

**Impediment to Refugee Status Determination in Kenya with specific reference to
the Right of Access to Information and Fair Administrative Action**

Submitted in partial fulfillment of the Requirements of the Bachelor of Laws
Degree, Strathmore University Law School

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MARCH 2018

TABLE OF CONTENTS

DEDICATION.....	v
ACKNOWLEDGEMENTS	vi
DECLARATION	vii
ABSTRACT	viii
LIST OF ABBREVIATIONS.....	ix
LIST OF CASES	x
LIST OF LEGAL INSTRUMENTS.....	xi
CHAPTER ONE.....	1
INTRODUCTION	1
1.1 Introduction	1
1.2 Background of Study.....	4
1.3 Statement of the Problem.....	7
1.4 Hypothesis.....	7
1.5 Research Objectives.....	7
1.6 Research Questions.....	8
1.7 Justification the Study.....	8
1.8 Theoretical Framework.....	9
1.9 Methodology	10
1.10 Chapter Summary	10
CHAPTER TWO	12
THEORETICAL FRAMEWORK AND METHODOLOGY.....	12
2.1 Public Administration under Colonial Rule.....	12
2.1.1 The Repressive Common Law.....	13
2.1.2 Colonialism and Constitutionalism.....	15
2.2.1 Post-Independence Africa and Constitutionalism.....	18
2.3 Abuse of Power in Administration.....	20
2.4 Pluralism and Human Rights	22
CHAPTER THREE	24
REFUGEE STATUS DETERMINATION, RELATED PROCESSES AND RIGHTS	24
3.1 Introduction	24
3.2 The Refugee Criteria.....	24
3.2.1 Events occurring before 1 st January 1951	25
3.2.2 Well-founded fear of being persecuted	25

3.2.3 The 1951 Convention Grounds.....	26
3.2.4 Is outside the country of his nationality	26
The refugee applicant must first establish that he in fact possesses the nationality of that country. Where the applicant’s nationality is difficult to establish, the status process will be similar to that of a stateless person.	26
3.2.5 And is unable or, owing to such fear, is unwilling to availing himself of the protection of that country.	26
3.2.6 or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it	27
3.3 Parties involved in RSD.....	27
3.4 RSD Procedure.....	28
3.5 The Rights of Refugees.....	28
3.6 Case Study: Kenya.....	30
3.6.1 Introduction.....	30
3.6.2 Background.....	31
3.6.3 RSD Procedure in Kenya.....	31
3.6.4 Problems Refugees undergo during the RSD process.....	31
CHAPTER FOUR.....	33
A COMPARATIVE STUDY ON THE DEVELOPMENT OF THE RIGHT TO FAIR ADMINISTRATIVE ACTION, ACCESS TO INFORMATION IN RELATION TO EFFECTIVE REFUGEE STATUS DETERMINATION	33
4.1 South Africa	33
4.1.1 Background.....	33
4.1.2 South Africa and Kenya: Comparative Study	34
4.2 Arab Republic of Egypt.....	36
4.2.1 Egypt and Kenya: Comparative Study	37
4.3 Cameroon.....	38
4.3.1 The Refugee Act	38
4.3.2 RSD procedure.....	39
4.3.3 Cameroon and Kenya: Comparative Study	40
4.4 Conclusion	42
CHAPTER 5.....	43
CONCLUSION.....	43
5.1 RSD Recommendations.....	43

BIBLIOGRAPHY	46
APPENDICES	52
APPENDIX 1	52
Reception Procedure	52
The Registration Interview	52
RSD Decision	53
Cancellation of Refugee Status	53
Grounds for commencing cancellation procedures	54
Cancellation Procedures.....	54
The Cancellation Interview	54
APPENDIX 2	56

DEDICATION

I dedicate this dissertation to the Almighty God whose mercy and grace have followed me throughout. To my family and friends. A special feeling of immense gratitude to my loving Mother, Lillian Awich whose sacrifice, prayers, words of encouragement and push for tenacity ring in my mind. My sister Zawadi who has always wished me the very best and believed in me.

I also dedicate this dissertation to my many friends and church family who have provided me support throughout the whole process. I will always appreciate their prayers that have followed me all the way. I especially thank my friend Moraa Ombati whose words of encouragement and morale have helped me keep on track until the finish line. She has been my best cheerleader. Special thanks to my friend George Siage.

ACKNOWLEDGEMENTS

I wish to thank my supervisor, Mr. Humphrey Sipalla who was more than generous with providing me the necessary research materials. I am greatly indebted to him for his encouragement, guidance, unwavering support and most of all patience throughout the entire process.

I am also grateful for the assistance from Cecil Abungu in obtaining additional research material and I offer my sincere gratitude to Mr. Desmond Tutu for his encouragement and support during this study.

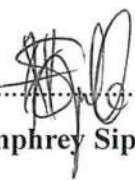
DECLARATION

I, **Joy Margaret Mbogo Awich**, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date:

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: 

Mr. Humphrey Sipalla



ABSTRACT

Refugee and asylum seekers' processing in host countries has been approached differently in different countries. Some countries are welcoming while others close their borders and/or deport them.

This study aims to investigate and analyse the international and countries level approach on Refugee Status Determination (RSD) and the bodies set up to administer it with keen focus on the right of access to information (ATI) and fair administrative action (FAA). We begin with the United Nations body established to promote and when need be, step in to handle refugee status determination; United Nations High Commissioner for Refugees (UNHCR).

Through secondary modes of data collection, which mainly includes of books, journal articles and decided cases, we will review the theories behind what could be curbing an effective RSD procedure then assess RSD rules and guidelines proposed by the UNHCR with a prime focus on its domestication and application to the case study; Kenya. We will also review RSD processes in three other countries within Africa who are a host to neighbouring countries refugees and asylum seekers with the teleological objective of what Kenya, the case study ought to correct, change and/or adopt for a more humanitarian and efficient RSD procedure.

LIST OF ABBREVIATIONS

ATI	Access to Information
FAA	Fair Administrative Action
JSR	Jesuit Refugee Society
NRC	Norwegian Refugee Council
OAU	Organisation of African Unity
RAS	Refugee Affairs Secretariat
RAAS	Refugees and Asylum Seekers
RSD	Refugee Status Determination
UNHCR	United Nations High Commissioner for Refugees
UNESCO	United Nations Educational, Scientific and Cultural Organisation

LIST OF CASES

KENYA

1. *Judicial Services Commission v Mbalu Mutava & Another* [2015] EKLR CA 52/2014
2. *Kenya National Commission on Human Rights & another v Attorney General & 3 others* [2017] EKLR

SOUTH AFRICA

1. *Lawyers for Human Rights v Ministers of Home Affairs*

UNITED KINGDOM

1. *Khan v Khan* [2007] EWCA Civ 399.

UNITED STATES OF AMERICA

1. *Marbury v Madison*, 5 US (1 Cranch) 137 (1803)
2. *Trop v Dulles* (No. 70) 356 U.S. 86

LIST OF LEGAL INSTRUMENTS

KENYA

1. Constitution of Kenya (2010).
2. Refugee Act (No. 13 of 2006).
3. The Kenya Citizenship and Immigration Act, 2011
4. Refugees (Reception, Registration and Adjudication) Regulations (2009)

SOUTH AFRICA

1. Constitution of the Republic of South Africa, 1996.
2. The Refugee Act (No. 130 of 1998)
3. Promotion of Access to Information Act 2 of 2000
4. Immigration Act (No. 13 of 2002).
5. Aliens Control Act (No. 96 of 1991).

CAMEROON

1. Cameroon's Constitution of 1972 with Amendments through 2008
2. Refugee Act No. 2005/006

ARAB REPUBLIC OF EGYPT

1. Constitution of the Arab Republic of Egypt 2014

AFRICAN STATUTES & CONVENTIONS

1. Convention Governing the Specific Aspects of Refugee Problems in Africa (28 July 1951, 189 UNTS 137)
2. African Charter on Human and Peoples Rights, 27 June 1981, CAB/LEG/67/3
3. African Charter on Human and Peoples' Rights, 27 June 1981, CAB/LEG/67/3
4. African Charter on the Values and Principles of Public Service and Administration, 31 January 2011, Ex.CL/Dec.243 (VIII)

5. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 11 July 2003
6. African Union Convention on Preventing and Combating Corruption, 11 July 2003;
7. Declaration of Principles on Freedom of Expression in Africa, 22 October 2002
8. African Youth Charter, 2 July 2006
9. African Charter on Statistics, 4 February, 2009

INTERNATIONAL STATUTES AND CONVENTIONS

1. Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 137
2. Universal Declaration of Human Rights, 10 December 1948, 217 A (III)
3. International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3
4. International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, 660 UNTS 195
5. Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, 1249 UNTS 13
6. Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3

CHAPTER ONE

INTRODUCTION

‘...[T]he right to fair administrative action is a reflection of some of the national values in Article 10 of the Constitution such as the rule of law, human dignity, social justice, good governance, transparency and accountability’.¹

1.1 Introduction

Refugees and asylum seekers (RAAS) undergo a great deal of frustration in their attempts at achieving a credible, objective assessment of their refugee status in host states and the United Nations High Commissioner for Refugees (UNHCR) in operation to deal with RAAS.

RAAS, though discussed in the same breath are categorised differently;

Refugees are defined under international law in the Convention Relating to the Status of Refugees² (1951 Convention) as people fleeing conflict or prosecution. Section 3 of the Kenyan Refugee Act³ defines refugee along the terms of;

- a) 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
- b) 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.

Article 1 of the Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa⁴ (OAU Convention) defines a refugee in similar terms. Asylum seekers are people who move across borders in search of protection, but

¹*Judicial Services Commission v Mbalu Mutava & Another* [2015] EKLRC CA 52/2014.

²Article 1 (A) (2), *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137.

³Section 3, *Refugee Act* (No. 13 of 2006).

⁴OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, CAB/LEG/24.3, 20 June 1974.

who may not fulfil the strict criteria laid down by the 1951 Convention. Asylum seeker describes someone who has applied for protection as a refugee and is awaiting the determination of his or her status. Refugee is the term used to describe a person who has already been granted protection.⁵ Asylum seekers can become refugees if the local immigration or refugee authority deems them as fitting the international definition of refugee.⁶

Due to this difference, not every asylum seeker will ultimately be recognized as a refugee, but every refugee is initially an asylum seeker.⁷ Further, the definition of asylum seeker may vary from country to country, depending on the laws of each country.⁸ In Kenya, for example, asylum seeker means a person seeking refugee status.⁹

The South African Constitutional Court decision in *Lawyers for Human Rights v Ministers of Home Affairs*¹⁰ did help in clarifying the rights afforded to asylum seekers: the Court held that the protection granted by the Bill of Rights applies to everyone, including illegal foreigners and asylum seekers.

However, with the gradual international acceptance of asylum claims arising from economic disadvantages than pure physical persecution, there are a larger number of refugees and there is dire need for a uniform standard for evaluating such claims.¹¹

This thesis will be focussed on the Refugee Status Determination (RSD) process and will therefore encompass RAAS in their respective capacities.

Refugee Status Determination (RSD) is the 'legal or administrative process by which host states or the UNHCR determine whether a person seeking international protection

⁵ 'Learning to live together' UNESCO, 2017 <http://www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/asylum-seeker/> on 23 March 2018.

⁶ 'Learning to live together' UNESCO, 2017 <http://www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/asylum-seeker/> on 23 March 2018

⁷ UNHCR Master Glossary of Terms, June 2006.

⁸ 'Learning to live together' UNESCO, 2017 <http://www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/asylum-seeker/> on 23 March 2018

⁹ Section 2, *Refugee Act*, (No. 13 of 2006)

¹⁰ *Lawyers for Human Rights v Ministers of Home Affairs* 2004 (4) SA 125 (CC).

¹¹ Ramos ML, 'A New Standard for evaluating claims of economic persecution under the 1951 Convention relating to the status of refugees' *Vanderbilt University Law School* (2011), 26.

is considered a refugee under international, regional or national law.’¹²Protection, with regards to refugees, refers to either providing physical shelter or to use legal authority to secure the rights and freedom of those at risk.¹³

The broad set of circumstances that can define an individual as a refugee and the statistical summary from United Nations High Commissioner for Refugees (UNHCR), The UN Refugee Agency (UNHCR) on refugees in Kenya¹⁴ is a pellucid indication that refugee determination can be a logistical nightmare.

Figures from the UNHCR as of 31st October 2017 stated that there were 489,239 registered RAAS in Kenya.¹⁵A majority of RAAS in Kenya originate from Somalia, South Sudan, Congo, Ethiopia, Burundi and Uganda¹⁶. As of 28th February 2018, there were 58,397 cases of RAAS seeking refugee status determination in Kenya with only 31 cases being recognized.¹⁷ With such high numbers, a procedure must be set up to ensure there is no backlog and cases are held as effective as possible.

The criteria the UNHCR uses under which a person may be declared as a refugee is stated under international law in the 1951 Convention¹⁸.

The primary responsibility of determining the refugee status of asylum seekers lies with host states¹⁹ and may be supported by UNHCR operations where host states are unable or unwilling to effectively conduct the required procedure.²⁰ In Kenya, presently

¹²Refugee Status Determination *UNHCR, The UN Refugee Agency* <http://www.unhcr.org/refugee-status-determination.html> on 13 October 2017.

