



Refugees / Migrants

Refugee Mobility, Recognition and Rights

Refugee Recognition Regime

Country Profile: Kenya

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Working Paper No. 05



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About RefMig Project

The RefMig project aims to examine the global refugee regime, with a particular focus on the institutionalisation of the refugee/migrant binary globally. The project is divided into two strands: Recognising Refugees and Organisations of Protection. This report falls under the Recognising Refugees strand, which examines the institutional practices that seek to distinguish refugees from migrants. We take a purposefully broad conception of refugee recognition, encompassing not only individual refugee status determination (RSD) but also the institutional processes that determine access to RSD, as well as various forms of group determination. We examine the role of state institutions in this context (bureaucracies, legislatures, and the judiciary), as well as UNHCR's mandate RSD practices, and its handovers to state authorities.

The project lead is Professor Cathryn Costello. During the RefMig project, she held the positions of Andrew W. Mellon Professor of International Refugee and Migration Law, Refugee Studies Centre, University of Oxford and Professor of Fundamental Rights and Co-Director of the Centre for Fundamental Rights at the Hertie School, Berlin. RefMig obtained ethics clearance from the Central University Research Ethics Committee (CUREC) of the University of Oxford (Ref No: R61177/RE001) and the European Research Council.

RefMig Working Papers are available to download at: <https://www.refmig.org/working-papers>

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The individual interviews and focus group discussions further enrich the report with real life experiences of asylum seekers and refugees and we are extremely grateful to them for sharing their experiences with us. Special thanks to Teddy, a very capable field assistant. We also thank the various translators, both in Nairobi and Kakuma.

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Executive Summary

This report discusses the evolution of the refugee recognition regime (RRR) in Kenya, chiefly over the period of 2000-2020. It highlights the government's responses towards refugee protection, its bifurcated approach towards refugees based on where they reside, the challenges faced by protection seekers in the recognition process, and the shifts in responsibility between the government and UNHCR. The report is based on extensive desk-based research as well as original fieldwork, including interviews and focus group discussions with adult asylum seekers and refugees, as well as officers involved in refugee status determination (RSD) processes. The research targeted refugees and asylum seekers from the top four recognised nationalities in Kenya in the 20-year period: Somalis, South Sudanese, Ethiopians, and Congolese from the Democratic Republic of Congo (DRC). The main findings of the report are provided below.

Norms: Kenya acceded to the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, as well as the 1969 OAU Convention governing the Specific Aspects of Refugee Problems in Africa. The Refugees Act, 2006 is the domestic legislation which provides for the recognition and protection of refugees; the Act splits the definition of 'refugee' into two, albeit non-mutually exclusive categories, 'statutory refugees' (defined as per the 1951 Convention) and '*prima facie* refugees' (as per the expanded OAU Convention definition). In effect, this categorisation serves to determine mainly the mode of recognition. The Refugees Bill, 2019 [as of 2022, in force as the Refugee Act, 2021] consolidates both definitions into one. Regarding exclusions, the Refugees Act uses the term 'disqualification in lieu of exclusion', however the Refugees Bill, 2019 separates grounds of exclusion from grounds of disqualification.

The Refugees Act contains an express prohibition of refoulement, yet there have been numerous cases where Kenyan courts have found government policies and directives to be in contravention of the same. Even though the Kenyan constitution does not contain any provision specific to refugees or asylum seekers, they may benefit from the bill of rights to the extent that the right claimed is not reserved only for citizens. In that regard, article 47 providing for the right to administrative action, and the Fair Administrative Action Act, 2015 which makes RSD decisions subject to judicial review, benefit refugees and asylum seekers.

Institutions: With the Refugees Act in 2006, the institutions for the RSD process were established in Kenya. The statutory and advisory bodies responsible for refugee affairs, such as the Refugee Affairs Secretariat (RAS), function under the oversight of the Ministry of Interior and Coordination. The RAS is headed by a Commissioner who is the deciding authority on asylum applications, and appeals against the Commissioner's decision can be filed with the Refugee Appeal Board. Despite the statutory provisions, as UNHCR continued to handle RSD until 2014, some statutory bodies were not fully functional until the handover of most operational aspects of RSD from UNHCR to government institutions.

Modes of Recognition: In Kenya, the modes of refugee recognition, depending on the nationality of individuals, are *prima facie* recognition and individual RSD. *Prima facie* recognition has been employed in situations of mass influx and has been used for Somalis, Ethiopians, and Sudanese. The Refugees Act makes provisions for who may be recognised on a *prima facie* basis; however, the process has been inscrutable and the Refugees Bill, 2019 is likely to make the decision making more transparent. As there was a mounting case backlog at the time of the handover process, UNHCR and RAS further implemented two simplified case processing approaches, the Rapid Results Initiative and simplified RSD, for specified cases.

Quality of Recognition Processes: The *accessibility* of refugee recognition procedures have not been greatly affected by the RSD transition and hence practices followed during UNHCR RSD have

continued. For those in the camps, most processes take place in different locations spread across the camps and walking to access them can be quite onerous. Regarding UNHCR's and RAS' decision-making *accuracy*, it can be stated that due to the predominant role of UNHCR until 2014 and the exclusive training provided by UNHCR to RAS, Kenyan officials are guided by both the Refugees Regulations and UNHCR standards in the conduct of RSD. With respect to *efficiency*, both UNHCR and RAS have faced challenges such as case backlog and delays in case processing. Further, there were also concerns regarding lack of clear communication to applicants and insufficient staffing. Finally, regarding *fairness*, despite standards regarding procedural fairness and administrative justice, a majority of participants in the focus group discussion perceived the RSD process as unfair. The long time for the decision making and the lack of communication were mentioned as main reasons.

Quality of Protection: Despite asylum applicants and refugees receiving valid documentation to remain in Kenya, they frequently experienced police harassment and exploitation, particularly in urban areas. Regarding prospects for permanent residency and citizenship, the Refugees Act, 2006 contains no provisions for the same. Refugees, therefore, are subject to the same requirements as all other foreign nationals; however, due to the encampment policy, refugees and asylum seekers find it difficult to meet the eligibility criteria for permanent residence or citizenship. Another consequence of Kenya's encampment policy is that refugees must obtain a movement pass to travel outside the camps, which is normally granted for specific purposes and a limited period of time. Despite the legal opportunity to apply for a work permit, refugees find it difficult to obtain necessary work permits, and many are self-employed. Regarding access to education, the government provides free primary education for children in government schools, including refugees and asylum seekers, however producing birth certificates to register for examinations can be challenging. At camps, education up to secondary level is provided for free by UNHCR and its partners, but the number of refugees enrolled in school dwindles at higher levels of education. With respect to healthcare, UNHCR and other international organisations provide free services in camps, but the costs in urban areas are prohibitive for refugees.

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Acronyms

ASP	Asylum Seeker Pass
BIMS	Biometric Identity Management System
COI	Country of Origin Information
CSO	Civil Society Organisation
DRA	Department of Refugee Affairs
DRC	Democratic Republic of Congo
FAAA	Fair Administrative Action Act
FGD	Focus Group Discussion
HRW	Human Rights Watch
ID	Identity
KASI	Kiosk for Access Service and Information
KCIA	Kenya Citizenship and Immigration Act
NACOSTI	National Commission for Science, Technology and Innovation
NGO	Non-Government Organisation
NHIF	National Health Insurance Fund
KES	Kenya Shillings
NRC	Norwegian Refugee Council
IHRC	International Human Rights Clinic
NRB	National Registration Bureau
OAU	Organisation of African Unity
ProGres	Profile Global Registration System
RAB	Refugee Appeal Board
RAC	Refugee Affairs Committee
RAS	Refugee Affairs Secretariat
RCK	Refugee Consortium of Kenya
RRI	Rapid Results Initiative
RRR	Refugee Recognition Regime
RSD	Refugee Status Determination
TAC	Technical Advisory Committee
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
USD	United States Dollars

I. Introduction

Since the early 1990s, Kenya has hosted hundreds of thousands of refugees, the majority of whom are from countries within the region. By the end of December 2020, the total number of refugees and asylum seekers in Kenya was estimated at 504,854, the highest populations of whom were from Somalia, South Sudan, Democratic Republic of Congo and Ethiopia respectively.¹ The majority (84%) of the refugee population resides in one of two refugee camp complexes, Dadaab, which is considered one of the world's largest camps, and Kakuma. The remaining 16% reside in urban areas, mainly in Nairobi, the country's capital city.²

Kenya has had a varied history of refugee status determination (RSD). Pre-1990, the Government of Kenya was in charge of refugee status determination, which came under the aegis of the Immigration Act (1967) and the Aliens Restriction Act (1973), neither of which contained explicit provisions on RSD.³ The refugee management structures were part and parcel of immigration control, which could only handle a small number of refugees. When the numbers increased exponentially in the 1990s, the government relinquished its RSD responsibility to the United Nations High Commissioner for Refugees (UNHCR), who also took on the overall responsibility for the provision of services and humanitarian assistance to refugees in areas allocated by the government. Hence the establishment of the camps, which Hyndman refers to as a 'strategy for containment with assistance'.⁴ The camps may have been established as an emergency response to what was initially thought of as a temporary situation but this situation has since become so protracted and without a definite end in sight. Although Kenya later enacted a Refugees Act in 2006, its implementation was delayed. UNHCR continued to conduct RSD until 2014, when the Government of Kenya, triggered by security concerns and increasingly restrictive refugee policies, effectively took over the responsibility.

This report sets out Kenya's refugee recognition regime (RRR), which, as used by the RefMig project, encompasses not only individualised refugee status determination (RSD), but also the practices that determine access to that process, such as registration and the alternatives to it, including a range of forms of group recognition. RRR refers to the norms, institutions and practices that govern access to refugee protection, which, by definition, vary significantly from state to state. This report discusses the evolution of Kenya's RRR over the last 20 years and more, focussing chiefly on the period 2000-2020 but providing some pre-2000 insights in as far as they explain the evolving refugee recognition practices and offering insights into more recent developments, where pertinent. It highlights the shifts in the government's response towards refugee protection, which are often mixed and may sometimes seem contradictory. The report also illustrates Kenya's bifurcated approach towards refugees based on where they reside. The camp-based refugees are essentially dependant on UNHCR and Non-Government Organisations (NGOs) for basic social services and material assistance. The urban-based refugees largely fend for themselves, not receiving any humanitarian assistance except for those that meet specific vulnerability criteria.⁵ As far as refugee recognition processes go, for camp-based refugees the process is comparatively less convoluted than for urban-based refugees. As this report will highlight, the refugee recognition processes in Kenya have been fraught with a number of challenges, not least of which are long waiting periods or asylum limbo, except for those refugees that benefit from *prima facie* refugee status. The report also explains the RSD process in more detail, tracing the various shifts in the responsibility from government to UNHCR and back to the government, with the latest shift still very much a transition in progress. Change is not only happening between the RSD decision-making bodies but deliberations are ongoing to revise the refugee laws to reflect some of the changes brought about by the government's resumption of RSD and also to fill in some of the gaps in the current laws.

¹ UNHCR, *Refugees and Asylum Seekers in Kenya: Statistical Summary as of 31 December 2020* available at <https://www.unhcr.org/ke/wp-content/uploads/sites/2/2021/01/Kenya-Statistics-Package-31-December-2020.pdf>. Up-to-date statistics are available at <https://www.unhcr.org/ke/857-statistics.html>.

² UNHCR, *ibid.*

³ E O Abuya, 'Past Reflections, Future Insights: African Asylum Law and Policy in Historical Perspective' (2007) 19(1) *International Journal of Refugee Law* 51, 59-60.

⁴ J Hyndman, *Managing Displacement: Refugees and the Politics of Humanitarianism* (University of Minnesota 2000) 23.

⁵ UNHCR, *Navigating Nairobi: a Re view of the Implementation of UNHCR's Urban Refugee Policy in Kenya's Capital City* (UNHCR 2011).

One of the arguments of the report is that the government's stance towards refugee protection is quite ambivalent, often driven by security concerns, which renders the future of refugee recognition in Kenya uncertain and indeed refugee protection generally. Consequently, the courts of law are increasingly called upon to mediate the ambivalence of the government's approach, especially where it potentially threatens the rights of refugees in the country. A further argument is that, even though UNHCR has recently taken a back seat in the refugee recognition process, it continues to play a vital role in Kenya's RRR, which remains heavily reliant on UNHCR's assistance and intervention.

The sections that follow discuss the relevant literature on refugee recognition in Kenya, the research methodology, the historical background to Kenya's current RRR, the norms governing refugee recognition, the institutions responsible for refugee recognition, the modes of recognition and the quality of the recognition process respectively. Subsequently, the report examines the quality of protection associated with asylum in Kenya, both *de jure* and *de facto*. Additionally, the report briefly discusses the role of NGOs in Kenya's RRR and some of the impacts of the COVID-19 pandemic.

II. Literature Review

There is a fair amount of cross-disciplinary literature on refugees in Kenya but the aspect of refugee recognition or RSD remains largely under-studied. Scholars and researchers have studied the situation of refugees in Kenya based on the camp-based versus urban-based binary. Hyndman, drawing both on her work experience with UNHCR and ethnographic research, decries the very notion of camps as a long-term solution to managing refugee situations, arguing that, despite providing short-term safety, 'they also institutionalize long-term exclusion, marginalization, and the waste of both human and financial resources'.⁶ She draws attention to the human rights violations that are inevitably associated with encampment, not least the restrictions on freedom of movement imposed on camp-based refugees.⁷ Harrell-Bond and Verdirame's study on refugee camps referred to the entire phenomenon as a 'warehousing' of refugees, where 'human rights violations can be perpetrated with impunity'.⁸ They further bitingly criticise UNHCR and international NGOs for arrogating state responsibilities to themselves and operating without effective accountability to any authority. Yet to some other scholars, including Verdirame in some of his works, it is not a case of UNHCR's arrogation but rather the government's 'abdication of its responsibilities'.⁹ It remains largely unclear what the exact terms of the agreement were between UNHCR and the government, prior to the former's assumption of RSD responsibilities. Neither do available UNHCR reports on Kenya for the years 1990-1993 contain reference to any such agreement.

Specific studies into the refugee recognition process are, however, scant. A number of cross-cutting themes emerge out of the literature on refugee recognition. One theme looks into modes of recognition, with a tendency to interlace with the camp-based versus urban-based binary. The Government of Kenya has recognised refugees either through individual status determination or via *prima facie* recognition. According to Hyndman, camp refugees were predominantly *prima facie* refugees¹⁰ but, with the government's increasingly stringent application of the encampment policy, the manner of recognition is irrelevant for where one resides. *Prima facie* recognition is usually applied to refugees who fall within the OAU Convention's expanded definition (see section V), and indeed, in her research on its usage,

⁶ J Hyndman, *Managing Displacement* (n4) 178.

⁷ J Hyndman & B F Nylund, 'UNHCR and the Status of *Prima Facie* Refugees in Kenya (1998) 10(1/2) *International Journal of Refugee Law* 21, 38-42

⁸ B Harrell-Bond & G Verdirame, *Rights in Exile: Janus-Faced Humanitarianism* (Berghahn Books 2005) xvii. See also, R Jaji, 'Social Technology and Refugee Encampment in Kenya' (2012) 25(2) *Journal of Refugee Studies* 221-238, L S Newhouse, 'More than Mere Survival: Violence, Humanitarian Governance, and Practical Material Politics in a Kenyan Refugee Camp' (2015) 47(11) *Environmental and Planning*, 2292-2307; B Jansen, *Kakuma Refugee Camp: Humanitarian Urbanism in Kenya's Accidental City* (Zed Books 2018); H Brankamp, "'Occupied Enclave': Policing and the Underbelly of Humanitarian Governance in Kakuma Refugee Camp, Kenya' (2019) 71 *Political Geography* 67-77.

⁹ G Verdirame, *The Rights of Refugees in Kenya: A Socio-Legal Study*, Refugee Studies Program Report 2000, 33; J Milner, *Refugees, the State and the Politics of Asylum in Africa* (Palgrave Macmillan 2009) 88; P M Kagwanja, 'Strengthening Local Relief Capacity in Kenya: Challenges and Prospects', in M Juma & A Suhrke (eds), *Eroding Local Capacity: International Humanitarian Action in Africa* (Nordiska Africa Institute 2002) 94, 102; Refugee Consortium of Kenya (RCK), 'Refugee Management in Kenya' (January 2003) 16 *Forced Migration Review* 17.

¹⁰ Hyndman & Nylund, 'UNHCR and the Status of *Prima Facie* Refugees' (n7).

Tamara Wood finds that the expanded definition is almost never used in individual RSD.¹¹ The literature on *prima facie* recognition is not only scant, but the decision-making process itself remains opaque, even though it is the mode under which the majority of refugees in Kenya have been recognised.¹² On the other hand, there are some studies that examine the individual status determination as it has pertained to the different phases of RSD transition in Kenya.

There are some studies that briefly look into the pre-1990s government RSD but are by no means an in-depth examination of the process.¹³ A couple of UNHCR studies illuminate RSD management and practices in Kenya, particularly during the early stages of the RSD transition period, but they do not offer penetrating insights into the quality of the process.¹⁴ For the UNHCR RSD period, Edwin Abuya's work in the early 2000s critically interrogated UNHCR's RSD processes in Kenya and highlighted several shortcomings, notably the inadequate staffing and financial resources, which inevitably impacted on the efficiency, accuracy and fairness of the process.¹⁵ Although this work relates to a period prior to the current RRR, which we examine in this report, it is instructive for comparing aspects of UNHCR versus government-led RSD. Rose Jaji's ethnographic study provides more recent insights of the RSD process undertaken during early phases of the RSD transition from UNHCR to the government, throws doubt on the accuracy of the RSD process in her examination of the role of credibility assessments by RSD officers and concludes that it is 'a subjective exercise, which leaves decisions to individual RSD officials' discretion, leading to inconsistency in decisions on refugee applications of similarly-situated applicants'.¹⁶

In addition, NGO reports, written at different points in time since the enactment of the Refugees Act right up to the recent RSD handover period, have likewise identified similar shortcomings of the RSD process, noting particularly the lack of information given to asylum seekers and refugees on almost all RSD-related processes.¹⁷ Nonetheless, there has yet to be a systematic study of the refugee recognition processes since the government fully resumed the RSD function from UNHCR, a gap that this report partially, if modestly, fills in its evaluation of the quality of the recognition process (section VIII).

The scant literature on refugee recognition processes is complemented by significant bodies of literature on diverse aspects of refugee life and protection in Kenya. Some of the more explored themes are: the plight of urban refugees,¹⁸ refugees' modes of survival and self-sufficiency and their valuable

¹¹ T Wood, 'Expanding Protection in Africa? Case Studies of the Implementation of the 1969 African Refugee Convention's Expanded Refugee Definition' (2015) 26(4) *International Journal of Refugee Law* 555-580.

¹² See C Costello et al, 'Recognising Refugees: Understanding the Real Routes to Recognition' (2020) 65 *Forced Migration Review* 5-6.

¹³ Verdirame, 'The Rights of Refugees in Kenya' (n9), UNHCR, *Analysis of Refugee Protection Capacity – Kenya* (UNHCR April 2005) available at <https://www.refworld.org/docid/472896f70.html>.

¹⁴ UNHCR, *Providing for Protection: Assisting States with the Assumption of Responsibility for Refugee Status Determination - a Preliminary Review*, March 2014, para 82, PDES/2014/01, available at <https://www.refworld.org/docid/53a160444.html>; UNHCR, *Building on the Foundation: Formative Evaluation of the Refugee Status Determination Transition Process in Kenya*, April 2015, para 110, PDES/2015/01, available at <https://www.unhcr.org/uk/research/evalreports/5551f3c49/building-foundation-formative-evaluation-refugee-status-determination-rsd.html>.

¹⁵ E O Abuya, 'United Nations High Commissioner for Refugees and Status Determination Imtaxaan in Kenya: An Empirical Survey' (2004) 48 (2) *Journal of African Law* 187-206; Abuya, 'Past Reflections, Future Insights' (n3); E O Abuya & G M Wachira, 'Assessing Asylum Claims in Africa: Missing or Meeting Standards?' (2006) LIII *Netherlands International Law Review* 171-204.

¹⁶ R Jaji, 'Refugee Law, Agency and Credibility in Refugee Status Determination' 2018 (1) *German Journal of Refugee Studies* 32-56.

