

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150 See Art. 7. Normally, internationally, two or more states may agree to accord certain rights and freedoms, under the doctrine of reciprocity, to nationals of the other state in its territory. Refugees are exempt from this rule since their parent state or its agents may have ignited events creating their refugeehood. Thus, it would be absurd to expect them to invoke a Reciprocity Clause.

151 As at 1st January 2002, there were almost 20 million people “of concern to the UNHCR”.

152 Originally founded as a Colony for freed slaves from Europe and America.

153 Strictly speaking, Ethiopia was never colonised by any European power. What were there are failed attempts to colonise it by Italians in the 1880’s and 1930’s.

154 Namely Australia, Austria, Belgium, Brazil, Canada, Colombia, Denmark, France, Federal Republic of Germany, Greece, Holy See, Iraq, Israel, Italy, Luxembourg, Monaco, Netherlands, Norway, Sweden, Switzerland (which delegation also represented Liechtenstein), Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela and Yugoslavia. Observers represented Governments of Cuba and Iran.

refugees.<sup>155</sup> Firstly, those recognised as statutory refugees<sup>155</sup> in Europe between the end of First World War and beginning of the Second. Secondly, a new category introduced to protect post-Second World War trans-European refugees. This second category laid specific tests. Overallly, this marks a fundamental shift from the former paradigm that sought to recognise refugees based on their ethnic background. In the first category the term “refugee” referred to any person who had been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization.<sup>156</sup>

It was important for the UN, through the Refugee Convention, to recognise and assume post-First World War trans-European refugees for two reasons. In the first place, provide a continuous protective link with the past. And secondly, demonstrate to the international community its determination to meet the goals set by the Preamble to its Charter.<sup>157</sup>

A modern three-pronged definition of this term is found in the second category.<sup>158</sup> It declares a refugee to be any person who, as a result of events occurring before 1 January 1951, and who

- owing to the 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 unwilling to avail himself of the protection of that country;<sup>159</sup> or

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155 I use this word to denote refugees recognised by the then existing “Treaties” instruments—Arrangements and Conventions.

156 See Art. 1 (A) of the Refugee Convention.

157 Namely, reaffirming its faith in fundamental human rights and promoting the social progress and better standards of life in larger freedom.

158 See Art.1 (A) (2) of the Refugee Convention.

159 The word “unable” refers to circumstances that are *beyond the will* of the person concerned. For instance, a state of war, which prevents the country of nationality from extending protection or makes protection ineffective. (See the UNHCR Handbook, *supra*, note 108, para 98).

- 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.

This definition has subsequently been incorporated by regional<sup>160</sup> and domestic<sup>161</sup> refugee protective legislations.

## The Holocaust

The holocaust<sup>162</sup> is traceable to Adolf Hitler, German Chancellor from 1933-1945, anti-semitic sentiments. When Hitler assumed power, the German economy that had just recovered from the First World War was hit again by the European economic recession.<sup>163</sup> This created an excuse and fertile ground for Hitler to look for and find a scapegoat in the thousands of Jews living and working in Germany.

The general mood [in the army] was miserable ... The offices were filled with Jews. Nearly every clerk was a Jew and nearly every Jew was a clerk ... As regards economic life, things were even worse. Here the Jewish people had become really 'indispensable'. *The spider was slowly beginning to suck the blood out of the people's pores* [and had to be eliminated].<sup>164</sup>

(Emphasis mine)

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160 See for instance, Art. 1(1) of the 1969 Organization of African Unity Convention on the Specific Aspects of Refugee Problems in Africa and Part III (3) of the Cartagena Declaration on Refugees, 1984, of the Central American region, Mexico and Panama.

161 See, for instance, Secs 3(1) of the South African Refugee Act, 1998; 2(1) of the Canadian Immigration Act, 1976-77; and 2(1) of the Malawian Refugee Act, 1989.

