



**Discussing New Challenges Facing the Principle of Non-Refoulement in the
Refugee Law with Particular Reference to Kenya**

By

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of the degree of Masters of Laws (LL.M) of the University of Nairobi.**

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DECLARATION

I, JOSEPHINE APONDI OPIYO, do hereby declare that this is my original work and has not been submitted and is not currently being submitted for a degree in any other University.

SIGNED.....

Date.....

JOSEPHINE APONDI OPIYO

This thesis has been submitted with my approval as the University of Nairobi Supervisor.

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DEDICATION

I would like to dedicate this dissertation first, to all asylum seekers and refugees in the world, and then, to all my family members.

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LIST OF CASES

CASES	
Kituo Cha Sheria & 8 others v Attorney General [2013] eKLR	Petition 19 & 115 of 2013 - Kenya Law
Republic v Mohamed Mogow Siyat [2017] Eklr	Criminal Case No. 37 of 2012
Samow Mumin Mohamed & 9 others v Cabinet Secretary, Ministry Of Interior Security and Co-Ordination & 2 others [2014] eKLR	Constitutional and Human Rights Division Petition No. 206 of 2011
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The Constitution of the Republic of Kenya 2010.

Tripartite Agreement, 11 November, 2013, “New Procedures Set for Somali Refugees to Return Home Voluntarily from Kenya”.

The Refugees Act, No. 13 of 2006

Report of the Eighth Session of the Asian-African Legal Consultative Committee held in Bangkok from 8 to 17 August 1966, p.335. Article III (1) of the as yet un-adopted Draft Consolidated Text of these principles revised at a meeting held in New Delhi on 26-27 February 2001.

United Nations Convention Related to the Status of Refugees, 1951.

United Nations Universal Declaration of Human Rights of 1948.

LIST OF ABBREVIATIONS

AIDS - Acquired Immune Deficiency Syndrome

CARE - Co-operative for Assistance and Relief Everywhere

CTD - Convention Refugee Travel Document

DOI – Digital Online Identifier

EC - European Commission

FAO - Food and Agricultural Organization

GTZ-IS - Gesellschaft für Technische Zusammenarbeit – International Services

HIV - Humane Immunodeficiency Virus

ICRC - International Committee of the Red Cross and Red Crescent Societies

IOM - International Organization for Migration

IP - Implementing partner

IRC - International Rescue Committee

JRS - Jesuit Refugee Service

LWF - Lutheran World Federation

MHA - Ministry of Home Affairs

NCCCK - National Council of Churches Kenya

NGO - Non Governmental Organization

OAU - Organization of the African Unity

OP - Operational Partner

RCK - Refugee Consortium of Kenya

RESCUE - Rational Energy Supply Conservation, Utilization and Education

Res. Resolution

RSD - Refugee Status Determination

SGBV - Sexual and Gender Based Violence

UAM - Unaccompanied Minor

UN - United Nations

UNDP - United Nations Development Programme

UNESCO - United Nations Education, Scientific and Cultural Organisation

UNFPA - United Nations Population Fund

UNGA – United Nations General Assembly

UNHCR - United Nations High Commissioner for Refugees

UNICEF - United Nations Children Funds

WFP - World Food Programme

WHO - World Health Organisation

CHAPTER ONE

1.0 Introduction

This is an exploratory research whose aim is to identify some research gap in the literature on refugee law of the Republic of Kenya. The agitation from the government of Kenya to close Dadaab refugee camp and repatriate all Somali refugees back to Somalia has been encountered by several resistance and discussions.

The old principle of non-refoulement in the refugee law is not new to the Republic of Kenya nor Somalia as the two governments reached an agreement to wind-up the refugee camp indefinitely. Such moves have created lots of discussions among the refugee lawyers and law scholars world-wide.

However, such government decisions must be explained within a context and appropriate study background as follows.

1.1 Background of the Study

In the preamble of the Statute of the Office of the United Nations High Commissioner for Refugees governments are called upon to co-operate with the United Nations High Commissioner for Refugees in the performance of its functions concerning the refugees falling under the competence of the office. Voluntary repatriation of the refugees is promoted by the UN and the governments.¹

¹ Jean-Pierre Colombey, Collection of International Instruments and other Legal texts concerning Refugees and Displaced Persons, UNHCR, 1995, p. 5.

As has been stated by Fozdar and Hartley, it is an appropriate time to review the situation of refugees from the countries that have ratified the Convention.² The principle of non-refoulement emerges as one of the highly privileged norms in the customary international law recognized by the United Nations. The same sentiment has been highlighted by the High Commission for Refugees as documented³ and made essential as component of international refugees and asylum seekers⁴ for their protection.⁵

Quoting from Article 38 of the Statute of the International Court of Justice,⁶ “the Court is required to apply *inter alia* international custom as evidence of a general practice accepted as law”. The principle of non-refoulement satisfies this requirement and constitutes a rule of international customary law.

More so, the Conclusion No. 25 adopted at its 23rd Session in 1982, the Executive Committee of the High Commissioner's Programme⁷ reaffirmed the basic principles of international protection, and in particular, the principle of non-refoulement which was

² F. Fozdar and L. Hartley, ‘Refugee Resettlement in Australia: What We Know and Need to Know’, *Refugee Survey Quarterly*, 32.3 (2013), 23–51 <<https://doi.org/10.1093/rsq/hdt009>>.

³ ‘UNHCR - Search’ <<http://www.unhcr.org/search?query=dadaab>> [accessed 17 March 2017].

⁴ ‘UNHCR - Search’.

⁵ Mariham Iskander Wahba, ‘The State of Statelessness: Justice, Violence, Subjectivity, and Urban Asylum Seeking and Refugee Women in Cairo’, 2011 <<http://dar.aucegypt.edu/handle/10526/1546>> [accessed 9 April 2017].

⁶ United Nations High Commissioner for Refugees, ‘Refworld | The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93’, *Refworld* <<http://www.refworld.org/docid/437b6db64.html>> [accessed 8 April 2017].

⁷ Refugees, ‘Refworld | The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93’.

progressively acquiring the character of a peremptory rule of international law was given more attention.⁸

Likewise, Joseph Vungo reiterates that the principle is encountering several legal challenges⁹ on protection and resettlement¹⁰ following frequent terrorist attacks on the sovereignty of states. For example, the historic terrorist attack on the territorial sovereignty of the United States of America on 11th September 2001¹¹ claimed lives of several people.¹² Consequently, the question of national security of a state and the obligation to provide protection against non-refoulement prevailed in the international legal debates.¹³

As already questioned by Saul, whether “after the terrorist¹⁴ attack on 11 September 2001, it is permitted to strike a balance between the national security of a State and the obligation to provide protection against non-refoulement principle?”¹⁵

Quoting from Saul, the definition of terrorism is unlawful use of violence or the threat of violence to attain goals that are religious, political, ideological, and economic in

⁸ United Nations High Commissioner for Refugees, ‘Refworld | The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93’, *Refworld* <<http://www.refworld.org/docid/437b6db64.html>> [accessed 9 March 2017].

⁹ Joseph Vungo, ‘Contemporary Legal Challenges to State Obligations Relating to Refugee Problems: The Case of Kenya’ (University of Nairobi, Kenya, 2007) <<http://erepository.uonbi.ac.ke:8080/xmlui/handle/11295/11749>> [accessed 9 May 2017].

¹⁰ ‘Law Journal Library - HeinOnline.Org’ <https://vpn.uonbi.ac.ke/proxy/74296c6f/http/heinonline.org/HOL/Page?handle=hein.journals/colhr36&div=20&start_page=299&collection=journals&set_as_cursor=2&men_tab=srchresults> [accessed 18 March 2017].

¹¹ Rene Bruin and Kees Wouters, ‘Terrorism and the Non-derogability of Non-refoulement’, *International Journal of Refugee Law*, 15.1 (2003), 5–29 <<https://doi.org/10.1093/ijrl/15.1.5>>.

¹² ‘Law Journal Library - HeinOnline.Org’.

¹³ ‘Law Journal Library - HeinOnline.Org’.

¹⁴ See B. Saul, ‘Definition of “Terrorism” in the UN Security Council: 1985-2004’, *Chinese Journal of International Law*, 4.1 (2005), 141–66 <<https://doi.org/10.1093/chinesejil/jmi005>>.

¹⁵ Bruin and Wouters.

nature to inculcate fear; intended to coerce or to intimidate governments or societies in the pursuit of said goals.¹⁶

Olagookun and White clearly purported that it was from this historical defining moment that many states, including the Republic of Kenya, started to scrutinize the presence of the so called refugees from suspected states within their international boundaries.¹⁷ Such sentiment has complicated the presence of refugees and asylum seekers¹⁸ from presumed countries with terrorist records such as the Republic of Somalia. Some of this information about refugee population and people in refugee like situations is available in various documents¹⁹ with statistics that have been widely published.²⁰

The Republic of Kenya shares a long border (700 kilometers) with the troubled Somalia the bedrock and home country of the Al-shabaab terrorists. The same terrorist group which is allegedly connected to Al-Qaeda has been crossing the borders of the two sovereign states causing threats and attacks.

However, the Republic of Kenya signed a tripartite agreement on 10 November 2013 with the Republic of Somalia to host its refugees in Dadaab refugee camp, next to the border with Somalia. The document was signed within the rule of non-refoulement

¹⁶ Saul.

¹⁷ Olalekan Olagookun and Julie White, 'Including Students from Refugee Backgrounds in Australian Schools', in *Inclusive Education*, ed. by Vicky Plows and Ben Whitburn, Innovations and Controversies: Interrogating Educational Change (SensePublishers, 2017), pp. 95–105 <https://doi.org/10.1007/978-94-6300-866-2_7>.

¹⁸ 'Law Journal Library - HeinOnline.Org'.

¹⁹ 'VOX, CEPR's Policy Portal | Research-Based Policy Analysis and Commentary from Leading Economists' <<http://voxeu.org/>> [accessed 9 April 2017].

²⁰ United Nations High Commissioner for Refugees, 'UNHCR Statistical Yearbook 2014, 14th Edition', *UNHCR* <<http://www.unhcr.org/afr/statistics/country/566584fc9/unhcr-statistical-yearbook-2014-14th-edition.html>> [accessed 17 March 2017].

assuring the refugees international legal protection, security and safety of their human rights as has been elaborated in Gil et Al.²¹

In Caroline Abu Sa' Da and Sergio Bianchi's ²²study on the state of exception and legal ambiguity captures in part the contextualization of the question of Somali refugees in Kenya relating it to tense political moment between the State of Somalia and Kenya. The study shows also some elements of repatriation of some refugees in accordance to the tripartite agreement.

