

DOCTORAL (Ph.D.) DISSERTATION

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Kenya's Asylum Governance: A Critical Inquiry into Policy - Practice Continuum

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Abstract

The global community continues to contend with a growing surge in the number of persons forcibly displaced due to conflict, persecution, violence, and other human rights violations. While these numbers constitute displacements of various kinds including the Internally Displaced Persons (IDPs) a significant percentage of these are displaced beyond borders to seek protection. Accordingly, legal frameworks such as the 1951 Refugee Convention, and its 1967 Protocol have been designed to offer protection for persons displaced beyond state borders, commonly referenced as refugees and asylum seekers. Kenya, a longstanding host of refugees, has not only acceded to these instruments but has also enacted a law that integrates the Comprehensive Refugee Response Framework (CRRF) as envisaged in the Global Compact on Refugees (GCR). However, systemic gaps between legal provisions and practical implementation are notable at the national level. It is for this reason that I examine the disconnect between Kenya's formal policies and their practical application. I explore how political, economic, legal, and social variables interact to influence the implementation of asylum laws. I apply the concept of a "*fading continuum*" to illustrate how these systemic factors dilute policy intent in the process of implementation.

It is the findings of this study that despite Kenya's progressive law on asylum, refugees continue to face indeterminate timelines for refugee status determination decisions, restricted movement due to encampment practices, limited access to work permits, and insufficient protection for vulnerable groups. These issues are reminiscent of the broader systemic tensions between global norms, national policy, and local practices. This therefore means that strong laws, while necessary are not by themselves the panacea for the myriad of challenges in refugee protection. Laws must be operationalized to reflect the lived experiences of the subjects. Indeed, legal frameworks should be designed to adapt international protection principles into shared, context-specific functions rather than replicating them verbatim. In this sense, refugee protection demands a multi-pronged approach, integrating law with community engagement, capacity building, and international cooperation. Eventually, the dignity and rights of refugees can only be safeguarded through the alignment of robust legal texts with genuine commitment and practical measures to ensure their implementation.

Keywords: asylum policy, asylum seekers, practice continuum, refugees

Declaration for Plagiarism

By signing the present statement, I, the undersigned Vincent Godana Yatani, a Ph.D. Candidate at the University of Debrecen, Geza Marton Doctoral School of Legal Studies, hereby declare that the dissertation entitled “*Kenya’s Asylum Governance: A Critical Inquiry into Policy-Practice Continuum*” is my own original work.

While writing the dissertation, I complied with the provisions of Act LXXVI of 1999 on Copyright and the regulations of the University of Debrecen regarding the principles of dissertation writing, especially as regards references and citations. I declare that I have not submitted a dissertation with the same content as the submitted dissertation for a doctoral degree for any other assessment at this or any other institution.

All sources of information used in this work, including but not limited to books, journals, websites, and personal communications, have been acknowledged and cited correctly using the Oxford Standard for Citation of Legal Authorities (OSCOLA). I understand that plagiarism, which includes presenting someone else's work as my own, whether intentionally or unintentionally, is a serious academic offense. I have not copied any material from any source without proper attribution. This includes direct quotations, paraphrasing, and summarizing. I am aware of the penalties for plagiarism, which may include failing the assignment, failing the course, or expulsion from the institution.


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February 14, 2026

Debrecen, 23rd February 2026

THESIS SUPERVISOR'S RECOMMENDATION

With regard to the eligibility of my student, Vincent Godana Yatani's dissertation (Kenya's Asylum Governance: A Critical Inquiry into Policy - Practice Continuum) for further procedural actions, I declare the following.

Issues related to refugee protection, international human rights law, and the implementation of asylum policies are of great significance today. The functioning of a comprehensive and just asylum system is essential for states committed to upholding international legal standards and human rights obligations. The increasing complexity of asylum governance necessitates the examination of the gap between legal frameworks and their practical implementation. The starting point of the doctoral dissertation is the analysis of Kenya's asylum system, critically evaluating the intersection between policy formulation and real-world application. In his dissertation, the author adopts a descriptive-analytical and doctrinal approach, incorporating empirical methods where necessary.

The doctoral candidate focuses his research on the inconsistencies between Kenya's progressive legal commitments and the systemic challenges affecting implementation. The author specifically addresses Kenya's encampment policy, the right to work for refugees, and the broader treatment of asylum seekers. He provides a detailed examination of the domestic and international legal frameworks governing asylum, analyzing policy execution through institutional mechanisms. The dissertation clarifies the interaction between Kenya's obligations under the 1951 Refugee Convention, the 1969 OAU Convention, and national legislation, while also addressing the role of judicial and administrative bodies in shaping asylum practices.

The backbone of the dissertation is the critical assessment of policy and practice within Kenya's asylum governance. The author approaches this issue from multiple angles. On the one hand, he examines Kenya's legal and institutional structures, evaluating how statutory provisions translate into tangible rights and protections for asylum seekers. On the other hand, he investigates how political, economic, and social variables influence the implementation of asylum policies, leading to discrepancies between legal intent and actual outcomes. The dissertation further explores judicial interpretations and administrative measures that have shaped the asylum landscape in Kenya.

The author's depth of expertise is evident in the interdisciplinary nature of his research. He has conducted his study with the requisite scholarly rigor, analyzing legal, policy, and practical dimensions with precision. The dissertation is structured in a coherent and systematic manner, following a logical progression from theoretical foundations to practical case studies. The research question

is thoroughly explored, and the author substantiates his arguments with detailed legal reasoning, empirical observations, and comparative insights.

The dissertation adheres strictly to formal and substantive academic requirements. Its scope meets the expected scholarly standards, and the structure is clear and well-organized. The author has reviewed relevant literature comprehensively and provided a robust answer to his research question through logical, descriptive, and comparative analysis. His conclusions are well-founded and contribute to the broader discourse on asylum policy and practice in Kenya.

The student has fully met all the requirements of the doctoral school, and his dissertation also meets all the requirements of all the written and unwritten rules that apply to him. On the basis of the above, I find the dissertation of **Vincent Godana Yatani** to be suitable for Public defence.

Debrecen, 2026.02.13.



Dr. Szűcs Lászlóné Prof. Dr. Siska Katalin
Supervisor

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Table of Contents

Abstract.....	3
Declaration for Plagiarism	4
Acknowledgment.....	6
Abbreviations	10
Definition of Terms and Concepts.....	12
CHAPTER 1: INTRODUCTION.....	19

1.1	Background of the study	19
1.2	Problem Statement	24
1.3	Hypothesis and Research Questions	24
1.4	Research Objectives	24
1.5	Significance of the Study	25
1.6	Scope of the Study	25
1.7	Research Methodology	26
1.8	Chapter Outline.....	26
CHAPTER 2: THE SYSTEM OF ASYLUM.....		28
2.0	Introduction	28
2.1	The Notion of Asylum.....	28
2.2	Asylum Systems and Refugee Rights.....	31
2.2.1	Human Dignity and the Right to Seek Asylum	33
2.3	The Evolution of the Global Refugee Protection Framework	34
2.3.1	The Modern Framework for International Protection of Refugees.....	38
2.3.2	Protection Dynamics: Quest to Surmount 21st-Century Challenges.....	43
2.4	Regional Frameworks for Refugee Protection	47
2.5	Theoretical and Conceptual Framework.....	50
2.5.1	Institutional Theory	50
2.5.2	Political Institutions and Asylum Policy Implementation	53
2.5.3	Legal Institutions and Asylum Policy Implementation.....	55
2.5.4	Social Norms and Informal Institutional Behavior.....	56
2.5.5	Economic Constraints and Institutional Resource Allocation	57
2.6	Conceptual Framework.....	58
2.6.1	Policy Scope and Context.....	58
2.6.2	From Policy to Practice: The Fading Continuum.....	59
2.7	Conclusion.....	61
CHAPTER 3: RESEARCH METHODOLOGY		61
3.0	Introduction	61
3.1	Approaches	62

3.2	Data Collection	64
3.3	Data Analysis and Techniques	67
3.4	Ethical Considerations.....	68
3.5	Limitations.....	68
3.6	Conclusion:.....	69
CHAPTER 4: THE EVOLUTION OF REFUGEE PROTECTION IN KENYA		69
4.0	Introduction	69
4.1	A Synopsis of the Refugee Act No. 10 of 2021	71
4.1.1	Compliance with Asylum Procedure Standards.....	74
4.1.2	Policy Fitness Lost in Textual Mistiness?	79
4.2	Documented Standards Versus Implementation Realities	82
4.3	Internal and External Implications	86
4.4	Empirical Perspectives on Kenya’s Asylum Governance	87
4.5	Insights from the Literature	92
CHAPTER 5: FINDINGS AND ANALYSIS		97
5.0	Introduction	97
5.1	Kenya’s Asylum Process	97
5.1.1	Reception of Asylum Seekers	97
5.1.2	Registration of Asylum Seekers	99
5.1.3	The Status Determination Process (RSD).....	100
5.1.4	Framing Durable Solutions	102
5.2	Alignment with International Standards.....	105
5.3	Policy Intent Nipped in the Bud	106
5.4	Digital Identity Schemes and Refugee Governance in Kenya	110
5.5	From Lofty Goals to Ground Realities	112
5.6	Conclusion	117
CHAPTER 6: DISCUSSION		117
6.0	Introduction	117
6.1	National Security Discourse in Refugee Protection	118
6.1.1	Refugee Encampment as National Security Measure	121

6.1.2	National Interests Versus Refugee Protection: Debunking the Tension.....	125
6.1.3	Conflicting or Complementary goals?.....	127
6.2	Durable Pathways	134
6.2.1	Kenya's Repatriation Efforts: Voluntary Return or Constructive Repulsion?	135
6.2.2	Kenya's refugee integration model: Reality or rhetoric?.....	139
6.2.2.1	Multilevel Governance and Structural Constraints to Refugee Integration in Kenya.....	144
6.2.3	Third Country Resettlement	147
6.3	Refugee Hosting: A Drain on National Resources?	149
6.4	Conclusion.....	151
CHAPTER 7: CONCLUSION & RECOMMENDATIONS		152
7.0	Introduction	152
7.1	Conclusion.....	152
7.2	Recommendations	154
Bibliography		156
Appendices.....		177

Abbreviations

1. AU	African Union
2. CAT	Convention Against Torture
3. CIDPs	County Integrated Development Plans
4. CJEU	Court of Justice of the European Union
5. CORD	Coalition for Reform and Democracy
6. CRRF	Comprehensive Refugee Response Framework
7. CSR	Corporate Social Responsibility
8. CTD	Conventional Travel Document
9. DAI	Development-Assisted Integration
10. DAR	Development Assistance for Refugees

11. DLI	Development through Local Integration
12. DRA	Department of Refugee Affairs
13. DRS	Department of Refugee Services
14. EAC	East African Community
15. ESG	Environmental, Social, and Governance
16. EU	European Union
17. GCR	Global Compact on Refugees
18. GISED	Garissa Integrated Socioeconomic Development Plan
19. HIAS	The Hebrew Immigrant Aid Society
20. ICCPR	The International Covenant on Civil and Political Rights
21. IGAD	Intergovernmental Authority for Development
22. IHRL	International Human Rights Law
23. IMF	International Monetary Fund
24. IRL	International Refugee Law
25. KISED	Kalobeyei Integrated Socioeconomic Development Plan
26. KNCHR	Kenya National Commission on Human Rights
27. KRA	Kenya Revenue Authority
28. LGBTQ	Lesbian, Gay, Bisexual, Transgender, and Queer
29. MOUs	Memorandum of Understanding
30. NACOSTI	National Commission for Science, Technology, and Innovation
31. NGOs	Non-governmental Organizations
32. NHIF	National Hospital Insurance Fund
33. NLAS	National Legal Aid Service
34. NSPP	National Social Protection Policy
35. NSSF	National Social Security Fund

36. OAU	Organization of African Unity
37. PINs	Personal Identification Numbers
38. PoC	Person of Concern
39. RAC	Refugee Advisory Committee
40. RSAC	Refugee Status Appeals Committee
41. RSD	Refugee Status Determination
42. SAP	Structural Adjustment Programs
43. SHA	Social Health Authority
44. SLAA	The Security Laws (Amendment) Act
45. TVET	Technical and Vocational Education and Training
46. UDHR	Universal Declaration of Human Rights
47. UN	The United Nations
48. UNHCR	United Nations High Commissioner for Refugees

Definition of Terms and Concepts

Administrative Discretion - Administrative discretion denotes the authority vested in public officials to interpret and apply legal provisions within statutory bounds. As explained by HWR Wade and CF Forsyth in *Administrative Law* (11th edn, OUP 2014), discretion must be exercised reasonably, lawfully, and in accordance with principles of fairness.

Asylum - Asylum refers to the protection granted by a state to a non-national who has fled their country of origin owing to persecution or serious harm and seeks refuge elsewhere. Although the term “asylum” is not expressly defined in the Convention Relating to the Status of Refugees 1951, its legal substance derives from the refugee definition under Article 1A(2) of the Convention and the protective obligations assumed by States Parties. In Kenya, asylum is operationalised through the statutory framework established under the Refugees Act No 10 of 2021.

Asylum Institutional Architecture - Asylum institutional architecture refers to the configuration of legal and administrative bodies responsible for asylum governance. In Kenya, this structure is established under the Refugees Act No 10 of 2021 and operates within the broader constitutional framework set by the Constitution of Kenya 2010.

Asylum Seeker - An asylum seeker is an individual who has applied for recognition as a refugee and whose claim remains pending before the competent authority. Under Article 33 of the Refugee Convention 1951, such individuals are entitled to protection against refoulement while their claims are being examined. In Kenya, procedural guarantees governing asylum seekers are set out in sections 11–16 of the Refugees Act No 10 of 2021.

Complementary Protection - Complementary protection applies to individuals who do not meet the refugee definition but would face serious harm if returned, consistent with Article 3 of the Convention Against Torture 1984 and Article 7 of the International Covenant on Civil and Political Rights 1966.

Documentation - Documentation refers to the issuance of identity papers and travel documents confirming lawful presence and access to rights, as required under Articles 27–28 of the Refugee Convention 1951 and provided for under Kenya’s Refugees Act No 10 of 2021.

Durable Solutions - Durable solutions refer to the long-term resolution of refugee situations through voluntary repatriation, local integration, or resettlement to a third country. This tripartite framework is consistently articulated in UNHCR policy documents, including the Framework for Durable Solutions (2003).

Encampment Policy - Encampment refers to a regulatory approach requiring refugees to reside in designated camps or settlements, often accompanied by restrictions on freedom of movement. While Article 26 of the Refugee Convention 1951 guarantees freedom of movement subject to lawful restrictions, Kenya’s approach has historically relied on statutory provisions such as section 28 of the

Refugees Act No 10 of 2021, as well as administrative directives. UNHCR's Policy on Alternatives to Camps (2014) advocates for less restrictive approaches.

Fading Continuum - *The Fading Continuum* is a conceptual framework developed in this dissertation to explain the progressive attenuation of normative commitments as they move from formal articulation in legal and policy instruments to their practical realization within administrative and institutional settings. It describes the phenomenon whereby rights, guarantees, and standards that are clearly expressed in constitutional texts, statutes, and policy frameworks gradually diminish in strength, clarity, or accessibility as they pass through successive stages of interpretation, implementation, and enforcement. This framework enables a structured examination of how Kenya's asylum governance evolves from normative aspiration to administrative reality, and how the strength of protection may diminish, not abruptly, but progressively along that continuum.

Freedom of Movement - Freedom of movement denotes the right of refugees lawfully present in a territory to move freely within that territory, as guaranteed under Article 26 of the Refugee Convention 1951. In Kenya, this right is constitutionally protected under Article 39 of the Constitution of Kenya 2010, subject to lawful limitations.

Human Security - Human security shifts the focus of protection from state sovereignty to individual safety and dignity. This concept was prominently articulated in the UNDP Human Development Report (1994).

International Protection - International protection encompasses the rights, safeguards, and institutional mechanisms through which refugees and asylum seekers are protected under international law. The mandate of the United Nations High Commissioner for Refugees (UNHCR), established by UN General Assembly Resolution 428(V) of 1950, provides the institutional foundation for such protection, while the Refugee Convention of 1951 establishes its substantive legal framework.

Legal Status - Legal status refers to formal recognition under domestic law, determining lawful presence and entitlement to rights. In Kenya, documentation and status recognition are governed by sections 27–30 of the Refugees Act No 10 of 2021.

Local Integration - Local integration involves the progressive incorporation of refugees into the host society, culminating in permanent residence or citizenship. Article 34 of the Refugee Convention 1951 obliges States to facilitate naturalisation, while Kenya's legal framework provides pathways for lawful residence under the Refugees Act No 10 of 2021.

Non-Refoulement - Non-refoulement is the principle prohibiting the expulsion or return of a refugee or asylum seeker to territories where their life or freedom would be threatened. It is codified in Article 33 of the Refugee Convention 1951 and reinforced under Article 3 of the Convention Against Torture 1984. In Kenya, this principle is expressly protected under section 18 of the Refugees Act No 10 of 2021 and is further supported by Article 2(5) and (6) of the Constitution of Kenya 2010, which incorporate international law into domestic law.

Policy - Practice Gap - The policy - practice gap describes the divergence between formally articulated legal or policy commitments and their actual implementation. Michael Lipsky's theory of "street-level bureaucracy" (1980) demonstrates how frontline administrative discretion shapes such divergences.

Prima Facie Recognition - Prima facie recognition refers to the group-based recognition of refugee status without individualised determination, typically applied in situations of mass influx. This approach is consistent with the expanded refugee definition under Article I(2) of the OAU Convention 1969 and is recognised within Kenya's statutory framework under section 3(2) of the Refugees Act No 10 of 2021.

Protection Gap - A protection gap arises where refugees' rights are recognised in law but not effectively realised in practice. James Hathaway, in *The Rights of Refugees under International Law* (2005), identifies structural and political factors that contribute to such gaps.

Refugee - A refugee is defined in Article 1A(2) of the Refugee Convention 1951 as a person who, owing to a well-founded fear of persecution on account of race, religion, nationality, membership of a particular social group, or political opinion, is outside their country of nationality and unable or unwilling to avail themselves of its protection. In the African context, Article I(2) of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa 1969 expands this definition to include persons fleeing external aggression, occupation, foreign domination, or events seriously disturbing public order. This broader definition is incorporated into section 3 of Kenya's Refugees Act No 10 of 2021.

Refugee Status Determination (RSD) - Refugee Status Determination (RSD) is the legal and administrative procedure through which authorities assess whether an asylum applicant satisfies the refugee definition. Guidance on RSD is provided in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (2019), while the domestic legal basis in Kenya is found in sections 11–16 of the Refugees Act No 10 of 2021.

Resettlement - Resettlement refers to the organised transfer of refugees from a host state to a third country that grants permanent protection status. The operational framework is set out in the UNHCR Resettlement Handbook (2011, rev edn).

Rights-Based Approach - A rights-based approach integrates international human rights standards into governance frameworks, emphasising accountability, equality, and dignity. It is grounded in the Vienna Declaration and Programme of Action (1993) and reinforced domestically by Articles 19–21 of the Constitution of Kenya 2010.

Securitisation of Migration - Securitization refers to the framing of migration and asylum as threats to national security, thereby legitimizing restrictive measures. This theory was developed by Barry Buzan, Ole, and Jaap de Wilde in *Security: A New Framework for Analysis* (1998).

Street-Level Bureaucracy - Street-level bureaucracy refers to frontline public officials whose discretionary decisions effectively determine how policies are implemented in practice, as theorised by Michael Lipsky in *Street-Level Bureaucracy: Dilemmas of the Individual in Public Services* (1980).

Voluntary Repatriation - Voluntary repatriation is the return of refugees to their country of origin in safety and dignity, based on free and informed consent. The principle is elaborated in UNHCR Executive Committee Conclusion No 18 (XXXI) of 1980.

Vulnerable Groups - Vulnerable groups include women, children, persons with disabilities, and survivors of torture who require heightened safeguards. International protections derive from the Convention on the Rights of the Child 1989 and the Convention on the Rights of Persons with Disabilities 2006, while domestic safeguards are incorporated within Kenya's Refugees Act No 10 of 2021.



KENYA

Registered refugees and asylum-seekers

as of 31 August 2024



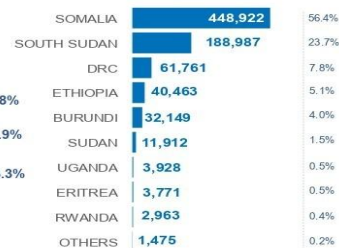
796,331

REGISTERED REFUGEES AND ASYLUM-SEEKERS

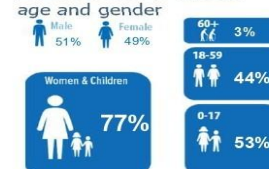
HOST LOCATIONS



COUNTRIES OF ORIGIN



DEMOGRAPHICS



LEGAL STATUS

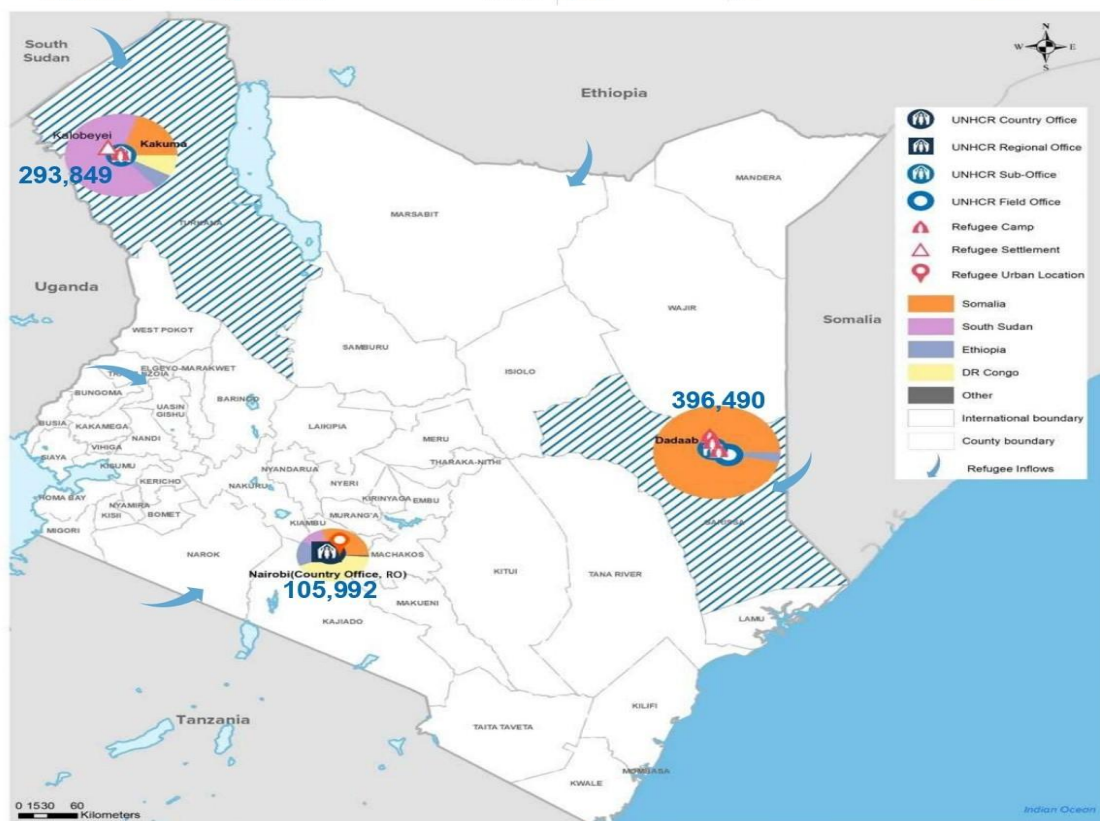


Figure 1: Map of Kenya showing locations of major refugee-hosting areas and Demographics (Source: UNHCR 2024)

CHAPTER 1: INTRODUCTION

1.1 Background of the study

“It's as if these laws and policies are just mentioned and written in sample books and archives, but they are not implemented.”²

The global community continues to contend with ever-surging numbers of persons forcibly displaced due to conflict, persecution, violence, and other human rights abuses. According to estimates³ by the United Nations High Commissioner for Refugees (UNHCR), a significant proportion of this displaced population currently approximated at 30%, comprises Refugees and Asylum seekers fleeing their countries to seek protection beyond state territorial borders because their government is not able or willing to safeguard their basic human rights. Notwithstanding varying management practices in national jurisdictions, International law recognizes the distinct and unique vulnerability of refugees and asylum seekers and establishes standards to ensure their protection and well-being. Complemented by other bodies of law, notably International Human Rights Law, International Humanitarian Law, and International Criminal Law, the 1951 Convention⁴ Relating to the Status of Refugees (the 1951 Refugee Convention) and its 1967 Protocol,⁵ today, stand as global legal instruments explicitly covering the most important aspects of international protection.

Furthermore, the United Nations High Commissioner for Refugees, a specialized UN agency is in place to safeguard the well-being of Refugees and Asylum Seekers. In this context, this category of forcefully displaced can be said to possess a unique legal status, supported by internationally recognized legal frameworks designed to address their specific needs and rights. The Refugee Convention, as expanded in scope by the 1967 Protocol promotes a compassionate, rights-based approach to refugee protection including critical

² Eva Freudenthaler, ‘Refugee Rights in Kenya: Between Theory and Practice’ (2012) 12 Wiener Zeitschrift für Kritische Afrikastudien 107. In this study Eva posed the question: If you had the power, what would you change for refugees in Kenya? A refugee respondent in Kakuma answered: I think as per what was implemented in international human right laws, we should give refugees the opportunities of the laws that are already in place. It’s like these laws and policies were just mentioned and written in sample books and archives, but they were not implemented.

³ UNHCR reports and publications, ‘Global Trends’ <<https://www.unhcr.org/global-trends>> accessed 28 December 2024.

⁴ United Nations Office of Legal Affairs, ‘Convention Relating to the Status of Refugees. Geneva, 28 July 1951 [United Nations, Treaty Series, Vol. 189, i-2545.]’ <<https://www.un-ilibrary.org>> accessed 3 April 2023.

⁵ United Nations, ‘No. 8791. Protocol Relating to the Status of Refugees. Done at New York, on 31 January 1967’ <<https://www.un-ilibrary.org>> accessed 3 April 2023.

principles, such as non-refoulement, the right to work, education, and access to courts. It consequently imposes legal obligations on states to protect refugees and to provide them with safe asylum.

However, while the edifice of the international refugee framework recognizes the crucial need for balance between the grant of refugee protection and the legitimate national interests of states that host the refugees, the work-ability of the compromise embedded in the architecture of the Refugee Convention and its Protocol is today threatened by critical failures at the level of implementation.⁶ These implementation challenges range from resource constraints and political pressures in host countries to the securitization of asylum and a lack of an elaborate global burden-sharing framework. Besides, it's notable that the entrenchment of international refugee regimes through national frameworks compounds structural tension between global norms and local contexts in some jurisdictions.

With a long history of hosting refugees, Kenya acceded to the Refugee Convention and its 1967 protocol on 16th May 1966 and 13th November 1981 respectively without any reservations. It also ratified the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa⁷ (the OAU Convention) on 23rd June 1992. At the national level, Kenya has also adopted a rights-oriented approach to refugee law,⁸ and, is at the forefront of global efforts toward implementing the Comprehensive Refugee Response Framework⁹ (CRRF) and the Global Compact on Refugees¹⁰ (GCR). The country continues to strive for the economic and social inclusion of refugees, setting ambitious goals under what is now commonly known as the Shirika Plan.

However, despite the progressive legal frameworks and national plans, there are notable structural and systemic disparities in policy and practice. For example, while the legal framework prescribes a statutory timeline of 90 days for Refugee Status Determination (RSD) decisions, in practice, many cases take several years to resolve. Similarly, although fast-track procedures exist in law¹¹ for vulnerable groups, such as unaccompanied minors, there exist no specific measures to actualize the intention of the provision of the law. In addition, despite legal provisions aimed at phasing out the encampment of refugees, refugees remain confined in Camps, restricting refugees' freedom of movement without any viable alternative for durable solutions. Furthermore, while the law provides for the

⁶ Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021).

⁷ 'OAU Convention Governing the Specific Aspects of Refugee Problems in Africa | African Union' <<https://au.int/en/treaties/oau-convention-governing-specific-aspects-refugee-problems-africa>> accessed 22 April 2023.

⁸ The Refugee Act, 2021.

⁹ 'CRRF <https://www.unhcr.org/what-we-do/protect-human-rights/asylum-and-migration/new-york-declaration-refugees-and-migrants-0>'.

¹⁰ Global Compact on Refugees (<https://www.unhcr.org/media/global-compact-refugees-booklet>).

¹¹ Refugee Act 2021. See Section 20 and 21 of the Act

documentation of refugees to access pathways for work permits, the issuance of such documentation frequently falls short of the legal requirements. This divergence in policy and practice is further compounded by the focus on security concerns at the national level leading to restrictive measures that often overshadow the country's international commitments to refugee protection.

While this paints a picture that Kenya's refugee policy and practice are an acne of formal commitments that often fall short of application, the available literature on the recasting of otherwise Kenya's progressive asylum architecture into practical form is shallow, varied in context, and some, out of date. In my interaction with literature on the subject, Eva Freudenthaler's work, *"Refugee Rights in Kenya Between Theory and Practice,"*¹² comes close to invoking similar discussion. Eva notes that refugees face significant challenges due to the gap between the country's ratification of international human rights laws and their practical implementation. She points out that, while Kenya adheres to the principle of non-refoulement, other critical rights, such as freedom of movement, employment, and access to fair refugee status determination (RSD), are poorly executed. Her research brought the fact that refugees are often confined to camps, enduring long RSD wait times, inadequate appeal procedures, and restricted mobility. She further notes that employment opportunities are limited, with informal work dominating due to the lack of legal frameworks, and many face daily insecurity, harassment, and challenges linked to insufficient identity documentation. While the focus of her study appears similar, it largely centred on specific rights and the divergence between their theoretical and practical application and was at the time reliant on Kenya's repealed Refugee Act of 2006.

Similarly, Ken Oluoch, paper *"Reconciling Security Concerns and Refugee Protection,"*¹³ centers on how security issues influence the extent of Kenya's commitment to international refugee law and durable solutions. Many other scholarly works and grey literature have focused on examining Kenya's asylum system in contexts such as legal frameworks,¹⁴ its human rights implications,¹⁵ integration challenges,¹⁶ and the impact of regional dynamics.¹⁷ While appreciating these varied contexts, I examine the interplay

¹² Freudenthaler (n 2).

¹³ Ken Oluoch, 'Reconciling Security Concerns and Refugee Protection' <https://rhps.thebrpi.org/journals/rhps/Vol_5_No_1_June_2017/3.pdf> accessed 28 October 2024.

¹⁴ Herbert Amatsimbi, 'Refugee Protection in Kenya' (2024) 16 Journal of Policy and Development Studies 245.

¹⁵ Guglielmo Verdirame, 'Human Rights and Refugees: The Case of Kenya1' (1999) 12 Journal of Refugee Studies 54.

¹⁶ David Beversluis and others, 'Developing and Validating the Refugee Integration Scale in Nairobi, Kenya' (2017) 30 Journal of Refugee Studies 106.

¹⁷ Ken Oluoch, 'Kenya's National Security and International Refugee Law in the Dynamic World Order' (2019) 311 Contemporary Africa and the Foreseeable World Order.

between policy and practice across the entire asylum process in Kenya, from initial reception to the durable solution phase. I explore the reasons for the mismatch between Kenya's asylum laws and the actual experiences of refugees and proceed to examine why Kenya's international and regional mandates do not consistently translate into effective national practices within its asylum system.

From the findings, I contend that many variables ranging from political, economic, legal, and social perceptions interact to produce the variation between the text of the law and the actual application of these provisions. On the political front, refugees and asylum seekers have been framed within the state's terrorism and counterterrorism discourse as existential threats to national peace and security leading to the implementation of socially constructed counterterrorism measures.¹⁸ Economically, the cost of hosting refugees is a major concern for the country and affects its capacity to properly execute its asylum obligations. Therefore, despite the legal obligations to provide for refugees, the country's economic status hampers its ability to deliver essential services. In funding refugee initiatives, the government is mainly dependent on foreign donors and agencies like the UNHCR, and therefore its ability to engage in long-term solutions, such as integrating refugees into host communities or strengthening their rights to work or move freely, is often hindered by shortfalls in donor financing.

Moreover, the robust legal provisions for protecting refugees are not always backed by strong enforcement mechanisms therefore institutional inefficiencies, such as bureaucratic delays, and lack of coordination between government agencies and international bodies, undermine the full implementation of these laws.¹⁹ Similarly, although legislative frameworks outline the protection of individuals from discrimination, social attitudes rooted in prejudice at the community and institutional levels continue to diminish the chances of integration for refugees in Kenya. Cultural differences between refugees and local communities have posed greater obstacles to the acceptance of refugees in accessing opportunities such as education, employment, and social mobility. Moreover, the lack of safety and protection of refugees, particularly women and children, mirrors social vulnerabilities that compound their challenges. Reported cases of sexual and gender-based violence are representative of greater social risk for refugees, particularly in areas where security measures

¹⁸ Oscar Gakuo Mwangi, 'The "Somalinisation" of Terrorism and Counterterrorism in Kenya: The Case of Refoulement' (2019) 12 Critical Studies on Terrorism 298.

¹⁹ Margaret Monyani, Adamnesh Bogale and Otilia Anna Maunganidze, 'Bridge over Troubled Waters: Migration Governance and Rule of Law in Kenya and Ethiopia' (2023) 2023 ISS East Africa Report 1.

are inadequate.²⁰ Therefore, despite the existence of a robust legal framework designed to protect refugees, these factors often obstruct its full implementation.

Mitigating the cumulative effect of these factors calls for a recalibration of the system. Consequently, for such recalibration to bridge the divide between legal ideals and practical realities, an appraisal of the existing system becomes inevitable. Such an appraisal is what indeed has informed the focus of this research. Accordingly, using institutional theory, the study scrutinizes how formal rules, structures, and policy frameworks interact with the day-to-day realities of organizational behavior and decision-making within the asylum process. The choice of the theory is informed by the fact that Refugee protection governance operates through institutions whose rules, practices, and bureaucratic logics actively shape how law is implemented in practice. The study, therefore, adopts an institutional perspective to examine how formal and informal structures influence decision-making and outcomes within Kenya's asylum system. It seeks to uncover the underlying institutional mechanisms that either facilitate or obstruct the implementation of asylum policies. The institutional theory approach offers clarity on how institutional pressures, bureaucratic inertia, and informal practices shape the continuum from policy creation to practical outcomes.

Further, in my assessment of the policy-practice continuum, I have framed the scope of international protection within the general realm of preliminary protection, such as Refugee Reception, substantive protection of obtaining legal status through documentation, and the durable solutions pathways. I identify these three as forming the fundamental components of refugee protection within which I examine how political, economic, legal, and social factors impact the implementation of asylum laws in Kenya. I have framed these issues through the "*fading continuum*," a conceptual model that illustrates how these systemic factors such of political, economic, social, and legal nature, dilute policy intent during implementation. In applying this innovative conceptual frame, I attempt to uncover the underlying causes of the policy-practice gap and propose actionable solutions.

Kenya's asylum system has been selected for its analytical value in illuminating broader dynamics in asylum governance and refugee protection. While the analysis is primarily grounded in the Kenyan context, the study incorporates a limited comparative perspective, specifically on refugee integration as a durable solution in Indonesia and Uganda. This comparative perspective is not intended to constitute a full cross-national analysis, but rather to situate Kenya's experience within wider regional and global patterns.

²⁰ Amy G Lewis, 'Gender-Based Violence among Refugee and Internally Displaced Women in Africa' (2005) 20 Geo. Immigr. LJ 269.

In doing so, the study seeks to generate analytically generalisable insights into the *policy - practice continuum* in asylum governance that may be relevant to other refugee-hosting contexts facing comparable structural and institutional challenges.

1.2 Problem Statement

The asylum system in Kenya consists of a blend of laws and programmes aimed at safeguarding the subjects of international protection. Despite its progressive legal frameworks anchored in international and regional instruments like the Refugee Convention and the OAU Convention, the policy intent wanes at the implementation level. This contrast between formal commitments, where, for instance, the laws offer freedom of movement, work rights, and integration options; and on the other hand, ground realities where there is restriction of movement, overwhelming bureaucratic barriers, and other implementation hurdles inform the reflection of this study. The research, therefore explores the extent to which Kenya's asylum policies transition into effective practice. This exploration is aimed at identifying structural and systemic issues that contribute to the fading continuum between the law and its intended application. The study further proffers suggestions for seamless recasting of the policy intentions into practice.

1.3 Hypothesis and Research Questions

The study hypothesizes that the policy and practice continuum in Kenya's asylum system is significantly impacted by political, economic, legal, and social factors, which act to hinder the consistent and effective implementation of refugee protection laws. I assess the causal relationship between these variables and the divergence in the policy and practice continuum using a mixed-method approach. As a consequence, I have considered the following research questions as instrumental in evaluating this assertion.

1. What political, economic, legal, and social determinants impact the policy and practice continuum in Kenya's asylum system, and how do they create barriers to the effective implementation of refugee protection laws?
2. What specific challenges do refugees face in accessing their rights within the context of the policy and practice continuum in Kenya's asylum system, and how are these challenges shaped by the referenced determinants?

1.4 Research Objectives

The overall objective of the study is to critically examine the continuum between policy and practice within Kenya's asylum system to identify and understand any deviations from intended policy objectives.

Specifically, the study aims:

1. To analyze Kenya's asylum policy and legal framework, encompassing national laws and international conventions, and to evaluate how these frameworks shape refugee protection in Kenya.
2. To examine the inconsistencies between Kenya's progressive legal framework and practical realities on the ground, and identify structural and systemic challenges to effective policy application.
3. To assess how political, economic, legal, and social determinants create barriers to the consistent application of refugee protection laws and policies.
4. To make practical recommendations for aligning policy with practice to enhance refugee protection in Kenya.

1.5 Significance of the Study

The significance of this research lies in its potential to bring to the fore the intricacies inherent in the policy and practice continuum within Kenya's asylum system, particularly in the context of the challenges faced by refugees. Through a structured analysis of the political, economic, legal and social factors shaping this continuum, the research has sought to gain a holistic picture of the obstacles that prevent the successful application of refugee protection laws. This insight is of importance to policymakers, and other stakeholders in the realm of refugee protection. The appraisal of the system is further expected to inform strategic approaches to refugee protection where refugees can exercise their rights to inform policy debates that impact their lives. That is, the findings here can act as a tool for advocacy work, informing stakeholders as they build more equitable and effective systems to protect refugees. Therefore, in a broad way, this work adds to the literature on refugee rights and protection under international human rights law on a global scale, reinforcing the importance of consistent and equitable protection for all individuals seeking asylum.

1.6 Scope of the Study

In this research, I consider the nexus between the text of the laws governing refugees and their practical implementation within Kenya's asylum system. Therefore, the geographical scope is primarily focused on Kenya, examining the governing legal regimes, onboarding the views of the stakeholders, and experiences of asylum seekers in the country. The legal frameworks here include Kenya's

national asylum laws, relevant policies, and regional as well as international commitments that Kenya has made in the realm of refugee protection. The intent and content of these frameworks and their impact on local asylum practices are analyzed within the context of three main protection limbs of preliminary protection stage, the substantive stage, and the durable solution stage. The study does not address broader migration policies, limiting its scope to an appraisal of Kenya's asylum system as a whole.

1.7 Research Methodology

The examination of the disparity between Kenya's progressive asylum legislation and its practical application was conducted through a comprehensive methodological framework. The study employed a single-country case study methodology centered on Kenya's asylum system. Both primary and secondary data collection were undertaken. A mixed-methods approach, incorporating both qualitative and quantitative techniques, was used, where primary data was gathered through questionnaires distributed to key informants and participatory observations. Secondary data was sourced through documentary analysis and doctrinal examination of legal frameworks and judicial decisions. Institutional theory was applied as the analytical framework to enable an examination of how institutional rules, norms, and practices shape the implementation of asylum law in Kenya.

1.8 Chapter Outline

Chapter One introduces the study by laying out the background of Kenya's asylum system within the global context of forced displacement, governed by international frameworks like the 1951 Refugee Convention and its 1967 Protocol. It presents the problem statement, emphasizing the gap between Kenya's progressive refugee policies and their inconsistent application due to structural and institutional challenges. It details the research questions, and objectives, highlights the significance of the study for policy enhancement, and clarifies the scope of the study within the Kenyan context.

Chapter two provides a comprehensive review of the existing literature and the theoretical and conceptual frameworks on which the study is based. The section introduces the concept of asylum and provides a historical look at the phenomenon of refugees. It covers developments in asylum practices, the legal frameworks at the global level, and the operational systems for international protection. The chapter also delves into the principles underpinning asylum, including the right to seek refuge, non-refoulement, and the legal obligations of states.

Chapter three outlines the steps taken to formulate the research problem and objectives, as well as the methods used to analyze and present findings derived from the data collected throughout the research period. The chapter provides a comprehensive discussion of the methodologies employed, detailing each aspect of the research process. This includes the research strategy, design, research philosophy, research type, and the study approach. Furthermore, considerations regarding data collection techniques, including primary and Secondary data collection methods, are also outlined in this chapter. Additionally, the tools employed in data analysis and the use of software for data analysis are elaborated. In the last part of the chapter, the main methodological approaches are summarized, further explaining the interrelations of the research components and why each was essential when conducting the research.

Chapter four traces the legal and policy evolution of refugee protection in Kenya, documenting the transition from a rigid, security-heavy encampment regime to a more integrated approach introduced by the Refugee Act No. 10 of 2021. By analyzing the synopsis of this new legislation, the chapter evaluates how Kenya's asylum procedures have matured to align with international standards, particularly regarding socioeconomic inclusion and procedural fairness. However, it concludes by critiquing the "textual mistiness" of the current law, arguing that while the legal framework has evolved on paper, practical implementation remains obscured by administrative ambiguities and the persistent tension between refugee rights and national security interests.

Chapter Five presents findings on the gap between policy and practice within Kenya's asylum process, examining both structural and experiential aspects. It begins by outlining key issues in policy implementation, including bureaucratic barriers, the tension between encampment and integration, resource limitations, and institutional roles. The chapter then shares insights from refugees' lived experiences, focusing on practical issues around freedom of movement, access to work, social integration, and the impacts of encampment policies, such as economic and psychological hardships. The chapter's analysis synthesizes these findings, linking institutional and structural factors with the observed policy-practice continuum, and concludes with reflections on the implications for Kenya's asylum framework

Chapter Six offers a comprehensive discussion of the study, synthesizing its findings and highlighting its contributions to the field. In this part, the study links the findings to existing literature and explores their broader implications. The primary focus is on how the observed continuum ebbing at implementation reflects deeper structural and systemic issues within Kenya's asylum system. Specifically, the chapter examines how aspects of political, economic, legal, and social determinants influence the common components of the asylum process, including reception, registration, refugee status determination (RSD), and the pursuit of durable solutions. In

unpacking these factors and their interconnected dynamics, the study demonstrates how they act as barriers to the effective implementation of policy intentions.

Chapter Seven provides a synopsis of the key insights into Kenya's asylum system. In this part, an overview of the study, synthesizing its findings, and contributions to the field is captured as Conclusion and Recommendations. The chapter offers a summary of the study's input on the advancement of knowledge in refugee protection. The aim here is to bridge the gap between theoretical policy and its practical application. In examining the implementation deficit in refugee protection, the chapter proposes actionable legal and institutional reforms to strengthen the current protection regime.

CHAPTER 2: THE SYSTEM OF ASYLUM

2.0 Introduction

This chapter provides a comprehensive review of the existing literature and the theoretical and conceptual frameworks on which the study is based. Since the contemporary asylum system cannot be understood without the knowledge of the broader global context from which it has emerged, and within which it continues to develop and be implemented, the chapter therefore introduces the concept of asylum and provides a historical look at the phenomenon of refugees. It covers developments in asylum practices, the legal frameworks, and the operational systems for international protection. The chapter also delves into the principles underpinning asylum, including the right to seek refuge, non-refoulement, and the legal obligations of states. In this Chapter, I have developed a conceptual context that sets the foundation for understanding the continuum between formal asylum policies and their practical implementation.