162 Or, ethnic cleansing of Jews by Nazi-German killing machines.

163 The overall economic situation is well captured by Yahil L. 'The Holocaust: The Fate of European Jewry, 1932-1945' (Delhi: Oxford University Press, 1990) at 16

By January 1932 the unemployment rate had reached a high of six million. The country's crippled industries sank into debt: The workers, who had been fired in droves, loitered about the streets and crowded into beer halls: unemployment benefits were insufficient to sustain families. The lower middle class of craftsmen and small businessmen was in the brink of ruin and the financial difficulties pressed especially on small farmers; the job shortage dashed the hopes of youngsters, those from the working class as well as those at Universities.

164 In his famous book *Mein Kampf* (London, 1974) at 193 quoted by Friedlander S, *Nazi Germany and the Jews: The Years of Persecution, 1933-39, Vol. 1* (London: Phoenix Giant, 1997) at 74.



He even boldly sought to justify the intended elimination enterprise on religious grounds

Today I believe that I am acting in accordance with the will of the Almighty creator: by defending myself against the Jew, I am fighting for the work of the Lord [!].<sup>165</sup>

Overall, Hitler aspired to completely wipe out the “spider” and create a pure non-Jew German Republic. His intention was bolstered by the words of a leading post-war German geneticist,

The differences among human beings are based on biology. Their blood, that is to say their genes, turns Jews into Jews .... All these ... are inferior, and thus inferior blood cannot receive rights equal to the superior. It is possible that the inferior will produce more children than the superior, and therefore the inferior must be excluded, sterilized, extirpated, and eliminated, that is killed, otherwise we will be responsible for the destruction of civilization.<sup>166</sup>

To realise his goals, Hitler manipulated the law in two ways. Firstly, he promulgated a Presidential Decree suspending the guarantees of individual liberty enshrined in the Constitution of the Weimer Republic<sup>167</sup> vide Article 48 (2). This Article empowered the President of the Third Reich to suspend basic civil rights ‘if the public safety and order in the Reich are considerably disturbed or endangered’.<sup>168</sup> This Clause was purposed at enabling the state to protect itself against imminent danger, for instance when faced with a *coup d’etat*. This was not to be the case with Hitler. Instead, he used the Constitution as a weapon to fight Jews.

Secondly, he enacted the Reich Citizenship Law and the Law for the Protection of German Blood and Honor—the Nuremberg Racial Laws. On the overall, as Vahakn<sup>169</sup> argues, this ‘divest[ed] Jews of the normal citizenship rights and

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165 Friedlander, *Ibid*, at 98.

166 Quoted by Friedlander *Ibid*, at 123-124.

167 See Vahakn DN, ‘The historical and legal interconnections between the Armenian genocide and the Jewish Holocaust: From impunity to retributive justice, 1998 23 (2) *Yale Journal of International Law* 503 at 521.

168 See Harris WR, ‘*Tyranny on Trial: The Evidence at Nuremberg*’ (1954) quoted by Vahakn, *Ibid*, at 45.

169 Vahakn, *supra*, note 168 at 522.

declare[d] them second class citizens'. For instance, the Blood Protection Law excluded Jews from the German national family by prohibiting marriages and sexual relations, outside marriage, between Jews and citizens with German or related blood.<sup>170</sup> Further, Jews were prohibited from employing as domestic servants, females with German or related blood, unless they were over 45 years old.<sup>171</sup> Additionally, Jews were excluded from the general economic circle. For instance, they could not assume official positions, engage in certain professions and cultural activities. Finally, the Enabling Act, 1933, "legally" created an avenue for confiscation of Jewish property by the German Government. To eliminate the "spider", Jews were conscripted into concentration camps,<sup>172</sup> (or, persecution factories). It is in these camps that they faced untold persecution and suffering. Majority were exterminated *en masse* in gas chambers, shot at point blank range or starved to death. Several others were subjected to forced labour and slavery. And German guards sexually abused others especially women and young girls. In total, before the allied forces stopped this killing enterprise in 1945 it had murdered close to 6 million Jewish men, women, and children, and caused at least five hundred thousand people to flee from Germany into neighbouring states.