¹⁷ Human Rights Watch (HRW), *From Horror to Hopelessness: Kenya's Forgotten Somali Refugee Crisis* (HRW 2009); Refugee Consortium of Kenya (RCK) & Danish Refugee Council, *Is my Claim Meritorious? Congolese Experience of the Refugee Status Determination Process in Kenya* (RCK 2014); Norwegian Refugee Council (NRC) & International Human Rights Clinic (IHRC), *Recognising Nairobi's Refugees: The Challenges and Significance of Documentation Proving Identity and Status*, (NRC/IHRC, 2017).

¹⁸ P Kagwanja et al, 'Urban Refugees in Kenya: a Review of the Literature', *Occasional Paper No. 2, Centre for Refugee Studies* (Moi University 2001); J B Wagacha & J Guiney, 'The Plight of Urban Refugees in Nairobi, Kenya' in D Hollenbach, *Refugee Rights, Ethics and Advocacy in Africa* (Georgetown University Press 2008) 91-101; E Campbell, 'Urban Refugees in Nairobi: Problems of Protection, Mechanisms of Survival, and Possibilities for Integration' (2006) 19(3) *Journal of Refugee Studies* 396-413; S Pavanello et al, *Hidden and Exposed: Urban Refugees in Nairobi, Kenya* (2010) *Humanitarian Partnership Group Working Paper* accessed at <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publicationsopinion-files/5858.pdf>; C Hough, 'Newcomers to Nairobi: the Protection Concerns and Survival Strategies of Asylum Seekers in Kenya's Capital City' *New Issues in Refugee Research*, Research Paper No 260 (UNHCR 2013); L Juma, 'Protection of the Rights of Urban Refugees in Kenya: Revisiting *Kituo cha Sheria v The Attorney General*'

contribution to a country's economy,¹⁹ with a specific body of literature that focuses on Somali refugees, who constitute the majority in Kenya and are often disproportionately targeted by the government's restrictive refugee policies and are also victims of systematic discrimination.²⁰

III. Methodology

This research examines refugee recognition in Kenya over a 20-year period (1999-2019) in order to provide a long view of the evolution of the practices, policies and norms relating to refugee recognition in Kenya. Although the end date is 2019, when the field work was undertaken, this report covers some of the relevant subsequent developments.

Our research on Kenya's refugee recognition regime commenced in late 2018, with extensive desk-based research into laws, policies, statistics on asylum seekers and refugees, existing literature, including scholarly material and reports by various organisations and institutions both international and domestic. The author paid a preliminary one week visit to Nairobi in December 2018. The purpose was to scope out key organisations to interview, the current situation of refugees as well as critical research requirements for undertaking research in Kenya.

The research was subject to multi-level, rigorous research and ethics clearances by the University of Oxford, the European Research Council and the Kenya National Commission for Science, Technology and Innovation (NACOSTI). The research further had to be cleared and approved by the Nairobi City Council, the Refugee Affairs Secretariat in Nairobi and the Camp Manager's Office in Kakuma. The British Institute for Eastern Africa (BIEA) helped us obtain the NACOSTI research permit. Once we had obtained all the necessary permits and clearances, we commenced fieldwork from May to July 2019. The fieldwork research revolved mainly around interviews, held in both Nairobi and Kakuma, and two focus group discussions in Nairobi.

We conducted 23 formal elite interviews with various respondents, including NGO officials, a refugee law practitioner and an academic, government officials in charge of refugee affairs, RSD officers, UNHCR RSD officers and an Australian embassy official (for a breakdown of elite interviews, see appendices, table 5). These interviews provided first-hand information on practices and processes on refugee recognition, refugee policies and the rights and practical realities of asylum seekers and refugees in Kenya. The interviews with RSD officers, both government and UNHCR, provided insights into the RSD process from the point of registration right up to when a refugee receives their identity card.

(2018) 33(2) *Southern African Public Law* 1-24. In addition to academic literature there are some report by NGOs and UNHCR. See UNHCR, *Navigating Nairobi* (n5); HRW, *Hidden in Plain View: Refugees Living without Protection in Nairobi and Kampala* (HRW 2002); RCK, *The Status of Legal Integration of Refugees in Kenya: a Nairobi Case Study* (RCK, October 2016).

¹⁹ E Campbell, 'Formalizing the Informal Economy: Somali Refugee and Migrant Trade Networks in Nairobi' (2005) *Global Migration Perspectives*, Working Paper No. 47; C Horst, *Transnational Nomads: How Somalis Cope with Refugee Life in the Dadaab Camps of Kenya* (Berghahn 2006); E Campbell et al, 'Congolese Refugee Livelihoods in Nairobi and the Prospects of Legal Local Integration' (2006) 25(1) *Refugee Survey Quarterly* 93-108; N Omata, 'Refugee Economies in Kenya: Preliminary Study in Nairobi and Kakuma Camp', *RSC Working Paper Series No. 120* (Refugee Studies Centre, University of Oxford 2016); A Sanghi et al, "Yes" in My Backyard? : *The Economics of Refugees and Their Social Dynamics in Kakuma, Kenya* (World Bank 2016); J Alix-Garcia et al, 'Do Refugee Camps Help or Hurt Hosts? The Case of Kakuma, Kenya' (2018) 130 *Journal of Development Economics* 66-83; A Betts et al, *Self-reliance in Kalobeyei? Socio-economic Outcomes for Refugees in North-west Kenya* (Refugee Studies Centre, University of Oxford 2018); A Betts, 'The Kalobeyei Settlement: a Self-reliance Model for Refugees?' (2020) 33(1) *Journal of Refugee Studies* 189-223; RCK, *Myths and Truths: The Facts about Refugee Self-sufficiency and Economic Contribution in Nairobi* (RCK 2016).

²⁰ O Otunnu, 'Factors Affecting the Treatment of Kenyan-Somalis and Somali Refugees in Kenya: a Historical Overview' (1992) 12(5) *Refugee* 21-26; Milner, *Refugees, the State and Politics in Africa* (n9) 84-107; A Lindley, 'Between a Protracted and a Crisis Situation: Policy Responses to Somali Refugees in Kenya' (2011) 30(4) *Refugee Survey Quarterly* 14-49; A Betts, *Survival Migration: Failed Governance and the Crisis of Displacement* (Cornell University 2013) 135-159; A M Abdullahi, *Protection of Refugees under International Law and Kenya's Treatment of Somali Refugees: Compliance or Contrary?* (University of Nairobi 1993); M Samora, 'The Somali Question. (Somali Refugees in Kenya)' (2013) 30(3) *World Policy Journal* 99-106; O G Mwangi, 'Securitisation, Non-refoulement and the Rule of Law in Kenya: the Case of Somali Refugees' (2018) 22 *The International Journal of Human Rights* 1318-1334; R Jaji, 'Somali Asylum Seekers and Refoulement at the Kenya-Somalia Border' (2013) 28(3) *Journal of Borderland Studies* 355-368; HRW, "Welcome to Kenya": *Police Abuse of Somali Refugees* (HRW 2010); HRW, "You are all Terrorists": *Kenyan Police Abuse of Refugees in Nairobi* (HRW 2013).

Although the author of this report was not able to directly observe the actual RSD interviews and related processes, she was provided detailed accounts by the officers involved in the different stages of the entire process. Interviews with UNHCR officials were particularly enlightening about the RSD transition. All elite interviewees gave informed consent to the interview, having received participant information sheets explaining the project and its objectives, the data protection measures and complaints mechanism in case they bore any grievances.

The research targeted adult asylum seekers and refugees from the top four recognised nationalities in Kenya over the 20-year period. These nationalities have been more or less consistent and they are comprised of nationals from Somalia, South Sudan (formerly part of Sudan), Ethiopia and the Democratic Republic of Congo (DRC) (see appendices, table 2). Other refugee nationalities that we interacted with, mainly in the focus group discussions, were from Rwanda and Burundi. These were randomly selected from lists of willing participants provided by community leaders. (for the breakdown, see appendices, table 3). One outlier among the interviewees was a (former) Burundian refugee, whose inclusion was based on the fact that he had acquired Kenyan citizenship. It was, therefore, of interest to learn how he had managed to attain that change in legal status.

Before each interview, the researcher, in some cases with the aid of a translator, would explain the objectives of the research, data protection and confidentiality measures and that participation was voluntary. Interviewees could withdraw their consent at any time in the interview and the researcher explained to them the complaints mechanism in case they were discontented with the research. Most individual interviewees gave oral consent to the interview. We worked with field assistants, who also assisted with translation where necessary. Translations were needed for Swahili speakers (mainly from DRC), Ethiopians and Somalis. For interviews with Ethiopians and Somalis, we worked with trusted community leaders, who also assisted with the translation.

Interviews were held both in Nairobi and Kakuma. In Nairobi, refugees of all nationalities can be found in a single community or location, which is not necessarily the case in Kakuma. Kakuma is divided into four major camps (Kakuma I-IV plus the more recently developed Kalobeyei Settlement) and each camp has a predominant nationality or nationalities. All our interviews were conducted in Kakuma I, so there is a higher representation of refugees and asylum seekers from DRC than other nationalities (see appendices, table 3).

We also held two focus group discussions with refugees and asylum seekers. The first one was held in Eastleigh, Nairobi with eight Somali refugees, men and women, who shared their experiences of integration and the everyday challenges that they, as Somalis, face. The second focus group discussion of 14 participants was a diverse representation of men and women from different age groups, different legal statuses (asylum seekers, refugees and rejected asylum seekers) and different nationalities (Somalis, Ethiopians, Congolese (DRC), South Sudanese, Rwandans and Burundians) (see appendices, table 4). This diverse focus group provided insight into refugees' and asylum seekers' perceptions and experiences of the recognition process and integration in Kenya and aspects which needed improvement.

One of the limitations of our methodology was that, by selecting the top four refugee populations, it conversely reduced the chances of meeting asylum seekers who had been rejected. Thus, we only had two rejected asylum seekers among our interviewees, a number so small that we could not draw any generalised conclusions from their stories regarding either the fairness or accuracy of RSD decisions. Additionally, we could not access a representative sample of case files from either UNHCR or RAS to enable us to objectively assess the elements of accuracy and fairness in the decisions. For our assessment on these elements of the process, we, therefore, mainly rely on the individual perceptions of asylum seekers and refugees.

IV. Historical Synopsis of Kenya's RRR

Due to the limited literature on refugee recognition, there are only a few sources cited in this section, from which we draw some historical insights of RSD prior to the 1990s. Most of these sources give a sketchy description and do not aim to critically examine the RSD process at that time.

For a long time, since it attained independence in December 1962, Kenya did not have specific legislation on refugees and, as such, the processes of recognising refugees were not clearly streamlined. The key piece of legislation was the Immigration Act, under which refugees were subject to the same processes as other immigrants when applying for entry and residence.²¹ The Act adopted the refugee definition contained in the 1951 UN Convention Relating to the Status of Refugees, which Kenya had ratified in 1966 (more details in the next section), whereby anyone fitting that definition could be granted a Class M Permit, issued gratis by the immigration authorities. In addition, the Aliens Restriction Act also contained some provisions relevant for the management of refugee affairs in Kenya, such as requiring an alien to register with the authorities within 90 days of entry into Kenya, a provision that was reportedly not consistently implemented.²² The Act further empowered the Minister to require aliens to reside or remain within certain places or districts or prohibit them from residing or remaining in any specified areas during times of emergencies.²³ The refugee framework was, therefore, based on these scant legal provisions.

Neither legislation provided any administrative structures for refugee management but, in practice, there was a National Refugee Secretariat under the Ministry of Home Affairs, which later became the Ministry for Immigration, Registration of Persons and Refugees under the Office of the President. Within the Secretariat was an Eligibility Committee, which decided on asylum seekers' applications, managed the Special Programme of Refugees to dispense the government's refugee policy and coordinated the activities of the various government bodies involved with refugees as well as acting as a liaison for UNHCR.²⁴

Regarding the assessment of asylum claims, the Eligibility Committee would conduct interviews twice a week at a reception centre located in Thika town. The interviews were based on a questionnaire previously filled in by the applicant, in which they explained their reasons for seeking asylum. Following the interview, successful applicants had to undergo security vetting by the Intelligence Agency (Special Branch), whose clearance was a prerequisite for being granted asylum by the Ministry of Home Affairs.²⁵ Upon recognition as a refugee, one would apply for a Certificate of Registration (also referred to as an 'Alien Card'), which was issued free of charge and had a renewable validity period of two years.²⁶ Refugees could also apply for a Class M Permit, which entitled them to engage in any occupation, trade, business or profession.²⁷ However, it was government policy that priority in employment was to be given to competent and trained Kenyan citizens²⁸.

The government's RSD process was not without its shortcomings, many of which are apparent in UNHCR's annual protection reports in the early 1990s. Firstly, the meetings of the Eligibility Committee became increasingly *ad hoc* by 1990, leaving many asylum seekers in limbo. This was coupled by a high rejection rate, which the UNHCR estimated at about 75% in 1990, as Kenya's asylum policy became increasingly hostile. Many were rejected because they were not cleared by the Special Branch but some rejections were also based on Kenya's capacity to absorb refugees rather than on substantive grounds.²⁹ The rejected refugees, who had been accepted by the Eligibility Committee but were not cleared by the Special Branch, were referred to by the government as 'mandate refugees' whom UNHCR was expected to resettle.³⁰ Secondly, the process lacked transparency and independent oversight. Even though rejected applicants had the option to appeal, the appeal was internal and decided upon by senior members of the Eligibility Committee.³¹ Even then, there was still the security clearance hurdle. The lack of transparency was compounded by the fact that the entire RSD framework and

²¹ Immigration Act, cap 172, Laws of Kenya, entered into force on 1 December 1967.

²² Aliens Restriction Act, cap 173, Laws of Kenya, section 4; Abuya, 'Past Reflections, Future Insights' (n3) 62-63); UNHCR, *Analysis of Refugee Protection Capacity* (n13) para 12.

²³ Aliens Restriction Act, section 3 (1) (c) & (d).

²⁴ Abuya, 'Past Reflections, Future Insights' (n3) 63; UNHCR, *Analysis of Refugee Protection Capacity - Kenya* (n13) paras 13-14.

²⁵ Abuya, *ibid*, 65-69; UNHCR, *Kenya 1990 Annual Protection Report*, para 1.1.1 available at <http://swigea56.hcrnet.ch/refworld/docid/3ae6b4081c.html>

²⁶ Aliens Restriction Act, section 6 (1) & (2).

²⁷ Immigration Act, section 6 (3).

²⁸ Explanatory note on Application for an entry permit as stated on the application form.

²⁹ UNHCR, *Kenya 1990 Annual Protection Report* (n25).

³⁰ UNHCR, *Ibid*. The report explains that a number of these mandate refugees remained in the country for several years. It is not clear whether they were all ever resettled.

³¹ Abuya, 'Past Reflections, Future Insights' (n3) 69.

structures existed in a legal vacuum, with the prevailing laws proving rather inadequate to deal with a refugee situation that seemed to be getting out of control. Thirdly, from January 1989, mandate refugees and asylum seekers were required to stay at established refugee reception centres, such as the one at Thika (with a maximum capacity of 500 persons), or camps established near the borders, such as at the Ethiopian-Kenya border, as they awaited the completion of their RSD process or were resettled.³² The government increasingly pushed refugees and asylum seekers into camps. When the refugee population rose exponentially in the early 1990s, the Kenyan RSD set-up was more or less in a derelict state and it was, therefore, no surprise that the responsibility for RSD fell to UNHCR, which carried on with the government preferred encampment policy.

Efforts towards enacting a refugee-specific law, by one account, began in the 1980s but, owing to domestic and regional politics, the draft was never submitted to parliament.³³ Other accounts, though, trace the process to the early 1990s, in the wake of the refugee influx, mainly from Somalia.³⁴ Accordingly, a Refugee Bill was drafted in 1991 and reviewed in 1994 by the government, UNHCR and some NGOs. The draft was considered unacceptable and the Bill was shelved³⁵. The government resumed consultations on a subsequent draft in 1999, which eventually became the 'Refugees Bill, 2000'. The Bill went through various iterations before it was presented in parliament as the 'Refugees Bill, 2006' and it was unanimously voted into law³⁶. Explaining what may have caused such a convoluted process, one refugee law expert was of the view that the government was 'reluctant to adopt law, since legislation brings about responsibility and requires resources, which the government was not willing to invest [in] for refugees'.³⁷

V. Norms, Refugee Definition and *Non-refoulement*

This section sets out the norms, both international and domestic, that apply to refugees in Kenya. Kenya is party to relevant international refugee law conventions as well as a number of human rights treaties. Its Constitution contains a bill of rights with many of its provisions applicable to every person in Kenya. Kenya's law on refugees, the Refugees Act, 2006 and its enabling regulations are, at the time of writing, undergoing review. At the time of writing this report, the new Refugees Bill, 2019 was laid before parliament and had gone through its second reading.

a) International Law

Kenya acceded to the 1951 United Nations Convention, relating to the status of refugees (1951 UN Convention), and its 1967 Protocol on 16 May 1966 and 13 November 1981 respectively. On 23 January 1993, it acceded to the 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa (1969 OAU Convention). In addition to the refugee specific instruments, Kenya is also party to a number of human rights treaties, both international and regional, including the International Covenant on Civil and Political Rights (acceded to on 1 May 1972); the International Covenant on Economic, Social and Cultural Rights (acceded to on 1 May 1972) and the African Charter on Human and Peoples' Rights (acceded to on 23 January 1992), among others.

International law forms part of the laws of Kenya,³⁸ although there is an ongoing scholarly and judicial debate on whether Kenya is a dualist or monist state.³⁹ Notwithstanding what is essentially an academic

³² UNHCR, *Kenya 1990 Annual Protection Report* (n25), Abuya 'Past Reflections, Future Insights' (n3) 71.

³³ L E Abdelataay, *Discrimination and Delegation: Explaining State Responses to Refugees* (Oxford University Press 2021) 135.

³⁴ Verdirame, *The Rights of Refugees in Kenya* (n9) 58.

³⁵ History of the enactment of the Kenya Refugees Act as narrated at <https://www.rckkenya.org/refugees-asylum-seekers-and-returnees/> accessed on 5 September 2019.

³⁶ RCK website, *ibid*.

³⁷ Interview KN_EL_02, 6 June 2019.

³⁸ The Constitution of Kenya, 2010, Article 2 (5) & (6).

³⁹ M Wabwile, 'The Emerging Juridical Status of International Law in Kenya' (2013) 13 (1) *Oxford University Commonwealth Law Journal* 167-189, 172; *The Matter of Zipporah Wambui Mathara* [2010] eKLR; *Walter Osapiri Barasa v Cabinet Secretary Ministry of Interior and National Co-ordination & 6 Others* [2014] eKLR, para 50; *Kasamani v Concord Insurance and another*, High Court, Constitutional Division, *Petition 303 of 2015*, para 35; *Diamond Trust Ltd v*

debate, Kenyan courts have often referred to international refugee law norms to reinforce the government's obligations towards refugees, including protection from non-*refoulement*, as demonstrated in a number of cases referred to in this report. Even more so, international refugee law has served as a model for Kenya's domestic refugee law and provides the standards, against which the government is held to account for its approach towards refugees, including reception, recognition and ensuing protection.

b) The Constitution of Kenya 2010

The Constitution of Kenya 2010 was adopted on 4 August 2010 and promulgated on 27 August 2010, following a constitution review process that lasted over a decade. Besides the provisions on the applicability of international law discussed above, the Constitution also embodies a bill of rights that guarantees a range of civil, political, social and economic rights.⁴⁰

The Constitution does not contain any provision specific to refugees or asylum in Kenya, but refugees and asylum seekers may benefit from the bill of rights to the extent that the right claimed is not reserved only for citizens. In terms of refugee recognition, article 47 is of particular importance, as it provides for 'the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair'. The Fair Administrative Action Act, discussed herein below, elaborates upon this provision, which, for the purposes of refugee recognition, provides an avenue for the judicial review of RSD decisions for asylum seekers that may be aggrieved by the process as laid out under the refugee law.

c) Refugees Act, 2006 and Regulations, 2009

Kenya's Refugees Act No. 13 of 2006 came into force on 15 May 2007, while its subsidiary legislation, the Refugees (Reception, Registration and Adjudication) Regulations came into force in 2009. According to its long title, the Refugees Act provides for the "recognition, protection and management of refugees and for connected purposes". It defines a 'refugee', persons that are 'disqualified' from refugee status and cessation of refugee status (sections 3-5); it establishes institutions for the management and handling of refugees' affairs and appeals (sections 6-10, 17, 22); recognition of refugees and rights while the refugee status is pending and after it is granted (sections 12-16) and withdrawal of refugee status and expulsion (sections 20-21). The Act further makes special provision for female refugees and children (section 23) and provides information for offences (section 25), among others. The Regulations, as indicated in their title, elaborate upon the asylum process and its adjudication.