2.1 The Notion of Asylum

Asylum as a state's protection for those individuals seeking refuge within its territory or under its control, has deep historical roots, developing over centuries from religious and cultural traditions into a well-established institution in international law.²¹ It is traceable to ancient civilizations where religious teachings in Judaism, Christianity, and Islam emphasized the importance of protection and hospitality toward strangers. To illustrate, asylum, under Judaism, was largely reserved for the innocent, while under Christianity, it was promulgated as a moral precept. Islam treated asylum from both legal and philosophical points of view and welcomed the refugee

²¹ María-Teresa Gil-Bazo, 'Asylum as a General Principle of International Law' (2015) 27 International Journal of Refugee Law 3.

into its fold as a dignified member of society.²² These customs thus provided the foundation for the early laws, recognizing the right to give asylum, as contained in the Kadesh Peace Treaty and the institutions of asylum in ancient Greece and Rome.²³

In the Middle Ages, asylum transitioned from church protection to state-regulated practices due to the emergence of territorial sovereignty, which allowed states to grant asylum without being perceived as hostile to the asylum seeker's country of origin.²⁴ Therefore, asylum is an expression of state sovereignty where legal status is granted by a government to a person who is fleeing persecution in their home country. It entails the protection a state provides to an individual within its territory (territorial asylum) or in other areas under its jurisdiction or control, such as diplomatic premises or military vessels.²⁵

The UN Declaration on Territorial Asylum²⁶ reinforces this sovereign right while recognizing limitations, among them treaty obligations like the UN Convention Against Torture²⁷ (CAT), which requires states either to prosecute or extradite individuals accused of such crimes as torture. However, while asylum remains firmly anchored in state sovereignty, it's without a stand-alone international treaty such as the 1951 Convention which confers special legal status on refugees. It differs from refugee status to the extent that asylum represents the institution providing protection, whereas refugee status falls into one of the categories of persons, among many others who are eligible to receive such protection.²⁸

Nonetheless, the line between asylum and refugee status has blurred in contemporary discussions, especially within the European context. In the EU, states have limited asylum to persons under the 1951 refugee Convention and established alternative protection frameworks, such as temporary and subsidiary protection. EU's Recast Qualifications Directive²⁹ further solidifies these protections under the rubric "international protection" both for refugees and persons protected under international human rights law. It is a distinction that, despite eliciting divergent views, is nevertheless well considered in law and practice. For example, the Court of Justice of the

²² *ibid.* 17

²³ *ibid.* 17

²⁴ *ibid.*

²⁵ *ibid.* 18

²⁶ Paul Weis, 'The United Nations Declaration on Territorial Asylum' (1969) 7 *Canadian Yearbook of International Law/Annuaire canadien de droit international* 92.

²⁷ 'UN Convention Against Torture' <<https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading>> accessed 24 October 2024.

²⁸ Gil-Bazo (n 21). 7

²⁹ 'Directive - 2011/95 - EN - Qualification Directive - EUR-Lex' <<https://eur-lex.europa.eu/eli/dir/2011/95/oj>> accessed 24 October 2024.

European Union in the *Halaf*³⁰ case affirmed that asylum can be granted to individuals who have been excluded from refugee status under EU law. The case arose in the context of the Dublin Regulation, which governs the determination of Member State responsibility for examining asylum applications. It involved a broader inquiry into the obligations of Member States to consider the guidance and supervisory role of the UNHCR and the substantive right to asylum under Article 18 of the EU Charter of Fundamental Rights.³¹ While the primary focus of the judgment was on procedural obligations regarding UNHCR's views, the CJEU also touched on the scope of the right to asylum. The Court affirmed that asylum may still be granted to individuals excluded from refugee status under the Qualification Directive (Directive 2004/83/EC and its recast Directive 2011/95/EU) in cases where their situation warrants protection on broader grounds.

Many modern constitutions around the world, often enshrine the right to seek asylum within their bill of rights, reflecting a longstanding normative tradition that links the institution of asylum to broader societal conceptions of individual well-being and protection.³² While no international instruments exist to provide a universal definition of asylum, many states have articulated their own definitions within constitutional and legislative frameworks. In Kenya, although the Constitution does not expressly define asylum, the Refugees Act of 2021 under section 2, paragraph 2 defines asylum as the protection granted to a person in Kenya who is outside their country of nationality or habitual residence and is fleeing persecution, serious harm, or other threats.

In the context of this study, I use the term "asylum system" to accommodate the network of state structures, institutions, and legal frameworks entrusted with the mandate of international protection. Reference to the 'system' here is not confined to legal provisions that define and regulate asylum but also the administrative bodies, enforcement mechanisms, and policies that facilitate the identification, reception, and protection of refugees and asylum seekers. Therefore, my appraisal of the policy and practice continuum of Kenya's asylum system encompasses the full spectrum of activities involved in assessing claims, granting legal status, and ensuring the rights and safety of those fleeing persecution, while also addressing the practical implementation challenges and coordination between national and international obligations.

³⁰ *Zuheyr Frayeh Halaf v Darzhavna agentsia za bezhantsite pri Ministerskia savet* [2013] An Chúirt Bhreithiúnais Case C-528/11.

³¹ Article 18 of the EU Charter of Fundamental Rights.

³² Lucas Kowalczyk and Mila Versteeg, 'The Political Economy of the Constitutional Right to Asylum' (2016) 102 Cornell L. Rev. 1219.

2.2 Asylum Systems and Refugee Rights

Without a doubt, the refugee phenomenon is one of truly global proportions, affecting not only millions of marginalized people directly but also the policies and practices of virtually every government in the world today.³³ Therefore, the need for international protection arises from the fact that by their very nature of being humans, refugees and asylum seekers attract certain fundamental rights espoused in natural law theory³⁴ that ought to be protected by communities of civilized nations. The natural law theory views certain rights as being inherent to all individuals by virtue of their humanity.³⁵ This idea was initially developed by the Greek philosopher Aristotle³⁶ and further augmented by Thomas Aquinas.³⁷ To Aquinas, rights are entitlements that are due to people naturally because they are human beings, and that God intended them to be so. He looks at the concept of natural rights as entitlements to human beings from an ethical viewpoint. The same view was picked by another Philosopher John Locke³⁸ who advanced natural rights as rights that are given by God which then makes them sacred and inalienable. According to Locke, natural law encompasses what is ideal and just, and these principles must be reflected in legislation and governance.³⁹ That is, for such rights to have practical effect, they must be codified and institutionalized within legal frameworks.

Similarly, Joel Feinberg argues that rights are not merely abstract moral claims but also legal entitlements that the law must recognize and protect.⁴⁰ Feinberg's view aligns with legal positivism, which emphasizes the importance of codifying human rights into formal legal systems to ensure they are actionable and enforceable. To him, a right is understood as a valid claim, where the "validity" of the claim refers to a specific type of justification; one that operates within a system of rules.⁴¹ He argues that "to have a right" means to hold a claim against another party, where the recognition of that claim as valid is necessitated by a set of governing legal rules or

³³ United Nations High Commissioner for Refugees, 'The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol' (*UNHCR*) <<https://www.unhcr.org/about-us/background>> accessed 6 November 2021.

³⁴ Robert P George, 'Natural Law' (2008) 31 Harv. JL & Pub. Pol'y 171.

³⁵ *ibid.*

³⁶ Fred D Miller Jr, 'Aristotle and the Origins of Natural Rights' [1996] *The Review of Metaphysics* 873.

³⁷ Anthony J Lisska, 'Human Rights Theory Rooted in the Writings of Thomas Aquinas' [2013] *Diametros* 134.

³⁸ John Locke, 'Natural Rights' [1990] *Moral Reasoning: A Philosophic Approach to Applied Ethics*, Dryden Press, London 133.

³⁹ *ibid.*

⁴⁰ Joel Feinberg, 'The Nature and Value of Rights' *Readings in the Philosophy of Law* (Routledge 2013)

<<https://www.taylorfrancis.com/chapters/edit/10.4324/9781315054247-9/nature-value-rights-joel-feinberg>> accessed 21 October 2024.

⁴¹ *ibid.*

moral principles.⁴² In this framework, possessing a claim entails having a case that merits consideration, grounded in reasons or justifications that position the claimant to engage in performative and propositional claiming. To Feinberg, securing these rights requires the fulfillment of corresponding duties such as refraining from depriving individuals of their rights, protecting individuals from being deprived, and assisting those who have been deprived.⁴³

These duties can be assigned to different actors. That is, while everyone bears the responsibility to respect the rights of others, only specific actors are tasked with protecting certain individuals from deprivations and ensuring that their rights are fulfilled if violated. Governments, for instance, have duties to respect, protect, and fulfill the rights of individuals within their jurisdiction.⁴⁴ Therefore, when individuals assert their rights in this manner, they do more than make a legal argument, they also affirm their dignity and self-respect through the exercise of their rightful entitlements. Accordingly, Feinberg is of the view that the codification of human rights such as the right to seek asylum, transforms moral obligations into legally protected claims, ensuring that refugees can assert these rights against host states.⁴⁵ In this sense, the right to seek asylum enshrined in international legal instruments like the 1951 Refugee Convention and the Universal Declaration of Human Rights represents both a moral and a legal duty to protect vulnerable individuals. By codifying these rights, the international community ensures that the dignity of refugees and asylum seekers is preserved through enforceable legal mechanisms.

Therefore, while natural law theory and legal positivism offer fundamentally different ways of conceptualizing rights where the former sees rights as inalienable and universal, with their basis in morality and ethics, and the latter believes that rights need to be translated into positive law before they can be said to enjoy functional efficacy, they complement each other within the modern asylum system. Recognition of natural rights provides a moral basis for protecting refugees, while legal positivism ensures that such rights are actionable under international and national legal systems.

However, while the fusion of natural law and positivist principles has led to the recognition of the right to seek and enjoy asylum as a fundamental human right, enshrined in international law,⁴⁶ they are not without criticism. Critics of natural law note that this

⁴² *ibid.*

⁴³ *ibid.*

⁴⁴ *ibid.*

⁴⁵ *ibid.*

⁴⁶ Atle Grahl-Madsen, 'Universal Declaration of Human Rights, Article 13' <https://brill.com/display/book/edcoll/9789004481039/B9789004481039_s039.xml> accessed 13 April 2023.

idealistic theory, although based on moral principles, lacks the political and social realism of protection. Meanwhile, critics observe that legal positivism relies on the merits of its laws, which are limited to the character of the implementing institutions, and how legal frameworks often fail to deal with root causes of displacement like conflict and persecution.

2.2.1 Human Dignity and the Right to Seek Asylum

The right to seek and enjoy asylum is fundamentally anchored in the principle of human dignity.⁴⁷ International human rights law recognises that individuals fleeing persecution, violence, or serious human rights violations do so to preserve their life, freedom, and inherent human worth.⁴⁸ Article 14 of the Universal Declaration of Human Rights affirms that “everyone has the right to seek and to enjoy in other countries asylum from persecution,” reflecting the international community’s acknowledgment that access to asylum is an essential safeguard against the erosion of human dignity.⁴⁹

Human dignity operates as the normative foundation of this right. The denial of access to asylum procedures, arbitrary exclusion from protection mechanisms, or prolonged exposure to legal uncertainty compromises the recognition of asylum seekers as rights-bearing persons. In this sense, asylum is not merely a discretionary act of State benevolence, but a legal mechanism through which dignity is preserved by ensuring protection from harm, refoulement, and conditions incompatible with humane existence.

Within the African human rights system, the connection between dignity and asylum is particularly pronounced. The 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa expands the refugee definition and emphasises solidarity, humanitarian considerations, and protection against mass displacement.⁵⁰ These normative commitments reflect a regional understanding of asylum as a dignity-preserving response to structural violence, conflict, and systemic oppression.

Kenya’s constitutional and statutory framework must be understood against this international backdrop. Article 2(5) and (6) of the Constitution of Kenya incorporate general rules of international law and ratified treaties into domestic law, rendering the dignity-infused right to seek asylum directly relevant to national asylum governance. The Refugees Act, 2021 gives domestic effect to Kenya’s international obligations by providing for admission, registration, documentation, and protection of refugees and asylum seekers. These

⁴⁷ Callixte Kavuro, ‘The Value of Human Dignity in the Refugee Protection’ (2019) 5 African Human Mobility Review 1510.

⁴⁸ Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (Oxford university press 2019).

⁴⁹ Elijah Kuisachor, *The Implementation of the Right of Asylum According to Article 14 of the Universal Declaration of Human Rights* (Salisbury University 2021).

⁵⁰ ‘OAU Convention Governing the Specific Aspects of Refugee Problems in Africa | African Union’ (n 7).

processes are not merely procedural; they are the means through which the State affirms the dignity of individuals seeking refuge by recognising their legal status and enabling access to protection and essential services. Failures in asylum governance thus implicate not only compliance with refugee law, but the State's broader obligation to respect, protect, and fulfil the inherent dignity of all persons within its jurisdiction.

2.3 The Evolution of the Global Refugee Protection Framework

Kenya's asylum policy is shaped by its international obligations and regional commitments. The national refugee framework fully entrenches these international and regional refugee regimes. Thus, beyond the obvious structural tension between global norms and local contexts, the national framework reflects the intrinsic weaknesses and complexities inherent in international and regional instruments, particularly at implementation. Therefore, understanding Kenya's asylum system requires comprehension of the broader global context from which it has emerged, and within which it continues to develop and get implemented, hence a historical look at the phenomenon of refugees suffices.

Accordingly, while there exist historically documented refugee crises that date as far back as 721 BC,⁵¹ this discussion begins with the 16th-century Reformation period, a pivotal moment in the development of modern nation-state systems. Reformation, deepened ideological divisions, fragmenting Europe along confessional lines, intensified political allegiances, reinforced emerging political identities, and solidified the alignment of territories along religious boundaries.⁵² The contemporary refugee crises are therefore intricately linked to the emergence of modern nation-state systems⁵³ that culminated in the manifestation of state sovereignty, territorial integrity, and non-interference in the affairs of other states as conceived in the Treaty of Westphalia.⁵⁴ This treaty formalized the concept of political borders and delineated a structure for interstate relations that laid the foundation for the modern nation-state.

The confessional rift led to widespread persecution of religious non-conformists prompting large-scale forced migrations. In the early seventeenth century, Europe was estimated to have up to a million refugees, reflecting the extensive scale of these forced

⁵¹ Ivan A Aleshkovski, Zoya S Botcharova and Alexander Grebenyuk, 'The Evolution of the International Protection of Refugees between the World Wars' (2021) 20 *Social Evolution and History* 109.

⁵² *ibid.*

⁵³ Elizabeth Mavroudi and Caroline Nagel, *Global Migration: Patterns, Processes, and Politics* (Routledge 2016).

⁵⁴ Library of Congress, 'The Treaty of Westphalia' <the <https://blogs.loc.gov/law/2017/10/the-peace-of-westphalia/>reaty of Westphalia> accessed 25 October 2024.

migrations.⁵⁵ A significant example of forced migration during this period is the expulsion of approximately half a million Huguenots from France at the turn of the seventeenth and eighteenth centuries.⁵⁶ The Huguenots, French Protestants fleeing religious persecution in France at the time, etched the word *refugee* into our dictionaries from the French term *réfugié*, meaning one who seeks refuge or safety.⁵⁷ This usage is evidenced in a session of the British House of Commons on April 2, 1695, which addressed matters related to French refugees.⁵⁸ It was not until 1798 that the term expanded to describe other groups of persons facing displacement, where, a revision of *Encyclopedia Britannica* marked the first time the term ‘*refugee*’ was applied to anyone other than the Huguenots.⁵⁹ Under the Westphalian system of state relations, national borders remained open for refugees to cross, with the right to migrate *jus emigrandi*, that is, the right to leave one’s territory with all belongings.⁶⁰ In this period, governments often maintained a *laissez-faire* approach toward refugees, each state, however, responded to refugee crises in its own ad hoc manner, without establishing formal supranational policies.⁶¹

Over time, as wars and revolutions uprooted more and more people in Europe, mass displacements of populations became a common phenomenon and the concept of refugees evolved to include a broader array of individuals seeking protection.⁶² For instance, the revolutions of the eighteenth and nineteenth centuries gave rise to “political refugee” or *émigré*, prompting the development of policies for accommodating such individuals.⁶³ The French Revolution of 1789 led to the first mass political migration, with more than 129,000 *émigrés* fleeing France to settle across Europe and beyond.⁶⁴ Following the revolution, France introduced legislation recognizing political asylum, with the 1791 Decree of the Legislative Assembly stipulating that political motives alone justified the acceptance of

⁵⁵ Philip C Orchard, ‘Making States Accountable for Deliberate Forced Displacement’ <<https://ro.uow.edu.au/lhapapers/3975/>> accessed 25 October 2024.

⁵⁶ Kelly Summers, ‘Huguenot Refugees, Revolutionary Émigrés, and the Origins of Modern Exile’ [2023] *The Routledge Handbook of French History* <<https://books.google.com/books?>> accessed 30 December 2024.

⁵⁷ Robin D Gwynn, *Huguenot Heritage: The History and Contribution of the Huguenots in Britain* (Liverpool University Press 2000) <<https://books.google.com/books>> accessed 30 December 2024.

⁵⁸ Jane Marchese Robinson, *Seeking Sanctuary: A History of Refugees in Britain* (Pen and Sword History 2021) <<https://books.google.com/books>> accessed 30 December 2024.

⁵⁹ Laura Barnett, ‘Global Governance and the Evolution of the International Refugee Regime’ (2002) 14 *International Journal of Refugee Law* 238.

⁶⁰ Phil Orchard, ‘The Dawn of International Refugee Protection: States, Tacit Cooperation and Non-Extradition’ (2017) 30 *Journal of Refugee Studies* 282.

⁶¹ Barnett (n 59).

⁶² Ninette Kelley, *People Forced to Flee: History, Change and Challenge* (Oxford University Press 2022) <<https://books.google.com/books>> accessed 30 December 2024.

⁶³ Orchard (n 60).

⁶⁴ *ibid.*

foreigners.⁶⁵ The French Constitution further consolidated this principle, declaring that France would provide “refuge for all who, on account of liberty, are banished from their native country,” refusing to extradite them to “tyrants.”⁶⁶ Similarly, the Swiss Constitution of 1848 granted each canton the right to offer political asylum as an element of sovereignty.⁶⁷ The United Kingdom passed the 1826 Registration of Aliens Act, which restricted the British government’s ability to deport refugees, thus implicitly affirming the notion that once granted asylum, refugees could not be forcibly returned.⁶⁸ By 1833, Belgium enshrined this principle in Article 6 of the Extradition Act (*Loi sur les extraditions*), prohibiting the extradition of political refugees except when public security was at risk.⁶⁹

While the displacement of people due to persecution and conflict existed for centuries, with examples even in antiquity as highlighted in the preceding paragraphs, the concept of formalized international refugee protection is a relatively recent development. Specifically, the idea of refugee protection only became framed within the global humanitarian initiatives during World War I with greater functional constructs designed after World War II, albeit restrictively.⁷⁰ In other words, whereas throughout history, the human population has continued to experience forced displacement in every corner of the globe arising from persecution, political violence, and armed conflict, it was only at the beginning of the twentieth century that States realized the need for coordinated global humanitarian and human rights action for refugees.

The establishment of formal patterns of international action on behalf of refugees began with the League of Nations in the 1920s.⁷¹ While this marked the beginning of a more coordinated and systematic approach to addressing refugee issues on a global scale, it was limited in scope, as it applied mainly to specific national or ethnic groups. Notably, Russian exiles emerged from the political turmoil of the 1917 Revolution and Civil War,⁷² faced with economic hardship, lacked citizenship, and endured poor living conditions.

⁶⁵ Kirsty Carpenter, *REFUGEES OF THE FRENCH REVOLUTION*. (Springer 2015) <<https://idp.springer.com>> accessed 30 December 2024.

⁶⁶ Michael A Peters and Tina Besley, ‘The Refugee Crisis and The Right to Political Asylum’ (2015) 47 *Educational Philosophy and Theory* 1367.

⁶⁷ Antje Ellermann, ‘When Can Liberal States Avoid Unwanted Immigration? Self-Limited Sovereignty and Guest Worker Recruitment in Switzerland and Germany’ (2013) 65 *World Politics* 491.

⁶⁸ Alison Bashford and Jane McAdam, ‘The Right to Asylum: Britain’s 1905 Aliens Act and the Evolution of Refugee Law’ (2014) 32 *Law and History Review* 309.

⁶⁹ *ibid.*

⁷⁰ Erika Feller, ‘International Refugee Protection 50 Years on: The Protection Challenges of the Past, Present and Future’ (2001) 83 *International review of the red Cross* 581.

⁷¹ Claudena M Skran, ‘The International Refugee Regime: The Historical and Contemporary Context of International Responses to Asylum Problems’ (1992) 4 *Journal of Policy History* 8.

⁷² Jon Smele, *The "Russian" Civil Wars, 1916-1926: Ten Years That Shook the World* (Oxford University Press 2015) <<https://books.google.com/books>> accessed 30 December 2024.

This group initially received relief from organizations like the International Red Cross⁷³ but as needs grew, intergovernmental coordination became essential. Consequently, in May of 1921, the League created the High Commissioner role to address refugee needs, and in September, Norwegian explorer Fridtjof Nansen was appointed as High Commissioner, coordinating legal, employment, and repatriation assistance for Russian refugees.⁷⁴ The first international conference on the legal status of Russian refugees that took place in Geneva in August of, 1921 addressed the need for identification cards for stateless Russian refugees, enabling them to reunite with family, seek employment, and resettle.⁷⁵ These identity cards, later known as "Nansen passports," were designed to be recognized by both home and host countries, functioning as a substitute for foreign passports and creating a uniform document system for refugees.

As statelessness affected other groups, such as Armenian refugees, the League extended Nansen passports to other groups with clarity on qualifying conditions that included a lack of protection from their country of origin and any other citizenship.⁷⁶ Similarly, an intergovernmental conference in June 1928⁷⁷ made progress on the legal status of Russian and Armenian refugees, the role of the High Commissioner's representatives, and on extension of these provisions to other refugee groups including Turkish, Assyrian, and Kurdish refugees, with the core criteria of "origin" and "lack of protection from the home country" defining refugee status. This framework established the basis for an international refugee protection regime, officially creating a "refugee" status in international law.⁷⁸ Following Nansen's death in 1930, the League established the Nansen International Office for Refugees, which continued his work until it was dissolved in 1938.⁷⁹ At the Geneva Conference from October 26–28, 1933, the League of Nations and the Nansen International Office for Refugees established the *Convention on the International Status of Refugees* being the first comprehensive international framework addressing refugee rights and protections, based on the principle of group status.⁸⁰ In 1936, the Institute of International Law introduced a resolution defining refugees as individuals who left their country due to political events and lacked citizenship or diplomatic protection

⁷³ Chandler P Anderson, 'The International Red Cross Organization' (1920) 14 American Journal of International Law 210.

⁷⁴ Carl Emil Vogt, 'An Internationalist Pioneer: Fridtjof Nansen and the Social Issues of the League of Nations' [2016] The League of Nations' Work on Social Issues 187.

⁷⁵ Aleshkovski, Botcharova and Grebenyuk (n 51).

⁷⁶ *ibid.*

⁷⁷ 'Sub-Sub-Series R1852/1A/11812 - Refugees - Agreement of the Governmental Conference, 1928' <<https://www.google.com/>> accessed 30 December 2024.

⁷⁸ Erika Feller, 'The Evolution of the International Refugee Protection Regime' (2001) 5 Wash. UJL & Pol'y 129.

⁷⁹ Ivor C Jackson, 'Dr. Fridtjof Nansen a Pioneer in the International Protection of Refugees' (2003) 22 Refugee survey quarterly 7.

⁸⁰ James C Hathaway, 'The Evolution of Refugee Status in International Law: 1920—1950' (1984) 33 International & Comparative Law Quarterly 348.

elsewhere.⁸¹ This definition added a political element to the criteria of "lack of protection" and "statelessness." Two years later the *Evian Conference*,⁸² initiated by U.S. President Franklin Roosevelt, addressed the growing refugee crisis, suggesting the inclusion of those forced to migrate within their own country due to religion, politics, or race. This expanded the refugee definition to include those affected by internal threats.

2.3.1 The Modern Framework for International Protection of Refugees

The devastation of World War II underscored the inadequacies of the fragmented protection approach under the League of Nations.⁸³ The humanitarian crisis of World War II and the ensuing soaring numbers of displaced persons across Europe and beyond prompted the creation of the United Nations and Human rights instruments marking the beginning of a more systematic and universal approach to refugee protection that culminated in the establishment of the 1951 Refugee Convention and the United Nations High Commissioner for Refugees.⁸⁴ Grounded in Article 14 of the 1948 Universal Declaration of Human Rights (UDHR),⁸⁵ which recognizes the right of persons to seek asylum from persecution in other countries, the 1951 Convention, forms the centerpiece of international refugee protection today.⁸⁶ Indeed, even though each emerged from different historical contexts, legal frameworks, and institutional structures, both humanitarianism and human rights are critical components of refugee protection because humanitarian crises yield human rights issues.⁸⁷

The basic nexus of Refugee and Human Rights Law is grounded in the idea that Governments exist to guarantee basic human rights and physical security of their citizens. People often become refugees because the government is not able or willing to provide

⁸¹ Paul Weis, 'The International Protection of Refugees' (1954) 48 American Journal of International Law 193.

⁸² Eric Estorick, 'The Evian Conference and the Intergovernmental Committee' (1939) 203 The ANNALS of the American Academy of Political and Social Science 136.

⁸³ John Milton Cooper, *Breaking the Heart of the World: Woodrow Wilson and the Fight for the League of Nations* (Cambridge University Press 2001) <<https://books.google.com/>> accessed 30 December 2024.

⁸⁴ 'Fact Sheet No.20, Human Rights and Refugees' <<https://www.google.com/>> accessed 30 December 2024.

⁸⁵ 'Universal Declaration of Human Rights | United Nations' <<https://www.un.org/en/about-us/universal-declaration-of-human-rights>> accessed 5 December 2023.

⁸⁶ Affairs (n 4).

⁸⁷ Max Cherem, 'Refugee Rights: Against Expanding the Definition of a "Refugee" and Unilateral Protection Elsewhere' (2016) 24 Journal of Political Philosophy 183.

these basic human rights.⁸⁸ The absence of protection from their state makes them a vulnerable group in society, so if other states do not let them in and protect them, they may be forced to suffer in situations where their basic rights, security, and even lives are endangered. Such violations are a major factor in causing the flight of displaced populations. Therefore, the institution of Asylum is founded on the principles of human rights law, which protects individuals from persecution and other forms of harm, hence the right to seek asylum and the principle of non-refoulment are fundamental to both human rights law and refugee law. Indeed, the inclusion of ‘the right to seek and to enjoy asylum from persecution’ in Article 14 of the UDHR alongside unanimously agreed human rights and fundamental freedoms squarely places International Refugee Law within the human rights paradigm. Moreover, reference in the Preamble to the 1951 Convention to the 1945 UN Charter, the UDHR, and ‘the principle that human beings shall enjoy fundamental rights and freedoms without discrimination’ confirms that IRL was not intended to be seen in isolation from IHRL. The Preamble further notes that the UN has ‘manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms’⁸⁹

For example, the Convention against Torture (CAT)⁹⁰ provides no exceptions to the prohibition against *refoulement* to locations where individuals may face a risk of torture. Equally, Contemporary human rights jurisprudence under the ICCPR and other human rights conventions asserts that transferring individuals to areas where they may be subjected to serious human rights violations is unacceptable. Furthermore, during armed conflict, Article 45 of the Fourth Geneva Convention⁹¹ 1949 mandates that "under no circumstances shall a protected person be transferred to a country where they have grounds to fear persecution due to their political opinions or religious beliefs." This, therefore, means that the institution of humanitarian law, which regulates the conduct of armed conflicts and protects civilians from the effects of war is of great importance to refugees too. Refugees are often forced to flee their homes due to armed conflicts and other humanitarian crises, and humanitarian law, comes in to provide protection for them as civilians in vulnerable situations.

⁸⁸ Paul Weis, ‘Human Rights and Refugees’ *Israel Yearbook on Human Rights, Volume 1 (1971)* (Brill Nijhoff 1971) <<https://brill.com/downloadpdf/book/edcoll/9789004422827/BP000005.pdf>> accessed 30 December 2024.

⁸⁹ Alice Edwards, ‘Human Rights, Refugees, and The Right “To Enjoy” Asylum’ (2005) 17 *International Journal of Refugee Law* 293.

⁹⁰ ‘UN Convention Against Torture’ (n 27).

⁹¹ ‘Convention (IV) Relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.’ <<https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949>> accessed 30 December 2024.

Similarly, the system of asylum is closely connected to international criminal law, which provides for the prosecution of individuals for international crimes such as genocide, crimes against humanity, and war crimes. In some cases, refugees may have been victims of these crimes, and international criminal law can provide a mechanism for justice and accountability. There is also the provision on the exclusion of persons under the convention which is critical in assessing who should be denied refuge, those are largely persons accused of crimes under international criminal law.⁹² Additionally, refugee law is affected by other branches of public international law, such as international environmental law, and international trade law.⁹³ For example, environmental disasters or conflicts caused by resource exploitation may lead to the displacement of populations, creating refugee situations.⁹⁴ As such, complemented by these bodies of law, the Refugee Convention and its 1967 Protocol, today stand as global legal instruments explicitly covering the most important aspects of refugee protection.

The 1951 Refugee Convention provides the first universally recognized definition of a "refugee," focusing on individuals who fled their country due to a well-founded fear of persecution based on race, religion, nationality, membership in a particular social group, or political opinion. The selectivity of the refugee definition is intrinsic in its very structure, which is composed of three layers of requirement: inclusion, exclusion, and cessation. Besides providing a standard international definition of "*refugee*," the 1951 Refugee Convention sets out the rights and responsibilities of refugees and the obligations of State Parties to it. The Convention was initially limited in scope, applying only to events occurring in Europe before 1951. Recognizing the need for broader applicability, the 1967 Protocol removed these temporal and geographical limitations, allowing the Convention's protections to extend to refugees across the globe.

To elaborate, the 1951 Convention consolidates previous international instruments relating to refugees and provides the most comprehensive codification of the rights of refugees at the international level. In contrast to earlier international refugee instruments, which applied to specific groups of refugees, the 1951 Convention endorses a single definition of the term "refugee" in Article 1 outlining who is included under 1A-B, who ceases to be under 1C and who is excluded from the benefit of the Convention under 1D-F, essentially referring to individuals who have committed serious crimes or have protection from other international agencies.

⁹² Joris Van Wijk, 'When International Criminal Justice Collides with Principles of International Protection: Assessing the Consequences of ICC Witnesses Seeking Asylum, Defendants Being Acquitted, and Convicted Being Released' (2013) 26 *Leiden Journal of International Law* 173.

⁹³ Angela Williams, 'Turning the Tide: Recognizing Climate Change Refugees in International Law' (2008) 30 *Law & Policy* 502.

⁹⁴ Gaim Kibreab, 'Environmental Causes and Impact of Refugee Movements: A Critique of the Current Debate' (1997) 21 *Disasters* 20.

Under Article 1, the term “refugee” applies to any person who:

A. *“(1) 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.”*⁹⁵

*“(2) 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, membership of a particular social group, or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”*⁹⁶

B. *“(1) For the purposes of this Convention, the words "events occurring before 1 January 1951" in Article 1, section A, shall be understood to mean either (a) "events occurring in Europe before 1 January 1951"; or (b) "events occurring in Europe or elsewhere before 1 January 1951"; and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention.”*⁹⁷

The 1967 protocol modifies the definition by omitting the phrase, "As a result of events occurring before 1 January 1951 and..." and the words "...as a result of such events", in article 1 A (2) to make it universal. The UNHCR Statute, in paragraph 6A(i), contains an identical provision to Article 1A(1) of the Convention defining pre-war refugees. As regards the later categories the Statute provision is substantially similar although there is a slight difference in wording: Thus, in addition to pre-war refugees, the competence of the High Commissioner shall, according to paragraph 6 A (ii) extend to:

*“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 his nationality and is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to return to it.”*⁹⁸

⁹⁵ Refugees, ‘The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol’ (n 33).

⁹⁶ *ibid.*

⁹⁷ *ibid.*

⁹⁸ Statute of the Office of the United Nations High Commissioner for Refugees, 1950 2018 356.

The definition in the Statute does not contain a qualification similar to that in Article 1 B of the Convention regarding “events occurring in Europe” and “events occurring in Europe and elsewhere”. Moreover, paragraph 6B of the Statute contains an additional provision according to which the competence of the High Commissioner shall extend to:

“Any other person (i.e. irrespective of whether or not as a result of events occurring before 1 January 1951) who is outside the country of his nationality, or if he has no nationality, the country of his former habitual residence, because he has or had a well-founded fear of persecution by reason of his race, religion, nationality or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationality, or, if he has no nationality, to return to the country of his former habitual residence.”⁹⁹

The scope of the Statute is therefore wider than that of the Convention in that it does not impose a geographical limitation and the definition is not bound to the dateline to be found in the Convention, referring to "events occurring before 1 January 1951."

Notably, from the foregoing definitions, refugee status determination hinges on four core elements of well-founded fear, persecution, grounds (race, religion, nationality, membership in a particular social group, or political opinion), and being outside the country of origin. Under the well-founded fear, which is a central component of the refugee definition, there exist both subjective and objective elements. Subjectively, the focus is on the applicant’s state of mind, which is evaluated through their background, experiences, and personal beliefs while objectively, it is validated by examining conditions in the applicant's country of origin.

The fear must involve persecution, which entails a threat to life, freedom, or dignity due to race, religion, nationality, political opinion, or social group membership. While persecution often stems from state actions, it can also arise from non-state actors, such as mob violence or death squads, especially when the government is unwilling or unable to protect individuals. Persecution may be cumulative, where varied discriminations lead to insecurity and fear. There is also the requirement of being ‘outside their country of nationality or habitual residence,’ unable or unwilling to seek protection from the country of origin. In cases of multiple nationalities, fear in one country qualifies if protection is unobtainable from any of the states of nationality.

It is illustrative to note from the Convention definition that a person attains declaratory refugee status as soon as he fulfills the criteria contained in the definition and starts to attract some bundles of rights while being bound by the duties contained in the Convention. Consequently, Articles 2-34 of the 1951 Refugee Convention comprehensively outline the rights afforded to refugees and

⁹⁹ *ibid.*

the corresponding obligations of host states.¹⁰⁰ Refugees are expected to respect the laws and regulations of their host country, while states are mandated to provide essential protections and support. Refugees are granted key legal rights, including access to courts, education, employment, and public relief, supporting their ability to integrate and contribute to the host society. Furthermore, Articles 27-28 ensure refugees receive identity and travel documents, facilitating lawful mobility and international passage. Recognizing that many refugees arrive without full documentation, Article 31 exempts them from penalties related to illegal entry or presence, acknowledging the urgency and constraints often involved in their flight. Central to these protections is also the principle of non-refoulement, which strictly prohibits states from returning refugees to any territory where they might face severe threats to life or freedom.

2.3.2 Protection Dynamics: Quest to Surmount 21st-Century Challenges

In recent decades, supplementary frameworks have emerged in response to changing dynamics of human displacement. This is influenced in large part, by new drivers such as environmental crises, climate change, and complex political conflicts. While the 1951 Convention remains the primary legal instrument for refugee protection, these contemporary drivers often fall outside its original parameters, challenging traditional notions of who qualifies as a refugee. In response, regional and international bodies have explored supplementary approaches. For example, the 2018 Global Compact on Refugees (GCR),¹⁰¹ adopted by the United Nations, represents a non-binding yet significant step toward a cooperative, rights-based approach that emphasizes burden-sharing and solidarity among nations. The GCR addresses a critical gap in the international refugee regime, that is, the imbalance between the institutionalized norm of asylum and the weaker norm of responsibility sharing.¹⁰² The Compact recognizes that traditional asylum systems alone cannot fully address the growing scale and diversity of forced displacement. Additionally, emerging policies on climate displacement are beginning to take shape, though international protection for those displaced by environmental factors remains legally ambiguous. Besides, while states have clear legal obligations to refugees within their territories, obligations to support refugees in other states remain discretionary, perpetuating a power asymmetry where proximity to crises determines responsibility. Therefore, as the international community grapples

¹⁰⁰ Refugees, 'The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol' (n 33).

¹⁰¹ UNHCR, The UN Refugee Agency, 'The Global Compact on Refugees' <<https://www.unhcr.org/about-unhcr/overview/global-compact-refugees>> accessed 31 December 2024.

¹⁰² Alexander Betts, 'The Global Compact on Refugees: Towards a Theory of Change?' (2019) 30 International Journal of Refugee Law 623.

with these evolving challenges, the role of international organizations, non-governmental organizations (NGOs), and host countries has become increasingly vital in implementing protection and assistance mechanisms for displaced populations.

Historically, the United Nations High Commissioner for Refugees has relied on *ad hoc* mechanisms to foster responsibility sharing, with limited success in ensuring consistent support for host countries.¹⁰³ The GCR aims to establish a predictable framework for responsibility sharing by engaging diverse actors, including governments, businesses, and development institutions, through innovative mechanisms like the Global Refugee Forum and Support Platforms.¹⁰⁴ Despite its non-binding nature, the Compact seeks to mobilize resources and foster stakeholder collaboration. Building on historical initiatives, such as the Indochinese Comprehensive Plan of Action and the Central American Refugees Conference,¹⁰⁵ the GCR combines generic commitments with situation-specific applications, exemplified by the Comprehensive Refugee Response Framework. This Compact also addresses the specific needs of host communities and displaced individuals, encouraging development-oriented approaches to refugee assistance rather than purely humanitarian responses. Host countries, especially those in the Global South, carry a disproportionate share of the global refugee population. Based on the principles within the Compact, many have adopted progressive policies despite limited resources, promoting local integration as a viable alternative to resettlement or repatriation.

Accordingly, the integration of refugees into national development agendas has become an essential strategy, with both economic and social benefits for host communities and displaced populations alike. Development-focused initiatives, often supported by international financial institutions like the World Bank and regional development banks, have introduced programs designed to empower refugees through employment opportunities, education, and skills training. For instance, the World Bank's Global Concessional Financing Facility provides support to middle- and low-income host countries by enabling them to integrate refugees into labor markets and local economies sustainably. Similarly, frameworks such as the Comprehensive Refugee Response Framework, established by the United Nations in 2016, seek to integrate refugee protection within national systems, fostering inclusive policies that encourage refugees' self-reliance and reduce dependency on humanitarian aid. The CRRF has shown promise in contexts like Kenya and Ethiopia,

¹⁰³ Michael Kagan, “‘We Live in a Country of UNHCR’: The UN Surrogate State and Refugee Policy in the Middle East’ [2011] The UN Refugee Agency: Policy Development & Evaluation Service Research Paper <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1957371> accessed 31 December 2024.

¹⁰⁴ Gillian D Triggs and Patrick CJ Wall, “‘The Makings of a Success’: The Global Compact on Refugees and the Inaugural Global Refugee Forum’ (2020) 32 International Journal of Refugee Law 283.

¹⁰⁵ W Courtland Robinson, ‘The Comprehensive Plan of Action for Indochinese Refugees, 1989–1997: Sharing the Burden and Passing the Buck’ (2004) 17 Journal of refugee Studies 319.

emphasizing self-reliance, economic inclusion, and development-oriented approaches.¹⁰⁶ By promoting the economic inclusion of refugees, these initiatives aim to enhance resilience, support local economies, and foster long-term stability in regions hosting large numbers of displaced persons, further advancing the global commitment to durable solutions for refugees.

Moreover, GCR highlights the role of complementary pathways for refugee protection, such as expanded opportunities for resettlement, humanitarian visas, and labor and educational mobility programs.¹⁰⁷ These pathways aim to relieve pressure on host countries, promote self-reliance for refugees, and enhance sustainable solutions. The Nansen Initiative and the Platform on disaster displacement have laid foundational principles for addressing climate-driven migration, though these frameworks have yet to gain full legal force.¹⁰⁸ Such initiatives represent a critical shift toward a multi-faceted, collaborative approach, acknowledging that responses to forced displacement must evolve alongside its complex and multi-dimensional causes. The path toward a more robust and inclusive international refugee protection system is increasingly guided by innovative policy approaches, legal reforms, and advocacy efforts aimed at bolstering refugees' rights and the resilience of host communities.¹⁰⁹ One such innovation is the gradual adoption of community-based protection models, which prioritize the involvement of refugees and host populations in designing and implementing assistance programs tailored to their specific needs.¹¹⁰ This participatory approach not only enhances the effectiveness of aid delivery but also fosters social cohesion by addressing the needs and concerns of both refugees and host communities. Additionally, legal reforms at the national level, such as granting refugees access to formal employment, social services, and education, are critical in advancing self-reliance and reducing dependency on external aid.¹¹¹

¹⁰⁶ Betts (n 102).

¹⁰⁷ AMY ZHU, 'ANALYSING THE EFFECT OF THE GLOBAL COMPACT ON REFUGEES AND COMPLEMENTARY PATHWAYS ON ATTAINING DURABLE SOLUTIONS: RECONCILING PERMANENCE AND FLEXIBILITY' <<https://www.austlii.edu.au/au/journals/UNSWLawJlStuS/2021/45.rtf>> accessed 31 December 2024.

¹⁰⁸ Elin Jakobsson, 'The Politics of Climate Change and Migration' CLIMATE CHANGE AND MIGRATION 7.

¹⁰⁹ Triggs and Wall (n 104).

¹¹⁰ Liam Patuzzi, Meghan Benton and Alexandra Embiricos, 'Social Innovation for Refugee Inclusion' <<https://cdn.givingcompass.org/wp-content/uploads/2019/06/17112800/Social-Innovation-Refugee-Inclusion-Final.pdf>> accessed 31 December 2024.

¹¹¹ Suzan Ilcan, Marcia Oliver and Laura Connoy, 'Humanitarian Assistance, Refugee Management, and Self-Reliance Schemes: Nakivale Refugee Settlement 1' *Transnational social Policy* (Routledge 2017) <<https://www.taylorfrancis.com/chapters/edit/10.4324/9781315665498-8/humanitarian-assistance-refugee-management-self-reliance-schemes-suzan-ilcan-marcia-oliver-laura-connoy>> accessed 31 December 2024.

Despite these progressive developments, challenges remain in achieving a fully effective and sustainable global refugee response.¹¹² Many host countries, particularly those in developing regions, continue to face significant economic pressures and social strains as they accommodate large refugee populations.¹¹³ Resource limitations, political resistance, and competing national priorities can hinder the implementation of inclusive policies, leaving refugees vulnerable to restrictive conditions and limited opportunities.¹¹⁴ Furthermore, refugee responses often depend on short-term funding cycles that can impede the development of long-lasting, strategic initiatives. Global disparities in responsibility-sharing persist, as wealthier nations often contribute funding rather than accepting substantial numbers of refugees for resettlement. The slow progress on legally binding frameworks for climate-induced displacement further underscores the need for adaptive solutions that address emerging types of forced migration, hence supplementary measures.

At the international level, enhanced frameworks for accountability and transparency, alongside increased use of data and technology in refugee management, are helping to streamline processes and monitor compliance with refugee rights.¹¹⁵ Digital identity tools, for instance, enable better tracking of services and support while ensuring that refugees retain control over their personal information.¹¹⁶ Together, these measures illustrate a shift toward more holistic and durable approaches to refugee protection that not only uphold human rights but also pave the way for inclusive development and stability in host societies. The ongoing evolution of refugee protection mechanisms demonstrates the international community's continued commitment to adapting to contemporary challenges while striving for a more just and compassionate approach to global displacement. While the GCR defers key legal and normative issues, it provides a foundation for future reforms. Its success, however, depends on its ability to adapt to emerging displacement drivers and to catalyze sustained commitments to refugee protection and solutions. Notwithstanding its successful implementation, these advancements in refugee protection illustrate a continuing commitment to uphold humanitarian principles while adapting to the dynamic realities of displacement in the 21st century.

¹¹² Volker Türk and Madeline Garlick, 'From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees' (2016) 28 *International Journal of Refugee Law* 656.

¹¹³ Alexander Betts and others, *Refugee Economies: Forced Displacement and Development* (Oxford University Press 2017) <<https://books.google.com/books>> accessed 31 December 2024.

¹¹⁴ Mohamed Abbas and others, 'Migrant and Refugee Populations: A Public Health and Policy Perspective on a Continuing Global Crisis' (2018) 7 *Antimicrobial Resistance & Infection Control* 113.

¹¹⁵ Prakash Sharma, 'Digital Transformation for Providing Better Protection to Refugees: Quest for Global Standards to Prevent Compromise with Core Protection Standards' (2022) 22 *ISIL YB Int'l Human. & Refugee L.* 53.

¹¹⁶ Margie Cheesman, 'Self-Sovereignty for Refugees? The Contested Horizons of Digital Identity' (2022) 27 *Geopolitics* 134.