In this background, therefore, the principle of non-refoulement²³ constitutes an essential component of asylum and international refugee protection. The essence of the principle is that a State may not oblige a person to return to a territory where he may be exposed to persecution. The wording used in Article 33 paragraph 1 of the 1951 United Nations Refugee Convention is "where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion". Since the purpose of the principle is to ensure that refugees are protected against such forcible return it applies both to persons within a State's territory and to rejection at its borders.²⁴

²¹ Gil Loescher and James Milner, 'The Long Road Home: Protracted Refugee Situations in Africa', *Survival*, 47.2 (2005), 153–174.

²² Caroline Abu Sa'Da and Sergio Bianchi, 'Perspectives of Refugees in Dadaab on Returning to Somalia', *Forced Migration Review*, 2014, 88.

²³ United Nations High Commissioner for Refugees, 'Refworld | The Leader in Refugee Decision Support', *Refworld* <<http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&skip=0&query=Principle+of+non-refoulement&coi=>>> [accessed 9 April 2017].

²⁴ Refugees, 'Refworld | The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93'.

1.2. Definition of the Principle Non-Refoulement

Before providing the legal interpretation of the principle of non-refoulement, it would be convenient to provide the definition of a refugee. The Refugee Act No. 13 of 2006 under section 3 states as follows:

(1) A person shall be a statutory refugee for the purposes of this Act if such person—

(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.

(2) A person shall be a prima facie refugee for purposes of this Act if such person owing to external aggression, occupation, foreign domination or events seriously disturbing public order in any part or whole of his country of origin or nationality is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

(3) If the Minister considers that any class of persons are prima facie refugees as defined in subsection (2), the Minister may declare such class of persons to be prima facie refugees and may at any time amend or revoke such declaration.

(4) If the Minister under subsection (3) expressly excludes or exempts any person from a declaration that a class of persons to which that person is a member are

refugees, such exclusion or exemption shall not preclude the person concerned from applying under subsection (2) for recognition of their status as a refugee.

Non-Refoulement:

Under Art. 18 of the Refugee Act of 2006 it is stated as follows:

Non-refoulement principle or non-return of refugees, their families or other persons.

No person shall be refused entry into Kenya, expelled, extradited from Kenya or returned to any other country or to subjected any similar measure if, as a result of such refusal, expulsion, return or other measure, such person is compelled to return to or remain in a country where:

- (a) The person may be subject to persecution on account of race, religion, nationality, membership of a particular social group or political opinion; or
- (b) The person's life, physical integrity or liberty would be threatened on account of external aggression, occupation, foreign domination or events seriously disturbing public order in part or the whole of that country.

On the universal level mention should first be made of the 1951 United Nations Convention relating to the Status of refugees, which, in Article 33 (1), provides that:²⁵

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

²⁵ UN General Assembly, ‘Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, Vol. 189’, *Retrieved April*, 20 (2015), 137.

political opinion”.²⁶ The Convention refers to this situation as well founded fear, that means, the fear must be credible which is tested in the pre-screening interviews.

The end of 2014 almost 59.5 million individuals²⁷ were forcibly displaced world-wide as a result of persecution, conflict, generalized violence, or human rights violations.²⁸

A refugee²⁹ is any person who is outside any country of such person’s nationality or, in the case of a person having no nationality³⁰, is outside any country in which such person last habitually resided, and who is unable to, or unwilling to return to, and is unable or, unwilling to avail himself or herself for the protection of, that country because of persecution, or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion³¹. By the virtue of the refugee law, such a person must be protected by the hosting state³² and must not be forcefully returned to the country of origin.

As explained in the Goodwin-Gill the Non-refoulement³³ is a concept which prohibits States from returning a refugee or asylum-seeker³⁴ to territories where there is a risk

²⁶ United Nations High Commissioner for Refugees, ‘Note on Non-Refoulement (Submitted by the High Commissioner)’, *UNHCR* <<http://www.unhcr.org/excom/scip/3ae68ccd10/note-non-refoulement-submitted-high-commissioner.html>> [accessed 10 March 2017].

²⁷ ‘International Labour Organization: Search Services’ <<http://www.ilo.org/Search5/search.do?searchLanguage=en&searchWhat=2014+refugees+59.5+million>> [accessed 9 April 2017].

²⁸ Refugees, ‘UNHCR Statistical Yearbook 2014, 14th Edition’.

²⁹ Leonard Birdsong, ‘Refugee Admittance and Asylum Outcomes in the U.S. Before and After 9/11; Fair or Unfair?’, *Birdsong’s Law Blog*, 2012 <<http://birdsongslaw.com/2012/02/16/refugee-admittance-asylum-outcomes-911-fair-unfair/>> [accessed 9 April 2017].

³⁰ Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 2007).

³¹ Bill Frelick, ‘Abundantly Clear: Refoulement’, *Georgetown Immigration Law Journal*, 19 (2004), 245.

³² ‘Returnee | Search Results | Dr. Luise Druke, MPA (Harvard)’ <<http://www.luisedruke.net/?s=returnee>> [accessed 9 April 2017].

³³ Goodwin-Gill and McAdam.

³⁴ ‘Boer, Tom de; Zieck, Marjoleine --- “From Internment to Resettlement of Refugees: On US Obligations towards MeK Defectors in Iraq” [2014] *MelbJlntLaw* 2; (2014) 15(1) *Melbourne Journal of International Law* 21’ <<http://www.austlii.edu.au/cgi->

that his or her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion.³⁵

Several law scholars have affirmed that the principle of non-refoulement³⁶ is part of international refugee law, international humanitarian law and international human rights law.³⁷

The US explicitly accepted the application of Geneva Convention IV and was, therefore, bound to observe the prohibition of refoulement laid down in art 45 para 4 thereof: ‘In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.’³⁸

This is the universally accepted definition of the concept of non-refoulement as a principle which this research relies on for its verifications, sampling, analysis and conclusions already echoed in the Convention and Protocols.³⁹

1.3 Particular Reference to Kenya Experience

The genesis of the Kenya’s rebuttal of the norm begins in August 1998 terrorist attack on the USA embassy that killed and harmed so many persons.⁴⁰ The suspects were

bin/sinodisp/au/journals/MelbJIntLaw/2014/2.html?stem=0&synonyms=0&query=refugee> [accessed 9 April 2017].

³⁵ Goodwin-Gill and McAdam.

³⁶ Janet M. Munywoki, ‘Rethinking Obligations: A Critical Analysis Of Refugee Cessation Based On “Changed Circumstances” In Kenya’ (University of Nairobi, 2013) <<http://erepository.uonbi.ac.ke:8080/xmlui/handle/11295/59705>> [accessed 9 May 2017].

³⁷ Goodwin-Gill and McAdam.

³⁸ ‘Boer, Tom de; Zieck, Marjoleine --- “From Internment to Resettlement of Refugees: On US Obligations towards MeK Defectors in Iraq” [2014] MelbJIntLaw 2; (2014) 15(1) Melbourne Journal of International Law 21’ <<http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/MelbJIntLaw/2014/2.html?stem=0&synonyms=0&query=refugee>> [accessed 9 April 2017].

³⁹ Robert L. Newmark, ‘Non-Refoulement Run Afoul: The Questionable Legality of Extraterritorial Repatriation Programs’, *Washington University Law Quarterly*, 71 (1993), 833.

believed to be members of the Somali terrorist group making the rule of non-refoulement a serious concern of the governments aggravating the Dadaab refugee camp presence.

In 1992, Kenya⁴¹, Somalia and the UNHRC⁴² had signed a tripartite agreement to open a camp at Dadaab in Garissa⁴³ which is hosting several Somalia refugees in line with the customary international law and the norm of non-refoulement.⁴⁴

In 2013, Kenya initiated the move to close the camp and send the refugees residing at the camp complex back to Somalia⁴⁵ against the spirit and letter of the agreement.⁴⁶

The main reason of this change of mind was provoked by frequent terrorist attacks on the Kenya's territory, national security challenges, and the fear that such camps were meant to be temporary⁴⁷ and not permanent (refugee problems are viewed to be temporary and unique events),⁴⁸ the corrosive allegations that almost convinced both Somalia and the United Nations.⁴⁹ Kenya's allegation that the camp had become a

⁴⁰ 'Kenya Entangled in Proscribed Crimes of Terrorism and Violations of Human Rights Law' <https://www.academia.edu/28245842/Kenya_Entangled_in_Proscribed_Crimes_of_Terrorism_and_Violations_of_Human_Rights_Law> [accessed 9 March 2017].

⁴¹ 'Kenya Postpones Planned Closure of Dadaab Refugee Camp | Global Development | The Guardian' <<https://www.theguardian.com/global-development/2016/nov/16/kenya-postpones-planned-closure-of-dadaab-refugee-camp-somalis>> [accessed 10 April 2017].

⁴² 'Dadaab', *Wikipedia*, 2017 <<https://en.wikipedia.org/w/index.php?title=Dadaab&oldid=774611448>> [accessed 10 April 2017].

⁴³ 'Dadaab', *Wikipedia*, 2017 <<https://en.wikipedia.org/w/index.php?title=Dadaab&oldid=768716249>> [accessed 9 March 2017].

⁴⁴ Goodwin-Gill and McAdam.

⁴⁵ Murithi Mutiga Emma Graham-Harrison, 'Kenya Says It Will Shut World's Biggest Refugee Camp at Dadaab', *The Guardian*, 11 May 2016, section World news <<https://www.theguardian.com/world/2016/may/11/kenya-close-worlds-biggest-refugee-camp-dadaab>> [accessed 10 April 2017].

⁴⁶ 'UNHCR - Search'.

⁴⁷ 'UNHCR - Search'.

⁴⁸ Barry N. Stein, 'The Refugee Experience: Defining the Parameters of a Field of Study', *The International Migration Review*, 15.1/2 (1981), 320–30 <<https://doi.org/10.2307/2545346>>.

⁴⁹ Mélanie Gouby, 'Climate of Fear in Dadaab Refugee Camp Leads Many to Consider Repatriation', *The Guardian*, 20 May 2015, section Global development <<https://www.theguardian.com/global->

breeding ground for islamist terrorists, especially, the Al-Shabaab which forced it to declare war on trans-boundary terrorist group both within Somalia⁵⁰ and in Kenya after the government had resolved to commit a section of its Kenya Defence Force to fight them in Somalia and to secure her borders.