The holocaust significantly crafted the modern definition of the term "refugee". Words *race*, *religion*, *nationality* and *membership into a particular social group* are traceable to Hitler's era. They mirror upon the relationship between the Reich Government and Jews. Since Jews were from a specific "race" and "nationality" it was easy to identify and isolate them for persecution. Similarly, majority were Christians by "religion", thus easily singled out. Kempner<sup>173</sup> adds

Most of the 120,000 [refugees] feel no loyalty to the Nationalist Socialist Government, a Government which has driven them to exile for *political, racial, or religious reasons* ... . Therefore, although they are "enemies" by origin, speech, and culture, they are often admirers of the enemy state in which they live [in]. (Emphasis added)

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170 Friedlander, *supra*, note 98 at 24.

171 This provision recognises that female servants sometimes double up as "sex-slaves". Or, their male masters sexually molest them. What this Law sought to prevent, though, were children likely to result from such unions at the first level, in the first place. Secondly, biologically at 45 most women have reached menopause thus incapable of conceiving, albeit engaging in sexual relations.

172 The main ones were Sobibor, Aushchwitz, Dachau, Berkenau, Treblinka and Belzec.

173 Kempner, *supra*, note 72 at 444.

Similarly, the words of Skran are supportive

In many minds, *refugees became synonymous with victims of Nazi persecution*. As a result, refugees tended to be thought of as individuals facing persecution for their religious or political beliefs, or because of their association with a particular class or racial group.<sup>174</sup> (Emphasis added)

The phrase “membership into a particular social group” was a saving clause. Perhaps an additional criterion incorporated to cater for those falling outside of the demarcated heads—race, religion and nationality—but could still be singled out for persecution. This ground caters for unforeseen or future contingencies the drafts-person may have inadvertently omitted.

### The Cold War

The post Second World War period saw the emergence of two global powers—United States of America, (USA), and Union of Socialist Soviet Republic, (U.S.S.R). Despite having fought on the same side during the War, the two states had different ideological beliefs,<sup>175</sup> historical backgrounds, economic and political systems, and national policies. Savage argues

the wartime bonds that held the Soviet Union, ... United States and Britain together in the face of German and Japanese aggression parted at the approach of victory'.<sup>176</sup>

What remained was the common interest to maintain global peace. The great divide between Washington and Moscow was caused by differences in principles, ideologies, and beliefs. Communist Moscow followed a state controlled (or, socialist) system of governance, whilst democratic Washington favoured a “people propelled” (or, democratic) system. As the two super powers, global politics was bound to, and indeed revolved around them. Finally, it divided the world into two—Eastern and Western blocs.<sup>177</sup>

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174 *Supra*, note 16 at 110.

175 *Waters, supra*, node 73 at 48.

176 *Savage, supra*, note 71 at 15.

177 Yet, other States, such as Kenya, opted for a middle ground—the Non Aligned Movement.

The Cold War lasted at least 40 years. But unlike other wars, its battlefields were not the traditional trenches, nor did it involve the conventional arms and other weapons of military warfare. Instead, it primarily revolved around differences in ideological beliefs. However, this eventually cut across the entire strata of the world's social, political, and economic affairs. Owing to the cold war, U.S.S.R and its allies<sup>178</sup> boycotted the final lap of the road leading to making the Refugee Convention. On the other hand, the term “refugee” was tailored to justify accepting fugitives fleeing to the East into Western European states, for political reasons. To Western states, their communist counterparts were suppressors *par excellence* of the basic universal human rights and freedoms the UDHR promised *all* members of the human fraternity. It was nothing but Adolf Hitler reincarnate. Meanwhile, they saw themselves as *the risen Messiah*. Likewise, the Eastern bloc thought the same of their Western counterparts. Salomon observes:

The Americans transferred their hatred for Hitler's Germany to Stalin's Soviet Union, and “totalitarianism” became a convenient formula to rationalize this metamorphosis. The Soviet Union argued similarly that fascism and liberal democracy were merely the same monsters in different guises, reflecting the fact that the United States was replacing Germany on the global scene. “Imperialism” came to play a role in Soviet Ideology similar to that of “totalitarianism” in American ideology.<sup>179</sup>

Meanwhile President Harry S. Truman, of the United States, made the following remarks in his comments to Congress:

One way of life is based upon the will of the majority, and is distinguished by free institutions, representative government, free elections, guaranties of individual liberty, freedom of speech and religion, and freedom from political oppression. The second way of life is based upon the will of a minority forcibly imposed upon the majority. It relies upon terror and oppression, a controlled press and radio, fixed elections, and the suppression of personal freedoms. *I believe that it must be the policy of the United States to support free people who are resisting attempting subjugation by armed minorities or by outside pressure.* (Emphasis added)

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178 Save for the former Yugoslavia, other Communist states failed to attend the meeting of Plenipotentiaries.