Refugee Definition

The Refugees Act defines a refugee as falling into one of two categories. The first category is a 'statutory refugee' who, defined in terms of the 1951 UN Convention,⁴¹ is a person who 'owing to a well-founded fear of being persecuted for reasons of race, religion, sex, 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 not having a nationality and being outside the country of his former habitual residence, is unable or, owing to a well-founded fear of being persecuted for any of the aforesaid reasons is unwilling, to return to it'.⁴²

The second category of refugee is the '*prima facie* refugee', defined in terms of the 1969 OAU Convention⁴³ as a person who 'owing to external aggression, occupation, foreign domination or events seriously disturbing public order in any part or whole of his country of origin or nationality is compelled to leave his habitual place of residence in order to seek refuge in another place outside his country of

Daniel Mwema Mulwa [2010] eKLR; *Beatrice Wanjiku and Another v Attorney General and Others* Petition 190 of 2011; *Mitu-Bell Welfare Society v Kenya Airports Authority and 2 others* [2021] eKLR, para 131-2.

⁴⁰ Constitution of Kenya, 2010, Articles 26-51.

⁴¹ 1951 UN Convention, Article 1A(2).

⁴² Refugees Act, 2006, section 3(1).

⁴³ 1969 OAU Convention, Article 1(2).

origin or nationality'.⁴⁴ This definition is also referred to as the 1969 OAU Convention expanded definition, since it expands upon and complements the 1951 UN Convention refugee definition.⁴⁵

When compared to other African countries, which similarly apply both the 1951 UN Convention and 1969 OAU Convention definitions,⁴⁶ it is not clear why the drafters of the Kenyan Refugees Act found it necessary to split up the definition of 'refugee' into these two distinct, though not mutually exclusive, categories. Persons whose reasons for flight fall within the OAU Convention can still apply and be granted refugee status via individual status determination, for instance. We shall see later that this has been the case with persons from the Eastern part of the DRC, Ethiopia, Burundi and other nationalities who have been forced to flee conflict. Apparently, the only tangible purpose served by the definitional distinction in the Refugees Act is the assignation of the mode of recognition: whether it be the adjudicatory individual status determination, for which the Commissioner is the final decision maker, or *prima facie* recognition, which is based on an executive decision (more details in section V). The Refugees Bill, 2019 [as of 2022, in force as the Refugee Act, 2021] consolidates both Convention definitions into one following the precedent of other African states.⁴⁷

Exclusion

Defining who qualifies to be formally recognised as a refugee involves sifting out those that ought to be excluded or disqualified. The Refugees Act uses the term 'disqualification in lieu of exclusion' to refer to a person who 'shall not be a refugee' under the Act.⁴⁸ Such a person would be one who: a) 'has committed a crime against peace, a war crime or a crime against humanity as defined in any international instrument to which Kenya is a party...'; b) has committed a serious non-political crime either outside Kenya, prior to them seeking asylum in Kenya, or inside Kenya, subsequent to their arrival and admission in Kenya as a refugee; c) 'has been guilty of acts contrary to the purposes and principles of the United Nations or the African Union'; d) 'having more than one nationality, had not availed himself of the protection of one of the countries of which the person is a national and has no valid reason, based on well-founded fear of persecution'.⁴⁹

Most of these grounds replicate the provisions of the 1951 UN Convention or the 1969 OAU Convention on exclusion from refugee status of persons considered to have committed a crime against peace, war crimes or crimes against humanity, or a serious non-political crime outside the country of asylum prior to one's admission therein, or to be guilty of acts contrary to the principles and purposes of the UN or the OAU (as the case may be)⁵⁰. The disqualification on the grounds of the commission of a serious non-political crime in Kenya subsequent to one's arrival and admission as a refugee is a domestic addition to the convention grounds, while the failure to avail oneself of an alternative country, for which one is a national and where one does not risk persecution, is a replication of a similar provision in the 1969 OAU Convention.⁵¹

This section of the Refugees Act has not yet been subjected to judicial interpretation or scrutiny. Thus, it is hard to tell how it is applied in practice. The Refugees Act and Regulations do not stipulate any procedures on exclusion or disqualification. RAS has not yet developed its own internal guidance on how to deal with or interpret exclusion cases beyond the broad provisions of the Refugees Act. In the interim, RSD officers may still refer to UNHCR guidelines⁵² as a guide to interpreting the exclusion provisions under the Refugees Act.

⁴⁴ Refugees Act, 2006, section 3(2).

⁴⁵ M Sharpe, *The Regional Law of Refugee Protection in Africa* (Oxford University Press 2018) 36; Wood, 'Expanding Protection in Africa?' (n11) 555-558.

⁴⁶ The law on refugees in a number of African countries that apply both Convention definitions do not separate the refugees in two distinct categories. See for instance, South Africa's Refugee Act No. 11 of 1998, section 3 (a) & (b); Tanzania's Refugees Act, Act No. 9 of 1998 (Chapter 37), section 4 (1); Uganda Refugees Act, 2006, section 4.

⁴⁷ Kenya Refugees Bill, 2019, section 3.

⁴⁸ Refugees Act, 2006, section 4.

⁴⁹ Refugees Act, *Ibid*.

⁵⁰ 1951 UN Convention, article 1F, compare the 1969 OAU Convention, article 1(5).

⁵¹ 1969 OAU Convention, article 1(3).

⁵² UNHCR, Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, 4 September 2003, HCR/GIP/03/05, available at: <https://www.refworld.org/docid/3f5857684.html>.

The Refugees Bill, 2019 separates grounds of exclusion from grounds of disqualification. With respect to exclusion, it maintains the conventional grounds with a slight modification. A person shall be excluded from refugee status if they have ‘committed a crime against peace, a war crime or a crime against humanity *as defined in the International Crimes Act*’ of Kenya (emphasis added)⁵³. Secondly, while the commission of a serious non-political crime inside Kenya is no longer a ground for exclusion, a person may be excluded if they have ‘sought asylum in another country’⁵⁴. It seems like the law does not consider that one has not yet been granted refugee status, and the simple act of having sought asylum elsewhere is enough. A person who has been granted refugee status in another country would instead be subject to disqualification, with a proviso that the person would receive effective protection in that country.⁵⁵

The two other grounds for disqualification that have been introduced are: i) where one fails to avail oneself of an alternative country, in which he or she is a national and where they have ‘no valid fear based on a well-founded fear of persecution’ or ii) where one takes up residence in a country where the competent authorities recognise the person as ‘having the rights and obligations that are attached to the possession of a nationality of that country, can be re-admitted into that country in [*sic*] the same condition and has no valid reasons based on a well-founded fear of persecution for having left that country’.⁵⁶

Non-refoulement

The principle of *non-refoulement* is a norm of customary international law and is described as the ‘cornerstone of refugee protection’⁵⁷. Accordingly, the Refugees Act states that a person shall not ‘be refused entry into, expelled, extradited from Kenya or returned to any other country or subjected to any similar measure if, as a result of such refusal, expulsion, return or other measure, such person is compelled to return to or remain in a country where’ they may be subject to persecution under the grounds enumerated in the 1951 UN Convention or where their life, physical integrity or liberty would be threatened in terms of the 1969 OAU Convention expanded definition.⁵⁸ This provision merges aspects of the *non-refoulement* clauses in both the 1951 UN Convention⁵⁹ and the 1969 OAU Convention.⁶⁰

The express prohibition of *refoulement* notwithstanding, there have been a number of cases, in which the Kenyan courts have found various government policies and directives to be in contravention thereof. In 2012 and 2013, the government passed a directive to close down all urban refugee centres and required all urban refugees to relocate to the refugee camps. A petition challenging this directive was successful and the High Court held that the Government Directive ‘threatened to violate the fundamental principle of *non-refoulement*’.⁶¹ In 2014, the Kenyan Parliament enacted the Security Laws (Amendment) Act, 2014, which made omnibus amendments to a number of laws, among which was the Refugees Act. In this regard, the law introduced a new provision that placed a ceiling of 150,000 as the number of refugees that would be permitted to be in Kenya at any one time, with parliament reserving the power to vary it for a maximum of 12 months. The High Court found that this provision

⁵³ Refugees Bill, 2019, section 4 (1)(a-c).

⁵⁴ Refugees Bill, 2019, section 4 (1)(d).

⁵⁵ Refugees Bill, section 4 (2)(b).

⁵⁶ Refugees Bill, section 4 (2)(a & c).

⁵⁷ G Goodwin-Gill, ‘The Principle of *Non-Refoulement*: Its Standing and Scope in International Law’, a study prepared for the Division of International Protection Office of the United Nations High Commissioner for Refugees, July 1993, 2. Similar words are used by court’s decision in *Kituo cha Sheria and others v The Attorney General*, Petition No 19 of 2013 consolidated with Petition No. 115 of 2013, [2013] eKLR, para 70.

⁵⁸ Refugees Act, 2006, section 18.

⁵⁹ 1951 UN Convention, article 33(1) states: ‘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’.

⁶⁰ 1969 OAU Convention, article 2(3) provides: ‘No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2’.

⁶¹ *Kituo cha Sheria and others v The Attorney General*, (n57) para 75. The High Court’s decision was upheld by the Court of Appeal in *The Attorney General v Kituo cha Sheria and others*, Civil Appeal No. 108 of 2014, [2017]eKLR. This case is further analysed by L Juma, ‘Protection of the Rights of Urban Refugees in Kenya’ (n18).

had the effect of violating the principle of *non-refoulement* and, therefore, nullified it.⁶² The Court, therefore, suspended that particular amendment. Then, in 2016, the government directed the closure of the Dadaab camp and purported to set up a taskforce to implement the repatriation of refugees to Somalia. The High Court found this decision to be in violation of the principle of *non-refoulement*.⁶³

Besides cases challenging government policy, the High Court has, on several occasions, prevented the possible *refoulement* of persons found to be unlawfully in Kenya in contravention of the Kenya Citizenship and Immigration Act, 2011⁶⁴. In many of these cases, where, in the course of the proceedings, the court is seized by the fact that one is an asylum seeker, a refugee or intends to apply for asylum, it has ordered the deportation orders to be set aside in respect of the principle of *non-refoulement*.⁶⁵ Court intervention notwithstanding, many NGO reports and academic writings have exposed the violations of *refoulement*, many of which may not come to the court's attention.⁶⁶

d) Fair Administrative Action Act No. 4 of 2015

The Fair Administrative Action Act, 2015 (FAAA) puts into effect the constitutional provision of the right to fair administrative action. The Act applies to 'all State and non-State agencies, including any person exercising administrative authority, or performing a judicial or quasi-judicial function..., or whose action, omission or decision affects the legal rights or interests to whom such action, omission or decision relates'.⁶⁷ RSD decisions, made by the relevant government institutions or bodies, come under the purview of the FAAA and are, therefore, subject to judicial review should the applicant be aggrieved by the decision.⁶⁸ Upon review, the court 'may grant any order that is just and equitable including an order directing the taking of the decision, or declaring the rights of the parties..., or directing any of the parties to do or refrain from doing any act' as is necessary, in the court's estimation, to achieve justice. It may also order 'costs and other monetary compensation'.⁶⁹

VI. Institutions

The Refugees Act and Regulations re-affirmed the government's primary responsibility in RSD and they not only created the institutions that would be in charge of the process but also laid down the RSD procedures. Despite the statutory provisions, UNHCR continued to handle RSD even when some of the government institutions became operational. It was not until 2014 that the handover of most operational aspects of RSD from UNHCR to the government institutions effectively commenced. This section explains the various institutions established under the Refugees Act and the role of each in refugee recognition, the challenges they face and the general impact that these may have on refugee recognition. It also discusses the transition of RSD from UNHCR to the government and the continuing role of UNHCR in Kenya's RRR.

a) Ministerial Oversight

The Refugees Act does not set out the administrative structure but, in reality, the management of refugee affairs comes under the oversight of the Ministry of Interior and Coordination of National Government

⁶² *Coalition for Reform and Democracy (CORD) and others v The Republic of Kenya and another*, Petition No.628 of 2014 consolidated with Petition No.630 of 2014 and Petition No.12 of 2015 [2015] eKLR, para 426-7.

⁶³ *Kenya National Commission on Human Rights (KNHCR) & another v The Attorney General and 3 others*, Constitutional petition No. 227 of 2016, [2017]eKLR.

⁶⁴ Prior to 2011, the applicable law was the Immigration Act, Cap 172.

⁶⁵ See for instance, *Ibrahim v Republic*, Nairobi High Court Case No. 137 of 2011, unreported; *Abdi Noor Saidi and another v Republic*, Nakuru High Court Case No. 58 of 2010, unreported; *Mohamed Abdi Mohamed v Republic*, Machakos High Court Case No. 58 of 2010, unreported; *Yusuf Noor v Republic*, High Court Criminal Appeal 227 of 2012, [2012]eKLR; *Fatuma Ismail and others v Director of Immigration and another*, High Court Criminal Revision No. 27 of 2014, [2014]eKLR; *Mohammed Hassan Hussein v Republic*, High Court Criminal Miscellaneous Application No. 78 of 2019, [2019]eKLR.

⁶⁶ HRW, "Welcome to Kenya" (n20); HRW, *From Horror to Hopelessness* (n17); RCK, *Asylum under Threat: Assessing the Protection of Somali Refugees in Dadaab Refugee Camps and along the Migration Corridor* (RCK 2012) 38; Mwangi, 'Securitisation, Non-refoulement and the Rule of Law' (n20); Jaji, 'Somali Asylum Seekers and Refoulement' (n20).

⁶⁷ FAAA, 2015, section 3.

⁶⁸ FAAA, section 7 allows for any person 'aggrieved by an administrative action or decision' to apply for judicial review.

⁶⁹ FAAA, section 11(2).

(previously, Ministry of Immigration and Registration of Persons), to whom the various statutory and advisory bodies responsible for refugee affairs and management are accountable in accordance with the provisions of the Act. The Minister or Cabinet Secretary (the latest nomenclature for the holder of this position in the Kenyan Government) appoints some of the members of these bodies. Moreover the Minister has a direct role in refugee recognition, as it is he or she who can declare *prima facie* refugee status upon any class of persons and revoke this declaration or status (details in section VII).⁷⁰

b) The Refugee Affairs Secretariat (RAS)

The Refugees Act establishes the Department of Refugee Affairs (DRA), which was disbanded in 2016 for stated reasons of national security⁷¹ and replaced by the Refugee Affairs Secretariat (RAS) in May 2017.⁷² RAS is responsible ‘for all administrative matters concerning refugees in Kenya’, including coordinating ‘activities and programmes relating to refugees’.⁷³

As per the stipulations of the Refugees Act, the Secretariat is headed by a Commissioner for Refugee Affairs (‘the Commissioner’), whose functions are quite manifold. Those specific to refugee recognition include functions to ‘formulate policies on refugee matters in accordance with international standards, ensure ... the provision of adequate facilities and services for the protection, reception, care of refugees within Kenya; receive and process applications for refugee status, register all refugees, issue refugee identification cards and travel documents; and manage refugee camps and other related facilities.’⁷⁴

Specific to RSD, all applications for asylum are made to the Commissioner, who decides whether or not to grant asylum.⁷⁵ In practice, though, the applications are usually made at any RAS office in Nairobi, Dadaab or Kakuma and they are heard and assessed by specially trained RSD officers (case workers and reviewers, in the tradition of UNHCR), who, upon making their recommendation, forward the case file or application to the Technical Advisory Committee before it reaches the Commissioner for his or her endorsement.

The Act does not regulate the Commissioner’s appointment, but provides that the Commissioner shall follow directions from the Minister, and submit regular reports on matters relating to refugees.⁷⁶

c) Technical Advisory Committee (TAC)

The TAC is not a statutory body but, according to a UNHCR report, ‘it was established on an ad hoc basis in 2014, when its role was endorsed by the Commissioner for Refugee Affairs and the UNHCR Representative in Kenya as part of the transition process.’⁷⁷ The chairperson of the TAC explained in an interview that the TAC is comprised of the senior RSD team from both RAS and UNHCR in Nairobi, Kakuma and Dadaab.⁷⁸ The TAC advises the Commissioner on cases of recognition, rejection or exclusion and all matters pertaining to RSD. Its role has been described as a ‘pipeline’ for conveying decision recommendations to the Commissioner,⁷⁹ who is the decision maker. The TAC chairperson explained that the TAC meets monthly to assess all pending files but may convene a special meeting to handle extraordinary cases.⁸⁰ Despite its important role, the TAC faces a legitimacy challenge. As one legal expert summed up, ‘[i]t is not in the law’,⁸¹ yet it performs some of the functions of the statutorily mandated Refugee Affairs Committee.

⁷⁰ Refugees Act, 2006, section 3 (2 & 4).

⁷¹ In its press release made on 6 May 2016, the government stated that ‘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 mechanism for closure of the two refugee camps (Kakuma and Dadaab) within the shortest time possible.’ This part of the government statement was reproduced in the aforementioned case of *KNHCR and another v Attorney General and 3 others* (n63).

⁷² The statutory amendment was effected through the Statute Law (Miscellaneous Amendments) Act No. 11 of 2017.

⁷³ Refugees Act, section 6.

⁷⁴ Refugees Act, section 7(2).

⁷⁵ Refugees Act, section 11 (1, 5 & 6).

⁷⁶ Refugees Act, section 7(3).

⁷⁷ UNHCR, *Building on the Foundation* (n14), para 110..

⁷⁸ Interview held in Nairobi on 26 July 2019.

⁷⁹ UNHCR, *Building on the Foundation* (n14) para 110.

⁸⁰ Interview with chairperson, TAC, Nairobi, 26 July 2019.

⁸¹ Interview KN_EL_09, 24 June 2019.

d) Refugee Affairs Committee

The Refugees Act established the Refugee Affairs Committee (RAC) to ‘assist the Commissioner in matters concerning the recognition of persons as refugees for the purposes of this Act’.⁸² The Committee should be comprised of at least 14 persons; the Chairperson is appointed by the Minister, while 11 of the other members are representatives of various government ministries and departments. The remaining two members are: one representative from the host community and the other from the civil society.⁸³ The Act, however, does not specify which aspects of recognition the RAC should assist the Commissioner with nor how the Committee should go about executing its function. According to RAS, the Committee last had a Chairperson in 2016, when it ceased to operate,⁸⁴ although one of our interviewees expressed doubt as to its operationalisation stated, “Actually, it is non-existent, let me say that because there is no record, at least to my knowledge, as to whether they actually sat and minutes were taken and if they went through the files of refugees who would require or were seeking asylum. There were others who were arguing that, within the RAS, the RAC was formed as a policy driver but that is not how they have been addressed under the Refugee Act. Because the Refugee Act says ‘in respect to recognition’, that is the exact word that is used, so it’s not about policy, it’s about RSD.”⁸⁵

Whether or not the RAC was ever functional, and, if it was, what work it performed remains unclear. As it stands, it is a moribund body, whose function in the refugee recognition process is presently performed by the TAC.

The Refugees Bill attempts to remedy the ambiguity around the roles of the RSD structures by allocating a policy-oriented role to the proposed Refugee Advisory Committee, while also establishing a Refugee Eligibility Panel to take on the functions of the present TAC.⁸⁶

e) The Refugee Appeal Board

The Refugees Act established the Refugee Appeal Board (RAB) to ‘consider and decide appeals’ that ‘may be made against the decision of the Commissioner’.⁸⁷ In the course of hearing the appeal, the RAB may make further investigation and inquiry, which may involve referring the matter back to the Commissioner for investigation or advice. Following the hearing, the RAB may confirm or set aside the Commissioner’s decision.⁸⁸

According to the Refugees Act, the members of the Board are ministerial appointees, who should have expertise in a range of matters, namely: refugee law, foreign affairs, immigration, national security, local administration and refugee affairs. The Chairperson, however, should be an advocate.⁸⁹

Although the RAB should have been established upon the enactment of the law, it was only in 2015 that the Minister appointed the first Board, constituted of six persons.⁹⁰ The appointment was more or less triggered by the transfer of RSD operations from UNHCR to the Government of Kenya, which had effectively begun in July 2014. Prior to this, RSD decisions were issued by UNHCR, over which the RAB had no jurisdiction. Hence it was irrelevant and would only have a role after the Commissioner began to issue RSD decisions as envisaged under the Act.

Consequently, upon the appointment of members, the Board’s immediate task was to set up regulatory and administrative structures that were necessary for it to become fully operational. It developed its Standards of Procedure as well the Rules of Procedure. Commencement of hearings was, however, stalled when the DRA was disbanded in 2016. The establishment of the RAS and the appointment of a Commissioner in 2017 signalled the start of operations for the Board.