¹³ Goodwin-Gill ‘*Refugee identity and protection’s fading prospect*’ in Nicholson and Twomey (eds) *Refugee Rights and Realities* 248.

¹⁴UNHCR Kenya- Data Management Unit Nairobi: KENYA Registered refugees and asylum-seekers as of 31 October 2017 *UNHCR Kenya* <https://goo.gl/pBT5cu> on 4th December 2017.

¹⁵UNHCR Kenya- Data Management Unit Nairobi: KENYA Registered refugees and asylum-seekers as of 31 October 2017 *UNHCR Kenya* <https://goo.gl/mUaMFE> on 4th December 2017.

¹⁶ UNHCR Kenya, Figures at a Glance <http://www.unhcr.org/ke/figures-at-a-glance> on 17th March 2018.

¹⁷ UNHCR Kenya Operation Statistics, <http://www.unhcr.org/ke/857-statistics.html> on 17th March 2018.

¹⁸Article 1 (A) (2), *Convention Relating to the Status of Refugees*.

¹⁹Refugee Status Determination *UNHCR, The UN Refugee Agency* <http://www.unhcr.org/refugee-status-determination.html> on 13 October 2017.

²⁰ UNHCR Resettlement Handbook, UNHCR, July 2011, 62.

assisted by UNHCR, RSD is conducted by the Refugee Affairs Secretariat (hereinafter referred to as RAS).²¹

Established by the Refugee Act, RAS is a public office 'responsible for all administrative matters concerning refugees in Kenya, and shall, in that capacity, co-ordinate activities and programmes relating to refugees'²².

1.2 Background of Study

The right to fair administrative action, as enshrined in the Constitution of Kenya²³ is available to all persons under all persons under Kenya's jurisdiction. Thus, an RAAS seeking assistance may invoke the same. Article 47 states that 'every person has the right to fair administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair.'²⁴ Article 35 on the other hand states that 'every citizen has the right of ATI held by the state and information held by another person and required for the exercise or protection of any right or fundamental freedom'²⁵. As RAAS of necessity are not citizens of Kenya, on the face of the letter, it may be stated that this constitutional right is unavailable to them.

The primary link between the right to information and fair administrative action is observed under Article 47 (2) where the right to be given written reasons for an administrative action adversely affecting a right or a fundamental freedom of a person is stated and Article 35 (1) which stipulates the right of ATI required for the exercise or protection of any right or fundamental freedom of a person. Thus, the exercise of both rights in relation to the RSD process may be noted to be crucial for the access of other rights and fundamental freedoms of a refugee and/or an asylum seeker.

²¹Formerly known as the Department of Refugee Affairs (DRA).

²² Section 6 (2), *Refugee Act* (No. 13 of 2006).

²³Article 47, *Constitution of Kenya* (2010).

²⁴Article 47 (1) *Constitution of Kenya* (2010).

²⁵Article 35, *Constitution of Kenya* (2010).

The right to ATI has been not only been captured under the Constitution of Kenya but also in international instruments²⁶, the African Union, United Nations²⁷ and the Council of Europe²⁸.

The constitutional guarantee of fair administrative action has been expounded upon and given content and meaning by the *Fair Administrative Act*, 2015. In frame of *Kenya National Commission on Human Rights & another v Attorney General & 3 others* [2017], Justice Mativo noted the following on the Act;

“... [T]he Act gives scope and meaning to procedural fairness by prescribing particular procedures, from which the public official must choose to ensure that administrative action affecting the public is procedurally fair. The aspiration of the requirements of procedural fairness to the public is to create a public administration that is justifiable and accountable in an open and democratic society.”²⁹

Refugee Status Determination is a vital process affecting the lives of many RAAS across the globe. The RSD process incorporates various steps and processes including registration, document issuance, and verification.³⁰

In Kenya, this administrative process through which a person seeking international protection is determined a refugee under national, regional and international law is

²⁶Article 9, *African Charter on Human and Peoples Rights*, 27 June 1981, CAB/LEG/67/3 rev. 5, *African Charter on the Values and Principles of Public Service and Administration*, 31 January 2011, Ex.CL/Dec.243 (VIII); Article 4-5, 14, 18, *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, 11 July 2003; Article 9, *African Union Convention on Preventing and Combating Corruption*, 11 July 2003; *Declaration of Principles on Freedom of Expression in Africa*, 22 October 2002; Article 4, 10, 11-12, 14, *African Youth Charter*, 2 July 2006; *African Charter on Statistics*, 4th February, 2009.

²⁷*Report of the Special Rapporteur, promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, 42.

²⁸*Recommendation No.R (81) 19 of the Committee of Ministers to Member States on the Access to Information Held by Public Authorities*, Council of Europe, 25 November 1981.

²⁹*Kenya National Commission on Human Rights & another v Attorney General & 3 others* [2017] eKLR.

³⁰UNHCR Kenya, Refugee Status Determination <http://www.unhcr.org/ke/refugee-status-determination> on 19th January 2018.

conducted by RAS and assisted by the UNHCR. The UNHCR is currently in the process of fully transferring this duty to RAS.³¹

Over the years, there have been numerous complaints have been lodged by refugees with regards to ATI and fair administrative action³². Refugees have stated that upon arrival in the country of asylum, they are unaware of the processes they need to undergo to successfully seek asylum and receive protection in the country of asylum. Most have stated that, upon arrival, they do not receive guidance with regards to registration, documentation and verification neither from the Government of Kenya at any stage of flight nor from the UNHCR save from fellow refugees who direct them to the UNHCR Offices.³³

This is contrary to the UNHCR RSD Handbook which states that;

‘... [T]he applicant should receive the necessary guidance as to the procedure to be followed’³⁴

The same concern is carried forward into the RSD process where asylum seekers and refugees claim³⁵ that they are unable to receive precise information on the progress of their on-going case from the UNHCR or RAS when requested, and may be issued with a confirmation or rejection without receiving written reasons for their rejection.³⁶This is also contrary to the Constitution and the 2009 Refugee regulations.³⁷

³¹ UNHCR Kenya, Refugee Status Determination <http://www.unhcr.org/ke/refugee-status-determination> on 18th March 2018.

³²Norwegian Refugee Council (NRC) *Recognising Nairobi's Refugees; The Challenges and Significance of Documentation Providing Identity and Status*, 10

³³NRC, *Recognising Nairobi's Refugees; The Challenges and Significance of Documentation Providing Identity and Status*, 10.

³⁴ UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, UNHCR, 2011, para.192 (ii).

³⁵Norwegian Refugee Council (NRC) *Recognising Nairobi's Refugees; The Challenges and Significance of Documentation Providing Identity and Status*, 10.

³⁶Refugee Status Determination in Kenya' *Human Rights Watch*, https://www.hrw.org/reports/2002/kenyugan/kenyugan1002%20ap%20alter-09.htm#P863_154059 on 16 October 2017.

³⁷Section 23 (3) (4), *Refugees (Reception, Registration and Adjudication) Regulations* (2009).

The aforementioned scenarios demonstrate the direct relation between RSD and the rights to fair administrative action and ATI.

1.3 Statement of the Problem

The Refugee Regulations state that where ‘a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action; the person has the right to be given written reasons for the action.’³⁸ However, this same provision is met with a limitation stipulated in the Constitution where the right to demand information is *only available to Citizens of Kenya*³⁹.

Therefore, this paves way for injustice in the RSD process expressed inadequate information, lengthy and cumbersome administrative procedures put in place for asylum seekers and refugees seeking assistance. Consequently, the supposed access to fundamental rights which may be made available to RAAS as a result of RSD is gravely impeded.⁴⁰

1.4 Hypothesis

Refugee Status Determination and its related administrative processes impacting the general access to human rights to asylum seekers and refugees is adversely affected by the gaps existing in ATI and just administrative action in Kenya.

1.5 Research Objectives

- i. To investigate the effect of conflicting ATI and administrative laws in Kenya on fair administration of RSD and its related processes for refugees.
- ii. To examine the impact of RSD and its related processes on access to fundamental rights and freedoms for refugees.
- iii. To examine the measures necessary to curb the injustice faced by refugees during RSD processing due to the gaps existing in law with regards to right to information and fair administrative action.

³⁸Section 23 (3), *Refugees (Reception, Registration and Adjudication) Regulations* (2009).

³⁹Article 35 (1) (b), *Constitution of Kenya* (2010).

⁴⁰Shall be further discussed in Chapter 3 and 4.

1.6 Research Questions

- i. What effect does the conflict between ATI and administrative laws in Kenya have on fair administration of RSD and its related processes for RAAS?
- ii. Whether RSD and its related processes create a significant impact on the access of fundamental rights and freedoms for asylum seekers and refugees.
- iii. Whether there exist measures necessary to curb the injustice faced by refugees during RSD processing due to the gaps existing in law with regards to right to information and fair administrative action?

1.7 Justification the Study

Refugee Status Determination and all its related processes are crucial in the lives of asylum seekers and refugees due to the rights and duties attached to the legal status and available under the 1951 Convention.⁴¹ The rights stated in international refugee law mirror rights contained in the Bill of Rights such as the right to social security⁴² and the right to education.⁴³ Thus, the loop existing between the right of ATI and the right to fair administrative action in the laws of Kenya relation to RSD and its related processes

⁴¹*Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137

⁴² Article 43 (1) (e), *Constitution of Kenya* (2010); Article 24, *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137; Article 22, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III); Article 9, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, Article 5 (d) (iv); *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 UNTS 195; Article 11, *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, 1249 UNTS 13; Article 26, *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3.

⁴³ Article 43 (1) (f) 53 (1) (b), *Constitution of Kenya* (2010); Article 26, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III); Article 22, *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137; Article 13, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3; Article 28-29, *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3; Article 10, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 UNTS 13; Article 5 and 7, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 UNTS 195; Article 18, *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171; Article 17, *African Charter on Human and Peoples' Rights*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21; Article 11, *African Charter on the Rights and Welfare of the Child*, 11 July 1990, 1 CAB/LEG/24.9/49, Article 12, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11 July 2003; Article 13, *African Youth Charter*, 2 July 2006.

may be said to have an overall impact on the full exercise of human rights for asylum seekers and refugees as it often stated that ‘...one right cannot exist without the other. This development is in line with the prevailing wisdom that claims that human rights are interrelated, interdependent, interconnected, and equal in status.’⁴⁴

Regarding the significance of RSD procedures in the exercise of the rights of asylum seekers and refugees in Kenya, it is relevant to address the gaps existing in the law which may lead to an impediment to the exercise of their rights and fundamental freedoms existing in national and international law. Failure to address these gaps in the law may result in great unjust administrative action against refugees.

1.8 Theoretical Framework

This study examines the RSD process with specific reference to the right of ATI and fair administrative action. Considering the fact that RSD is an administrative process, the theoretical discussion will be guided through the development of administrative law in Africa.

1.8.1 Public administration under colonial rule

During colonialism, colonialists introduced a system of administering justice that diminished the value and application of customary law and introduced a law that greatly favoured them.⁴⁵

After its success in Nigeria,⁴⁶ common law was transplanted into Kenya. It was however only set up to favour the British citizens who were familiar with the law and framework. As Mahmood Mamdani noted ‘the colonial state was primarily constructed to enable a tiny and foreign minority rule over an indigenous authority’.⁴⁷

⁴⁴ Mbondenyei K and Ambani O, *The new constitutional law of Kenya: principles, governments & human rights*, Claripress Nairobi, 2012, 198, Article 5, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23.

⁴⁵ OHCHR *Human Rights and Traditional Justice Systems in Africa*, HR/PUB/16/2, 2016, 23.

⁴⁶ ‘Maurice Nyamoti: Colonial System of Administration in Kenya’ *Atika School*, 31 March 2017 <http://notes.atikaschool.org/kesehistorynotes/colonial-administration> on 24th March 2018.

⁴⁷ Mamdani M, *Citizen and Subject. Contemporary Africa and the Legacy of Late Colonialism* New Jersey: Princeton University Press, 1996, 16

1.8.2 Public administration post-independence.

Post-colonial Africa had leaders who blatantly abused power to their benefit and practised nepotism. International, regional or sub-regional law too found its shortfalls and cannot adequately protect human rights. The then public administrative law met the main principles discussed by Professor Migai Akech:⁴⁸ Legality, reasonableness, proportionality, the right to participate/the duty to consult, justification, legitimate expectation, independence and accountability.

In quest for control, African leaders strongly advocated the need for one party rule, controlled media⁴⁹ and government bureaucracies were staffed by party loyalist. African leaders adopted a culture of autocracy from the colonial administration.

This autocracy and disregard for another seeped into RSD procedure where the refugees and asylum seekers rights were impugned.

1.9 Methodology

This study approaches the subject matter through literature review on the rights of ATI and fair administrative action in Kenya with regards to fair administrative action in the RSD processes affecting the rights and fundamental freedoms of refugees. It describes and conducts qualitative analysis in the course of dealing with the subject matter Refugee Law, soft law, statutes, and policies which are significant for laying down the legal position in relation to the subject matter nationally. Books, journal articles, conference papers, and online journals which document the studies on the subject matter by various scholars.