The decision to close the camp encountered legal resistance⁵¹ when the majority of refugees expressed their fear to return to their state of origin which is plagued by war, famine, chaos, poverty, diseases and inter alia, insecurity.⁵² Convinced of the norm of non-refoulement, Justice John Mativo of the Kenya High Court ruled that the government's plan to close the camp, especially targeting Somali refugees is an act of group persecution, illegal, discriminatory, and, therefore, unconstitutional.⁵³ The same rule also ordered the re-opening of the refugee department which had been arbitrarily closed by the government.⁵⁴ "An order of Mandamus be and is hereby issued directing the 1st, 2nd, 3rd, and 4th Respondents to, with immediate effect, restore the status quo ante predating the impugned directive with regard to administration of refugee affairs in the Republic of Kenya and, to specifically and with immediate effect, reinstate and operationalize the Department of Refugee Affairs."⁵⁵

Given this background study and the court order, this research seeks to discuss in details the merit of the legality of non-refoulement principle which is slowly turning to

development/2015/may/20/dadaab-refugee-camp-kenya-repatriation-somalia> [accessed 10 April 2017].

⁵⁰ Gouby.

⁵¹ 'Law Journal Library - HeinOnline.Org'.

⁵² Jeffrey Gettleman, 'Kenyan Court Blocks Plan to Close Dadaab Refugee Camp', *The New York Times*, 9 February 2017 <<https://www.nytimes.com/2017/02/09/world/africa/kenyan-court-blocks-plan-to-close-dadaab-refugee-camp.html>> [accessed 9 March 2017].

⁵³ Gettleman.

⁵⁴ 'Constitutional Petition 227 of 2016 - Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/131173/?platform=hootsuite>> [accessed 9 March 2017].

⁵⁵ 'Constitutional Petition 227 of 2016 - Kenya Law'.

be part of *jus cogens* but consistently threatened by states due to litigations about trans-boundary and organised crime *vis-à-vis*, the international terrorism.⁵⁶

1.4 Statement of the Problem

In our study a number of problems were raised. There is evidence that in the recent decades there has been an explosion of a number of persons fleeing their states of origin in fear of political persecution, civil unrest, natural disasters, war, torture among other factors.⁵⁷ The single most principle in the refugee law is the rule of non-refoulement related to the protection and security of the refugee population and those found in refugee like situations. United Nations Convention relating to the Status of refugees.⁵⁸ This principle generally prohibits nations from repatriating the alleged refugees and asylum seekers against their will.

International refugees and asylum seekers from Somalia face numerous challenges in the era of trans-boundary terrorism pitying their state of origin. They have become easy preys in the illegal and violent extraterritorial repatriation programme by the government and continuously targeted for state ruthlessness and indiscriminate attack backed by counter terrorism policies.

Quoting from Monette Zard it is clearly stated that, “Far from being a cloak behind which the perpetrators of terror can hide, international refugee law explicitly excludes

⁵⁶ ‘Law Journal Library - HeinOnline.Org’.

⁵⁷ Newmark.

⁵⁸ Goodwin-Gill and McAdam.

from protection those who have violated the human rights of others or committed other serious crimes”.⁵⁹

It is necessary to consider the Kenya’s law on refugees and its compliance with the non-refoulement principle⁶⁰ in the problem analysis.

1.5 Research Objective

The research seeks to identify gaps in the literature and make contribution to the knowledge of the principle of Non-refoulement as part of the state obligation in Kenya.

1.5.1. Special Objectives

1. Establish documentations on the principle of non-refoulement
2. Collecting data, reading the data, analysing the data and processing the data
3. Reviewing the legal framework around the principle of non-refoulement
4. Using the Research Methodology and appropriate tools to verify the data and test the hypothesis and theories
5. Discussing the research findings and current challenges

⁵⁹ Monette Zard, ‘Exclusion, Terrorism and the Refugee Convention’, *Forced Migration Review*, 13.32–34 (2002) <<http://www.fmreview.org/sites/fmr/files/FMRdownloads/en/FMRpdfs/FMR13/fmr13.11.pdf>> [accessed 9 March 2017].

⁶⁰ Titus W. Ranja, ‘The Kenyan Law on Refugees and Its Compliance with the Principle of Non Refoulement’, 2015 <<http://erepository.uonbi.ac.ke:8080/xmlui/handle/11295/94878>> [accessed 9 May 2017].

1.6. Research Questions

1. Is it legally sustainable to use terrorism as an excuse to violate the norm of non-refoulement?
2. Is it constitutional for the Republic of Kenya to reverse the customary international law of refugees by sending the refugees of Somali origin by closing the Dadaab Camp?
3. Is Kenya justified by customary international law⁶¹ to send Somali refugees to their state of origin against their will?
4. Does Kenya violate refugee law by forcefully sending or deporting refugees with right to stay within the Kenya territory?
5. Is refugee camp meant to be a permanent home for refugees or a temporary transitional place for refuge?
6. For how long should a refugee camp be allowed to exist?

1.7. Research Hypothesis

Should it be that any refugee camp is time-bound, would Kenya be legally justified to send the Somali refugees back to Somalia?

If refugees are not criminals, is Kenya justified to allege that they are the source of her terrorist attacks?

Could the returnees charge the Republic of Kenya at the International Court of Justice of violating their human rights and entitlement to seek refuge in Kenya?

⁶¹ See Alison Stuart, (2005), The Inter-American System of Human Rights and Refugee protection: Post 11 September 2001, 'Search Results | International Journal of Refugee Law | Oxford Academic' <https://academic.oup.com/ijrl/search-results?f_TocHeadingTitle=ORIGINAL%20MANUSCRIPT> [accessed 9 March 2017].

1.7.1. Hypothetical Questions

- 1) The UN refugee camps are not time bound.
- 2) Refugees are not criminals
- 3) The refugees at Dadaab Camp have rights and obligations under the international law. Can they proceed to constitute a case against the decision of the government of Kenya and Somalia to close the camp?

1.8. Purpose and Aim

This research aims to enhance credible academic debate on the refugee law in Kenya and to add more knowledge to legal scholarship on customary international law. Its chief purpose is to analysis in details the genesis of resentment of accepting refugees from states perceived to be the origin of islamist terrorists in the world. For instance, the same experience has occurred in the recent years in the European Union zone when refugees and migrants from Syria decided to walk to Western European states crossing borders to seek asylum and migration rights. The same sentiment has been echoed by the United States of America, during President Donald Trump administration that alluded that certain states shall be banned from entering the United States of America, and Somalia is among the 6 states appearing in the Executive Order of those who are banned from entering America.

The purpose and goals of this research is to create more rational and academic legal debate on the legality and legitimacy of closing Dadaab refugee camp and how to dispel the sentiment that refugees from the perceived terrorist bedrocks and criminals or suspects of terrorism.

1.9 Significance of the Study

Not so much has been written about non-refoulement principle in regard to the situation of Somali refugees and asylum seekers in Kenya especially in regard to the era of trans-boundary terrorism making this academic attempt worthwhile. The concerns of the governments are weighty while the mandate of the UNHCR is equally valid and convincing. The persons who need a prompt answer to this legal problem are the victims and legal researchers particularly human rights lawyers involved in such litigations.

We are convinced that this topic is timely and has come at the right time in which government decision and policy makers are committed to finding lasting solution to the problem of whether to close the camp or allow it to continue.⁶²

1.10. Research Methodology

This research shall rely on the ontological and epistemological analysis of the topic in question. It shall entail more qualitative analysis of the data available. The principle of Non-Refoulement has been widely explored and the interest of this research is to look at the principle from modern challenges related to international terrorism and counter-terrorism measures adopted by the Republic of Kenya.

There shall be research design that shall include the planning of how to go about this research. It shall include identification of the relevant literature around the topic,

⁶² Kate Ogg, 'Protection from "Refugee": On What Legal Grounds Will a Refugee Be Saved from Camp Life?', *International Journal of Refugee Law*, 28.3 (2016), 384–415 <<https://doi.org/10.1093/ijrl/eev034>>.

collecting the available and accessible data, reading the primary and secondary data to find out what is more relevant to the issue in question.

This research shall not include field survey in terms of using tools such as questionnaires and interviews. The reason is that, Non-Refoulement principle under the refugee law has been documented adversely and such interviews may not add more value at the research topic in question. It has therefore been decided to that from the reading of the primary data (legal sources) and secondary data (doctrines, commentaries, and online data) I will be able to provide sufficient persuasive and documentary evidence to support the discussion of the findings.

This research is fully compliant with the research ethics and the work has relied on library and desktop activities. It has explored the published work on Non-Refoulement and the legal framework including the existing case law on the decision made by the governments of Kenya and Somalia to close down the Dadaab Refugee camp that lies within the borders of Kenya.

The Research findings shall be empirically and systematically analysed using tools such as randomization, triangulations, and other techniques such as verifications of deductive data. Such techniques shall include the testing of the hypothesis and theories that this research has relied on.

1.11. Theory

The undertaken research relies heavily on the theory deduced from human rights which states that each person is entitled to human rights and fundamental freedoms.

Article 1 of the Universal Declaration of Human Rights⁶³ rules that “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”.⁶⁴ It is from this premise that refugee law is postulated and it would be right to test it with the principle of non-refoulement and the new challenges.

1.12. Limitation

We admit that this piece of research could not be what it is without some advertent limitations in the research process itself. The nature of refugee law in essence, requires some degree of global commitment and there is no way, other agencies may interfere with the state sovereignty under the obligations of the international law⁶⁵. Therefore, it was unnecessary to commit the study to several field research that would require time and some substantive budget.

The first and foremost limitation is on the time dedicated for this research due to pressure of work. There was short time to carry out many necessary field surveys. Second, it was very difficult and expensive to perform field research within a limited time and resources due to need to travel and engage research assistants.

⁶³ IAN Brownlie, *Basic Documents in International Law*, Oxford University Press, 2009, 6th Edition, p. 192 – UN Resolution of the GA, Doc: A/811.

⁶⁴ UNITED NATIONS UNIVERSAL DECLARATION OF HUMAN RIGHTS, 1948.

⁶⁵ Heather A. Leary, ‘The Nature of Global Commitments and Obligations: Limits on State Sovereignty in the Area of Asylum’, *Indiana Journal of Global Legal Studies*, 5.1 (1997), 297–315.