In terms of practical operation, the Board should meet eight times in a year at most,⁹¹ although we could not ascertain whether it has always met as many times since it became fully operational. By December

⁸² Refugees Act, section 8.

⁸³ Refugees Act, section 8.

⁸⁴ Email communication with RAS official, 8 April 2021.

⁸⁵ Interview KN_EL_09, 24 June 2019.

⁸⁶ Refugees Bill, 2019, sections 10 & 13.

⁸⁷ Refugees Act, sections 9(1) & 10(1).

⁸⁸ Refugees Act, section 10 (2).

⁸⁹ Refugees Act, section 9(2).

⁹⁰ Republic of Kenya, Gazette Notice No. 2328, *The Kenya Gazette* 10 April 2015.

⁹¹ Communication with RAB staff dated 2 October 2019.

2020, the Board had received 14 cases and issued six decisions.⁹² According to its Procedural Rules, decisions of the Board are only shared with the parties to the case (one of whom is the Commissioner), ‘the Principal Secretary to the ministry responsible for refugee affairs, the representation of UNHCR’.⁹³

The Refugees Bill proposes retaining the role of the RAB, re-named Refugee Appeals Committee, with a more streamlined composition. While all members would still be appointed by the Cabinet Secretary, there are four specific places for government departmental representatives and the remaining three should be persons knowledgeable in refugee matters. The Appeals Committee may also co-opt an official of the UNHCR in an advisory capacity.⁹⁴

f) The Judiciary

Any person aggrieved by the RAB’s decision may appeal to the High Court within 21 days.⁹⁵ This provision remained redundant for the period that UNHCR was in charge of RSD and while statutory institutions were not functional. By the end of 2020, no appeal from the RAB had been made to the High Court.⁹⁶

Although the courts have not been active in reviewing RSD decisions, there is an emerging jurisprudence on the rights of refugees. As earlier discussed, a few cases have been brought by way of public interest litigation, challenging the constitutionality of particular executive decisions that have adversely affected refugees. The cases revealed a pattern of systemic rights violations that ensued from these decisions, including violations of the *non-refoulement* principle (see discussion above), the right to fair administrative action,⁹⁷ the right to free movement,⁹⁸ the right to dignity and, in one case, the child’s right not to be separated from the parent.⁹⁹

g) Transition of RSD Decision-making from UNHCR to the Government of Kenya

As mentioned earlier, the Government of Kenya was in charge of RSD from the time of independence until the early 1990s, when its administrative machinery proved inadequate to deal with the swelling tide of refugees coming into the country. According to UNHCR statistics, the number of refugees under their mandate sharply increased from 14,249 in 1990 to 120,163 in 1991 and by the following year it had more than tripled.¹⁰⁰ The Kenyan government then handed over the management of refugees to UNHCR, including RSD and the administration of the camps in Dadaab (at that particular time) that were specifically set up to accommodate the refugees. The details of this agreement are neither known nor clear.¹⁰¹ But the predominant view among existing literature is that the influx and the lack of adequate resources and capacity within existing government structures provided the impetus for the handover of refugee matters to UNHCR.¹⁰²

From the 1990s until 1 July 2014, UNHCR handled RSD in accordance with its mandate and would issue what in Kenya are commonly referred to as ‘mandate letters’ to persons it recognised as refugees. All documents, forms, procedures and processes were in accordance with or guided by UNHCR standards and guidelines. Only the issuance of an ID card remained under the government’s full remit. A recognised refugee would have to apply to the Government of Kenya and be issued with ‘an alien certificate’, the equivalent of a refugee identity card, renewable in tandem with the ‘mandate’.

⁹² Figures provided by UNHCR office, Nairobi in communication with UNHCR Senior RSD Officer, 15 September 2021.

⁹³ Refugee Appeal Board (Procedural) Rules, 2016 (ungazetted), rule 25.

⁹⁴ Refugees Bill, 2019, section 11(2)-(6).

⁹⁵ Refugees Act, 2006, section 10(3).

⁹⁶ One case appealing a RAB decision was subsequently filed with the High Court in 2021.

⁹⁷ *Refugee Consortium of Kenya & N (Suing on behalf of 47 others) v Attorney General & others*, High Court, Constitutional Division, Petition 382 of 2014; *KNHRC & Anor v Attorney General & others* (n63); *Kituo cha Sheria & others v The Attorney General* (n57).

⁹⁸ *Kituo cha Sheria & others v The Attorney General*, *ibid*; *The Attorney General v Kituo cha Sheria & others* (n61); *S M Mohammed & others v Cabinet Secretary & others*, High Court, Constitutional Division, Petition 206 of 2014.

⁹⁹ *Refugee Consortium of Kenya & N v Attorney General & ors* (n97).

¹⁰⁰ Statistics available at <https://www.unhcr.org/refugee-statistics/download/?url=dUOZn2>

¹⁰¹ Both UNHCR and government officials that we spoke to admitted to not having seen the formal agreement. Verdirame in his research likewise reports of the futile efforts to track down the document of transfer of responsibility from government of Kenya to UNHCR – Verdirame, *The Rights of Refugees in Kenya* (n9), 6.

¹⁰² Milner, *Refugees, the State and the Politics of Asylum in Africa* (n9) 88, Verdirame, *The Rights of Refugees in Kenya*, *ibid*; Abuya, ‘Status Determination Imtaxaan in Kenya’ (n15) 188; Campbell, ‘Urban Refugees in Nairobi’ (n18) 396, 399.

Upon assessing Kenya's refugee protection capacity, before the enactment of the Refugees Act, UNHCR observed:

'The absence of specific legislation governing refugee affairs leaves refugees vulnerable to treatment that is not in accordance with internationally recognised protection standards. It also means that important areas of refugee governance which fall within the state's responsibilities are being carried out by UNHCR including: reception and registration of new asylum-seekers; refugee status determination; maintenance of data on asylum-seeker and refugee population; issuance of documents confirming status; management and co-ordination of the refugee camps; and provision of secure arrangements for critical protection cases'.¹⁰³

The enactment of the Refugees Act and its establishment of RSD structures was thus a turning point that paved the way for the handover of RSD operations. The government started with the establishment of the DRA, which was built from the Refugee Affairs Secretariat that already existed in the Ministry of Immigration and Registration of Persons.¹⁰⁴ Although the DRA received support mainly from the Danish Aid Development Agency (DANIDA) and UNHCR to build both its infrastructural, human resource and technical capacity, it did not take on RSD operations until 1 July 2014.

The handover process was proceeding, albeit at a slow pace, but it was precipitated by security concerns, which, according to a government source, were given primacy following the terrorist attack on the Westgate Mall in Nairobi in September 2013.¹⁰⁵ In fact, a Parliamentary Committee looking into the Westgate attack a few months afterwards had concluded that there was a linkage between Kenya's refugee regime and exposure to terrorist attacks. It claimed that '[t]he influx and the resultant increase of refugee population in Kenya have led to deterioration in security (sic)... A major security threat has been the infiltration of terrorist elements such as Al Shabaab posing as refugees into the camp'.¹⁰⁶ It thus recommended the repeal of the Refugees Act, as it was inadequate to deal with the emerging trends/threats of terrorism, and for the closure of refugee camps and the repatriation of all refugees.¹⁰⁷ The recommendations did not allude to the government's international and constitutional obligations towards refugees, and it is not clear whether this report prompted the government's action to fully take on the RSD function without further delay. Nevertheless, it provides insight into some of the political considerations on refugees and refugee management in the run up to the handover date.

A UNHCR review noted that UNHCR-to-government RSD transitions 'have tended to be long term processes, with hurdles and changes along the way, and often with a gradual expansion of the national role'.¹⁰⁸ This is all so true for the Kenyan experience.

In late 2013, the DRA, as it was then, and UNHCR drew up a work plan laying out four phases of the handover, which was envisaged to be completed by January 2015 at that time. The first two phases would focus on building the DRA's human resource and institutional capacity. This involved the continuing support and training of DRA staff (by UNHCR), the recruitment of RSD supervisors and the establishment of the statutory bodies, the RAB and RAC, and training of their members. On the logistics front, both parties envisaged the construction and equipping of office facilities for the DRA as well as creating a filing system. Before many of these plans could be realised, the government demanded to take over the responsibility of RSD decision-making from 1 July 2014.¹⁰⁹

From 1 July 2014, all definitions, interpretations, forms, procedures and processes had to be in accordance with the Refugees Act and not under UNHCR mandate. Since the DRA's capacity was still very low in many respects, including skills, knowledge and physical infrastructure, among others, UNHCR continued to perform some of the functions that the DRA was still unable to carry out, as it

¹⁰³ UNHCR, *Analysis of Refugee Protection Capacity - Kenya*, April 2005 (n13), para 16..

¹⁰⁴ C E Walkey, *Building a Bureaucracy: The Transfer of Responsibility for Refugee Affairs from United Nations Refugee Agency to Government of Kenya*, PhD Thesis (University of Oxford 2019) 120.

¹⁰⁵ Informal discussion with RAS official, July 2019.

¹⁰⁶ Republic of Kenya, *Report of the Joint Committee on Administration and National Security; and Defence and Foreign Relations on the Inquiry into the Westgate Terrorist Attack, and other Terror Attacks in Mandera in North-Eastern and Kilifi in the Coastal Region*, Nairobi, December 2013, pp. 16-17.

¹⁰⁷ Report of the Joint Committee, *ibid*, p.54.

¹⁰⁸ UNHCR, *Providing for Protection* (n14), para 82.

¹⁰⁹ Detailed information available in UNHCR, *Building on the Foundation* (n14), paras 51-54.

simultaneously continued to build DRA's capacity. For instance, both UNHCR and the DRA carried out registration, interviews and the assessment of applications, with UNHCR deploying its RSD staff to the DRA, even though initially the DRA staff operated from UNHCR office premises, since the government lacked the proper facilities. The review of cases was performed by a UNHCR officer and the cases were then forwarded to the TAC, which would discuss and forward recommendations for the Commissioner's endorsement. The form of the Commissioner's decisions before May 2016 was questionable, since they were not based on any statutory template as was the case with most of the documents provided for under the Refugees Act and Regulations. Consequently, the Refugees Regulations were amended in May 2016 to specifically include a form of both the recognition and rejection letters envisaged under the Refugees Act.¹¹⁰ The joint UNHCR-DRA RSD continued until the latter was disbanded in May 2016. The DRA disbandment, of course, had some serious repercussions for the RSD process. There was no government apparatus to conduct RSD and no Commissioner to issue decisions. Even though UNHCR continued to process cases, i.e. conducting interviews, assessments and reviews, decisions were not being issued as envisaged under the Refugees Act, which inevitably contributed to the build-up of an already existing backlog. Another knock-on effect was that both the TAC and the recently established RAB were rendered redundant, as their roles are dependent on the function of the Commissioner. It was not until RAS was established and an acting Commissioner was appointed in July 2017 that government-led RSD resumed.¹¹¹

When RAS was set up, it resumed the joint handling of RSD with UNHCR, and the transition continued to gather pace until 2018, when the government became solely in charge, although the process happened at different paces in Kakuma and Nairobi. Beginning in October 2018, RAS was fully in charge of RSD in Kakuma, with UNHCR only providing support where necessary or in what were considered complex cases. In Nairobi, however, by the time of our fieldwork in July 2019, RAS and UNHCR were still working side-by-side as one of the strategies to handle the case backlog. The phasing out of UNHCR staff in Nairobi has been gradual; by October 2020, there were only two UNHCR staff members, compared to the RAS' 16, conducting RSD interviews and drafting assessments, while there were four full-time RAS reviewers and two part-time UNHCR reviewers.¹¹² Essentially, UNHCR's current role in Kenya's RSD is 'providing technical support and some capacity and quality support where required'.¹¹³

Knowledge transfer from UNHCR to government officials has mainly been through training programmes, including on-site training. In this way, there has been a transmission of UNHCR norms, interpretations and practices that the RAS staff apply in their day-to-day work, as far as we could discern from our interactions with them.

UNHCR has also played a critical role in setting up the government's RSD infrastructure, including building new office blocks in Kakuma and providing equipment and the necessary information and communication technology. As RAS has not yet developed a comprehensive case management database of its own in the interim, it uses UNHCR's ProGres (Profile Global Registration System) for its RSD case management. ProGres operates with functional accessibility restrictions, hence RAS' access to it is only for limited purposes. This has created some tension between UNHCR, which is bound by its data protection obligations, and the Government of Kenya, which would like greater access. An RAS official did indeed express the government's desire to have greater access, although he admitted that the government had not yet pursued any alternatives, although they were being considered.¹¹⁴ Presently, a data sharing agreement has been signed between UNHCR and RAS on the use of ProGres and efforts are underway to assess its interoperability with other government databases for purposes of refugee inclusion.¹¹⁵

Despite the Government of Kenya taking on the RSD function, the entire operation continues to be heavily financially dependent on UNHCR. UNHCR still provides salaries for most of the RAD staff and to fund most of its activities. Most RAS RSD staff are considered 'project staff' on short-term

¹¹⁰ Republic of Kenya, Legal Notice No. 71 of 2016, The Refugees (Reception, Registration and Adjudication) (Amendment) Regulations, 2016, 16 May 2016.

¹¹¹ NRC & IHRC, *Recognising Nairobi's Refugees* (n17) 36.

¹¹² Communication with UNHCR Senior RSD Officer, 6 October 2020.

¹¹³ Communication with UNHCR Senior RSD officer, 24 September 2021.

¹¹⁴ Interview with Senior RAS official, Nairobi, 29 July 2019.

¹¹⁵ Update provided in communication with UNHCR Nairobi office staff, 15 September 2021.

contracts, usually one year, in line with UNHCR's funding cycle. According to an RAS official, 'it is RAS' desire to have all staff as permanent staff, however one cannot tell how soon'.¹¹⁶ The lack of sufficient financial investment into RSD by the Kenyan government may adversely impact the quality of its RSD as it may become increasingly difficult to retain good and experienced staff dedicated to maintaining the integrity of the process.

The transition process has thus not been as smooth and well-mapped out as envisaged in the handover work plan. Besides stalling the RSD process at various times from 2014 until the RAS Commissioner was firmly in office, there was poor communication and an overwhelming lack of information regarding the process to key stakeholders, mostly refugees and asylum seekers, and Civil Society Organisations (CSOs) and NGOs.¹¹⁷ Refugees in Nairobi and other urban areas were the most adversely affected, as they were referred back and forth between UNHCR and RAS offices without adequate explanation. At the time of our fieldwork, the state of affairs was clearer to refugees and asylum seekers in Nairobi. They knew that they had to go to RAS for RSD-related matters, although some still experienced the back-and-forth movement between RAS and UNHCR offices, depending on where their case was being handled.¹¹⁸

The Refugees Bill, 2019, which comes in the wake of the transition, reinforces the Government of Kenya's commitment to its international obligations towards refugees. It streamlines and more clearly delineates the roles of the various institutions and offices in charge of refugee management. The role of UNHCR under the Bill is confined to technical advisor, whenever co-opted by either the Refugee Eligibility Panel or the Refugee Appeals Committee.¹¹⁹ The memorandum to the Bill acknowledges that its implementation 'shall occasion additional expenditure to the public fund', and its passage should, therefore, commit the government to funding the RSD operations. One instructive lesson from the post-enactment experience of the Refugees Act, 2006 is that the expected uptake by the government of its responsibility might take a similarly slow and delayed trajectory.

VII. Modes of Recognition

The Refugees Act distinguishes between statutory and *prima facie* refugees, which in effect assigns the manner for recognition.

a) *Prima Facie* Recognition

Under the Refugees Act, the term '*prima facie refugee*' is defined in the singular, implying that it may be applied to an individual who fits the definition whether or not they are part of a group or class of persons. *Prima facie* recognition, on the other hand, applies to a group or class of persons. As Marina Sharpe argues, and has indeed been the practice in Kenya and many other African states, *prima facie* recognition has been employed in situations of mass influx.¹²⁰

Previous and on-going prima facie refugees and practices

Based on the brief historical accounts sketched in section IV,¹²¹ it seems like the practice of *prima facie* recognition in Kenya commenced in the 1990s, when UNHCR took over the RSD mandate following the influx of refugees from Somalia, Ethiopia and Sudan. It may seem that the practice was prompted by the events at the time as mentioned in a UNHCR annual report.

During the reporting period, all persons who received asylum letters from UNHCR have been allowed to stay in the country. As of November 1992, the office decided to adjudicate the claims of asylum seekers from countries other than Ethiopia, Sudan and Somalia, and, if recognized, they were granted

¹¹⁶ Interview with Senior RAS official, Nairobi, 29 July 2019.

¹¹⁷ See also C Nalule & D Ozkul, 'Exploring RSD Handover from UNHCR to States' 65 *Forced Migration Review* (2020) 27.

¹¹⁸ The UNHCR Senior RSD Officer in a communication dated 15 September 2021 mentioned that UNHCR and RAS had in 2021 moved into one processing centre in Nairobi.

¹¹⁹ Refugees Bill, 2019, sections 11(5) & 13(3).

¹²⁰ Sharpe, *The Regional Law of Refugee Protection* (n45) 66.

¹²¹ B Rutinwa, 'Prima Facie Status and Refugee Protection' (2002) UNHCR New Issues in Refugee Research Working Paper No 69 <<http://www.unhcr.org/3db9636c4.pdf>>, 10-11.

mandate status. Ethiopians, Sudanese and Somalis who requested protection in Nairobi were considered as *prima facie* refugees and were advised to reside in refugee camps. The office issues letters stating the individual's status and indicates whether the person has been advised to reside in a refugee camp according to the criteria and exceptions included in the proposal presented to the government. The letters, in general, are accepted by the authorities.¹²²

It remains unclear by whom the decision to recognise refugees on a *prima facie* basis was made and what the terms of such recognition would be. Our efforts to trace the relevant agreement(s) proved futile.¹²³ According to Hyndman and Nylund, the development of the *prima facie* recognition of refugees under the UNHCR mandate or 'good offices' became 'a *de facto* regime...', and since in Kenya there were 'no legal obstacles to including *prima facie* refugees under the refugee definition ... the refugees [were] not granted Convention status, but rather temporary asylum under the *prima facie* regime'.¹²⁴ It would, therefore, appear that UNHCR introduced the practice with the government's acquiescence.

Ethiopians benefitted from this status for a short while from 1991 and by 1998, following a change in the political situation in their country, which meant they were no longer recognised on a *prima facie* basis.¹²⁵

The Sudanese, many of whom were from what would later become South Sudan, were recognised on a *prima facie* basis until 2008, when the situation changed in their country.¹²⁶ When conflict broke out again in South Sudan in 2014, the Kenyan government declared persons fleeing the conflict to be *prima facie* refugees.¹²⁷ This declaration still exists, and by the end of 2019, there were 121,410 South Sudanese refugees in Kenya¹²⁸.

The Somalis, mainly from South-Central Somalia, first received *prima facie* recognition in 1991. There have been cycles of major Somali influx into Kenya, some of which have been brought on by drought and famine rather than conflict *per se*. There were significant spikes, however, in 1991-1992 and from 2008-2011 (see appendices, table 2). Moreover, in 2005 and 2006, there were no recorded *prima facie* recognitions, although some Somalis were recognised on an individual basis. In spite of the lack of a clear formal basis for the *prima facie* recognition of Somalis in Kenya for all those years, in 2016, the Government of Kenya revoked this recognition. Although this revocation of *prima facie* status would not affect the legal status of those who had benefitted from it, but only the new arrivals who would have to undergo RSD, the legality of the revocation is open to question. As one of our respondents, a top NGO official, reflected, '[i]t's really interesting this *prima facie* thing because it was never documented anywhere. So even what was revoked never existed'.¹²⁹

When the government's decision to revoke the Somali's *prima facie* status was challenged, the issue of the legality of the revocation notice was not raised as such. Rather the government's decision was challenged on its constitutionality on the grounds that it was discriminatory against the Somalis, and the decision had been made in violation of the right to fair administrative action. The High Court agreed with the petitioners that the decision targeting Somalis was indeed discriminatory and in violation of the right to fair administrative action.¹³⁰ Following this decision, the government did not close the Dadaab camp and repatriate all Somalis, as it had declared. However, it did not change its decision on the revocation of their *prima facie* status.

Currently, all Somali asylum seekers have to undergo individual status determination, with the exception of 'Somali nationals from Mogadishu, and South and Central Somalia who registered with

¹²² UNHCR, *Kenya 1992 Annual Protection Report*, 1 January 1992, available at: <http://swigea56.hcrnet.ch/refworld/docid/3ae6b3f34.html> [accessed 22 April 2021].