1.10 Chapter Summary

a) Chapter 1 - Introduction

This Chapter introduces the background of the main topic and explores its research expectations, objectives and assumptions.

b) Chapter 2 – Theoretical framework and methodology

⁴⁸ Migai A, *Administrative Law*. Strathmore University Press, 2016, 29 - 50

⁴⁹ Wanyande P, 'Mass Media-State Relations in Post-Colonial Kenya' *Michigan State University*, 56

This Chapter examines the theoretical framework of the public administration in general and linking it to the current RSD administration.

c) Chapter 3 – Refugee Status Determination, related processes and benefits

This Chapter looks at the RSD process framework provided by UNHCR, its highs, pitfalls and then examines the case country's application of RSD using UNHCR rules and their own incorporation. The case country will be the author's home country; Kenya.

d) Chapter 4 – RSD Procedure – Comparative Study

This Chapter will be a comparative study where we shall compare and contrast other country's application of RSD making sure to point out what ought to be adopted by other countries and what could be better revised.

e) Chapter 5 - Conclusion

This Chapter makes the conclusions of the study with a review of the discussion and possible measures that can be adopted by Kenya to greatly ease RSD process in ensuring there is ATI and fair administrative action for RAAS.

CHAPTER TWO

THEORETICAL FRAMEWORK AND METHODOLOGY

In this Chapter, the study's prime focus will be examining the background and framework of public administration in Africa then linking it with the main discussion on RSD.

2.1 Public Administration under Colonial Rule

Administration of the vast colonies was critical to Europeans. This was evident where an alliance between the British and a community was forged and there was an assumption of outright authority of the British.⁵⁰ A police force was early established to be the iron fist protecting the British administration structure.⁵¹

On the policy conundrum, the British applied a dual system of law: English Law was introduced to the Kenyan jurisdiction to serve and govern the British subjects.⁵² Governing of the Africans mainly administered through a system referred to as 'indirect rule' advocated for by Frederick Lugard when he was colonial administrator of Nigeria⁵³.

Indirect Rule was the strategy used existing tribal structures and traditions as conduits for establishing rules and regulations while English officials worked behind the scenes and could exercise veto power.⁵⁴

With success in Nigeria, the concept was further exported to Uganda and Kenya.⁵⁵

⁵⁰Ghai YP and Ghai JC, *Kenya's Constitution: An Instrument for Change*, 3.

⁵¹Ghai YP and Ghai JC, *Kenya's Constitution: An Instrument for Change*, 3.

⁵² 'Ojienda Tom and Aloo Leonard Obura: Researching Kenyan Law' *Hauser Global Law School Program, New York University*, <http://www.nyulawglobal.org/globalex/Kenya.html> on 23rd March 2018.

⁵³ Maurice Nyamoti: Colonial System of Administration in Kenya' *Atika School*, 31 March 2017 <http://notes.atikaschool.org/kcsehistorynotes/colonial-administration> on 24th March 2018.

⁵⁴ England's Indirect Rule in its African Colonies' *American Historical Association*, <https://www.historians.org/teaching-and-learning/teaching-resources-for-historians/teaching-and-learning-in-the-digital-age/through-the-lens-of-history-biafra-nigeria-the-west-and-the-world/the-colonial-and-pre-colonial-eras-in-nigeria/englands-indirect-rule-in-its-african-colonies> on 24th March 2018.

Common law was first developed in England as a process of applying continental feudal law.⁵⁶ English common law was developed to protect the property of individuals and limit the power of the state to expropriate resources.⁵⁷ Its familiarity with the British citizens and adaptability led to easy transplantation to different regions of the world⁵⁸.

2.1.1 The Repressive Common Law

Common Law was introduced in India and to the British East India Company and was a success.⁵⁹

Public administration legitimacy is cemented by the establishment of law. There exists a very close relationship between public administration and law.⁶⁰ The framework of rules and regulations set up for administration are laws.⁶¹

‘Common Law, to the indigenous people however, was unknown in substance and procedure.’⁶² It was an unequal system from the start.⁶³ ‘It was a system which the minority was well versed with and could operate while the majority did not know.’⁶⁴ Its legitimacy could hardly be cemented.

⁵⁵ Maurice Nyamoti: Colonial System of Administration in Kenya’ *Atika School*, 31 March 2017 <http://notes.atikaschool.org/kcsehistorynotes/colonial-administration> on 24th March 2018.

⁵⁶ Joireman SF, ‘The evolution of the common law, 3.

⁵⁷ Joireman SF, ‘The evolution of the common law, 3.

⁵⁸ Joireman SF, ‘The evolution of the common law, 8.

⁵⁹ Joireman SF, ‘The evolution of the common law: 8.

⁶⁰ Gozubuyuk S: Public Administration and Law, http://www.todaie.edu.tr/resimler/ekler/b2c5af6ba302e9a_ek.pdf?dergi=Turkish%20Public%20Administration%20Annual on 28th March 2018.

⁶¹ ‘Gozubuyuk S: Public administration and Law’, http://www.todaie.edu.tr/resimler/ekler/b2c5af6ba302e9a_ek.pdf?dergi=Turkish%20Public%20Administration%20Annual on 28th March 2018.

⁶² Robins S, ‘Restorative Approaches to Criminal Justice in Africa: The case of Uganda’ *Institute for Security Studies*(2009), 57-84.

⁶³ Ghai YP and McAuslanJPW, *Public law and political change in Kenya: A study of the legal framework of government from colonial times to the present*, Nairobi, New York, Oxford University Press, 1970, 508.

⁶⁴ Ghai and McAuslan, *Public law and political change in Kenya*, 508.

The introduction of Common Law in Kenya created a two class society.⁶⁵The scenario was paraphrased by Ghai and McAuslan from Lord Belloc when he stated;

‘Whatever happens, we have got the Common Law and they have not’⁶⁶

‘Common law did not become quickly rooted in society, in part because it was restricted in its application to certain segments of society.’⁶⁷

The aforementioned may be seen to be related to the topic being discussed in this paper. The limited knowledge by the indigenous people on the ‘substance and procedure’⁶⁸ of the law, may be likened to the plight faced by RAAS constantly uninformed on RSD and its processes.⁶⁹ Furthermore, the gap in the law (on article 35 and article 47) could be said to cause an inequality between RAS and RAAS This is expressed through the alleged unfair administration identified in the process suffered by RAAS during RSD and its related processes such as applications for an alien card.E.g. use of bribes to enter the Department of Refugees Affairs.⁷⁰ RAAS as a result are unable to seek redress for unfair administrative action administered⁷¹.

⁶⁵Ghai and McAuslan,*Public law and political change in Kenya* 508.

⁶⁶The Original Couplet is:

‘Whatever happens, we have got
The Maxim gun and they have not.’

‘The Modern
Traveller’https://archive.org/stream/moderntraveller00belluoft/moderntraveller00belluoft_djvu.txt on
19th January 2018.

⁶⁷Joireman SF, ‘The evolution of the common law, 8.

⁶⁸Robins S, ‘Restorative approaches to criminal justice in Africa: The case of Uganda’ *Institute for Security Studies* (2009), 60.

⁶⁹Asylum Access, ‘FORUM: UNHCR refugee status determination: The Kenyan Experience’ RSD Watch, 13 November 2005 <https://rsdwatch.com/2005/11/13/forum-unhcr-refugee-status-determination-the-kenyan-experience/> on 19th January 2018.

⁷⁰UN High Commissioner for Refugees (UNHCR), *Building on the foundation: Formative Evaluation of the Refugee Status Determination (RSD) Transition Process in Kenya*, PDES/2015/01, April 2015.

⁷¹UN High Commissioner for Refugees (UNHCR), *Building on the foundation: Formative Evaluation of the Refugee Status Determination (RSD) Transition Process in Kenya*, PDES/2015/01, April 2015.

2.1.2 Colonialism and Constitutionalism

The colonialists, as earlier mentioned, introduced and imposed new laws to the native Africans to strengthen their administration. However, the laws did not promote equality among the races and ethnicity,⁷² they practised segregation and hierarchy among the people it set to govern.⁷³

From the African point of view, the English Law introduced into East Africa was the focal point in the Europeans objective of colonial domination.⁷⁴ As Mahmood Mamdani noted 'the colonial state was primarily constructed to enable a tiny and foreign minority rule over an indigenous authority'⁷⁵

The colonialists 'rule of law' was regarded as legitimate⁷⁶ by their home country governments and the international community: Mr. L.S. Amery,⁷⁷ a Pro-Settler Colonial Secretary at the time out-rightly expressed that the responsibility for the future of Kenya law with the British Government alone.⁷⁸ Administration of the colony was primarily placed in the hands of the Europeans.⁷⁹ Other minorities and the African majority could contribute to administration however was subordinate to the greater good of the British Government and the Settlers.

On the international front, the colonial state and its laws were validated by the Berlin Conference at the start of the League of Nations. Article 35 of the General Act of the Berlin Conference on West Africa⁸⁰ obligated the signatory powers to establish an authority in the regions occupied by them. The League of Nations, while dispossessing

⁷²Mamdani M, 'Political Identity, Citizenship and Ethnicity on Post-Colonial Africa' *World Bank Conference* (2005), 5.

⁷³Chelati D, 'Colonialism and the Construction of National identities: The Case of Eritrea' *Journal of Eastern African Studies* (2007), 4

⁷⁴GhaiYP and McAuslan BPW, 'Public Law and Political Change in Kenya' *University of Pennsylvania Law Review* (1971).

⁷⁵Mamdani M, *Citizen and Subject. Contemporary Africa and the Legacy of Late Colonialism* New Jersey: Princeton University Press, 1996, 16

⁷⁶ By 'legitimate' I do not mean 'found to be lawful' but 'found acceptable' or 'justifiable'.

⁷⁷Hallett R, *Africa Since 1875 A Modern History*, East African Educational Publishers Limited, 1974. 586

⁷⁸Hallett R, *Africa Since 1875 A Modern History*, 586

⁷⁹Hallett R, *Africa Since 1875 A Modern History*, 586.

⁸⁰General Act of the Berlin Conference on West Africa, 26 February 1885.

the losing states⁸¹ off their colonial spheres of influence, did not outlaw colonialism but strengthened the extant law on colonial dependencies.⁸²

This application of harsh constitutionalism has been transplanted to RSD where, as we will discuss later, the RSD process fails to be amenable to a particular RAAS plight or is applied discriminately to a group (like family) instead of a person.

2.2 Post-Independence Patrimonialism

Patrimonialism manifests itself through the practices of patronage.⁸³ Migai Aketch defines patrimonialism as a political regime in which ‘all power relations between ruler and ruled, politics as well as administrative relations, are personal relations. There is no difference between the private and public realm’⁸⁴

Houphouet-Boigny once stated that the Africa Africans took from former masters (the colonialists) were not nations but rather, states with extremely fragile links between ethnic groups.⁸⁵

The leaders recognised threats to their leadership both externally and internally; at the independence of most African states, the Cold War was at its peak and Africa was a battle ground to forge ideologies.⁸⁶ Internally, in the fight for independence, politicians sought nationalistic objectives, post-independence leaders sought their political base from their ethnic background.⁸⁷ The division among the Africans arose partly from the restrictions established during the colonial era that barred country wide political parties.⁸⁸ This resulted in ethnic based political parties.⁸⁹

⁸¹Germany and Turkey.

⁸²Makau wa Mutua ‘Why Redraw the Map of Africa: A Moral and Legal Inquiry’ *Michigan Journal of International Law* (1995), 27.

⁸³Migai A, *Privatization & Democracy in East Africa, the Promise of Administrative Law*. 24

⁸⁴Migai A, *Privatization & Democracy in East Africa, the Promise of Administrative Law*. 23

⁸⁵Meredith M, *The Fortunes of Africa A 5,000-Year History of Wealth, Greed and Endeavour*. Simon & Schuster, 2014, 637.

⁸⁶Mazrui A. Ali, Wondji C General History of Africa. VIII *Heineman California UNESCO* 1993, 177.

⁸⁷Mazrui A. Ali, Wondji C General History of Africa. VIII, 442.

⁸⁸The Final Report of the Constitution of Kenya Review Commission, ‘Approved for issue at 95th Plenary meeting of the Constitution of Kenya Review Commission held on 10th February 2005’.

The British in several of their colonies⁹⁰ transferred the ‘Westminster’ model of government that encouraged multi-partyism and electoral competition among various parties.⁹¹ The African political elite contested for government seats on an ethnic or geo-ethnic or regional platform.

Independence enabled the elite control of land registration, taxation, credit, public investments all providing opportunities for patronage.⁹² The ethnic elites practice Patrimonialism with specific expectations. They expect political support during elections and even intra-elite competitions at the national level.⁹³

Ethnicised politics significantly influences peoples’ attitude towards state institutions.⁹⁴ Many communities feel marginalised and unjustly deprived of opportunities.⁹⁵ The administration and leading party only derive their political legitimacy and capital from their ethnic base.⁹⁶

Legitimacy may refer to two distinct situations, charismatic legitimacy and institutional legitimacy.⁹⁷ Of the two, the latter is what states ought to transform into. A mechanism

⁸⁹The Final Report of the Constitution of Kenya Review Commission, ‘Approved for issue at 95th Plenary meeting of the Constitution of Kenya Review Commission held on 10th February 2005’.

⁹⁰Nigeria, Sudan, Kenya, Uganda, Zimbabwe and others.

⁹¹Mazrui AA, Wondji C General History of Africa. VIII *Heinemann. California. UNESCO* 1993, 442.