1.13. Chapters Breakdown

CHAPTER ONE: INTRODUCTION – This chapter shall include the Background Study, Statement of the Problem, the Research Objective, Purpose and Aim, the Methodology, Limitations.

CHAPTER TWO - LITERATURE REVIEW: This chapter shall include critical and analytical review of the existing literature and recent debates around the topic. It shall be divided under thematic areas as has been designed in the research methodology and methods applicable to this study.

CHAPTER THREE: THEORETICAL FRAMEWORK: This chapter shall include research methodology and justification of how the work arrives at its inferences and conclusion using known scientific methods that have been qualified and approved by scholars in the area. It shall begin with the research methodology, that is the qualitative analysis of the secondary and primary data to arrive at the theory. Theoretical framework on which this work has relied shall be as well discussed and explained.

CHAPTER FOUR: This Chapter shall focus on the research findings and discussion of the topic at hand. It shall rely on the literature, the research methodology and the theoretical framework in order to arrive at the outcomes of the research. It shall be supported by evidence through the case law that has been built around this topic. As

well it shall be cognizant of the jurisprudence surrounding the refugee law in Kenya and what has been achieved so far.

CHAPTER FIVE: THE CONCLUSION – Chapter five shall be on the conclusion. It shall include the summary, the conclusion of the work and the recommendations.

BIBLIOGRAPHY: There shall be comprehensive bibliography that this work has relied on as included in the citations found in the work.

CHAPTER TWO

2.0 The Literature Review

So much has been written about refugee law by outstanding law scholars at both international and regional levels.⁶⁶ There is a lot of literature in the area by law academic and several court cases related to the rights⁶⁷ and obligations of refugees and international asylum seekers. Part of our work is to go through already published documents, materials and available international treaties on the concept of non-refoulement as understood by internationally recognised law scholars. The thematic area of this research shall majorly include writers from the Kenya jurisdiction in order to render the research consistent with the reality on the ground and the issues in question.

The literature review that has been cited, read, and utilized shall be divided into three components: the international, regional and local known publications on the area of refugee law.

2.1 Literature on the Principle of Non Refoulement

Non-refoulement is not a new principle in the cadre of the jurisprudence of the refugee law. On the universal level mention should first be made of the 1951 United Nations Convention relating to the Status of refugees, which, in Article 33 (1), provides that⁶⁸:

⁶⁶ Goodwin-Gill and McAdam.

⁶⁷ Eva Maria Freudenthaler, 'Refugee Rights in Kenya' (uniwien, 2011) <<http://othes.univie.ac.at/17268/>> [accessed 9 March 2017].

⁶⁸ UN General Assembly, 'Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, Vol. 189', *Retrieved April*, 20 (2015), 137.

“No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”.⁶⁹ The Convention refers to this situation as well founded fear, that means, the fear must be credible which is tested in the pre-screening interviews.

The end of 2014 almost 59.5 million individuals⁷⁰ were forcibly displaced world-wide as a result of persecution, conflict, generalized violence, or human rights violations.⁷¹

A refugee⁷² is any person who is outside any country of such person’s nationality or, in the case of a person having no nationality⁷³, is outside any country in which such person last habitually resided, and who is unable to, or unwillingly to return to, and is unable or, unwilling to avail himself or herself for the protection of, that country because of persecution, or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion⁷⁴. By the virtue of the refugee law, such a person must be protected by the hosting state⁷⁵ and must not be forcefully returned to the country of origin.

⁶⁹ United Nations High Commissioner for Refugees, ‘Note on Non-Refoulement (Submitted by the High Commissioner)’, *UNHCR* <<http://www.unhcr.org/excom/scip/3ae68ccd10/note-non-refoulement-submitted-high-commissioner.html>> [accessed 10 March 2017].

⁷⁰ ‘International Labour Organization: Search Services’ <<http://www.ilo.org/Search5/search.do?searchLanguage=en&searchWhat=2014+refugees+59.5+million>> [accessed 9 April 2017].

⁷¹ Refugees, ‘UNHCR Statistical Yearbook 2014, 14th Edition’.

⁷² Leonard Birdsong, ‘Refugee Admittance and Asylum Outcomes in the U.S. Before and After 9/11; Fair or Unfair?’, *Birdsong’s Law Blog*, 2012 <<http://birdsongslaw.com/2012/02/16/refugee-admittance-asylum-outcomes-911-fair-unfair/>> [accessed 9 April 2017].

⁷³ Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 2007).

⁷⁴ Bill Frelick, ‘Abundantly Clear: Refoulement’, *Georgetown Immigration Law Journal*, 19 (2004), 245.

⁷⁵ ‘Returnee | Search Results | Dr. Luise Druke, MPA (Harvard)’ <<http://www.luisedruke.net/?s=returnee>> [accessed 9 April 2017].

2.2. Terrorism Versus Non Refoulement Principle

There is rich literature on the principle of non-refoulement in the history of the international law. So much has been documented by authors with different backgrounds. This research has selected just some relevant authors that have developed the jurisprudence on refugee law in the recent years and particularly those whose explanations relate to the topic under our exploration. They shall be divided into two classifications: international and local publicists whose work this research has relied on.

2.2.1 International Publicists:

MONETTE ZARD is a Policy Analyst at the Migration Policy Institute⁷⁶, Washington. Some of his widely cited work include “Human Rights and Refugees, Internally Displaced Persons”⁷⁷ published in the 2 Towards a Comprehensive Approach to Protecting Refugees and the Internally Displaced Persons and Internally Migrant Workers published in 2005 in the collections of human rights⁷⁸ and humanitarian law⁷⁹. He is also the author of the article entitled “Exclusion, Terrorism, and the Refugee Convention.”⁸⁰

⁷⁶ ‘Notes from the Field: MPI Expert Returns from Iraqi Border’, *Migrationpolicy.Org*, 2003 <<http://www.migrationpolicy.org/research/notes-field-mpi-expert-returns-iraqi-border>> [accessed 15 May 2017].

⁷⁷ ‘UNHCR - Search’.

⁷⁸ ‘Information Centre about Asylum and Refugees: Statistics: Analysis of Asylum and Refugee Statistics’ <<http://icar.livingrefugeearchive.org/9556/statistics/analysis-of-asylum-and-refugee-statistics.html>> [accessed 10 April 2017].

⁷⁹ Monette Zard, ‘Towards a Comprehensive Approach to Protecting Refugees and the Internally Displaced’, 2006.

⁸⁰ Zard, ‘Exclusion, Terrorism and the Refugee Convention’.

TAMARA WOOD: Wrote about Expanding Protection in Africa?⁸¹ Case Studies of the Implementation of the 1969 African Refugee Convention's⁸² Expanded Refugee Definition published by Oxford University Press in 2014.⁸³ The author raises the issue of lacking efficient case law in Africa concerning the protection of refugee rights.

KATE OGG has published an article on Protection from 'Refuge': On What Legal Grounds Will a Refugee Be Saved from Camp Life?⁸⁴ The author address a critical issue about the place of refuge other than the usual protection claims. "This article addresses an emerging trend whereby refugees are coming to the courts, not seeking protection from persecution in their home country, but rather seeking protection from a place of 'refuge'. In particular, the article focuses on cases where refugees or aspirant refugees are resisting being sent to a place of encampment. Such places are sites of refuge in a notional sense: while they are designated as places of refuge⁸⁵, the human rights of refugees and protection concerns in camp environments are well documented".⁸⁶

ALICE FARMER,⁸⁷ the author of Non-refoulement and Jus Cogens⁸⁸: Limiting Anti-terror Measures that Threaten the Refugee Protection has made it impeccably clear

⁸¹ Tamara Wood, 'Expanding Protection in Africa? Case Studies of the Implementation of the 1969 African Refugee Convention's Expanded Refugee Definition', *International Journal of Refugee Law*, 26.4 (2014), 555–580.

⁸² Tamara Wood, 'The African War Refugee: Using IHL to Interpret the 1969 African Refugee Convention's Expanded Refugee Definition', 2014.

⁸³ Tamara Wood, 'Expanding Protection in Africa? Case Studies of the Implementation of the 1969 African Refugee Convention's Expanded Refugee Definition', *International Journal of Refugee Law*, 26.4 (2014), 555–80 <<https://doi.org/10.1093/ijrl/eeu048>>.

⁸⁴ 'Search Results | International Journal of Refugee Law | Oxford Academic'.

⁸⁵ 'Search Results: Kate Ogg' <http://find.anu.edu.au/search?q=kate+ogg&client=anu_frontend&proxystylesheet=anu_frontend&site=default_collection&btnG=Search&filter=0&search1=GO> [accessed 10 April 2017].

⁸⁶ Ogg.

⁸⁷ 'Biography of Alice Farmer', *American Civil Liberties Union* <<https://www.aclu.org/other/biography-alice-farmer>> [accessed 10 April 2017].

that the non-refoulement norm is progressively becoming part of the *Jus Cogens*.⁸⁹

This research shall rely on this literature for the argumentation of non-refoulement and its current challenges.

As quoted from AIOFE DUFFY's article, "Expulsion to Face Torture? Non-refoulement in International Law giving clear intellectual insight about the reality most of international refugees and asylum seekers are likely to be faced with back in the country of origin whenever they are deported or forced to relocate"⁹⁰. Duffy argues that, "Non-refoulement is a principle of international law that precludes states from returning a person to a place where he or she might be tortured or face persecution. The principle, codified in Article 33 of the 1951 Refugee Convention, is subject to a number of exceptions. This article examines the status of non-refoulement in international law in respect to three key areas: refugee law, human rights law and international customary law. The findings suggest that while a prohibition on refoulement is part of international human rights law and international customary law, the evidence that non-refoulement has acquired the status of a *jus cogens* norm is less than convincing".⁹¹

RENE BRUIN AND KEES WOUTERS have made a profound contribution to the knowledge of "Terrorism and the Non Derogability"⁹² of Non-Refoulement" in their

⁸⁸ Alice Farmer, 'Non-Refoulment and Jus Cogens: Limiting Anti-Terror Measures That Threaten Refugee Protection', *Georgetown Immigration Law Journal*, 23 (2008), 1.

⁸⁹ Farmer.

⁹⁰ Aoife Duffy, *Searching for Accountability: British-Controlled Detention in Southeast Iraq, 2003-2008*, 2016.

⁹¹ Aoife Duffy, 'Expulsion to Face Torture? Non-Refoulement in International Law', *International Journal of Refugee Law*, 20.3 (2008), 373-90 <<https://doi.org/10.1093/ijrl/een022>>.