179 *Supra*, note 97 at 44.

Thus, the Western world wholeheartedly welcomed victims of “persecution” from the Communist States—namely, those who were not allowed to freely express themselves, move, assemble or associate freely with others. In the words of Salomon<sup>180</sup>

Persons fleeing a Communist regime were by definition considered victims of political oppression and were therefore entitled to aid.

Salomon further argues

Refugees and politics are often linked. A refugee is often a person who does not accept the political conditions in his own country. His flight is often interpreted as a political gesture, both by his own country and by the receiving country, just as the decision of the receiving country to give him asylum is interpreted in political terms by the country of origin.<sup>181</sup>

Does it then come as a surprise that the words ‘political opinion’ were incorporated into Article 1 (1) of the Refugee Convention, as one the hinge points for seeking asylum? As Coles explains

The Cold War existing in 1951 explains to a significant extent the substance of the Convention, there is no provision on voluntary repatriation, a solution to the Eastern Europe refugee situation, which at that point in time, was discounted by the Western countries; and there is also no substantive provision on international solidarity and the co-operation in burden sharing.<sup>182</sup>

Before, the UNHCR was established Moscow was categorical that

if such a legally unjustified office (the UNHCR) was created the U.S.S.R. *would not recognize it* and would not enter into any kind of commitment with regards to it.<sup>183</sup>

So that even after the High Commissioner’s Office was established, Moscow stuck to its guns. It viewed this Office as a Western creature. Without mincing words its representative to the UN, Mr. Nasinovsky, observed

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180 *Supra*, note 97 at ...

181 *Supra*, note 97 at 20.

182 *Supra*, note 16 at 665.

183 Clark, *supra*, note 94 at 59.

The Russian people have never been under the thumb of a High Commissioner. .... It is true that there was a United Nations High Commissioner for Refugees, but *the U.S.S.R. had never recognized him or financed his activities, which were really aimed at assisting those who had been the accomplices of Hitler ...*.<sup>184</sup> (Emphasis added)

### **REMOVING THE TIME LIMITATION—REFUGEE PROTOCOL, 1967**

To allies, the UN was the Saviour that the world so desperately needed to save it from the scourge of war that had twice brought untold sorrow and suffering to humankind. It was through it that global peace, security, justice, dignity and equal rights of all human beings could be achieved or advanced. At the founding of the UN, in 1945, Ambassador Andrei Gromyko, Chairman of the Delegation of the Union of the Soviet Socialist Republics said

The peace-loving nations who suffered countless sacrifices in the war naturally rest their hopes on the establishment, by collective efforts, of an international instrument which could prevent the repetition of a new tragedy for humanity. In accordance with the decisions adopted at the Dumbarton Oaks Conference, Marshal Stalin said: To win the war against Germany does not mean the insurance of lasting peace and security for the people in the future. The task is not only to win the war but also to make impossible the occurrence of a new aggression and a new war, if not forever, then at least for a long period of time. .... Under the Charter, members of the International Organisation obligate themselves to achieve peaceful settlements of the disputes. .... [I] wish to express confidence that this Conference ... will go down in the history of humanity as one of the most significant events that all our efforts will be beneficial for all peaceloving peoples of the world, who endured many hardships and sufferings as a result of the conflagration set by Hitlerite Germany.<sup>185</sup>

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184 *Ibid*, at 57.

185 *Ibid*, at 15.