⁹²Mazrui AA, Wondji C General History of Africa. VIII, 440.

⁹³Kanyinga K, ‘Pluralism, Ethnicity, and Governance in Kenya’ in Ghai YP and Ghai JC, *Ethnicity, Nationhood and Pluralism: Kenyan Perspectives*, The Global Centre for Pluralism and The Katiba Institute, 2013, 50.

⁹⁴Ghai YP and Ghai JC, ‘Ethnicity, Nationhood and Pluralism: the 2010 Kenya Constitution’ in Ghai YP and Ghai JC, *Ethnicity, Nationhood and Pluralism: Kenyan Perspectives*, The Global Centre for Pluralism and The Katiba Institute, 2013, 85.

⁹⁵Ghai YP and Ghai JC, ‘Ethnicity, Nationhood and Pluralism: the 2010 Kenya Constitution’, 86.

⁹⁶Maina Daisy Maritim, ‘How Kenya could move away from the politics of ethnicity’ 25 June 2017 <https://theconversation.com/how-kenya-could-move-away-from-the-politics-of-ethnicity-77980> on 23rd March 2018.

⁹⁷These terms are adopted from Weber’s ‘three pure types of legitimate authority’, legal authority, traditional authority, and charismatic authority. Maboloc Ryan Christopher, Max Weber’s 3 types of authority 29 May 2015 <http://opinion.inquirer.net/85293/max-webers-3-types-of-authority> 23 March 2018.

where institutions facilitate Public Law values especially participation and accountability.⁹⁸

The culture of autocracy could be said to exist in the current Kenyan government. In relation to the current topic, this is specifically identified in RAS where RSD and its related processes are heavily governed by the institution with minimal accountability towards the refugees and/or asylum seekers (hereinafter 'persons of concern').

The gap in the law identified in this paper stimulates authoritarianism and unaccountability with the institution and its interaction with persons of concern. The aspect of legitimacy previously intended as a principle to facilitate public law values such as participation and accountability, are usurped by the said discrepancy resultantly impeding RSD and its benefits to persons of concern.

2.2.1 Post-Independence Africa and Constitutionalism

'I am confident that it should be possible to devise a constitutional structure applicable to our special conditions in Africa and not necessarily framed in terms of the existing constitutions of Europe, America or elsewhere, which will enable us to secure the objectives I have defined and yet preserve to some extent the sovereignty of each state within a Union of African states.'⁹⁹

The expectation of Africans during independence was that the constitution would become the truly fundamental law, with the governments acting in accordance with its values and framework.¹⁰⁰

'In Kenya, the Constitution was designed to introduce liberal democratic values, of which constitutionalism (the limitation of the powers of governments, the assurance of the rights of the citizens) and representation, values of which were present during the traditional societies unfortunately repressed during the colonial era.'¹⁰¹

⁹⁸Migai A, *Privatization & Democracy in East Africa, the Promise of Administrative Law*.19

⁹⁹'Nkrumah Kwame The African Struggle: Africa must unite' *African Echo 'The voice of Africa'* <http://www.africanecho.co.uk/africanechonews5-may24.shtml> on 19th January 2018.

¹⁰⁰Ghai YP and Ghai JC, *Kenya's Constitution: An Instrument for Change*, 2011, 5.

¹⁰¹Ghai YP and McAuslan JPW, *Public law and political change in Kenya*, 513-14.

The 1963 Constitution eliminated the dual system of administration of justice.¹⁰² It also provided for a fully elected parliament, an independent judiciary and a Bill of Rights to protect Civil and Political Rights.¹⁰³

However, as patrimonialism crept into the post-independence leaders, key developments were backtracked and Constitution was dismantled.

The authoritarian state model adopted from the colonial regimes favoured the African postcolonial elite.¹⁰⁴ The single, unquestionable and unaccountable executive possessed full control over colonies; economically¹⁰⁵ and judicially.¹⁰⁶

In Kenya, Jomo Kenyatta, it may be stated that the first prime minister of Kenya in his quest for power, desired to acquire greater political for himself and his associates.¹⁰⁷

This is evidenced by the change in the 'system of government from parliamentary to presidential',¹⁰⁸ hence weakening the parliament.¹⁰⁹ Major legal provisions protecting democracy, power sharing and human rights were removed in the years shortly after the attaining independence.¹¹⁰ His successor, Daniel Moi reduced Kenya to a single party state, abolished the security of tenure of judges, auditor general and attorney general in order to facilitate their dismissal at will.¹¹¹

¹⁰²Ghai and McAuslan, *Public law and political change in Kenya a study of the legal framework of government from colonial times to the present*, 516.

¹⁰³Ghai and Ghai, *Kenya's Constitution: An Instrument for Change*, 2011, 6.

¹⁰⁴Prempeh K, 'Africa's "constitutionalism revival": False start or new dawn?' *International Journal of Constitutional Law* (2007), 469-506.

¹⁰⁵Macroeconomy to microeconomy. From the tax rate to the crops small scale farmers could produce at different locales.

¹⁰⁶Prempeh K, 'Africa's "constitutionalism revival": False start or new dawn?' *International Journal of Constitutional Law* (2007), 469-506.

¹⁰⁷Ghai YP and Ghai JC, *Kenya's Constitution: An Instrument for Change*, 9-10.

¹⁰⁸ Ghai YP and Ghai JC, *Kenya's Constitution: An Instrument for Change*, 10.

¹⁰⁹Ghai YP and Ghai JC, *Kenya's Constitution: An Instrument for Change*, 10.

¹¹⁰Ghai and McAuslan JWP, *Public law and political change in Kenya a study of the legal framework of government from colonial times to the present*, 516-517.

¹¹¹Ghai YP and McAuslan JWP, *Public law and political change in Kenya a study of the legal framework of government from colonial times to the present*, 516-517.

In Uganda, Milton Obote, in a bid to centre the powers of the President, introduced a new revolutionary constitution that abolished the institution of the kingship not only in Buganda but also in Bunyoro.¹¹² He further declared a state of emergency and ordered the army to attack and occupy the *Kabaka's* palace in Mengo.¹¹³ The palace attack is estimated to have cost more than one hundred lives.¹¹⁴ Great injustice has been done under the pretext of 'instilling the right administration.'

The state was regarded as the agent of development. It was thought that only the state was capable of providing public goods such as schools and infrastructure.¹¹⁵ Additionally, it was expected to provide employment and improve everyone's standard of living.¹¹⁶ It was therefore important, to the African elites, that the executive is granted wide-ranging power.¹¹⁷

2.3 Abuse of Power in Administration

Rules do matter, even in Africa. The flaw in the dominant accounts of African politics is their failure to grasp the role that the law plays and has always played in African politics. '...Africa's formal legal systems tend to feature broad grants of poorly circumscribed discretionary powers, law and legal processes often important tools in political contests. Indeed, the sheer breadth of formal power is what facilitates informal and accountable uses of it.'¹¹⁸

The limitation of the right of ATI as being available only to citizens¹¹⁹ and incidentally affecting the right to fair administrative action¹²⁰ could be deemed to be against the liberal democratic values (limitations of powers of governments, the assurance of the

¹¹²Hallett R, *Africa Since 1875 A Modern History*. 661

¹¹³'Uganda Historical Background', *Human Rights Watch*
<https://www.hrw.org/reports/1999/uganda/Uganweb-06.htm> on 19th January 2018.

¹¹⁴'Uganda Historical Background', *Human Rights Watch*
<https://www.hrw.org/reports/1999/uganda/Uganweb-06.htm> on 19th January 2018.

¹¹⁵Migai A, *Privatization & Democracy in East Africa, the Promise of Administrative Law*. 20.

¹¹⁶Migai A, *Privatization & Democracy in East Africa, the Promise of Administrative Law*. 20.

¹¹⁷Migai A, *Privatization & Democracy in East Africa, the Promise of Administrative Law*. 20.

¹¹⁸ Migai A, *Administrative Law*, 14.

¹¹⁹Article 35 (1) *Constitution of Kenya*.

¹²⁰Article 35 (1) *Constitution of Kenya*.

rights of citizens etc.)¹²¹ represented by constitutionalism and initially intended by the Constitution of Kenya.

As illustrated in the above narratives, the abuse of power by African leaders could be stated to have been orchestrated through manipulation of laws affecting various forms of administration. The discrepancy hereby identified with regards to article 35 and article 47 may be attributed to a devising in power with which ultimate power on matters affecting persons of concern would significantly lie with RAS. Incidentally, the inconsistency may advance potential abuse of power by state institutions in matters affecting persons of concern.¹²²

It is noteworthy to mention that in the event where a citizen is unable to obtain information held by the 'state or any information held by another person and required for the exercise or protection of any right or fundamental freedom. The style of administration in today's government may be said to be significantly similar to that in the colonial era. Though the Kenyan people democratically can verbally contribute discussions on matters affecting the country and desire to further explore this, they are met with various limitations on the right of ATI.

Despite developments on the law on the right of ATI over the years,¹²³ the aspect of 'colonial domination' is still identified in the current right to ATI laws and its administration. There exists a culture of secrecy in Kenya with regard to state-held information; this is evidenced by the enactment of certain legislation such as the Official Secrets Act, Evidence Act, National Assembly (Powers and Privileges) Act, Service Commissions Act and the provisions therein.

The right to information is a pivotal aspect of this thesis. RSD possesses its gaps with providing right to information. This could stem from the very abuse of administration and secrecy public bodies have been seen strive for.

¹²¹Kanyinga K, 'Pluralism, Ethnicity and Governance in Kenya' in Ghai YP and Ghai JC, *Ethnicity, Nationhood and Pluralism: Kenyan Perspectives*, The Global Centre for Pluralism and The Katiba Institute, 2013, 50.

¹²²UN High Commissioner for Refugees (UNHCR), *Building on the foundation: Formative Evaluation of the Refugee Status Determination (RSD) Transition Process in Kenya*, PDES/2015/01, April 2015.

¹²³Access to Information Act (Act No. 31 of 2016)

2.4 Pluralism and Human Rights

Pluralism refers to adoption of multi-ethnic or multi-cultural states.¹²⁴ Pluralism assumes that diversity is beneficial to society and that autonomy should be enjoyed by disparate functional or cultural groups within a society.¹²⁵

The Honourable Court in *Khan v Khan*¹²⁶ stated that ‘pluralism involves the recognition that different groups in society may have different traditions, practices and attitudes and from that value, tolerance must inevitably flow. Tolerance involves respect for the different traditions, practices and attitudes of different groups.’

Plurality, apart from being present in laws, rules and regulations, must be imbedded into society. States may implement the later by undertaking three steps¹²⁷: recognition, incorporation and decentralisation.

Recognition¹²⁸ and incorporation will actively reflect cultural diversity and decentralisation will ensure that the diversity and rights seep to the lowest levels of administration, formal judicial systems and by effect, applying human rights.

This propels the study to the next chapter: A case study on refugee rights and status determination. The study has presented customary law pre-colonial system, the injustice during the colonial period, post-independence progress and setbacks, an international, regional, sub-regional and national approach to human rights and their failures and pluralism; a hope in the new world of multi-cultural, multi-ethnic communities.

Refugees are affected by failures in the administration of status determination that may have its roots of unjust application from the colonial era. They may also be wrongly

¹²⁴Ghai YP and Ghai JC, ‘Ethnicity, Nationhood and Pluralism: the 2010 Kenya Constitution’ in Ghai YP and Ghai JC, *Ethnicity, Nationhood and Pluralism: Kenyan Perspectives*, The Global Centre for Pluralism and The Katiba Institute, 2013, 1.

¹²⁵‘Definition of Pluralism’ *Encyclopaedia Britannica* <https://www.britannica.com/topic/pluralism-politics> on 31st January 2018.

¹²⁶*Khan v Khan* [2007] EWCA Civ 399.

¹²⁷ International Council on Human Rights Policy, *When Legal Worlds Overlap: Human Rights, State and Non-State Law*, ATAR Roto Press SA, Vernier, Switzerland, 2009.

¹²⁸ Packer J and Holt S, ‘Towards Good Governance and Social Integration Proceedings and developments from the Conference ‘governance and participation: Integrating diversity’’, OSCE High Commissioner on National Minorities, 2007, 22.

targeted for a political agenda. Additionally, international instruments set up to protect them have claw back provisions and a nation's failure to apply those rights is not met with the harshest condemnation.

CHAPTER THREE

REFUGEE STATUS DETERMINATION, RELATED PROCESSES AND RIGHTS

3.1 Introduction

In this chapter, this study shall focus on delve into the intricacies by definition and process of 'RSD in the main body of the text and in appendices.

RSD though legalistic and restrictive, is to ensure that upon recognition as a refugee, the special legal regime is granted to the refugee.¹²⁹ This regime has with it rights and responsibilities that apply to both parties that is, state and refugees.¹³⁰ This forms part of 'international refugee protection'¹³¹.

It is noteworthy to state that RSD does not by default provide refugee status to an asylum seeker. This is because under international law, an asylum seeker is a considered a refugee as soon as they meet the definition set out in the 1951 Convention.¹³² In reality, though, an asylum seeker needs to be officially recognized as a refugee in order to receive the rights and entitlements that attach to refugee status¹³³.

3.2 The Refugee Criteria

The prose form of Article 1A (2) carries with it the required elements that are the relevant criteria a refugee is to meet. This section will categorise each element and interpret its key phrases.