⁹² Yumpu.com, 'Terrorism And Non Derogability Magazines', *Yumpu.Com* <https://www.yumpu.com/en/terrorism_and_non_derogability> [accessed 10 April 2017].

writing cited in “The International Journal of Refugee Law”.⁹³ Bruin and Wouters reiterate that “although no uniform or single definition of terrorism in international law exists, it is clear that the opinio communis wants the perpetrators, planners or facilitators to be prosecuted”.⁹⁴

Membership of a terrorist organization cannot in itself be qualified as a terrorist act. Nevertheless, the danger exists that mere membership will suffice to be excluded from refugee status or from protection against refoulement. The European Commission has stated in a Working Document that the European Court of Human Rights should reconsider the decisions in which the absolute character of Article 3 ECHR was laid down. In the Suresh case, the Canadian Supreme Court deemed a decision to expel to be possible even if there is a chance the alien will become a victim of a human rights violation as proscribed in Article 3 Convention Against Torture. “If there are reasonable grounds for regarding a refugee a danger to the national security or the community of the country of refuge, he is not protected against refoulement under Article 33(1) Refugee Convention. This rule needs to be interpreted restrictively and applied with particular caution. The assessment of the danger needs to be individual and ex futuro. Article 33(2) Refugee Convention allows refoulement if a provable danger to the national security or community of the country of refuge exists, unless refoulement entails a risk of the individual being subjected to torture or inhuman or degrading treatment or punishment. In such cases refoulement is prohibited. The obligation of non-refoulement under Article 3 of the European Convention on Human Rights, Article 7 International Covenant on Civil and Political Rights and Article 3

⁹³ Bruin and Wouters.

⁹⁴ ‘Law Journal Library - HeinOnline.Org’.

Convention Against Torture is absolute. No exceptions and no derogations are permitted, not even if an alleged terrorist constitutes a danger to the national security of a country. In search of a way to derogate from the obligations of non-refoulement, States may look for safety guarantees to allow expulsion. In cases involving the imposition or the carrying out of legal sentences, for example the death penalty, the issue of guarantees is clear⁹⁵. However, cases involving extra-judicial acts like torture are much more complicated. There is a real risk that a balancing act can be avoided and will be ‘found’ in the assessment of the risk of being subjected to prohibited treatment by trying to expel an alien after guarantees have been obtained⁹⁶. We believe exclusion is no solution and prosecution of alleged terrorists may be a better solution than co-operating with further violations of human rights by refraining to give protection”.⁹⁷

DONALD DOERNBERG raised the question of John Locke’s theory on constitutional collective rights by addressing the people versus the government powers.⁹⁸ Doernberg opens a discourse on the constitutional limits and the government powers in perspective to John Locke’s natural law theory. He quotes the preamble of the constitution of the United States of America⁹⁹ which states that “We the people of the United States of America, in order to form a more perfect union, establish justice,

⁹⁵ Yumpu.com.

⁹⁶ Bruin and Wouters.

⁹⁷ Bruin and Wouters.

⁹⁸ Donald L. Doernberg, “‘We the People’: John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action”, *California Law Review*, 73.1 (1985), 52–118 <<https://doi.org/10.2307/3480464>>.

⁹⁹ The American Law Institute, ‘<https://www.ali.org/Search?Term=DONALD+L.+DOERNBERG+>’, *American Law Institute* <<https://www.ali.org/search?term=DONALD+L.+DOERNBERG+>> [accessed 10 April 2017].

ensure domestic tranquility, provide for the communion defence, promote the general welfare and secure the blessings of liberty...”.¹⁰⁰

VICTOR GOUREVITCH - JEAN JACQUE ROUSSEAU was a French sociologists who opened the question of social contract in time of social inequality¹⁰¹ in his treatise on social contract theory.¹⁰² “The social contract and other political writings is published by the Oxford University Press. The issues raised here including infelicity reflect closely the issues of refugee justice and the norm of non-refoulement¹⁰³ in the customary international law”.¹⁰⁴

JENNIFER HYNMAND & BO VIKTOR NYLUND, an associate field officer in Somalia wrote a convincing article entitled, UNHCR¹⁰⁵ and “*The Status of Prima Facie Refugees in Kenya*”. The authors have investigated the challenge the UN Agency is facing with failure of signatory states of the refugee convention and human rights law to meet their obligations at international law. The situation is getting legally more complex and incomplete as displaced persons¹⁰⁶ no longer fit the traditional definitions of a refugee.¹⁰⁷ States tend to over rely on the multilateral agencies such as

¹⁰⁰ Doernberg.

¹⁰¹ ‘Can Someone Summarize Jean-Jacques Rousseau’s “Social Contract”?’ <<https://answers.yahoo.com/question/index?qid=20070204061547AA78f5u>> [accessed 11 April 2017].

¹⁰² Jean-Jacques Rousseau, *Rousseau: ‘The Social Contract’ and Other Later Political Writings* (Cambridge University Press, 1997).

¹⁰³ Alison Stuart, ‘The Inter-American System of Human Rights and Refugee Protection: Post 11 September 2001’, *Refugee Survey Quarterly*, 24.2 (2005), 67–82 <<https://doi.org/10.1093/rsq/hdi027>>.

¹⁰⁴ Rousseau.

¹⁰⁵ ‘UNHCR - Search’.

¹⁰⁶ United States: Congress.: Senate.: Committee on the Judiciary.: Subcommittee on Immigration, Border Security, and Citizenship., *Refugees: Seeking Solutions to a Global Concern : Hearing before the Subcommittee on Immigration, Border Security, and Citizenship of the Committee on the Judiciary, United States Senate, One Hundred Eighth Congress, Second Session, September 21, 2004*, HeinOnline (Washington: U.S. G.P.O., 2004) <<http://www.library.yorku.ca/e/resolver/id/2477433>> [accessed 11 April 2017].

¹⁰⁷ Jennifer Hyndman and Bo Viktor Nylund, ‘UNHCR and the Status of Prima Facie Refugees in Kenya’, *International Journal of Refugee Law*, 10 (1998), 21.

UNHCR for humanitarian assistance¹⁰⁸ directed to refugees especially in the camps. By doing so, the agency finds difficulty for meeting its obligations according to the mandate and failing to get full support of the sovereign states.

2.2.2 Local and Regional Publications:

E. ABUYA a law teacher and an author of several publication on refugee law: He made a substantive contribution to “Voluntary repatriation of urban Somali refugees from Kenya: a case for inclusion in the decision making process” by Eva Maria Freudenthaler.¹⁰⁹ The same issue of voluntary repatriation of refugees has been enshrined in the international human rights instruments “as the right to return to one’s own country”.¹¹⁰

2.3 Legality and Constitutionality of Closure of a Refugee Camp

PETER ONYANGO O.: has published on international terrorism and counter terrorism measures in Kenya.¹¹¹ His insights about the challenges facing counter terrorism measures and violations of human rights¹¹² create clear anecdote on the topic of non-refoulement and its serious challenges in the age of trans-boundary terrorism.

¹⁰⁸ ‘UNHCR - Search’ <<http://www.unhcr.org/afr/search?query=closing%20dadaab>> [accessed 17 March 2017].

¹⁰⁹ Freudenthaler.

¹¹⁰ Veronicah W. Mbogo, ‘Voluntary Repatriation of Urban Somali Refugees from Kenya: A Case for Inclusion in the Decision Making Process’ (University of Nairobi, 2016) <<http://erepository.uonbi.ac.ke:8080/xmlui/handle/11295/99516>> [accessed 9 May 2017].

¹¹¹ Peter Onyango Onyoyo, ‘Human Rights And The Genesis Of Counter-Terrorism Practice In Kenya’, 2014 <<http://erepository.uonbi.ac.ke/handle/11295/73556>> [accessed 9 March 2017].

¹¹² Satvinder S. Juss, ‘The Decline and Decay of European Refugee Policy’, *Oxford Journal of Legal Studies*, 25.4 (2005), 749–92 <<https://doi.org/10.1093/ojls/gqi036>>.

The constitution of the Republic of Kenya¹¹³ and Statutes protecting the refugee rights¹¹⁴ showing the legal and policy response of Kenya to international refugees and asylum seekers. Article 2 (5) “The general rules of international law shall form part of the law of Kenya” as reflected also in Linda’s paper;¹¹⁵(6) “Any treaty of convention ratified by Kenya shall form part of the laws of Kenya under this constitution (2010)”.¹¹⁶

Quoting from EKURU AUKOT, “It is better to be a Refugee than a Turkana in Kakuma Revisiting the Relationship between Refugee and Host in Kenya”.¹¹⁷ Aukot echoes stories and perceptions of the hosts to the refugees in their day-to-day relations in Kakuma refugee camp with little emphasis on academic abstraction of refugee protection contained in international instruments but rather on the realities on the ground. It is argued that good refugee-host relations enhance refugees’ enjoyment of their rights under the international conventions and promote local integration. “The article discusses areas of conflict between refugees and their hosts and how these factors endanger refugees’ physical protection, and it echoes the hosts’ solutions to the conflicts. The failure of local integration is attributed to poor refugee-host relations. Consequently, it is argued that even the enactment of refugee specific legislation “that would give force” to the international conventions will not necessarily improve

¹¹³ ‘Kenya Law Cases Database’ <<http://kenyalaw.org/caselaw/>> [accessed 16 May 2017].

¹¹⁴ Truphosa Atero Anjichi, ‘Protecting Refugees: A Critical Analysis of the Kenya Refugee Act, 2006’ (University of Nairobi, Kenya, 2010) <<http://erepository.uonbi.ac.ke:8080/xmlui/handle/11295/3794>> [accessed 9 May 2017].

¹¹⁵ ‘Linda Musumba’, *Plone Site* <http://dullahomarinstitute.org.za/constitution-making-in-africa-conference/constitution-building-in-africa-conference-papers/Linda%20Musumba%20-%20Paper%20-%20SA%20Conference%20-%202002.09.2013_2.pdf/view> [accessed 16 May 2017].

¹¹⁶ ‘Kenya Law: Home Page’ <<http://www.kenyalaw.org/kl/>> [accessed 11 April 2017].