2.4 Regional Frameworks for Refugee Protection

Building on the foundation of the 1951 Convention and its 1967 Protocol, and in response to regional specificities within geopolitical contexts, States in different parts of the globe have developed regional laws and standards that complement the international refugee protection regime.¹¹⁷ States participate in regional arrangements because they can be an effective means of providing protection in a manner beyond the reach of a single State and responsive to the particular circumstances presented, within a basic framework of protection principles.¹¹⁸ Some of the regional agreements on refugee protection that have since emerged to reinforce these regional specificities include the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa¹¹⁹ the 1984 Cartagena Declaration (Latin America), and the 2004 European Council Asylum Qualification Directive (Europe).¹²⁰

While the regional instruments have by and large adopted the text of the 1951 Convention and its Protocol in totality, the OAU Refugee Convention and the Cartagena Declaration provide for refugee protection in specific humanitarian situations, including large-scale arrivals of people fleeing specific situations or circumstances in their country of origin. The OAU Refugee Convention broadened the definition of a refugee, including individuals fleeing not only persecution but also widespread violence, occupation, and foreign aggression, circumstances particularly relevant to post-colonial Africa. Similarly, the 1984 Cartagena Declaration, adopted in Latin America, expanded the refugee definition to encompass those fleeing “generalized violence, foreign aggression, internal conflicts, and massive violation of human rights.” These regional frameworks acknowledge the fact that the definitions under the 1951 Convention and the UNHCR Statute do not account for the full scope of displacement causes in Africa and Latin America and sought to ensure that protection standards reflected the realities facing refugees in diverse regions.

The regional instrument of interest in the context of Kenya’s asylum system is the Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa 1969, adopted in Addis Ababa, 10 September 1969. Article I(1) of the

¹¹⁷ United Nations High Commissioner for Refugees, ‘Refugee Protection: A Guide to International Refugee Law (Handbook for Parliamentarians)’ (UNHCR) <<https://www.unhcr.org/publications/legal/>> accessed 7 November 2021.

¹¹⁸ ‘Policy_Brief_2_Regional_refugee_protection_in_comparative_perspective. Pdf’.

¹¹⁹ ‘OAU Convention Governing the Specific Aspects of Refugee Problems in Africa | African Union’ (n 7).

¹²⁰ Alexander Betts, ‘The Refugee Regime Complex’ (2010) 29 Refugee Survey Quarterly 12.

OAU Convention replicates the 1951 Convention refugee definition contained in Article 1A(2) of the 1951 Convention, as amended by the 1967 Protocol, while Article I(2) offers refugee protection to:

*“every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.”*¹²¹

The 1969 OAU Convention sought in large part to address the specific challenges facing African countries in responding to refugee crises on the continent at the time.¹²² Article I (2) of the 1969 OAU Convention is the first refugee definition of its kind to steer away from persecutory conduct towards more generalized or so-called "objectively" identifiable situations.¹²³ The 1969 OAU definition acknowledges that the compulsion for persons to leave their country may occur not only as a result of the conduct by state or non-state actors in the refugee's country of origin, but also as a result of that government's loss of authority or control due to external aggression, occupation, foreign domination or events seriously disturbing public order. This definition focuses on situations that compel people to leave their countries in search of safety and sanctuary.

The 1969 OAU Convention, in contrast to the 1951 Refugee Convention, confers a narrower scope of rights for refugees, that is, it does not explicitly incorporate the entire standard of treatment found in Articles 3 to 34 of the 1951 Convention notably protections against refoulement, provisions for voluntary repatriation, and the issuance of travel documents. However, the Convention's limited rights framework does not present significant practical challenges, as the majority of African Union Member States are parties to both the 1951 Convention and its 1967 Protocol. Thus, refugees recognized under either Article I (1) or I (2) of the 1969 OAU Convention are afforded the rights framework established in the 1951 Convention. Besides, the preamble of the 1969 OAU Convention calls upon Member States of the African Union to accede to the 1951 Convention and its 1967 Protocol and meanwhile to apply the provisions of the 1951 Convention to refugees in Africa. Furthermore, considering the fact that refugee protection encompasses both international refugee law and human rights law, in the African context, the African Charter on Human and Peoples' Rights, also known as the Banjul

¹²¹ 'OAU Convention Governing the Specific Aspects of Refugee Problems in Africa | African Union' (n 7).

¹²² *ibid.*

¹²³ Alice Edwards, 'Refugee Status Determination in Africa' (2006) 14 African Journal of International and Comparative Law 204.

Charter¹²⁴ is of particular significance, as it has been ratified by all African Union Member States. The Banjul Charter ensures a broad spectrum of civil, political, economic, social, and cultural rights to all individuals, regardless of nationality or legal status, with the sole exception of Article 13, which applies explicitly to citizens.

For refugees in Africa, the African Charter on Human and Peoples' Rights provides robust protections comparable to those articulated in Articles 3 to 34 of the 1951 Refugee Convention. Among the critical rights safeguarded are the prohibition of exploitation and degradation under Article 5, the right to liberty, security, and protection against arbitrary detention in Article 6, and freedom of movement and residence as enshrined in Article 12(1). Furthermore, Article 12(4) guarantees lawful expulsion procedures, while Article 12(5) prohibits mass expulsions. Access to public services is enshrined in Article 13(3), alongside rights to property (Article 14), fair working conditions and equal remuneration (Article 15), health (Article 16), education (Article 17), and family life (Article 18(1) and (2)). Article 18(4) extends special protections to the elderly and persons with disabilities. Collectively, these provisions fortify refugee rights within Africa's legal framework, ensuring alignment with international norms. Notably, Article 12(3) of the Banjul Charter explicitly affirms the right of every individual to seek and obtain asylum from persecution, thereby obligating States Parties to uphold the principles of asylum, including non-refoulement, admission to territory, access to fair asylum procedures, and adherence to human rights standards. Recognizing that asylum seekers often arrive without proper authorization or documentation due to urgent or perilous circumstances, the provision underscores the necessity of preventing penalization or undue restrictions on movement.

Complementing the Banjul Charter, the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa imposes obligations on African Union (AU) Member States to receive and settle refugees who are unable or unwilling to return to their countries of origin. It prioritizes durable solutions, including voluntary repatriation, local integration, or resettlement in third countries. Central to these efforts is the granting of secure legal status and the progressive expansion of rights for refugees, consistent with the protections enshrined in the 1951 Refugee Convention and other international human rights instruments. The 1969 OAU Convention emphasizes the principle of good faith in the implementation of international obligations, mandating AU Member States to report on refugee conditions, legislation, and regulations. It also fosters collaboration with the United Nations High Commissioner for Refugees,

¹²⁴ African Union, 'The African Charter on Human and Peoples' Rights' <[chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf](https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf)> accessed 31 December 2024.

ensuring complementarity with the 1951 Refugee Convention. This framework enables UNHCR to fulfill its mandate effectively, even in states that are not parties to the 1951 Convention or its 1967 Protocol. The synergy between these instruments reinforces Africa's commitment to a comprehensive and rights-based approach to refugee protection.¹²⁵

2.5 Theoretical and Conceptual Framework

2.5.1 Institutional Theory

The governance structures of Refugee protection must ideally be implemented by persons embedded in institutions.¹²⁶ Institutions are integral to understanding the social world, as they are deeply embedded in the social order and dictate the patterns of social life. Often these institutions are massive bureaucracies that shape and constrain decision-makers choices, incentivize certain behaviours, and discourage others. They influence action by enforcing social controls that discourage deviations from established norms. The role of institutions extends well beyond a passive role, and to understand even the disaggregated and devolved forms of contemporary governance one must first and foremost understand the roles played by institutions.¹²⁷ Therefore, in understanding the role of stakeholders and their impact on refugee governance, I find institutional theory, which views the social world as significantly comprised of institutions with rules, practices, and structures that set conditions for action,¹²⁸ as an appropriate framework for analyzing how formal and informal institutional contexts shape behaviors, decision-making processes, and policy implementation outcomes. It is a common research paradigm that traces its origin in seminal works on how organizational founding and change were driven less by functional considerations and more by symbolic actions and external institutional pressures.¹²⁹ In this study, I draw upon this theory to examine how institutional factors influence refugee protection programs.

¹²⁵ Dejo Olowu, *An Integrative Rights-Based Approach to Human Development in Africa* (PULP 2009) <<https://books.google.com/books> > accessed 31 December 2024.

¹²⁶ Rebecca Hamlin, 'Institutional Analyses of Refugee Protection' [2022] *Journal of Refugee Studies* feac045.

¹²⁷ B Guy Peters, 'Chapter 30: Institutional Theory' (2022) <<https://www.elgaronline.com/display/edcoll/9781800371965/9781800371965.00039.xml>> accessed 27 November 2024.

¹²⁸ Thomas B Lawrence and Masoud Shadnam, 'Institutional Theory' *The International Encyclopedia of Communication* (John Wiley & Sons, Ltd 2008) <<https://onlinelibrary.wiley.com/doi/abs/10.1002/9781405186407.wbieci035>> accessed 27 November 2024.

¹²⁹ John W Meyer and Brian Rowan, 'Institutionalized Organizations: Formal Structure as Myth and Ceremony' (1977) 83 *American Journal of Sociology* 340.

Institutional theory, which has its foundations in Max Weber's concepts of legitimacy and authority,¹³⁰ emerged through the works of Talcott Parsons,¹³¹ Philip Selznick,¹³² and Alvin Gouldner.¹³³ They examined the interaction between organizations and their environments. The theory posits that institutional forces, norms, rules, and cultural expectations are essential in guiding behaviors and determining the legitimacy of the organization's actions. Scholarly discourses in the field of sustainability widely utilize this theory to examine interactions between socially responsible movements and institutional change in advancing corporate social responsibility (CSR).¹³⁴ It has also been applied to identify the determinants of environmental, social, and governance (ESG) performance¹³⁵ and to explore developments in the domain of integrated reporting.¹³⁶ Its core concepts of Institutional Norms and Legitimacy, Isomorphism, and Decoupling have been used, for example, to explain why some decisions become adopted by organizations or diffuse across organizations in spite of their inability to improve organizational efficiency or effectiveness.

The shared expectations that influence the behaviors of actors within an organization reflect an Institutional norm. On the other hand, Legitimacy, which is gained by adhering to Institutional norms, is crucial for organizations, including government bodies responsible for asylum administration. The other key concept of the theory, which is institutional isomorphism describes how organizations within an institutional field may start to resemble each other due to coercive, mimetic, or normative pressures. In this study, institutional theory, with its three isomorphic coercive, normative, and mimetic drivers, offers a valuable framework for analyzing Kenya's asylum system. Coercive pressures that may arise from authorities such as governments and international organizations, shape asylum policies. For instance, Kenya's compliance with international treaties like the 1951 Refugee Convention and the 1969 OAU Convention can be attributed to external coercive pressures, which may include diplomatic influence and funding dependencies. These pressures may also explain Kenya's adoption of progressive legislative measures, like the Refugees Act 2021, despite challenges in

¹³⁰ Martin E Spencer, 'Weber on Legitimate Norms and Authority' (1970) 21 *The British journal of sociology* 123.

¹³¹ Uta Gerhardt, *The Weberian Talcott Parsons: Sociological Theory in Three Decades of American History* (Russell Sage Foundation New York 2005) <<https://books.google.com/books?hl=>> accessed 28 November 2024.

¹³² Philip Selznick, 'Foundations of the Theory of Organization' (1948) 13 *American sociological review* 25.

¹³³ Alvin W Gouldner, 'Metaphysical Pathos and the Theory of Bureaucracy' (1955) 49 *American Political Science Review* 496.

¹³⁴ Emma Avetisyan and Kai Hockerts, 'The Consolidation of the ESG Rating Industry as an Enactment of Institutional Retrogression' (2017) 26 *Business Strategy and the Environment* 316.

¹³⁵ Nabil Tamimi and Rose Sebastianelli, 'Transparency among S&P 500 Companies: An Analysis of ESG Disclosure Scores' (2017) 55 *Management decision* 1660.

¹³⁶ Amal Aouadi and Sylvain Marsat, 'Do ESG Controversies Matter for Firm Value? Evidence from International Data' (2018) 151 *Journal of business ethics* 1027.

implementation. External coercive pressures, such as conditions tied to international funding and diplomatic relationships, further encourage Kenya to align with global norms.

Normative pressures, such as societal expectations and ethical values, impact asylum policies, as much as they drive sustainable practices in other contexts. In Kenya's refugee protection context, normative pressures may arise when international and domestic stakeholders demand adherence to human rights and refugee protection standards. For instance, global entities like the UNHCR and local advocacy groups emphasize humane treatment, integration, and sustainable refugee management, pushing the government to adopt and uphold progressive asylum policies.¹³⁷ Mimetic behaviors also influence Kenya's asylum system, as the country often emulates practices from nations perceived as successful in managing asylum and refugee integration. For example, Kenya's attempts to transition toward community-based refugee management and explore alternative refugee settlement models may have been inspired by Uganda's refugee self-reliance strategy.

Of direct importance, in addressing the objective of this study, is the concept of Decoupling, which is a phenomenon where formal policies and procedures are disconnected from actual practices. This concept is central to analyzing Kenya's asylum system, where policies may appear progressive on paper but diverge significantly in practical implementation. Decoupling offers a lens to understand the gap between Kenya's asylum policies and on-the-ground practices. As already elaborated on in the preceding part of this study, the Refugee Act No. 10 of 2021 provides comprehensive protections for asylum seekers and refugees, yet, these policies often fail to materialize in practice. This, as highlighted is due to factors such as the encampment policies, and stringent restrictions on the right to work for refugees. Some of the factors contributing to such decoupling often include limited resources, understaffing, and inadequate training among officers. There are also political and security considerations that influence how Kenya's asylum policies are executed, frequently resulting in restrictive measures that contradict policy ideals. Besides, administrative challenges that include bureaucratic inefficiencies within institutions responsible for refugee management, such as the Department of Refugee Services, exacerbate the gap between policy and practice.

Accordingly, an analysis of entities involved in asylum governance helps in understanding how the law works, not just in text but also in action. Such an assessment encompasses an examination of both the formal rules and the informal agency culture that shapes

¹³⁷ Mohammed Ali Abukar, 'Exploring Uganda's Refugee Protection Model: Effectiveness, Adaptability, and the Interplay of Humanitarian Assistance and Integration in East Africa' (Master's Thesis, Webster University 2024) <<https://search.proquest.com/openview/>> accessed 3 January 2025.

policy outcomes. In this regard, the political, legal, social, and economic environment becomes particularly important in shaping stakeholder responses and, hence policy implementation outcomes. Accordingly, I discuss these variables within the frame of this theory, in the following sections.

2.5.2 Political Institutions and Asylum Policy Implementation

The subject of refugee protection ordinarily intersects with the issue of political inclusion and civil rights.¹³⁸ Political institutions, such as the government ministries, parliament, and executive agencies, contribute to asylum policy outcomes. Public opinions and national policies toward refugees are, therefore, influenced by political institutions, which may include the host country's relations with countries of origin and local absorptive capacity.¹³⁹ The institutional theory postulates that political structures and power dynamics create the formal rules and norms that guide asylum governance. The institutional model offers an avenue for assessing how political environments direct stakeholder responses. Clemens and Cook contend that institutions can constrain or enable political action, serving as both barriers and facilitators for mobilization and influence.¹⁴⁰ This is so because institutions have the potential to constitute frameworks that legitimize or delegitimize actions. For instance, the institution of parliament legislates refugee laws, and the executive is entrusted with implementing the enacted legislation. Such actions carry with them competing interests of national security, international relations, and internal governance priorities, which in turn, impact public not only perceptions of refugees but also the roles of actors in the realm of refugee protection generally.

Kenya's approach to refugee management illustrates institutional theory in action, highlighting how political structures and power dynamics establish formal rules and norms that guide asylum governance. Under the institutional theory, political institutions are not just passive facilitators but active participants that create the frameworks legitimizing or delegitimizing actions toward refugees. In Kenya for example, the enactment of laws on refugee protection, ranging from the repealed Refugee Act of 2006 to the Refugee Act of 2021, demonstrates the legislative branch's role in institutionalizing refugee rights within the country's legal system. These laws codify international principles such as non-refoulement and outline procedures for refugee registration, status determination, and durable

¹³⁸ Liangrong Zu and Lina Song, 'Determinants of Managerial Values on Corporate Social Responsibility: Evidence from China' (2009) 88 Journal of Business Ethics 105.

¹³⁹ Idean Salehyan and Kristian Skrede Gleditsch, 'Refugees and the Spread of Civil War' (2006) 60 International organization 335.

¹⁴⁰ Elisabeth S Clemens and James M Cook, 'POLITICS AND INSTITUTIONALISM: Explaining Durability and Change' (1999) 25 Annual Review of Sociology 441.

solutions. On the other hand, the executive arm, through agencies like the Department of Refugee Services, operationalizes these laws. More often than not, however, competing institutional power dynamics come into play during implementation.

Institutional conflicts do arise within these political structures. The Kenya National Commission on Human Rights Commission in its most recent Report¹⁴¹ cites the uncoordinated nature of refugee programs between the Department of Refugee Services and other relevant ministries like the Ministry of Interior and Coordination of National Government. The uncoordinated nature of these programs has resulted in institutional agendas clash, leading to fragmented implementation. For instance, the encampment policy which is implemented from the perspective of national security agencies, institutionalizes the containment of refugees within camps. In this context, the containment action is legitimized under the guise of national interests, particularly in response to perceived threats like the Al-Shabaab insurgency. In such instances, institutional dynamics constrain progressive legislative intent while enabling security-centric management of refugees.

Moreover, institutional theory provides a frame within which the interplay between Kenya's refugee management policies and its relations with countries of origin can be discerned. To illustrate, the dispute concerning the delimitation of maritime spaces claimed in *Somalia v. Kenya*¹⁴² did strain the diplomatic relations between the two countries. Arising from the strained relationship, the diplomatic posture the two countries adopted impacted refugee management in Kenya, particularly in the handling of Somali refugees. Often justified on the grounds of national security, it is this geopolitical tension that contributed in large part, to the periodic calls for the repatriation of Somali refugees and closure of the Camps. Therefore, the case of Kenya and Somalia shows the significance of the relationship between the host country and the country of origin of the displaced population on the nature of refugee protection granted. In the instant case, the Kenya-Somali border closure and refugee return are framed as both a national security imperative and a diplomatic gesture¹⁴³ to legitimize government actions. Such actions, grounded in formal institutional processes, for instance of law-making to respond to issues at hand, guide how political structures respond to both external pressures and internal governance priorities. The strength of democratic institutions plays a pivotal role in shaping policy implementation too. Matten and Moon argue that in a robust

¹⁴¹ 'Kenya National Commission on Human Rights > Publications > Thematic Reports > Group Rights > Rights of Migrants' <<https://www.knchr.org/Publications/Thematic-Reports/Group-Rights/Rights-of-Migrants>> accessed 18 November 2024.

¹⁴² *Somalia v Kenya; Maritime Delimitation in the Indian Ocean*.

¹⁴³ Stephen Magu, *A Contemporary Analysis of Kenya's Foreign Policy* (Springer Nature Switzerland 2024) <<https://link.springer.com/10.1007/978-3-031-67344-3>> accessed 2 December 2024.

democratic context where institutions provide services such as access to justice, civil liberties, and political freedoms¹⁴⁴ refugee protection programs get implemented as conceived in the policy texts. Conversely, in politically constrained systems with weaker democratic frameworks, stakeholder participation is limited, deepening the challenges of effective policy execution. In analyzing how these broader political and diplomatic conflicts affect the development of institutional frameworks and implementation of refugee policies, institutional theory is useful.

Besides, heavy dependence on foreign aid for refugee programs impacts Kenya's domestic policy decisions too. Since the government may not be in a position to direct its policy intention due to financial constraints, such reliance exacerbates the gap between the intent of asylum policies and their practical outcomes, leaving systemic challenges unresolved. The political class often prioritizes short-term stability over long-term sustainable solutions. For instance, in calls to close refugee camps, the government did not consider the broader implications of such actions, both nationally and globally.

2.5.3 Legal Institutions and Asylum Policy Implementation

Legal institutions, such as courts and other statutory bodies, influence how asylum policies are developed and enforced. For instance, the legitimacy of action that is dependent on adherence to formal rules as emphasized in institutional theory is visible in the Judiciary's role of interpreting the formal rules. As the branch of government that is considered free from political influence, the judiciary is uniquely positioned to safeguard the rights of vulnerable groups, such as refugees. Unlike the other arms of government, which are frequently swayed by political considerations and high-stakes rhetoric, the judiciary is expected to evaluate policies and decisions impartially.¹⁴⁵ This independence enables it to scrutinize laws and policies and render decisions that uphold constitutional guarantees and prevent the erosion of fundamental freedoms. Hence, its position in the legal system allows it to act as a counterbalance, providing a voice of reason that reinforces the principles of justice and equality in the asylum framework.

¹⁴⁴ Dirk Matten and Jeremy Moon, "'Implicit' and 'Explicit' CSR: A Conceptual Framework for a Comparative Understanding of Corporate Social Responsibility" (2008) 33 *Academy of Management Review* 404.

¹⁴⁵ Samuel Berhanu Woldemariam and Muhizi Pacifique, 'Securitisation of Refugee Protection: The Judiciary's Role in the Protection of the Rights of Refugees: *Attorney General v. Kituo Cha Sheria & 7 Others*' (2024) 43 *Refugee Survey Quarterly* 169.

Nanima, in *An Evaluation of Kenya's Parallel Legal Regime on Refugees, and the Courts' Guarantee of Their Rights*,¹⁴⁶ demonstrates how legal institutions and the judiciary's interpretation of refugee law have significantly influenced Kenya's asylum policy and practice. Nanima contends that the judiciary has occasionally stepped in to bridge the systemic gaps characterized by inconsistencies between statutory provisions, executive policies, and international obligations, offering legal clarity and ensuring compliance with constitutional and international standards. Using the three cases of *Kituo Cha Sheria*, *Samow Mumin Mohamed*, and *the Coalition for Reform and Democracy (CORD)*, that contested the directives to stop reception, registration and close down all registration centers in urban areas and relocate to Camps and the enactment of the enacted the Security Laws (Amendment) Act 19 of 2014 (SLAA), respectively, Nanima demonstrates how the judiciary applied human rights approaches in guarding refugee rights. Nanima's work highlights the judiciary's potential to align policy with legal obligations, while also exposing the limitations of legal institutions in the face of entrenched structural barriers.

Similarly, while Kenya's legal framework for refugees is anchored in international instruments such as the 1951 Refugee Convention and the 1969 OAU Convention, as well as domestic legislation like the Refugees Act, of 2021, the gap between these formal legal commitments and actual implementation reveals the influence of institutional dynamics. Therefore, legal and institutional cultures operate within a complex web of formal rules and informal practices that shape their ability to deliver.

2.5.4 Social Norms and Informal Institutional Behavior

While institutional theory mainly focuses on the formal structures within the public sector, informal frameworks also play a significant role, either complementing or competing with formal institutions.¹⁴⁷ The theory acknowledges the impact of informal norms, social expectations, and cultural values on the behavior of institutions and individuals. In Kenya, the formal legal and policy frameworks usually prescribe how projects and refugee protection programs should be undertaken. However, informal social dynamics, such as local attitudes toward refugees, traditional power structures, and the role of community leaders, often shape how these policies are executed on the ground. In regions like Turkana and Garissa, where the majority of refugees are hosted, informal negotiations between refugees

¹⁴⁶ Robert Doya Nanima, 'An Evaluation of Kenya's Parallel Legal Regime on Refugees, and the Courts' Guarantee of Their Rights' (2017) 21 Law, Democracy & Development 42.

¹⁴⁷ Peters (n 127).

and host communities sometimes determine access to resources such as water and grazing lands, which are critical for survival but are outside the formal institutional purview. The success of integrated settlement programs like KISED P often depends not just on formal agreements but also on the willingness of host communities and the refugees to collaborate. In some instances, these informal interactions have fostered cooperation, while in others, competition over scarce resources, have led to tension, deterring policy implementation.

Gaim Kibreab in “*The conduct and the attitudes of the refugees and asylum seekers do matter too. Pulling the Wool over the Eyes of the Strangers: Refugee Deceit and Trickery in Institutionalized Settings*”¹⁴⁸ observed that in spite of refugees' cavalier attitudes towards the laws that guide allocation and distribution of international aid and their propensity to behave in an ethically unrestrained manner in their interactions with aid agencies and the host community, their pre-displacement social institutions are still intact in their interactions.¹⁴⁹ This is reflected, inter alia, in the fact that refugees' internal social relations are enforced through informal institutional set ups. Kibreab notes that within refugee communities, an act of cheating committed in pursuit of self-interest disregarding the interest of a relative, a neighbour or a villager is considered to be disgraceful and inappropriate behavior while the same act when committed against faceless entities such as governments, UNHCR and NGOs may often be considered heroic.¹⁵⁰

Therefore, how host communities view refugees is shaped by cultural biases, economic competition, or political narratives. These perceptions can influence the behavior of frontline officers and decision-makers, leading to discriminatory practices or uneven enforcement of policies. For example, it is possible to have informal practices emerging within the DRS or camp management structures, where staff prioritize cases based on personal biases rather than established rules. Institutional culture within organizations also reflects broader societal norms. In Kenya, the perception of refugees as a security threat has permeated institutional attitudes, creating resistance to policies that promote integration or self-reliance.

2.5.5 Economic Constraints and Institutional Resource Allocation

Economic factors pose significant challenges to the effective implementation of Kenya's asylum policies. As detailed in the preceding part of this study, limited government funding and dependency on donor aid constrain the capacity of key institutions, such

¹⁴⁸ Gaim Kibreab, 'Pulling the Wool over the Eyes of the Strangers: Refugee Deceit and Trickery in Institutionalized Settings' (2004) 17 Journal of Refugee Studies 1.

¹⁴⁹ *ibid.*

¹⁵⁰ *ibid.*

as the DRS, to fulfill core responsibilities, including refugee status determination, camp management, and basic service provision. These financial limitations incentivize prioritizing donor-driven initiatives over locally identified needs, often undermining long-term sustainability and alignment with Kenya's national priorities. Economic pressures extend beyond government institutions to host communities, where resource competition between refugees and local populations often fuels tensions. This dynamic frequently results in *ad hoc* institutional responses that circumvent formal policies. For example, donor funding priorities, which may emphasize immediate humanitarian relief over durable solutions, create further misalignments, complicating the implementation of protection programs.

Global and national economic contexts also influence corporate and societal engagement with refugee issues. In countries with robust economies and developed financial systems, organizations are incentivized to engage in refugee protection initiatives to maintain social legitimacy and appeal to diverse shareholders.¹⁵¹ However, in economies marked by inequality or high unemployment, public attitudes toward refugees is often hostile, as refugees are viewed as competing for scarce resources. Studies from Sweden and other contexts reveal that even in the presence of formal anti-discrimination policies, economic polarization can lead to discriminatory practices in employment and hinder refugee integration efforts.¹⁵² Kenya's reliance on donor aid, combined with local economic pressures and public attitudes shaped by inequality, underscores the need for economic reforms to reduce dependency and build resilience. Strengthening institutional capacity and aligning economic priorities with long-term refugee solutions are crucial for bridging the gap between asylum policy intent and implementation.

2.6 Conceptual Framework

2.6.1 Policy Scope and Context

The Black's Law Dictionary defines policy as "the general principles by which a government is guided in its management of public affairs."¹⁵³ It is a course of action or a set of principles adopted or proposed by a government, political party, business entity, or

¹⁵¹ Rong Wang and Katherine R Cooper, 'Corporate Social Responsibility in Emerging Social Issues:(Non) Institutionalized Practices in Response to the Global Refugee Crisis' (2022) 26 Journal of Communication Management 98.

¹⁵² *ibid.*

¹⁵³ Bryan A. Garner, 'Black's Law Dictionary' <<https://legal.thomsonreuters.com/en/products/law-books/blacks-law-dictionary>> accessed 2 December 2024.

individual.¹⁵⁴ Fundamentally, policy delineates the goals and the planned activities required to accomplish a specific purpose. In the legislative process, the ideal and recommended approach is for policy development to precede the drafting of a law or any legislative instrument.¹⁵⁵ That is, the policy is a precursor to or foundation for legislative instruments because it articulates the goals and the rationale, whereas legislative instruments implement the intent of the policy in a legally enforceable manner. As such, an overarching policy framework before drafting of any legal instrument serves as a roadmap that facilitates an assessment of the underlying issues and potential solutions and defines the opportunities to be leveraged as well as the strategies for achieving the intended outcomes.¹⁵⁶ As a foundational step in the legislative process, the policy ensures that the proposed legal framework aligns with the identified objectives and is well-grounded in systematic planning. Besides, a robust policy framework allows for a harmonized legislative agenda and the intended developmental priorities.

However, while the legislative process is most effective when grounded in a well-conceived policy framework that ensures coherence, practicality, and alignment with broader developmental goals as elaborated, Kenya's Refugee law, indeed, like many other pieces of legislation in the country, is not anchored on any policy. Despite the existence of both substantive and subsidiary legislation, a recent call for consultancy¹⁵⁷ to develop a comprehensive refugee policy brings to light the enduring dearth of an all-encompassing framework. Consequently, in the absence of a unified refugee policy, the term 'policy' in this study is used broadly to include the guiding principles, legislative instruments, regulations, and administrative frameworks that collectively shape Kenya's approach to refugee management. Within this context, the term "policy," as employed in *Kenya's Asylum System: An Appraisal of Policy and Practice Continuum* and the entirety of this discussion refers to the comprehensive framework of the government's overarching strategies, encompassing the laws, regulations, and administrative structures that stem from it.

2.6.2 From Policy to Practice: The Fading Continuum

Building on institutional theory, I have developed an idea of a 'fading continuum' to analyze the operational dynamics of Kenya's asylum governance. Whereas institutional theory frames the systemic pressures influencing the policy-practice gap, in a fading continuum, I conceptualize the interplay of political, economic, legal, and social factors that contribute to the divergence as illustrated

¹⁵⁴ Kenya Law Reform Commission, 2015, *A Guide to the Legislative Process in Kenya* <<https://www.google.com/>> accessed 4 December 2024.

¹⁵⁵ *ibid.*

¹⁵⁶ *ibid.*

¹⁵⁷ 'Consultancy for Refugee Policy Kenya -<<https://www.google.com>> accessed 4 December 2024.

in the Fishbone diagram below. I use the phrase “policy and practice continuum,” to refer to the ongoing processes and programmes through which asylum policies are institutionalized, and implemented in practice.

In the context of Kenya, this continuum spans the process from policy at the institutional level to practical implementation in stages such as refugee reception, protection measures, and durable solution approaches. However, this transition is not always seamless, with institutional barriers, resource limitations, and external pressures creating gaps along the continuum, hence the “*Fading Continuum*.” Institutional implementation focuses on how the policies are operationalized through different actors such as government agencies and non-governmental organizations. On the other hand, practical realities bring to the fore, how these policies affect the lived experiences of refugees and asylum seekers, where access to rights, humanitarian assistance, and opportunities for durable solutions such as integration are considered. Despite its interconnected nature, as illustrated in the diagram, the continuum often exhibits gaps, including discrepancies between legal commitments and on-the-ground practices, which undermine the protection and support offered to asylum seekers and refugees.

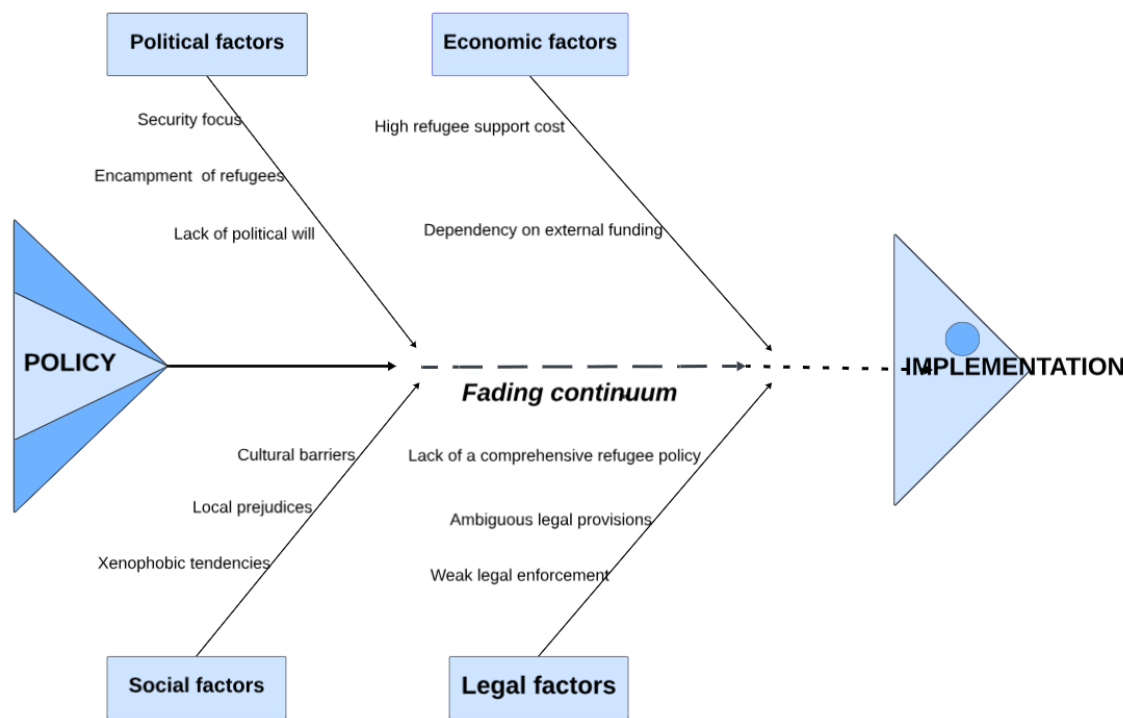


Figure 2: Fishbone diagram showing the fading Policy and Practice Continuum of Kenya's asylum system

The above diagram represents the “fading continuum” in Kenya’s asylum system, capturing the disconnect between policy formulation and its practical implementation. At its core, the triangular shape on the left symbolizes policy as the foundation of the system, depicting an intention to address refugee-related challenges. However, as the law is transitioned towards implementation, systemic and structural barriers emerge to weaken the impact. The transition, shown in the diagram, with dotted lines labeled “*fading continuum*,” illustrates how the well-intended policy objectives often lose momentum at implementation. As indicated, the continuum fades off towards implementation due to what I call ‘pullback triggers’ from political pressures, resource constraints, legal ambiguities, and social attitudes. These factors interact to create a disconnect between policy intentions and practical outcomes, as analyzed further in the findings of this study.

2.7 Conclusion

In this chapter, foundational elements necessary for understanding Kenya’s asylum system within its broader global and historical contexts have been explored. In reviewing key debates and scholarly discussions, I have attempted to illuminate the dynamic interaction between formal asylum policy objectives and the institutions entrusted with its practical application. The examination of global and national legal frameworks, along with operational systems for international protection, accentuates the complexities of balancing state sovereignty with international obligations. Furthermore, the chapter has outlined the principles underpinning asylum, providing a lens through which to evaluate Kenya’s policy framework and its alignment or divergence from global standards. The development of a conceptual framework grounded in literature and theory establishes a solid foundation for the study, enabling analysis of Kenya’s asylum system as a continuum of policy and practice. This serves as a critical tool for examining the systemic, institutional, and practical factors influencing the implementation of asylum policies, paving the way for subsequent chapters to investigate these issues in depth.

CHAPTER 3: RESEARCH METHODOLOGY

3.0 Introduction

The inquiry into the disconnect between Kenya's progressive asylum laws and their practical implementation was undertaken through an elaborate methodological framework. Research methodology serves as the framework guiding the process through which the research objectives are executed. It outlines the steps taken to formulate the research problem and objectives, as well as the methods used to analyze and present findings derived from the data collected throughout the research period. This chapter, therefore, provides a comprehensive discussion of the methodologies employed, detailing each aspect of the research process. This includes the research strategy, design, research philosophy, research type, and the study approach.

Furthermore, considerations regarding data collection techniques, including primary and Secondary data collection methods are also outlined. Primary data collection included the issuance of questionnaires to key informants, and participatory observations, wherein documentary analysis, and doctrinal examination of legal frameworks and judicial decisions constituted secondary literature. Additionally, the tools employed in data analysis, and the use of software for data analysis are elaborated. In the last part of the chapter, the main methodological approaches are summarized, further explaining the interrelations of the research components and why each was essential when conducting the research.

3.1 Approaches

This study is built on a single-country case study centered on Kenya's asylum system with a narrowly circumscribed comparative dimension. The comparative dimension involves a brief examination of refugee integration as a durable solution in Kenya, with reference to selected practices in Indonesia and Uganda, intended to provide contextual insight rather than a comprehensive cross-national comparison.

A case study research is an empirical inquiry that examines a contemporary phenomenon in depth and within its real-life context, particularly when the distinctions between the phenomenon and its surrounding environment are ambiguous or intertwined.¹⁵⁸ It is characterized by its focus on a particular case where the subject of investigation is "a specific, unique, bounded system."¹⁵⁹ A case study may encompass either a single case or multiple cases.¹⁶⁰ The choice of the type of case study to use in any given inquiry, that is, whether

¹⁵⁸ Robert K Yin, *Case Study Research: Design and Methods*, vol 5 (sage 2009) <<https://books.google.com/books?>> accessed 27 September 2024. Pg. 14

¹⁵⁹ Robert E Stake, 'Qualitative Case Studies' *Strategies of qualitative inquiry*, 3rd ed (Sage Publications, Inc 2008).

¹⁶⁰ Yin (n 59)Pg. 14.

Multiple or Single, is determined by the size of the bounded case or the intent of the analysis.¹⁶¹ The researcher must therefore evaluate whether it is more appropriate to conduct a single case study or a multiple case study to gain a deeper understanding of the phenomenon.¹⁶² Consequently, this study narrows down to a unique, delimited setting which is the asylum system in Kenya. In this particular context, therefore, Kenya stands out as a fitting subject for a single case study due to its significant role as a primary host country for refugees in the region. The current status of the asylum system in Kenya is closely linked to regional trends, international obligations, and national laws, with the effect that in most cases, the line separating policy and practice blurs at the level of policy operationalization. Therefore, this combination of factors justifies the need for a scholarly inquiry using a single case study approach, which, unlike in a multiple-case study framework, allows for an extensive exploration of system dynamics in a single 'bounded' unit. While a unit analysis of a single case may appear to limit the extent to which findings can be applied in other contexts, the depth and details afforded by such an approach are useful in informing policy discourse and progress in similar settings.

While research methodologies are ordinarily aligned with specific philosophical positions that guide the overall research process,¹⁶³ multiple research paradigms emerge as relevant in examining Kenya's asylum system through a case study approach. This is because case study research often demonstrates a unique versatility, as it is "not confined to a specific ontological, epistemological, or methodological stance."¹⁶⁴ That is to say, case study research can be approached from a realist or positivist perspective, which posits that there is a singular, objective reality independent of individual perception, that can be observed, measured, and analyzed.¹⁶⁵ In the alternative, it may adopt a relativist or interpretivist orientation, which holds that multiple realities exist, co-constructed by individuals and influenced by context.¹⁶⁶ This flexibility, therefore, allows the researcher to determine the most suitable methodological orientation based on the study's aims and context. This case study incorporates a mix of these paradigms with a dominant interpretivist approach focusing on the lived experiences of refugees and asylum seekers to understand their perceptions of the asylum-seeking process better.

¹⁶¹ 'Creswell: Qualitative Inquiry and Research Design:<https://scholar.google.com/scholar_year=2013> accessed 28 September 2024.

¹⁶² Johanna Gustafsson, 'Single Case Studies vs. Multiple Case Studies: A Comparative Study' <<https://www.diva-portal.org/smash/get/diva2:1064378/FULLTEXT01.pdf>> accessed 28 September 2024.

¹⁶³ Helena Harrison and others, 'Case Study Research: Foundations and Methodological Orientations' (2017) 18 Forum Qualitative Sozialforschung / Forum: Qualitative Social Research <<https://www.qualitative-research.net/index.php/fqs/article/view/2655>> accessed 29 September 2024.

¹⁶⁴ John P Rosenberg and Patsy M Yates, 'Schematic Representation of Case Study Research Designs' (2007) 60 Journal of Advanced Nursing 447.

¹⁶⁵ Harrison and others (n 163).P7

¹⁶⁶ Yvonna S Lincoln, Susan A Lynham and Egon G Guba, 'Paradigmatic Controversies, Contradictions, and Emerging Confluences, Revisited' (2011) 4 The Sage handbook of qualitative research 97.

As a consequence, the forgoing different sets of beliefs or paradigms yield different research approaches. That is to say, the qualitative approach is grounded in essentially different sets of beliefs from those that form the basis of quantitative research. However, adopting a blend of philosophical paradigms spans a continuum between qualitative and quantitative approaches. Qualitative research, as a systematic exploration of social phenomena that encompasses a broad range of subjects, including individuals' lived experiences, behaviors of groups, organizational dynamics, and ways interactions influence relationships,¹⁶⁷ is central to this inquiry. Equally, the study leverages a quantitative approach grounded in the positivist view. For instance, insights into asylum claim processing times, registration efficiency, and policy implementation ratings sought through semi-structured questionnaires reflect quantitative components. Therefore, a mixed-method approach has been applied to achieve maximum breadth and depth of the asylum system with multiple procedures.

In addition to the case study design and mixed-method orientation, this study adopts an institutional methodological approach to analysis. Institutional analysis provides the analytical structure through which the asylum system is examined, by treating institutions as the primary sites where refugee protection norms are interpreted, operationalized, and implemented. This approach enables systematic examination of how formal legal frameworks, organizational practices, and informal administrative norms shape decision-making and policy outcomes within Kenya's asylum governance system, particularly where gaps emerge between policy design and practice.

3.2 Data Collection

In assessing the congruence or dissonance in Kenya's asylum policy and practice, both primary and secondary data were obtained. The primary data were gathered through semi-structured questionnaires and participatory observation over the course of 4 months (from March to July 2024) of fieldwork in Kenya. The questionnaires were aimed at obtaining information on policy application and implementation from key stakeholders in the asylum system.

Non-probability purposive sampling, targeting predefined categories involving DRS officials, UNHCR representatives, Department of Immigration Officials, and refugee community leaders - these are key institutional and individual stakeholders in Kenya's asylum system. For instance, in the Kenyan context, UNHCR is an important actor in refugee protection and engaging representatives from this office come with valuable professional skills in international refugee law, and their knowledge enriches both the local

¹⁶⁷ Arianne Teherani and others, 'Choosing a Qualitative Research Approach' (2015) 7 *Journal of Graduate Medical Education* 669.

application of global structures and Kenya's twinning with global standards. The Department of Immigration and DRS, being the coordinating organs on refugee matters at the national level, is centrally involved in policy administration, while on the other hand, the Refugee Community leaders were selected because they represent the voices of those directly affected by Kenya's asylum system.

Therefore, purposive sampling, as a strategic approach to selecting participants based on their specific qualities,¹⁶⁸ becomes relevant in this context. Researchers using this technique aim to identify individuals with relevant expertise or experiences who can provide valuable information.¹⁶⁹ This method is especially exemplified through the key informant technique, and in this study, the deliberate selection of DRS officials, UNHCR representatives, Department of Immigration Officials, and refugee community leaders were informed by their central roles in the asylum process, and, therefore, their unique perspectives on policy implementation and lived experiences are of critical importance. Thus, their contributions are vital for achieving a comprehensive understanding of the continuum between policy and practice.

Semi-structured questionnaires designed to capture insights into the practical implementation of asylum policies, the efficiency of asylum processing, and the lived experiences of refugees and asylum seekers were administered to key informants from the Department of Refugee Services (DRS), representatives of UNHCR in Kenya, and community leaders of refugee groups both from urban and refugee camps settings. The questionnaires for government officials and UNHCR representatives collected information on their understanding of the asylum process, the extent of policy implementation, and the challenges faced in fulfilling their mandates. Asylum seekers were asked about their experiences upon arrival in Kenya, the efficiency of the asylum process, and the level of protection they received. This approach ensured a comprehensive understanding of how asylum policies are perceived and experienced across different levels of the system. The key informants from DRS and the Department of Immigration were conceptualized as heads of Units who possess sufficient knowledge, and experience and are well-versed in policy and practical realities of Kenya's asylum system. In other words, their positions make them gatekeepers to the elaborate workings of the asylum process, offering unique insights into both the legal and operational frameworks.

¹⁶⁸ Maria Dolores C Tongco, 'Purposive Sampling as a Tool for Informant Selection' <<https://scholarspace.manoa.hawaii.edu/handle/10125/227>> accessed 2 October 2024.

¹⁶⁹ H Russell Bernard, 'Research Methods in Anthropology' [2012] AltaMira <<https://indiachinainstitute.org/wp-content/uploads/2017/05/9AIn-Russell-Bernard-2002.pdf>> accessed 2 October 2024.