Harry Truman, President of the United States, whilst expressing faith in this Organization, said

This Charter ... is a solid structure upon which we can build a better world. ... It was the hope of such a Charter that helped sustain the courage of stricken peoples through the darkest days of the war. *It is a declaration of great faith by the nations of the earth ... that peace can be maintained. If we had this Charter a few years ago ... millions now dead would be alive. If we falter in the future in our will to use it, millions now living will surely die ...*<sup>186</sup> (Emphasis added)

However, this dream of the UN maintaining everlasting global peace was not achieved. Global peace could protect the world from experiencing yet another influx of refugees, at least of the World War I and II scales. As fate may have had it, none of the predictions made by the American and Russian leaders came to pass. Though not on a global scale like the First or Second World War, the world was littered with inter-state and civil wars creating new refugee situations. For instance, the Vietnam War, which rendered at least 10 million people homeless and refugees in the south. In Africa, the mid-50s to late 60s wind of independence caused a mass influx of people from the war zones to independent states. Since the Refugee Convention only strictly protected *historical* refugees—situations arising out of ‘events’<sup>187</sup> occurring *prior* to January 1, 1951—it effectively excluded post-1951 asylum seekers. In its quest to internationally protect refugees, the High Commissioner’s competence included

promoting the conclusion and ratification of international conventions, supervise their application and propose amendments.<sup>188</sup>

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186 *Ibid*, at 16.

187 Although the Refugee Convention fails to define, or explain, what it means by ‘events’, this word can be understood to mean

‘happenings of major importance involving territorial or profound political changes as well as systematic programmes of persecution which are after-effects of earlier changes’.

See UNHCR Handbook, *supra*, note 108, para 36.

188 See High Commissioner’s statute article 8 (a).

For post-1951 asylum seekers, two options were available. In the first place, amend or modify the time limitation. Or, secondly, repeal and replace the Convention with an entirely new treaty.<sup>189</sup> Weis,<sup>190</sup> argues that due to the urgency of the problem, it could be best met by a Protocol to the Convention.<sup>191</sup>

In response, the UN General Assembly passed an independent treaty in the form of an 11-articled Refugee Protocol.<sup>192</sup> More significant, the Refugee Protocol amended the Refugee Convention by removing its time and geographical<sup>193</sup> limitations. With regards to time, it omitted the following 2 sets of words: “As a result of events occurring before 1 January 1951 ...”, and “... a result of such events ...” in Article 1 A (2) of the Refugee Convention. Further, it made signatories to the Refugee Protocol

‘undertake to apply Articles 2 to 34 inclusive of the [Refugee] Convention’.<sup>194</sup>

Practically, this means there is no real difference between states that have ratified the Refugee Convention, on the one hand, and those of the Refugee Protocol regime *only*. Notwithstanding that, once the Refugee Protocol comes into operation there will theoretically be two refugee treaties. This is because once a state ratifies the Refugee Protocol simultaneously it adopts a better part of the Refugee Convention’s provisions. Furthermore, articles 2-10 of the Refugee Protocol effectively cover the balance of the Refugee Convention’s provisions this undertaking omits. Notwithstanding, that they are more or

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189 See also article 45 of the Refugee Convention which empowers a contracting State to make proposals for the revision of the Convention to the UN Secretary-General. It is mandatory for the General Assembly to deliberate on these Proposals and make recommendations, if any.

190 See Weis P, ‘The 1967 Protocol Relating to the Status of Refugees and some Questions of the Law of Treaties’, 1967 *The British Year Book of International Law*, 39 at 42. See this Article generally discussing evolution of the Refugee Protocol.

191 Considering it took 26 States four (4) years to make the Refugee Convention, it is a matter of conjecture how long it would take 120 eligible UN member States to make a new treaty.

192 Weis, *supra*, note 190 at 49, describes a Protocol as a [secondary] treaty that amends, clarifies, interprets, or modifies the provisions of a primary treaty.

193 See Article 1 (3).

194 *Ibid*, Article 1 (1).



less a replica of the Refugee Convention's equivalent provisions. Effectively, the Protocol is dual purposed. In the first place, it supplements the Refugee Convention for state parties that have ratified the Convention. Secondly, it is an independent treaty for state parties that have acceded to the Refugee Protocol but are not party to the Refugee Convention.