¹²⁹UNHCR *Refugee Status Determination, Identifying who is a refugee*, 1 September 2005, 6.

¹³⁰UNHCR *Refugee Status Determination, Identifying who is a refugee*, 6.

¹³¹Feller E, 'The Evolution of the International Refugee Protection Regime' *Washington University Journal of Law & Policy* (2001), 6.

¹³²'Dr Joyce Chia, Alice Drury: Refugee Status Determination in Australia'

¹³³'Dr Joyce Chia, Alice Drury: Refugee Status Determination in Australia'

3.2.1 Events occurring before 1st January 1951

The date was provided to aid governments who wished to limit their obligations to refugee crises that were known to exist at the time.¹³⁴ This however was done away with by the 1967 Refugee Protocol that had in its preamble¹³⁵;

Considering that it is desirable that equal status should be enjoyed by all refugees covered by the definition in the Convention irrespective of the dateline 1 January 1951.

3.2.2 Well-founded fear of being persecuted

i. Fear

Fear is a subjective condition which will vary to each person and depends on an individual's personal and family background.¹³⁶ To deal with the subjective assessment of fear, it is assumed that a person does not leave his home and country to become a refugee unless they are fearful of being 'persecuted'.¹³⁷

ii. Persecution

Persecution has not been defined in the 1951 Convention but from Article 33. However, it can be inferred as a threat of life or physical freedom that constitutes persecution, as would other serious violations of human rights.¹³⁸

If the persecution is legitimate and not by a law enacted by the persecuting State protected under international law, the claim for a refugee status will be rejected.¹³⁹

¹³⁴ *UNHCR Handbook and Guidelines on Procedures and criteria for determining Refugee Status-Under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV.3.

¹³⁵ UNGA, *Convention and Protocol Relating to the Status of Refugees*, A/RES/57/187, 18 December 2001.

¹³⁶ *UNHCR Refugee Status Determination, Identifying who is a refugee*, 35.

¹³⁷ *UNHCR Handbook and Guidelines on Procedures and criteria for determining Refugee Status-Under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV.3.

¹³⁸ *UNHCR Refugee Status Determination, Identifying who is a refugee*, 37.

¹³⁹ *UNHCR Refugee Status Determination, Identifying who is a refugee*, 39.

3.2.3 The 1951 Convention Grounds.

Often referred to as the ‘nexus’ requirement,¹⁴⁰ this refers to the reasons under the convention that gave rise to the fear of persecution: “for reasons of race, religion, nationality, membership of a particular social group or political opinion.”

The refugee applicant must show that his reason(s) from the nexus element of the 1951 Article carries with it, a fear of prosecution.¹⁴¹

3.2.4 Is outside the country of his nationality

The refugee applicant must first establish that he in fact possesses the nationality of that country¹⁴². Where the applicant’s nationality is difficult to establish, the status process will be similar to that of a stateless person.¹⁴³

The fear of persecution need not extend to the entire state.¹⁴⁴ This ensures that grave circumstances such as ethnic clashes in inaccessible border areas gives the persecuted an option to flee the country and obtain a refugee status.¹⁴⁵

3.2.5 And is unable or, owing to such fear, is unwilling to availing himself of the protection of that country.

Being ‘unable’ to avail him or her of such protection implies circumstances that are beyond the will of the person concerned¹⁴⁶ e.g. war or the state having denied him entry.¹⁴⁷

¹⁴⁰ UNHCR *Refugee Status Determination, Identifying who is a refugee*, 41.

¹⁴¹ UNHCR *Refugee Status Determination, Identifying who is a refugee*, 17.

¹⁴² UNHCR *Handbook and Guidelines on Procedures and criteria for determining Refugee Status-Under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 18.

¹⁴³ UNHCR *Handbook and Guidelines on Procedures and criteria for determining Refugee Status-Under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 19.

¹⁴⁴ UNHCR *Handbook and Guidelines on Procedures and criteria for determining Refugee Status-Under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* 19.

¹⁴⁵ An example of this is in the bordering Nigeria Countries that have adopted RRP that will aid those escaping from the Boko Haram insurgents and the human rights violations. UNHCR, *Nigeria Regional Refugee Response Plan*, January – December 2017.

¹⁴⁶ UNHCR *Handbook and Guidelines on Procedures and criteria for determining Refugee Status-Under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 20.

¹⁴⁷ UNHCR *Handbook and Guidelines on Procedures and criteria for determining Refugee Status-Under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 20.

Being 'unwilling' refers to refugees who refuse to accept the protection of the government of the country of their nationality.¹⁴⁸ This is where the clause 'owing to such fear' comes to play. Whenever the protection of the country of nationality is available, and there is no ground based on well-founded fear for refusing it, the person concerned is not in need of international protection and is not a refugee.¹⁴⁹

3.2.6 or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it

This phrase, relates to stateless refugees, is parallel to the preceding phrase, which concerns refugees who have a nationality.

3.3 Parties involved in RSD

The parties involved are states and the UNHCR.¹⁵⁰ States which are parties to the 1951 Convention, 1967 Protocol and/or the 1969 OAU Convention are bound by these instruments.

One of the core functions of the UNHCR is RSD.¹⁵¹ In most states, the UNHCR does, at least in an advisory capacity, get involved.¹⁵² The relationship and mandate shared between UNHCR and the Kenyan Government in RSD was earlier noted. This Chapter will be guided by the general practise provided by UNHCR.

Each UNHCR office is responsible to develop and implement RSD procedures to ensure quality and efficiency and to meet its objectives the diverse and challenging environment.¹⁵³

The 1951 Convention does not set out in the procedures that must be followed in an RSD system, but there are numerous non-binding international standards.¹⁵⁴

¹⁴⁸ UNHCR, *Handbook on Procedures and criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/Eng/REV.1.

¹⁴⁹ UNHCR *Handbook and Guidelines on Procedures and criteria for determining Refugee Status-Under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 20.

¹⁵⁰ UNHCR *Refugee Status Determination, Identifying who is a refugee*, 7.

¹⁵¹ UNHCR, *Procedural Standards for Refugee Status Determination under UNHCR's Mandate*, 1.

¹⁵² UNHCR *Refugee Status Determination, Identifying who is a refugee*, 9.

¹⁵³ UNHCR, *Procedural Standards for Refugee Status Determination under UNHCR's Mandate*, 2.

Though RSD procedure differs with the country or region, there are certain core principles and standards that must be incorporated into the RSD procedures of every UNHCR office.¹⁵⁵

3.4 RSD Procedure

This is the stipulated process provided for by the UNHCR (See Appendix 1 for procedure).

3.5 The Rights of Refugees

Upon arrival to the host country, during the asylum process and final decision making, asylum seekers are entitled to basic protection of their human rights. In certain occasions, they are to be granted equal rights as the hosting state's citizens.

Article 12 through to Article 34 of the 1951 convention sets out the rights which individuals are entitled to.¹⁵⁶

- i. All refugees must be granted identity papers and travel documents that allow them to travel outside the country.
- ii. All refugees must be granted identity papers and travel documents that allow them to travel within the Country. There are several identification papers available to refugees at different circumstances (See Appendix 2).
- iii. Refugees must be accorded the same level of rights as nationals of the host country with regard to:¹⁵⁷
 - o Free exercise of religion and religious education¹⁵⁸.
 - o Equal treatment by taxing authorities¹⁵⁹
 - o Free access to the courts, including legal assistance¹⁶⁰

¹⁵⁴ See e.g. UNHCR, *Procedural Standards for Refugee Status Determination under UNHCR's Mandate*, UNHCR Refugee Status Determination, Identifying who is a refugee, 3.

¹⁵⁵ UNHCR, *Procedural Standards for Refugee Status Determination under UNHCR's Mandate*.

¹⁵⁶ Study Guide: The Rights of Refugees <http://hrlibrary.umn.edu/edumat/studyguides/refugees.htm> on 3 March 2018.

¹⁵⁷ 'Study Guide: Rights of Refugees' *Human Rights Library, University of Minnesota* <http://hrlibrary.umn.edu/edumat/studyguides/refugees.htm> on 4 April 2018.

¹⁵⁸ Article 3 and Article 4, *Convention relating to the Status of Refugees*.

¹⁵⁹ Article 29, *Convention relating to the Status of Refugees*.

¹⁶⁰ Article 16, *Convention relating to the Status of Refugees*.

- Access to public relief and assistance¹⁶¹
 - Access to elementary education¹⁶²
 - Protection provided by social security¹⁶³
 - Protection of intellectual property¹⁶⁴
- iv. Refugees must receive the most favourable treatment provided to nationals of a foreign country with regard to the following rights:-¹⁶⁵
- Right to engage in wage-earning employment¹⁶⁶
 - Right to belong to other non-political non-profit organization¹⁶⁷
 - Right to belong to trade unions¹⁶⁸
- v. Refugees must receive the most favourable treatment possible, which must be at least as favourable to that accorded aliens generally in the same circumstances, with regard to the following rights:-¹⁶⁹
- The right to higher education¹⁷⁰
 - Access to housing¹⁷¹
 - Right to self-employment¹⁷²
 - Right to practice a profession¹⁷³
 - Right to own property¹⁷⁴
- vi. Refugees must receive the same treatment as that accorded to aliens generally with regard to the following rights:
- The right to choose their place of residence¹⁷⁵

¹⁶¹Article 23, *Convention relating to the Status of Refugees*.

¹⁶²Article 22, *Convention relating to the Status of Refugees*.

¹⁶³Article 24, *Convention relating to the Status of Refugees*.

¹⁶⁴Article 14, *Convention relating to the Status of Refugees*.

¹⁶⁵ 'Study Guide: Rights of Refugees' *Human Rights Library, University of Minnesota*.

¹⁶⁶Article 1, *Convention relating to the Status of Refugees*.

¹⁶⁷Article 15, *Convention relating to the Status of Refugees*.

¹⁶⁸Article 15, *Convention relating to the Status of Refugees*.

¹⁶⁹ 'Study Guide: Rights of Refugees' *Human Rights Library, University of Minnesota*.

¹⁷⁰Article 22 (2), *Convention relating to the Status of Refugees*.

¹⁷¹Article 21, *Convention relating to the Status of Refugees*.

¹⁷²Article 18, *Convention relating to the Status of Refugees*.

¹⁷³Article 19, *Convention relating to the Status of Refugees*.

¹⁷⁴Article 13, *Convention relating to the Status of Refugees*.

¹⁷⁵Article 26, *Convention relating to the Status of Refugees*.

- The right to move freely within the host country¹⁷⁶
- Right not to be expelled save for grounds of national security or public order¹⁷⁷.
- When facing expulsion, right to have decision reached in accordance with due process of law and right to appeal if decision is not satisfactory¹⁷⁸.

3.6 Case Study: Kenya

3.6.1 Introduction

To have a pellucid understanding of the subject topic, it is prudent to have a case study to review how it handles the RSD procedure as a case study.

Kenya has overwhelming indicators of being the right case study for the subject; As earlier mentioned, Kenya's administrative process of RSD is not exclusively under the purview of UNHCR. Kenya, through the Act of Parliament created body RAS, conducts RSD with the help of UNHCR. It is critical to analyse RSD when government is involved as the case in Kenya.

It has an influx of RAAS¹⁷⁹ who have fled conflict in border countries and some from non-border countries e.g. Eritrea¹⁸⁰ and Congo¹⁸¹ and is further a host to several refugee camps with one infamously being, arguably, the largest refugee camp in the world¹⁸². It may be said that it serves as a deep 'petri-dish' of which to find all the relevant data on RSD.

Article 2(5) and 2(6) of the Constitution of Kenya deepens the relationship of international law with the Kenyan legal system.

¹⁷⁶Article 26, *Convention relating to the Status of Refugees*.

¹⁷⁷Article 32, *Convention relating to the Status of Refugees*.

¹⁷⁸Article 32 (2), *Convention relating to the Status of Refugees*.

¹⁷⁹'BD Data Hub: Refugee population in Kenya' *Business Daily Africa*, 22 September 2017.

¹⁸⁰'Ann Simons: Kenya is pulling welcome mat on 600,000 refugees, triggering fear of another mass migration' *LA Times Magazine*, 11 May 2016.

¹⁸¹'Congolese refugee in Kenya determined to show he is not helpless' *UNHCR*, 12 August 2013.

¹⁸²'Gelle Abdi Z: My life in the world's largest refugee camp', *BBC News*, 18 January 2017.

3.6.2 Background

The Refugee Act¹⁸³ created a detailed legal framework for the Kenyan government to exercise control over refugee affairs and affirmed Kenya's commitment to abide by international general rules and convention on refugee rights.¹⁸⁴

In line with international regulation, Kenyan law distinguishes between 'statutory' refugees and 'prima facie' refugees. The Act,¹⁸⁵ in broad terms, refers to statutory refugees as people who face a well-founded fear of persecution should they return to their countries of origin. 'Prima facie refugees are persons who have been compelled to leave their country of residence by external aggression, occupation, foreign domination, or events seriously disturbing public order.'¹⁸⁶

3.6.3 RSD Procedure in Kenya

As earlier noted, RSD process in Kenya is mainly conducted by RAS with the help of UNHCR.¹⁸⁷ Using the UNHCR RSD procedure as a blueprint, Kenya applies the Refugee Act together with the Refugees (Reception, Registration and Adjudication) Regulations.¹⁸⁸

3.6.4 Problems Refugees undergo during the RSD process.

The RSD process is not operating in its most efficient form. Administrative glut and political interference form a great part of this inefficiency. This study shall demonstrate key problems refugees undergo during the RSD process.¹⁸⁹

¹⁸³ Refugee Act (Act No. 13 of 2006).