¹²³ See also Wood, 'Expanding Protection in Africa?' (n11) 572-573.

¹²⁴ Hyndman & Nylund, 'UNHCR and the Status of Prima Facie Refugees' (n7) 33.

¹²⁵ Hyndman & Nylund, *ibid.*, 30.

¹²⁶ I analysed UNHCR, Global Trends Reports 1998-2018 according to which the Sudanese were last recognised on a *prima facie* basis in 2008. Available at <https://www.unhcr.org/search?comid=56b079c44&&cid=49aea93aba&tags=globaltrends>.

¹²⁷ Republic of Kenya, Gazette Notice No. 5274, *The Kenya Gazette* 1 August 2014.

¹²⁸ UNHCR, Global Trends 2019, available at

<https://www.unhcr.org/search?comid=56b079c44&&cid=49aea93aba&tags=globaltrends>.

¹²⁹ Interview KN_EL_04, 10 June 2019.

¹³⁰ *KNHRC & another v AG & others* (n63).

the Government of Kenya before 1 April 2016'.¹³¹ By July 2019, the Government of Kenya had paused the registration of new Somali asylum seekers in the Dadaab camp and was instead 'profiling' them. An RAS official explained that 'profiling' meant recording details of asylum seekers in a book register rather than in the computerised format or ProGres.¹³²

Prima facie recognition under the Refugees Act

Section 3(3) of the Refugees Act stipulates, '[i]f the Minister considers that any class of persons are *prima facie* refugees ..., the Minister may declare such class of persons to be *prima facie* refugees and may at any time amend or revoke such declaration'. The section further states that should 'the Minister expressly exclude or exempt any person from a declaration that a class of persons to which that person is a member are refugees' the affected person may still apply for recognition as a refugee on the grounds that they are a *prima facie* refugee as defined under the Act.¹³³ This provision would imply that even a '*prima facie* refugee' may apply for individual recognition through the RSD process. According to UNHCR observations, the interpretation of RAS (and DRA before it) is that *prima facie* recognition of refugees lies exclusively within the jurisdiction of the Minister/Cabinet Secretary and not the Commissioner who is in charge of the individual status determination process.¹³⁴

The Refugees Act states that the ministerial declaration shall be published in the official gazette.¹³⁵ Similarly, the revocation of *prima facie* recognition is effected by a notice in the gazette.¹³⁶ As regards the content of the declaration, based on the subsisting *prima facie* declaration for persons fleeing events in South Sudan, besides categorically mentioning the group of persons to whom it applies, it states when it should come into effect. However, it does not state for how long the specified category of persons will continue to benefit from *prima facie* recognition, nor does it indicate the circumstances under which it may be revoked. But when such revocation does occur, it does not affect the legal status of those who have benefitted from the *prima facie* recognition prior to the revocation. Rather, any newly arriving person(s) from the same group seeking refugee status in Kenya will have to undergo individual status determination.

While the Act generally makes provision for who may be recognised on a *prima facie* basis and how this recognition is brought into effect, the process behind it remains inscrutable. It is not clear how the Minister/Cabinet Secretary comes to the decision to accord *prima facie* status to any particular group or to revoke its status. Our investigations did not yield much in this respect, and we encountered conflicting responses, some of which could be mere speculation. In an informal discussion with some experts in Kenyan refugee matters, they suggested that the Kenyan Government might be influenced by the practice of neighbouring countries when they accord *prima facie* refugee status to a particular group of persons usually fleeing situations of generalised violence.¹³⁷ A top official of the RAS, however, refuted this assertion, suggesting instead that the Minister acts on the advice of a committee (unnamed) and also consults other ministers.¹³⁸ Another key informant speculated that the decision is made at the highest political level that includes a security committee chaired by the President, which has to approve the ministerial decision.¹³⁹

Future decision-making on *prima facie* status, as envisaged in the Refugees Bill, 2019, promises to be more transparent and consultative. The Refugee Advisory Committee, to be established thereunder, will be responsible for recommending the declaration and revocation of *prima facie* status to the Cabinet Secretary.¹⁴⁰

¹³¹ Refugee Affairs Secretariat (RAS), *RAS Handbook 2018* (RAS 2018) 14.

¹³² Interview with Senior RAS official, Nairobi, 29 July 2019.

¹³³ Refugees Act, section 3(4).

¹³⁴ Communication with UNHCR RSD Officer dated 15 September 2021.

¹³⁵ See for instance, Republic of Kenya, Gazette Notice No. 5274, *The Kenya Gazette* 1 August 2014. This was the declaration by which 'the class of persons running away from the Republic of Southern Sudan to seek refuge in ...Kenya' were recognised on a *prima facie* basis.

¹³⁶ See for instance, Republic of Kenya, Gazette Notice No. 3017, *The Kenya Gazette* 29 April 2016 which revoked the *prima facie* status of Somali refugees

¹³⁷ Informal discussion with refugee experts in Nairobi, 14 June 2019.

¹³⁸ Interview with Senior RAS official, Nairobi, 29 July 2019.

¹³⁹ Interview KN_EL_05, 12 June 2019.

¹⁴⁰ Refugees Bill, 2019, section 10.

Current prima facie recognition practice

Prima facie refugees do not have to go through the RSD process, except for those who could potentially be subject to exclusion. Once the ministerial declaration is made, all persons falling within the declaration will only undergo a registration or screening process, described in more detail below. Proof of place of origin is sufficient to be registered by the authorities. Upon registration, the applicant is given a ‘Government of Kenya Proof of Registration’ document (commonly known as a ‘manifest’), which, in Kakuma, they present to the Camp Office of the National Registration Bureau (NRB) so they are able to apply for and be issued with a refugee ID card. In Nairobi, the applicants apply for the ID card at the RAS offices and RAS submits their application to the NRB, which issues the ID.

One of the South Sudanese refugees that we interviewed explained the process that he and a group of other asylum seekers went through. He arrived in Kenya in February 2014 at the Nadapal border, where he was among a throng of asylum seekers fleeing the conflict in South Sudan. At the border they were met by military officials who searched them. They were held at the border for about two days when finally officials from UNHCR, DRA and the International Organisation for Migration arrived. They conducted a pre-screening interview, questioning them about their reasons for coming to Kenya and details of their flight. They were informed about registration and then transported to Kakuma, about seven buses-full. It took him about two and a half months before he was properly registered and allocated a place in the camp.¹⁴¹

While this reception might be indicative of the practice at the height of a conflict or displacement, many asylum seekers, including *prima facie* refugees, usually find their way to the camps or to Nairobi where they may be registered and are then issued with a movement pass to relocate to the camps.

b) Individual RSD

Statutory refugees have to undergo RSD, which follows a registration process. The Refugees Regulations lay out the procedure and processes involved in RSD.

Applying for asylum and registration

The Refugees Act suggests 30 days as the time within which an asylum seeker, after entry into Kenya, must present himself or herself to a registration officer and apply for recognition as a refugee.¹⁴² The Refugees Regulations expound the actual RSD procedures. During the registration process, the Regulations require the registration officer to take into consideration ‘categories at risk’ and unaccompanied minors, and they should also be sensitive to the special needs of women and the elderly.¹⁴³ At the time of registration, applicants have their fingerprints and photographs taken. The officer should check the fingerprints against the ‘national fingerprints databases’.¹⁴⁴ Upon registration, the asylum seeker receives an Asylum Seeker Pass specifying the ‘time and date when the asylum seeker shall return to a specified refugee reception office’; and is notified that failure to comply with that condition may lead to the withdrawal of the pass.¹⁴⁵

One of our respondents, an RAS registration officer, explained how the registration process currently works in practice. Apparently, all new cases are registered at RAS offices in the camps or in Nairobi, it was previously the suburb of Shauri Moyo but as of 2021 RAS and UNHCR have moved to a new joint processing centre. The applicant is usually required to provide the following information to the registration officer: name of applicant, sex, age, family composition (household registration), nationality, ethnicity, religion, marital status, name of parents and family line (useful in cases of family reunification), education level, work experience, contact, reasons for registration and whether one is a new applicant, returning applicant or delayed registration applicant. Additional information includes place of registration (i.e. in country of asylum), country of asylum, country of origin, addresses and contacts and whether they would be willing to return to their country once the situation changes. If the

¹⁴¹ Interview KN_MSS_11, Nairobi, 4 July 2019.

¹⁴² Refugees Act, section 11(1), and Refugees Regulations, reg 6.

¹⁴³ Refugees Regulations, reg 6, 7 & 15. Neither the Refugees Act nor the Regulations define the ‘categories at risk’.

¹⁴⁴ Refugees Regulations, reg 9.

¹⁴⁵ Refugees Regulations, reg 10 (1d & 1e) & 12.

applicant has any documents on them, they may present them for verification¹⁴⁶. The applicant will also have their photograph and fingerprints taken as well as an iris scan.

At the time of the fieldwork, the RAS officers were doing unified registration with UNHCR, with the latter mainly in charge of continuous registration, which includes updating applicants' details.¹⁴⁷ Using UNHCR's Biometric Identity Management System (BIMS), they can tell if an applicant has been registered in another country. If this is the case, they will not register the applicant until his or her file has been closed in the first country of registration.¹⁴⁸

Upon registration, one receives a Government Proof of Registration (aka "manifest").¹⁴⁹ However, for those who would have to undergo individual status determination, they are also issued with an Asylum Seeker Pass (ASP) valid for one year, within which time a decision on their status should have been reached. In case of a family, the proof of registration will bear the details of the principal applicant as well as those of each family member at the point of registration. Asylum seekers that are registered in Nairobi are given movement passes to go to Kakuma or Kalobeyei to get assessed there. For *prima facie* refugees, this is where the process ends, and they can proceed to apply for a refugee ID card. For all other asylum seekers that have to undergo RSD, the process differs in Nairobi and in the camps.

In the camps, the applicants are given an Asylum Seeker Pass and advised to await a text message or check on the notice boards around the camps for when they are due for an interview. In Nairobi, one is given an ASP-cum-appointment slip for an interview, usually in six months' time¹⁵⁰. The person could be interviewed at RAS or UNHCR offices, depending on the available interviewing facilities. In case the appointment does not happen on the appointed date, the applicant is given another appointment slip to return in the stated duration. In Kakuma, since October 2018, all interviews are conducted at the RAS facilities by RAS staff.

The registered cases are then forwarded to the clerks, who allocate and schedule cases to the caseworkers who conduct the interviews.

RSD interview and assessment

The Refugees Regulations lay down the procedures for the conduct of RSD. They contain important guidelines for RSD officers on how to conduct the interview as well as what to look for in an interview. Conversely, they stipulate the rights of asylum seekers and how they should be treated in the interview. The interview is a non-adversarial hearing to elicit information on the asylum seeker's eligibility for refugee status.¹⁵¹ Determination for the eligibility of refugee status is on a case-by-case basis. Members of an asylum seeker's family are included in his or her application, although adult family members are interviewed separately.¹⁵² Additionally, there is nothing to prevent a family member applying individually.¹⁵³

At the conclusion of the initial interview, the RSD officer advises the asylum seeker of the date and time to return for the decision on the application.¹⁵⁴ The RSD officer should then submit a recommendation to the Commissioner, who must determine within 90 days of receiving the RSD recommendations if the application will be approved. The decision will be either to recognise one as a refugee or a rejection of one's application, in which case reasons must be given.¹⁵⁵

¹⁴⁶ Interview KK_EL_16, 16 July 2019.

¹⁴⁷ Interview with Senior UNHCR Protection Officer, Kakuma, 18 July 2019.

¹⁴⁸ Interview KK_EL_16, 16 July 2019. During the Covid-19 pandemic, a temporary measure was introduced in Kakuma whereby persons who have previously been registered elsewhere may still be registered in Kenya and receive humanitarian assistance, but they do not undergo RSD. (Update provided by UNHCR staff in communication dated 15 September 2021).

¹⁴⁹ The government of Kenya started issuing Proofs of Registration in 2016-2017 when it conducted a verification exercise of all refugees, and subsequently all asylum seekers receive one upon registration. If it is a family or household, the 'Proof of Registration' is issued to the principal applicant or head of the household and the names of members of the family or household included on the same document.

¹⁵⁰ Interview RAS caseworker, Nairobi, 26 July 2019.

¹⁵¹ Refugees Regulations, reg 21.

¹⁵² Refugees Regulations, reg 25(8).

¹⁵³ Refugees Regulations, reg 25(9).

¹⁵⁴ Refugees Regulations, reg 21(10).

¹⁵⁵ Refugees Regulations, reg 29.

Current practices pertaining to case processing modalities were considered by UNHCR and DRA during the hand-over deliberations. In its evaluation report, UNHCR noted that ‘there are a number of specific approaches that have been devised and used or discussed in Kenya that could help to ensure swifter processing of some categories of claims’.¹⁵⁶ Consequently, and faced with a mounting case backlog, both UNHCR and RAS implemented two simplified case processing approaches for specified cases, as explained to us by the various RSD officers (also referred to as ‘caseworkers’) that we interviewed. Essentially, the interviews under both approaches should aim to establish all the material elements pertaining to one’s case but the RSD assessment varies in scope and depth under each approach. In practice, though, and as illustrated in the account that follows, RSD officers tend to abridge or focus on specific elements during the interview for each of the simplified approaches.¹⁵⁷

The first approach is the Rapid Results Initiative (RRI),¹⁵⁸ a term borrowed from the approach taken by the Kenyan Government to improve service delivery among its ministries and departments.¹⁵⁹ The RRI has been in effect since February 2018.¹⁶⁰ Under this approach, the interviewer aims to ascertain a limited number of material elements, such as the applicant’s place of origin, which would have already been ascertained in the registration information. They may also ask questions about one’s village, neighbouring villages, schools in the area or any landmark in the area one claims to come from.¹⁶¹ The interviewer usually relies on a map to verify the applicant’s responses. The interview lasts about 30 -45 minutes, and the RSDO’s assessment is normally tick-box based. An asylum seeker will usually not be required to return for another interview unless there are issues that need further verification or clarification. At the end of the interview, the applicant is given an appointment letter-cum-ASP, stating the date they should collect their decision letter. The RSD officers we interviewed estimated that about 70% of cases fall under RRI.¹⁶² Persons that are processed under this category include asylum seekers from places where there is an ongoing conflict and who do not benefit from *prima facie* recognition, although the category of persons that may be included is always subject to change. At the time of writing this report, persons assessed under RRI included asylum seekers from Burundi, those from parts of Eastern DRC (i.e. North Kivu, South Kivu), Sudanese nationals originating from the Darfur region, South Kordofan and Blue Nile States, and Ethiopian nationals who are Anuak or originate from the Ogaden region.¹⁶³

The second approach is the simplified RSD, under which the applicant is subjected to a more probing interview but less rigorous than the full RSD. According to the RSD officers, this interview tends to delve deeper into one’s reasons for flight but does not go into as much depth as the full RSD interview. More information is needed on one’s occupation, personal life and wider country knowledge. The interview usually lasts about an hour or longer, depending on each person’s story and circumstances.¹⁶⁴ While the interview still addresses all material elements, the ‘RSD assessment has been simplified by developing a standard text for the largest part of the assessment, in particular the well-founded fear, persecution, grounds and internal flight alternative sections’.¹⁶⁵ Asylum seekers that may be assessed under this simplified approach include persons from Rwanda, Ethiopia, including the Oromo, and other persons from other parts of the DRC.¹⁶⁶

All cases, which are not assessed under either of the simplified approaches or which may still require further interrogation, including those with exclusion triggers, have to undergo the full RSD process. These interviews tend to be in-depth and may take 2-3 hours or even days, depending on the

¹⁵⁶ UNHCR, *Building on the Foundation* (n14) para 100.

¹⁵⁷ The variation in concept and practice was ascertained during the interviews with RAS RSD officers, whose explanation on either simplified approach focussed more on the line of questioning they pursue rather than on difference in assessment. UNHCR observed that this differentiation in interviewing was still the practice- communication with UNHCR Senior RSD Officer, 15 September 2021.

¹⁵⁸ As explained to the interviewer in interviews with RSD officers in Kakuma and Nairobi on 15 July 2019 and 26 July 2019, respectively.

¹⁵⁹ S K Chepton, *The Effects of Rapid Results Initiatives on Service Delivery in the Civil Service of the Republic of Kenya*, MA dissertation (Kenyatta University, November 2013) 29-34.

¹⁶⁰ Interviews with UNHCR and RAS officials on 24 July 2019 and 26 July 2019, respectively.

¹⁶¹ Interview with UNHCR Senior RSD officer, Nairobi, 24 July 2019.

¹⁶² Interview with UNHCR Senior RSD officer, Nairobi, 24 July 2019.

¹⁶³ Communication with UNHCR Senior RSD officer, 15 September 2021.

¹⁶⁴ Interviews with RAS RSD caseworkers in Kakuma and Nairobi on 15 July 2019 and 26 July 2019, respectively.

¹⁶⁵ Communication with UNHCR Senior RSD officer, 15 September 2021.

¹⁶⁶ Communication with UNHCR Senior RSD Officer, 15 September 2021.

circumstances of the case. According to RSD officers, cases with exclusion triggers tend to take the most time.¹⁶⁷

Following the interview, the RSD officer assesses the case and tries to verify and cross-check the applicant's information. Once the assessment is done, he or she forwards the file to the reviewer who goes through every piece of documentation on the file and makes a decision, which may or may not agree with the case worker's recommendation. In case of a disagreement, the file is referred back to the caseworker with specific recommendations or instructions, such as to re-draft the assessment, to verify some information or to gather more information. Where the caseworker and reviewer appear to have reached a stalemate, the case may be subjected to case-conferencing.¹⁶⁸

For the cases on which there is agreement, the reviewers recommend a decision that is either recognition or rejection, and the files are forwarded to the TAC. Cases for the TAC are batched up in profiles according to one's reason for flight or persecution, such as nationality, political opinion, membership of a particular social group, sex, race etc. The list of cases is sent to the TAC members a week before the TAC is set to meet.¹⁶⁹

The TAC scrutinises the profile summary and makes its recommendations. It deals with rejections individually, as there are not usually many of them - RSD officers mentioned indicative estimates of between one and five percent of the total number of cases.¹⁷⁰ In some cases, the TAC may refer cases back to the reviewers for more information or clarification. Otherwise, the list of cases sent to the TAC will usually be forwarded to the Commissioner to sign off on the decision letter.

RSD decision

Since 1 July 2014, decisions are only issued by the Commissioner for RAS, as indeed envisaged under the Refugees Act. The various RAS caseworkers and reviewers that we interviewed explained the current practice regarding RSD decisions. As it stands, once the Commissioner has signed off on the decision letters, they are sent to the respective offices and the applicants are notified to collect them. In the camps, applicants get to know that their decision letter is ready by either checking on any of the noticeboards, via which such communication is made, or they receive a text message to that effect. In Kakuma, decisions are issued every Friday unless otherwise informed.¹⁷¹ In Nairobi, where the authorities may not always have up-to-date contact details of the applicants, the applicant may have to regularly follow-up on the day indicated on the appointment slip.

A recognition letter is valid for only one year, in which time one is expected to have applied for and obtained a refugee ID card. Application for a refugee ID card is made to the NRB, based in Nairobi, although the application is made at RAS offices. One fills in an application form and has one's fingerprints taken as well as scanned. One will also have a photograph taken. Once issued, an ID is valid for five years and is renewable.¹⁷² Processing an ID after an application has been made 'should not take more than two months',¹⁷³ although according to individual testimonies, the applicants are normally given waiting slips with a three month period. The majority of our interviewees who had refugee IDs reported that they received their IDs within three months,¹⁷⁴ while some waited for longer, four months to one year, before they got it.¹⁷⁵ One was still waiting three months after making an application the second time round.¹⁷⁶ A few reported that they received their ID cards when they were about to expire and had to re-apply for a new one soon after.¹⁷⁷ Moreover, on a visit to the ID collection point in Kakuma, we witnessed several boxes containing unclaimed IDs, which the staff at the offices

¹⁶⁷ Interview with RAS RSD caseworker, Nairobi, 26 July 2019.

¹⁶⁸ Interviews with RSD caseworkers in Kakuma and Nairobi on 15 July 2019 and 26 July 2019, respectively.

¹⁶⁹ Interview with two RAS RSD reviewers in Kakuma, 15 July 2019.

¹⁷⁰ Interview with two RAS RSD reviewers in Kakuma, 15 July 2019. The 2018 UNHCR statistics do not indicate any rejections for that year – UNHCR, *Global Trends* 2018 (UNHCR 2019).