¹¹⁷ Ekuru Aukot, “It Is Better to Be a Refugee Than a Turkana in Kakuma”: Revisiting the Relationship between Hosts and Refugees in Kenya’, *Refuge: Canada’s Journal on Refugees*, 21.3 (2003) <<https://refuge.journals.yorku.ca/index.php/refuge/article/view/23482>> [accessed 9 March 2017].

refugees' enjoyment of their rights as long as, through a practice of selective compassion by humanitarian agencies and international refugee law, refugees are targeted for assistance without regard to the negative impact on the local economy and its residents.”¹¹⁸

2.4 Literature on Legal Framework Defining A “Refugee”

Grounded in Article 14 of the Universal Declaration of human rights 1948, which recognizes the right of persons to seek asylum from persecution in other countries, the United Nations Convention relating to the Status of Refugees, adopted in 1951, is the centrepiece of international refugee protection today.¹¹⁹

The Convention entered into force on 22 April 1954, and it has been subject to only one amendment in the form of a 1967 Protocol, which removed the geographic and temporal limits of the 1951 Convention and Protocol relating to the status of refugee of 1951.

Article 1(A) A. For the purposes of the present Convention, the term “refugee” shall apply to any person who:

(1) Has been considered a refugee under the arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization;

¹¹⁸ Aukot.

¹¹⁹ www.unhcr.org/1951-refugee-convention.html

Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of paragraph 2 of this section;

(2) As a result of events occurring before 1 January 1951 and owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. In the case of a person who has more than one nationality, the term “the country of his nationality” shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.¹²⁰

Refugee Act No. 3 of 2006 of the Republic of Kenya provides for proper interpretation of refugee under section 3. Other meaning such as “Non-Return” is also provided for under section 18. This research shall rely on legal framework as primary data in its qualitative analysis of contents available in various secondary data as provided for.

2.5 Literature Defining Refugee Camp

A refugee camp is a temporary settlement built to receive refugees and people in refugee-like situations. Refugee camps usually accommodate displaced persons who

¹²⁰ www.unhcr.org/1951-refugee-convention.html

have fled their home country, but there are also camps for internally displaced persons.¹²¹ The concept of refugee camp has been discussed by various scholars. Gourevitch - Jean Jacques Rousseau have all made substantive contribution to the knowledge of refugee camp in one way or the other.¹²² In the Treatise of Gourevitch referring to Rousseau on social contract theory the question of inequality and non discrimination of persons are factored in.¹²³ It illustrates some of the issues of refugee justice and the norm of non-refoulement¹²⁴ in the customary international law”.¹²⁵ Hynmand and Bo Victor, an associate field officer in Somalia wrote a convincing article entitled, UNHCR¹²⁶ and “*The Status of Prima Facie Refugees in Kenya*”. In their document the authors have explained the refugee camp raising pertinent issues of concern in this research.

2.6 Literature on Refugee Rights and Obligations

The Refugee Act of 2006 in Kenya under section 16 provides as follows:

- (1) Subject to this Act, every recognized refugee and every member of his family in Kenya—

¹²¹

[¹²² ‘Can Someone Summarize Jean-Jacques Rousseau’s "Social Contract"?’ <<https://answers.yahoo.com/question/index?qid=20070204061547AA78f5u>> \[accessed 11 April 2017\].](https://www.google.co.ke/search?q=what+is+a+refugee+camp+definition&oq=what+is+a+refugee+camp&gs_l=psy-ab.1.2.0l2j0i22i30k118.816927.825028.0.829601.63.30.0.0.0.0.422.4651.0j6j12j1j1.20.0....0...1.1.64.ps-y-ab..48.15.3657...0i67k1.0.-I44mMpiaAQtraced on 10th October 2017.</p>
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¹²³ Jean-Jacques Rousseau, *Rousseau: ‘The Social Contract’ and Other Later Political Writings* (Cambridge University Press, 1997).

¹²⁴ Alison Stuart, ‘The Inter-American System of Human Rights and Refugee Protection: Post 11 September 2001’, *Refugee Survey Quarterly*, 24.2 (2005), 67–82 <<https://doi.org/10.1093/rsq/hdi027>>.

¹²⁵ Rousseau.

¹²⁶ ‘UNHCR - Search’.

(a) shall be entitled to the rights and be subject to the obligations contained in the international conventions to which Kenya is party;

(b) shall be subject to all laws in force in Kenya.

(2) The Minister may, by notice in the Gazette, in consultation with the host community, designate places and areas in Kenya to be—

(a) transit centres for the purposes of temporarily accommodating persons who have applied for recognition as refugees or members of the refugees' families while their applications for refugee status are being processed; or

(b) refugee camps.

(3) The designated areas provided for in subsection (2) shall be maintained and managed in an environmentally sound manner.

(4) Subject to this Act, every refugee and member of his family in Kenya shall, in respect of wage-earning employment, be subject to the same restrictions as are imposed on persons who are not citizens of Kenya.

16A. Permitted number of refugees and asylum seekers in Kenya

(1) The number of refugees and asylum seekers permitted to stay in Kenya shall not exceed one hundred and fifty thousand persons.

(2) The National Assembly may vary the number of refugees or asylum seekers permitted to be in Kenya.

(3) Where the National Assembly varies the number of refugees or asylum seekers in Kenya, such a variation shall be applicable for a period not exceeding six months only.

(4) The National Assembly may review the period of variation for a further six months.

The human rights principle of non discrimination is applicable directly to the rights entitled to refugees under refugee law. In principle, refugees should be given protection by the governments in whose territory they happen to be. Such provisions are spelt out in the international human rights law, international Bill of Rights and, in particular, the refugee law. “A refugee has the right to safe asylum. However, international protection comprises more than physical safety. Refugees should receive at least the same rights and basic help as any other foreigner who is a legal resident, including freedom of thought, of movement, and freedom from torture and degrading treatment”.¹²⁷ Such provision obligates every signatory state to respect the rights of the refugees as any other foreigner and award asylum status to such persons.

Article of the Convention of 1951 states as follows: Every refugee has duties to the country in which he finds himself, which require in particular that he conforms to its laws and regulations as well as to measures taken for the maintenance of public order. A refugee is subjected to both international laws and the laws of the hosting country. In the event of violations of any of the laws, the refugee can be taken to national courts with the jurisdiction over the matter for hearing and determination or can be expatriated if found repatriated back to his or her country of origin as required by the law.

¹²⁷ www.unhcr.org/afr/publications/brochures/.../protecting-refugees-questions-answers.htm.

CHAPTER THREE

3.1 Research Methodology and Theoretical Framework

This chapter is dedicated to the research methodology adopted for this research. It shall include the research design, collection of data, reading and evaluation of the data, selection of the data and data analysis. Qualitative data analysis shall be adopted. This research project shall consist of reading through the existing literature available as has been explained in the previous chapter.

The methods this research has relied on shall include random evaluation of data, data comparison and triangulation of similar data available.

The verification of such data shall be done through evaluations and discussions. The work shall also rely on lectures and notes collected from conferences on the closure of Dadaab refugee camp. Such collection, verification, validation and justification of the authenticity of such data shall lead this research to deduced theory which shall eventually inform the outcome.

It is from the theoretical framework that the suppositions of this research shall be tested and verified to provide empirical arguments on the principle of non-refoulement and current challenges related to “war on terrorism” and counter terrorism measures adopted by the government of Kenya.

3.2 Theoretical Framework Based on Natural Law Theory

Refugee law ¹²⁸ inclines so much to the principles of natural justice.¹²⁹ The principle of non-refoulement is the cornerstone of the refugee protection ¹³⁰ and has also so much to do with the sociological and historical schools of thought as it concerns human mobility and by extension, socio-economic problems. Yet the same concept of non-refoulement borrows so much from the realistic American school of thought.¹³¹

The protagonists of constitutional law, civil liberties, and the entire natural justice theory, have insisted on the humanity or better, human dignity.¹³² In its early stages, those who coined natural law such as St. Thomas Aquinas had highlighted the component of law backed by good reason in relation to nature.¹³³ Alice Farmer argues that “humanity is imbued with the power of reason and it is from this conception that one can conveniently claim that *the principle of non-refoulement*” opposes any act that would compromise human dignity.¹³⁴ Any state act that may infringe on the individual or group freedom or civil liberty would be construed as in violation of the natural rights of which all human beings are stakeholders.

¹²⁸ ‘UNHCR - Search’
<<http://www.unhcr.org/search?query=kenya%20signed%20tripartite%20agreement>> [accessed 9 April 2017].

¹²⁹ Farmer.

¹³⁰ Ranja.

¹³¹ Birdsong.

¹³² Alexander Betts, ‘Human Rights and Refugees, Internally Displaced Persons and Migrant Workers: Essays in Memory of Joan Fitzpatrick and Arthur Helton. Edited by Anne F. Bayefsky.’, *Journal of Refugee Studies*, 20.1 (2007), 149–51 <<https://doi.org/10.1093/jrs/fel034>>.

¹³³ ‘Thomas Aquinas’, *Wikipedia*, 2017
<https://en.wikipedia.org/w/index.php?title=Thomas_Aquinas&oldid=774151109> [accessed 11 April 2017].

¹³⁴ Farmer.

The conceptualization of the topic under discussion makes pragmatic argument that has been echoed in the thoughts of John Locke in the medieval time ¹³⁵. He echoed the very concept of natural rights to include, life, liberty and property. The same school of thought insists on the ability to enjoy of human rights of all human beings including slaves and citizens. He advocated for the free will of the people to design their constitution and in liberty appoint the sovereign.

Locke purports that even refugees and asylum seekers are human beings whose natural rights must be respected by any sovereign state in the principles of *jus gentes* or what is later known as the international law.

It is from the thoughts and postulations of John Locke that the English Bill of Rights of 1625 was crafted.¹³⁶ The United Kingdom has been the promoter of natural rights backed by human dignity and the sense of freedom to life, to liberty and to hold property. It is in this sense, the same United Kingdom stood firmly for the abolition of slave trade of the 17th Century and ensured that slavery was reduced to its meaningful end.

3.3. Human Rights School of Thought

However, due to social mobility, human persons have never been restricted to one territory and free movement has been encouraged by various international legal documents. The definition of a refugee¹³⁷ is one who is fleeing from his or her state of origin due to political threats of persecution, torture, based on race, ethnic differences,

¹³⁵ 'John Locke', *Wikipedia*, 2017
<https://en.wikipedia.org/w/index.php?title=John_Locke&oldid=769534049> [accessed 11 April 2017].

¹³⁶ 'John Locke'.