¹⁸⁴ NRC, *Recognising Nairobi's Refugees; The Challenges and Significance of Documentation Providing Identity and Status*, 7.

¹⁸⁵ Section 3 Refugee Act (Act No. 13 of 2006).

¹⁸⁶ NRC, *Recognising Nairobi's Refugees; The Challenges and Significance of Documentation Providing Identity and Status*, 7.

¹⁸⁷ With several other bodies on a consultancy basis e.g. Refugee Consortium of Kenya <https://www.rckkenya.org/refugees-asylum-seekers-and-returnees/> on 3 March 2018.

¹⁸⁸ *The Refugees (Reception, Registration and Adjudication) Regulations*, Legal Notice no. 24 *The Refugees Act* (No. 13 of 2006)

¹⁸⁹ NRC, *Recognising Nairobi's Refugees; The Challenges and Significance of Documentation Providing Identity and Status*, 10.

1. Lack of access to adequate information

There is dire need for the host country to be cognisant of the surrounding countries possible tensions and subsequent wars to prepare any RAAS for orientation.

One applicant, upon entering Kenya, did not know where to go. He inquired from some of his countrymen who were already settled in Kenya.¹⁹⁰

2. Administrative issues. E.g. a Refugee's file being misplaced and lack of an interpreter. An applicant's claim was rejected on the basis of language barrier. On the appeal interview, he requested for a French interpreter and only then was he able to obtain refugee documentation.¹⁹¹
3. Bribery – Officials demanding bribes from refugees.
4. RSD process being subjective – certain refugees have deemed the process to be based on personal preferences. The Commissioner's power, though appealable, may not have fully weighed the circumstances and situation the refugee. A good example is presented by Tilahun, an Ethiopian refugee who was initially rejected by the UNHCR Eligibility Office in Kakuma. This rejection occurred despite being able to provide documentation from the ICRC verifying his visitation at Moyale Police Station. The reason for rejection stated on his letter was credibility.¹⁹²
5. Lack of adequate staff at UNHCR.
6. Stalled or suspended processes.
7. Inconsistencies and delays.

The UNHCR guidelines and Kenya's application manifests, in its many facets, gaps in administrative powers, its application, fair administrative action and ATI.

¹⁹⁰Kabue S, 'is my claim meritorious?' RCK, 2013, 19.

¹⁹¹Kabue S, 'is my claim meritorious?' 19.

¹⁹²Kanere 'Refugee Status Determination: Facing Rejections' on 12 May 2009 <https://kanere.org/2009/05/12/refugee-status-determination-facing-rejections/> on 3 March 2018.

CHAPTER FOUR

A COMPARATIVE STUDY ON THE DEVELOPMENT OF THE RIGHT TO FAIR ADMINISTRATIVE ACTION, ACCESS TO INFORMATION IN RELATION TO EFFECTIVE REFUGEE STATUS DETERMINATION

This chapter shall have a focus on three African countries' procedures, their laws and whether the right to fair administrative action and right to information have been fully addressed in relation to RSD. The author decided on South Africa, Arab Republic of Egypt and Cameroon.

4.1 South Africa

4.1.1 Background

South Africa (SA) is a party to the 1951 Convention, the 1967 Protocol, the 1969 OAU Convention, its local Refugee Act¹⁹³ and Immigration Act.¹⁹⁴

SA is the only country in Southern Africa that has not entered reservations to the 1951 Convention¹⁹⁵. Practice of the articles within the Convention however has met some shortfall. Review of the refugee policy history of SA is as follows;

Before the Refugee Act, RAAS were administered through the Aliens Control Act¹⁹⁶ (ACA). ACA can trace its origins to British colonial policies designed to restrict the number of immigrants to the Union.¹⁹⁷ It was widely and indiscriminately used in India.¹⁹⁸ Due to its brash procedure and discriminate implementation to benefit the colonialists, it was adopted in apartheid era SA.¹⁹⁹ As earlier mentioned, laws and regulations that did not promote fair administrative action and right to information

¹⁹³*The Refugee Act* (No. 130 of 1998).

¹⁹⁴*Immigration Act* (No. 13 of 2002).

¹⁹⁵ UNHCR 'Submission by the UNHCR Complaint Report – Universal Periodic Review: South Africa', 2011, 1.

¹⁹⁶*Aliens Control Act* (No. 96 of 1991).

¹⁹⁷Handmaker J, 'No Easy Walk: Advancing Refugee Protection in South Africa' *Africa Today*, (2011), 2.

¹⁹⁸Handmaker J, 'No Easy Walk: Advancing Refugee Protection in South Africa', 2.

¹⁹⁹ Hicks, F.T., 'The Constitution, Aliens Control Act, and Xenophobia: The Struggle to Protect South Africa's Pariah-the Undocumented Immigrant' *Indiana Journal of Global Legal Studies*, (1999), 2.

continued to apply post-independence to the detriment of Africans. This Act was implemented until its repealing by the Immigration Act.²⁰⁰

On ATI, SA have a Bill of Rights chapter in their constitution²⁰¹ that is very similar to Kenya save for the wording of the Article on 'Access to Information'; while Kenya's constitution states "every *citizen* has the right to access information...", South African Constitution states that "*everyone* has the right to access to..."²⁰² This distinction indicates how better suited the Constitution of SA is to better deal with the right of ATI.²⁰³

On fair administrative action, it may be stated that Kenya and SA are at par, constitutionally, granting this right to everyone.²⁰⁴

4.1.2 South Africa and Kenya: Comparative Study

Like Kenya, RSD in South Africa is handled by an entity set up by an Act of Parliament. The procedure from the point of arrival to confirmation of status is almost similar.

Both countries' ATI is however limited. Even with SA's constitution granting rights to *everyone*, applicants may lack the necessary information to fully understand the process throughout.²⁰⁵

In both countries, implementation of the existing law is one of the major problems. Fair administrative action is guaranteed in both constitutions and legislation however, officials fail to implement them. Administrative faults is a problem faced by many host states and the main issues are insufficient staff and inadequate equipment.²⁰⁶ These faults cause major delay and backlog which in turn may place the application of an applicant in jeopardy. An example can be seen with the 14 day permit provided at the

²⁰⁰Schedule 3, *Immigration Act* (No. 13 of 2002).

²⁰¹The Constitution of the Republic of South Africa, 1996.

²⁰²Article 35, the Constitution of the Republic of South Africa, 1996.

²⁰³Particulars on this right was regulated under the Promotion of Access to Information Act 2 of 2000.

²⁰⁴Article 33, the Constitution of the Republic of South Africa, 1996.

²⁰⁵ Johnson C, 'Failed Asylum Seekers in South Africa: policy and practice' *African human mobility review* (2015), 6.

²⁰⁶ Human Rights Watch: 'living on the margins inadequate protection for refugees and asylum seekers in Johannesburg', 12.

entry point of the applicant. In most occasions, the two weeks period may be inadequate time for the applicant to make it to the nearest RRO, be interviewed and be issued with a permit.²⁰⁷ This is present in Kenya too. Both countries must focus on implementation.

Fair administrative action also falls into immigration, a thorny issue in SA. 'While refugee law and immigration law are separate regimes, they do overlap at certain points. One of the most critical junctures is where an asylum seeker receives a final rejection of their asylum claim and is termed a 'failed asylum seeker', transitioning from the refugee to immigration system'.²⁰⁸

Despite the repealing of the ACA, immigrants are still a plight to violence. This was the case in Kenya too where, after a terrorist attack, there was sudden skepticism against Somalis and the government reacted by deporting hundreds to Somalia against their will and without any due process.²⁰⁹ This could be traced to the post-independence patrimonialism where political elites decide to amass power through their tribes and outsiders/foreigners can be made easy enemies and scapegoats for economic hardships.²¹⁰

Though SA law allows asylum seekers and refugees to work and study, most employers and/or schools will fail to recognize the legal right to work and study.²¹¹ Further, the Immigration Act establishes a very narrow applicable immigration that advocates for immigration of highly skilled immigrants but fails to provide a wide range of options for low-skilled workers.²¹²

²⁰⁷ Human Rights Watch: 'living on the margins inadequate protection for refugees and asylum seekers in Johannesburg', 12.

²⁰⁸ Johnson C, 'Failed Asylum Seekers in South Africa: policy and practice', 2.

²⁰⁹ HRW, 'Halt Crackdown on Somalis' (2014)

²¹⁰ Ramjathan-Keogh K, 'presentation to refugee status determination and rights in southern and East Africa regional workshop Kampala, November 2010 country report: refugee status determination in South Africa', (2010), 10.

²¹¹ Ramjathan-Keogh K, 'presentation to refugee status determination and rights in southern and East Africa regional workshop Kampala, November 2010 country report: refugee status determination in South Africa', 25.

²¹² Johnson C, 'Failed Asylum Seekers in South Africa: policy and practice', 2.

The government should promote an inclusive employment policy that will lessen the fear of hiring RAAS and do more to punish xenophobia.²¹³

The South African Refugee Act does not provide for legal assistance to applicants.²¹⁴ This is to the detriment of the Applicants who may not fully understand the law, its interpretation and application during the interviews, the final decision and/or any possible appeal. Kenya also has a similar scenario. Fair administrative action fails if the duty to consult is not available to RAAS.

4.2 Arab Republic of Egypt

The Arab Republic of Egypt is a party to the 1951 Convention, the 1967 Protocol and the 1967 OAU refugee convention.²¹⁵ RSD however is not the responsibility of the Egypt's government but dealt solely by the UNHCR.²¹⁶

An agreement was entered between the UNHCR and the Egyptian government on 10 February 1954 that fully placed the responsibilities and activities pertaining to RSD in the hands of the UNHCR Branch in Egypt.²¹⁷ This agreement committed the government to maintain a generous admission policy, to observe the principle of non-refoulement, to grant UNHCR an unhindered access to any RAAS and to provide temporary residence permits to recognize RAAS.²¹⁸

Egypt has not adopted domestic legislation on refugees or to implement the 1951 Convention.²¹⁹

Apathy from the Egyptian government is further presented by the number of Articles they placed reservations when ratifying the 1951 Convention:²²⁰ Articles 12(1)

²¹³Handmaker J, 'No Easy Walk: Advancing Refugee Protection in South Africa', 2.

²¹⁴ Human Rights Watch: 'living on the margins inadequate protection for refugees and asylum seekers in Johannesburg', 30.

²¹⁵ 'Why is UNHCR Doing RSD Anyway? A UNHCR Report Identifies the Hard Questions' *rsdwatch*, 2014 <https://rsdwatch.com/> 5 April 2018.

²¹⁶Gozdziak E and Walter A, 'Urban Refugees in Cairo' *Georgetown University Centre for Contemporary Arab Studies*, (2012), 11.

²¹⁷Egypt: Basic Information – Forced Migration' *Forced Migration Online*, <http://www.forcedmigration.org/research-resources/expert-guides/egypt/fmo029> on 5 April 2018.

²¹⁸ UNHCR 'Country operations plan: Arab Republic of Egypt', (2004), 2.

²¹⁹Gozdziak E and Walter A, 'Urban Refugees in Cairo' 11.

(personal status), 20 (rationing), 22(1) (access to primary education), 23 (access to public relief and assistance) and 24 (labour legislation and social security). According to Egyptian government officials, “refugees should not have access to the same rights as those guaranteed to Citizens”.²²¹ This statement is supported by the Egyptian constitution under article 9, which states that ‘the State ensures opportunity for all citizens without discrimination.’²²²

This blanket limitation only further spreads to the core discussion: access to information²²³ and fair administrative action.²²⁴

4.2.1 Egypt and Kenya: Comparative Study

Egypt’s constitution scribes that RAAS do not have access the same rights. A truly repressive law with deep entrenchment to patrimonialism. Any attempt at the prime focus rights being discussed would fail *ab ovo* as the constitution deems RAAS as lesser persons not entitled to the same rights as citizens. With regard to ATI, Kenya has granted this right just to the citizens. Both countries adopted this from the British colonials who considered themselves as superior to the natives.

A refugee or asylum seeker who followed due process (including possible appeals and reviews) but had his/her application rejected is excluded from any formal assistance from UNHCR and Egypt. Furthermore, the Egyptian government may arrest, detain and deport the rejected applicants.²²⁵

To prevent refoulement, government officials and the security personnel ought to be trained on refugee laws, the validity e.g. when freedom of movement is curtailed.²²⁶ A

²²⁰ ‘UNHCR convention relating to the status of refugees – reservations and declarations, 1981 <http://www.unhcr.org/protection/convention/3d9abe177/reservations-declarations-1951-refugee-convention.html> on 5 April 2018 and Gozdzia E and Walter A, ‘Urban Refugees in Cairo’ 11.

²²¹Gozdzia E and Walter A, ‘Urban Refugees in Cairo’ 11.

²²² Constitution of The Arab Republic of Egypt 2014.

²²³Article 68, Constitution of the Arab Republic of Egypt 2014.

²²⁴Article 96 (due process) and Article 97 the Arab Republic of Egypt 2014.