¹⁷¹ Interview with two RAS RSD reviewers in Kakuma, 15 July 2019.

¹⁷² RAS, *RAS Handbook* (n131) 15.

¹⁷³ RAS, *ibid*, 23.

¹⁷⁴ Interviews KN_MD_05, KN_FSS_06, KN_FSS_08, KN_ME_09, KN_MSS_10, KN_FE_14, KN_MS_22, KN_MS_27, KN_FE_28, KN_MS_29.

¹⁷⁵ Interviews KN_FSS_07, KN_MSS_11, KK_MSS_17, KK_FS_18, KK_FD_24, KK_MD_25.

¹⁷⁶ Interview KK_MD_21. Having not received an ID on the first attempt, he re-applied and was still yet to get his ID after the three months he had been advised it would be ready.

¹⁷⁷ Interviews KN_MSS_11, KN_FSS_07 (speaking of son's experience).

claimed remained uncollected despite communication to the applicants on the notice boards or last known contact phone number. In mid-2020, a new Live Capture Unit was introduced that would enable refugees in Kakuma, Nairobi and other urban locations to electronically submit their applications and biometrics, an initiative that NRB, UNHCR and RAS hope will greatly reduce processing time.

Where one's application has been rejected, he or she will receive a rejection letter, which, according to the template in the Refugees Regulations (as amended), should clearly set out the reasons for rejection in sufficient detail. The rejection letter further advises the applicant, should they be aggrieved by the decision, to appeal to RAB using the attached appeal form at the place and within the time stated therein.

VIII. Quality of the Recognition Process

We assess the quality of the recognition process in terms of accessibility to the process, accuracy of the decision, including factors that would enable decision makers to make more or less accurate decisions, efficiency of the process and the general fairness of the process. Since the RSD decision-making bodies have changed within the 20-year period that we examine, the section discusses aspects of the quality of the process during UNHCR's RSD decision-making tenure, as far as can be assessed from the available literature, and how the process currently stands under RAS. For the latter, we mainly rely on our fieldwork data as well as statistical data, where applicable.

a) Accessibility

This part discusses the accessibility of refugee recognition procedures in terms of physical access. It lays out the legal provisions in this regard and explains the practice around accessibility, information about which we gathered during our fieldwork. Worth noting is that the practices around access, especially in the camps, have not been greatly affected by the RSD transition, and so this discussion largely reflects practices as they were during UNHCR RSD and have continued during the transition.

The Refugees Act requires that an asylum seeker who has entered Kenya legally or illegally present himself or herself before the Commissioner for Refugee Affairs within 30 days after entry into the country.¹⁷⁸ The main locations, where asylum seekers can register for asylum, are in the camps, Dadaab and Kakuma, and in Nairobi. However, asylum seekers can also register with the government offices situated in Mombasa, Nakuru and Eldoret, which are generally regarded as transit centres.

Access to the camps and refugee recognition process: Since the camps of Dadaab and Kakuma are respectively situated near the borders with Somalia and South Sudan, the refugees from these two countries, who come through the border points (Nadapal for South Sudan and Liboi for Somalia), are usually directed to and contained in the camps. It can be said that there are mainly four routes to the camps. The first and most straightforward, as some of our respondents testified, is that they met, or were met by, Kenyan police and/or UNHCR officers at one of the borders, either Liboi or Nadapal, and after a couple of days, they were driven to the nearest camp.¹⁷⁹ The second route, as reported by a number of our respondents, especially those from the DRC and Ethiopia but also some Somalis and South Sudanese, was that upon entry into Kenya, they proceeded to Nairobi, where many of them learnt of the need to register. Some went to register at UNHCR, and those who had arrived more recently went to RAS offices. Upon registration, they were also given a movement pass to proceed to the camps or they were taken to one of the transit centres in Nairobi and, after some time, UNHCR transported them to the camps.¹⁸⁰ The third route is one whereby the asylum seekers get to the camps on their own.¹⁸¹ The fourth route is where the government has forcibly relocated urban refugees to camps following directives to that effect, as happened in April 2014. The government and police actions were subject to a judicial challenge. The court found, in part, that the government had violated the right to fair administrative action by failing to consider individual cases, and its actions were not justified on the grounds of national security, as had been claimed.¹⁸²

¹⁷⁸ Refugees Act, section 11(1), Refugees Regulations, reg 4(2)(b).

¹⁷⁹ KN_MSS_11, KK_FS_18, KK_MS_19.

¹⁸⁰ KN_MD_01, KK_MS_22, KK_FD_23, KK_MD_25, KK_MSS_17.

¹⁸¹ KN_FD_02, KK_MD_21, KK_FD_24.

¹⁸² *Refugee Consortium of Kenya & N v Attorney General* (n97).

At the camp, asylum seekers have to report to the reception centre for registration. As explained earlier, they would thereafter have to await notification of when to go for an interview, if they need to undergo RSD. Notices are displayed in well-known places all over the camp. Alternatively, they are contacted through text messages.

In terms of physical access, most of the processes take place in different locations spread across the entire camp area, and which are very spread apart. The reception centre and the registration office are situated in Kakuma 2 and, therefore, easily within reach of new arrivals, who will only leave the reception centre once they have been registered and allocated a place in the main camp area. RSD interviews are conducted in the RAS Processing Centre in Kakuma 3, while decision letters are issued at the Camp Manager's office, which is closer to Kakuma 1. The popular means of transport is by motorbike taxis otherwise, if one cannot afford those, walking the entire distance, which can be quite onerous for some of the applicants.

Access in the urban centres: From about 2011, both UNHCR and DRA were registering new applicants but since 2018, they can only be registered at the RAS office. Many of the refugees, who register in the urban centres, get to know of the need to register as well as the process from their fellow refugees.¹⁸³ Many of our respondents, who registered in Nairobi, reported that they were able to register on the same day that they presented themselves to the UNHCR offices or to the RAS offices. Among the focus group discussion (FGD) participants, all of whom had arrived in Kenya at varying times between 1997 to 2019, 10 out of 14 reported having received their 'manifest' and appointment letter on the same day that they presented themselves at either the UNHCR or RAS offices. Three reported getting them on the second attempt, which was the following day. While one, paradoxically, registered after she had already acquired an alien card.¹⁸⁴ Many of them, however, had to go very early in the morning in order to gain entry to the offices. Queues and groups of people waiting outside and about the RAS or UNHCR offices are a common sight.

Since 2018, however, all persons who register in Nairobi are given a movement pass to Kakuma, where they should undertake the remainder of the recognition process. One would need to apply for an exemption to reside in Nairobi on the grounds of 'employment or self-employment in an urban area; undertaking education in an urban area; medical needs that can only be addressed in urban areas; specific needs or vulnerabilities, and others'.¹⁸⁵ Neither the Refugees Act nor the Regulations stipulate the grounds for exemption.

A number of asylum seekers may choose to stay unregistered or, if they have started the process, some may not follow through and pick up their decision letters or even turn up for interviews, a fact that has been bemoaned by both RAS and UNHCR.¹⁸⁶ The UNHCR evaluation report posits that fear of forcible relocation to the camps may partly account for this failure on the part of asylum seekers.¹⁸⁷

b) Accuracy

Similar to RSD in Kenya, the element of accuracy in RSD decisions over the years has generally not been under much independent scrutiny. During UNHCR's tenure, Abuya and Wood's research¹⁸⁸ shed some light on whether the process produced accurate findings. Abuya specifically assessed the practice against UNHCR's procedural standards on RSD, which guide its staff on the conduct and assessment of individual asylum claims in determining whether or not one should be recognised as a refugee.¹⁸⁹ According to these standards, RSD officers should carry out a credibility assessment based on the applicant's testimony, any other evidence provided by the applicant and the country of origin information (COI). Consequently, the RSD interview should 'facilitate the most complete and accurate

¹⁸³ In a focus group discussion (FGD) we held with 14 asylum seekers and refugees of diverse nationalities, eleven out of fourteen stated that they had learnt of the need to register and where to go from friends or relatives - Focus Group Discussion, Nairobi, 29 July 2019.

¹⁸⁴ FGD, Nairobi, 29 July 2019.

¹⁸⁵ UNHCR, *Building on the Foundation* (n14) para 291.

¹⁸⁶ Interview with Senior RAS official, Nairobi, 26 July 2019. See also UNHCR, *Building on the Foundation* (n14) para 254.

¹⁸⁷ UNHCR, *Building on the Foundation*, *ibid*.

¹⁸⁸ Abuya, 'Status Determination Imtaxaan in Kenya' (n15); Wood, 'Expanding Protection in Africa' (n11).

¹⁸⁹ Abuya, *ibid*; UNHCR, *Procedural Standards for Refugee Status Determination under UNHCR Mandate* (UNHCR 2003, 2020).

disclosure of the facts that are relevant to the refugee claim'.¹⁹⁰ This extends to, among other things, the quality of the interpretation.

In his empirical research on UNHCR RSD in Kenya in the early 2000s, Abuya described a UNHCR rejection letter as 'a broadly worded statement, which, as it is bereft of any substance, fails to assist claimants and particularly those wishing to lodge appeals'.¹⁹¹ In other words, the contents of the letter were not helpful and, as such, were inadequate for anyone to objectively assess the accuracy of the findings. Additionally, the letters did not indicate under which refugee definition one's claim had been assessed.¹⁹² However, since the amendment to the Refugees Regulations, which contains the template for the rejection letter, it is clear that one's claim should be considered not only under the grounds of the 1951 UN Convention but also under the expanded definition of the 1969 OAU Convention, as provided under the Refugees Act. The template provides:

The persecution you fear must be for reasons of race, religion, sex, nationality, membership in a particular social group or political opinion. If you do not meet the criteria described above, you may still be eligible for refugee protection under the 2006 Refugees Act of Kenya if you are unable to return to your country of origin owing to external aggression, occupation, foreign domination or events seriously disturbing public order in any part or whole of your country of origin or nationality.¹⁹³

RSD, under the RAS mandate, is regulated by the Refugees Regulations, which provide some guidelines for RSD officers to enable them to assess an asylum claim with a degree of accuracy. A RSD officer should 'have all the particulars of the asylum seeker', including any written statement by the asylum seeker, any identity documents and claim-specific information or COI from reputable sources.¹⁹⁴ The asylum seeker may also produce witnesses.¹⁹⁵

Moreover, UNHCR has been exclusively providing RSD training to government officials since 2011, in which it has essentially shared its standards on conducting RSD.¹⁹⁶ Therefore, RAS RSD officers are guided by both the Refugees Regulations and UNHCR standards in the conduct of RSD in order to make accurate assessments.

RAS RSD officers that we interviewed provided some insights into how they test applicant credibility as well as their sources for corroboration for the applicant's claim. During the interview they may ask the applicant the same question in different ways and at different times when the narrative may not be so clear.¹⁹⁷ They also verify COI using sources, such as UNHCR reports on Refworld, reports by NGOs such as Human Rights Watch and Amnesty International, media reports, UK Home Office reports, among other sources.¹⁹⁸ RSD officers mentioned that they usually rely on digital maps to verify the applicant's stated place of origin by asking him or her for known landmarks or places in that area.¹⁹⁹ For COI, UNHCR has relied on 'fact-finding missions to refugees' country of origin ... country reports and media coverage, [and also] what their governments and embassies are saying'.²⁰⁰ The heavy reliance on COI has sometimes resulted in undermining the individual experience, which, according to Jaji's research, a number of refugees felt should be accorded more merit.²⁰¹ These sentiments have been

¹⁹⁰ UNHCR, *ibid*, section 4.3.6.

¹⁹¹ Abuya, 'Status Determination Imtaxaan in Kenya' (n15) 200.

¹⁹² Wood, 'Expanding Protection in Africa' (n11) 572.

¹⁹³ The Refugees (Reception, Registration and Adjudication) (Amendment) Regulations (n111), Form 6A.

¹⁹⁴ Refugees Regulations, reg 21(2), 23, 25.

¹⁹⁵ Refugees Regulations, reg 26.

¹⁹⁶ In addition to the UNHCR Procedural Standards, UNHCR developed a RSD handbook for governments which is also part of its training package – UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (UNHCR 2011 reissued in 2019). See Walkey, *Building a Bureaucracy* (n104) 15, 210.

¹⁹⁷ Interview with RAS RSD caseworkers in Kakuma, 15 July 2019.

¹⁹⁸ Interview with RAS RSD caseworkers, Kakuma and Nairobi, 15 July 2019 and 26 July 2019 respectively.

¹⁹⁹ Interview with RSD caseworker, Nairobi, 26 July 2019.

²⁰⁰ Jaji, 'Refugee Law, Agency and Credibility' (n16) 43.

²⁰¹ Jaji, *ibid*, 47.

similarly voiced by scholars, who have questioned COI's accuracy, currency, reliability, balance and relevance to the particularities of individual experiences.²⁰²

Since we did not encounter an asylum seeker who had been rejected under RAS mandate, we could not ascertain whether the decision is based on a comprehensive assessment of one's claim or if the rejection letters still lack sufficient detail, as identified in earlier research. We, therefore, could not exactly assess the accuracy of the decisions or their compliance with applicable RSD standards.

Rejection rates: Kenya's aggregate refugee rejection rate over a 20-year period (1999-2019) is approximately 15.8%.²⁰³ Among our research cohorts, however, which include Somalis and South Sudanese who have been subjected to the RSD process, the rejection rates are approximately as follows: Somalis (2000 to 2019) - 2.9%; South Sudanese (2012 to 2019) - 15%; Congolese (1999-2019) - 7.15% and Ethiopians (2000-2019) - 32.85%. The Ethiopians have experienced the highest rejection rate over the years, although they may not necessarily suffer the highest rejection rate among all the nationalities that have to undergo RSD in Kenya.²⁰⁴ Overall, the recognition rates in Kenya remain higher than the rejection rates.²⁰⁵

c) Efficiency

In assessing efficiency, some of the factors we consider are the case conclusion rate, taking into account pending applications or case backlogs, waiting times for applicants, starting with their first application until the final decision on their application, as well as institutional capacity and adaptability. Both UNHCR and RAS have faced, or continue to face, efficiency-related challenges, and due to the hastiness of the handover, some of these challenges, such as the backlog and case processing timelines, were passed on to the fledgling RAS.²⁰⁶ UNHCR had staffing challenges but, while these were not passed onto RAS, the latter is similarly grappling with its own staffing challenges. The aspect of communication has always been problematic, especially in Nairobi, both during UNHCR RSD tenure and under the RAS mandate.

Case backlog: For the period that UNHCR was in charge of RSD in Kenya, it experienced serious resource constraints that adversely affected the efficient execution of its RSD mandate. Abuya noted that in the early 2000s, UNHCR witnessed budget cuts that led to its reduction of staff and thus mainly relied on staff with short-term contracts in its RSD operations.²⁰⁷ This, in turn, led to delays in case processing, which resulted in a backlog build-up. A subsequent UNHCR evaluation report similarly noted the impact that shortages of qualified RSD staff had on case processing times for UNHCR offices worldwide. Kenya, in particular, had 52,200 pending applications (including new applications, first instance and cases under administrative review) by the end of 2013.²⁰⁸ While new case processing modalities, described earlier on, have since been introduced to enable a quick processing of cases, by the end of 2018, there were still 56,514 pending applications (including new applications, first instance and cases under administrative review).

Waiting times: Delays in case processing have been a regular occurrence, dating back to the time when UNHCR was handling RSD. Whereas one report stated the waiting period, i.e. from first registering with UNHCR until receiving the first instance decision, was 14 months in Nairobi,²⁰⁹ some applicants

²⁰² G Gyulai, *Country Information in Asylum Procedures: Quality as a Legal Requirement in the EU* (2007) available at <https://www.refworld.org/docid/479074032.html>; F Vogelaar, 'The Eligibility Guidelines Examined: The Use of Country of Origin Information by UNHCR' (2018) 29 *International Journal of Refugee Law* 617-640.

²⁰³ UNHCR's calculation for the recognition rate is: Refugee status protection rate = 'recognized' divided by total of 'recognized, other positive and rejected' multiplied by 100 (see appendices, table 2 for detailed breakdown). We have applied the same formula to calculate the rejection rate. Thus: Rejection rate = Rejected divided by total of 'recognized, other positive and rejected' multiplied by 100.

²⁰⁴ In her research, Jaji identified other nationalities from the Great Lakes region including those from Rwanda, Uganda and Burundi, although the circumstances for the latter changed when conflict erupted in the country in 2015 – Jaji, 'Refugee Law, Agency and Credibility' (n16) 38.

²⁰⁵ One RAS official very roughly estimated that since 2017 when RAS was constituted, the Commissioner had signed less than 50 rejection letters – Meeting with RAS official, Nairobi 21 July 2019.

²⁰⁶ Interview with UNHCR Senior RSD officer, Nairobi, 24 July 2019.

²⁰⁷ Abuya, 'Status Determination Imtaxaan in Kenya' (n15) 190-197.

²⁰⁸ UNHCR, *Providing for Protection* (n14) paras 36- 37.

²⁰⁹ UNHCR, *ibid*, para 37.

reported experiencing longer waiting periods with some stretching up to three years.²¹⁰ One of our interviewees attested to waiting two years to have an interview as, at the time (2003–2005), there was no protection officer in the camp to conduct interviews.²¹¹ Many asylum seekers and refugees, irrespective of whether their case was processed by UNHCR or RAS, deem the frequent postponement of appointments as one of the most trying aspect of the RSD process in Kenya.²¹²

The Kenya Constitution and FAAA highlight expeditious and efficient administrative action as some of the components of fair administrative action.²¹³ The Refugees Regulations stipulate 90 days as the time within which the Commissioner should determine an application.²¹⁴ Yet the number of pending applications over the years (see appendices, table 1) strongly suggest that this has hardly ever been the case. Among our interviewees, the majority reported having experienced exasperating long waiting periods, ranging from nine months to seven years.²¹⁵ While those in the camps would continue to receive all kind of assistance while they awaited the final decisions, those in Nairobi have to fend for themselves. In any case, for all refugees, the waiting or limbo period was exasperating to various degrees, with some admitting to having abandoned the process.²¹⁶

Communication: The Refugees Regulations stipulate that the ‘Commissioner shall put in place a fair and transparent system for the scheduling of refugee status determination interviews’.²¹⁷ This provision notwithstanding, many of our interviewees, particularly those in Nairobi, complained about the lack of clear communication. For most of them, they had to personally follow up their cases at either the UNHCR or RAS offices on the days indicated in their appointment letters. While many of them received new appointments to return at indicated times, they did not receive an explanation on the status of their case. An RAS official explained that, since most of the urban asylum seekers tend not to have a fixed place of abode or stable mode of contact, getting in touch with them is extremely difficult, leaving self-follow-up by the applicant as the more viable option.²¹⁸ Moreover, during the handover process, due to a lack of information from both UNHCR and the government, many asylum seekers and refugees were confused and uncertain about the status of their applications and where to follow up, leading to a costly and exasperating back-and-forth between the two institutions.²¹⁹

In Kakuma, strategically placed notice boards are the common mode of informing asylum seekers and refugees to attend an interview or to collect their decision. Our interviewees informed us that new notices are pinned up every Friday and they regularly check if their numbers appear on the list. At the time of our fieldwork, UNHCR had introduced, and was trialling, a system known as Kiosk for Access Service and Information (KASI), which, among others, would enable asylum-seekers and refugees to access their basic bio-data and book appointments for various services including RSD interviews, which have been conducted at RAS offices since October 2018.²²⁰ Only those in the camps and with a valid phone number could use KASI. Yet, even in Kakuma, one respondent was concerned that many registered asylum seekers never turn up for interviews. For instance in 2019, the no-show rate in the first half of the year was almost fifty percent, raising questions as to where the asylum seekers might be.²²¹

For all other communication, including important announcements to all refugees or camp residents, a van operated by FilmAid, an NGO, goes round the camps making the announcement(s).

Staffing: Earlier studies revealed that Kenya’s asylum system has always suffered from insufficient staff numbers, which has inevitably impacted on the asylum processing capacity of both UNHCR and DRA/RAS. Abuya explains the impact of budgetary cuts to UNHCR in the early 2000s and how these

²¹⁰ Abuya, ‘Status Determination Imtaxaan in Kenya’ (n15) 195.

²¹¹ Interview KK_MS_19.

²¹² UNHCR, *Navigating Nairobi* (n5) para 54-56.

²¹³ Constitution of Kenya, 2010, article 47(1), FAAA, section 4(1).

²¹⁴ Refugees Regulations, reg 18(1).