These were the Head of Reception & Registration (N=2); Head of Documentation (N=1); Head of Protection (N=1); Refugee Status Determination Unit (N=1); Office of the Commissioner (N=1); Department of Immigration (N=2) and the representatives from UNHCR working in various capacities (N=2). In the case of Asylum seekers and refugees, community leaders from different refugee groups living in Nairobi as urban refugees and Camp Chairpersons for the two refugee Camps were picked as key informants in sharing their perspectives on lived experiences as follows; Nairobi – Urban refugees (N=8); Kakuma Camp (N=2); and Dadaab Camp (N=2). Most participants were secured through DRS offices and in-person networking while in Kenya. The information power model, as tied to the distinctiveness of experiences, knowledge, or attributes among participants informs this sample size.¹⁷⁰ This model advocates that to achieve adequate information power, a smaller sample is needed if participants fit the defined target group while still displaying some variation in the experiences being investigated.

To supplement the information obtained through the questionnaires, I was also involved in participatory observation, undertook informal interviews, and took part in Expert Lectures/Discussions on the subject of asylum in Kenya. I also attended a forum organized by a refugee movement called the Refugee United where refugee leaders and key stakeholders shared experiences and challenges of the asylum system in Kenya. In this forum, a plan to petition the authorities in the asylum system over major issues affecting the refugees in the country was mooted. This forum gave a critical insight into how refugees themselves challenge the failures of policy implementation through active resistance to bureaucratic failure while also shedding light on what may exist in terms of tension between formal policies and their actual implementation on the ground. The forum offered means of gaining firsthand knowledge of policy experiences by the subjects in the system, providing a rich understanding of the policy-practice continuum from the perspective of those directly affected.

Besides views from the forum, I had an opportunity to gather personal testimonies from participants who shared their individual experiences with the system. While in the field, I had an opportunity to attend a guest lecture organized by the Refugee Law students of the University of Nairobi. This lecture was delivered by the Head of the Legal Unit at the DRS on the subject of the legal framework governing refugees in Kenya. This insight was critical in understanding the actual frame of the law; the extent of its application and the challenges the authorities face in actualizing the provisions of the law. I was also privileged to attend a Lecture by The UN High

¹⁷⁰ Kirsti Malterud, Volkert Dirk Siersma and Ann Dorrit Guassora, 'Sample Size in Qualitative Interview Studies' [2015] Qualitative Health Research <<https://journals.sagepub.com/doi/full/10.1177/10>> accessed 4 October 2024.

Commissioner for Refugees, Filippo Grandi at the University of Nairobi during his official visit to Kenya on Monday, June 24, 2024. The lecture on the topic: “*Tackling Forced Displacement as a Development Challenge*” showcases the important progress Kenya is making in this regard, discusses some of the learnings and challenges. This lecture gave an overview of the international view of refugee protection-the systemic issues that still persist both nationally and globally.

Prior to embarking on the collection of the primary data, I carried out an intensive review of the grey literature and scholarly publications on the refugee situation in Kenya. As such, this research incorporates both documentary and doctrinal analysis of secondary data, where the documentary analysis was used to review a variety of non-legal documents such as reports, government publications, Stakeholder studies, petitions, and declarations, while the doctrinal method was employed to conduct an in-depth examination of the Refugees Act, the 1951 Refugee Convention, the OAU Refugee Convention, and other relevant legal instruments.

3.3 Data Analysis and Techniques

I conducted a comprehensive mixed-methods analysis to examine the practical functioning of Kenya’s asylum system. The analysis began with a detailed review of both qualitative and quantitative data. Thematic analysis identified key patterns and themes from interviews and questionnaires, while content analysis of legal and policy documents assessed Kenya’s asylum laws for their language, intent, and alignment with international standards. A comparative analysis was conducted to place these findings within a broader global context, helping to situate Kenya in the international asylum framework.

For the qualitative data, I utilized NVivo software to organize and code the information, which highlighted key themes such as inefficiencies in refugee status determination, challenges in registration, and shortcomings in policy implementation. The quantitative data, sourced from secondary materials like government records, UNHCR reports, and NGO publications, was analyzed using statistical software. Descriptive statistics and regression analysis shed light on important aspects of Kenya’s asylum system, including processing delays, registration efficiency, and demographic trends. These analyses helped to identify factors affecting the system’s efficiency, such as the volume of claims and resource limitations.

This concurrent mixed-methods approach enabled me to integrate findings from both qualitative and quantitative data, providing a well-rounded perspective of the system. By triangulating results from various sources, I was able to identify significant discrepancies between policy and practice, especially in areas like legal representation, processing delays, and resource distribution.

3.4 Ethical Considerations

This research was designed and conducted in strict adherence to ethical standards and regulatory frameworks, ensuring full compliance with institutional and national requirements. Prior to initiating fieldwork, all requisite approvals were secured from the Geza Marton Doctoral School of Legal Studies at the University of Debrecen, alongside formal authorizations from Kenyan authorities, including the National Commission for Science, Technology, and Innovation (NACOSTI) and the Department of Refugee Affairs. Moreover, given the heightened vulnerabilities often experienced by refugee and asylum-seeker populations, exceptional care was taken to address the ethical dimensions of the study. Informed consent was obtained from all participants, ensuring they fully understood the study's purpose. To uphold the privacy and dignity of participants, all identifying information was systematically removed from the dataset, thereby guaranteeing anonymity and confidentiality. Furthermore, to mitigate any potential risks to participants, anonymity was scrupulously preserved. Identifying details were withheld, with only job titles and affiliated organizations disclosed unless participants explicitly consented otherwise.

3.5 Limitations

A key limitation of this study is its focus on a single case, which restricts the generalizability of the findings to other contexts. While the case study provides valuable insights into Kenya's refugee protection system, the specific domestic conditions may not be applicable to other refugee-hosting countries. However, while the research does not seek statistical generalisation, the case is selected for its analytical value in illuminating broader dynamics within asylum governance, particularly the policy–practice continuum in refugee protection. The limited comparison with selected practices in Indonesia and Uganda further enhances the analytical generalisability of the findings by situating Kenya's experience within wider regional and global patterns. Accordingly, although the findings are grounded in Kenya's specific legal and institutional context, they offer transferable insights relevant to other refugee-hosting states facing similar structural and governance challenges.

The use of semi-structured interviews as the main method for data collection also has its limitations. The insights gathered are influenced by the perspectives and experiences of the participants, which may not fully reflect the broader dynamics of the asylum system. This dependence on participant views restricts the study's scope, as the data showcases individual experiences rather than

offering a comprehensive overview of the system. Moreover, there is high dependency on secondary data sources, such as policy papers and news articles, which could introduce bias or limit the depth of the analysis. While these sources are useful for providing context to the findings, they may not always deliver a complete or impartial account of the refugee protection system.

Despite these limitations, the study enhances the broader understanding of how variations within a single case can affect the interaction between national systems and the international refugee regime. Although the findings may not be applicable to all refugee-hosting states, the study highlights the significance of domestic contexts and how different political opportunity structures can shape decision-making processes. These structures, which differ from country to country, are essential for understanding how international interventions and local actors, such as sub-national governments or refugee-run organizations, navigate and influence refugee policies. This has important implications for the future of the international refugee regime, especially regarding forward planning and the role of donor states in shaping the global refugee agenda.

3.6 Conclusion:

Here, I have comprehensively outlined the research methodology employed in this study. Much of the emphasis has been placed on a mixed-methods approach that successfully integrates qualitative and quantitative data collection techniques. In leveraging this methodological synergy, the study has achieved a richer, more holistic understanding of the complexities inherent in Kenya's asylum system. These approaches facilitated an in-depth exploration of the asylum process, capturing the perspectives of diverse stakeholders, including government agencies, international organizations, and refugees themselves. The methodologies presented form an important foundation for the subsequent analytical chapters, which examine the gap between Kenya's asylum policies and their implementation in practice. This analysis not only underscores the systemic challenges confronting the asylum framework but also contributes to broader scholarly and policy discussions on refugee protection and governance. In identifying key shortcomings and offering insights into potential areas of reform, this research aspires to inform and shape more effective national and international asylum policies.

CHAPTER 4: THE EVOLUTION OF REFUGEE PROTECTION IN KENYA

4.0 Introduction

It is worth noting from the onset that at the domestic level, the 1951 Refugee Convention and its 1967 Protocol do not prescribe the way States should implement their obligations under these instruments.¹⁷¹ States Parties are at liberty to determine procedures and institutions suitable to their circumstances through national asylum legislation that incorporates the provisions of these treaties. Therefore, the exact form of such domestic frameworks varies among countries, depending on their legal traditions and existing provisions relating to refugees, and as such, States have taken different approaches in drafting their legislation and in the decisions of their judicial authorities. With this hindsight, I analyze provisions of relevant legal instruments and concepts in refugee protection within the context of Kenya's asylum system. I do so by leveraging on the review of existing literature and the relevant domestic statutes, specifically, the Refuge Act 2021 and its attendant regulations.

Kenya has a long history of hosting a significant population of forcibly displaced persons from neighboring countries, with diverse numbers originating from countries such as Somalia, Ethiopia, Eritrea, Sudan, Rwanda, Burundi, and the DRC. This is attributable to Kenya's geographical proximity to these countries, from which a combination of natural and human-induced factors, mainly drought, civil war, and political oppression, push hundreds of thousands of asylum-seekers to its frontier. In understanding Kenya's asylum, the context of its colonial legacy, post-independence policies, and evolving regional security dynamics are important. In the early years of independence, these refugees were mainly from Uganda, Sudan, and Ethiopia. Specifically, the flow of asylum seekers into the country began in the late 1960s and gained traction in the early 1970s as a result of political developments in Uganda under the regimes of Idi Amin and Obote.¹⁷² The government managed these refugees, including their status determination, through the Refugee Secretariat under the Ministry of Home Affairs. Due to the relatively small number of asylum seekers at the time, the government undertook the management of refugees without any specific legal framework at the national level. In most instances, these refugees were easily integrated due to their link with Kenya's border communities. The Aliens Restriction Act¹⁷³ and the Kenya Immigration Act¹⁷⁴ of 1967, as amended in 1972, introduced the Class M permit for refugees, and addressed limited issues of refugee

¹⁷¹ William Thomas Worster, 'The Evolving Definition of the Refugee in Contemporary International Law' (2012) 30 Berkeley J. Int'l L. 94.

¹⁷² Edwin Odhiambo Abuya, 'Past Reflections, Future Insights: African Asylum Law and Policy in Historical Perspective' (2007) 19 International Journal of Refugee Law 51.

¹⁷³ 'Aliens Restriction Act No. 5 of 1973' <http://kenyalaw.org/kl/fileadmin/pdfdownloads/RepealedStatutes/AliensRestrictionAce_No.5of1973.pdf> accessed 22 April 2023.

¹⁷⁴ 'Immigration Act Cap172 Laws of Kenya' <<http://kenyalaw.org/kl/fileadmin/pdfdownloads/RepealedStatutes/ImmigrationActCap172.pdf>> accessed 22 April 2023.

protection. Therefore, even though these Statutes were not specifically tailored to address asylum protection, they catered for the situations of refugees in the country.¹⁷⁵

The political instability in Somalia, Sudan, Ethiopia, and Rwanda in the early 1990s prompted a shift in refugee management. The influx of refugees into Kenya led to the establishment of camps across the country, and the government delegated the responsibilities of refugee status determination and management to UNHCR. Despite Kenya's early accession to the Refugee Convention and its 1967 Protocol (16 May 1966 and 13 November 1981, respectively) and subsequent ratification of the 1969 OAU Convention on 23 June 1992, the dualist nature of the independence constitution required domestic legislation to bring these international obligations into effect. However, the legislative gap remained until the enactment of the Refugee Act of 2006, which institutionalized the encampment policy and established a department to oversee refugee affairs.

Kenya's 2010 Constitution, while it redefined Kenya's political and legal landscape, enshrining principles of democracy, human rights, and devolution, does not explicitly reference refugees or the right to asylum. During the constitutional review process, many drafts attempted to include the right to asylum, with Article 56 of the Bomas draft and the Wako Draft addressing non-refoulement. The Committee of Experts expanded this to include the broader right to asylum in line with international laws (Article 57). However, the Parliamentary Select Committee removed this right to asylum from the final draft without providing any justification, a change ultimately endorsed by the Committee of Experts, thereby effectively extinguishing the aspiration for an explicit constitutional guarantee. Despite this omission, the constitutional framework still offers sufficient protection safeguards for refugees under Articles 2(5) and (6) of the Constitution which incorporates general principles of international law and treaties ratified by Kenya into the domestic legal framework,¹⁷⁶ providing a foundation for refugee protection. This means that any treaty or convention ratified by Kenya automatically forms part of the laws of Kenya. Furthermore, the comprehensive Bill of Rights Chapter applies broadly to foreigners residing in Kenya, distinguishing between rights designated solely for citizens and those available to all "persons."

4.1 A Synopsis of the Refugee Act No. 10 of 2021

¹⁷⁵ Nanima (n 146).

¹⁷⁶ Kenya law, 'The Constitution of Kenya' <<http://kenyalaw.org/kl/index.php?id=398>> accessed 21 October 2021.

While there are other domestic laws that may have a considerable impact on the protection of asylum-seekers and refugees in Kenya, for example, the Kenya Citizenship and Immigration Act, 2011, Kenya Citizens and Foreign Nationals Management Service Act, the legal and policy landscape governing asylum is predominantly structured under Refugee Act No. 10 of 2021 (The Refugee Act), and the Refugee (General) Regulations 2024 (cite). Therefore, the Refugee Act and its attendant regulations form the primary focus of this contribution, and I only refer to these other laws when deemed appropriate, and to the extent it is relevant to the issues under discussion. To offer a suitable foundation for the analysis, I give a synopsis of the Refugee Act in the following paragraphs.

The Refugee Act illustrates how stakeholders have sought to harmonize refugee policy with principles of international protection, supporting refugees' transition from mere endurance to active contribution to society. The Act is structured into nine parts, each addressing various aspects of refugee protection, from the processes of application and recognition of refugee status to matters of integration, reception, and control within designated areas. The first part, which encompasses sections one to five, provides foundational definitions and terminologies used in the Act. The definition of an asylum seeker that is absent in international instruments is provided; "asylum seeker" is an individual seeking protection whose refugee status is yet to be determined.¹⁷⁷ The Act considers the definition of a 'refugee' from both the 1951 Refugee Convention and the OAU Convention, which includes key elements such as the well-founded fear of persecution based on race, religion, nationality, membership in a particular social group, or political opinion, or external threats, is unable or unwilling to seek protection in the country of origin.¹⁷⁸ The grounds for exclusion, disqualification, and cessation of refugee status are also addressed in this section of the Act.¹⁷⁹ Part two of the Act establishes the administrative bodies responsible for refugee governance and delineates the roles, duties, and responsibilities of each institution. These entities are the Department of Refugee Services (DRS), the Refugee Advisory Committee (RAC), and the Refugee Status Appeals Committee (RSAC).

The procedures for application of refugee status are outlined in Part III of the Act. Section 12 allows an application to be made directly to the Commissioner or through an authorized officer, with a requirement to produce both oral and documentary evidence. Eligibility is assessed by an Eligibility Panel.¹⁸⁰ During this period, an applicant is issued with an Asylum Seeker's Pass (see the specimen

¹⁷⁷ Refugee Act 2021. Section 2.

¹⁷⁸ *ibid.* Section 3

¹⁷⁹ *ibid.* Section 4

¹⁸⁰ *ibid.* Section 13

in the Appendix), valid for 90 days since the process of Refugee Status Determination is intended to be completed within 90 days.¹⁸¹ Sections 14 and 15 provide applicants with the right to remain in the country during the appeals process. The act also outlines procedures for the expulsion of refugees, which may occur after the termination of refugee status and the exhaustion of appeals, including for reasons such as misrepresentation,¹⁸² committing war crimes,¹⁸³ or national security concerns.¹⁸⁴ Expulsion is intended to follow due process to uphold the principle of non-refoulement. This part outlines special protections for vulnerable groups such as refugee women and children, and persons with disabilities or trauma. These measures are conceived to ensure dignity and safety for those seeking asylum in the Country. Specifically, applications and appeals brought under this section are free of charge, and refugees applying for asylum are protected from prosecution for their initial unlawful presence in Kenya.

Part IV of the Act outlines the procedures for the reception of asylum seekers in Kenya, where any person who is entering Kenya to seek asylum is required to within 30 days, report their intention to the nearest reception center or government office. The Commissioner is mandated to ensure reception officers are available at designated entry points, where asylum seekers may be temporarily accommodated in reception or transit areas pending further processing. Asylum seekers in these transit centers are to be processed within a reasonable time frame. The Act also provides for security screening to ensure individuals who may be of threat to national security or are involved in contraband businesses do not take advantage of the asylum process. There is also an express provision on *sur place* claims at section 24(2), where individuals are allowed to apply for asylum based on activities or events occurring in their country of origin after departure. In cases of large asylum-seeker inflows, Section 24(3) obligates the Commissioner to work with other agencies and advise the Cabinet Secretary on emergency measures, including ensuring the availability of essential services, engaging local communities, and situating reception areas at appropriate distances from border regions.

Drawing on both international and regional legal sources, including the 1951 UN Refugee Convention, the 1967 Protocol, and the 1969 OAU Convention, the rights and duties of refugees and asylum seekers are outlined under Part V of the Act. The Act underscores the need for refugees to contribute to Kenya's economic and social development by facilitating access to necessary documentation which grants them necessary mobility and access to essential services, similar to the Foreign National Registration

¹⁸¹ *ibid.* Section 12(9)

¹⁸² *ibid.* Section 17

¹⁸³ *ibid.* Section 18

¹⁸⁴ *ibid.*

Certificate enabling them to participate in the workforce. This is a shift from the traditional camp-based practice conceived in the repealed Refugee Act of 2006 to a more inclusive protection strategy, which aims at the economic integration of refugees. The section further provides Refugees from East African Community (EAC) countries with an option to voluntarily relinquish their refugee status to enjoy benefits under the EAC Treaty, the Common Market Protocol, and other relevant laws.

Part Six of the Act details control measures over designated refugee areas. The emphasis here is on environmental protection which is undertaken in coordination with national and county governments. The Commissioner is mandated to relocate refugees to different designated areas, with non-compliance deemed a criminal offense. Designated areas are managed by settlement officers appointed by the Commissioner, who also regulates access, permitting only authorized individuals. The seventh part sets out the conventional durable solutions of integration, repatriation, and resettlement of refugees. The Act promotes the sharing of social space between refugees and host communities and calls for greater awareness of peaceful coexistence. On repatriation, the Act places emphasis on voluntary return while resettlement in third countries is done in collaboration with stakeholders such as the Ministry of Foreign Affairs, in partnership with UNHCR.

Administrative and legal compliance provisions are detailed in Part Eight of the Act. The DRS is entrusted with the maintenance of a register of all asylum seekers and refugees, with the Commissioner acting as Registrar. The part sets out offenses and penalties, with specific sanctions against double registration. The provisions in this part are intended to support a regulated approach to refugee management, to specifically obtain a balance in terms of safeguarding individual refugee rights without posing any threat to national security and administrative order. The final part of the Act is on transitional provisions and delegated powers to make subsidiary legislation for effective implementation of the Act. At Section 42 the Act ensures continuity by transferring the rights, duties, and administrative authority of former boards and committees to the new Refugee Status Appeals Committee, Refugee Advisory Committee, Commissioner, and Cabinet Secretary, while retaining the roles and terms of existing officers and employees. Section 43 empowers the Cabinet Secretary to develop regulations covering refugee welfare, identification, database management, protection of vulnerable groups, and status determination, among others. These regulations must comply with national legal frameworks and international standards, reinforcing Kenya's commitment to orderly and lawful refugee governance.

4.1.1 Compliance with Asylum Procedure Standards

The Refugee Act of 2021 has been heralded as a protection model that enhances the inclusion of refugees into the national systems granting broader access to services.¹⁸⁵ According to Andrea Thorgren and Mona Ghasemi,¹⁸⁶ the Act onboards substantial policy reforms aimed at enhancing refugee economic participation, integration, and the process of refugee status determination while fostering refugees' capacity to contribute meaningfully to Kenya's national and local economies.¹⁸⁷ There is a deliberate effort to promote refugee self-reliance, aligning with Kenya's commitments under CRRF.¹⁸⁸ Its provisions on the issuance of essential documentation, enable refugees to engage in livelihood activities, access financial services, and utilize resources provided by both government and other institutions.¹⁸⁹ Indeed from my interaction with various writings on refugee protection regimes in Kenya, grey literature¹⁹⁰ abounds on the comprehensive and progressive nature of Refugee law in Kenya.

While States maintain their sovereign prerogative to regulate the admission of foreign nationals within their borders, accession to international instruments imposes on them binding obligations. In light of the possible risks and consequences of an erroneous determination, it is crucial that asylum-seekers are afforded full procedural safeguards and guarantees at all stages of the procedure. The provisions under Article 14 of UDHR on the right to seek and enjoy asylum, form the basis for the endeavor to have fair and efficient refugee status determination standards. The Programme of Action for the implementation of the Agenda for Protection which was adopted by UNHCR's Executive Committee in 2002, affirms the need for States to grant access to asylum procedures and ensure their asylum systems provide for effective and fair decision-making.¹⁹¹ Consequently, certain international and regional human rights instruments, as well as, relevant conclusions adopted by UNHCR's Executive Committee,¹⁹² offer guidelines on *certain minimum*

¹⁸⁵ Milan Jacobi and Rose Jaji, 'Refugee Policy and Selective Implementation of the Comprehensive Refugee Response Framework in Kenya' (IDOS Policy Brief 2022) <<https://www.econstor.eu/handle/10419/265455>> accessed 12 November 2024.

¹⁸⁶ Andrea Thorgren and Mona Ghasemi, 'Development through Local Integration: The Quest for Durable Solutions for Refugees in Kenya' <<https://lup.lub.lu.se/student-papers/record/9123984/file/9123995.pdf>> accessed 12 November 2024.

¹⁸⁷ 'The New Refugee Act in Kenya and What It Means for Refugees' <<https://www.refugeesinternational.org/perspectives-and-commentaries/the-new-refugee-act-in-kenya-and-what-it-means-for-refugees/>> accessed 16 November 2024.

¹⁸⁸ HIAS, 'Kenya's Refugee Act 2021: Opportunities for Refugee Livelihoods and Self-Reliance, Part 1' <https://efaidnbmnnnibpcajpcgicfindmkaj/https://hias.org/wp-content/uploads/kenyas_refugee_act_2021-_opportunities_for_refugee_livelihoods_and_self-reliance_-final_draft31.pdf> accessed 12 November 2024.

¹⁸⁹ *ibid.*

¹⁹⁰ See for example, reports by Kenya National Commission on Human Rights and Refugee International as well synopsis of the Act by Kituo Cha Sheria and the Refugee Consortium of Kenya

¹⁹¹ 'Goals Archive' <<https://globalgoals.org/goals/>> accessed 13 November 2024.

¹⁹² UNHCR, 'Determination of Refugee Status' <<https://www.unhcr.org/publications/determination-refugee-status>> accessed 13 November 2024.

requirements to be observed by States in setting up individual asylum systems under their domestic law. This means that, while different national models may have been put in place by States, certain core elements of international refugee protection standards are expected to be reflected in individual asylum systems set up within national jurisdiction. In this regard, I evaluate the alignment or otherwise of Kenya's Refugee Act 2021 against these minimum standards for fair and efficient asylum procedures.

The 1951 Refugee Convention, envisages that from the moment an asylum-seeker declares intention to seek refuge, the host state assumes responsibility to offer protection by first and foremost availing competent officials to whom the applicant addresses himself in the territory of a Contracting State.¹⁹³ Such an official should have clear instructions in the form of specialized procedures for examining refugee status claims within their national frameworks. Physical access to the territory of the host State and, further, access to procedures where the validity of their refugee claim can be assessed are essential preconditions for fair and effective asylum procedures. The official is expected to act in accordance with the principle of non-refoulement and to refer such cases to a higher authority for processing. In particular, procedural guarantees for applicants, including access to information about the procedure and assistance of interpreters, should be available.¹⁹⁴ Section 7 of the Refugee Act, which establishes a structured and fair approach to reviewing asylum claims, provides for this requirement in express terms. There are safeguards for non-discrimination and an all-inclusive inquiry into the merits of each claim, enabling fact-finding essential for fair determination. In incorporating this requirement, the Act provides a mechanism for systematic assessment in line with international expectations.

Asylum applications inherently involve complex issues that demand specialized knowledge and expertise. A central requirement of effective asylum processing is decision-making by a single, authoritative body with specialized knowledge for examining requests for refugee status and making a decision in the first instance.¹⁹⁵ That is to say, persons entrusted with refugee status determination are expected to possess specific expertise in asylum and refugee matters, as well as proficiency in cross-cultural communication and interviewing techniques. On the other hand, there are requirements to provide the applicants with the necessary facilities, including the services of a competent interpreter, for submitting their case to the authorities concerned and accorded the opportunity, of which they should be duly informed, to contact a representative of UNHCR.¹⁹⁶ Ideally, this function should be centralized within a single authority,

¹⁹³ *ibid.*

¹⁹⁴ *ibid.*

¹⁹⁵ *ibid.*

¹⁹⁶ *ibid.*

and all forms of international protection that are available in a national legal system should be decided upon by the same competent authority in one single procedure with the same minimum guarantees. Section 8 of the Refugee Act in the Kenyan case establishes DRS, which is a centralized authority with the requisite expertise to handle asylum applications. The establishment of such an entity at the national level is in line with the need to have a clearly defined 'central authority', for decision-making on asylum issues.

Since the circumstances that force people to flee their country are complex and often of a composite nature, international standards stipulate that asylum seekers arriving at borders be admitted temporarily until a full determination of their claims is made, irrespective of their possession of identity documents. Information obtained during an examination of a claim under the 1951 Convention could also be relevant for the examination of complementary/subsidiary protection needs.¹⁹⁷ Such an approach should increase efficiency and reduce the costs of decision-making in asylum matters. Thus, each case should be considered in its entirety with regard to both 1951 Convention¹ grounds and complementary/subsidiary protection needs.¹⁹⁸ In Kenya, part four of the Refugee Act addresses this requirement, ensuring admissibility decisions are not solely made based on the applicant's documentation status. It is in line with the requirement that seeks to avoid undue rejection at entry points, allowing applicants to have their cases heard.

Lack of familiarity with the precise grounds for the recognition of refugee status and the legal system of a foreign country, Asylum-seekers are often unable to articulate the elements relevant to an asylum claim without the assistance of a qualified counselor. Therefore, access to information and quality legal representation is essential for ensuring that asylum seekers understand the proceedings and their rights. In UNHCR's view, the right to legal assistance and representation is an essential safeguard, especially in complex asylum procedures. Section 12(4) of Kenya's Refugee Act attends to this requirement to the extent that the information provided is in a language the applicant understands, and that contact with UNHCR and legal representatives is facilitated. Besides, interpreters are made available as needed. These provisions are consistent with international standards and enable them to participate in the process meaningfully.

The Act's requirement for a personalized assessment and a direct interview with the decision-maker, as outlined in Part III, aligns with an important international standard. In ensuring that each claim is evaluated individually, it promotes the principle of personalized

¹⁹⁷ 'United Nations High Commissioner for Refugees, Fair and Efficient Asylum Procedures: A Non-Exhaustive Overview of Applicable International Standards of 2 September 2005' <www.unhcr.org> accessed 6 October 2023.

¹⁹⁸ *ibid.*

justice, enabling decision-makers to gain direct insights into the specific situations of each applicant. Maintaining confidentiality throughout the asylum process is also essential for protecting the safety and privacy of applicants. Section 40 of the Act enforces confidentiality, safeguarding the sensitive information provided by asylum seekers. This provision too aligns with global best practices that guard applicants' identities and backgrounds from unnecessary exposure.

Written decisions are crucial for ensuring transparency and accountability in asylum procedures. This helps the applicant understand the rationale behind the host state's decisions to recognize the applicant as a refugee or reject the application. Where the applicant is recognized as a refugee, he should be informed accordingly and issued with documentation certifying his refugee status.¹⁹⁹ Sections 12(5) and 17(2) of Kenya's Refugee Act mandate written notifications of decisions and provide applicants with a formal record to support any appeals or reviews. Besides, the Conclusion endorsed by the Executive Committee of the High Commissioner requires that the applicant be permitted to remain in the country pending a decision on his initial request by the competent authority unless it has been established that his request is abusive.²⁰⁰ In the same breath, the applicant is allowed to remain in the country while an appeal to a higher administrative authority or to the courts is pending.²⁰¹ Sections 11, 14, and 22 of Kenya's Refugee Act allow applicants to seek a full appeal or review of decisions and grant the right to remain in the country during the appeal process, which is vital for protecting applicants from premature deportation and ensuring a fair procedure.

The Act further provides specific measures for vulnerable applicants. Sections 20 and 21 address the unique needs of women, separated or unaccompanied children, the elderly, and individuals with mental health issues. It specifies that women should have access to specially trained staff and, when feasible, female interviewers and interpreters. Child applicants, more so the unaccompanied ones, benefit from special protections, such as priority processing and the involvement of child experts. Elderly and mentally ill applicants receive age-sensitive assessments and, when necessary, expert medical input. These provisions demonstrate a commitment to addressing the distinct challenges faced by vulnerable asylum seekers, aligning Kenya's approach with international standards.

Therefore, based on the foregoing assessment, it can be concluded that Kenya's Refugee Act 2021 embeds the minimum requirements for fair and efficient asylum procedures as envisioned in international and regional instruments. The provisions of the Act

¹⁹⁹ 'Determination of Refugee Status' (n 192).

²⁰⁰ *ibid.*

²⁰¹ *ibid.*

reflect an aspiration for addressing refugee needs with a structured, rights-respecting asylum system. However, the extent to which this aspiration translates into practical implementation remains a central concern, as explored in the subsequent analysis.

4.1.2 Policy Fitness Lost in Textual Mistiness?

Despite its largely progressive attributes, some provisions of the Act contain critical ambiguities and omissions that appear to undermine its transformative potential, raising questions about its practical implementation. A recent report²⁰² on Kenya's new refugee law, jointly published by Refugees International and the Kenya National Human Rights Commission highlights some of these ambiguities that were inherent in the repealed legal regime and appear to be carried over into the new law.

In the Act, Kenya appears to strategically shift the management of refugees from the traditional camp-based practice (encampment) anchored in the repealed Refugee Act of 2006 towards settlements where refugees would have more freedom of movement and be able to engage in a wider range of economic activities with the host communities and beyond. Encampment is a containment policy that confines refugees to designated camps rather than allowing them to integrate into the host country's population. Many countries around the world, including Kenya, have adopted this method to deal with the influx of refugees. In Kenya, the crisis and political instability in Somalia, Sudan, Ethiopia, and Rwanda in the early 90's, changed the state of refugee management. Specifically, in contrast to its pre-1991 policy of giving refugees unfettered movement and integration options, Kenya's approach to refugees changed dramatically with the arrival of the first Somali refugees in the early 1990s.²⁰³

The influx of a huge population of refugees into the Kenyan territory resulted in the establishment of refugee camps in many parts of the country including Rift Valley, Central, North-eastern and Coast provinces. Later, many of these camps were closed, some refugees repatriated, and others got resettlement in 3rd countries. The remaining refugee population in the country was relocated to two major camps, the Dadaab in Garissa County and Kakuma in Turkana. As such, in the years that followed, Kenya pursued an unwritten executive policy centered on containment of the refugee population in camps up until 2006 when it got entrenched in the repealed Refugee Act of 2006. The use of the refugee encampment policy in Kenya has been a subject of criticism from various quarters, including human rights groups and international organizations. On the face of it, the shift in the Refugee Act, 2021 is such that the word

²⁰² 'Kenya National Commission on Human Rights > Publications > Thematic Reports > Group Rights > Rights of Migrants' (n 141).

²⁰³ James Milner, 'A History of Asylum in Kenya and Tanzania: Understanding the Drivers of Domestic Refugee Policy' (2019) 15 *Monde(s)* 69.

"camp" has largely been omitted from the text of the Law, and replaced with the term "designated areas." In fact, "camp" appears only once in the entire Act,²⁰⁴ a singular instance that may well be attributed to an editorial oversight rather than an intentional inclusion.

While economic integration, along with the right to freedom of movement, is central to the Act, it does not clarify the structure or nature of these “designated areas,” leaving open the possibility that they may not differ significantly from the existing camp model.²⁰⁵ That is, the parameters for exercising freedom of movement are unclear due to the use of the term “*designated area*.” The Act defines this as “any reception area, transit point, or settlement area as may be declared by the Cabinet Secretary,” leaving significant ambiguity. A livelihood expert, as quoted in the KNCHR Report on refugee issues, explained that the undefined term “*designated area*” could refer either to the refugee camp itself or to the larger county where the camp is situated.²⁰⁶ This lack of clarity suggests the Act may not represent a shift away from the camp model after all but rather an extension of it, effectively creating larger camp-based zones under the guise of “designated areas.” Thus, the right to freedom of movement, upheld by the International Covenant on Civil and Political Rights and Kenya’s Constitution, is inconsistently applied to refugees, who must still obtain authorization to leave the camps.²⁰⁷

The Refugee Act, 2021 emphasizes the need for refugees to be issued the necessary documents to enable them access essential services and participate in the workforce. Yet, the employment context for refugees reflects policy and practice constraints in accessing meaningful livelihoods. Although Sections 28(4) and (6) of the Refugees Act 2021 entitle refugees and asylum seekers to rights under international and domestic law, including access to identification and documentation to support their economic and social participation in the country, these rights are effectively diminished under Section 31 of the Act, which requires refugees to remain in designated areas. The asylum-seeking process itself often exceeds the legally stipulated timelines, leaving asylum seekers without the documentation needed to secure employment, resulting in exploitative wages and limited opportunities. Besides, while refugees technically have the right to work under Kenya's legal framework,²⁰⁸ this right is conditioned by the requirement to obtain Class M work permits, governed by the Kenya Citizenship and Immigration Act 2011 rather than the Refugees Act. Needless to say, the issuance of a Class M permit is

²⁰⁴ The Refugee Act, section 8(1) paragraph (r)

²⁰⁵ Jacobi and Jaji (n 185). Pg 4

²⁰⁶ ‘Kenya National Commission on Human Rights > Publications > Thematic Reports > Group Rights > Rights of Migrants’ (n 141).

²⁰⁷ Amatsimbi (n 14).Pg 251

²⁰⁸ The Kenya Citizenship and Immigration Act, 2011.

exceedingly rare because the process for obtaining it is fraught with challenges, including bureaucratic delays, corruption, and a lack of clear procedural guidance.

Furthermore, the absence of legal identity appears to compound the vulnerability of refugees and asylum seekers in many spheres of their lives. For example, in the realm of property ownership in Kenya, which ordinarily operates in a complex web of legal and administrative procedures,²⁰⁹ lack of identity documentation amplifies their vulnerability. In the instant case of property ownership, which in essence is directly linked to their livelihoods, the Refugee Act is imprecise on how this should be achieved. For instance, while the Act allows for socio-economic integration at sections 34, 35, and 36, it is silent on specific measures to realize housing rights. In the joint report by Refugees International and the Kenya National Human Rights Commission, the authors reference a refugee law expert involved in the development of the Act who acknowledged that the omission of explicit land and housing rights was a deliberate strategic decision to facilitate the Act's passage, reflecting entrenched interests surrounding land issues.²¹⁰

One of the novel features of the Act is a provision enabling refugees who renounce their status to acquire citizenship of the East African Community (EAC),²¹¹ thereby gaining rights and privileges such as freedom of movement and the right to work within EAC member states. However, even though EAC pioneered regional integration on the continent, the legitimacy of the idea of the emergence of an EAC citizenship remains a distant mirage. While the concept of 'Community citizens' would indeed remove obstacles to freedom of movement and allow for residence within the territory of the Community, as of now, no specific law grants a supranational EAC citizenship beyond the rights derived from member states' national legal systems and the protocols on movement and residence. Even as the possibility of a political federation suggests the idea of an EAC citizenship might evolve in the future, the current set of EAC treaties²¹² and protocols promote regional integration through the free movement of persons, goods, and services, as well as the right to residence and establishment but do not equate to a legally codified EAC citizenship akin to national citizenship. In addition, while such a provision would be particularly relevant for Somali and South Sudanese refugees in Kenya, the framework for renouncing refugee status remains undefined.

²⁰⁹ Ambreena Manji, *The Struggle for Land and Justice in Kenya*, vol 49 (Boydell & Brewer 2020) <<https://books.google.com/books>> accessed 1 January 2025.

²¹⁰ 'Kenya National Commission on Human Rights > Publications > Thematic Reports > Group Rights > Rights of Migrants' (n 141).

²¹¹ See section 28(8) of the Refugee Act.

²¹² 'EAC Treaties' <<https://www.google.com/>> accessed 1 January 2025.

4.2 Documented Standards Versus Implementation Realities

Notwithstanding varying management practices in national jurisdictions, International law recognizes the distinct and unique vulnerability of refugees and asylum seekers and establishes standards to ensure their protection and well-being. Complemented by other bodies of law, notably International Human Rights Law, International Humanitarian Law, and International Criminal Law, the 1951 Convention²¹³ Relating to the Status of Refugees (the Refugee Convention) and its 1967 Protocol,²¹⁴ today, stand as global legal instruments explicitly covering the most important aspects of international protection. Furthermore, the United Nations High Commissioner for Refugees (UNHCR), a specialized UN agency, is in place to safeguard the well-being of Refugees and Asylum Seekers. In this context, this category of forcefully displaced can be said to possess a unique legal status, supported by internationally recognized legal frameworks designed to address their specific needs and rights.

The Refugee Convention, as expanded in scope by the 1967 Protocol, promotes a compassionate, rights-based approach to refugee protection, including critical principles, such as non-refoulement, the right to work, education, and access to courts. It consequently imposes legal obligations on states to protect refugees and to provide them with safe asylum. However, while this edifice of the international refugee framework recognizes the crucial need for balance between the grant of refugee protection and the legitimate national interests of states that host the refugees, the workability of the compromise embedded in the architecture of the Refugee Convention and its Protocol is today threatened by critical failures at the level of implementation.²¹⁵ These implementation challenges range from resource constraints and political pressures in host countries to the securitization of asylum and the absence of a comprehensive global burden-sharing framework. Besides, it's notable that the entrenchment of international refugee regimes through national frameworks compounds structural tension between global norms and local contexts in some jurisdictions.

With a long history of hosting refugees, Kenya acceded to the Refugee Convention and its 1967 protocol on 16th May 1966 and 13th November 1981 respectively. It also ratified the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in

²¹³ United Nations Office of Legal Affairs, 'Convention Relating to the Status of Refugees. Geneva, 28 July 1951 [United Nations, Treaty Series, Vol. 189, i-2545.]' <<https://www.un-ilibrary.org>> accessed 3 April 2023.

²¹⁴ United Nations, 'No. 8791. Protocol Relating to the Status of Refugees. Done at New York, on 31 January 1967' <<https://www.un-ilibrary.org>> accessed 3 April 2023.

²¹⁵ Costello, Foster and McAdam (n 6).

Africa²¹⁶ (the OAU Convention) on 23rd June 1992. At the national level, Kenya has also adopted a rights-oriented approach to refugee law,²¹⁷ and, is at the forefront of global efforts toward implementing the Comprehensive Refugee Response Framework²¹⁸ (CRRF) as conceived in the Global Compact on Refugees²¹⁹ (GCR). As one of the pilot countries for CRRF, Kenya launched the Kalobeyei Integrated Settlement in 2015, with support from UNHCR, to promote the socio-economic integration of refugees and host communities in the Turkana region.²²⁰ This initiative marked a shift from an aid-dependent model to a self-reliant approach. The country continues to strive for the economic and social inclusion of refugees, setting ambitious goals under what is now commonly known as the Shirika Plan.²²¹ However, despite these progressive legal frameworks and national plans, there are notable structural and systemic disparities in policy and practice. For instance, while the legal framework prescribes a statutory timeline of 90 days²²² for Refugee Status Determination (RSD) decisions, in practice, many cases take several years to resolve. Similarly, although fast-track procedures exist in law for vulnerable groups such as unaccompanied minors, there are no special procedural guarantees in reality.²²³ Moreover, despite legal provisions designed to phase out the encampment of refugees, the practice continues to persist, significantly restricting refugees' freedom of movement and undermining their ability to integrate into host communities. Furthermore, while the law provides for the documentation²²⁴ of refugees, the issuance of such documentation frequently falls short of the legal requirements.

Many factors, such as political, economic, legal, and social variables, interact to produce these disparities between the documented standards and the actual application of these Standards. Therefore, while Kenya is a signatory to international and regional conventions and has a strong domestic framework for the protection of Refugees, these factors often obstruct their full implementation. On the political front, threats from terrorist groups like Al-Shabaab have led to the securitization of asylum policies. To illustrate,

²¹⁶ 'OAU Convention Governing the Specific Aspects of Refugee Problems in Africa | African Union' (n 7).

²¹⁷ The Refugee Act,.

²¹⁸ 'CRRF <https://www.unhcr.org/what-we-do/protect-human-rights/asylum-and-migration/new-york-declaration-refugees-and-migrants-0/>' (n 9).

²¹⁹ Global Compact on Refugees (<https://www.unhcr.org/media/global-compact-refugees-booklet/>).

²²⁰ Stefan Mathew Millar, 'Encamped States: The State of the Camp in Kakuma Refugee Camp and Kalobeyei Integrated Settlement' <<https://researchportal.helsinki.fi/en/publications/encamped-states-the-state-of-the-camp-in-kakuma-refugee-camp-and->> accessed 16 October 2024.

²²¹ Government of Kenya, 'The Economic and Social Inclusion of Refugees, Setting Ambitious Goals under What Is Now Commonly Known as the Shirika Plan' <<https://www.unhcr.org/news/speeches-and-statements/high-commissioners-statement-high-level-dialogue-shirika-plan>> accessed 17 October 2024.

²²² Refugee Act 2021. See Section 12(9).

²²³ *ibid.* See Section 20

²²⁴ *ibid.* See Section 28(7)

measures such as the revocation of the *prima facie* refugee status for Somali nationals,²²⁵ disbandment of the Department of Refugee Affairs at some point in time, the incessant calls and plans to close the Dadaab refugee camp, the involvement of the National Security Council in the repatriation program and the attempts to reduce the refugee population at Dadaab were all aimed at securitization of the asylum system in Kenya.

All these attempts show that the refugee populations are often viewed through a security lens, resulting in restrictive measures that limit their rights. As such, refugees and asylum seekers have been framed within the state's terrorism and counterterrorism discourse as existential threats to national peace and security, leading to the implementation of socially constructed counterterrorism measures.²²⁶ Besides, even though it's not as pronounced as is the case in Western countries, it's not uncommon to see during election cycles, populist rhetoric framing refugees as burdens, causing policies to become stricter to appease certain voter bases.²²⁷ Equally, diplomatic relations between Kenya and refugee-producing countries have, albeit informally, continued to inform the operationalization of the asylum policy. A case in point is the diplomatic tensions between Kenya and Somalia over a dispute regarding the ownership of the oil, gas, and tuna-rich maritime territory in the Indian Ocean²²⁸ where there were threats of forceful repatriation of Somali refugees and Dadaab Camp closure due to Somalis' inflexibility against the negotiated agreement.

Economically, the cost of hosting refugees is a major concern for Kenya and affects its capacity to properly execute its asylum obligations. That is, despite the legal obligations to provide for refugees, the country's economic status hampers its ability to deliver essential services. For instance, refugee camps such as Dadaab and Kakuma, are often underfunded, resulting in overcrowded conditions, inadequate healthcare, and insufficient education services.²²⁹ In funding refugee initiatives, the government is mainly dependent on foreign donors and agencies like the UNHCR, and therefore its ability to engage in long-term solutions, such as integrating refugees into host communities or strengthening their rights to work or move freely, is hindered by shortfalls in donor financing. Equally, the practice of confining refugees to camps restricts their ability to contribute to the economy.²³⁰ This deprives refugees of livelihood

²²⁵ THE REFUGEES ACT. (No. 13 of 2006). REVOCATION OF PRIMA FACIE REFUGEE STATUS.

²²⁶ Mwangi (n 18).

²²⁷ 'William Ruto Directs UNHCR to Close Dadaab Camp - TV Broadcast' <<https://www.youtube.com/watch?v=-YMD4aXgEc8>> accessed 18 October 2024.

²²⁸ *Somalia v. Kenya; Maritime Delimitation in the Indian Ocean* (n 142). <https://www.icj-cij.org/case/161> accessed 17 October 2024.

²²⁹ Hakim Chkam, 'Aid and the Perpetuation of Refugee Camps: The Case of Dadaab in Kenya 1991–2011' (2016) 35 Refugee Survey Quarterly 79.

²³⁰ Karen Jacobsen, *The Economic Life of Refugees* (Kumarian Press 2005) <<https://books.google.com>> accessed 17 October 2024.

opportunities while also preventing them from contributing to local economies, which perpetuates the cycle of dependency and poverty in refugee-hosting regions.