### CONCLUSION: SOME COMMENTS ON THE CURRENT LEGAL SITUATION

As Kenya prepares itself for passage of new Refugee and Asylum seekers' legislation, it is important for the legislator to spend time to understand the genesis and evolution of the problem the intended legislation seeks to address. Only then, will the Legislator appreciate the underlying reasons for protection. However, it is insufficient for the legislator to simply pass legislation. Past efforts to protect refugees by legalisation should not only be recognised but also taken into account. I have in mind, particularly, the Aliens Restriction Act, (Cap 172), (ARA), and the Immigration Act, (Cap 173), (IA), which contain "pockets" of "Refugee law". Although the IA was passed primarily to govern *orderly* immigration,<sup>195</sup> it incidentally applies to forced migrants. Before a person is allowed into the Republic of Kenya, one must first apply for, and obtain, an Entry Permit. Section 5(1) of the IA creates these Permits while the different Classes—13 in total—are outlined in its Schedule. Class M acknowledges, 'a person who qualifies for the grant of refugee status', may be eligible to apply for an Entry Permit. Two categories of persons can apply: firstly, any person who meets the "refugee" definition. The Act adopts the classical definition of the term "refugee"<sup>196</sup> and copies it word-for-word in its Schedule. Thus, for a person to be granted a Permit under this class s/he must prove<sup>197</sup>

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195 See Preamble to the Act outlining two purposes. Firstly, 'amend and consolidate the law relating to immigration in Kenya...'. And secondly, for 'matters incidental [to] ... and connected' with immigration'. What falls in the "incidental" or "connected" box is a matter of conjecture, more so in this broad field of immigration.

196 See Art 1 (A) (2) of the Refugee Convention.

197 See sec. 15(d) Immigration Act laying the burden of proof upon the Applicant.

- owing to the 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 unwilling to avail himself of the protection of that country; or
- 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.

Secondly, *anyone* related to the refugee of the first category by either marriage or blood. Specifically, it refers to 'any wife or child over the age of thirteen years of such a refugee'. This provision suffers from at least three shortcomings. In the first place, by use of the word "wife" the IA implies that only, or normally, men flee or are targets of persecution. A wife and or child ordinarily follow the husband or father, as the case may be. Maybe that was the case when the Act was passed in 1967. Today however, this is not necessarily the case. Experience shows that mass movement, for persecutory reasons, cuts across sex and age. Secondly, the provision fails to cover polygamous marriages—a common form of marriage in Africa and recognised by Kenyan law.<sup>198</sup> The practical ramification of this section is more troubling. Interpreting the Act strictly means, in situations of flight a polygamous male asylum seeker is forced to choose one wife and abandon the other(s), if he is to be allowed entry into Kenya. Thirdly, the other child(ren) of a refugee is in a similar position to his other wife(ves), since the Act only recognises '*any [or one] child*'. However, this is not the only requirement. Additionally, this child has to be '*over the age of thirteen years*', raising serious questions about the fate of other child(ren) (if any) below this age. These are examples of provisions the new legislation should avoid. Otherwise, left the way it is makes it capable of not only separating families, but also breaching international law.<sup>199</sup>

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198 See, Evidence Act sections 130(2)—on privilege of communications made during the subsistence of a marriage—127(4)—addressing competency and compellability of spouses—defining the term "marriage" to include polygamous marriages. See also, Waiyaki J in *Esther Karimi v. Fabian Murugu* HCCC No. 7 of 1973, in Cotran E, *Casebook on Kenya Customary Law* (Nairobi: Nairobi University Press, 1991) at 25 arguing Kenya's 'laws provide for both monogamous and polygamous marriages'.

199 See, for instance, Arts. 16 Universal Declaration of Human Rights, 1948; 17(1) International Covenant on Civil and Political Rights, 1966; and 23 Convention on the Elimination of all Forms of Discrimination against Women, 1981.