²²⁵Kagan M, ‘Assessment of refugee status determination procedure at UNHCR’s Cairo office 2001 - 2002’, 10.

²²⁶Gozdzia E and Walter A, ‘Urban Refugees in Cairo’ 16.

trained police force will also curb trafficking of migrants from Egypt to Europe.²²⁷ The Egyptian society too may need to undergo sensitization over its interaction with the African refugees; racism and xenophobia is prevalent.²²⁸ The government may be said to be underacting to tackle this problem and certain government bodies may be regarded as part of the problem. In January 2003, the police began a campaign dubbed 'Operation track down blacks' whose main objective was to arrest RAAS with black African origin,²²⁹ practice clearly adopted from the colonials and lacking in fair administrative action.

The State should reconsider the reservations they put on the 1951 Convention on a basic human principle.

4.3 Cameroon

Cameroon is a party to the 1951 Convention, the 1967 Protocol and the 1967 OAU refugee convention.²³⁰ Its commitment to ameliorate the flight of RAAS is advanced by the enactment of the domestic law on refugee rights, RSD procedure and state obligations: The Refugee Act.²³¹

4.3.1 The Refugee Act

Before the enactment of the Refugee Act, Cameroon handled RAAS under immigration laws.²³² This was very disadvantageous to RAAS without any documentation as the law was silent on various crucial matters in refugee protection and is problematic when dealing with an influx of RAAS.²³³ A colonial adoption.²³⁴ The Refugee Act was

²²⁷Acer E, 'Refugees in Egypt urgently need protection' *human rights first* 29 January 2015, <https://www.humanrightsfirst.org/blog/refugees-egypt-urgently-need-protection> on 5 April 2018.

²²⁸ 'Shafie S, Egypt: Basic Information – Forced Migration' *Forced Migration Online*, <http://www.forcedmigration.org/research-resources/expert-guides/egypt/fmo029> on 5 April 2018

²²⁹ 'Shafie S, Egypt: Basic Information – Forced Migration' *Forced Migration Online*, <http://www.forcedmigration.org/research-resources/expert-guides/egypt/fmo029> on 5 April 2018

²³⁰Mbua E, 'Law No. 2005/006 of 27 July 2005 Relating to the Status of Refugees in Cameroon: An Additional Hurdle or a Major Step Forward to Refugee Protection?' *Journal of Law, Policy and Globalization* (2015), 1.

²³¹*Refugee Act* No. 2005/006.

²³²Mbua E, 'Law No. 2005/006 of 27 July 2005 Relating to the Status of Refugees in Cameroon: An Additional Hurdle or a Major Step Forward to Refugee Protection?' 6.

²³³Mbua E, 'Law No. 2005/006 of 27 July 2005 Relating to the Status of Refugees in Cameroon: An Additional Hurdle or a Major Step Forward to Refugee Protection?' 6.

enacted to solve these problems with a Chapter III which outlines the rights and obligations of refugees in Cameroon and the establishment of Commissions to administer RSD.

Article 9 of the Act stipulates that refugees are entitled to the rights provided in the 1951 Convention and the OAU Convention.²³⁵

Cameroon has also ratified the ICCPR and UDHR and is therefore both.²³⁶ These articles mirror the articles provided in the 1951 Convention and the OAU Convention. The right of ATI and fair administrative action are key pillars in the aforementioned conventions.

Cameroon's constitution grants the right to fair administrative action to all²³⁷ however, is silent on right of ATI.

Article 16 of the 2005 refugee law established the Refugee Status Eligibility Commission and the Refugee Appeal Board.

The Eligibility Commission manages all applications for refugee status while the Appeal Board applicants a possibility to contest any decision rendered by the Eligibility Commission if such a decision does not favour them.²³⁸

4.3.2 RSD procedure

Cameroon's RSD structure may be referred to as a good example of failure in implementation. The Eligibility and the Appeals Commissions have been formally

²³⁴ Mbua E, 'Law No. 2005/006 of 27 July 2005 Relating to the Status of Refugees in Cameroon: An Additional Hurdle or a Major Step Forward to Refugee Protection?' 6.

²³⁵ The substantive rights guaranteed in the 2005 refugee law include the right to practice religion freely, the right to property, freedom of association, the right to sue, the right to work, the right to education, the right to housing, the right to social assistance, freedom of movement, the right to obtain identity and travel documents, the right to transfer of assets, and the right to naturalization.

²³⁶ Mbua E, 'Law No. 2005/006 of 27 July 2005 Relating to the Status of Refugees in Cameroon: An Additional Hurdle or a Major Step Forward to Refugee Protection?' 6.

²³⁷ Article 10, Cameroon's Constitution of 1972 with Amendments through 2008.

²³⁸ Article 13 (1) *Refugee Act* No. 2005/006.

established but are not yet functioning.²³⁹ The eligibility officers and support staff are yet to be selected.²⁴⁰

The entire RSD procedure is therefore carried out by UNHCR.²⁴¹ There are discussions to operationalize the Commissions and shift responsibilities to the government.²⁴²

4.3.3 Cameroon and Kenya: Comparative Study

The failure to implement the Refugee Act is not owed to special disregard for refugees but internal fractures which have made the government inept and dysfunctional. A state would find it challenging to handle RSD when it is, at the same time, causing its own citizens to flee to neighbouring countries. As is the case when 15,000 Cameroonians fled to Nigeria amid a crackdown on Anglophone separatists.²⁴³

Government's delay and apathy in the implementation of the Refugee Act has led to the delay in building and authorizing new refugee camps²⁴⁴ and the recently committed refoulement by returning 100,000 Nigerian asylum seekers escaping the Boko Haram.²⁴⁵ An outright failure in administrative action.

On previous parts of this paper, the international view the state has taken in its domestic law on the rights of the refugees was commended. It may thus be inferred that the

²³⁹ UNHCR 'Submission by the United Nations High Commissioner for refugees (UNHCR) for the Office of the High Commissioner for Human Rights' Compilation Report Universal Periodic Review: Cameroon' 3.

²⁴⁰ UNHCR 'Submission by the United Nations High Commissioner for refugees (UNHCR) for the Office of the High Commissioner for Human Rights' Compilation Report Universal Periodic Review: Cameroon' 3.

²⁴¹ The procedure we discussed in Chapter 3.

²⁴² UNHCR 'Submission by the United Nations High Commissioner for refugees (UNHCR) for the Office of the High Commissioner for Human Rights' Compilation Report Universal Periodic Review: Cameroon' 3.

²⁴³ Carsten P, 'At least 15,000 Cameroonian refugees flee to Nigeria amid crackdown' *Reuters* 11 January 2018.

²⁴⁴ Mbua E, 'Law No. 2005/006 of 27 July 2005 Relating to the Status of Refugees in Cameroon: An Additional Hurdle or a Major Step Forward to Refugee Protection?' 6.

²⁴⁵ HRM, Cameroon: Mass Forced Return of Nigerian Refugees Military Deports 100,000, Torture and Abuse in Remote Border Area' 27 September 2017 <https://www.hrw.org/news/2017/09/27/cameroon-mass-forced-return-nigerian-refugees> on 6 April 2018.

problem is in access, understanding and enforcement. An example is in final decision making:²⁴⁶

‘it is the UN Refugee Agency (UNHCR) in Yaounde that hears claims and makes decisions on refugee’s status. Asylum seekers register through the same UNHCR officer in Yaounde. Applicants receive appointment slips for eligibility interviews and wait up to five months for such interviews. The law permits denied applicants to appeal within 30 days of notification but does not allow ordinary courts to review decisions.’

This is further exacerbated by the fact that refugees do not receive legal aid.²⁴⁷ A major shortfall of the Act is in Article 17 that ‘states that decisions of the two commissions shall not be subject to any petition before national common law jurisdictions.’

Though the Act provides for right to employment and movement, there are limited options for self-reliance.²⁴⁸ This may stem from the failure in implementation of the domestic law. Its application could usher in opportunities for refugees and nationals to step in and offer proposals on how to better the situation. This could also lessen the xenophobia towards the refugees.²⁴⁹ The RAAS would easily have access to format education, hospitals and employment.²⁵⁰

Though the commissions are yet to be enforced, their structure may threaten fair administrative action by leading to biased/partial judgments. The Commissions are filled with political and security officials and dangerously lacking in UNHCR

²⁴⁶Itoe M, West Africa: Refugees in Cameroon: An overview’ *Pambazuka News*, 22 January 2010 on 6 April 2018.

²⁴⁷Itoe M, West Africa: Refugees in Cameroon: An overview’ *Pambazuka News*, 22 January 2010 on 6 April 2018.

²⁴⁸Refworld, World Refugee Survey 2009 – Cameroon.(2009), 4.

²⁴⁹Mbua E, ‘Law No. 2005/006 of 27 July 2005 Relating to the Status of Refugees in Cameroon: An Additional Hurdle or a Major Step Forward to Refugee Protection?’ 13.

²⁵⁰Mbua E, ‘Law No. 2005/006 of 27 July 2005 Relating to the Status of Refugees in Cameroon: An Additional Hurdle or a Major Step Forward to Refugee Protection?’ 13.

representatives, law practitioners, social and humanitarian workers.²⁵¹ Patrimonialism has seeped into commissions set up by acts of parliament.

4.4 Conclusion

Apart from providing representation for every region of Africa, the three countries represent the core issues with implementation of RSD with reference to the thesis' main pointers:

Egypt has no domestic law and the government is not involved in RSD. Unfortunately, its constitution, as Kenya's, has a focus on citizens rather than 'aliens'. Government officials in Kenya may view Egypt as a petri dish of a case where the laws are discriminate

South Africa has a better phrasing of its constitution as it applies to 'everyone'. As Kenya, implementation and administrative issues are the main hinderances to efficient RSD processing. Both countries may apply the solutions discussed as well as revisit the leadership deficit that leads xenophobia in SA and looting of funds in Kenya.

Cameroon is the example of failure of implementation. A domestic law is available but the State is reluctant to implement what, in theory, would greatly benefit the RAAS. The lack of state will in Cameroon may be considered as caution to Kenya's officials. As Kenya, Cameroon shares borders with countries that are undergoing conflict.²⁵²

In the aforementioned countries, government involvement is a key preliminary aspect of the RSD process. A government expressing good-will, without prejudice as in colonial times, (functioning administrative power) in hand with the UNHCR would enhance the effectiveness of RSD. Public information on the plight of refugees (to the locals) and the ATI to the RAAS would significantly aid in the aim to achieve effective RSD for the overall access to fundamental rights for RAAS.

²⁵¹Pauli T and Claire M, 'Fairness in refugee status determination upon the transfer of competence to the national authorities of Cameroon' *International Journal of Innovation and Scientific Research* (2015), 6.

²⁵²Central African Republic to the east and Nigeria to the West. There is an on-going civil war in the former: Kokopakpa L, 'Civilians killed in Central African Republic were 'manipulated: UN' 13 April 2018 <https://af.reuters.com/article/africaTech/idAFKBN1HK0PW-OZATP> on 14 April 2018. Jihadist militant organization Boko Haram in the later.

CHAPTER 5 CONCLUSION

'RSD is a means not an end. It is the process by which states and UNHCR identify who are entitled to the benefits of refugee protection and thereby facilitate the fulfilment of their obligations to the beneficiaries of the international refugee regime. It is a truism of refugee law that RSD does not confer status on a refugee but merely confirms it'²⁵³

Legal, psychological and cultural factors make refugee determination one of the most complex adjudication processes in any society.

This chapter will examine the recurring problems/issues that come with RSD, focus the discussion to aspects of fair administrative action and right to information and propose recommendations for each.

5.1 RSD Recommendations

In Kenya, it is crucial that the procedure ensures efficient case management and enhances protection.²⁵⁴ This will be achieved through²⁵⁵;

A continued effort to work towards better file management by developing consolidated databases of refugee information. This may be executed by promoting a standardisation of refugee documentation where all essential data is gathered to a central basis.²⁵⁶

RAS should improve registration and RSD processes by streamlining the RSD process, increasing competent staff and resuming the regular issuance and renewal of refugee identity cards. The bias that 'all administrative acts are deemed to have been rightly done (*Omnia praesumuntur rite acta esse*) makes any rebuttal/appeal against an administrative decision very hard or purposely strenuous.²⁵⁷ Procedural fairness may not

²⁵³ Jones M & Houle F, 'Building a Better Refugee Status Determination System' *Refugee Journal*, (2008) 5.

²⁵⁴ Salomons M, Madeline G & Guild E, 'Formative evaluation of RSD Transition Process in Kenya' UNHCR (2014), 3.

²⁵⁵ NRC, *Recognising Nairobi's Refugees; The Challenges and Significance of Documentation Providing Identity and Status*, 20.

²⁵⁶ Salomons M, Madeline G & Guild E, 'Formative evaluation of RSD Transition Process in Kenya' (2014), 3.

²⁵⁷ Kapferer S, 'Legal & Protection Policy Research Series cancellation of Refugee Status' 12

be seen to apply but rather apply to all. The procedure of RSD is a balancing of factors that seek to ensure that there exists no practical unfairness in decision making.²⁵⁸

A continued interaction and promotion of sharing of information on changes to policy and practice with local and international NGOs working with refugees should be encouraged. Katiba Institute for example is a practical example of positive party building interaction. The institute drafted a handbook that will aid the *populi* in understanding their right of ATI.²⁵⁹ However, the right of ATI is still unavailable to all compared to South Africa's constitution which grants the right to all. Patrimonialism ought to be exchanged for true constitutionalism.