As indicated, Kenya's legal framework for asylum is progressive on paper but often lacks full implementation. The Refugee Act of 2021 lays down the institutional and legal framework for the recognition, protection, and management of refugees. The Act asserts the principle of *non-refoulement*²³¹ and codifies the rights and duties of refugees in Kenya. Moreover, it is illustrative to note that the Refugee Convention and various other treaties that complement refugee protection measures are fully domesticated vide section 28 of the Refugees Act to the effect that every person recognized as a refugee and every member of his family living in Kenya is entitled to the rights and be subject to the obligations contained in the international conventions to which Kenya is a party. However, while the 2021 Refugee Act guarantees rights such as freedom of movement and access to documentation, the reality on the ground frequently diverges from these standards. Refugees often face long delays in receiving documentation, leaving them without legal recognition and limiting access to services. The legal provisions for protecting refugees are not always backed by strong enforcement mechanisms. Institutional inefficiencies, such as bureaucratic delays, and lack of coordination between government agencies and international bodies, undermine the full implementation of these laws.²³² It is also noteworthy that, while courts have consistently ruled in favor of refugees' rights,²³³ their ability to enforce such decisions has been hampered by the Executive's reluctance to comply with such decisions.

Xenophobic attitudes and discrimination in societies create an environment where refugees are sometimes excluded and faced with hostility.²³⁴ Though legislative frameworks outline the protection of individuals from discrimination, social attitudes rooted in prejudice at the community and institutional levels continue to diminish the chances of integration for refugees in Kenya. Cultural differences between refugees and local communities have posed greater obstacles to the acceptance of refugees in accessing opportunities such as education, employment, and social mobility. Such social influences limit the abilities of refugees to build supportive groups and access opportunities for socio-economic development, further expanding the gap between the rights they are

²³¹ 'RefugeeAct_No13of2006.Pdf' <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/RefugeeAct_No13of2006.pdf> accessed 16 December 2021. Section 18 of the Refugees Act. The principle is to the effect that no refugee should be returned or expelled to the frontier or territory where his life or freedom could be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion (see Article 33 of the UN Convention Relating to the Status of Refugees 1957, as modified by the Protocol of 31st January 1967)

²³² Monyani, Bogale and Maunganidze (n 19).

²³³ *Kituo Cha Sheria & 8 others v Attorney General [2013] eKLR 2 (Kituo Cha Sheria)* (2013) PETITION NO. 115 OF 2013 (High Court of Kenya).

²³⁴ Tendayi Achiume, 'Beyond Prejudice: Structural Xenophobic Discrimination against Refugees' (2014) 45 *Georgetown Journal of International Law* 13.

entitled to and their lived experiences. Moreover, the lack of safety and protection of refugees, particularly women and children, mirrors social vulnerabilities that compound their challenges. Reported cases of sexual and gender-based violence are representative of greater social risk for refugees, particularly in areas where security measures are inadequate.²³⁵

4.3 Internal and External Implications

The challenges of Kenya's asylum system have consequences for both Kenya and the international community.²³⁶ Domestically, an inability to implement effective policies has caused a bottleneck concerning the refugee camps that have seen numerous issues related to overcrowding and poor living conditions, creating humanitarian crises that further burden Kenya's limited resources and pose challenges to national stability. Thus, the processes of securitization could give rise to friction between refugees and the host communities, especially if refugees are perceived as a threat to their livelihood. This tension fuels localized conflicts and is seen to compromise counter-terrorism measures. The inability of refugees to integrate economically hampers the chances for Kenya to exploit the economic potential of a productive refugee labor force, especially in provinces with much refugee hospitality. This economic underutilization in turn entrenches poverty and dependency among refugees with local communities under constant pressure.

At the international and regional levels, the goodwill that would arise from the effective implementation of this policy would strengthen regional diplomacy and relations with neighboring countries. At the same time, failure to do so would strike a blow against relations with governments that might take issue with Kenya's treatment of refugees. An ability to follow through with these international commitments shapes Kenya's standing in the international community. Failures in the asylum system can draw criticism from global human rights organizations, tarnish reputation, and complicate relationships with donor countries and international institutions. International funding is often linked to Kenya's performance in adhering to international asylum and refugee conventions. Failure to implement policies effectively can lead to reduced financial support, as international organizations and donor countries may be less willing to invest in systems that are perceived as inefficient or non-compliant.

²³⁵ Lewis (n 20).

²³⁶ Peter Kirui and John Mwaruvie, 'The Dilemma of Hosting Refugees: A Focus on the Insecurity in North-Eastern Kenya' (2012) 3 International Journal of Business and Social Science 161.

4.4 Empirical Perspectives on Kenya's Asylum Governance

Kenya's prominence in asylum discourse reflects both the scale and complexity of its protracted refugee situation. The existing body of literature on asylum governance in Kenya predominantly focuses on the intricate relationship between its legal frameworks, policy choices, and implementation challenges in managing a protracted refugee situation. Central themes include the enduring impact of encampment²³⁷ policies on refugees, the tension between international obligations and domestic politics, and the securitization of refugee issues, especially concerning Al-Shabaab-linked terrorism.

Rose Jaji, in her article '*Social Technology and Refugee Encampment in Kenya*'²³⁸ situates Kenya's policy of encampment within the broader discourse on asylum governance, focusing on the administration of Kakuma and Dadaab Refugee Camps as pivotal sites of containment under the country's non-integration refugee policy. She analyzes 'Encampment' as a form of "social technology," encompassing both overt physical mechanisms and covert ideological strategies for managing and restricting refugee populations.²³⁹ Jaji sees the structures and rationale of the encampment as inherently provoking resistance, transforming control mechanisms into social interactions where refugees actively counteract containment measures, highlighting a dynamic interplay between control and agency. The article illuminates the intersection of policy intent, practical implementation, and the lived experiences of refugees within Kenya's asylum system.

Billy Agwanda's article on forced migration and policy transitions in East Africa,²⁴⁰ with Kenya as a case study, contextualizes the shift from integration to encampment policies within the region's socio-political landscape. He employs a descriptive and historical approach, to characterize policy transition to discourses of national security, domestic pressures, and regional politics. Using the theory of securitization, he argues that the framing of refugees as security threats exacerbates their vulnerabilities while neglecting the challenges faced by host states. His argument underscores the need for global cosmopolitanism in refugee responses and advocates for international responsibility-sharing to balance the rights and freedoms of forced migrants with the critical national interests of host states.

²³⁷ Rose Jaji, 'Social Technology and Refugee Encampment in Kenya' (2012) 25 Journal of Refugee Studies 221.

²³⁸ *ibid.*

²³⁹ *ibid.*

²⁴⁰ Billy Agwanda, 'Securitization and Forced Migration in Kenya: A Policy Transition from Integration to Encampment' (2022) 48 Population and Development Review 723.

Adding a decolonial dimension, Bosco Opi examines Kenya's encampment and asylum policies through an Afrocentric lens, arguing that the use of camps as tools of deterrence, dehumanization, and detention reflects a colonial legacy in Africa's asylum systems.²⁴¹ By contrasting Kenya's refugee camps with Australia's offshore detention centers in Papua New Guinea and Nauru, he highlights neo-colonial dynamics and outsourcing practices that deepen global inequalities. Grounded in personal experiences as a former refugee, he challenges dominant refugee literature for its lack of lived experience perspectives, advocating for approaches more attuned to the voices of refugees themselves.

From a human rights perspective, Svetlana Sytnik investigated long-term encampment policies in protracted refugee situations, using Kakuma Refugee Camp as a case study.²⁴² Departing from the predominant focus on international refugee law, Sytnik examined the ability of encamped refugees to claim their human rights in practice. Sytnik critiqued the roles of host states, international organizations, and dominant refugee discourse in normalizing such policies, emphasizing the need to align responses to protracted refugee situations with the promotion and protection of human rights. Elias Opongo critiques the policy of refugee encampment for its failure to acknowledge refugees' positive economic potential.²⁴³ He is of the view that, while refugees are often perceived as dependents or security threats, they create markets for local goods, bring foreign currency into host countries through remittances and donor funding. He advocates for policies that move beyond containment to harness the economic and social contributions of refugees.

Researchers have also explored refugees' socio-economic contributions against the backdrop of the strain on local infrastructure and host communities. The welfare challenges faced by refugees in Kenya, particularly within the two major camps of Dadaab and Kakuma remain a major focus for scholarly inquiry. These camps, strain resources and infrastructure, intensifying tensions with host communities. Abulogn Ojulu Okello in *'Refugee Welfare in Kenya: Challenges and Solutions'* highlights critical issues such as lack of documentation, scarcity of clean water, food insecurity, inadequate shelter, and limited healthcare services, all of which exacerbate the

²⁴¹ Bosco Opi, 'A Decolonial Critique of Kenya's Encampment and Asylum Policy' in Rachel Sharples and Linda Briskman (eds), *Deter, Detain, Dehumanise: The Politics of Seeking Asylum* (Emerald Publishing Limited 2024) <<https://doi.org/10.1108/978-1-83753-224-720241006>> accessed 19 November 2024.

²⁴² Svetlana Sytnik, 'Rights Displaced: The Effects of Long-Term Encampment on the Human Rights of Refugees' [2012] Refugee Law Initiative 1.

²⁴³ Elias O Opongo, 'Refugee Undesirability and Economic Potentials: Questioning Encampment Policy in Forced Migration' in Johannes Dragsbaek Schmidt, Leah Kimathi and Michael Omondi Owiso (eds), *Refugees and Forced Migration in the Horn and Eastern Africa* (Springer International Publishing 2019) <https://link.springer.com/10.1007/978-3-030-03721-5_7> accessed 19 November 2024.

vulnerability of refugees.²⁴⁴ Despite efforts by the government and international actors, persistent challenges, including donor fatigue and limited integration opportunities, underscore the need for durable solutions to improve the dignity, security, and well-being of refugees.

Tracy Luseno and Oluwaseun Kolade, in *'Displaced, Excluded, and Making Do: A Study of Refugee Entrepreneurship in Kenya'*,²⁴⁵ discussed the role of social capital in overcoming resource constraints within encampment settings. Their study investigates how refugees in Kakuma camp, Kalobeyi settlement, and Nairobi city deploy social capital to aggregate and recombine resources for entrepreneurial activities, leading to livelihood recovery.²⁴⁶ This research introduces a conceptual framework illustrating the interaction between social capital, resource aggregation, and entrepreneurial action, highlighting refugees' ability to mobilize financial and human capital to create new ecosystems and institutions within resource-constrained environments. The findings emphasize the transformative potential of social capital in enabling refugees' economic participation and argue for policy approaches that integrate refugees into local economies, benefiting both refugees and host communities.

In a socio-legal environment where same-sex relations are abhorred as is the case in many African communities, LGBTQ+ refugees face acute risks, including structural and physical violence, discrimination, exclusion, harassment, and threats to their lives.²⁴⁷ Ulrike Krause and Nadine Segadlo, argue that the heteronormative paradigms embedded in the humanitarian aid system, marginalize LGBTQ+ individuals and deny them access to critical assistance and protection. To navigate these challenges, they must demonstrate remarkable resilience and agency, employing individual and collective strategies to create safe spaces for mutual support and hope within an otherwise hostile environment. These findings bring out the urgent need for inclusive policies and aid practices that address the unique vulnerabilities of LGBTQ+ refugees.

Similarly, there are publications examining the gendered and racialized dimensions of refugee experiences in Kenya. For instance, Bina Fernandez and Handun Rasari Athukorala, with a focus on Ethiopian refugees in Nairobi, theorize the gendered consequences of

²⁴⁴ Abulogn Ojulu Okello, 'Refugee Welfare in Kenya: Challenges and Solutions' <<https://www.intechopen.com/online-first/1193555>> accessed 19 November 2024.

²⁴⁵ Tracy Luseno and Oluwaseun Kolade, 'Displaced, Excluded, and Making Do: A Study of Refugee Entrepreneurship in Kenya' (2023) 15 *Journal of Entrepreneurship in Emerging Economies* 808.

²⁴⁶ *ibid.*

²⁴⁷ Ulrike Krause and Nadine Segadlo, 'Surviving Exile. Queer Displaced People's Lived Experiences of Aid, Risks and Coping in Kakuma' (2024) 41 *Gender Issues* 26.

dispossession for social reproduction.²⁴⁸ They situate the Kenyan refugee regime within colonial legacies of racialization and neo-colonial strategies of managing "surplus" populations. In their view refugees face structural and interpersonal violence that disrupts their capacity for social reproduction. They introduce the concept of the "feminization of refugee survival," identifying two forms of transnational displacement. The first involves dispossession from support infrastructures in both origin and host countries, while the second reflects a racialized refusal by Global North countries to bear the welfare costs of refugee social reproduction. They contend that recognition of how global capitalist regimes, intertwined with gendered, racialized, and colonial hierarchies, exacerbate the crisis of refugee survival. They call for transformative approaches to address these systemic inequalities, emphasizing the need for re-generative policies that support refugee social reproduction.

The literature on durable solutions in the Kenya context is quite extensive on the three conventional approaches of repatriation, third-country resettlement, and local integration. The dynamics of protracted refugee situations in Kenya, challenge the traditional perception of refugees as a temporary phenomenon. This quasi-permanent state of refugee situations compels the government, humanitarian actors, and refugees, to navigate ever more constrained options for a lasting solution, albeit with some novel approaches. Kirui et al.²⁴⁹ discuss the limitations of focusing on a single solution. They instead advocate for a balanced approach that integrates all three conventional solutions.

While focusing on Somali refugees, Stanley and Nakache²⁵⁰ critique the overemphasis on repatriation as the sole solution for refugees. They contend that political motives overshadow the principle of voluntariness, with many Somali refugees returning prematurely due to restrictive conditions in Kenya. Similarly, Dulo Nyaoro, in *'From Co-Option, Coercion to Refoulement: Why the Repatriation of Refugees from Kenyan Refugee Camps is Neither Voluntary nor Dignified'*²⁵¹ challenges the instrumentalization of voluntary repatriation as a political program. Nyaoro highlights the coercive practices and policies that erode its voluntariness and

²⁴⁸ Bina Fernandez and Handun Rasari Athukorala, 'Dispossession, Social Reproduction and the Feminization of Refugee Survival: Ethiopian Refugees in Nairobi, Kenya' (2024) 31 Review of International Political Economy 905.

²⁴⁹ Peter K Kirui, Hellen S Wanyonyi and Naomi Kutto, 'Somali Refugee Solutions in Kenya: Challenges of Repatriation and Prospects of Local Integration' (2020) 7 Advances in Social Sciences Research Journal 120.

²⁵⁰ Lauren Stanley and Professor Delphine Nakache, 'Repatriation as a Controversial Concept: The Case of Somali Refugees in Kenya'.

²⁵¹ Dulo Nyaoro, 'From Co-Option, Coercion to Refoulement: Why the Repatriation of Refugees from Kenyan Refugee Camps Is Neither Voluntary Nor Dignified' [2019] null.

compromise refugee protection. On their part, Mbogho et al. deconstruct the effects of framing repatriation in local and international media on public and institutional attitudes, mediated through donors, governments, and ideological frameworks.²⁵²

Publications on Resettlement, a critical durable solution for refugees, reveal underlying issues regarding resettlement programmes being undertaken by various stakeholders. For instance, Elliott²⁵³ in a publication '*Refugee Resettlement: The View from Kenya-Findings from Field Research in Nairobi and Kakuma Refugee Camp*,' brings out systemic constraints such as limited resettlement opportunities, heightened insecurity, and geopolitical influence as shaping the lived experiences of refugees and impacting the resettlement decisions by the concerned authorities. The process of performing vulnerability tests to access this solution requires the refugees to navigate a culture of disbelief that the resettlement requests often generate. Similarly, Ikanda, highlights the tension between the UNHCR's standardized resettlement criteria and the lived realities of refugees.²⁵⁴ He argues that these mismatche is the resource for the contested and strategic tools for justifying or denying resettlement claims. The use of socio-temporal hierarchies of displacement, where earlier arrivals leverage their extended suffering to assert prioritization. That is, the distinctions between "new" and "old" refugees evolve, redefining the meanings and thresholds of vulnerability.

Significant scholarly attention has also been directed towards local integration as a durable solution. Specifically, there is heavy literature on the socio-economic integration in the two principal refugee camps in Kenya, Dadaab and Kakuma. Although local integration appears not to be an envisaged or desirable solution for the Government of Kenya, a national integration initiative, originally termed the "*Marshall Programme*" and later rebranded as the "*Shirika Plan*,"²⁵⁵ has garnered considerable interest from stakeholders in the refugee sector. This is largely due to its novel approach to addressing asylum issues, particularly for refugees in protracted situations. Okello in '*The Impact of Socioeconomic Factors on the Mental Health and Integration of Refugee and Asylum Seekers in Kenya*,' contends that the concept of local integration has the potential to uphold fundamental rights, enhance psychological well-being, and

²⁵² Wakio Mbogho, Michael Ndonge and James Ogola Onyango, 'Ideological Framing of Somali Refugees' Repatriation from Kenya' (2021) 3 Editon Consortium Journal of Media and Communication Studies 205.

²⁵³ Hannah Elliott, 'Refugee Resettlement: The View from Kenya-Findings from Field Research in Nairobi and Kakuma Refugee Camp' (European University Institute 2012) <<https://research.cbs.dk/en/publications/refugee-resettlement-the-view-from-kenya-findings-from-field-rese>> accessed 20 November 2024.

²⁵⁴ Fred Nyongesa Ikanda, 'Animating "Refugeeness" through Vulnerabilities: Worthiness of Long-Term Exile in Resettlement Claims among Somali Refugees in Kenya' (2018) 88 Africa 579.

²⁵⁵ 'Beyond hype and hope: Unpacking the uncertainties about Kenya's Shirika Plan for hosting refugees – Netzwerk Fluchtforschung' <<https://fluchtforschung.net/beyond-hype-and-hope-unpacking-the-uncertainties-about-kenyas-shirika-plan-for-hosting-refugees/>> accessed 16 October 2024.

foster socio-economic participation among refugees.²⁵⁶ To Okello, integration is positioned as a promoter of social cohesion, safety, and stability within host communities. He interrogates the structural and socio-economic barriers that hinder integration. He identifies limited access to resources, economic hardships, and the intersecting impacts of conflict, displacement, and climate change as key factors hindering integration. On another note, Rahul Oka and Rieti Gengo pick on persistent challenges to the CRRF's implementation, which is foundational to the idea of local integration.²⁵⁷ Their research acknowledges the need to address different states of vulnerabilities, stressors, and community dynamics to overcome barriers to resilience and self-sufficiency for both refugees and host populations.

These works offer an understanding of Kenya's asylum policies, highlighting their securitization, colonial underpinnings, human rights limitations, and challenges for a lasting solution. Despite this wealth of research, significant gaps persist in understanding how Kenya's legal and policy frameworks for asylum translate into effective on-the-ground practices. The preceding studies focus on individual aspects of Kenya's asylum governance. As elaborated, discussions on the impact of encampment policies, durable solutions measures, and restrictive policy approaches dominate these discourses but none touch on the broader continuum between policy intentions and their practical outcomes. In this study, I focus on these broader continua between policy intentions and their practical outcomes by assessing the alignment, or lack thereof, between Kenya's asylum policies and their implementation. I do this by examining the existing legal regimes and socio-political influences for a holistic understanding of the system. This is intended to bring to the fore the disconnect between policy objectives and practical realities.

4.5 Insights from the Literature

Without a doubt, the effective implementation of Kenya's asylum policies is contingent upon a confluence of interrelated factors that determine how legal frameworks and policy intentions manifest on the ground. The foregoing empirical perspectives on Kenya's asylum governance can be framed in a general manner within the overarching matrix of political, economic, legal, and social variables. That is to say, most of these scholarly observations point to the fluid and contested nature of Kenya's asylum system, where legal frameworks are operationalized amid overlapping political, socio-economic, and institutional forces, albeit in different ways and

²⁵⁶ Abulogn Ojulu Okello, 'The Impact of Socioeconomic Factors on the Mental Health and Integration of Refugee and Asylum Seekers in Kenya' *Migration and Forced Displacement-Vulnerability and Resilience-Volume 1* (IntechOpen 2024) <<https://www.intechopen.com/chapters/1184562>> accessed 20 November 2024.

²⁵⁷ Rahul Oka and Rieti Gengo, 'The Political Economy of Refugee-Host Integration in Kenya' <https://www.rtachsn.org/wp-content/uploads/2020/03/RTAC_Kenya-Refugee-Study_FINAL_508.pdf> accessed 19 November 2024.

contexts. A World Bank survey²⁵⁸ on forced displacement in East Africa categorizes the impacts of refugees in the region into four broad groups: sociopolitical, security, economic, and environmental. While this report applies the categorization in the context of refugee impact on the host communities, I use the same variables to determine the shape that the continuum takes, between policy and practice.

As Jaji contends in her work '*Refugee Law, Agency and Credibility in Refugee Status Determination in Nairobi, Kenya*'²⁵⁹ the implementation of refugee law is mediated by factors that straddle the political binary. Jaji explores the inherently political nature of 'refugeeness' and demonstrates how refugee law is susceptible to power, assumptions, and the subjective images that underpin credibility assessments in Refugee Status Determination. Indeed, Kenya's asylum policies have been heavily influenced by regional security concerns, particularly the spillover effects of conflicts in neighboring Somalia and the perceived association of refugee flows with terrorism. This perception has been fueled by high-profile acts of terrorism, such as the Westgate attack,²⁶⁰ the Garissa University massacre,²⁶¹ and other urban assaults,²⁶² which reinforced the framing of refugees within the state's terrorism and counterterrorism discourse as existential threats to national peace and security.

Consequently, restrictive policies and measures aimed at containing the movement of refugees and controlling their population run through refugee governance themes. For instance, in March 2014 the government issued a directive relocating all refugees to camps,²⁶³ allegedly, to enhance surveillance and mitigate perceived risks. This was further enhanced through a legal instrument, the Security Laws Amendment Act, of 2014, capping the refugee population at 150,000 and restricting them to designated camps.²⁶⁴ Besides, further directives to disband the Department of Refugee Affairs in May 2016 and the incessant calls by the authorities to close

²⁵⁸ 'World Bank Survey on Forced Displacement in East Africa Categorizes the Impacts of Refugees in the Region into Four Broad Groups: Sociopolitical, Security, Economic, and Environmental (World Bank Group, 2015). -'
<<https://thedocs.worldbank.org/en/doc/892801436371029880-0290022015/render/ForceddisplacementHornofafricaReport.txt>> accessed 24 November 2024.

²⁵⁹ Rose Jaji, 'Refugee Law, Agency and Credibility in Refugee Status Determination in Nairobi, Kenya' (2018) 2 Zeitschrift für Flüchtlingsforschung 32.

²⁶⁰ Daniel Howden, 'Terror in Nairobi: The Full Story behind al-Shabaab's Mall Attack' *The Guardian* (4 October 2013) <<https://www.theguardian.com/world/2013/oct/04/westgate-mall-attacks-kenya>> accessed 22 November 2024.

²⁶¹ 'Kenya Attack: 147 Dead in Garissa University Assault' *BBC News* (2 April 2015) <<https://www.bbc.com/news/world-africa-32169080>> accessed 22 November 2024.

²⁶² 'Kenya Attack: 21 Confirmed Dead in DusitD2 Hotel Siege' (16 January 2019) <<https://www.bbc.com/news/world-africa-46888682>> accessed 22 November 2024.

²⁶³ 'Refugee Law and Policy in Selected Countries' (*Library of Congress, Washington, D.C. 20540 USA*) <<https://www.loc.gov/item/2016296551/>> accessed 22 November 2024.

²⁶⁴ The Security Laws (Amendment) Act, 2014

the refugee camps reflect the political prioritization of security over humanitarian and legal considerations.²⁶⁵ Such measures, however, while ostensibly aimed at addressing security concerns, often disregard state obligations under international refugee law, highlighting the tension between political expediency and legal commitments.

Economic realities present both opportunities and constraints for asylum governance. Based on the insights provided by Okello,²⁶⁶ the economic dimensions of refugee welfare in Kenya are pivotal to understanding the challenges and opportunities within the country's asylum governance framework. Okello emphasizes how the economic strain on host communities, coupled with the limited capacity of camps like Dadaab and Kakuma, exacerbates tensions over scarce resources such as food, water, healthcare, and shelter. Writing on the '*Barriers and Opportunities for Refugee Entrepreneurship in Africa: A Social Capital Perspective*'²⁶⁷ Luseno and Kolade discuss how social capital shapes refugee entrepreneurship, particularly in the context of Kenya's restrictive asylum policies.²⁶⁸ They contend that refugees often draw on various forms of social capital to navigate barriers and rebuild their livelihoods. To them, bonding social capital, within close-knit refugee communities, facilitates the sharing of resources, information, and mutual support. In such instances bridging social capital is seen to allow refugees to connect with broader networks, fostering knowledge exchange and entrepreneurial skill development, while linking social capital provides access to institutional resources and market opportunities.

Although refugees' contribution to the Kenyan economy through labor and entrepreneurship is acknowledged, the host communities often see them as a burden to already strained local infrastructure and resources. These perceptions, especially in instances where they are viewed as competitors for scarce resources, impact the nature of policies that the host country generates. Okello reiterates this view and asserts that despite such perceptions, refugees contribute to the economy even in their informal sector setting adding that their input can further be optimized as economic assets through inclusive policies. Omata, in '*Refugee Economies in Kenya: Preliminary*

²⁶⁵ Nadew Zerihun Gebeyehu, 'A Critical Case Study of Kenya's Decision to Permanently Close Dadaab Refugee Complex and To Permanently Disband the Department for Refugee Affairs in Light of International Refugee Law' [2023] Available at SSRN 4768984 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4768984> accessed 22 November 2024.

²⁶⁶ Okello (n 256).

²⁶⁷ Tracy Luseno and Oluwaseun Kolade, 'Barriers and Opportunities for Refugee Entrepreneurship in Africa: A Social Capital Perspective' in Oluwaseun Kolade and others (eds), *The Palgrave Handbook of African Entrepreneurship* (Springer International Publishing 2022) <https://link.springer.com/10.1007/978-3-030-75894-3_17> accessed 22 November 2024.

²⁶⁸ *ibid.*

*Study in Nairobi and Kakuma Camp*²⁶⁹ they examined refugees' economic activities in two contrasting settings, urban Nairobi and Kakuma camp. Omata looks at the diverse livelihood ventures refugees pursue, from informal trade to small-scale businesses, and the pivotal role of social networks in overcoming barriers to resources and markets. While urban refugees in Nairobi benefit from access to broader economic opportunities, they face challenges due to a lack of legal recognition and documentation.²⁷⁰ Refugees in Kakuma are constrained by encampment policies that limit mobility and market access, relying heavily on donor support.²⁷¹

The ever-growing humanitarian need and protection issues against shrinking donor funding for asylum programmes exacerbate further vulnerabilities, as such fluctuations in international support directly impact the sustainability of protection programmes. As a matter of fact, the chronic underfunding has necessitated austerity measures that are frequently misaligned with the ever-growing demands of humanitarian crises.²⁷² The resultant donor fatigue, especially in the host countries of the south like Kenya, where their own citizens lack the fundamentals such as health care, shelter, employment, education, and other basic needs exerts a profound influence on policy implementation direction. Therefore, the economic costs of hosting refugees, coupled with unabated and new arrivals of displaced persons, impact theory praxis gaps between the policy design and the lived experience aspects of refugees.

Another determinant that is not only linked to the economic factor but also has similar ramifications on asylum policy implementation is the social variable. Relationships among refugees and the host community's attitudes towards them contribute to the nature and designs of programmes on policy implementation. Refugee-host dynamics, shaped by cultural differences and local attitudes, can either facilitate or hinder the application of policy intentions. Literature on refugee livelihoods contends that the negative perceptions of refugees as economic and security threats exacerbate social tensions and limit opportunities for community-based approaches to asylum governance. Pavanello et al.²⁷³ reveal pervasive distrust and negative perceptions of refugees among the authorities especially in the security sector. They point out how police officers, rooted in the belief that refugees should remain in camps and assumptions of

²⁶⁹ Naohiko Omata, 'Refugee Economies in Kenya: Preliminary Study in Nairobi and Kakuma Camp' (2016) 120 Refugee Studies Centre, Working Paper Series number 9.

²⁷⁰ *ibid.*

²⁷¹ *ibid.*

²⁷² Sikanyiso Masuku, 'Universal Refugee Social Protection Guidelines: A Discussion into the Challenges to Their Successful Adoption' [2024] International Journal of Politics, Culture, and Society <<https://link.springer.com/10.1007/s10767-024-09477-2>> accessed 24 November 2024.

²⁷³ Sara Pavanello, Samir Elhawary and Sara Pantuliano, *Hidden and Exposed: Urban Refugees in Nairobi, Kenya* (Overseas Development Institute London 2010) <<https://library.alnap.org/system/files/content/resource/files/main/hidden---exposed-urban-refugees-report-final.pdf>> accessed 25 November 2024.

criminal intent, particularly associating Somali refugees with terrorism. The authors observed that, within the general host community environment, some refugees reported positive and harmonious relations with the local populace, whereas others reported negative experiences including discrimination, hostility, and, in some instances, open violence. They also noted that especially susceptible individuals, such as women, children, LGBTQ+ refugees are more prone and face compounded challenges. For instance, HIAS Kenya reported that LGBTQ+ refugees suffer from systemic discrimination and, as a consequence, the achievement of fair asylum policies becomes more challenging.²⁷⁴

Ambiguities in legal provisions as brought out in the preceding part of this study, and the absence of clear pathways for transitioning refugees to other legal statuses or accessing durable solutions heavily impact policy outcomes too. Kenya's legal framework for refugee protection has consistently clashed with politically driven directives, leading to significant judicial interventions. The relationship of stakeholders, especially that of human rights groups with the state has mostly been conflictive. Often, the government had to be litigated into abiding by the edicts stipulated in not only the relevant international conventions but also its own National laws. For example, the 2014 directive requiring refugees to relocate to camps faced legal challenges for violating constitutional guarantees such as freedom of movement and the principle of non-refoulement. The *Samow Mumin Mohamed & 9 others v Cabinet Secretary and Refugee Consortium of Kenya & another v Attorney General* were all filed to safeguard refugees' rights against executive overreach. The Security Laws (Amendment) Act, 2014, which capped the refugee population and confined them to camps, was also adjudicated upon in *Coalition for Reform and Democracy & others v Republic of Kenya*. In this case, the High Court declared the population cap as unconstitutional, and affirmed the supremacy of constitutional principles over politically motivated legislative amendments. In *Constitutional Petition No. 227 of 2016 and Kenya National Commission on Human Rights & another v Attorney General & 3 others (2017)*, the courts reinforced Kenya's commitment to both domestic and international legal standards. However, despite the existence of various laws and conventions that protect refugee rights, the implementation of these protections often falls short of the intent of the law.

²⁷⁴ HIAS Kenya, 'Protection Assessment of LGBTQI+ Displaced Persons in Urban Kenya' <<https://hias.org/wp-content/uploads/HIAS-Protection-Needs-Assessment-for-LGBTQI-Persons.pdf>> accessed 25 November 2024.

CHAPTER 5: FINDINGS AND ANALYSIS

5.0 Introduction

This chapter presents the findings and analysis of the study, based on the data obtained from secondary sources including legal frameworks, reports, and scholarly literature, integrated with findings from primary sources. The section presents the themes, patterns, and insights that emerged from participants, particularly from primary stakeholders in refugee protection, that is; refugees and asylum seekers, staff members of the Department of Refugee Services, and the representatives of UNHCR in Kenya. The analysis is organized into three key themes: Asylum Process constituting reception, registration including issuance of identification documents and access to essential services such as employment, education, legal services, and social protection, status determination processes and durable solutions; Policy alignment with International Standards, and Policy to Practice gaps. Each thematic finding is structured into policy provisions and practical realities to establish the nature of the *continuum* that obtains between the two. In presenting the primary data, I have included direct quotes from participants and detailed descriptions of observations to illustrate their experiences and perspectives. The findings reveal a significant divergence between formal policy commitments and on-the-ground realities.

5.1 Kenya's Asylum Process

The asylum process in Kenya follows structured steps, designed to balance international obligations of safeguarding asylum seekers with national security and administrative considerations. The process begins with the reception of Person of Concern (PoC) at designated entry points or reception centers. This is followed by the registration phase, during which personal and demographic details are recorded, and the applicants are issued temporary documentation as they await the processing of their application. The next step is RSD, where an assessment to ascertain whether the applicant meets the criteria for recognition of refugee status under the governing laws, is carried out. Once granted refugee status, the focus shifts to identifying durable solutions, the conventional ones being repatriation, integration, and third-country resettlement.

5.1.1 Reception of Asylum Seekers

Kenya's asylum reception process is anchored in the Refugee Act, of 2021, which provides a structured framework for the management of asylum seekers at designated points of entry and other administrative offices. Section 24(1) of the Act directs individuals

entering Kenya to seek asylum to declare their intention immediately or within 30 days of arrival in the country. This declaration can be made at designated entry points, reception centers, or government administrative offices. For those entering through non-gazetted points, the Act requires them to report to the nearest administrative office for referral to the Department of Refugee Services. Individuals lawfully in Kenya but unable to return to their country of origin due to fear of persecution, as outlined in Section 3, are permitted under Section 24(2) to apply for refugee recognition before the expiration of their lawful stay.

Reception officers, as described in Sections 25 and 26, are tasked with providing information, receiving applications for refugee status, and conducting initial processing. This includes taking photographs, collecting biometric data, and performing screenings. Health screenings aim to detect and contain public health risks, while security screenings, as outlined in Section 27, focus on identifying individuals who may pose risks such as involvement in trafficking or terrorism. During large-scale influxes of asylum seekers, Section 24(3) empowers the Commissioner, in consultation with other agencies, to coordinate emergency measures. These measures include establishing reception zones at safe distances from borders, ensuring adequate facilities and services for vulnerable groups such as women, children, and persons with disabilities, and maintaining the civilian and humanitarian character of refugee zones. Findings from interviews with asylum seekers highlight significant inconsistencies between these provisions and their experiences during the reception process.

One Congolese asylum seeker described the absence of clear guidance at reception facilities:

"At the reception camp, there are no clear sections or accessible resources offering guidance on the refugee status determination process or up-to-date information for asylum seekers. This information gap left me vulnerable and led to losing money to unscrupulous individuals."

A Somali asylum seeker recounted being left in limbo after a security interview, with no communication on the next steps:

"In my efforts to seek protection, I was assisted by a resident in approaching the Department of Refugee Services for processing. I was referred to the Joint Refugee Services Centre in Westlands, Kenya, and scheduled for a security interview. However, after the interview, I received no further communication from the security interviewer. Upon making further inquiries, I learnt that a negative report had been filed against me. The officer handling my case claimed to have directed me to register at the Dadaab refugee camp, but I haven't received any formal communication or guidance on how to proceed with this process. I am stranded."

A Burundian refugee recounted their experience of fleeing to Kenya and encountering a lack of assistance during arrival:

"I was vulnerable and disappointed to flee my country for the second time because I started being a refugee for the first time in 2002 and I repatriated voluntarily in 2012. So when I fled again due to the violent protests and killings that were happening in 2015 in Burundi, no one provided me adequate information about asylum. Fortunately, I had been through it before, so I knew to inquire about where UNHCR was located."

These accounts point to recurrent issues such as limited access to information, unclear procedures, and delayed communication at various stages of the reception process. Some asylum seekers highlighted the role of local residents or personal initiative in navigating the system, suggesting gaps in official guidance and support. Additionally, challenges with referral systems and inconsistencies in processing timelines were reported, particularly for individuals redirected to camps for registration.

In cases of large-scale influxes, findings indicate that facilities often lack sufficient resources to meet the needs of vulnerable groups. Instances were reported where designated zones lacked the infrastructure necessary to ensure adequate safety and welfare, as envisioned in Section 24(3). Therefore, while the Refugee Act, 2021 provides detailed legal provisions to facilitate an organized and humane reception process, the findings illustrate significant discrepancies between the framework and the lived experiences of asylum seekers, particularly concerning access to information, procedural clarity, and timely communication.

5.1.2 Registration of Asylum Seekers

The registration phase is a critical component of asylum protection in Kenya, focusing on the collection and verification of personal data from Persons of Concern. This includes biometric and civil data as well as other relevant information necessary for case management. Registration serves as an entry point for asylum seekers, where their information is recorded, verified, and updated by the Government of Kenya. During this process, PoCs are issued documentation, such as proof of registration, which provides initial protection and allows access to essential services while their cases are processed.

Findings indicate varying levels of efficiency in the registration process. Some units of the Department of Refugee Services rated the process as “Efficient” or “Very Efficient,” attributing these ratings to advancements such as the integration of biometric systems and the use of UNHCR’s real-time registration technology. For instance, a representative from a DRS registration unit highlighted:

"We have adopted biometrics and live capture technology to improve the accuracy and speed of registration."

However, several challenges were noted in the responses. One of the significant issues raised was the reliance on UNHCR systems, which sometimes leads to limited technological integration and inaccuracies in data management. Additionally, the appointment-based system used to access registration services was reported to cause delays. A UNHCR representative explained:

"Access to registration is through an appointment system, and delays between requests and appointment dates slow the process."

In urban areas, the encampment policy was identified as another factor complicating the registration process. Some asylum seekers reportedly avoid registration for fear of being sent to camps, as highlighted by another UNHCR representative:

"In urban areas, the encampment policy discourages some asylum seekers from registering for fear of being sent to camps."

From the foregoing, while the adoption of advanced technologies and real-time systems has improved the speed and accuracy of registration, challenges related to system dependencies, procedural delays, and policy barriers were identified.

5.1.3 The Status Determination Process (RSD)

The registration phase is followed by the status determination stage where the Status Eligibility Panel conducts the assessment, and review of asylum applications. The eligibility for refugee status lies with the applicant presenting oral evidence or proof that will support their claim. This stage does not automatically assure one of attaining a refugee status, one can either be approved or rejected. In cases where one is rejected, they can appeal to the Refugee Appeals Committee. While awaiting RSD decisions, applicants rely on temporary identification passes issued at the registration stage, allowing them limited access to services. This means legal protection continues through the RSD phase, where the DRS applies both the Refugee Act and international refugee law instruments to evaluate whether an individual qualifies for refugee status based on the reasons for fleeing their home country.

Upon approval and recognition, refugees are issued with substantive legal identification documents as per the requirements of the Act. This is pursuant to Section 28(6) and (7) of the Refugees Act, 2021 which entitles the refugees right to identification and civil registration documents which are considered to be sufficient to not only identify them but also enable them access to rights and services under the Act and any other applicable law. In fact, the law envisages the Refugee ID Card to have at a minimum, a similar status to the

Foreign National Registration Certificate (issued under section 56 (2) of the Kenya Citizenship and Immigration Act No 12 of 2011) for the purposes of accessing their rights. Different kinds of documentation gazetted by the Cabinet Secretary, Ministry of Interior, and National Administration include; Refugee Identity Card, Asylum Seeker Pass, Conventional Travel Document (CTD), Movement Pass, and Letter of Recognition (see the samples under Appendix 1). The Act further entitles Asylum seekers to a prompt and fair review of their applications, aiming to stabilize their legal status within a predictable timeline. Hence the Statutory timelines of 14 days for registration and 90 days for RSD decisions.

The Department of Refugee Services asserts the position of the law²⁷⁵ and communicates on its platform that in line with the provisions of the Refugee Act No. 10 of 2021, protection starts when Persons of Concern (PoCs) access Kenyan territory and that they are safeguarded under the principle of non-refoulement, ensuring they are not returned to their country of origin. Legal protection is formalized through the registration process as outlined. DRS highlights that:

*"Access to registration ensures that PoCs are under the protection of the Kenyan government, meaning they will not be returned to their home country while their asylum claims are being processed. Documentation ensures access to social contracts, legal procedures, and aspects of daily life that the local community normally enjoys."*²⁷⁶

The Department further asserts that its protection efforts transcend the provision of legal documentation. According to their account, DRS has utilized case management to deliver tailored solutions that address the specific needs of refugees, thereby ensuring comprehensive protection and facilitating their integration into Kenyan society.²⁷⁷

However, despite these policy directives and the department's avowal to live by the text of the law, the reality reveals an uncoordinated protection system with severe procedural delays and a substantial backlog. Indeed, both primary and secondary data reflect this situation. Participants in this study acknowledged widespread delays at the RSD stage. Some responses from the participants highlighted delays in meeting statutory timelines for RSD:

"RSD applications are rarely determined within the statutory 90 days; instead, cases often take years due to backlogs at all stages of the process." (UNHCR, Protection Associate)

²⁷⁵ Department of Refugee Services, 'Department of Refugee Services Kenya' <<https://www.google.com/departmen.refugee.services>> accessed 7 December 2024.

²⁷⁶ *ibid.*

²⁷⁷ *ibid.*

"We lack adequate resources to process applications promptly, which leads to delays and dissatisfaction among refugees." (DRS Administration Unit)

"I have been waiting for over two years for my case to be resolved. Every time I ask, they tell me to wait." (Congolese Asylum Seeker)

Secondary data too, confirms these delays, attributing them to systemic inefficiencies, including limited resources and high caseloads at the DRS. For instance, the 2023 UNHCR Annual Results Report highlights that RSD backlogs remain a critical bottleneck in the asylum process.²⁷⁸ In an analysis and evaluation of refugee-related policies and legislation of Kenya and Uganda, the International Rescue Committee provides staggering figures on pending asylum applications in Kenya, which they say have led to waiting times ranging from three months to several years.²⁷⁹

5.1.4 Framing Durable Solutions

Kenya's legal regime on refugee management provides various durable solutions, the conventional ones being local integration, resettlement, and voluntary repatriation. The integration, repatriation, and resettlement programs of refugees in Kenya reflect essential elements of the refugee management system, as outlined in the Refugee Act 2021. These programs aim to balance the rights and needs of refugees with the interests of host communities and other government priorities.

Local integration, which is conceptualized through the lenses of social, economic, and cultural integration, each representing distinct forms of interaction with society.²⁸⁰ The Refugee Act emphasizes the importance of fostering harmonious relationships between refugees and host communities. Under Section 34(1) of the Act, the Commissioner is tasked with promoting the shared use of public institutions, facilities, and spaces by both refugees and host populations, as far as practicable. This is intended to reduce tensions and foster mutual benefit. Moreover, Section 34(2) of the Act emphasizes the need for sensitization programs to educate host communities about the presence and rights of refugees, as well as strategies for peaceful coexistence. The Commissioner is also required under Section

²⁷⁸ UNHCR, 'Kenya' <<https://reporting.unhcr.org/operational/operations/kenya>> accessed 6 December 2024.

²⁷⁹ An Analysis and Evaluation of Refugee-related International Rescue Committee (IRC), 'An Analysis and Evaluation of Refugee-Related Policies and Legislation - Kenya and Uganda | International Rescue Committee (IRC)' <<https://www.rescue.org/report/analysis-and-evaluation-refugee-related-policies-and-legislation-kenya-and-uganda>> accessed 6 December 2024.

²⁸⁰ Kofi Kobia and Leilla Cranfield, 'Literature Review: Urban Refugees' [2009] Refugees Branch, Citizenship and Immigration Canada 1.

36 to ensure that integration efforts give special attention to vulnerable groups, including women, children, older persons, persons with disabilities, and victims of trauma. Further, Section 35 of the Act, directs the Commissioner to liaise with national and county governments to ensure that refugee-related issues are incorporated into sustainable development and environmental plans. This provision recognizes that refugees are not only beneficiaries of aid but also potential contributors to the socio-economic development of host regions.

Voluntary repatriation is upheld as a fundamental right of refugees under Section 37(1). Refugees have the freedom to return to their country of nationality or the country from which they entered Kenya at any time, provided their return is voluntary and safe. Any actions or omissions aimed at restricting this right, except as allowed by law, are expressly prohibited. Upon repatriation or cessation of refugee status, Section 37(2) requires refugees to surrender all documentation acquired by virtue of their refugee status. They are, however, permitted to take with them any movable property they lawfully own, provided they comply with Kenya's existing property laws. Kenya also facilitates the resettlement of refugees to third countries as an alternative durable solution. Section 38(1) allows refugees residing in Kenya to seek resettlement in any country outside their country of origin. The Commissioner, in liaison with relevant government ministries, is further tasked under Section 38(2) with actively seeking additional resettlement opportunities beyond those allocated through other agencies.