²¹⁵ Interviews KN_MD_01, KN_FD_02, KN_MD_03, KN_FD_04, KN_MD_05, KN_FSS_07, KN_FSS_08, KN_ME_09, KN_MB_12, KN_MD_13, KN_FE_14, KN_FE_15, KK_MS_19, KK_ME_20, KK_MD_21, KK_FD_23, KK_FD_24, KK_MD_25, KN_MS_27, KN_MS_29.

²¹⁶ Interviews KN_MB_12, KK_ME_20.

²¹⁷ Refugees Regulations, reg 18(3)(a).

²¹⁸ Interview with Senior RAS official, Nairobi, 26 July 2019

²¹⁹ NRC, *Recognising Nairobi’s Refugees* (n17) 14-18.

²²⁰ Interview with Senior UNHCR Protection Officer, Kakuma, 18 July 2019.

²²¹ Interview, *ibid*.

led to staff cuts with adverse consequences for case processing capacity.²²² A UNHCR evaluation report noted insufficient staff capacity at the DRA, which was compounded by a high staff turnover.²²³ Indeed, most of the RAS RSD staff are considered project staff working on one-year contracts and whose salaries are paid for by UNHCR.²²⁴ In some situations, the staff had not been paid for a number of months, which contributed to staff turnover.²²⁵ Some of the RAS staff that we interviewed admitted that the job uncertainty that comes with short-term contracts was a major challenge in addition to unsatisfactory remuneration relative to the demands of the job.²²⁶ UNHCR staff acknowledged this sentiment but also clarified that the remuneration for project staff is based on national United Nations Volunteer rates, which conform to the market standards.²²⁷

Although in Nairobi, UNHCR and RAS have continued to handle RSD together, the number of UNHCR staff involved has been gradually decreasing as RAS staff take on more responsibilities.²²⁸ The staffing question, therefore, continues to be of concern as the government fully takes over RSD. An RAS official admitted that this was indeed a problem and they were still lobbying to have all RSD staff as permanent staff.²²⁹ The failure to quickly address the staffing problem will lead to longer processing periods and a build-up in the case backlog. It may also affect the quality of the decisions if RAS cannot retain experienced and well-trained staff.

d) Fairness

Fairness is quite a fluid concept and may be understood differently by different actors. As we discovered in this research, asylum seekers and refugees tend to interpret ‘fairness’ more broadly than the RSD decision makers who operate under an established framework on ‘procedural fairness’. UNHCR guidelines on RSD emphasise the aspect of fairness as underlying the entire process, although it is not specifically defined nor explained.²³⁰ UNHCR officers are expected to apply these guidelines in the execution of their RSD functions. Since UNHCR uses its guidelines in training government officials, it essentially transmits its practices to government officers.²³¹ As adjudicators, RAS officials are also bound by the Kenyan constitutional and legal framework, which contains specific stipulations on fair administrative action and procedural fairness.

RAS operates under a constitutional and legal framework that sets out standards on procedural fairness or administrative justice. The Constitution of Kenya makes provision for the right to fair administrative action, including the right to be given written reasons for the action.²³² This right is further elaborated in the FAAA, which reiterates the constitutional provisions and, among others, obliges an administrator to give the person affected by the administrative decision prior and adequate notice of the nature and reasons for the decision, an opportunity to be heard and make representation, notice of a right to a review or internal appeal, a statement of reasons, notice of the right to legal representation, where applicable, and information, materials and evidence to be relied upon in making the decision.²³³

Under the Refugees Regulations, which contain analogous RSD-specific provisions, the RSD officer should explain to the applicant the purpose and nature of the interview, the use of interpreters and the nature of the procedures for receiving notification of the RSD decision.²³⁴ The Regulations further allow

²²² Abuya, ‘Status Determination Imtaxaan in Kenya’ (n15) 192-3.

²²³ UNHCR, *Providing for Protection* (n14) paras 62 & 65.

²²⁴ UNHCR, *ibid*, paras 154-155, Walkey, *Building a Bureaucracy* (n104) 84.

²²⁵ UNHCR official formerly working in Kakuma, interview held on 11 November 2020.

²²⁶ Interview with RAS RSD officials, Nairobi, 26 July 2019.

²²⁷ Communication with UNHCR Senior RSD officer, 15 September 2021.

²²⁸ Email communication with UNHCR official, 6 October 2020. At the time, there were two UNHCR and 16 RAS caseworkers that were conducting the initial interviews, while there were two UNHCR part-time reviewers and four RAS full-time reviewers.

²²⁹ Interview with Senior RAS official, Nairobi, 29 July 2019.

²³⁰ UNHCR, *Procedural Standards for Refugee Status Determination* (n189); UNHCR, *Handbook on Procedures* (n196); UNHCR, *Asylum Processes (Fair and Efficient Procedures)*, Global Consultations on International Protection, 2nd mtg, U.N. Doc EC/GC/01/12 (31 May 2001).

²³¹ Walkey, *Building a Bureaucracy* (n104) 210-11.

²³² Constitution of Kenya, 2010, article 47(1&2).

²³³ FAAA, section 4(3).

²³⁴ Refugees Regulations, reg 21(3).

for legal representation at the cost of the applicant, if they so wish. The role of the legal representative is limited to making ‘a statement or comment on the evidence presented’.²³⁵

The Regulations also make provision for the burden of proof, which lies with the applicant ‘to establish that he is a refugee’. However the RSD officer should base their assessment on ‘the credible testimony of an asylum seeker in consideration of conditions in the country of origin’.²³⁶ RAS RSD officers explained how they might apply this standard in practice: ‘RSD is not about proving persecution, individuals are given the benefit of the doubt, for example, a politician does not have to prove individual persecution beyond reasonable doubt. It may suffice if other politicians from the same country have been treated in the same or similar way’. They, however, stressed their heavy reliance on COI to corroborate the applicant’s claims.²³⁷

There is a paucity of scholarship that scrutinises in depth the fairness of the RSD process in Kenya. The available research, which was carried out before the transition, found UNHCR procedures to be wanting on several aspects of procedural fairness. For instance, the failure of UNHCR to give applicants full and accurate information on the RSD procedures and processes²³⁸ and ‘insufficient legal reasoning in refugee decisions’.²³⁹ During our fieldwork, many of the individual interviewees admitted to learning about the RSD procedure and process from fellow asylum seekers and refugees. As mentioned earlier, communication from the RSD authorities continues to be a challenge.

When asked about their perception of the fairness of the process, 15 of the respondents categorically stated that the process was unfair.²⁴⁰ The main reasons that many of them gave for the assessment was the long time it took and the lack of communication. Four expressed that it was fair in some aspects: one said it took a short time, although he complained about harassment by security officers (in Kakuma) and poor interpreters,²⁴¹ one was of the opinion that the process is better in the camps than in Nairobi, where there is ‘too much walking’,²⁴² while two were of the view that the process was good in the beginning but is currently bad.²⁴³ Those that viewed the process as fair were mainly refugees in Kakuma. Similarly, out of the 14 participants in the FGD, ten thought that the RSD process was unfair, two thought it was fair, while the remaining two were of mixed opinion.²⁴⁴ What clearly emerges from these interviews is that refugees’ perception of fairness is largely influenced by aspects of efficiency rather than procedural fairness *per se*, as laid out in the RSD guidelines and laws.

The provisions of the FAAA have not really been tested with regard to RSD decisions. Since the RSD decisions have only recently been subject to appeal, it remains to be seen how the appellate body or the court, acting on judicial review, adjudge the fairness of the process in individual cases.

IX. Quality of Protection

Every recognised refugee in Kenya is ‘entitled to the rights and subject to the obligations contained in the international conventions to which Kenya is a party’.²⁴⁵ Besides the 1951 UN Convention, which provides a range of rights for refugees and concomitant obligations for the host country, Kenya is also party to a number of international human rights treaties. This section looks at a selection of rights associated with refugee status and the degree of their incorporation into Kenyan law, policy and practice. It is also worth mentioning that, with regard to some of the social rights, refugees may not fare better than Kenyan citizens or communities that may be similarly socially and economically disadvantaged.

²³⁵ Refugees Regulations, reg 21(8).

²³⁶ Refugees Regulations, reg 22.

²³⁷ Interview with RAS RSD caseworkers, Kakuma, 15 July 2019.

²³⁸ Abuya & Wachira, ‘Assessing Asylum Claims in Africa’ (n15) 171, 182.

²³⁹ Wood, ‘Expanding Protection in Africa’ (n11) 574, Abuya, ‘Status Determination Imtaxaan in Kenya’ (n15) 199-200.

²⁴⁰ Interviews KN_MD_01, KN_FD_02, KN_MD_03, KN_FSS_06, KN_FSS_07, KN_FSS_08, KN_ME_09, KN_MD_13, KN_FE_14, KN_FE_15, KK_ME_20, KK_MD_21, KK_FD_24, KN_MS_27.

²⁴¹ Interview KK_MSS_17.

²⁴² Interview KN_FS_26.

²⁴³ Interviews KN_FD_04, KN_MD_05.

²⁴⁴ FGD, Nairobi, 29 July 2019.

²⁴⁵ Refugee Act, section 16(1).

a) Security of Residence

An asylum seeker that has applied for refugee status and members of his or her family has the right to remain in Kenya until they are recognised, or they have exhausted the right of appeal. Even where the appeal is not successful, one has 90 days to remain in Kenya as admittance to a country of one's choice is sought.²⁴⁶ The law guarantees refugees protection from *refoulement*, discussed earlier on.

Every asylum seeker and refugee in Kenya is entitled to a refugee ID card or pass, which permits him or her to remain in Kenya.²⁴⁷ Upon application, an asylum seeker, depending on the mode of recognition, is issued with either a 'Government of Kenya proof of registration', which *prima facie* refugees use to apply for a refugee ID card or, in addition, an ASP, which also doubles as the appointment letter for an interview for those refugees that undergo RSD. The ASP is usually valid for six months, renewable until one receives a decision. The Asylum Seeker Pass may be withdrawn if: the asylum seeker contravenes any of the conditions specified therein, the application is rejected and no appeal is lodged the asylum seeker is excluded from obtaining refugee status or there is a final determination that the asylum seeker no longer qualifies for refugee status under the refugee status cessation clauses.²⁴⁸ As explained earlier, upon receipt of a recognition letter, the applicant is required to apply for a refugee ID card.

Yet possession of valid documentation is not a guarantee against police harassment and exploitation, particularly in the urban areas. In a focus group discussion that we held with Somali refugees, the participants revealed that they faced frequent harassment, arrests and exploitation by the police, who disregard their documents. The police officers sometimes tear up their letters and, as a safeguard, refugees resort to laminating them.²⁴⁹ The harassment and arrests tend to escalate whenever there are renewed calls for urban refugees to relocate to the camps or in the aftermath of a terrorist attack.²⁵⁰

Although the situation of urban refugees may seem more precarious than for refugees in the camps, the persistent and periodic directives by the Kenyan Government to close refugee camps and repatriate refugees threaten the security of residence and status of the entire refugee population in Kenya.²⁵¹

Regarding prospects for permanent residency and citizenship, the Refugees Act is silent. Refugees, therefore, are subject to the same requirements as all other foreign nationals that seek Kenyan citizenship by registration. Although there is potential for refugees to secure more permanent legal status in Kenya, it is challenging for them to practically meet the criteria laid out in the Kenya Citizenship and Immigration Act (KCIA).²⁵² An NGO report found that the encampment policy is a major barrier for refugees and asylum seekers meeting the eligibility criteria for either permanent residence or citizenship, besides other technical obstacles.²⁵³

The Refugees Bill, 2019, although it contains new provisions on the integration of refugees into local communities, is silent on their prospects of obtaining permanent residence or citizenship.

b) Freedom of Movement

The Refugees Act empowers the Minister, 'in consultation with the host community, [to] designate places and areas in Kenya to be refugee camps'.²⁵⁴ Consequently, the majority of Kenya's refugees and asylum seekers reside in either of the two camps, Dadaab or Kakuma, which were both established in

²⁴⁶ Refugees Act, section 12(1).

²⁴⁷ Refugees Act, section 14, Refugees Regulations, reg 31-32.

²⁴⁸ Refugees Regulations, reg 14.

²⁴⁹ Focus Group Discussion with Somali refugees held in Nairobi, 13 June 2019.

²⁵⁰ Campbell, 'Urban Refugees in Nairobi' (n18) 400-401, HRW, *Hidden in Plain View* (n18) 42-50; B Rawlence, *City of Thorns: Nine Lives in the World's Largest Refugee Camp* (Picador 2017).

²⁵¹ See also C Rodgers & M Talili, 'Whether or Not Kenya Closes its Camps, Much Damage has been done' *African Arguments*, 9 April 2021 available at <https://africanarguments.org/2021/04/whether-or-not-kenya-closes-its-camps-much-damage-has-been-done/>.

²⁵² KCIA, 2011, sections 11-14.

²⁵³ RCK, *The Status of Legal Integration* (n18) 16-18, 25.

²⁵⁴ Refugees Act, section 16(2)(b).

response to the large refugee influx in the 1990s, although they were only formally designated as camps in 2014.²⁵⁵ Only about 16% of the entire refugee population reside in urban areas.²⁵⁶

Camp residents may only travel outside the camps upon obtaining a movement pass from the Camp Officer/Manager.²⁵⁷ One needs to apply for the movement pass, stating the purpose for which they seek to travel. Although the law does not state any reasons under the current directives and practice, one will normally be granted a movement pass for purposes of education, business, medical, resettlement or other travel abroad, termed 'humanitarian consideration'.²⁵⁸ The pass states the number of days that one is allowed to be outside the camp. In case they need an extension of their time outside the camp, they will go to the RAS office in Nairobi to seek an extension or an exemption to reside outside the camps. Refugees, who fail to get the proper documentation or violate the terms of their passes, may get arrested and charged with residing outside the camp without authority.²⁵⁹

Even though there are prospects and processes in place to leave the camp, they are currently at the discretion of the Camp Manager and his or her vetting committee. Even then, as many prior studies have averred, the encampment policy may amount to a violation of refugees' rights and freedoms as stipulated in the 1951 UN Convention, in more ways than one,²⁶⁰ and possibly (though not least of all) the constitutional right to free movement.²⁶¹

The Refugees Bill re-affirms the continuance of camps, which it re-names 'designated areas', and it further elaborates upon the Cabinet Minister's and Commissioner's powers to manage these places, including requiring residents to move from one designated area to another. Non-compliance with any of the executive or administrative decisions would attract a rather steep punishment, a maximum of five years imprisonment or a fine not exceeding KES 200,000/- (about USD1,900).²⁶²

c) Right to Work

Under the KCIA (previously the Immigration Act), a refugee may apply for a work permit. The 'Class M Permit' is issued free of charge to a 'person who has been granted refugee status in Kenya in accordance with the refugee law of Kenya and any spouse of such a refugee who intends to take up employment or engage in a specific occupation, trade, business or profession'.²⁶³ The Refugees Act, in tandem, recognises that refugees may engage in wage-earning employment but are subject to the same restrictions that may apply to other foreigners.²⁶⁴

Consequently, a refugee may only be granted a work permit for skills not presently available on the Kenyan labour market and 'on the understanding that effective training programmes are undertaken to produce trained citizens within a specified period'.²⁶⁵ This restriction, while disadvantageous for all refugees, particularly those in a protracted situation, fails to take into account that many refugees receive basic and higher education in Kenya and, as such, their academic standing and career prospects are virtually at a par with Kenyan nationals.

²⁵⁵ Republic of Kenya, Gazette Notice No. 1927, *The Kenya Gazette* 28 March 2014.

²⁵⁶ According to UNHCR population figures, by the end of January 2021, it was reported of Kenya's total refugee population that 44% reside in Dadaab, 40% in Kakuma and only 16% are urban refugees - <https://www.unhcr.org/ke/figures-at-a-glance>.

²⁵⁷ Refugees Act, section 17(f).

²⁵⁸ RAS, *RAS Handbook* (n131) 24.

²⁵⁹ Refugees Act, section 25(f), one may be liable to fine or imprisonment for a maximum term of six months.

²⁶⁰ Hyndman & Nylund, 'UNHCR and the Status of *Prima Facie* Refugees' (n7) 40-42; E O Abuya, 'From Here to Where? Refugees Living in Protracted Situations in Africa' in A Edwards & C Ferstman (eds), *Human Security and Non-Citizens: Law, Policy and International Affairs* (Cambridge University Press 2010) 125, 132-135; UNHCR, *Building on the Foundation* (n14) para 218.

²⁶¹ *Kituo cha Sheria and others v The Attorney General* (n57) paras 56-57; *The Attorney General v Kituo cha Sheria and others* (n61); *S M Mohammed and others v Cabinet Secretary and others* (n98).

²⁶² Refugees Bill, 2019, sections 30-33.

²⁶³ KCIA, section 36, Kenya Citizenship and Immigration Regulations, 2012, reg 20(2) and Sch. 7.

²⁶⁴ Refugees Act, section 16(4).

²⁶⁵ Explanatory note on form for application for a work permit, Kenya Citizenship and Immigration Regulations, 2012, regulation 20(1), Schedule 1, form 24.

The application for a ‘Class M Permit’ needs to be endorsed by RAS, even though the issuance of the permit is solely within the remit of the immigration department. In practice, it is rather difficult for refugees to obtain the necessary work permits.²⁶⁶ An NGO official explained:

[t]he majority just do without it and, that way, they are not able to access formal employment... I know a number of people who have work permits and they have good jobs, some are doctors, there is a pilot. Some are lecturers in universities. They have work permits. The majority don’t have because they give up in the process of following up or their files are lost. Some are asked for money, they don’t have the money to bribe so it becomes very difficult. Then the other requirement ... where, for refugees, it is hard for them to get the work permits, is that the person must be applying for a job a Kenyan can’t do. Because there is also a very high unemployment level for the Kenyans. So that becomes very tricky for the refugees.²⁶⁷

One report suggested that the government’s reluctance to issue work permits, particularly to urban refugees, would be inimical to its encampment policy.²⁶⁸ Yet in the camps, which are located in remote regions, there are barely any work opportunities in formal employment. NGOs and UNHCR employ a number of highly educated refugees in an informal capacity, whereby they receive an ‘incentive pay’ and not a salary.²⁶⁹ One of our interviewees explained the incentive system thus, ‘it’s an incentive to keep them going, to motivate them ... and the incentives scale is provided by UNHCR.... The reasoning by UNHCR is that they have given this person shelter, they are giving this person free water, medical, food, everything is provided for and covered by UNHCR. The activities being implemented in the camp are also financed by UNHCR, so a portion of the money you give them then becomes an incentive because there are many other activities financed by UNHCR for them, so that’s why it’s called an incentive payment’.²⁷⁰

As a means of earning a living, many refugees are self-employed, engaging in various kinds of trade and businesses. Urban refugees, in particular, are, in the main, not eligible for humanitarian assistance, except for a small fraction of ‘vulnerable’ refugees that may receive some short-term assistance from NGOs.²⁷¹ Many refugees operate their trade or business informally although, for those that follow the official procedures, the process may differ from county to county. Yet even in self-employment, refugees still encounter challenges, such as accessing start-up capital (a few are assisted by NGOs), opening bank accounts, registering for mobile money operations, steep licensing fees and harassment by law enforcement officers in the city, while for those in camps, ease of movement for business purposes is not always guaranteed.²⁷² Therefore, access to work in Kenya continues to elude many refugees in practical terms.

d) Access to Education

The Government of Kenya provides free primary education for children enrolled in government schools, including refugees and asylum seekers. The dynamics differ based on camp or urban residence. In Nairobi, children can benefit from free primary education in government schools but the parents have to provide most, if not all, of the school materials, including uniforms, exercise books, text books and other school requirements. Furthermore, a child may easily get admitted into a school but they might fail to register for their primary leaving examinations if their parents do not produce their birth certificate. For refugee children, born outside Kenya, this can be very challenging.

In the camps, all education, right up to secondary school level, is provided free of charge courtesy of UNHCR and its partners. However, the number of refugees enrolled in school keeps dwindling at the higher levels of education. For instance, it was reported that in Kakuma, which hosts ‘about 180,000 refugees and asylum seekers, including 50,000 children enrolled in 19 primary schools – [the national enrolment ratio] stands at 65 per cent at the primary level and three (3) per cent at the secondary

²⁶⁶ A Betts et al, *Refugee Economies in Kenya* (Refugee Studies Centre 2018) 25.

²⁶⁷ Interview KN_EL_04, 10 June 2019.

²⁶⁸ RCK, *The Status of Legal Integration* (n18) 18.

²⁶⁹ Betts et al, *Refugee Economies in Kenya* (n266) 15.

²⁷⁰ Interview KN_EL_03, 7 June 2019.