Applications for refugee status are heard and determined by Immigration Officers.<sup>200</sup> Applicants must satisfy an officer that they qualify to be granted refugee status. Although the Act is not clear-cut on the minimum evidence required to “satisfy” an Immigration Officer, nevertheless section 11 of the IA provides the first pointer. It creates an inquisitive regime requiring an applicant to

... answer any question [posed by an Officer] or produce any document in his [or her] possession for the purpose of ... ascertaining whether [s/he] ... should be permitted to enter Kenya ... .

Fair enough. A second pointer is from Rule 6 of the First Schedule, which specifies the Form to be used in making an application—Form 3. Notwithstanding that rule 6 refers to ‘every application for an entry permit’, Form 3 on the other hand appears to be designed *only* for persons seeking to enter Kenya for commercial purposes beneficial to Kenya. The reverse of this statement, unfortunately, is a declaration that refugees are nothing but economic parasites. Since rule 6 makes it mandatory for every person to complete Form 3, the only information that a Class M entry permit applicant can provide is personal details—full names, current address, date and place of birth, passport number, nationality and particulars of a child over 13 years of age, if any. Effectively, this means reason(s) of a person’s fear of persecution is a question to be determined at the (subjective) Question and Answer Session, conducted by an Immigration Officer.

Strangely, it is insufficient for an applicant to “satisfy” an Immigration Officer s/he is a “refugee”. This is but the preliminary step. The final decision rests on the Immigration Officers who retains ‘discretion’<sup>201</sup> to issue an Entry Permit. It is also not clear whether upon refusal such reasons should be given. Further, what the exercise of discretion entails is a matter of conjecture. Even so, I believe the draftsman meant it to be exercised judiciously, not capriciously. Appeals lie with the Minister. But more interestingly, these decisions are not only ‘final’, but also more interestingly they ‘shall not be questioned in *any* court’ of law.<sup>202</sup>

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200 See section 5(2) Immigration Act. The Minister, under sec. 10, appoints these Officers.

201 *Ibid*, sec 20 (1).

202 *Ibid*, sec 5 (1).

Akin to the IA, the ARA was passed for two reasons.<sup>203</sup> Firstly, impose specific restrictions on aliens. Secondly, and on a more general note, the legislature bestowed upon the executing organs of this legislation power to ‘make such provisions as are necessary or expedient’,<sup>204</sup> to effect the restriction function. Section 2 defines an alien as, ‘any person who is not a citizen of Kenya’<sup>205</sup> — a category that covers refugees and asylum seekers. Although the ARA does not wholly discuss refugees as a special category of aliens, the Schedule to the Act makes a microscopic mention. Section 3 read together with Rule 4, requires all aliens to report to a Registration Officer within 90 days of their arrival into Kenya. This registration process entails completion of Form A1—‘Form for Registration as an Alien’. Paragraph 10, while seeing refugees as aliens, asks:

If *Refugee* in Kenya:

Date of Arrival in Kenya

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

Since the ARA is silent on the steps a claimant should follow in order to be granted refugee status—hence be capable of responding to the second question—it is only reasonable to infer that the IA is the procedural law in this regard.<sup>206</sup> What this means is the two Acts will have to be read together.

Finally, it is important for the new Refugee and Asylum seekers legislation to be comprehensive and clear. In this regard, the latest version of the Refugee Bill, (2000), deserves mention. Laudably, in addition to the classical definition of the term “refugee”, Clause 3(1)(c) recognises that internal and ‘external aggression’, or ‘events seriously disturbing public order’ also contribute to the mass flow and displacement of people in Africa. Cases such as the Rwanda genocide, war in Angola, Sudan, Somalia, Sierra Leone, and Democratic Republic of Congo attest to this. These wars have significantly contributed to the displacement and mass flow of millions of people across the African

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203 *Ibid*, Preamble to the Act.

204 *Ibid*.

205 Section 3 (1) of the Kenya Citizenship Act, (Cap 170), outlines the following ways by which a person can be a citizen of Kenya: by birth, domicile, or residence.