Although the Refugee Act of 2021 establishes a structured framework for the integration, repatriation, and resettlement of refugees in Kenya, empirical research indicates limited progress or tangible outcomes in its implementation. For instance, on integration, Kenya's Shirika Plan, while praised as a pioneering approach to refugee socio-economic inclusion and aligned with the Global Compact on Refugees and the Comprehensive Refugee Response Framework, fails to address refugees' daily challenges, legal status, and protection needs, prioritizing economic goals and donor funds over their perspectives and lacking a clear implementation roadmap.²⁸¹ Similarly, during my field interaction with the participants in this study, the encampment was repeatedly cited as a hindrance to mobility and integration:

*"The encampment policy limits refugee mobility, creating additional barriers to their integration and access to opportunities."
(DRS Protection Unit)*

²⁸¹ 'Beyond hype and hope: Unpacking the uncertainties about Kenya's Shirika Plan for hosting refugees – Netzwerk Fluchtforschung' (n 255).

Literature on local integration raises varying prospects of integration depending on their ethnicity, nationality, and support systems.²⁸² Jacobsen in, “*Building Different Bridges: Technology Integration, Engaged Student Learning, and New Approaches to Professional Development*,”²⁸³ contends that local integration, though once associated with permanence, has lost political support and now carries a controversial connotation, provoking negative reactions from both host governments and donor agencies. As such, while legal recognition of refugees' status remains a critical component of true integration, in Kenya, different integration programs hardly pursue this element as the ultimate goal.

On repatriation, which is only feasible when conditions in the country of origin has sufficiently improved to allow for a dignified return, studies provide the context of Somali refugees in Kenya. Literature shows that the tripartite agreement on voluntary repatriation, signed on November 10th, 2013, has managed to repatriate only 25% of refugees over the years.²⁸⁴ Many Somali refugees continue to perceive Somalia as too fragile for return, which explains the low number of individuals opting for repatriation.²⁸⁵ The ongoing volatile security situation and the reluctance of the majority of Somalis to return further diminish prospects for an immediate solution.²⁸⁶ Additionally, refugees who have spent extended periods in camps may face significant challenges in readjusting to life in their home countries, should they choose to return.²⁸⁷

The refugee resettlement process involves the collaboration and conflicting interests of both state and non-state actors. These competing interests often revolve around humanitarian efforts to assist the most vulnerable refugees, on the one hand, and national security concerns aimed at protecting borders from individuals deemed undesirable, on the other. Studies highlight the challenges refugees face as they navigate a fragmented and unsynchronized system of institutions.²⁸⁸ Resettlement, while important, is viewed as a limited option that benefits only a small proportion of the refugee population. Refugees, particularly those with better education and

²⁸² Kobia and Cranfield (n 280).

²⁸³ D Michele Jacobsen, ‘Building Different Bridges: Technology Integration, Engaged Student Learning, and New Approaches to Professional Development.’ <<https://eric.ed.gov/?id=ED453232>> accessed 10 December 2024.

²⁸⁴ Kirui, Wanyonyi and Kutto (n 249).

²⁸⁵ *ibid.*

²⁸⁶ *ibid.*

²⁸⁷ *ibid.*

²⁸⁸ Sophia Balakian, ‘Navigating Patchwork Governance: Somalis in Kenya, National Security, and Refugee Resettlement’ (2020) 63 African Studies Review 43.

connections, often have high expectations of resettlement programs, sometimes even to the detriment of seeking legal status in their current country of asylum.

5.2 Alignment with International Standards

As comprehensively covered in chapter two and four of this study, Kenya's legal framework aligns closely with international standards, including the 1951 Refugee Convention, its 1967 Protocol, and the 1969 OAU Convention. The Refugee Act, 2021, domesticates commitments conceived in these frameworks, providing a robust legal foundation for refugee management. The Act aligns with Kenya's commitments under the Comprehensive Refugee Response Framework, emphasizing refugee self-reliance and enabling access to essential documentation. The provision of the Act on economic inclusion allows refugees to participate in livelihood activities, access financial services, and utilize resources from governmental and non-governmental institutions.

The national law, fully incorporates standards for fair and efficient asylum procedures, procedural safeguards, and the principle of non-refoulement. Notably, Section 7 introduces a structured and fair approach to reviewing asylum claims, addressing issues such as non-discrimination and fact-finding to uphold the rights of asylum seekers. As noted, the Act under Section 8 establishes a centralized authority for managing asylum applications. This aligns with international best practices requiring specialized decision-making by a competent authority. Sections 12(4) and Part III further require personalized assessments, interviews, and confidentiality in handling asylum claims, ensuring individualized justice and privacy. The Act also provides for vulnerable groups through provisions under Sections 20 and 21. These sections address the unique needs of women, unaccompanied children, the elderly, and individuals with mental health challenges, offering specialized protections such as trained staff, priority processing, and expert input.

Kenya's Refugee Act 2021 also mandates transparency and accountability in asylum decisions through written notifications, as outlined in Sections 12(5) and 17(2). Applicants are allowed to remain in the country during appeals, ensuring procedural fairness and protection against premature deportation. Indeed, participants in the study confirm that Kenya's refugee law meets international minimum requirements for asylum procedures.

"Kenya has good alignment with its international obligations and with international standards for refugee protection." (UNHCR Protection Associate)

However, while the Act meets international minimum requirements for asylum procedures, concerns remain about the practical implementation of these provisions. The subsequent analysis explores the gap between the Act's aspirational framework and operational realities.

5.3 Policy Intent Nipped in the Bud

As evidenced, Kenya's refugee law has lofty goals and progressive measures aimed at improving refugee protection and facilitating appropriate durable solution options. Responses from the staff of various DRS Units highlight that Kenya's asylum system operates under national (Refugee Act, 2021) and international frameworks, including the 1951 UN Refugee Convention, its 1967 Protocol, and the 1969 OAU Convention. They affirm that the Asylum system generally follows a sequence of reception, registration, refugee status determination (RSD), and documentation. However, the durability and practical application of these stages vary. Many units reported partial implementation of their mandates due to structural, logistical, and regulatory challenges. For instance, while the Refugee Act, 2021, provides a legal foundation, certain processes like refugee work rights and access to documentation (e.g., driving licenses, M-Pesa accounts) face bureaucratic hurdles. A recurrent issue is inadequate funding and staffing. For instance, the Head of Registration highlighted challenges like overcrowded camps, RSD processing backlogs, and limited infrastructure resources. Units like Documentation and RSD highlighted the absence of a comprehensive refugee policy to streamline services across departments, resulting in inconsistent application and implementation of laws. Some Units, such as Protection, noted difficulties aligning mandates with existing regulations, which restricts full access to services and integration of refugees.

Similarly, empirical research reveals a significant gap between the ambitious policy goals and the challenges encountered in the 'daily grind' of implementation. As elaborated in the preceding part of this research, frontline workers and institutions grapple with systemic inefficiencies, resource shortages, and operational hurdles, which hinder the translation of policy into effective practice. This is evident in the challenges refugees face at various stages of the refugee status determination process, economic participation, education, access to justice, and social protection.

Numerous 'lived reality' situations of refugees bring out the contrast in policy and practice in Kenya's asylum system. As already alluded to in the preceding part, the Refugee Act mandates the Department of Refugee Services to process refugee status applications within 90 days, during which applicants are required to provide oral evidence supporting their claims. In reality, the process often

stretches far beyond this timeframe, with some applicants waiting up to three years for a decision, reflecting a substantial backlog. While temporary identification passes are issued during this waiting period, many asylum seekers struggle with uncertainty and face challenges accessing services, particularly in employment, as final identification documents are only issued upon completion of status determination. Refugees frequently report receiving unclear or conflicting information about the application process, compounding their difficulties. The Refugees Act of 2021, along with the Employment Act, entitles refugees to participate in Kenya's social and economic sectors and prohibits discrimination based on nationality. Of critical importance in this regard is the issuance of necessary documentation to enable access to these services. For example, Class M work permits are issued by the Department of Immigration and are facilitated by the DRS to allow refugees formal employment. Additionally, the Act permits refugees to obtain business licenses, enabling small business ownership, while the Kenya Comprehensive Refugee Response Framework and the Micro and Small Enterprises Act No. 55 (2012) aim to streamline the work permit process and acknowledge foreign qualifications. However, this study has revealed that despite legal provisions regarding refugee identification and associated benefits, refugee ID cards are often not recognized as valid forms of identification, particularly by critical institutions enabling the right to work.²⁸⁹ Indeed, challenges with the implementation of these provisions continue to impede the ability of refugees to enjoy the benefits accruing from recognition as refugees. In practice, refugees are unaware of the benefits accruing from the status as described.²⁹⁰

Kenya Revenue Authority (KRA) Personal Identification Numbers (PINs) and work permits, prerequisites for formal employment or business operations. Respondents highlighted systemic issues, such as the omission of refugee IDs from online application platforms and additional administrative requirements by the Department of Refugee Services, including KRA PINs and business licenses, which are not legally mandated for first-time Class M work permit applications. The inability to secure work permits and KRA PINs have left refugees vulnerable to exploitation, limited their economic opportunities, and restricted their ability to own immovable property. Particularly urban refugees, reported greater challenges compared to camp-based refugees, with some instances of extortion by immigration officers demanding up to Kshs. 200,000 for permits that should be free.²⁹¹ Another respondent in Nairobi

²⁸⁹ Bisimwa Mulemangabo and Kenneth Wyne Mutuma, 'Refugee-Led Research Series, Research Report No.6' <<https://refugeeledresearch.org/wp-content/uploads/2023/04/RLRH-Kituo-and-RELON-Finding-durable-solutions-Full-report-For-website-1.pdf>> accessed 16 November 2024.

²⁹⁰ *ibid.*

²⁹¹ *ibid.*

shared a poignant account of losing out on employment twice due to legal constraints, underscoring the profound impact of these systemic challenges on refugees' livelihoods and security.

A key informant from the Department of Immigration disclosed that work permits for refugees are often denied as a matter of policy, citing national interest considerations. While this approach contravenes Kenya's national, regional, and international obligations, as the law mandates progressive facilitation of refugees' rights, it remains the position of the authorities in refugee governance. In practice, however, refugees encounter substantial barriers in accessing formal employment due to complex bureaucratic requirements, unclear procedures, and a lack of documentation required for work permit applications. Many report challenges in navigating online business registration systems and obtaining necessary licenses. Furthermore, societal stereotypes, negative perceptions, and misconceptions about the economic impact of refugees contribute to employment discrimination, exacerbating job market entry challenges. Despite policy frameworks supporting economic integration, practical implementation remains inconsistent and often inaccessible for refugees.

Kenya is a signatory to the Djibouti Declaration on refugee education²⁹² and the Kampala Declaration on Jobs,²⁹³ which commits the government to integrate refugees into national education systems. This includes developing minimum education standards, expanding access to quality education, including refugee teacher development, and linking refugees to Technical and Vocational Education and Training (TVET) institutions. However, several barriers inhibit refugees' access to education and vocational training. Key declarations have yet to be fully legislated into national law, and no formal framework facilitates refugee access to TVET institutions. Additionally, eligibility requirements, such as certificates from Kenyan schools or completion of Kenyan exams, exclude many refugees who were educated abroad. The high cost of TVET programs and language barriers further marginalize refugees, impeding their access to career development and skill-building opportunities essential for socio-economic integration.

Under Article 48 of the Kenyan Constitution, every person has the right to access justice, and the state is obligated to ensure this access is affordable and practical. The Legal Aid Fund and the National Legal Aid Service (NLAS) were established to support indigent persons, including refugees, in navigating the legal system and protecting their rights. Despite constitutional and policy guarantees,

²⁹² Lucas Tusiime, 'Djibouti Declaration on Refugee Education in IGAD' (*IGAD*, 11 May 2022) <<https://igad.int/increasing-the-accessibility-of-the-djibouti-declaration-on-refugee-education-in-igad-member-states/>> accessed 2 January 2025.

²⁹³ Sougal Omar, 'Kampala Declaration on Jobs, Livelihoods, and Self-Reliance' (*IGAD*, 16 December 2022) <<https://igad.int/kampala-declaration-on-jobs-livelihoods-and-self-reliance/>> accessed 2 January 2025.

refugees face significant challenges in accessing legal representation. Many are unaware of Kenyan law and their rights, particularly regarding labor protections, and lack the financial means to hire lawyers. The Legal Aid Fund and NLAS lack sufficient resources to meet the high demand for their services, leaving many refugees without access to essential legal assistance. This gap further limits their ability to resolve disputes, seek protection, or defend their rights within Kenya's legal framework.

Article 43(1) of the Constitution provides every person with the right to social security, which mandates state support for individuals unable to sustain themselves. The Kenya National Social Protection Policy (NSPP)²⁹⁴ establishes three pillars: social assistance, social security, and health insurance. Refugees are eligible to contribute to and benefit from the National Social Security Fund (NSSF)²⁹⁵ and the National Hospital Insurance Fund (NHIF)²⁹⁶ recently transitioned to the Social Health Authority (SHA)²⁹⁷ which offers contributory schemes for retirement and health benefits respectively. Additionally, informal sector workers may participate in the Haba Haba Scheme,²⁹⁸ which provides coverage for non-salaried individuals. Despite these provisions, awareness and utilization of social protection benefits among refugees are minimal. Interviews reveal that most refugees associate social protection solely with humanitarian aid, lacking an understanding of governmental social protection mechanisms. Many also face practical obstacles, such as limited access to NHIF-SHA and NSSF registration centers and difficulty navigating contributory scheme requirements. This limited engagement with Kenya's social protection system underscores a gap between refugees' perceived and actual rights, compounded by insufficient governmental outreach to educate refugees on their entitlements.

Furthermore, research findings reveal insights into Kenya's approach to granting permanent residency and citizenship to refugees, as discussed during an interview with a key informant from the Department of Immigration. The informant, corroborated reports indicating that granting permanent residency to refugees is not prioritized as a matter of national interest.²⁹⁹ Instead, such applications are generally discouraged. He explained that the process for obtaining permanent residency is prolonged and involves rigorous screening by security agencies. Similarly, regarding citizenship, an informant who is also an immigration officer deployed to the Citizenship

²⁹⁴ 'The Kenya National Social Protection Policy' <<https://www.google.com/>> accessed 2 January 2025.

²⁹⁵ NSSF, 'The National Social Security Fund' <<https://www.nssf.or.ke/>> accessed 2 January 2025.

²⁹⁶ NHIF, 'The National Hospital Insurance Fund' <<https://www.nhif.or.ke/>> accessed 2 January 2025.

²⁹⁷ Ministry of Health, 'NHIF-SHA Transition Progress | Ministry of Health' <<https://www.health.go.ke/ps-muthoni-updates-nhif-sha-transition-progress>> accessed 2 January 2025.

²⁹⁸ 'The National Social Security Fund' (n 295).

²⁹⁹ Amy G Slaughter, 'Fostering Refugee Self-Reliance: A Case Study of an Agency's Approach in Nairobi' (2020) 33 Journal of Refugee Studies 107.

Section indicated that although the position of the law may be different, the practice is that a class M permit does not confer ‘*legal residency status*’ to the refugees. He suggested that the prevailing perception within government circles views refugee protection as a temporary measure rather than a pathway to long-term integration through residency or citizenship. This position aligns with the dominant narrative that durable solutions for refugees should be pursued outside Kenya’s borders. According to him, this perspective is unlikely to change in the foreseeable future, reflecting a firm stance on the temporal nature of refugee protection within the country. These findings underscore the limited avenues for refugees to transition from temporary status to more permanent forms of residency or integration in Kenya. They also highlight the broader policy orientation that prioritizes short-term refugee assistance over long-term integration, framing Kenya’s role as a host nation within a transient protection paradigm.

5.4 Digital Identity Schemes and Refugee Governance in Kenya

Kenya has emerged as a continental leader in digital innovation, leveraging mobile technology, internet-enabled services, and e-government platforms across multiple sectors. Building on this reputation, the Government of Kenya embarked on an ambitious digital identity transformation agenda through the establishment of the *National Integrated Identity Management System (NIIMS)*. NIIMS was conceived as a unified identity infrastructure comprising a centralized database, a unique and permanent personal identification number, called *Huduma Namba*³⁰⁰ and an automated identity card referred to as the *Huduma Card*, intended to serve as a foundational identity system for persons residing within Kenya’s territorial jurisdiction.

From a governance perspective, digital identity systems such as NIIMS are often justified as mechanisms to enhance administrative efficiency, reduce duplication, and improve access to public services. In principle, such systems could support refugee governance by facilitating documentation, access to services, and coordination across government agencies. However, in practice, the rollout of NIIMS revealed deep-seated policy, legal, and institutional incoherence, particularly as it relates to non-citizens and populations whose legal status is already precarious.

While the need for a harmonized digital identity framework has been widely acknowledged, the manner in which NIIMS was conceptualized and implemented generated significant legal and societal contestation. Central among the concerns raised by civil society

³⁰⁰ ‘Huduma Namba’ is a *Swahili* phrase for service number

organizations, refugee rights groups, and data protection advocates was the absence of a comprehensive and coherent legal and regulatory framework to govern the collection, processing, storage, and use of personal data. This absence was particularly consequential for refugees and asylum seekers, whose legal identity is mediated through specialized protection regimes rather than ordinary citizenship-based registration systems.

The legal vacuum surrounding NIIMS became a focal point of judicial scrutiny. In *Nubian Rights Forum & Others v Attorney General & Others*,³⁰¹ the Court emphasized the centrality of a clear legislative framework as a prerequisite for the lawful implementation of a national digital identity system. The Court restrained the executive from proceeding with the digitization programme in the absence of an appropriate regulatory framework, emphasizing the need for safeguards against exclusion, discrimination, and arbitrary state action. However, while the decision affirmed the necessity of legal anchorage, it stopped short of articulating the substantive content, scope, and safeguards that such a framework should entail.

The relevance of digital identity to refugee governance must also be understood against the backdrop of international normative commitments. Target 16.9 of the Sustainable Development Goals obliges States to “provide legal identity for all, including birth registration” by 2030.³⁰² Legal identity is inextricably linked to the human right to recognition as a person before the law, which in turn determines the scope and enjoyment of rights and entitlements. For refugees and asylum seekers, legal identity is not merely administrative; it is foundational to protection, access to services, freedom of movement, and durable solutions.

Kenya’s statutory refugee framework implicitly acknowledges this reality. As already discussed, the Refugees Act No. 10 of 2021 guarantees refugees and asylum seekers the right to identification and civil registration documents sufficient to enable access to rights and services under the Act and any other applicable law. This entitlement, set out under section 28(6), must be understood in light of the contemporary governance environment in which identity verification, service delivery, and population management are increasingly conducted through digital platforms. Documentation that is not digitally verifiable or interoperable with national systems risks exclusion from essential services, notwithstanding its formal legal validity.

³⁰¹ *Petition 56, 58 & 59 of 2019 (Consolidated)* - Kenya Law (High Court of Kenya).

³⁰² Sdg Fund, ‘Sustainable Development Goals’ [2015] Available at this link: <https://www.un.org/sustainabledevelopment/inequality> <<https://documents1.worldbank.org/curated/en/106391567056944729/pdf/World-Bank-Group-Partnership-Fund-for-the-Sustainable-Development-Goals-Annual-Report-2019.pdf>> accessed 24 January 2026.

The Act further reinforces the functional importance of refugee identity documentation by providing, under section 28(7), that the Refugee Identity Card shall, at a minimum, have a status equivalent to the Foreign National Registration Certificate issued under Kenya's immigration regime. This equivalence presupposes not only legal recognition but also administrative usability within State systems that are progressively digitized. As government institutions migrate towards digital databases and automated verification processes, refugee documentation must be capable of operating within these environments if it is to retain its intended protective and facilitative role.

Moreover, section 39 of the Act mandates the Department of Refugee Services to establish and maintain a register of refugees and asylum seekers. While the statute does not explicitly prescribe the technological form of this register, the scale, mobility, and administrative complexity of refugee populations render digital registration indispensable for accuracy, continuity, and coordination. Digital registers enable real-time updates, reduce duplication, support identity verification across agencies, and enhance accountability in refugee administration. In this sense, digital registration is not antithetical to refugee protection; rather, it is increasingly central to its effective realization.

However, the necessity of digital registration also amplifies governance risks. Where digital identity systems are introduced without clear legal safeguards, defined institutional responsibilities, and alignment with refugee-specific legal frameworks, they may generate exclusion, data misuse, or inadvertent loss of legal status. The development of NIIMS as a centralized national digital identity system without explicit articulation of how refugee registration data interfaces with refugee protection mandates exposes a critical gap between the statutory recognition of refugee identity and its operationalization within digital governance reforms.

This tension illustrates a broader challenge in Kenya's asylum governance, that is, while the law affirms the right of refugees and asylum seekers to legally recognized identity documentation, the translation of that right into digitally mediated administrative practice remains insufficiently theorized and regulated. Without deliberate integration of refugee registration into national digital identity architecture that is grounded in protection principles and statutory safeguards, digital registration risks becoming a site where policy ambition outpaces rights-based implementation.

5.5 From Lofty Goals to Ground Realities

During my field engagement, I got important insights into the lived experiences of refugees not just from the key informants but also from members of the refugee community. Additionally, my participation in expert lectures and grassroots discussions provided a deeper understanding of the challenges faced by refugees and asylum seekers. One particularly notable engagement was a lecture delivered by the UN High Commissioner for Refugees, Filippo Grandi at the University of Nairobi during his official visit to Kenya, on June 24, 2024. The lecture on the topic: *“Tackling Forced Displacement as a Development Challenge”*³⁰³ showcases the important progress Kenya is making in this regard, discusses some of the learnings and challenges. This lecture gave an overview of the international view of refugee protection-the systemic issues that still persist both nationally and globally. The High Commissioner’s address highlighted the complexities of refugee management, lauding Kenya for its innovative approaches to dealing with protracted refugee situations. Kenya’s frameworks were celebrated as a regional model, emphasizing integration and resilience amidst significant challenges. However, the High Commissioner also criticized countries in the Global North for their insufficient contributions to international protection and humanitarian efforts.

This lecture, however, was at some point disrupted by protestors chants carrying placards with strong messages such as, *“Caroline Must Go,” “We Don’t Want Integration,” “We Don’t Want Shirika,”* and *“We Want Documents.”* This moment underscored the discontent within the refugee community regarding the implementation of policies and their perceived disconnect from the realities on the ground. I gained further insights during a planning meeting organized by an association of refugees and asylum seekers, known as the *“Refugee United,”* which aimed to mobilize refugees for a peaceful protest at the UNHCR offices. This meeting provided a platform where refugees voiced their grievances, highlighting systemic issues affecting their dignity, safety, and well-being. These grievances were encapsulated in a detailed petition addressed to the Government of Kenya, the UNHCR, and other relevant stakeholders.³⁰⁴

³⁰³ Filippo Grandi, UN High Commissioner for Refugees, *Tackling Forced Displacement as a Development Challenge* (Lecture, University of Nairobi, Kenya, 24 June 2024).

³⁰⁴ Refugee United, *Petition Addressed to the Government of Kenya, UNHCR, and other Stakeholders* dated 4th September 2024. Key concerns include inadequate access to basic services, legal and documentation barriers, discrimination and xenophobia, lack of economic opportunities, forced encampment and relocation, and inadequate protection and security. The refugees demand improved access to services, streamlined documentation processes, protection against discrimination, economic inclusion, freedom of residence, and enhanced security measures. They call on the government, UNHCR, and relevant stakeholders to address these issues and work towards sustainable solutions, emphasizing their commitment to peaceful protests until their demands are met.

The petition articulated several pressing concerns, beginning with the inadequate access to basic services such as healthcare, education, and legal aid, particularly for urban refugees. Refugees in cities like Nairobi face significant barriers to accessing these services, often living in deplorable conditions with little to no support systems. A second major issue was the challenge of obtaining and renewing essential documentation, including refugee identity cards, work permits, and travel documents. The lack of proper documentation restricts their freedom of movement, limits employment opportunities, and hinders their integration into society. The petition also highlighted widespread discrimination and xenophobia faced by refugees, both at the community level and in their interactions with authorities. These biases exacerbate their vulnerabilities, leading to social exclusion and, in some instances, violence. Economic exclusion emerged as another critical concern. Refugees expressed frustration with policies that prevent them from participating in formal employment and entrepreneurial activities. This has led to widespread unemployment and poverty, forcing many refugees into precarious livelihoods.

Additionally, the government's push to relocate urban refugees to camps has been met with strong resistance.³⁰⁵ Many urban refugees have established livelihoods in cities and fear that forced encampment would strip them of the limited opportunities and freedoms they currently enjoy.³⁰⁶ The petition also underscored the inadequacy of protection mechanisms, particularly for vulnerable groups such as women and children. Refugees reported increased instances of sexual and gender-based violence, harassment, and abuse, with insufficient security measures to address these challenges. The petition included a series of demands aimed at addressing these systemic issues. Refugees called for improved access to healthcare, education, and legal services, irrespective of their location in Kenya. They advocated for a transparent and efficient process for issuing and renewing documentation to ensure legal recognition and the ability to work and travel freely. The petition also demanded that the government implement strict measures to combat xenophobia and discrimination, ensuring that refugees are treated with dignity and respect. Economic inclusion was emphasized, with refugees urging for the right to work and access to financial and entrepreneurial opportunities. Another significant demand was the right to choose their place of residence without coercion, rejecting forced encampment policies. Finally, the petition called for enhanced protection and security measures, particularly for vulnerable groups within the refugee community.

³⁰⁵ Hanno Brankamp and Zoltán Glück, 'Camps and Counterterrorism: Security and the Remaking of Refuge in Kenya' (2022) 40 *Environment and Planning D: Society and Space* 528.

³⁰⁶ Danielle Huot, 'Migration and Integration in Nairobi, Kenya: Refugee Rights, Social Capital, and Livelihoods in an Urban Environment' (Master's Thesis, University of Waterloo 2014) <<https://uwspace.uwaterloo.ca/handle/10012/8923>> accessed 2 January 2025.

The image below visualizes this policy drift in practice.



Figure 3: Pictorial reflection of the fading continuum of policy goals at implementation

The image, akin to the fishbone illustration under the conceptual analysis, offers a vivid representation of the “fading continuum” within Kenya’s asylum system as it unfolds in practice. It visually captures the stark contrast between the legal framework and its actual implementation. On the left, the image represents the laws enshrined in the statute books, symbolizing the foundational intent to address refugee-related challenges. Conversely, the banner held by protesting refugees conveys their lived reality, underscoring the disparity between the legal provisions and their experience on the ground. The banner poignantly reads, “*Refugees = The Old and New Slave Caste of Kenya.*” Liking the refugee situation to Caste-based slavery that is often linked to forced and bonded labour highlights the systemic issues faced by refugees in Kenya.

As policies transition toward implementation, systemic and structural barriers emerge, weakening their impact. This transition, represented by the dashed line labeled “fading continuum,” illustrates how well-intended policy frameworks often lose momentum due to a combination of political, economic, social, and legal factors. The political dimension of the continuum highlights key obstacles that undermine the effective implementation of asylum policies. A primary concern is the security focus that dominates refugee management,

where national security concerns take precedence over humanitarian obligations. This prioritization often results in restrictive measures, such as the encampment of refugees, which limits their mobility and access to rights like work and education. Moreover, the lack of political will underscores government's reluctance to commit fully to implementing refugee-friendly policies, often influenced by political dynamics and fluctuating priorities. Together, these factors reveal a governance framework that is more reactive than proactive, focusing on containment rather than integration.

Economic constraints further exacerbate the challenges in translating policy into practice. The high costs associated with supporting refugees place a significant strain on national resources, particularly in a developing country like Kenya.³⁰⁷ Additionally, the dependency on external funding from international donors makes the system vulnerable to shifts in global priorities. When donor funding fluctuates or diminishes, the sustainability of refugee programs is jeopardized, leaving policies unimplemented or poorly executed. This economic reliance hampers Kenya's ability to independently fulfill its international and domestic obligations toward refugees. Social dynamics play an equally critical role in hindering policy implementation. Cultural barriers and local prejudices contribute to an environment of exclusion, where refugees are viewed as outsiders who do not belong to the local social fabric. This is further compounded by xenophobic tendencies, which manifest as hostility toward refugees and asylum seekers. These societal attitudes create resistance to programs aimed at integrating refugees into local communities, making it difficult to achieve the inclusivity envisioned in policies. Such social factors highlight the need for broader societal awareness and education to combat prejudice and foster acceptance.

Legal challenges form another significant layer of the continuum. The absence of a comprehensive refugee policy³⁰⁸ creates a fragmented legal framework, where piecemeal legislation fails to address the complexities of refugee management. As elaborated, existing laws often contain ambiguous legal provisions that lead to inconsistent application, leaving gaps in the protection of refugees' rights. Furthermore, weak legal enforcement compounds the problem, as even the existing legal safeguards are not uniformly upheld. This legal ambiguity undermines efforts to operationalize Kenya's commitments under international conventions and regional frameworks. The dashed line in the image, labeled "fading continuum," vividly portrays the dilution of policy intent as it moves toward implementation. By the time policies reach the implementation stage, represented by the smaller triangle on the right, they are significantly constrained by the cumulative effects of political, economic, social, and legal barriers. The smaller size of the triangle

³⁰⁷ Asfaw Kumssa and others, 'Conflict and Migration: The Case of Somali Refugees in Northeastern Kenya' (2014) 1 Global Social Welfare 145.

³⁰⁸ 'Kenya National Commission on Human Rights > Publications > Thematic Reports > Group Rights > Rights of Migrants' (n 141).

signifies the diminished scope of implementation compared to the original policy aspirations. The grey broken arrow within the implementation triangle symbolizes isolated successes or areas where efforts are concentrated, but these are overshadowed by the systemic issues that limit broader effectiveness.

5.6 Conclusion

The findings of this study reveal a significant disconnect between the ambitious policy frameworks governing Kenya's asylum system and the realities of their practical implementation. While Kenya has established progressive legal instruments aligned with international and regional standards, their application on the ground faces numerous challenges. Institutional capacity, resource constraints, and bureaucratic inefficiencies emerge as recurrent themes. Key stakeholders highlighted the disparity between policy intentions and their operationalization. For instance, while Kenya's Refugee Act and international obligations advocate for the right to seek asylum, in practice, asylum seekers face delays in processing, inadequate reception facilities, and insufficient resources for humanitarian assistance. Registration and Refugee Status Determination (RSD) processes, though structured, are hindered by understaffing and a lack of technological infrastructure, leading to prolonged wait times and backlogs.

Frontline workers expressed frustration with limited training and logistical support, which undermines the implementation of durable solutions such as local integration or resettlement. Furthermore, political and economic factors, such as fluctuating government priorities and dependency on donor funding, exacerbate these challenges, leaving many refugees in a state of limbo. The findings also reveal that systemic issues, including corruption and mismanagement, further impede the realization of policy goals. For example, interview respondents noted instances of discriminatory practices and a lack of accountability in service delivery. This misalignment between lofty policy goals and ground realities highlights the need for a more robust implementation framework that addresses structural inefficiencies, enhances accountability, and aligns resources with stated objectives. Ultimately, while Kenya's asylum system aspires to uphold international norms, the findings underscore the critical need to translate policy rhetoric into tangible action to improve the lived experiences of asylum seekers and refugees.

CHAPTER 6: DISCUSSION

6.0 Introduction

This chapter provides an analytical discussion of the study's findings. In this part, I attempt to link these findings to existing literature and explore their broader implications. The primary focus is on how the observed continuum ebbing at implementation reflects deeper structural and systemic issues within Kenya's asylum system. Specifically, the chapter examines how aspects of political, economic, legal, and social determinants influence the common components of the asylum process, including reception, registration, refugee status determination (RSD), and the pursuit of durable solutions.

The foregoing political, economic, legal, and social factors referenced as impacting the asylum system in Kenya do not operate in isolation but are deeply interconnected. The political decisions around security influence economic policies, which, in turn, affect legal enforcement. For instance, the government's focus on security concerns often leads to the enforcement of policies like the encampment requirement, which restricts refugees' mobility. This policy then exacerbates social divisions, creating barriers to integration and fostering tensions between refugees and host communities. Moreover, the economic strain on local resources, compounded by political and social factors, creates a feedback loop that hinders the effective implementation of refugee protection laws. Limited economic resources contribute to inadequate infrastructure, which further limits refugees' access to services and opportunities for integration.

These barriers eventually create a cycle of dependency that undermines the long-term objectives of the asylum system. In the subsequent part of this chapter, therefore, I provide an in-depth discussion on the elements of political, economic, legal, and social determinants that affect the policy and practice continuum in Kenya's asylum system. Specifically, I consider to an extended length how the elements of national security, multilevel governance structure, encampment policy, and certain efforts towards durable solutions affect the main strands of refugee protection. In unpacking these factors and their interconnected dynamics, I demonstrate how they create barriers to the effective implementation of policy intentions.

6.1 National Security Discourse in Refugee Protection

Refugee populations and national security are two of the most important issues that countries around the world are grappling with. National security and refugee protection, conceptually, convey the desire for human safety and well-being, but from distinct perspectives and with different emphases.³⁰⁹ Refugee policies can have both positive and negative impacts on national security. For

³⁰⁹ Donald Kerwin, 'How Robust Refugee Protection Policies Can Strengthen Human and National Security' (2016) 4 Journal on Migration and Human Security 83.

instance, policies that prioritize refugee protection and assistance can reduce the vulnerability of refugees and minimize the risk of radicalization and exploitation. Additionally, effective integration programs can promote social cohesion and reduce tensions between refugees and locals. Conversely, policies that are overly restrictive or discriminatory can exacerbate the vulnerability of refugees, create social tensions, and potentially contribute to political instability.³¹⁰ Moreover, inadequate screening or monitoring of refugee populations can put the host country's national security at risk.

Therefore, while the primary focus of refugee policies is to provide protection and assistance to refugees, national security is crucial for the safety and stability of the host country. However, the question of how these two issues intersect and potentially impact each other remains a contentious issue. Often host States use 'national security' to justify virtually all of their refugee protection measures. Yet many of these measures fail to advance the fight against security threats and undermine refugee protection as well.³¹¹ The key question in the refugee context should be how the host state's asylum system can be informed to prevent security threats, without diminishing refugee rights. It is worth noting that the relationship between refugee populations and national security varies across countries and regions. For instance, countries that have experienced terrorist attacks in recent years, such as France and the United States, have become more stringent in their refugee policies, often prioritizing national security concerns over refugee protection. In contrast, countries that have traditionally been more open to refugees, such as Sweden and Norway, have emphasized the importance of humanitarian principles and integration programs in their policies. The chapter explores these different approaches and provides insights into the challenges and opportunities that refugee populations present for national security.

Foremost, the expression 'National security' though is a familiar phraseology, lacks a universally agreed upon definition. Many entities and state authorities have the tendency to set out definition of "National security" often so broad as to cover every aspect of human endurance. The expansiveness of these definitions oscillates around aspects of military, political, economic, societal, and environmental issues. Arnold wolfer, in his classic essays expressed concern about inherent ambiguity in the concept "National security" when he stated,

³¹⁰ REFUGEES DEEPLY, 'Fire Reduces Rohingya Camp to Ashes, Exposing India's Refugee Policies' [2018] Constraints.

³¹¹ 'Use and Misuse of "National Security" Rationale in Crafting U.S. Refugee and Immigration Policies | International Journal of Refugee Law | Oxford Academic' <<https://academic.oup.com/ijrl/article/17/4/749/1551271>> accessed 23 April 2023.

*“it would be an exaggeration to claim that the symbol of national security is nothing but a stimulus to semantic confusion, though closer analysis will show that if used without specifications it leaves room for more confusion than sound political counsel or scientific usage can afford.”*³¹²

While there is no conventionally agreed upon definition on the international arena within treaties or conventions, a group of experts in international law, national security and human rights framed what ‘legitimate National security’ entails in the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*. Under Principle 2 they describe Legitimate National Security as:

*“(a) A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government. (b) In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest.”*³¹³

This lack of universality in definition is potent in many scholarly renditions and therefore, it is prudent to describe the context of its usage rather than provide a constrict definition of the term ‘National Security.’ As such the context setting that this study adopts arises from the consideration of the dominant elements that constitutes threats to a state’s power and disruption of its wellbeing. This is undertaken with a specific focus on the threat in the nature of armed attacks allegedly being undertaken by terrorist affiliates disguised as persons seeking asylum on the Kenyan soil.

The Constitution of Kenya 2010 defines National Security as the protection against internal and external threats to Kenya’s territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity, and other national interests.³¹⁴ It further provides under article 238(2)(b), that national security shall be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights, and fundamental freedoms. Article 238(2)(b) sets out conditions for

³¹² WOLFERS Arnold, “‘National Security’ as an Ambiguous Symbol’ (1952) 67 Political Science Quarterly 481 <<https://www.jstor.org/stable/2145138>> accessed 8 December 2021.

³¹³ CAMMACK et al. - 1998 - Election Reporting Apractical Guide to Media Moni.Pdf’<<https://www.article19.org/wp-content/uploads/2018/02/joburg-principles.pdf>> accessed 13 December 2021.

³¹⁴ ‘The Constitution of Kenya’ article 238(1) & (2) (27 August 2010) <<http://kenyalaw.org/kl/index.php?id=398>> accessed 21 October 2021.

legitimate National Security measures. Although the Constitution emphasizes that national security shall be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights, and fundamental freedoms, there are challenges in effectively implementing this delicate balance. That is, the presence of a large refugee population can sometimes create problems for the host country, particularly with regard to national security. The most common concerns include terrorism, human trafficking, organized crime, the spread of infectious diseases, and political instability. This has been the case in Kenya, where the government has cited the presence of refugees as a security threat. These concerns arise due to the fact that refugee populations are often vulnerable and marginalized, making them susceptible to exploitation and radicalization. Additionally, the inflow of refugees can affect the socioeconomic fabric of the host country, potentially creating tensions and conflicts with locals, and resulting in social and political instability.

As a consequence, refugees have been subjected to restrictions and surveillance measures by state authorities under the guise of national security concerns in many jurisdictions. These measures often lead to their criminalization, detention, and deportation. In addition, refugees may suffer discrimination and exclusion, which limit their access to essential services, employment opportunities, and social welfare provisions.³¹⁵ Another challenge is the lack of clear accountability mechanisms to ensure that the state's national security measures are proportional and necessary. The government may justify its actions under the guise of national security, but fail to provide evidence to support those actions. This lack of transparency can create an environment in which state authorities can act with impunity, potentially leading to human rights abuses. In the Kenyan context, measures ostensibly framed under the guise of addressing security concerns range from policies such as the encampment of refugees and periodic calls for the complete closure of those camps.

6.1.1 Refugee Encampment as National Security Measure

Refugee encampment policy, also known as containment policy, is a system that confines refugees to designated camps rather than allowing them to integrate into the host country's population. Often, these are policies that are deliberately framed to exert control over refugees in the context of real and perceived security concerns. The security threat is seen from different dimensions. That is, they

³¹⁵ Roger Zetter and Héloïse Ruaudel, 'Labor Markets – An Assessment'.

are considered a threat to the host state³¹⁶ (Crisp 2009), a threat to their country of origin,³¹⁷ and under threat unto themselves. Consequently, they are often subjected to containment and restrictions, purportedly to ensure the safety of both the broader community and their own well-being. Many countries around the world, including Kenya, have adopted this method to deal with the influx of refugees.

For Kenya, the crisis and political instability in Somalia, Sudan, Ethiopia, and Rwanda in the early 90's, changed the state of refugee management. Specifically, in contrast to its pre-nineteen ninety-one policy of giving refugees unfettered movement and integration options, Kenya's approach to refugees changed dramatically with the arrival of the first Somali refugees in the early 1990s.³¹⁸ The influx of a huge population of refugees into the Kenyan territory resulted in the establishment of refugee camps in many parts of the country including Rift Valley, Central, North-eastern and Coast provinces. Later, many of these camps were closed, some refugees were repatriated, and others got resettlement in third countries. The remaining refugee populations in the country were relocated to two major camps, the Dadaab in Garissa County and Kakuma in Turkana. While the placement of refugee camps in sparsely populated areas near the borders of countries of origin suggests that the Kenyan government initially perceived the refugee influx as a temporary phenomenon, several decades later, these camps remain among the largest in the world. This protracted situation has underscored a critical divergence between policy intent and practice. As such, in the years that followed, Kenya pursued an unwritten executive policy centered on containment of the refugee population in camps.

The encampment policy deviates from the principles of refugee integration enshrined in national, international and regional frameworks, such as the 1951 Refugee Convention and the African Union Convention Governing Specific Aspects of Refugee Problems in Africa, which Kenya is party to. Despite Kenya's commitments under these frameworks, the containment approach highlights a tension between formal policy obligations and practical implementation. The use of refugee encampment policy in Kenya has been a subject of criticism from various quarters, including human rights groups and international organizations. The containment policy deprives refugees of their basic human rights, including freedom of movement and the right to seek asylum. Moreover, encampment policies

³¹⁶ Jeff Crisp, 'Refugees, Persons of Concern, and People on the Move' (2009) 26 *Refuge: Canada's Journal on Refugees* 73.

³¹⁷ Marc Sommers, 'Young, Male and Pentecostal: Urban Refugees in Dar Es Salaam, Tanzania' (2001) 14 *Journal of Refugee Studies* 347.

³¹⁸ Milner (n 203).

have resulted in overcrowding, with poor living conditions in the camps. According to Amnesty International,³¹⁹ refugees in Kenya face inadequate access to basic services like healthcare and education, and live in an environment that is insecure and unstable.

On the other, the Kenya government has defended encampment on grounds of national security, resource constraints, and the perception of refugees as competitors for limited opportunities in host communities. Yet, the prolonged encampment has not only hindered refugees' ability to achieve self-reliance but also exacerbated human rights challenges, including restricted movement, limited access to essential services, and dependency on humanitarian aid. Furthermore, the containment strategy reflects a broader trend of securitization of refugee issues, where refugees are often viewed as a burden or threat rather than individuals entitled to protection and rights. The persistence of this approach, despite its documented shortcomings, underscores the gap between Kenya's formal commitments to refugee protection and the practical realities on the ground. Nonetheless, the situation of refugees in Kenya is not entirely hopeless. There have been efforts by local and international organizations to mitigate the impact of the containment policy. Therefore, in the camps, refugees and asylum seekers are highly dependent on national and international assistance provided by the government and humanitarian partners. For example, several organizations have facilitated education, vocational training, and entrepreneurship programs to empower refugees to support themselves and their families. Furthermore, some groups have advocated for the government to provide more opportunities for refugees to integrate and contribute to the economy of the country.

Citing national security concerns over alleged infiltration of the Refugee Camps by militants from the Somalia-based terrorist group Al-Shabaab, the Kenya government initiated a move to close refugee Camps in the country. The government argued that the camps were a breeding ground for terrorism and that their presence posed a threat to national security. Additionally, the government claimed that the camps were straining the country's resources and that their closure would free up resources for Kenyan citizens. In May 2016, the Government issued a directive disbanding the Department of Refugee Affairs in its attempt to effect Camps closure measures; the directive read in part;

*"Owing to national security, hosting of refugees has come to an end and that the Department of Refugee Affairs (DRA) has been disbanded, and that the Government is working on the mechanism for closure of the two refugee camps (Kakuma and Dadaab) within the shortest time possible."*³²⁰

³¹⁹ Natasha Tracy, 'Neoliberalism and Refugees' [2021] Education.

³²⁰ Press Statement by Principal Secretary for Interior & Coordination of National Government on "Government Statement on Refugees and Closure of Camps" on 6th May 2016.

The move to close the camps has been met with widespread criticism from the international community, including human rights organizations, UN agencies, and the donor community. Critics argue that the closure of the camps violates international law and the fundamental rights of refugees, including the right to seek asylum and the right to nonrefoulement. They further contend that the closure of the camps could have severe humanitarian consequences for refugees and asylum seekers. The closure could lead to mass displacement, loss of livelihoods, and increased vulnerability to violence and exploitation. The refugees and asylum seekers would be forced to return to their countries of origin, where they may face persecution, violence, and discrimination.

Furthermore, flurry of petitions from stakeholders in the refugee protection sector resulted in judicial decisions barring the government's attempts to proceed with the Camps closure. One such decision was delivered by the High Court of Kenya where in the case of *National Human Rights Commission vs Attorney General of the Republic of Kenya*,³²¹ where the presiding judge, Justice John Mativo declared that the proposed closure of the camps was unconstitutional, noting that it would be a violation of Kenya's national, regional, and international refugee law obligations. Notwithstanding such decisions from the courts, the Government has continued to pursue with zeal its intention to undertake complete closure of the camps.

Camps closure undertaken on the pretext of national security safeguards may have serious implications on both the refugees and the host state. On the one hand, refugees may lose their temporary protection and be forced to return to their country of origin, where they face persecution, violence, and human rights violations. This may lead to the loss of lives and further displacement of refugees. In the absence of alternative arrangements, the refugees may be left to fend for themselves, which may result in a protracted refugee crisis. On the other hand, the host state may face several challenges when closing down refugee camps. Firstly, the closure of camps may result in refugees settling in urban areas illegally, which can create tension with the host community. This can lead to conflicts, forced evictions, and xenophobic attacks. Secondly, refugees may join armed groups or engage in criminal activities, which can pose a security threat to the host state. Thirdly, the closure of camps may have economic implications as the host state loses the revenue generated from the camps' operations.