¹³⁷ 'UNHCR - Search'.

religion, political conviction and others.¹³⁸ Such traditional definition has since been broadened to include also calamities and humanitarian disasters that may threaten human life, liberty and ownership of property.¹³⁹

The development of human rights law finds its logical roots in the natural law concept that every human being is born free and with human rights endowed with dignity to which every person and authority is obliged to respect (UDHR of 1948)¹⁴⁰. Even if cases of asylum seekers and international refugees have been persistently increasing at the global level, the international convention was put in place only in 1951.¹⁴¹

3.4. American Realist School of Thought

Anglo-American legal regime has echoed the wider application of human rights¹⁴². By extension, “refugees are not less holders of human rights and their right to freedom of movement is equally valid and legally protected. United States of America is the initiator of the Realist school of thought in which the works of the law is what is done in the law court. The role of judges in making judicial decision on matters related to international refugees and asylum seekers has held prime level of non-refoulement by the same USA coming up with constitutional rights of the citizens and the law regulating the rights of aliens including refugees and migrants”.¹⁴³

¹³⁸ ‘Refugee’, *Wikipedia*, 2017
<<https://en.wikipedia.org/w/index.php?title=Refugee&oldid=774593479>> [accessed 11 April 2017].

¹³⁹ Refugees, ‘Refworld | The Leader in Refugee Decision Support’.

¹⁴⁰ ‘Universal Declaration of Human Rights’, *Wikipedia*, 2017
<https://en.wikipedia.org/w/index.php?title=Universal_Declaration_of_Human_Rights&oldid=773472873> [accessed 11 April 2017].

¹⁴¹ ‘UNHCR - Search’.

¹⁴² Betts.

¹⁴³ Refugees, ‘Note on Non-Refoulement (Submitted by the High Commissioner)’.

What is of essence and relevance to this work is the restrictions based on repatriation of refugees and asylum seekers from the host country.¹⁴⁴

When the Supreme Court ruled against the Executive Order by Trump banning some states from entering the United States of America, the whole debate on non-refoulement opened a new twist in the judicial corridors of refugee justice.¹⁴⁵ Some legal minds were of the opinion that restricting certain persons from entering the United States of America would prejudice their legal rights and natural law justice. Some law scholars instead argue that every sovereign state is free and is under obligation to make decisions that would safeguard the national security of their territorial space.¹⁴⁶

In principle, the whole analytical jurisprudence of refugee law relies on the concept of natural justice and human rights of those who seek government protection.¹⁴⁷ Any alleged deportation can only be done with the approval of the court and proper coverage of the legal requirements. Certain policies ordering refugees and asylum seekers to be deported or expatriated to the state of origin have created controversial disputes among international and domestic lawyers.¹⁴⁸

¹⁴⁴ Fozdar and Hartley.

¹⁴⁵ A. B. C. News, 'Court Blocks Trump's Immigration Order Indefinitely', *ABC News*, 2017 <<http://abcnews.go.com/Politics/government-lawyers-call-delay-trump-immigration-order-case/story?id=45467116>> [accessed 11 April 2017].

¹⁴⁶ News.

¹⁴⁷ Robert Allen, 'Refugee', *Source*, 2016 <<http://lawin.org/refugee/>> [accessed 11 April 2017].

¹⁴⁸ Duffy, 'Expulsion to Face Torture?'

CHAPTER FOUR

4.1 Discussing the Research Findings

On of the critical and disturbing new Challenges Facing the Principle of Non-Refoulement¹⁴⁹ in the Refugee Law in the Era of Tans-Boundary Terrorism¹⁵⁰ with Particular Reference to Kenya is backed by the literature and selected conceptualization of the thematic area in the previous chapters.¹⁵¹ It has taken into account all circumstances surrounding the debate on the legality and legitimacy of non-refoulement in the age of trans-boundary terrorism.¹⁵²

Of course there shall be some other challenges of equally prevalence in this research. For the purpose of limitation, this research has chosen to confine those challenges to the “war on terror” and “counter terrorism measures” that have impacted on the decision to close Dadaab refugee camp within the borders of the Republic of Kenya.

The Republic of Kenya is a *de jure* and *bonafide* member of the OAU and whatever treaty has been concluded under the same regional organization is legally binding on Kenya in disregard to the alleged national security issues raised.

The same sentiment is expressed in Article 22 (8) of the American Convention on Human Rights of 1969¹⁵³ provides that:

¹⁴⁹ Refugees, ‘Refworld | The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93’.

¹⁵⁰ United States: Congress.: Senate.: Committee on the Judiciary.: Subcommittee on Immigration, Border Security, and Citizenship.

¹⁵¹ ‘Kenya Comprehensive Refugee Programme’, *UNHCR* <<http://www.unhcr.org/ke/kenya-comprehensive-refugee-programme>> [accessed 10 March 2017].

¹⁵² Zard, ‘Exclusion, Terrorism and the Refugee Convention’.

¹⁵³ ‘American Convention on Human Rights’ <http://www.hrcr.org/docs/American_Convention/oashr5.html> [accessed 4 April 2017].

In no case may an alien be deported or returned to a country regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status or political opinions.¹⁵⁴

4.2 Claim of Closure of Dadaab Refugee Camp

Kenya's overriding reasons of national security or safeguarding the population¹⁵⁵ according to the already cited from the document signed in Bangkok in 1966 by Asian-African Legal Consultative Committee¹⁵⁶. However such claim can allegedly contravene natural justice and principles of natural law with reference to the principle of non-refoulement.¹⁵⁷

While the principle of non-refoulement is basic in character, it is recognized that there may be certain cases in which an exception to the principle can legitimately be made. Thus Article 33 (2) of the 1951 Refugee Convention provides that:

“The benefit of the present provision [i.e. Article 33 (1) referred to above] may not however be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted

¹⁵⁴ Refugees, ‘Note on Non-Refoulement (Submitted by the High Commissioner)’.

¹⁵⁵ ‘In Kenyan Town Where Students Were Massacred, “It’s Not Safe”’ <<https://www.usatoday.com/story/news/world/2015/04/03/kenya-university-attack/25230247/>> [accessed 19 April 2017].

¹⁵⁶ ‘Home Sweet Home: A Review of International Refugee Law’ <<http://www.legalservicesindia.com/article/article/home-sweet-home-a-review-of-international-refugee-law-1238-1.html>> [accessed 19 April 2017].

¹⁵⁷ Aoife Duffy, ‘Expulsion to Face Torture? Non-Refoulement in International Law’, *International Journal of Refugee Law*, 20.3 (2008), 373–90 <<https://doi.org/10.1093/ijrl/een022>>.

by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.”¹⁵⁸

Janet M. Munywoki has covered the concept of refugee cessation based on change of circumstances.¹⁵⁹

In reference to the human rights ¹⁶⁰ principles, any forceful return of a refugee back to his or her country of origin can be construed as prejudice to human rights that promote right to life, security and protection by state authorities.¹⁶¹

4.3. Dadaab Refugee Camp

The notion of a camp has been illustrated by several studies.¹⁶² It is an open field with shelters like house where persons can stay for a temporary time. It also entails the concept of aid meant for the refugees. Such aid requires an administrative authority and a chain of power that would ensure that there is law and order within the refugee camp. Refugee camps are enclosed areas restricted to refugees and those assisting them. The camps are supposed to be temporary and often lack social infrastructures and economic development.¹⁶³

¹⁵⁸ Refugees, ‘Note on Non-Refoulement (Submitted by the High Commissioner)’.

¹⁵⁹ Munywoki.

¹⁶⁰ K. K. Oluoch, ‘Implementation of International Refugee Law: The Case of Kenya’ (University of Nairobi, Kenya, 2012) <<http://erepository.uonbi.ac.ke:8080/xmlui/handle/11295/8440>> [accessed 9 May 2017].

¹⁶¹ Ogg.

¹⁶² Stein.

¹⁶³ Michael Dzeamesi, ‘Refugees, the UNHCR and Host Governments as Stake-holders in the Transformation of Refugee Communities: A Study into the Buduburam Refugee Camp in Ghana’, *International Journal of Migration, Health and Social Care*, 4.1 (2008), 28–41 <<https://doi.org/10.1108/17479894200800004>>.

The Kenya's government by obligation must provide the needed law and order in the administration of the camp and the management¹⁶⁴ of the aid.¹⁶⁵

The question of administrative power of the resources can lead to mistrust of refugees and, therefore, the need to craft government policies to close the camp¹⁶⁶ and send the refugees back may be considered cruel and profoundly misguided.¹⁶⁷ The quest for Kenya to close only Dadaab and not other refugee camp, such as Kakuma, may allude to lack of trust¹⁶⁸ and failure to maintain law and order within the camp. In such circumstance, the easiest thing to do by the government is to impose its powers over the camp ordering its closure rather than offering more security services. Security service requires more attention on the social organization of the distribution of power meant for assistance. The question of menace coupled with the threat of terrorism may be seriously considered under wider perspective of understanding refugees as human beings with individual and group problems and dynamics that may become uncontrollable by inordinate weaker systems. The issue of who is to handle the aid and how such agents are related to the host state can create some dispute. The worst can as well occur when the host state does not use its resources willingly to provide the needed aid for the refugees in the camp.¹⁶⁹

¹⁶⁴ Jane N. Kanyoro-Mwaura, 'Comparative Study of Refugee Management', 2004 <<http://erepository.uonbi.ac.ke:8080/xmlui/handle/11295/19425>> [accessed 9 May 2017].

¹⁶⁵ E. Valentine Daniel and John Chr Knudsen, *Mistrusting Refugees* (University of California Press, 1995).

¹⁶⁶ 'Featured News' <http://www.theadvocatesforhumanrights.org/separating_migrant_families_is_cruel_un-american.html> [accessed 19 April 2017].

¹⁶⁷ 'Kenya Postpones Planned Closure of Dadaab Refugee Camp | Global Development | The Guardian'.

¹⁶⁸ Daniel and Knudsen.

¹⁶⁹ Daniel and Knudsen.

Even if Dadaab¹⁷⁰ is lying within the Kenya's jurisdiction and territorial space, the whole decision of establishing the camp did not unilaterally originate from the Kenya's government but from the international community¹⁷¹. It was a United Nations request to utilize the space in order to host increasing number of refugees and asylum seekers from the Horn of Africa, especially from the war-torn Somalia for humanitarian purposes.