²⁷¹ Information on UNHCR urban refugee program in Kenya is available at <https://www.unhcr.org/ke/urban-areas>. See also RCK, *Myths and Truths* (n19) 11-14; UNHCR, *Navigating Nairobi* (n5) para 31-32; interview KN_EL_05, 12 June 2019.

²⁷² Betts et al, *Refugee Economies in Kenya* (n266); Campbell, ‘Urban Refugees in Nairobi’ (n18) 400-402; UNHCR, *Navigating Nairobi* (n5) paras 138-148.

level'.²⁷³ The numbers even get lower at the post-secondary level. Only a few refugees manage to get scholarships to proceed with higher education either at the tertiary institutions, most of them run by NGOs in partnership with UNHCR, or at university.

e) Access to Health Services

According to the Kenyan Constitution 'every person has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care'.²⁷⁴ In practice, however, Kenyan citizens who are 18 years old and above and have a monthly income of KES 1,000/- (about USD 10) may opt to become members of the National Health Insurance Fund (NHIF). It is compulsory for persons employed in the formal sector, it is open and voluntary for those in the informal sector.

Refugees are not the primary target group for the NHIF, especially as many are not in formal employment. Through UNHCR and NGO intervention and assistance, some refugees and asylum seekers may get NHIF cards or benefit from medical services directly provided by a few NGOs.²⁷⁵ Overall, the cost of health care remains prohibitive to many of Kenya's urban refugees.

The situation is different in the camps, where UNHCR, other international organisations and implementing partners provide free health services for all persons. In Kakuma, for instance, there are two major hospitals, where refugees and asylum seekers go for treatment. Treatment and medicine are free of charge, unless the medicine is not available at the hospital, in which case one would have to buy it from private pharmacies. However, there are some medical conditions that it may not be possible to treat in Kakuma. In this case, one needs certification from a UNHCR doctor in order to get an exemption to stay in Nairobi.²⁷⁶

X. Role of NGOs

NGOs in Kenya play a crucial role in the promotion of refugees' rights, including law and policy advocacy, provision of economic, social and humanitarian services, and provision of legal aid and representation for refugees, including public interest litigation. A number of significant constitutional cases challenging government policy inimical to refugee protection were initiated by NGOs such as *Kituo cha Sheria* and RCK. The NGOs that provide legal aid services also provide legal information to refugees, assistance in lodging RSD appeals and some may offer legal representation. Currently, NGOs have taken the lead in pushing for the passage of the Refugees Bill although, beyond legal mobilisation, NGOs remain the main conduit through which UNHCR provides services and assistance to refugees both in urban areas and in the camps.

XI. Impact of Covid-19 Pandemic on Refugee Recognition

The Covid-19 pandemic, as generally observed by UNHCR, had an impact on asylum systems worldwide.²⁷⁷ When Kenya introduced lockdown measures and travel restrictions, the registration of new arrivals did not take place for several months. RAS also suspended interviews, although some aspects of RSD, such as assessments, reviews and decision-making on pending files, continued. Consequently, in 2020, the number of new applicants was significantly much lower than in 2019, as was the total number of decisions made (see appendices, table 6). RAS resumed new arrival registration in Kakuma in November 2020, after putting some safety measures in place with the support of UNHCR.

²⁷³ UNHCR, *Education for Refugees: Priority Activities and Requirements Supporting Enrolment and Retention in 2016* (UNHCR 2016) 22.

²⁷⁴ The Constitution of Kenya, 2010, article 43(1)(a).

²⁷⁵ Some of the NGOs that provide medical services are the National Council of Churches in Kenya (NCCCK), and RefugePoint. A number of reports have been written on access to health care among Kenya's urban refugees, a synthesis of which is available in J Jemutai et al, *A Situation Analysis of Access to Refugee Health Services in Kenya: Gaps and Recommendations: A Literature Review*, Research Paper 178 (Centre for Health Economics, University of York 2021).

²⁷⁶ Interview with Senior RAS official, Nairobi, 26 July 2019.

²⁷⁷ UNHCR, *Global Trends: Forced Displacement in 2020*, (UNHCR 2021) 58.

In Nairobi and other urban areas, the services remained very limited well into 2021. Only emergency and vulnerable refugees were considered on a case-by-case basis and were registered as an exception.²⁷⁸

XII. Conclusion

The report has explored Kenya's RRR over the last 20 years, which has, in so many ways, been shaped and defined by its refugee situation as well as the various actors involved in refugee recognition. Even though Kenya had long been a party to both the 1951 UN Convention and the 1969 OAU Convention and had been hosting large refugee populations for more than a decade, it took several years for the government to enact refugee-specific legislation. This normative gap was attended by a gap in the administrative and financial capacity to recognise and offer necessary assistance to the large numbers of refugees arriving since the early 1990s. UNHCR, at the government's invitation, doubtless filled in these gaps in ways that continue to define Kenya's RRR. The recognition of groups of refugees on a *prima facie* basis has benefitted nationalities that comprise the majority of Kenya's refugee population. The concretisation of the encampment system, which the government had been operating on a small scale pre-1990s, became a defining element of Kenya's refugee protection regime with the Dadaab and Kakuma camps, formed during the 1990s influx. RSD practices that were instituted by UNHCR during its tenure have more or less been carried on by the RAS after the government's resumption of RSD, even though, from a scholarly perspective, many elements of the decision-making processes remain largely opaque.

Although the government of Kenya has taken on the role of RSD, the UNHCR imprint remains and, in some ways, its role has remained substantial. Despite the change in RSD decision makers over the 20 year period, there is yet to be a significant change in the quality of RSD, many of the RSD-related issues that beset UNHCR during its tenure have been inherited by the RAS, which also continues to labour under several challenges. The Kenyan Government's approach to refugees continues to be security-driven, with its running policy that refugees should be contained in camps for security reasons but also where they can be easily managed and receive humanitarian aid and other social services from UNHCR and other international partners.

The Government of Kenya might, on the one hand, portray a readiness to continue with its refugee protection obligations by its resumption of RSD, the setting up of the necessary statutory bodies and adopting a new Refugees Act that could further streamline the RRR and reinforce its commitment towards refugees. However, on the other hand, a degree of scepticism about the underlying motives remains, occasioned by the same government's anti-refugee attitudes. For instance, its hesitation to substantially finance its RSD operations, despite having been in charge for more than five years. More concerning, though, is its recurring threats to close the camps. In early 2021, the Government of Kenya renewed its push to close not only Dadaab but all refugee camps by June 2022, even though encampment underpins its policy on refugee protection. Even though UNHCR and the government are working on a roadmap towards finding solutions for the different refugee groups in the camps,²⁷⁹ for many refugees the conditions for return may still not be conducive, resettlement slots are on the decline and local integration may appear questionable for many refugees given the circumstances. The future of many refugees in Kenya remains worryingly uncertain, the legal guarantees of Kenya's RRR notwithstanding.

²⁷⁸ Updates available in UNHCR monthly statistical package available at <https://www.unhcr.org/ke/857-statistics.html>.

²⁷⁹ UNHCR, *Joint Statement by the Government of Kenya and the United Nations High Commissioner for Refugees: Dadaab and Kakuma Refugee Camps Roadmap*, 29 April 2021 available at <https://www.unhcr.org/uk/news/press/2021/4/608af0754/joint-statement-government-kenya-united-nations-high-commissioner-refugees.html>.

XIII. Appendices

Table 1: Asylum applications and refugee status determination by country/territory of asylum and level in the procedure, 1998-2018

(Source: UNHCR Global Trends Reports)

Year	Procedure		Pending start of the year	Applied during the year	Decisions during the year					Pending end of the year	Protection indicators			
	T	L			Total	Conventional status	Completed status	Rejected	Other w. closed		Total	Total	Recognition rates	O/w. closed rate (%)
1998	U		1,046	9,265	2,629	-	1,277	15	3,921	6,390	67.0	67.0	n/a	n/a
1999	U	FA	6,390	10,030	1,950	-	4,090	4,590	10,620	5,800	32.3	32.3	n/a	-9.2
2000	U		5,799	8,568	2,466	-	2,959	229	5,654	8,713	44.0	44.0	4.0	50.0
2001	U		8,713	12,011	3,962	-	3,465	702	8,129	12,595	53.0	53.0	n/a	45.0
2002	U		12,599	3,661	1,266	-	1,165	11,411	13,842	2,418	52.0	52.0	n/a	-81.0
2003	U	FI	2,415	4,195	1,069	-	1,511	7	2,587	4,023	41.0	41.0	n/a	67.0
	U	AR	--	--	43	--	230	--	273	--	16.0	16.0	n/a	--
2004	U	AR	-	-	52	-	251	-	303	-	17.0	17.0	n/a	--
	G	FI	4,022	9,329	3,101	-	501	3	3,605	9,474	86.0	86.0	n/a	136.0
2005	U	FI	9,171	39,008	29,797	-	1,250	672	31,719	16,460	96.0	96.0	n/a	79.0
	U	AR	281	-	61	-	220	-	281	-	22.0	22.0	n/a	100.0
2006	U	AR	366	104	160	-	305	5	470	-	34.4	34.4	1.1	-100.0
	U	FI	16,460	37,392	22,775	-	1,723	10,839	35,337	18,515	93.0	93.0	30.7	12.5
2007	U	FI	17,493	18,952	2,958	--	1,209	27,430	31,597	4,848	71	71	86.8	-72.3
	U	AR	1,022	524	136	--	374	119	629	917	26.7	26.7	18.9	-10.3
2008	U	AR	917	723	317	--	187	68	572	1,068	62.9	62.9	11.9	16.5
	U	FI	4,848	8,093	2,609	--	458	2,182	5,249	7,692	85.1	85.1	41.6	58.7
2009	U	FI	7,692	15,403	3,206	--	599	1,407	5,212	17,883	84.3	84.3	27.0	132.5

	U	AR	1,068	857	451	--	331	68	850	1,075	57.7	57.7	8.0	0.7
2010	U	FI	17,883	19,317	7,392	--	900	2,369	10,661	26,539	89.1	89.1	22.2	48.4
	U	AR	1,075	807	254	--	182	19	455	1,427	58.3	58.3	4.2	32.7
2011	U	AR	1,424	12,811	1,974	--	1,804	181	3,959	10,276	52.2	52.2	4.6	621.6
	U	FI	26,539	2,391	3,195	--	15	725	3,935	24,995	99.5	99.5	18.4	-5.8
2012	U	FI	34,232	19,973	4,198	40	2,314	7,674	14,226	39,979	64.1	64.7	53.9	16.8
	U	AR	1,042	1,269	81	--	239	26	346	1,965	25.3	25.3	7.5	88.6
2013	U	AR	1,965	2,333	697	--	362	32	1,091	3,207	65.8	65.8	2.9	63.2
	U	FI	39,979	19,238	5,392	--	2,210	2,537	10,139	49,078	70.9	70.9	25.0	22.8
2014	U	AR	3,207	1,290	242	--	260	489	991	3,506	48.2	48.2	49.3	9.3
	J	FI	29,646	9,468	3,606	--	519	4,484	8,609	30,505	87.4	87.4	52.1	2.9
	U	FI	49,315	12,051	1,061	--	408	59,897	61,366	--	72.2	72.2	97.6	-100
2015	J	AR	3,506	218	183	--	25	285	493	3,231	88.0	88.0	58.0	-8
	J	FI	30,505	15,766	4,144	1,490	72	3,827	9,533	36,738	72.6	98.7	40.0	20.0
2016	J	AR	3,231	185	81	--	--	195	276	3,140	100.0	100.0	71.0	-3.0
	J	FI	36,738	18,055	5,095	523	13	8,538	14,169	40,624	90.5	99.8	60.0	11.0
2017	J	AR	3,140	748	38	-	-	804	842	3,046	100.0	100.0	95.5	-3.0
	J	FI	40,624	19,025	2,326	-	-	3,855	6,181	53,468	100.0	100.0	62.4	31.6
2018	G	AR	3041	96	0	0	0	821	821	2316	100	-23.8
	G	FI	53473	19397	3	16576	0	8131	24710	48160	0	100	32.9	-9.9

Notes:

1. Type of application: N=New; R=Repeat/reopened; A=Appeal/administrative review; J=Court.

2. Data refers to number of cases (C) or persons (P): App. = Applications; Dec. = Decisions taken during the year.

3. T=Type: G=Government; U=UNHCR; J=Government and UNHCR jointly.

4. L=Level: NA=New applications; FI=First instance decisions; AR=Administrative review decisions; RA=Repeat/reopened applications; BL=Backlog procedure JR=Judicial review; SP=Subsidiary protection; FA=First instance and appeal; TP=Temporary protection; TA=Temporary asylum.

**Table 2: Refugees and people in a refugee-like situation, excluding asylum-seekers, and changes by origin and country of asylum
(Source: UNHCR Global Trends Reports)**

Year	Origin	Population start of year		Major increases			Major decreases during year					Population end of year	
		Total	of whom UNHCR assisted:	Spont. arrivals		Other increases	Voluntary repatriation*		Resettlement		Other decreases	Total	of whom UNHCR assisted:
				Group / Prima facie recogn.	Indiv. recogn.		Total	of whom UNHCR assisted :	Total	of whom UNHCR assisted :			
2006	Somalia	150,459	150,459	--	17,721	13,802	--	--	4,004	4,004	4,274	173,702	173,702
	Sudan	76,646	76,646	--	4,092	3,203	2,186	2,186	1,002	1,002	8,128	73,004	73,004
	Ethiopia	14,862	14,862	--	682	2,560	--	--	949	949	725	16,428	16,428
2007	Somalia	173,702	173,702	23,786	1,119	12,916	--	--	4,798	4,798	14,305	192,420	192,420
	Sudan	73,004	73,004	1,203	173	13,255	19,159	4,794	526	526	22,689	45,261	45,261
	Ethiopia	16,428	16,428	--	1,269	2,885	--	--	1,021	1,021	1,441	18,119	18,119
2008	Somalia	192,420	192,420	65,001	569		--	--	2,308	2,308		259,121	259,121
	Sudan	45,261	45,261	110	163		9,876	8,479	379	379		28,496	28,496
	Ethiopia	18,119	18,119	--	1,714		1	1	824	824		22,649	22,649
2009	Somalia	259,121	259,121	72,476	686		--	--	3,612	3,612		310,280	310,280
	Sudan	28,496	28,496	--	185		665	665	101	101		20,315	20,315
	Ethiopia	22,649	22,649	--	1,306		--	--	475	475		17,103	17,103
2010	Somalia	310,280	310,280	73,715	289		6	6	2,776	2,776		351,773	351,773
	Ethiopia	17,103	17,103	--	5,102		--	--	606	606		21,253	21,253
	Sudan	20,315	20,315	--	139		64	64	103	103		20,528	20,528
2011	Somalia	351,773	351,773	163,138	436		70	70	2,102	2,102		517,666	517,666
	Ethiopia	21,253	21,253	--	3,816		--	--	906	906		21,857	21,857
	Sudan	20,528	20,528	--	80		28	28	213	213		17,568	17,568

	DRC	4,879	4,879	--	519		--	--	234	234		5,155	5,155
2012	Somalia	517,666	517,666	13,761	248		--	--	1,442	1,442		512,069	512,069
	South Sudan	15,160	15,160	--	231		--	--	35	35		16,774	16,774
	Ethiopia	21,857	21,857	--	2,553		--	--	806	806		22,221	22,221
	DRC	5,155	5,155	--	852		7	5	192	192		6,244	6,244
2013	Somalia	512,069	512,069	751	377		28,828	--	2,612	2,612		475,304	475,304
	South Sudan	16,774	16,774	--	196		--	--	88	88		19,930	19,930
	Ethiopia	22,221	22,221	--	3,134		--	--	469	469		23,524	23,524
	DRC	6,244	6,244	--	2,011		--	--	308	308		8,076	
2014	Somalia	475,304	475,304	11,498	92		486	486	3,562	3,562		424,691	424,691
	South Sudan	19,930	19,930	66,993	65		--	--	92	92		89,226	89,226
	Ethiopia	23,524	23,524	--	993		--	--	480	480		21,250	21,250
	DRC	8,076	8,076	--	3,364		5	5	560	560		9,324	9,324
	Sudan	3,907	3,907	--	27		--	--	82	82		3,381	3,381
	Eritrea	1,432	1,432	--	121		--	--	57	57		1,333	1,333
2015	Somalia	424,691	424,691	7,730	1,343		5,679	5,679	3,143	3,143		417,920	417,920
	South Sudan	89,226	89,226	8,077	74		159	159	136	136		95,671	95,671
	Ethiopia	21,250	21,250	--	999		--	--	644	644		21,229	21,229
	DRC	9,324	9,324	--	2,772		--	--	874	874		12,046	12,046
	Sudan	3,381	3,381	--	287		8	8	46	46		3,419	3,419
	Eritrea	1,333	1,333	--	39		--	--	28	28		1,229	1,229
2016	Somalia	417,920	417,920	848	58		33,792	33,792	5,744	5,521		324,448	324,448
	South Sudan	95,671	95,671	22,629	88		--	--	413	412		87,141	87,141
	Ethiopia	21,229	21,229	--	1,226		--	--	1,277	1,265		19,064	19,064
	DRC	12,046	12,046	--	2,758		--	--	1,647	1,621		13,328	13,328

	Sudan	3,419	3,419	--	368		--	--	123	123		2,863	2,863
	Burundi	848	848	--	1,016		--	--	71	70		1,717	1,717
	Eritrea	1,229	1,229	--	28		--	--	121	121		1,081	1,081
2017	Somalia	324448	324448	0	35		35409	35409	2102	2102		281692	281692
	South Sudan	87141	87141	20990	*		0	0	272	272		111510	111510
	Ethiopia	19064	19064	0	433		0	0	663	663		17873	17873
	DRC	13328	13328	0	1439		0	0	730	730		13941	13941
	Sudan	2863	2863	0	35		0	0	184	184		2922	2922
	Burundi	1717	1717	0	260		0	0	50	50		1902	1902
2018	Somalia	281692	281692	0	11		82840	82840	398	398		252498	252498
	South Sudan	111510	111510	7276	*		4631	0	100	100		115202	115202
	DRC	13941	13941	0	10739		0	0	643	643		24586	24586
	Ethiopia	17873	17873	0	1523		16	16	282	282		18115	18115
	Burundi	1902	1902	0	3071		586	586	81	81		4872	4872
	Sudan	2922	2922	0	856		0	0	9	9		3582	3582

Notes:

1. Prior to 2006, the reported statistics do not include a table for refugee population by country of origin and country of asylum.
2. From 2013 backwards, the refugee population is included in the table if it is 5,000 or more, while, from 2014 forwards, the refugee population is included if the number is 1,000 or more.
3. The columns "Major increases" and "Major decreases" exclude population changes resulting from administrative corrections, adjustments as a result of registration, new estimates as well as births and deaths. In some cases, the population at the end of 2014 does not equal the population at the start of 2014 plus increases and decreases. This discrepancy is due to the fact that the voluntary repatriation figures include estimates from countries of return.
4. Voluntary repatriation shows a best estimate, based on country of asylum and country of origin reports.

Table 3: Individual interviews broken down by nationality, age group, gender and legal status

Nationality		Age group	
Somali	6	18-25	4
South Sudanese	7	26-35	15
Ethiopians	7	36-45	8
Congolese (DRC)	10	46-60	4
Burundi	1	61+	0
Status		Gender	
Asylum seeker	4	Male	17
Recognised	24	Female	14
Rejected	2		
Citizen	1		

Table 4: Focus Group Discussions

Focus Group 1: Nairobi, June 2019

Somalis 8 Gender - Male 4 Female 4

Focus Group 2: Nairobi, July 2019

Nationality		Status	
Somalia	2	Asylum seekers	6
South Sudan	1	Recognised	7
DRC	3	Rejected	1
Ethiopia	3	Gender	
Burundi	3	Male	7
Rwanda	2	Female	7

Table 5: Elite interviews

Organisation	Total no. of interviews	Number of interviewees	Place of interview
UNHCR	2	2	Kakuma, Nairobi
NGOs	10	11	Kakuma, Nairobi
RAS	7	12	Kakuma, Nairobi
Embassies	1	1	Nairobi
Others (academics/independent consultants)	2	2	Nairobi

Table 6: Impact of Covid-19 on refugee recognition – statistical comparison

December 2019		December 2020	
Total applied in 2019	14,512	Total applied in 2020	5,258
Total recognised	6,113	Total recognised	2,911
Total rejected	0	Total rejected	0
Otherwise closed	8,019	Otherwise closed	1,259
Total decided in 2019	14,132	Total decided in 2020	4,170

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