Moreover, the closure of refugee camps may affect the host state's international reputation and diplomatic relations. The United Nations and other international organizations may criticize the host state for closing down refugee camps without providing alternative arrangements for the refugees. This may damage the host state's credibility as a responsible member of the international community,

³²¹ *Kenya National Commission on Human Rights & another v Attorney General & 3 others* (2017) Petition no. 227 of 2016 Kenya Law (High Court of Kenya).

and affect its relationship with other countries and organizations. Therefore, while national security safeguards are important, the closure of refugee camps should not be undertaken without due consideration of the refugees' human rights and welfare. Countries should ensure that the closure of the camps is done in a humane and orderly way and that refugees are provided with alternative arrangements for protection and basic needs. Additionally, countries should engage with the international community to find solutions to the root causes of forced displacement and conflicts, which will help reduce the need for refugee camps in the first place.

6.1.2 National Interests Versus Refugee Protection: Debunking the Tension

The tension between national interests and refugee protection is a complex issue that is influenced by various factors. The point of departure lies in an objective evaluation of the Government's position.³²² The questions that arise; are refugees a threat to national security of Kenya as the host state? or put differently; is there any nexus between refugee population in Kenya and the prevailing security situation in the country? Will the refugee camps closure enhance the national security of the host state? What are the likely implications of such a measure undertaken on the pretext of national security safeguards on both the refugees and the host state? Response to these questions requires contextual analysis of the concept of the national security and refugee protection within Kenyan setting.

Despite its robust legal and institutional frameworks, state practice in Kenya appears to be on a different trajectory. While the country's legal plane provides requisite rights for refugees as has been repeatedly affirmed by various judicial decisions, the state has on many occasions issued pejorative directives under the pretext of national security. For instance, as illustrated, the refugee population in Kenya is currently confined to two camps, effectively denying them freedom of movement as guaranteed in the existing legal regimes. The encampment of refugee is allegedly informed by national security threat posed by the refugee population in the country. The encampment measures as national security safeguards, when placed in the context article 238(2)(b), of the constitution of Kenya which requires national security to be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms, is not only a violation of refugee rights but also a contravention of a constitutional provision by the state.

³²² Nanima (n 146).

In *Kituo Cha Sheria & 8 others v Attorney General*³²³ the court stated encampment of refugees would lead to a violation of refugee rights. The Court based its reasoning on five grounds:

*“First, the policy is unreasonable and contrary to Article 47(1). Second, it violates the freedom of movement of refugees. Third, it exposes refugees to a level of vulnerability that is inconsistent with the States duty to take care of persons in vulnerable circumstances. Fourth, the right to dignity of refugees is violated. Fifth, the implementation of the Government directive threatens to violate the fundamental principle of non-refoulement.”*³²⁴

On various other occasions, the court have darted the move by the state through human rights approach in safeguarding refugee rights. In the case of *Kenya National Commission on Human Rights & another*³²⁵ stated that Refugees are a special category of persons who are, by virtue of their situation, considered vulnerable. The Court ruled that the government action was arbitrary and offends the constitutionally guaranteed rights, international law, international and regional instruments on the treatment of refugees. It went on to state that, in any event, the reasons offered by the Government have not been shown to fall within the exceptions to the principle of *non-refoulement* in order to safely state that they are backed by the law, hence falls within the exceptions to the said principle.

These cases present a chronological trajectory that enhances the protection of human rights. In the instant case, refugees in Kenya reside in camps that are managed by government agencies and UNCHR, therefore the refugee population in the camps can hardly be said to be of any threat to national security in the nature of armed attacks. Indeed, it’s difficult to conceive that, persons fleeing from a well-founded fear of persecution can use the opportunity of refugee status to embed themselves as a security threat to the state that offers them refuge. In fact, as a vulnerable population of society, refugees, for the most part, are much less likely to take a part in armed attacks than to be victims of such attacks - nowhere is insecurity more visible than in the lives of such a population.

One of the main factors contributing to this tension is the perception of refugees as a burden on national resources. This perception is often fueled by political and economic considerations and public opinion. Governments may view refugees as a threat to national security and prioritize their citizens' interests over those of refugees. Another factor contributing to the tension between national interests and refugee protection is the lack of capacity and resources to provide adequate support and assistance to refugees. Governments

³²³ *Kituo Cha Sheria & 8 others v Attorney General* [2013] eKLR 2 (*Kituo Cha Sheria*). (n 233).

³²⁴ *ibid.*

³²⁵ *Kenya National Commission on Human Rights & another v Attorney General & 3 others* (n 321).

may lack the capacity to provide basic services, such as healthcare, education, and shelter, to refugees, which can lead to resentment and tension between host communities and refugee populations. Additionally, the lack of resources may lead governments to prioritize the interests of their own citizens over those of refugees, as they may be seen as a drain on limited resources. Furthermore, the politicization of refugee issues and the securitization of migration have also contributed to the tension between national interests and refugee protection. Governments may view refugees as a security threat and may use this perception to justify restrictive policies, such as the closure of refugee camps. The securitization of migration also leads to the criminalization of refugees and asylum seekers, which further undermines their rights and protection. Lastly, the lack of political will and commitment to refugee protection is another factor contributing to the tension between national interests and refugee protection. Governments may lack the political will to provide protection and assistance to refugees due to domestic political considerations or pressure from external actors. This lack of political will can result in policies that prioritize national interests over refugee protection, as evidenced by the closure of refugee camps in Kenya.

6.1.3 Conflicting or Complementary goals?

In this part, the scope of the term National Security within the context of refugee protection is framed to avoid drifting into its wide and imprecise definition. The research confines itself to the definition and application of national security with reference to domestic laws of Kenya and its application with regard to refugee protection, and therefore determination of various in-depth analysis of the conceptions of security is outside the scope of this study.

The expression ‘National security,’ though, is a familiar phraseology that lacks a universally agreed upon definition. Many entities and state authorities have the tendency to set out definition of “National security” often so broad as to cover every aspect of human endurance. The expansiveness of these definitions oscillates around aspects of military, political, economic, societal, and environmental issues.

Arnold wolfer, in his classic essays expressed concern about inherent ambiguity in the concept “National security” when he stated, *“it would be an exaggeration to claim that the symbol of national security is nothing but a stimulus to semantic confusion, though*

closer analysis will show that if used without specifications it leaves room for more confusion than sound political counsel or scientific usage can afford."³²⁶

While there is no conventionally agreed upon definition on the international arena within treaties or conventions, a group of experts in international law, national security and human rights framed what 'legitimate National security' entails in the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*. Under Principle 2 they describe Legitimate National Security as:

*"(a) A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government. (b) In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest."*³²⁷

This lack of universality in definition is potent in many scholarly renditions and therefore, it is prudent to describe the context of its usage rather than provide a constrict definition of the term 'National Security.' As such the context setting that this paper adopts arises from the consideration of the dominant elements that constitutes threats to a state's power and disruption of its wellbeing. This is undertaken with a specific focus on the threat in the nature of armed attacks allegedly being undertaken by terrorist affiliates disguised as persons seeking asylum on the Kenyan soil.

The Constitution of Kenya 2010³²⁸ defines National Security as the protection against internal and external threats to Kenya's territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity, and other national interests. It further provides under article 238(2)(b), that national security shall be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms. Article 238(2)(b) sets out conditions for legitimate National Security measures. This research is receptive to the scope of elaboration provided by the Constitution of Kenya and

³²⁶ WOLFERS Arnold, "'National Security' as an Ambiguous Symbol" (1952) 67 Political Science Quarterly 481 <<https://www.jstor.org/stable/2145138>> accessed 8 December 2021.

³²⁷ CAMMACK et al. - 1998 - Election Reporting Apractical Guide to Media Moni.Pdf' <<https://www.article19.org/wp-content/uploads/2018/02/joburg-principles.pdf>> accessed 13 December 2021.

³²⁸ 'The Constitution of Kenya' article 238(1) & (2) (27 August 2010) <<http://kenyalaw.org/kl/index.php?id=398>> accessed 21 October 2021.

Principle 2 of the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, in appraising the host state's action as regards its national security measures and refugee protection.

Having assessed the concept of National Security and basis for refugee protection, the questions that come into focus are; whether refugees are a threat to national security of the host state generally or is it a single-story cliché that is laced with distortion? Do asylum seekers have the capacity to undertake unlawful violence reminiscent of terrorist attacks? Is there any nexus between national security of the host state and asylum seekers within its borders in the first instance? Responses to these questions require elaborate debunking of the refugee phenomena and existing protection frameworks towards their reception and management by the host state. This research takes the view that, in the realm of 'national interest', refugee protection and host state's security are not mutually exclusive issues; that is to say, refugee protection is a constituent part of the host state's national interest, whether this is acknowledged in its governance structure or otherwise.

Complemented by other bodies of law, notably international human rights law, international humanitarian law, and international criminal law, the 1951 Convention and its 1967 Protocol, today stand as global legal instruments explicitly covering the most important aspects of refugee protection. These instruments set out the standard international definition of a “*refugee*”, the rights and responsibilities of refugees and the obligations of State Parties. The significance of the 1967 Protocol is that it expands the applicability of the 1951 Convention by removing the geographical and time limits that were part of the 1951 Convention.

The 1951 convention as supplemented by the 1967 Protocol, defines refugee as including any person who is outside their country or origin and unable or unwilling to return there or to avail themselves of its protection, owing to well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group, or political opinion. It is illustrative to note from this definition that a person attains declaratory refugee status within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition and starts to attract some bundles of rights and are bound by the duties contained in the Convention.

In addition to the 1951 Convention, there is also a substantial body of international human rights law that complements the rights of refugees in the 1951 Convention. Besides, in order to respond to regional specificities, States in different parts of the world have developed regional laws and standards that complement the international refugee protection regime.³²⁹ States participate in regional

³²⁹ United Nations High Commissioner for Refugees, 'Refugee Protection: A Guide to International Refugee Law (Handbook for Parliamentarians)' (UNHCR) <<https://www.unhcr.org/publications/legal/>> accessed 7 November 2021.

arrangements because they can be an effective means of providing protection in a manner beyond the reach of a single State and responsive to the particular circumstances presented, within a basic framework of protection principles.³³⁰ Some of these regional instruments include; 1969 OAU Convention governing the Specific Aspects of Refugee Problems in Africa, the 1984 Cartagena Declaration on Refugees, the Arab Convention on Regulating Status of Refugees and common European asylum system among others.

At the domestic level, the 1951 Convention and its 1967 Protocol do not prescribe the way States should implement their obligations under these instruments. States Parties are at liberty in determining procedures and institutions suitable to their circumstances through national asylum legislation that incorporates the provisions of these treaties. Therefore, the exact form of such domestic frameworks varies among countries, depending on their legal traditions and existing provisions relating to refugees, and as such, States have taken different approaches in drafting their legislations and in the decisions of their judicial authorities.

With this hindsight, the subsequent part of this article analyses provisions of relevant legal instruments and concepts in refugee protection within the context of refugee rights and national security safeguards with a specific focus on the Kenyan case. The study does so by leveraging on the review of existing literature on the subject of refugees and asylum seekers and host states' conduct in fulfilment of its international obligations towards refugee protection generally. This is done through analysis of relevant domestic statutes, international and regional legal instruments, government reports, identified policies and correspondences. The study also utilizes the doctrinal legal approach method in the assessment of relevant domestic case laws and pertinent jurisprudence from other jurisdictions to draw illustrative lessons in refugee protection.

Refugee protection within National Security context is fraught with myths and misconceptions. Without much elaboration and justification, it is often contended that refugees are a threat to national security in instances where they attempt to use the territory of the receiving state to undertake military activities against their country of origin, putting the host state on collision course with the other state. Second, there is the hitherto erroneous view that refugees may persuade the host state to undertake direct actions against their country of origin. There are also instances where the host state may be kin on confronting the establishment of the refugees' country of origin and may use them as an excuse to execute its agenda. In addition to this traditional fear of threats, there has arisen a new dimension of threats that states appear to apply in justifying their national security measures. This has largely been triggered by terrorist events such as the 9/11 attacks and the 2015 Paris attack, which seem to enhance the view that refugees pose threat to national security, hence

³³⁰ 'Policy_Brief_2_Regional_refugee_protection_in_comparative_perspective.Pdf' (n 118).

an object of anxiety for governments and citizens alike. For these reasons, security concerns often seem to undermine similarly critical humanitarian and protection considerations. Such is visible in restricted border policies often justified in the name of security or are entrenched in domestic agenda distinct from the actual presence of refugees.

However restrictive or limiting it may appear in the perspective of some scholars, the term ‘refugee’ has been framed in international, regional, and national legislation with considerable elaborations. The 1951 Convention on the Status of Refugees as supplemented by its 1967 Protocol defines a refugee as any person owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group, or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.³³¹

The drafters of the 1951 Convention relating to the Status of Refugees were indeed aware of the national security dimension, in particular with ensuring that the refugee protection regime would not provide a cover for persons involved in serious criminality or otherwise posing a threat to the security of host countries. Consequently, certain provisions were included in the 1951 Convention to ensure that such persons could not benefit from refugee status. Under Article 1C, the 1951 Convention further sets out when refugee status comes to an end.³³² In addition, it is illustrative to note that the Convention definition expressly excludes from the benefits of refugee status anyone whom there are serious reasons to believe has committed a war crime, a serious non-political offence prior to

³³¹ 1967 Protocol relating to the Status of Refugees, Article I section 2, incorporating by reference with modifications article 1 A(2) of the 1951 Convention on the Status of Refugees. See Goodwin-Gill, *The Refugee in International Law*, pp. 409–412 for the text of the 1967 Protocol.

³³² United Nations High Commissioner for Refugees, ‘Convention and Protocol Relating to the Status of Refugees’ <<https://www.unhcr.org/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html>> accessed 7 December 2021. Article 1C. This Convention shall cease to apply to any person falling under the terms of section A if: (1) He has voluntarily re-availed himself of the protection of the country of his nationality; or (2) Having lost his nationality, he has voluntarily re-acquired it; or (3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or (4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or (5) He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality; Provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality; (6) Being a person who has no nationality he is, because of the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence; Provided that this paragraph shall not apply to a refugee falling under section A (1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.

admission, or acts contrary to the purposes and principles of the United Nations.³³³ Article 1F of the Convention provides for the exclusion of persons who are responsible for certain serious crimes or heinous acts, and who are, therefore, not deserving of international protection as refugees.

Besides, refugees are expected to prove themselves through relevant narrations regarding their “well-founded” fear of persecution, as well as their comportment, to be neither war criminals and perpetrators, nor impostors trying to access benefits meant for those considered more deserving through the process of Refugee Status determination. Without a doubt, even though they are generally subjects for humanitarian care, refugees also come under suspicion as unauthorized border crossers, and therefore the process of status determination comes in handy in separating the genuine refuge seekers from malevolent personalities with forbidden intentions.

The same framework also makes it clear that refugees and asylum-seekers are bound by the laws of the host state. This is to say, they are not exempted from prosecution for any crimes committed on the territory of the host state. Such status does not preclude appropriate measures where persons with refugee status is found to pose a security risk. This certainly includes express provisions in the 1951 Convention, which permit the expulsion of a refugee on grounds of national security or public order under specifically circumscribed circumstances.

Against the backdrop of this definition, it is evident that the 1951 Convention offers sufficient safeguards to ensure that serious criminal and terrorist do not benefit from international protection. Visibly, security consideration remains the vanguard of the 1951 convention as is the refugee protection, therefore, it cannot be said to pose an obstacle when it comes to addressing security concerns of the host state. Indeed, both security and refugee protection are best achieved through an integrated approach founded on the principle of complementarity since the Convention itself provides a system of checks and balances, taking full account of the security interests of States and host communities, while at the same time protecting the rights of refugees.

In a nutshell, starting with its very definition, refugees are a vulnerable lot in society, needing of protection by their very nature and cannot be said to be of security threat to the host state in the first instance. Besides, the system of refugee status determination is in itself laced with security safeguards that the host state can apply as a national security measure to ensure criminal elements do not take

³³³ *ibid.* 1F states that the provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

advantage of the process at the reception and registration stages. On the other hand, the ramifications of the camps closure without proper right-based measures in place will be dire for the refugee population in the country. The international protection of refugees begins with securing their admission to a safe country of asylum, the grant of asylum and ensuring respect for their fundamental human rights, including the right not to be forcibly returned to a country where their safety or survival are threatened. It ends only with the attainment of a durable solution. Therefore, camps closure can only suffice in instance where durable solutions have been fully realized. Besides, such an action will raise eyebrows as regards host state's standing in the community of nations because there is legitimate expectation that states fulfil in good faith their obligation under the international law.

As illustrated in the figure below, refugee camps closure delivers no positive result for the parties involved, that is, the refugee population and the host state's national security situation.

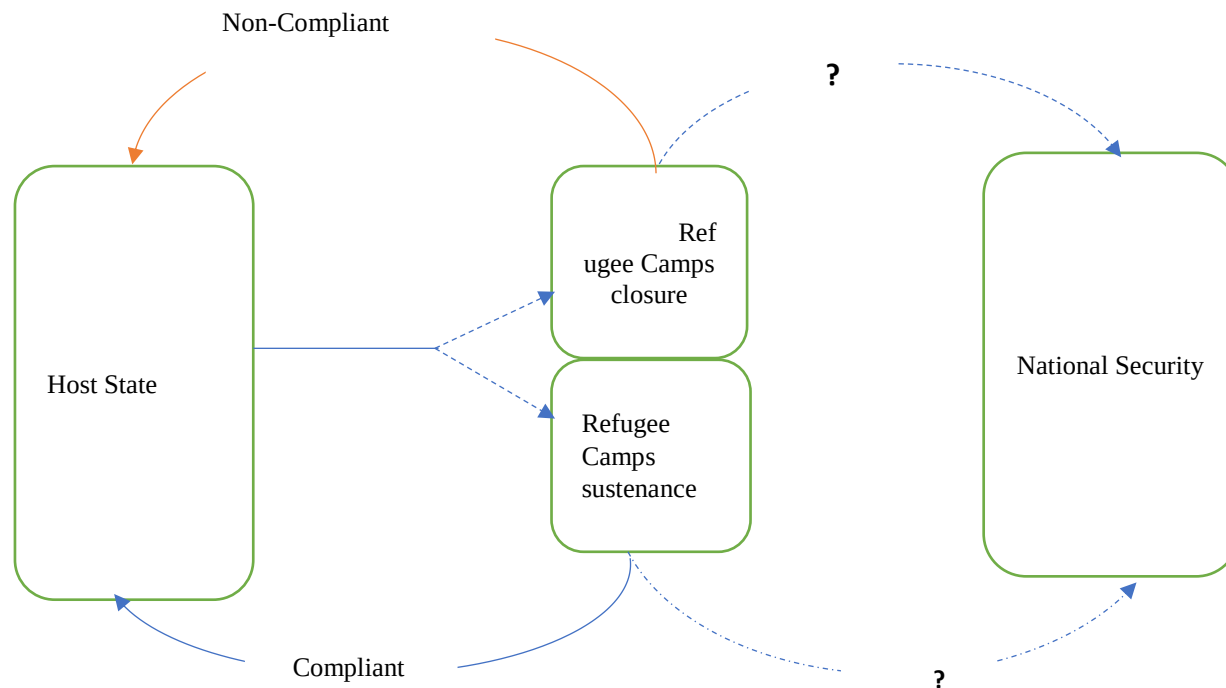


Figure 4: *Hypothetical illustration of Camps closure effects*

Figure 4 is an illustration of possible impact of the camps closure on both the state and the refugees. From the illustration, the closure of the camp produces a negative effect on both the host state and the refugees. This is likely to be the case because any closure of the camp without a right-based approach is likely to result in violation of refugee rights. Similarly, such a closure will also impact negatively on the host state for non-compliance with its international obligation without necessarily improving on its national security as intended.

6.2 Durable Pathways

Ordinarily, host states and other stakeholders in refugee protection prioritize the immediate humanitarian imperative of ensuring the physical safety and protection of refugees from harm. However, as refugee populations become more established, it becomes increasingly apparent that physical protection alone is insufficient to address their evolving issues, hence the need for durable solutions. The frameworks of international protection such as the 1951 Refugee Convention and the 1950 Statute of the Office of the United Nations High Commissioner for Refugees³³⁴ have a clear focus on achieving durable solutions. These instruments tasked UNHCR with facilitating the voluntary repatriation of refugees or their integration into new national communities, either through local integration in host countries or resettlement in third countries. This solutions-oriented approach is evident in the provisions of both the Statute and international refugee instruments, particularly those addressing cessation, integration, and naturalization. In essence, the overarching goal of international protection and UNHCR's mandate is the realization of durable solutions.³³⁵

However, the prioritization and implementation of these durable pathways for refugees continue to evolve. For instance, during the Cold War and decolonization periods, resettlement and local integration were the preferred durable solutions, while the end of communism and colonialism, alongside increased migration from poorer to wealthier countries, industrialized nations began to favour

³³⁴ UNHCR Statute, United Nations General Assembly (UNGA) Resolution 428 (V), 14 Dec. 1950.

³³⁵ 'Executive Committee for the Programme of the UNHCR (EXCOM), Conclusion on Local Integration, Conclusion No.104 (LVI), 7 Oct. 2005'; <<https://www.unhcr.org/refugees/104>> accessed 19 December 2024.

voluntary repatriation and the developing countries became less supportive of local integration. These dynamics prompted discussions on initiatives such as the Global Consultations, the Agenda for Protection, and UNHCR's 2003 Framework for Durable Solutions that introduced integrated strategies like Development Assistance for Refugees (DAR), Repatriation, Reintegration, Rehabilitation, and Reconstruction (4Rs), and Development through Local Integration (DLI). These were complemented by the 2004 Convention Plus initiative, which promoted multilateral agreements to address challenges like resettlement, development assistance, and secondary movements. Despite these efforts, no unified framework for comprehensive durable solutions exists in the international arena. On her part, Kenya has demonstrated commitment to embracing sustainable solutions to the protracted refugee situation in the country. However, as discussed in the subsequent part of this study, the efforts to obtain durable solutions for the refugee population in the country remain fragmented and fall short of addressing the systemic challenges that hinder effective implementation.

6.2.1 Kenya's Repatriation Efforts: Voluntary Return or Constructive Repulsion?

The fundamental prohibition of refoulement, as stipulated in Article 33(1) of the Convention, is formulated in a comprehensive manner and mandates that:

*“No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”*³³⁶

The *travaux preparatoires* indicate that the inclusion of a broad wording in the provision was intentional.³³⁷ During the discussions on the prohibition's terms in the draft Convention, State parties specifically considered whether it would encompass situations where a refugee found themselves in a country that, while not directly endangering their safety, was inclined to comply with requests for extradition to the country of origin. The International Law Commission, in its draft articles on expulsion, explicitly examined what it termed 'disguised expulsion', which refers to the use of disguised or indirect methods or techniques to achieve the

³³⁶ Affairs (n 4).

³³⁷ Sanmati Verma, 'Refoulement by Another Means—‘Constructive Refoulement’and Character-Based Decisions under the Migration Act 1958 (Cth)' (2022) 28 Australian Journal of Human Rights 347.

same outcome that would be attained through an expulsion decision, namely compelling an individual to leave the territory. The draft articles identify the following conditions of 'disguised expulsion'.

*“Such cases would seem to presuppose at least (1) that the circumstances in the country of residence are such that the alien cannot reasonably be regarded as having any real choice, and (2) that behind the events or acts leading to the departure there is an intention of having the alien ejected and these acts, moreover, are attributable to the State in accordance with principles of state responsibility.”*³³⁸

In 2012, the European Court of Human Rights examined the issue of constructive or disguised refoulement in the case of *M.S. v Belgium*.³³⁹ The case involved an Iraqi national who sought asylum in Belgium but had his asylum application rejected due to convictions for various offenses in 2003. Subsequently, he was detained for several years while preparations were made for his expulsion. Eventually, he was returned to Iraq. The applicant, through his representatives, argued that his return violated Article 3 of the European Convention, which prohibits torture and includes a non-refoulement obligation. The court determined that Article 3 had indeed been violated and expressed the following opinion:

*“[t]he applicant has been faced with the following choices: he could decide to stay in Belgium without any hope of obtaining, one day, the right to stay legally and without a real prospect of living freely; another option would be to return to Iraq, knowing of the risks of being arrested and subjected to ill treatment in prison ... The court is of the opinion that, in these circumstances, the conditions of ‘free consent’ were not met ...”*³⁴⁰

Similar conclusions were reached by the court in the case of *N.A. v Finland*³⁴¹, which involved the daughter of an Iraqi man, Mr. A, who had applied for asylum in Finland. Mr. A's asylum request was denied based on the assessment of changed conditions in his home country. After the expiration of his appeal process in October 2017, Mr. A voluntarily opted to return to Iraq. Tragically, he was killed in Baghdad in December 2017. The court applied the rationale established in the *M.S. v Belgium* case. Both the cases of *M.S. v Belgium* and *N.A. v Finland* revolved around instances where actual return had occurred, allowing the court to establish the occurrence of refoulement. However, when adjudicating cases of constructive refoulement where an individual has not yet been repatriated, the

³³⁸ Gerald L Neuman, 'Human Rights and the International Law Commission's Draft Articles on the Expulsion of Aliens' (2017) 30 Harv. Hum. Rts. J. 3.

³³⁹ 'M.S. v Belgium (2012) App No 50012/08 (ECtHR, 31 January 2012)'.

³⁴⁰ *ibid.*

³⁴¹ *N.A v Finland (révision)* [2021] ECtHR 25244/18.

application of the standard of proof becomes a pertinent issue. Mathew³⁴² posits that the standard of proof in such cases should be based on a 'real chance' or its equivalent, questioning whether there exists a realistic possibility of a person being returned if certain policies are pursued. He highlights that non-refoulement obligations encompass both the outcome and the conduct, as demonstrated by the recognition that procedural unfairness in the asylum determination process can violate non-refoulement obligations.³⁴³ By extending these principles through analogy, it could be contended that a state would breach its non-refoulement obligations by pursuing policies that create a genuine likelihood of asylum seekers being returned to a place where they would face severe harm, even in the absence of actual repatriation taking place.

The protracted nature of Somali refugees in Kenya has seen stakeholders ponder on the most appropriate durable solution for the longest time. On 10th November 2013, the UNHCR, along with the governments of Kenya and Somalia, entered into a Tripartite Agreement primarily aimed at repatriating refugees of Somali origin. The Agreement serves as a legal framework that establishes a mechanism for the repatriation of Somali refugees who are residing in Kenya. It is noteworthy that this agreement was signed despite the fact that the UNHCR's essential preconditions for repatriation had not been met.³⁴⁴ In the Tripartite Agreement, the voluntary character of repatriation is emphasized. It is stated that the repatriation of Somali refugees in Kenya should align with international law pertaining to voluntary repatriation, and the decision to repatriate should be based on the refugees' freely expressed wish and their knowledge of the conditions in their country of origin.

The Joint Communiqué agreed by Kenya and Somalia also affirms the need for the return to be conducted in safety and dignity. The agreement stresses the importance of sustainable repatriation and highlights the role of development, security, and humanitarian assistance in facilitating the reintegration of returnees. However, despite the emphasis on the voluntary nature of returns in the Tripartite Agreement, ensuring the practical implementation of this principle remains a mirage. The decision of refugees to return appears to be influenced by various push factors, leading to involuntary departures that undermine the protection of refugees. First, the readiness of Somalia for large-scale returns has remained uncertain. Considering that the Federal Government of the Republic of Somalia was only established in 2012, doubts arise regarding future political stability and the government's capacity to provide protection, particularly

³⁴² Satvinder Singh Juss, *Research Handbook on International Refugee Law* (Edward Elgar Publishing 2019).

³⁴³ *ibid.*

³⁴⁴ Stanley and Nakache (n 250).

against Al-Shabaab.³⁴⁵ As such, the conditions in the country of origin does not show an overall and significant improvement, so as to enable a return in safety and dignity for the majority of the refugees, which is a requirement for a voluntary return. Besides, the presence of multiple "push factors" in Kenya poses challenges to the voluntary return of Somali refugees.

The lack of safety in Kenya, with instances of discrimination and harassment against Somali refugees in urban centres, along with growing insecurity in the camps, contribute to the refugees' decision to return. The Kenyan government's counter-terrorism operations, specifically targeting Somalis, exacerbate this situation. The government's directive in 2012 to relocate all Somali refugees to the already overpopulated Dadaab Refugee Camp has further contributed to the refugees' inclination to repatriate. The camp's conditions are poor, and in recent years, there have been reductions in food rations due to funding shortages. This has resulted in a decrease in kilocalories below the minimum standard set by the World Health Organization. In November 2014, the World Food Programme announced further cuts to food rations until January 2015. Although the cuts were attributed to funding constraints rather than the repatriation movement, they directly affect the quality of life for Somali refugees in Dadaab, exacerbating their already harsh circumstances and serving as a push factor for their return. Furthermore, there have been claims that the repatriation taking place is not truly voluntary, with some NGOs suggesting that refugees are encouraged to return through the provision of cash.

From the foregoing, the impetus behind the promotion of repatriation for Somali refugees lies in the government's perception of them as both a security threat and an economic burden. Evidently, the decision to repatriate refugees appears to be primarily driven by the motives of the stakeholders, rather than being a truly voluntary return. The premature nature of the repatriation is attributed to various push factors present in Kenya, which undermine the prospects of a sustainable and durable solution for Somali refugees. Consequently, these repatriation efforts compromise the protection of the refugees and is reminiscent of constructive repulsion.

While the circumstances of the return of Somali refugees appear to be couched in the manner of a constructive repulsion, the most recent case of Turkish asylum seekers is a classic case of involuntary return. Here, on October 18, 2024, seven Turkish asylum seekers; Mustafa Genç, his son Abdullah Genç, Hüseyin Yeşilsu, Necdet Seyitoğlu, Öztürk Uzun, Alparslan Taşçı, and his wife Saadet Taşçı, were abducted by unidentified individuals in Nairobi.³⁴⁶ While Abdullah Genç, Necdet Seyitoğlu, and Saadet Taşçı were later

³⁴⁵ *ibid.*

³⁴⁶ 'UN Slams Kenya over Deportation of Turkish Refugees' *Garowe Online* (30 June 2020) <<https://www.garoweonline.com/en/world/africa/un-slams-kenya-over-deportation-of-turkish-refugees>> accessed 19 January 2025.

released, the fate of Öztürk Uzun, Alparslan Taşçı, and Hüseyin Yeşilsu remains unknown. These individuals were refouled, which constitutes a severe violation of international law.

This incident represents a clear breach of both Kenyan and international legal frameworks designed to protect refugees and asylum seekers. The principle of non-refoulement, central to the 1951 Refugee Convention, the African Union Convention Governing Specific Aspects of Refugee Problems in Africa, and Kenya's national laws, prohibits the forced return of individuals to countries where they face persecution or other serious harm. The abduction of these asylum seekers not only violates these principles but also raises critical concerns about the safety of all refugees and asylum seekers within Kenya. Such actions underscore broader systemic issues in Kenya's approach to refugee protection, especially concerning the safeguarding of vulnerable populations from abduction and forced return. The case of these seven Turkish asylum seekers serves as a stark reminder of the challenges facing Kenya's asylum system.

6.2.2 Kenya's refugee integration model: Reality or rhetoric?

Local integration refers to the gradual process through which a country of first asylum extends to refugees the same rights as its citizens.³⁴⁷ A study by the Refugee Consortium of Kenya on “*The Status of Legal Integration of Refugees in Kenya*”³⁴⁸ highlights three primary models of integration to provide a detailed analysis of the legal and practical barriers to refugee integration in Kenya. The first model involves the full grant of citizenship to refugees, granting them equal rights to those of the host population, including political rights such as voting and standing for election, as permitted by the host country's laws.³⁴⁹ The second model is based on granting permanent residency. Refugees under this model enjoy rights comparable to those of native citizens, with the exception of certain political rights like electoral participation. However, they can apply for citizenship through registration, as demonstrated by Tanzania's decision to grant permanent residency to 3,000 Somali nationals, who, while not citizens, could apply for citizenship under Tanzanian law.³⁵⁰

³⁴⁷ Anna Lindley, 'Exploring Crisis and Migration: Concepts and Issues' [2014] Crisis and migration 1.

³⁴⁸ The Refugee Consortium of Kenya, 'The Status of Legal Integration of Refugees in Kenya' <<chrome-extension://efaidnbmninnibpcapjpcglclefindmkaj/.pdf>> accessed 3 January 2025.

³⁴⁹ Anna Lindley, 'Between a Protracted and a Crisis Situation: Policy Responses to Somali Refugees in Kenya' (2011) 30 Refugee Survey Quarterly 14.

³⁵⁰ Alexandra Fielden, 'New Issues in Refugee Research' [2008] Policy Development and Evaluation Service United Nations High Commissioner for Refugees, Intern, Policy Development and Evaluation Service, UNHCR, Geneva: UNHCR <<https://www.unhcr.org/uk/sites/uk/files/legacy-pdf/486cc99f2.pdf>> accessed 3 January 2025.

The third model is Development-Assisted Integration (DAI), which assumes that full legal local integration may not be feasible. Instead, refugees are provided access to a range of rights and resources, including land and other factors of production.³⁵¹ Under this model, refugee inclusion is pursued not primarily through permanent legal status or naturalisation, but through enhanced access to livelihoods, services, and infrastructure that benefit both refugees and host communities. DAI has been prominently promoted through global frameworks such as the Comprehensive Refugee Response Framework (CRRF) and operationalised in Kenya through initiatives targeting refugee-hosting counties.

In principle, DAI reflects a pragmatic response to protracted displacement and acknowledges that humanitarian assistance alone is insufficient to sustain long-term refugee populations. By embedding refugee needs within development programming, DAI purports to reduce dependency, promote self-reliance, and mitigate host-community resentment.³⁵² Kenya's policy commitments under the Refugees Act, 2021 particularly those relating to access to education, employment, and documentation appear to provide a legal foundation upon which DAI could meaningfully operate.

However, the practical application of DAI in Kenya reveals significant tensions that call into question whether it advances genuine integration or merely repackages long-standing containment practices in development language. While DAI emphasises inclusion within national systems, refugees' legal status remains precarious, their freedom of movement constrained, and their access to formal labour markets subject to administrative discretion. In this context, development interventions risk operating on top of unresolved protection deficits, rather than remedying them.

From a rights-based perspective, DAI cannot substitute for the legal guarantees that underpin refugee integration. The right to seek and enjoy asylum under international law and its domestic articulation through Kenya's constitutional commitment to human dignity requires more than service provision or economic participation. It demands recognition of refugees as rights-bearing individuals entitled to legal identity, predictability, and agency. Where development benefits are extended without secure legal status or enforceable rights, integration becomes conditional and reversible, undermining its transformative potential.

³⁵¹ Sara J Feldman, 'Development Assisted Integration: A Viable Alternative to Long Term Residence in Refugee Camps' (2007) 22 *The Fletcher Journal of Human Security* 49.

³⁵² Sara J Feldman, 'Development Assisted Integration: A Viable Alternative to Long Term Residence in Refugee Camps' (2007) 22 *The Fletcher Journal of Human Security* 49.

Kenya's Refugee Act 2021 outlines a progressive framework for refugee integration as a durable solution, focusing on fostering coexistence between refugees and host communities, shared use of resources, and inclusion in sustainable development plans. This model, detailed in Sections 34 to 36 of the Act, emphasizes integration as a socioeconomic process rather than a pathway to citizenship. Section 34 underscores the importance of resource-sharing and community engagement to facilitate integration. The Act mandates the Commissioner to ensure shared use of public institutions, facilities, and spaces between refugees and host communities. This provision reflects a practical approach to integration by leveraging existing infrastructure to promote equitable access and minimize friction over resource competition.

The Act also recognizes the critical role of social cohesion in successful integration. By requiring the Commissioner to sensitize host communities about the presence of refugees, the law addresses potential xenophobia and misunderstandings that often arise in protracted displacement situations. Sensitization initiatives can build trust and mutual understanding, laying the groundwork for peaceful coexistence. An additional innovative aspect of the provision is the mandated handover of amenities established for refugees to national and county authorities once refugees depart. This ensures that infrastructure developed for refugees continues to benefit host communities, contributing to long-term development goals.

Section 35 directs the Commissioner to liaise with national and county governments to incorporate refugee considerations into sustainable development and environmental plans. This provision situates refugee integration within broader development strategies, aligning Kenya's refugee policy with global trends that view refugees as potential contributors to local economies rather than solely as beneficiaries of aid. By embedding refugee needs into development planning, the Act seeks to create a win-win scenario that enhances local resilience while addressing the needs of displaced populations. Section 36 highlights the Act's commitment to inclusivity by prioritizing the needs of vulnerable groups, including women, children, older persons, victims of trauma, and persons with disabilities. This aligns with international standards, such as those outlined in the Global Compact on Refugees, which emphasize targeted support for vulnerable populations as a core component of durable solutions. Collaboration with UNHCR and other organizations ensures that the integration process is adequately resourced and informed by best practices.

From the foregoing, Kenya's model of refugee integration, as codified in the Refugee Act 2021, aligns most closely with the Development-Assisted Integration framework, rather than the models offering permanent residency or citizenship. The Kenyan approach does not grant refugees a pathway to citizenship or the accompanying political rights. Instead, it focuses on facilitating socioeconomic

inclusion through shared use of resources, access to services, and integration into local development frameworks, as outlined in Sections 34 to 36 of the Act. In contrast to the first two citizenship and permanent residency models, Kenya's integration model is not designed to naturalize refugees as citizens or grant them permanent residency. That is to say, refugees in Kenya remain distinct from the local population in terms of legal status and rights. They do not possess political rights, such as the ability to vote or stand for office, nor do they have an automatic or facilitated pathway to citizenship. This distinction positions Kenya's model firmly outside the frameworks of legal integration that result in long-term or permanent incorporation into the national fabric. Kenya's model reflects the principles of DAI by focusing on enhancing refugees' self-reliance and coexistence with host communities without altering their legal status. Kenya's approach is transitional rather than fully durable. By enabling refugees to participate in local economies and access essential services, the model aims to address immediate needs and improve living conditions. However, it does not resolve the long-term question of legal status and permanency for refugees, leaving them in a liminal state where their rights and stability are dependent on the prevailing political and economic climate.

Building on the foregoing provisions of the law, various initiatives aimed at enhancing refugee integration have been mooted. Notable among these are the Kalobeyei Integrated Socioeconomic Development Plan (KISED P)³⁵³ and the Garissa Integrated Socioeconomic Development Plan (GISED P).³⁵⁴

KISED P represents Kenya's most elaborate DAI experiment. Conceived as a response to congestion in Kakuma and informed by development-oriented economic analyses, KISED P reframed refugee presence as a potential development asset for Turkana County.³⁵⁵ Integration under KISED P is pursued through urban planning, market development, financial inclusion, and mainstreamed service delivery, with refugees and host communities treated as a single development constituency.³⁵⁶ Significantly, however, the plan does not alter the underlying legal status of refugees nor dismantle the encampment framework; instead, it seeks to achieve integration outcomes within existing asylum constraints.

³⁵³ Måns Felleesson, 'A Sustainable Solution or Just a Different Form of Humanitarian Assistance? Examining the Kalobeyei Integrated Socio-Economic Development Plan (KISED P)' (2023) 42 Refugee Survey Quarterly 158.

³⁵⁴ Jacobi and Jaji (n 185).

³⁵⁵ Måns Felleesson, 'A Sustainable Solution or Just a Different Form of Humanitarian Assistance? Examining the Kalobeyei Integrated Socio-Economic Development Plan (KISED P)' (2023) 42 Refugee Survey Quarterly 158.

³⁵⁶ *ibid.*

A similar logic underpins GISED, ³⁵⁷ which adapts the DAI model to a more securitised refugee context. While GISED similarly emphasises shared development gains, its implementation reveals the limits of DAI in environments where security considerations and restrictive governance practices remain dominant. This contrast underscores the extent to which DAI outcomes are contingent not only on development financing but also on the broader political and legal climate governing asylum.

At the national level, the Shirika Plan, an initiative yet to be implemented, builds on these efforts. Previously referred to as the "Marshall Plan" in a nod to the United States' post-World War II reconstruction strategy in Europe, the Shirika Plan envisions the socioeconomic integration of refugees by transforming traditional refugee camps into integrated settlements. This approach aims to create sustainable and inclusive communities, enhancing opportunities for refugees and host populations alike. While the plan's potential has generated significant optimism, questions linger about its implementation and actual impact. One of the primary concerns raised is the lack of adequate consultation with key stakeholders, particularly refugees and host communities. In an episode dubbed, '*Kenya's new integration plan for refugees: Hope or hype?*' ³⁵⁸ Victor Nyamori highlights the perception that local communities are involved only superficially and at the tail end of planning processes, noting that they are typically engaged at the final stages and merely informed about the plan, its implementation, and its expected compliance. Such top-down approaches risk alienating the very groups whose cooperation is critical to the success of the initiative.

Financially, the Shirika Plan has received significant donor support, with nearly \$200 million allocated since its launch in mid-2023. ³⁵⁹ However, persistent delays and limited transparency about refugees' rights within the proposed framework have raised doubts. Therefore, while the Shirika Plan represents a promising step towards addressing Kenya's protracted refugee situation, its success will depend on the inclusivity of its implementation, the timeliness of delivery, and the clarity of its commitments to refugee rights. Moreover, as the Plan continues to be developed, civil society groups are challenging inconsistencies in Kenya's laws to expand the rights of refugees and offer meaningful integration that would lead to permanent residency or 'citizenship' status. For instance, *Haki na Sheria*,

³⁵⁷ Michael Owiso and Farah Manji, 'Localisation and Participation within the Rollout of the Comprehensive Refugee Response Framework in Kenya' <<http://repository.maseno.ac.ke/handle/123456789/4694>> accessed 26 January 2026.

³⁵⁸ 'Beyond hype and hope: Unpacking the uncertainties about Kenya's Shirika Plan for hosting refugees – Netzwerk Fluchtforschung' (n 255).

³⁵⁹ *ibid.*

an NGO that seeks to empower marginalised communities in northern Kenya, has filed two petitions at the Garissa High Court.³⁶⁰ The first, filed in November 2022, focuses on access to citizenship for children born to a refugee and a Kenyan parent. The second, filed in February 2023, focuses on rights to citizenship for refugee spouses.

Similarly, in February 2023, *Kituo Cha Sheria* filed a constitutional petition in the Nairobi High Court challenging sections of Kenya's Citizenship and Immigration Act for denying refugees the right to apply for permanent residency or citizenship.³⁶¹ The organization argues that these provisions violate the Constitution of Kenya and international obligations under the 1951 UN Refugee Convention. The petition contends that refugees, despite meeting requirements such as seven years of lawful residence, are excluded because the Act does not recognize refugee status as lawful residence. Kituo Cha Sheria also highlights barriers such as the denial of work permits and movement restrictions, which force refugees into informal employment. The petition seeks a declaration of unconstitutionality for the relevant sections of the Act to ensure equal treatment for refugees in accessing citizenship or permanent residency. All three petitions are awaiting hearings. If successful, they would have a significant impact on the lives of refugees in Kenya, probably paving the way for them to move freely, access services, and fully contribute to the economy.

6.2.2.1 Multilevel Governance and Structural Constraints to Refugee Integration in Kenya

Refugee protection does not occur in an institutional vacuum; it is fundamentally shaped by the distribution of authority, responsibilities, and resources across different levels of government. Multilevel governance dynamics further complicate Kenya's DAI model. Development programming is largely implemented at the county level, yet refugee affairs remain institutionally centralised. Counties hosting refugees are expected to absorb development pressures and deliver services to mixed populations without commensurate authority, resources, or policy influence over asylum governance. Therefore, while Kenya's legal and policy frameworks increasingly gesture toward refugee integration, existing multilevel governance arrangements function as structural constraints that undermine the effective realisation of integration at the local level.³⁶² The constitutional allocation of functions between national and

³⁶⁰ *Haki Na Sheria Initiative & 3 others v Cabinet Secretary Ministry of Interior and Co-ordination of National Government & 4 others; Katiba Institute & 2 others (Interested Parties); Global Strategic Litigation Council for Refugee Rights (Amicus Curiae) (Constitutional Petition E011 of 2022 & Petition E001 of 2023 (Consolidated))* [2024] KEHC 15353 (KLR).

³⁶¹ Kituo Cha Sheria, 'Kituo Cha Sheria Press Release 15 February 2023' <<https://www.google.com/>> accessed 3 January 2025.