206 *Ibid*, secs. 5 and 1, Schedule to the Act, and Rule 6.

continent. Omitting a provision of this kind from the Act effectively removes the Act from modern reality. In the end, it knocks out otherwise deserving refugee claims. However, it is not enough for an Applicant to meet the “refugee” definition. Additionally, a person must demonstrate s/he does not fall within the Exclusion or Cessation clauses.<sup>207</sup>

Procedurally, the Bill outlines a triple-tier hierarchy to determine refugee claims. Applications are first heard and determined by the Director of Refugee Affairs (Director).<sup>208</sup> To avoid keeping asylum seekers in limbo for too long, the Bill requires the Director to hand down a decision within three and a half months,<sup>209</sup> from the time an application is first referred. In this regard, the Director has two options—either accepts or rejects an application.<sup>210</sup> Where an application is rejected reasons for such rejection *must* be given.<sup>211</sup> Aggrieved parties may appeal, in the first place, to the Refugee Appeal Board.<sup>212</sup> What the Bill needs to clarify here, is whether such appeals are based on points of law, fact, or mixed law and fact. Since the Bill is silent on this, appeals from the Director can be grounded both on points of law or fact, or a mixture of the two. The High Court is the final-port-of-call.<sup>213</sup> As opposed to the first tier appeals, the Bill is clear on the second tier appeals. Appeals lodged in the High Court are restricted to *a* point of law.<sup>214</sup> However, it remains important to increase the human capacity of the three levels of refugee status adjudication

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207 See clauses 3(4) and (5) of the Refugee Bill, 2000.

208 Established under Clause 7 (1) of the Refugee Bill, *Ibid.*. See also Sub-clause (2) outlining its functions, namely

- (a) to recognize persons as refugees ... ;
- (b) to ensure the provision of adequate facilities and services for the reception and care of refugees within Kenya;
- (c) to promote ... durable solutions for refugees accepted in Kenya;

209 *Ibid.*, clauses 10(5) read together with (6) (b).

210 *Ibid.*, clause 10 (6) (a).

211 *Ibid.*, clause 10 (6) (b).

212 *Ibid.*, clause 9. See also clause 8 establishing the Refugee Appeal Board, and outlining its composition.

213 *Ibid.*, clause 10 (9).

214 *Ibid.* The time limitation for filing appeals to the High Court is 21 days from the date the Refugee Appeals Board handed down its decision.

process. This is bearing in mind the large number of potential asylum seekers Kenya hosts currently. Otherwise, the three-and-a-half month deadline for the Director, appears ambitious. Similarly, the five-person Appeal Board,<sup>215</sup> and already clogged High Court of Kenya may be overwhelmed handling refugee appeals.

Regarding the Director's appointment, the Bill only goes as far as mentioning that the office holder shall be deemed to be a public servant.<sup>216</sup> It is silent on whether the holder needs to have a legal background/training. It is my argument that since refugee determination status is legal in nature, requiring interpretation of Treaties domestic and foreign Legislation, as well as judicial precedents, the Director's office holder should possess, at the very least, a law degree. In addition to this general degree, it would be preferable if s/he possessed additional qualifications in Forced Migration. In relation to "refugee rights", the Bill grants the same package of rights and duties the Refugee Convention and its Protocol outline.<sup>217</sup> Further, it specifically recognizes the right of *non-refoulement*.<sup>218</sup> Finally, the Bill establishes a refugee Trust Fund to defray costs incurred in the performance of functions or powers under the Act.<sup>219</sup> As a word of caution, once the Refugee Bill is passed the legislator will have to go back to the drawing board and amend the necessary provisions of the IA and ARA.

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215 Clause 8 (2) of the Refugee Bill, *Ibid*, outlines its composition:

- (a) a chairperson having not less than 10 years experience as a practicing advocate ... ;
- (b) a nominee of the Minister ... for Foreign Affairs;
- (c) a nominee of the Minister ... for Internal Security;
- (d) a nominee of the Minister ... for Immigration;
- (e) one other member appointed by the Minister from a panel provided ... by the National Council of Non-Governmental Organizations.

216 *Ibid*, clause 7(1).

217 See *Ibid*, clause 15(1) (a).

218 See *Ibid*, clause 16(1) prohibiting the state from refusing to admit or forcefully returning a refugee back to a state where s/he may be subjecto persecution for Convention reasons.

219 *Ibid*, clause 5(1).