The final determination and appeal should be delivered in a timely fashion.²⁶⁰ This can be done by creating specialised courts in RAAS settlement prone areas to aid in access of the courts.

The government should also fully recognise refugees' right to freedom of movement and allow refugees freedom of movement within Kenya, including by ensuring refugees have the ability to access registration and live legally outside camps. Previously, in 2014, the right to fair administrative action was ignored and undocumented Somalis were deported.²⁶¹

There exists a problem with the management of funds. The plight of insufficient funding may always remain however careful right administration of the funds may create a significantly positive impact.

Funding to the UNHCR is entirely pegged on goodwill donations.²⁶² Often, there exists an increasing need for more funding due to the rise in RAAS²⁶³ and when there exists a

²⁵⁸ Stern K, 'Procedural Fairness – its Scope and Practical Application' *AustLII*, 14.

²⁵⁹ Nyabira B & Ghai JC, 'KATIBA: Understanding the Access to Information Law' *The Star* (2018)

²⁶⁰ Michael Kagan, 'A Gentle Reminder to UNHCR: Deciding Refugee Cases Is Not Just About Efficiency' on 23 August 2013 <https://rsdwatch.com/2013/08/23/a-gentle-reminder-to-unhcr-deciding-refugee-cases-is-not-just-about-efficiency/> on 3 March 2018

²⁶¹ HRW, 'Halt Crackdown on Somalis' (2014)

²⁶² UNHCR Global Appeal Funding and Budget 2001 <http://www.unhcr.org/3e2c05c30> on 26th March 2018.

²⁶³ UNHCR 'Kenya comprehensive refugee programme' 2015, 11.

shortage in funding, the UNHCR introduces food rationing and a cut in the supply necessary kits e.g. sanitary pads.²⁶⁴

In a sudden crisis, UNHCR²⁶⁵ or a host state²⁶⁶ is obliged to seek funding from international bodies, NGOs and states.

Host states and UNHCR should be held accountable for the expenditure of funds; in Kenya, the Auditor General stated that Eight Billion Kenya Shillings²⁶⁷ could not be accounted from the Interior Ministry and more particular to this thesis, the immigration department was short of accounting for One Billion Four Hundred and Seven Million Kenya Shillings.²⁶⁸ The poor management of funds may be said to inhibit effective RSD as this may lead misrepresentation of the funds available, depicting a state of underfunding which may indirectly affect the size of workforce administering RSD vis a vis the influx of RAAS and eventually providing ineffective service.

'In a large centralized system, the sources of error are not so visible. Spreadsheets do not make people feel shame. The penalty of shame is a factor that counts in favour of governments (and businesses) that are small, local, personal, and *decentralized* versus ones that are large, national or multi-national, anonymous, and centralised...'²⁶⁹

The same decentralized approach should be adopted by the UNHCR to prevent scenarios where the higher echelons in the agency are oblivious of what is happening on the ground. A macabre history is evidence of this failure: in Rwanda²⁷⁰ and Kosovo²⁷¹.

²⁶⁴ UNHCR 'Kenya comprehensive refugee programme' 2015, 14.

²⁶⁵ Nebehay S, 'Risk of mass starvation rapidly rising in Africa, Yemen, U.N. warns,' 11 April 2017 <https://af.reuters.com/article/topNews/idAFKBN17D11V-OZATP> 26 March 2018.

²⁶⁶ Kenya Citizen TV 'DP Ruto accuses UN of renegeing on refugees support pledge' 19 September 2016,

²⁶⁷ Obala R, Standard Media Group 'Sh8b 'missing' at Interior ministry' 8 December 2017.

²⁶⁸ Ngirachu J, 'Sh1.47bn unaccounted for at Immigration Department' 11 December 2017,

²⁶⁹ Taleb N.N and Sandis C, 'The Skin in the game Heuristic for protection against tail events' *Review of Behavioural Economics*, (2014), 3.

²⁷⁰ Chiusiwa J, 'How effective has the UNHCR been in fulfilling its mandate to protect refugees?' *Australian National University*, 1999 (6).

²⁷¹ UN 'failed Kosovo Refugees' BBC 11 February 2000,

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APPENDICES

APPENDIX 1

Reception Procedure

Each UNHCR Office must have and train staff and UNHCR interpreters. Their main duty is to meet refugee applicants as soon as possible after their arrival at the gate and aid them in dissemination of the necessary information and scheduling of RSD interview.²⁷²

The necessary information includes²⁷³;

1. Reception hours and procedures.
2. Access to UNHCR premises and all UNHCR services are free of charge.
3. Procedures for reporting misconduct by UNHCR staff and difficulties relating to access to the UNHCR Office.
4. The rights and responsibilities of RAAS.
5. Information about how host country laws and procedures that may affect the rights of RAAS.

The Registration Interview

These are scheduled to take place shortly after asylum seekers approach the UNHCR office.²⁷⁴ They should be conducted in a non-intimidating, non-threatening and impartial manner by a registration staff that is qualified and trained.²⁷⁵

On production of evidence, the asylum seeker could have problems with production of documents proving his case due to the nature of his departure of his home country²⁷⁶ e.g. abrupt civil war. Therefore, the responsibility for establishing the facts is shared between the applicant and the decision maker.²⁷⁷

²⁷²UNHCR, *Procedural Standards for Refugee Status Determination under UNHCR's Mandate*.

²⁷³UNHCR, *Procedural Standards for Refugee Status Determination under UNHCR's Mandate*.

²⁷⁴UNHCR, *Procedural Standards for Refugee Status Determination under UNHCR's Mandate*.

²⁷⁵UNHCR, *Procedural Standards for Refugee Status Determination under UNHCR's Mandate*.

²⁷⁶ UNHCR *Refugee Status Determination, Identifying who is a refugee*, 118.

²⁷⁷ UNHCR *Refugee Status Determination, Identifying who is a refugee*, 118.

Misrepresentations and withholding of information should not deem the applicant's claim revocable. e.g. distrust or quality of interpretation.²⁷⁸

The interviews ought to be conducted on an individual basis even for asylum seekers that come as a family.²⁷⁹

RSD Decision

At the end of the RSD interview, the eligibility Officer should issue a date on when the RSD decision will be issued.²⁸⁰

An asylum seeker can review and revise the RSD decision after it has been issued to the applicant through the any of the established procedures²⁸¹:

- Appeal procedures
- Re-opening if the RSD file
- Cancellation/Revocation of refugee Status
- Cessation of Refugee Status

Cancellation of Refugee Status

RSD incorporates the process of obtaining it and when necessary, cancelling the status. 'The issue of cancellation arises where a person recognised as a refugee by a State under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol is subsequently found not to have been entitled to Convention refugee status at the time of the positive determination. In other words, the applicant was not eligible for protection as a refugee because the criteria of Article 1A (2) of the 1951 Convention were not met, or because the applicant was not in need, or not deserving, of such protection.'²⁸²Cancellation procedures should be distinguished from cessation²⁸³ procedures which are intended to reassess refugee status that was properly conferred but

²⁷⁸ UNHCR *Refugee Status Determination, Identifying who is a refugee*, 119.

²⁷⁹ UNHCR, *Procedural Standards for Refugee Status Determination under UNHCR's Mandate*.

²⁸⁰ UNHCR, *Procedural Standards for Refugee Status Determination under UNHCR's Mandate*.

²⁸¹ UNHCR, *Procedural Standards for Refugee Status Determination under UNHCR's Mandate*.

²⁸² Kapferer S, 'Legal & Protection Policy Research Series cancellation of Refugee Status' 9

²⁸³ This refers to the ending of refugee status pursuant to Article 1C of the 1951 Convention because international protection is no longer necessary or justified on the basis of certain voluntary acts of the individual concerned or a fundamental change in the situation prevailing in the country of origin.

may no longer be appropriate²⁸⁴ or revocation of refugee status that was proffered accordingly but the RAAS has engaged in conduct that would lead to the revocation of that status.²⁸⁵

Grounds for commencing cancellation procedures²⁸⁶

- a) Misrepresentation or concealment by the individual concerned or a third party of facts that were material to the RSD determination, with or without fraudulent intent.
- b) Misconduct by the individual, including threats or bribery.
- c) Error of fact or law by UNHCR in applying the inclusion or exclusion criteria;
- d) Misconduct or administrative error by UNHCR at any stage in the RSD procedures, including the wrongful issuance of UNHCR documents.

Cancellation Procedures

The Refugee Act²⁸⁷ states that the cancellation of a person's refugee status shall-

- a) be carried out using the same standards and due process that apply to refugee status determination procedures and
- b) be determined on an individual basis.

The Cancellation Interview²⁸⁸

Every individual whose claim is examined pursuant to cancellation procedures must have an individual cancellation interview where he/she will be given the opportunity to respond to specific allegations or provide other evidence that is relevant to the decision whether or not to cancel refugee status.²⁸⁹

²⁸⁴ UNHCR, 'Procedure for cancellation of Refugee Status' 2.

²⁸⁵ Revocation applies if the refugee engages in conduct which comes within the scope of Article 1F (a) or 1F (c) of the 1951 Convention- regarding either a crime against peace, a war crime or crime against humanity or is guilty of acts contrary to the purposes and principle of the United Nations.

²⁸⁶ UNHCR, 'Procedure for cancellation of Refugee Status' 3.

²⁸⁷Section 37 (2) Refugee Act (No. 13 of 2006).

²⁸⁸ UNHCR, 'Procedure for cancellation of Refugee Status' 4.

²⁸⁹ UNHCR, 'Procedure for cancellation of Refugee Status' 4.

The officer who conducts the interview should be thoroughly familiar with the RSD file of the individual concerned, including the evidence upon which the cancellation proceedings are based.²⁹⁰

Upon a decision being made and the individual ought to be duly informed that he/she has the right to appeal. If the appeal fails, UNHCR is to take all feasible steps to withdraw UNHCR documentation issued.²⁹¹

This process begs two questions:

1. Is cancellation mandatory or discretionary?
2. What are the consequences of cancellation?

Cancellation clauses in national refugee and general administrative legislation²⁹² often provide for the exercise of discretion on the part of authorities.²⁹³

On consequences;

- i. The person is no longer deemed to be a refugee.²⁹⁴
Section 41²⁹⁵ makes the withdrawal of refugee status of a person result in the withdrawal of the members of the family of the refugee.
- ii. Depending on the jurisdiction, the refugee may not be protected against *non-refoulement* and the host country will remove the person.²⁹⁶ To prevent this, RAAS, upon arriving to their desired destination, burn their fingertips to prevent recognition and subsequent deportation²⁹⁷. In other countries,²⁹⁸ the person concerned generally remains in possession of their residence permit.

²⁹⁰ UNHCR, 'Procedure for cancellation of Refugee Status' 4.

²⁹¹ UNHCR, 'Procedure for cancellation of Refugee Status' 8.

²⁹² Five among the countries reviewed for the purpose of this paper, cancellation is discretionary in Australia, Canada, New Zealand, United Kingdom and the United States of America.

²⁹³ UNHCR, 'Procedure for cancellation of Refugee Status' 8.

²⁹⁴ Kapferer S, 'Legal & Protection Policy Research Series cancellation of Refugee Status' 42.

²⁹⁵ Refugee Act (No. 13 of 2006).

²⁹⁶ Kapferer S, 'Legal & Protection Policy Research Series cancellation of Refugee Status' 43.

²⁹⁷ Domokos J and Grant H: Dublin regulation leaves asylum seekers with their fingers burnt' *The Guardian*, 7 October 2011.

²⁹⁸ For example, Kenya.

APPENDIX 2

The following documents are significant to a refugee;²⁹⁹

A **Mandate Certificate** is issued by UNHCR that states the persons listed on the certificate (usually a family) are refugees under the UNHCR mandate in Kenya. It expires after two years.

An **Alien Card** refers to a government-issued identity card that includes a notation (either in the card's title or elsewhere) to indicate the holder is a refugee. Since 2006 they have been formally called "refugee identity cards" in Kenyan legislation.

An **Asylum Seeker Certificate** is a document issued by UNHCR noting that those listed on it (usually a family) are recognised as asylum seekers by UNHCR.

A **Waiting Card**, waiting document, or appointment slip could refer to any number of documents issued by RAS or UNHCR. These documents usually indicate that the holder is waiting for a document, such as an alien card, that they are entitled to (but it may not state this is the case) or has an appointment for an interview as part of the RSD process.

A **Movement Pass** is a document issued by RAS that requires a refugee to move from an urban area to a camp within 10 days.

A **Proof of Registration** is a document issued by RAS that lists the members of a family registered in an urban setting. Its camp equivalent is usually referred to as a "manifest" and is very similar in form.

A **Refugee Recognition Letter** (or notification of recognition) is a letter issued by RAS with a validity of one year that states the holder has been recognised as a refugee by the government and is waiting for an alien card.

An **Asylum Seeker Pass** is a document issued by RAS that indicates the holder has been recognised as an asylum seeker by the government.

²⁹⁹ Norwegian Refugee Council (NRC) *Recognising Nairobi's Refugees: The Challenges and Significance of Documentation Providing Identity and Status*, 6.