³⁶² Vincent Godana Yatani, 'Refugee Protection in Multi-Level Governance Regimes: A Case for Kenya and Indonesia' <<https://dea.lib.unideb.hu/bitstreams/b65236e7-8bdd-42aa-a20f-3dec3635bdb8/download>> accessed 25 January 2026.

county governments has significant implications for how asylum policies are operationalised and, by extension, how refugees are integrated into host communities.³⁶³

Traditionally, immigration and asylum governance in Kenya has been treated as a core national function. This centralisation reflects the close association of refugee protection with border control, international obligations, and foreign relations. Consequently, policy formulation, legal frameworks, and official discourse on refugees and asylum seekers remain largely centralised, with limited formal involvement of county governments in planning or decision-making processes. Yet, this centralisation contrasts sharply with the lived realities of refugee protection. Refugees reside within counties, rely on subnational institutions for access to healthcare, water, sanitation, land administration, and local security, and interact daily with county-administered services. County governments, therefore, are not peripheral actors but frontline institutions in the practical delivery of refugee-related services. This misalignment between formal functional assignment and operational reality lies at the heart of Kenya's asylum policy - practice continuum, particularly with regard to refugee integration.³⁶⁴

Although counties have limited legislative or policy authority in refugee affairs, their proximity to refugee hosting communities positions them as first responders during humanitarian emergencies and as critical actors in long-term inclusion processes. Effective refugee integration requires the mainstreaming of refugee needs across devolved functions such as public health, education, environmental management, and community development, all of which are constitutionally assigned to county governments.

Kenya's constitutional design further complicates matters. Under the Fourth Schedule, refugee affairs fall under the national government's mandate, rendering refugee protection an obligatory and exclusive national function. Simultaneously, counties are tasked with sectors essential to refugee welfare, creating a structural tension: counties must provide services to refugee populations without formal authority, dedicated resources, or institutional integration into the national asylum governance framework. This governance configuration raises a critical question: can refugee protection and integration be effectively implemented as an exclusive national function within a devolved system where essential services are constitutionally vested in subnational governments? Kenya's experience

³⁶³ Tiziana Caponio, Irene Ponzio and Leila Giannetto, 'Comparative Report on the Multilevel Governance of the National Asylum Seekers' Reception Systems' (2019) 24 CEASEVAL Research on the Common European Asylum System <https://fier.i.it/wp-content/uploads/2023/11/24_WP3_Comparative-Report.pdf> accessed 25 January 2026.

³⁶⁴ Blake Barkley, 'Revisiting the Politics of Asylum in Africa: Explaining Kenya's Sub-National Policy Variation' (PhD Thesis, Carleton University 2022) <<https://carleton.scholaris.ca/bitstreams/cba1b6da-2065-435f-b078-db27ff593e59/download>> accessed 25 January 2026.

suggests that exclusive functional allocation, while legally coherent, may inadvertently undermine integration by marginalising counties from planning, coordination, and accountability mechanisms.

Comparative insights from Indonesia, another refugee-hosting country with decentralised governance, underscore this point. Although Indonesia is not a party to the 1951 Refugee Convention, Presidential Regulation No. 125 of 2016 explicitly distributes refugee-related functions across multiple levels of government. Responsibilities for shelter, healthcare, and emergency response are formally shared between central and local authorities, providing operational clarity and strengthening local engagement. In contrast, Kenya relies largely on informal coordination and *ad hoc* collaboration with counties, which exacerbates integration gaps in refugee-hosting areas where service delivery pressures are highest.

Uganda and Kenya represent two contrasting approaches to refugee protection and integration in East Africa, which are illustrative for understanding the dynamics of the *policy–practice continuum*. Uganda’s self-reliance model, anchored in a development-oriented framework, affords refugees the right to work, freedom of movement, and access to land for cultivation within rural settlements.³⁶⁵ Its integrated refugee–host interaction promotes shared social services and market participation, linking refugee protection with local development planning. By contrast, Kenya’s asylum system remains largely encampment-based, particularly for refugees outside urban areas. Movement and employment rights are limited, and refugees’ access to land and livelihoods is constrained, which reinforces dependency on humanitarian assistance.³⁶⁶ While Kenya’s framework is informed by international and regional instruments, its practical implementation often falls short of providing durable solutions. In DAI terms, Uganda operationalises development as integration, producing more self-reliant outcomes, whereas Kenya’s practice reflects a humanitarian-centric approach, limiting both economic integration and social inclusion.

From a multilevel governance perspective, refugee protection in Kenya exemplifies the limitations of exclusive national functional assignment in contexts where integration requires both vertical and horizontal coordination. While centralised authority may support policy coherence and international compliance, the absence of clearly defined roles for county governments weakens accountability, strains local service delivery, and obscures responsibility when protection or inclusion failures occur.

³⁶⁵ Alexander Betts and others, ‘Refugee Economies in Uganda: What Difference Does the Self-Reliance Model Make?’ [2019] Refugee Studies Centre <<https://ora.ox.ac.uk/objects/uuid:6184be40-ff63-48d9-b42e-c2a26d8d22e5>> accessed 27 January 2026.

³⁶⁶ Heidrun Bohnet and Clara Schmitz-Pranghe, ‘Uganda: A Role Model for Refugee Integration?’ <<https://www.ssoar.info/ssoar/handle/document/62871>> accessed 27 January 2026.

In this sense, multilevel governance does not merely shape administrative arrangements; it directly influences refugees' access to essential services, social inclusion, and participation in local communities. The Kenyan case underscores the need to reconceptualise refugee protection as a function that, while nationally regulated, must be operationalised through structured intergovernmental collaboration. Persistent integration gaps can therefore be traced not only to resource or capacity constraints but to foundational governance choices regarding functional assignment within Kenya's devolved system.

In this regard, while Kenya's integration model presents a forward-looking approach, several challenges could hinder its effective implementation. For instance, resource constraints, both financial and institutional, may limit the feasibility of shared use of public facilities and the establishment of sustainable development plans. Additionally, the model's emphasis on socioeconomic integration without a pathway to citizenship might leave refugees in a precarious legal and political limbo, raising concerns about their long-term stability and rights.

6.2.3 Third Country Resettlement

Resettlement serves as a vital protection mechanism for refugees who are unable to return to their home countries due to persecution, violence, or conflict. Section 38 of Kenya's Refugee Act, 2021, provides a structured framework for facilitating resettlement, reflecting Kenya's alignment with international refugee protection standards. At the same time, it reveals the complexities and challenges that come with this durable solution. Bram J. Jansen's article, "*Between Vulnerability and Assertiveness: Negotiating Resettlement in Kakuma Refugee Camp, Kenya*,"³⁶⁷ provides valuable insights into these challenges, particularly in the context of refugee agency, vulnerability, and the structural constraints of the global resettlement system.

Globally, resettlement opportunities are scarce, with less than one percent of refugees able to access this solution.³⁶⁸ The process is both rigorous and selective, with eligibility determined by vulnerability and protection needs as assessed by the UNHCR and potential host countries. For many refugees, resettlement is more than just a chance for safety; it represents hope for a better future. Jansen's research, however, underscores that resettlement is not a straightforward, top-down process.³⁶⁹ Rather, it is a negotiation where refugees

³⁶⁷ Bram J Jansen, 'Between Vulnerability and Assertiveness: Negotiating Resettlement in Kakuma Refugee Camp, Kenya' (2008) 107 African Affairs 569.

³⁶⁸ Susan Fratzke and others, 'Refugee Resettlement and Complementary Pathways: Opportunities for Growth' [2021] Geneva and Brussels: UNHCR and MPI Europe <<https://www.unhcr.org/sites/default/files/legacy-pdf/614462c94.pdf>> accessed 3 January 2025.

³⁶⁹ Jansen (n 367).

must strategically align their experiences with the criteria for vulnerability. This reality reveals a tension between the structural inequalities of the resettlement system and the agency of refugees who navigate these obstacles to secure a chance at resettlement.

Kenya's Refugee Act of 2021 codifies resettlement as one of the durable solutions for refugees. Section 38(1) guarantees refugees the right to seek resettlement in third countries, excluding their countries of origin. This provision aligns with the principle of non-refoulement, ensuring that refugees are not returned to places where they face danger. By situating resettlement as a shared international responsibility, this provision aims to both support refugees and ease the strain on Kenya as a host country.

However, Jansen's findings highlight the challenges of implementing such frameworks. Access to resettlement often hinges on a refugee's ability to navigate and articulate their vulnerability within institutionalized frameworks. Those who cannot meet the formal expectations of the system risk exclusion, despite their genuine need for protection. Subsection (2) of Section 38 mandates Kenyan authorities to advocate for increased resettlement quotas through international partnerships. This effort to expand opportunities is laudable, but as Jansen notes, the disconnect between policy intentions and implementation realities remains a significant barrier. Refugees in camps like Kakuma often view resettlement as their only viable solution. Limited slots, coupled with a lack of transparency in the process, exacerbate frustrations and feelings of inequity.

The implementation of Section 38 faces several challenges. Structural inequalities in the global resettlement system favor refugees who can align their narratives with predetermined vulnerability criteria. Additionally, the scarcity of opportunities means that even well-crafted policies may fail to meet the overwhelming demand. Refugees must navigate complex bureaucracies, often requiring external support to fulfill procedural requirements. While refugees demonstrate agency in advocating for their cases, the structural limitations of the system can lead to disempowerment and frustration. Furthermore, as Jansen notes, exploitation and fraud sometimes emerge within the resettlement process, with refugees resorting to informal networks that can undermine their chances and the integrity of the system. Jansen's research also reveals the strategic role of vulnerability as a tool for negotiating resettlement. Refugees in Kakuma often leverage this perception to strengthen their cases. This dynamic calls for a nuanced approach by Kenyan authorities and international stakeholders, one that recognizes refugee agency while ensuring equity and fairness in decision-making.

Resettlement, though limited in scope, remains indispensable for protecting refugees. Section 38 of Kenya's Refugee Act, 2021, represents a significant step in addressing refugee needs, but its success depends on bridging the gap between institutional frameworks and lived realities. By improving transparency, enhancing implementation mechanisms, and advocating for greater global resettlement

quotas, Kenya can ensure that its policies fulfill their promise. Addressing these challenges not only helps alleviate Kenya's refugee burden but also solidifies its role as a leader in the global refugee protection framework.

6.3 Refugee Hosting: A Drain on National Resources?

Kenya's experiences with refugee hosting cannot be divorced from the broader socio-economic context shaped by structural adjustments and policy reforms in the post-Cold War period.³⁷⁰ During this era, African states, including Kenya, grappled with economic stagnation characterized by fiscal deficits, rising unemployment, and high inflation.³⁷¹ This economic downturn was compounded by a reduction in foreign aid, prompting international financial institutions such as the International Monetary Fund (IMF) and the World Bank to introduce Structural Adjustment Programs (SAPs) as conditions for economic support.³⁷² These programs mandated currency devaluation, public expenditure cuts, privatization, and market deregulation. Despite their goal of economic stabilization, SAPs generated widespread criticism for exacerbating socio-economic inequalities, undermining public services, and leaving large sections of the population impoverished.³⁷³

The ramifications of these economic reforms extended to refugee hosting, significantly influencing attitudes and policies in Kenya. SAP-induced reductions in social welfare programs heightened tensions between host communities and refugees, as locals perceived a disparity in service provision. While host communities faced diminished access to essential services, refugees received aid from international humanitarian organizations. This dynamic was vividly captured by Ekuru Aukot, who described the frustration of host communities in regions like Turkana, where residents perceived that "it is better to be a refugee than a Turkana in Kakuma."³⁷⁴ These perceptions fueled resentment, contributing to stricter government policies and the adoption of encampment as a central feature of refugee management.

³⁷⁰ Blake Barkley, 'Revisiting the Politics of Asylum in Africa: Explaining Kenya's Sub-National Policy Variation' (PhD Thesis, Carleton University 2022) <<https://repository.library.carleton.ca/concern/etds/jq085m21f>> accessed 3 January 2025.

³⁷¹ Robert K Fleck and Christopher Kilby, 'Changing Aid Regimes? US Foreign Aid from the Cold War to the War on Terror' (2010) 91 *Journal of Development Economics* 185.

³⁷² Ikubolajeh Bernard Logan and Kidane Mengisteab, 'IMF-World Bank Adjustment and Structural Transformation in Sub-Saharan Africa' (1993) 69 *Economic Geography* 1.

³⁷³ Joseph Kipkemboi Rono, 'The Impact of the Structural Adjustment Programmes on Kenyan Society' (2002) 17 *Journal of social development in Africa* 81.

³⁷⁴ Ekuru Aukot, 'Refugee Protection in Africa: A Developing Country's Dilemmas Toward Effective Protection' (2003) 9 *East African Journal of Peace and Human Rights* 213.

Encampment policies sought to address tensions between host communities and refugees by confining refugees to designated camps and restricting their movement. Urban refugees, in particular, faced negative perceptions as competitors for limited economic opportunities. They were also frequently, though often baselessly, associated with rising crime and the proliferation of small arms. Such narratives reinforced public support for restrictive policies, further entrenching the encampment approach within Kenya's refugee management framework. These policies reflect not only socio-economic pressures but also the structural and systemic challenges rooted in the post-Cold War economic reforms.

The perception of refugees as a drain on national resources remains a contentious issue. Scholars such as Hovil and Jacobsen highlight the dual narrative surrounding refugee employment: unemployed refugees are viewed as an economic burden, while employed refugees are seen as taking jobs from locals.³⁷⁵ This dichotomy reinforces host governments' ambivalence toward integrating refugees into the labor market. Additionally, the pressure exerted by large refugee populations on urban infrastructure has become a significant deterrent to more open-door policies.

Kenya's historical trajectory provides a clear example of this dynamic. Prior to 1988, the country maintained a generous and hospitable refugee policy, emphasizing local integration due to the relatively small size of the refugee population.³⁷⁶ However, by 1992, the refugee population had ballooned to over 400,000, straining government resources and prompting the adoption of restrictive encampment policies.³⁷⁷ Similar trends have been observed globally, as illustrated by the impact of Iraqi refugees in Jordan, Lebanon, and Syria. In these contexts, refugee inflows drove up food and fuel prices, strained housing markets, and placed immense pressure on public services.³⁷⁸

In Kenya, urban host communities have borne the brunt of these challenges, as the arrival of refugees exacerbates existing socio-economic inequalities and strains community infrastructure.³⁷⁹ While host states such as Kenya warrant recognition for their efforts to accommodate refugees, the socio-economic burdens they face highlight the limitations of current refugee policies. The structural

³⁷⁵ Lucy Hovil, 'Self-Settled Refugees in Uganda: An Alternative Approach to Displacement?' (2007) 20 *Journal of Refugee Studies* 599.

³⁷⁶ Maria Vincenza Desiderio, 'Integrating Refugees into Host Country Labor Markets: Challenges and Policy Options' [2016] Washington DC: Migration Policy Institute <<https://www.migrationpolicy.org/sites/default/files/publications/TCM-Asylum-Desiderio-FINAL.pdf>> accessed 3 January 2025.

³⁷⁷ Elizabeth H Campbell, 'Urban Refugees in Nairobi: Problems of Protection, Mechanisms of Survival, and Possibilities for Integration' (2006) 19 *Journal of refugee studies* 396.

³⁷⁸ Crisp (n 316).

³⁷⁹ Katarzyna Grabska, 'The Return of Displaced Nuer in Southern Sudan: Women Becoming Men?' (2013) 44 *Development and Change* 1135.

constraints that underpin these challenges necessitate a rethinking of refugee management strategies, with a view to balancing humanitarian obligations with the economic and social realities of host communities.

6.4 Conclusion

The discussion in this chapter has elucidated the intricate interplay between structural determinants and the challenges faced in implementing Kenya's asylum system. In examining the political, economic, legal, and social dimensions that influence key aspects of the asylum process, of reception, registration, refugee status determination, and the pursuit of durable solutions, it has become evident that the gap between policy intentions and practical outcomes stems from deeply entrenched systemic issues.

Politically, the asylum system is shaped by shifting priorities that oscillate between national security concerns and international obligations, often creating tension between restrictive practices and Kenya's commitment to global refugee protection norms. Economically, the nation's limited resources, compounded by structural adjustment reforms, exacerbate inequalities and fuel host-community resentment, thereby affecting refugee management policies and their implementation. Legally, inconsistencies in domestic frameworks and enforcement mechanisms undermine the coherence required to operationalize progressive international and regional commitments effectively. Socially, the perceptions of refugees as economic competitors or security threats deepen societal divisions and entrench support for restrictive measures such as encampment policies.

This chapter has further linked these findings to existing literature, highlighting how Kenya's experience mirrors global trends in refugee hosting, where the burden of responsibility disproportionately falls on resource-constrained states. Nevertheless, the specificity of Kenya's socio-political and economic context underscores unique challenges, such as the impact of large-scale urbanization and the legacy of structural adjustments on host communities and refugee integration policies.

In synthesizing these elements, the discussion has demonstrated how the implementation gap in Kenya's asylum system reflects a broader continuum of systemic inefficiencies. These inefficiencies are not isolated but rather interconnected, with one dimension; be it political, economic, legal, or social, exacerbating the challenges in another. Consequently, effective policy implementation requires a holistic approach that addresses these interdependencies while balancing humanitarian commitments with the socio-economic realities of host communities.

Ultimately, the findings underscore the need for structural reforms that align policy intentions with practical capacities. These reforms should not only enhance resource allocation, institutional coordination, and legal clarity but also foster meaningful engagement with host communities to mitigate tensions and build social cohesion. In doing so, Kenya can take significant strides toward bridging the gap between its progressive legal frameworks and the lived realities of those within its asylum system. This discussion serves as a foundation for proposing actionable recommendations in the subsequent chapter.

CHAPTER 7: CONCLUSION & RECOMMENDATIONS

7.0 Introduction

In this final part of the study, the central findings of the research are inferred, and possible actionable recommendations to address the challenges identified within Kenya's asylum system are provided. The conclusion section extrapolates the main insights drawn from the research, placing greater emphasis on the obstinate divide between what appears to be Kenya's progressive refugee policies and their practical implementation as conceived in the policy context. Subsequently, the chapter presents targeted recommendations aimed at enhancing the effectiveness of the country's asylum programme. These recommendations are rooted in the findings of the study and are designed to inform policymakers, practitioners, and stakeholders in their efforts to implement policy intentions with practical outcomes that are reflective of the policy objectives. In summary, the conclusion and recommendations chapter offer a roadmap for bridging the policy-practice divide.

7.1 Conclusion

This study has demonstrated that refugees in Kenya possess the right to protection within the framework of the governing laws. They are entitled to security, freedom of movement, the right to work, access to essential services, and the right to seek justice, as articulated in international refugee instruments and Kenya's Refugee Act of 2021. However, these rights often remain theoretical due to insufficient implementation and enforcement of both international standards and national laws. The petition and related engagements underscore a critical disconnect between Kenya's progressive legal frameworks and the lived realities of refugees. While Kenya's asylum policies have garnered international acclaim, their implementation often fails to meet the needs of displaced populations, leaving many in vulnerable and precarious circumstances. This is clearly brought out in the grievances articulated in the petition submitted by the

Refugee United forum and amplified through recurrent refugee protests in the country. This reflects widespread disillusionment among refugees regarding the unfulfilled promises of protection, support, and dignity.

This gap between policy intentions and practical outcomes highlights the pressing need for a recalibration of existing frameworks to ensure that humanitarian goals translate into tangible improvements in the lives of refugees. These findings reveal that Kenya's asylum system must transcend policy rhetoric and adopt actionable measures that effectively address the systemic challenges confronting displaced populations, ensuring their rights and well-being are upheld. That is to say, while a comprehensive and well-crafted legal framework is crucial, it is not a panacea for the myriad challenges in refugee protection. A robust legal text that is precise, inclusive, and aligned with international human rights standards provides a necessary foundation. Yet, the successful realization of these rights hinges on factors beyond the laws themselves, including the political will of state actors, resource availability, institutional capacity, and the socioeconomic realities faced by refugees.

Furthermore, this study contends that the gap between policy intent and practice is exacerbated by the interplay of political, economic, social, and legal variables. These macro-level factors generate micro-level challenges such as bureaucratic barriers, institutional inefficiencies, and resource constraints. Entrenched xenophobia and discriminatory practices further obstruct the operationalization of legal protections, highlighting the growing disconnection between formal legal frameworks and the lived realities of refugees. Bridging this gap requires a multidimensional approach that goes beyond legislative reform. Therefore, as outlined in the recommendation part of this chapter, addressing the fading policy-to-practice continuum will require political commitment, adequate resource allocation, institutional strengthening, and societal transformation to ensure that refugee protection is not only a legal promise but a lived reality.

From a personal perspective, this study reinforces the view that legal frameworks, no matter how progressive, are only as effective as the systems that implement them. Kenya's asylum laws, including the Refugee Act 2021, demonstrate a commitment to upholding the rights of displaced persons. Yet, the lived experience of refugees exposes a stark gap between legislation and practice. I am persuaded that the solution is not simply to amend laws or issue new policy instruments but to invest in the holistic functioning of the refugee protection ecosystem. This entails cultivating genuine political will, tackling bureaucratic inertia, enhancing institutional capacities, and fostering societal empathy toward displaced communities.

In my view, meaningful refugee protection in Kenya demands a paradigm shift: from treating refugees as subjects of charity or mere legal abstractions to recognizing them as rights-bearing individuals with agency and dignity. The recurring protests, petitions, and grassroots activism underscore a critical truth: refugees are not passive recipients of protection but active participants in shaping the legal and social structures that affect them. Policymakers must, therefore, engage refugees as partners rather than beneficiaries, ensuring that policy formulation and implementation are informed by lived realities on the ground.

Ultimately, bridging the policy-practice gap requires sustained, coordinated, and context-sensitive interventions that recognize the interdependence of legal, political, economic, and social dimensions. Only then can Kenya's asylum system evolve from being a framework of aspirational promises into a lived reality where refugees can genuinely exercise their rights, attain self-reliance, and contribute meaningfully to the society that hosts them. I firmly hold that the strength of Kenya's legal and policy instruments will only be realized when complemented by responsive institutions, empowered communities, and a social consciousness that prioritizes protection, inclusion, and justice.

7.2 Recommendations

The recommendations presented underscore the need for a holistic, multi-stakeholder approach to address the systemic challenges in Kenya's asylum system and enhance refugee protection. They are summarized as follows: Kenya should revise the Refugees Act and related policies to align with international standards and explicitly promote local integration as a durable solution alongside voluntary repatriation and resettlement. Clear legislative provisions for refugee registration and documentation issuance must be established, addressing ambiguities in the Refugee Status Determination (RSD) process and incorporating international commitments, such as the Djibouti and Kampala Declarations. Institutional strengthening is critical. The Department of Refugee Services (DRS) should receive increased funding, recruit skilled personnel, and conduct regular training to improve its efficiency. Inter-agency collaboration among the government, UNHCR, and NGOs should be fostered to ensure cohesive implementation of refugee policies, with clear delineation of roles to avoid overlaps or gaps. Resource mobilization is essential to address existing gaps. Kenya should advocate for international financial and technical support while allocating resources to prioritize refugee registration, documentation, integration, and livelihoods programs. Simplified processes for obtaining work permits and business licenses should be implemented to foster refugee self-reliance and economic independence.

Community engagement is fundamental for fostering social cohesion and reducing xenophobia. Participatory consultations with refugees and host communities should inform policy and program development. Awareness campaigns should highlight refugees' contributions to the economy and society while improving urban refugee programming in collaboration with city authorities. Regional and global collaboration should be strengthened through frameworks like IGAD and the African Union to promote burden-sharing. Kenya should also advocate for equitable global responsibility-sharing to address protracted refugee situations and secure support for refugee programs. Monitoring and evaluation mechanisms must be established to assess the effectiveness of policies and programs. Regular impact assessments should guide adaptive measures to ensure relevance and efficiency. NGOs should integrate information campaigns addressing bureaucratic processes into refugee programming, expand legal aid services, and support refugee education through teacher training, secondary education, and vocational training programs. NGOs should also enhance urban refugee support and engage in advocacy for policy development and implementation. Stakeholder partnerships are crucial for sustainable solutions. Collaborative efforts with civil society organizations, private sector actors, community-based groups, and refugee-led organizations should focus on advocacy and capacity building. Roundtable meetings and MOUs can address systemic gaps and enhance coordination. By adopting these integrated measures, Kenya can strengthen its commitment to international refugee protection standards, enhance the efficacy of its asylum system, and improve the dignity and livelihoods of refugees within its borders.

These recommendations go beyond policy tweaks. They reflect a moral and practical imperative for Kenya to make refugee protection a tangible reality. Legal frameworks alone are insufficient; meaningful change requires political will, institutional capacity, and societal recognition of refugees as contributors, not just beneficiaries. Engaging refugees directly, simplifying access to work and services, strengthening urban programs, and fostering social cohesion are essential steps toward translating rights into real-life impact. Kenya's asylum system can only succeed if it balances legal rigor with practical implementation, guided by inclusivity, accountability, and humanitarian commitment. With consistent effort, these measures have the potential to transform Kenya's asylum landscape from one of gaps and unfulfilled promises into a model of effective, rights-based protection.

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Appendices

SAMPLE
ASYLUM SEEKER PASS



MINISTRY OF INTERIOR AFFAIRS
OFFICE OF THE COMMISSIONER
DEPARTMENT OF IMMIGRATION SERVICES

Form No. IAS/100/2017
Rev. 01/2017

Form No. IAS/100/2017
Rev. 01/2017

ASYLUM SEEKER PASS

NAME OF ASYLUM SEEKER	XXXXXXXXXX
Place of Birth	XXXXXXXXXX
Date of Birth	01 September 1982
Place of Issue	JAMAICA
Sex	Female
Nationality	Refugee
Date of Entry	20/01/2017
Place of Entry	JAMAICA
Date of Expiry	18 Jan 2021

TO WHOM IT MAY CONCERN

This is to certify that the above-named person is a person who has been granted asylum in Jamaica by the Minister of the Interior, and is entitled to remain in Jamaica for the purpose of seeking asylum in the Office of the Commissioner for Refugees, and to travel in and out of Jamaica for the purpose of seeking asylum in the Office of the Commissioner for Refugees.

This Pass is valid for the purpose of seeking asylum in the Office of the Commissioner for Refugees, and is not valid for any other purpose.

This document is valid until: 18 Jan 2021

Signature of Asylum Seeker

Signature of Asylum Seeker

This document is valid until the date of expiry of the Asylum Seeker Pass.

SAMPLE - LETTER OF RECOGNITION



REPUBLIC OF KENYA
REFUGEE AFFAIRS SECRETARIAT

P.O. BOX 42227 - 00100
The Castle, James Gichuru
Road, Lavington, Nairobi

No Linked Applicants exist



Ref: RAS/OPER/26/REG/URB/2/2XXXXX

Date: 24 Feb 2021

REFUGEE RECOGNITION LETTER

Name: XXXX, XXXXXXXXXX
Case number: 823-14CXXXXX
Nationality: Democratic Republic of the Congo
Date of birth: 01/Jan/1980
Sex: M
Place of birth: KABEMBWE

This is to certify that the bearer of this letter is recognised as a refugee by the Commissioner for Refugee Affairs under Section 3(1)(a) of the Refugees Act 2006. This person is of concern to the Refugee Affairs Secretariat and should in particular be protected from forcible return to a country where he/she faces threats to his/her life or freedom, pending issuance of a Refugee ID card as per Sections 14(a), 15(1)(a) of the Refugees Act 2006 and Section 33(1) of the Refugees (Reception, Registration and Adjudication) Regulations, 2009.

This recognition letter expires on 24 February 2022 and will be replaced by a refugee identity card.

Should you have any queries regarding this case, please do not hesitate to contact the Refugee Affairs Secretariat at the above address.

Thank you for your kind cooperation.

Yours Sincerely,

COMMISSIONER FOR REFUGEE AFFAIRS

823-14CXXXXX

SAMPLE - PROOF OF REGISTRATION



GOK PROOF OF REGISTRATION



GOK Case Number	823-XXXXXXXXXX	File No	COA: Nairobi, Kilimanjaro, Hurlingham, .	Date of Registration: 2/24/2022
Size	5		COO: Türkiye, Kahramanmaraş, Gökçün, Yenyapan, .	

SN	Full Name	Gender	Date of Birth	Relationship to HRI	Individual Number	GOK Serial No	GOK ID No	GOK 101R No
01	XXXX XXXXX, XXXXX	Male	2/3/1983	Head of Unit	823-XXXXXXX	XXXXXXX		XXXXXXX
02	XXXXXXXXXXXX, XXXXX	Female	10/1/1994	Wife	823-XXXXXXX			
03	XXXXXX XXXXX, XXXXX	Male	6/2/2013	Son	823-XXXXXXX			
04	XXXXXX XXXXX, XXXXX	Male	1/3/2018	Son	823-XXXXXXX			
05	XXXXXX XXXXX, XXXXX	Female	1/2/2019	Daughter	823-XXXXXXX			







823-XXXXXXX
823-XXXXXXX
823-XXXXXXX
823-XXXXXXX
823-XXXXXXX

GOK/UNHCR Proof of Registration for -823-14CXXXXX - Issued on 22-Jan-2021

MOVEMENT PASS



OFFICE OF THE PRESIDENT
MINISTRY OF INTERIOR AND COORDINATING NATIONAL GOVERNMENT
DEPARTMENT OF REFUGEE SERVICES



Website: www.dhs.gov
 Form: <https://www.dhs.gov>
 Form: <https://www.dhs.gov>

07-Nov-2022

MOVEMENT PASS

Name of Applicant: XXXXX XXX, XXXXX

Nationality: Burundi

Date of Birth: 01-Jan-1980

Place of Birth: KIGALI

Date of Entry in Kenya: 01-Feb-2018

Place of Entry: Kileleshwa

Gender: Male

No. of Dependents: 0



This is to certify that the above named individual(s) is of concern to the Government of Kenya. Pursuant to
 Section 10(1) of the Refugees Act (2011), the Office hereby authorizes the foregoing individual(s) to travel within
 KENYA to KIGALI for family visit.
 The authorities are kindly requested to allow him/her/them safe passage in accordance with the travel
 authorization.
 This document expires on 17-Nov-2022 and should be surrendered to the Camp Manager/Officer in-charge
 upon arrival.

For Commissioner, Refugee Affairs



This document is only valid in the original when bearing official stamp

SAMPLE - REFUGEE IDENTITY PASS (Mino


OFFICE OF THE PRESIDENT
MINISTRY OF INTERIOR AND CO-ORDINATION OF NATIONAL GOVERNMENT
DEPARTMENT OF REFUGEE SERVICES

Head Office: P.O. Box 30000, Nairobi, Kenya
Tel: +254 20 271 2345
Fax: +254 20 271 2346
Email: info@refugeeservices.go.ke

Regional Office: P.O. Box 30000, Nairobi, Kenya
Tel: +254 20 271 2345
Fax: +254 20 271 2346
Email: info@refugeeservices.go.ke

Ref. No.: R/S/XXXXXXXXX Serial No.: XXXXXXXX XXXXXXXX

REFUGEE IDENTITY PASS FOR (MINOR) BELOW 18 YEARS OF AGE

Name of Applicant: XXXXX XXXXX XXXXXXXX
Date of Birth: XXXX/XX/XX
Place of Birth: XXXXXXX
Nationality: Democratic Republic of the Congo
State of Entry (in Kenya): 10/10/2018
Place of Entry: -
Date of Issuance: 05-Oct-2022
Expiry Date: 05-Oct-2027


Photo: 10 years of age

This is to certify that the above named person being 18 years of age is a national of Democratic Republic of the Congo, recognised as a refugee in Kenya under Refugee Act.

The holder therefore is a person of concern to the Commissioner for Refugees and should be in accordance be protected from forcible return to a country where he claims to face threats to his life or freedom.

This pass will expire on attaining 18 years or when the parent's refugee identity card expires. On attaining 18 years the holder becomes eligible to apply for the refugee identity card.

Questions regarding the information contained in this document may be directed to the Office of the Commissioner for Refugee Affairs.

Signature of Designated Officer: _____

Refugee Identity Pass

6

WAITING SLIP


REPUBLIC OF KENYA
MINISTRY OF INTERIOR AND CO-ORDINATION OF NATIONAL GOVERNMENT
DEPARTMENT OF REFUGEE SERVICES

Head Office: P.O. Box 30000, Nairobi, Kenya
Tel: +254 20 271 2345
Fax: +254 20 271 2346
Email: info@refugeeservices.go.ke

Regional Office: P.O. Box 30000, Nairobi, Kenya
Tel: +254 20 271 2345
Fax: +254 20 271 2346
Email: info@refugeeservices.go.ke

APPLICATION FOR REGISTRATION ACKNOWLEDGEMENT

1. Date of Birth: _____
2. Date of Issuance: _____
3. Date of Expiry: _____
4. Date of Issue: _____
5. Date of Issuance: _____
6. Date of Issuance: _____

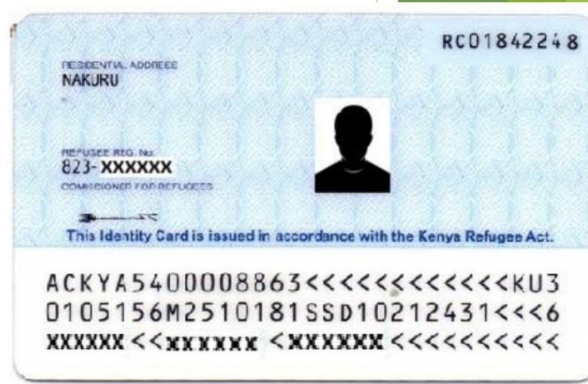
ORIGINAL


Photo: 10 years of age

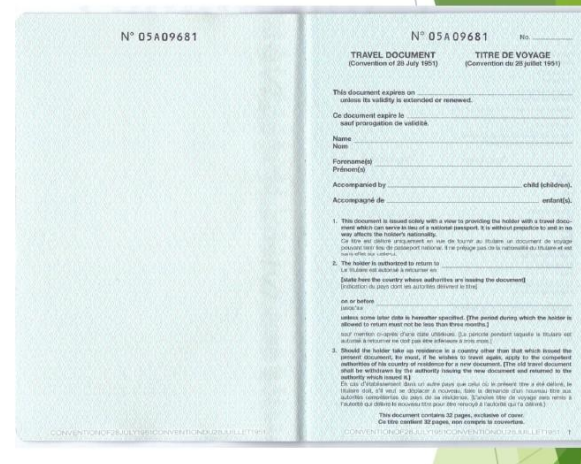
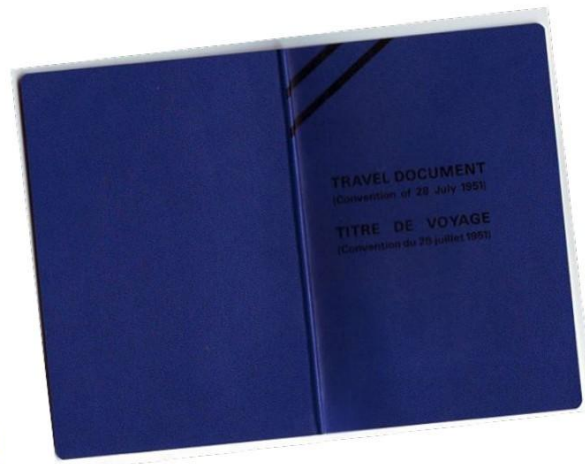
Signature and Signature of the Registration Officer: _____

SIGNATURE
Date: _____
Place: _____

SAMPLE - ALIEN CERTIFICATE



Sample CTD



A: Letter of Introduction from the Doctoral School



**DEBRECENI
EGYETEM**

DEBRECENI EGYETEM
Marton Géza Állam- és Jogtudományi Doktori Iskola

H-4002 Debrecen, Pf.: 400
4028 Debrecen, Kassai út 26.
Tel.: 52/512-700/74803, 74804
E-mail: szabadfalvi.jozsef@law.unideb.hu; zaccaria.marton@law.unideb.hu
Honlap: martongezadi.unideb.hu

The Director General

Re: Research Authorization Request

National Commission for Science, Technology and Innovation
P.O. BOX 30623-00100 Nairobi, KENYA

Dear Sir,

I am writing to introduce Mr. Vincent Godana Yatani, a Ph.D. candidate at Geza Marton Doctoral School of Legal Studies, University of Debrecen, Hungary. Mr. Yatani is currently undertaking research in Refugee and asylum law under the guidance of Professor Katalin Siska, a faculty member in our doctoral school.

Mr. Yatani is embarking on a critical phase of his doctoral research, which involves data collection in the field and is therefore seeking authorization from the Commission to conduct research in Kenya. His research Dissertation which is titled „*Kenya's Asylum System: An Appraisal of Policy and Practice Continuum*” is an integral part of his academic journey and holds significant potential for contributing to the knowledge base in the field of refugee law. In light of the above, we kindly request your authorization to allow Mr. Yatani to conduct his research in Nairobi, Kenya with occasional visits to refugee Camps in the country. The said field activities will be conducted in strict compliance with all relevant laws, regulations, and ethical standards.

Your cooperation in granting the necessary authorization and your support throughout his research endeavor is highly appreciated.

Sincerely,

Dr. József Szabadfalvi
Professor of Law
University of Debrecen Faculty of Law
Head of Géza Marton Doctoral School of Legal and Political Sciences

Appendix B: Research License - NACOSTI



REPUBLIC OF KENYA



NATIONAL COMMISSION FOR
SCIENCE, TECHNOLOGY & INNOVATION

Ref No: 987738

Date of Issue: 22/December/2023

RESEARCH LICENSE



This is to Certify that Mr.. Vincent Godana Yatani of University of Debrecen, has been licensed to conduct research as per the provision of the Science, Technology and Innovation Act, 2013 (Rev.2014) in Nairobi on the topic: Kenya's Asylum System: An Appraisal of Policy and Practice Continuum for the period ending : 22/December/2024.

License No: NACOSTI/P/23/32129

987738

Applicant Identification Number

Director General
NATIONAL COMMISSION FOR
SCIENCE, TECHNOLOGY &
INNOVATION

Verification QR Code



NOTE: This is a computer generated License. To verify the authenticity of this document,
Scan the QR Code using QR scanner application.

See overleaf for conditions

Appendix C: Letter of Authorization - Commissioner DRS



OFFICE OF THE PRESIDENT
MINISTRY OF INTERIOR & NATIONAL ADMINISTRATION
STATE DEPARTMENT FOR IMMIGRATION AND CITIZEN SERVICES

DEPARTMENT OF REFUGEE SERVICES

Website: www.refugee.go.ke
E-mail: refugeeaffairs@refugee.go.ke
Tel: +254-020-4348145
+254-020-4405057

Corporate Place
Upper Hill, Kiambere Rd
P.O Box 42227 - 00100
Nairobi, Kenya

When replying please quote:
DRS/OPER/2/22/VOL IX (12)

13TH JUNE 2024

Vincent Godana Yatani
PhD Candidate
University of Debrecen
Hungary

RE: AUTHORIZATION TO CONDUCT RESEARCH INTERVIEWS AT DRS OFFICES

We refer to your letter dated 22nd MAY 2024, on the above subject.

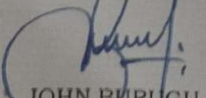
The Commissioner for Refugee Affairs grants authority to Vincent Godana Yatani, Passport No. AK0857081, a PhD candidate to conduct research interview titled "Kenya's Asylum System: An Appraisal of Policy and Practice Continuum" within DRS Offices in accordance with section 33 (1) (2) (3) (4) of the Refugee Act no. 10 of 2021.

While at the department, he will therefore interview officers from the following sections;

1. Protection/Legal
2. RSD
3. Registration & Documentation

This clearance is subject to the following conditions to the visitors:

- i. You MUST all adhere to all security protocols at the offices.
- ii. Your activities shall be objective, balanced and in compliance with the Laws of Kenya.
- iii. You will share a copy of your published work with DRS.
- iv. Officers are free to choose not to answer some questions or not participate completely.


JOHN BURUGU
COMMISSIONER FOR REFUGEE AFFAIRS

Appendix D: Sample Interview Questionnaires



UNIVERSITY OF DEBRECEN
MARTON GÉZA DOCTORAL SCHOOL OF LEGAL STUDIES

Introduction

Kenya is a significant host country for refugees and asylum seekers. This responsibility is guided by legal frameworks encompassing both national and international instruments. As a Researcher in the field of Refugee & Asylum Law, I am currently undertaking a study on, *“Kenya’s Asylum System: An Appraisal of Policy and Practice Continuum.”* The study endeavors to evaluate the extent to which existing asylum policies have been translated into practice as intended in the text of the laws. In recognition of your (*pivotal role as a primary stakeholder in/situation as a subject of*) international protection, your insights hold immense value in shedding light on the practical realities of the system. Therefore, this questionnaire aims to gather information about your experience with Kenya’s asylum system. All responses will be kept confidential and used solely for academic research purposes. Your participation is greatly appreciated.

Part I - The Department of Refugee Services/Department of Immigration, Kenya

1. Background Information

Position: _____

Unit/Section

☐ Protection/Legal

☐ Refugee Status Determination (RSD)

☐ Registration & Documentation

☐ Other (Specify) _____

2. Please provide a general overview of Kenya's asylum system, including its key components and processes.

3. What are the primary legal and policy provisions that outline your unit's mandate?

4. Within your Unit, has all legal/administrative structures envisaged in the governing law been put in place?

☐ Yes

☐ No

Please provide details and examples:

5. Describe key tasks/programmes/activities that your unit undertakes to fulfill its mandate.

6. In your view, to what extent are the mandates of your units being implemented?

- ☐ Fully Implemented
- ☐ Partially Implemented
- ☐ Not Implemented

Please provide details and examples: _____

7. What are your unit's primary challenges in executing your mandate as outlined in law?

8. How efficient is the current registration process for asylum seekers and refugees?

- ☐ Very Efficient
- ☐ Efficient
- ☐ Neutral
- ☐ Inefficient
- ☐ Very Inefficient

Please provide details: _____

9. Please provide any additional information or comments regarding the translation of refugee policy into practice in Kenya.

Part II- United Nations High Commissioner for Refugees (UNHCR)

10. Background Information

Position: _____

Unit/Section _____

11. Please describe the asylum process in Kenya, including the steps involved and timelines for processing claims

12. How does Kenya's asylum system align with international standards for refugee protection?

- ☐ Fully implemented
- ☐ Partially implemented
- ☐ Not Implemented
- ☐ Other:

Please elaborate on the factors influencing your assessment, citing specific examples where possible.

14. From your experience, how efficient is the registration process for asylum seekers and refugees in Kenya?

- ☐ Very efficient
- ☐ Efficient
- ☐ Neutral
- ☐ Inefficient
- ☐ Very inefficient
- ☐ Other:

Please provide details on the strengths and weaknesses observed in the registration process.

15. Where do you see the biggest gaps between policy and practice?

16. Please provide any additional insights or comments regarding the challenges and successes in implementing refugee policies in Kenya.

Part III- Refugees & Asylum Seekers, Kenya

17. Background information

- a) Your country of origin _____
- b) Date of arrival in Kenya _____
- c) Your current legal status in Kenya:
 - ☐ Asylum Seeker
 - ☐ Refugee

18. What was your experience like when you first arrived in Kenya? (please elaborate on whether you were provided with adequate information about the asylum process in Kenya)

19. How long did it take for your asylum claim to be processed?

20. Did you have access to legal representation during your asylum process?

21. How satisfied are you with the protection you continue to receive from the government of Kenya?

- ☐ Very satisfied
- ☐ Satisfied
- ☐ Dissatisfied
- ☐ Very dissatisfied

Please elaborate on your position _____

22. Is there anything else you would like to share about your experiences with Kenya's asylum system regarding policy and practice divergence?

Recommendation for the members of the evaluation committee

PhD Candidate	Vincent Godana Yatani	
Doctoral School	Géza Marton Doctoral School of Legal Studies	
Thesis Title:	Kenya's Asylum System: An Appraisal of Policy and Practice Continuum	
Supervisor:	Prof. Dr. Katalin Szűcs Lászlóné Siska	
Name	Degree, position	Place of Work
Chair of the evaluation committee (professor / professor emeritus)		
Prof. Dr. László Pribula	PhD., habil., professor	University of Debrecen
Opponents		
1. Dr. Szilvia Köbel	PhD., habil., associate professor	Károli Gáspár University
2. Dr. Imola Schiffner	PhD., habil., associate professor	University of Szeged
Substitute opponent (optional)		
Dr. Adrienn Prieger	PhD, assistant professor	Károli Gáspár University
Secretary (optional)		
Dr. Csaba Török	PhD Candidate	Géza Marton Doctoral School, UD
Alternate Secretary		
Dr. Bence Pilisy	PhD Candidate	Géza Marton Doctoral School, UD

Decision of the Social Sciences Doctoral Council:

Decision _____: the evaluation committee has been accepted/accepted/rejected by the Social Sciences Doctoral Council without modification / with the following changes (in case of rejection, justification):

Debrecen, 202_____

President of the Social Sciences Doctoral Council