This initiative could not be taken without the involvement of the Kenyan government whose comprehensive refugee programme,¹⁷² under the Ministry of Interior and Coordination of National Government, had to approve and endorse the refugee programme in Dadaab before its implementation¹⁷³. Given the law of treaty which rules on *pacta sunt servanda* principle¹⁷⁴, the government has a big role to play in managing and facilitating the camp and supporting the programme¹⁷⁵ with collaboration of the government of Somalia. The United Nations Agency (UNHCR) provides the resources and humanitarian assistance together with other international governmental and Non-Governmental Organizations.¹⁷⁶

The question under dispute is why did Kenya decide to change its policy on the Dadaab Refugee Camp in Garissa County?¹⁷⁷ Was it necessary and legally justified to

¹⁷⁰ 'Dadaab'.

¹⁷¹ 'UNHCR - Search'.

¹⁷² 'Kenya Comprehensive Refugee Programme'.

¹⁷³ Oluoch.

¹⁷⁴ Oliver Dörr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (Springer Science & Business Media, 2011).

¹⁷⁵ 'Eb10' <<http://www.fcthighcourtelibrary.com/maitama/library/en/top/our-collections/e-resources/e-books/eb10/>> [accessed 19 April 2017].

¹⁷⁶ 'UNHCR - Search'.

¹⁷⁷ 'Kenya Postpones Planned Closure of Dadaab Refugee Camp | Global Development | The Guardian' <<https://www.theguardian.com/global-development/2016/nov/16/kenya-postpones-planned-closure-of-dadaab-refugee-camp-somalis>> [accessed 10 April 2017].

come up with such decision that would affect lives of several refugees? The constitutionality of the order to close the refugee camp has been raised adversely in the case law.¹⁷⁸

4.4. Repatriation and Closure of Dadaab

The topic of border closure, safe zones, and refugee protection has been persistent in the sector of public international law for many decades.¹⁷⁹ The buffer zones and safe havens have been used in the post cold war period to make reference to refugee protection under refugee law. The Republic of Kenya has been chosen as a safe haven for many refugees especially from Somalia.

However, the government of Kenya came to a decision to close the Dadaab refugee camp lying at its border with Somalia. The allegations read in part as follows: “for reasons of pressing national security that speak to the safety of Kenyans in a context of terrorist and criminal activities¹⁸⁰, the Government of the Republic of Kenya has commenced the exercise of closing Dadaab Refugee Complex”¹⁸¹ as one of its policies on national security.

This decision was arrived at in November 2013, when Kenya, Somalia and UNHCR signed a Tripartite Agreement¹⁸² setting grounds for repatriation of Somali refugees.¹⁸³

¹⁷⁸ ‘Petition 19 & 115 of 2013 - Kenya Law’ <<http://kenyalaw.org/caselaw/cases/view/84157>> [accessed 10 March 2017].

¹⁷⁹ ‘Default’, *Journal of Refugee Studies*, 26 (2013), 458.

¹⁸⁰ ‘In Kenyan Town Where Students Were Massacred, “It’s Not Safe”’.

¹⁸¹ ‘Government Statement And Update On The Repatriation Of Refugees And Scheduled Closure Of Dadaab Refugee Camp’ <<http://www.interior.go.ke/index.php/2015-02-28-06-43-54/news/98-government-statement-and-update-on-the-repatriation-of-refugees-and-scheduled-closure-of-dadaab-refugee-camp>> [accessed 10 March 2017].

¹⁸² Munywoki.

¹⁸³ ‘UNHCR - Search’.

There has been very slow progress on the implementation of the agreement due to difficulty to reach conclusions on the matter in question. UNHRC was concerned about the announcement by the Kenya government and sent mixed signals indicating that 350,000 refugees at Dadaab camp would be faced with humanitarian disaster and practical consequences caused by abrupt closure of the camp.¹⁸⁴

This decision has been made by Government reflecting the fact that the camps have become hosting grounds for Al Shabaab as well as centres of smuggling and contraband trade besides being enablers of illicit weapons proliferation.¹⁸⁵

Considering the changing landscape of global terrorism, with new terrorist entities seeking to root themselves in our region, it would be inexcusable for the Government to overlook its primary constitutional responsibility to protect her citizens and their property.¹⁸⁶

The statement concludes by saying - We are aware that several large-scale attacks such as:¹⁸⁷ Westgate Shopping Mall attack; Garissa University attack;¹⁸⁸ and Lamu attack.

The proscribed three terrorist attacks were planned and deployed from Dadaab Refugee Camp by transnational terrorist groups. This is the basis of the decision to close the camp by the Kenya's government.

¹⁸⁴ 'UNHCR - Search'.

¹⁸⁵ 'In Kenyan Town Where Students Were Massacred, "It's Not Safe"', *USA TODAY* <<https://www.usatoday.com/story/news/world/2015/04/03/kenya-university-attack/25230247/>> [accessed 19 April 2017].

¹⁸⁶ 'Government Statement And Update On The Repatriation Of Refugees And Scheduled Closure Of Dadaab Refugee Camp'.

¹⁸⁷ 'Government Statement And Update On The Repatriation Of Refugees And Scheduled Closure Of Dadaab Refugee Camp'.

¹⁸⁸ 'In Kenyan Town Where Students Were Massacred, "It's Not Safe"'.

How did Kenya manage to justify its decision to repatriate protracted Somali refugees and close the camp? I quote: In the 590th (Five Hundred and Ninetieth) meeting of AU Peace and Security Council in April this year, the AU recognized and acknowledged, and I quote:

“Kenya’s legitimate security concerns that Dadaab Refugee camp had been infiltrated and become hideout for Al Shabaab terrorist group which exploited the camps to plan and carry out attacks against Kenya’s institutions, installations and civilians...”¹⁸⁹

It is important to note that AU has also confirmed that Somalia is now safe, ready and willing to receive her citizens.¹⁹⁰

The Republic of Somalia had been declared by the African Union a safe haven for its refugees and Kenya was not in any violation to make a credible decision of repatriation and closure of the camp that had become a haven for deadly terrorist groups and the only solution was nothing other than closing it down. However, the question of refugees is a concern of international community as the document claims in part. “Shouldering the burden of refugees is the responsibility of the international community as a whole and not individual countries alone.”

“The UN Security Council in its Resolution 1269 — arrived at, two years before 9/11 — called on States to deny safe haven to those who plan, finance or commit acts of terrorism and to refrain from granting refugee status to terrorists”.

¹⁸⁹ ‘In Kenyan Town Where Students Were Massacred, “It’s Not Safe”’.

¹⁹⁰ ‘Government Statement And Update On The Repatriation Of Refugees And Scheduled Closure Of Dadaab Refugee Camp’.

4.5. Legal Implications of Repatriation and Closure

The argument backed by credible evidence of the Kenya's government has its proper locus and justification¹⁹¹ as has been stated earlier in this research analysis. The main contention is contained in the Tripartite Agreement of 2013 in which voluntary returning home is emphasized to dismiss the allegations of forceful sending of refugees back to Somalia¹⁹². The Republic of Kenya is under obligation of offering security to its citizens in the international law. There is no proper ground for the international community to challenge this reason in any law court without making sound reference to the natural law theory of humanitarian and human rights principles of refugees.

The definition of refugee camp is not very clear by lawyers expressing different views and interpretations. What does a refugee camp refer to? Barry N. Stein has made an exceptional attempt to define the refugee experience including the concept of the camp in his distinguished writing "the refugee experience: defining the parameters of a field of study" dealing with various stages such as the perception of threat; decision to flee; the period of extreme danger and flight; reaching safety; camp behaviour; repatriation; settlement or resettlement; adjustment or acculturation; and residual states and changes in behaviour caused by the refugee experience.¹⁹³

Barry's analysis points at a very relevant issue. It would be misleading to believe that terrorists are bred elsewhere and transported to the camp. It is as well correct to believe that during the long stay at the camp can change one's behaviour and act as a

¹⁹¹ 'Petition 19 & 115 of 2013 - Kenya Law'.

¹⁹² 'UNHCR - Search'.

¹⁹³ Stein.

terrorist or sympathizer of terrorists. The same reading shows that being a refugee can make one go through very distressful stages in life. Due to such conditions that may lack some social services, the perception that refugee camp should be a temporary place of refuge stands justified. Refugee assistance system should dispel the idea that a designated camp such as Dadaab can become a place for settlement or resettlement for refugees and their siblings. Therefore, Dadaab refugee camp is meant to be a place for temporary stay and where international community and the hosting government can provide coordinated assistance.

The best example are the refugees that settled in France in a the so called callais jungle camp hosting migrants and their families. The alternative was to come up with 2 refugee camps for asylum seekers¹⁹⁴. The argument is, Franch government decision followed terrorist attacks in Paris and realized that such uncontrolled and informal settlements within its territory would be a threat to its national security.

The distinction here is the use of migrants and refugees. Migrants are not refugees and refugees are not migrants. Refugees can be held temporarily in a camp before they are given the status and right to stay. Legal migrants are those who have voluntarily chosen to settle in a host country and are seeking residence. In the case of the Jungle Camp, the idea refugee was the best option other than migrants and the government ordered the destruction of the jungle.

¹⁹⁴ 'France Vows to Destroy Calais "Jungle" as Paris Authorities Plan 2 More Refugee Camps', *RT International* <<https://www.rt.com/news/358050-france-destroy-calais-jungle/>> [accessed 10 March 2017].

Refugees are a special category of persons¹⁹⁵ who are, by virtue of their situation, considered vulnerable.¹⁹⁶ Article 21 (3) therefore, imposes specific obligations on the State in relation to vulnerable persons. It provides that, “All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.”¹⁹⁷

Dadaab camp is meant for refugees and asylum seekers who are considered vulnerable persons. Refugees can stay as so long as their situation back home is still precarious. Asylum seekers are those who seek the status of staying in the host country being given the state protection in lieu of their situation. Dadaab became a permanent home of so many Somali refugees that escape persecution, threats, insecurity and humanitarian disasters.

Similar concept is reinforced by the Refugee Act 2006¹⁹⁸ as follows-

Section 3 of the Refugees Act, 2006¹⁹⁹ provides for a statutory refugee and a prima facie refugee. It states;

(1) A person shall be a statutory refugee for purposes of this Act if such person:

¹⁹⁵ ‘Kenya Law Cases Database’.

¹⁹⁶ ‘Petition 19 & 115 of 2013 - Kenya Law’ <<http://kenyalaw.org/caselaw/cases/view/84157>> [accessed 10 March 2017].

¹⁹⁷ ‘Kenya Law Cases Database’.

¹⁹⁸ Anjichi.

¹⁹⁹ ‘MyWay’ <<http://int.search.myway.com/search/GGmain.jhtml?p2=%5EAZ0%5Exdm249%5ETTAB02%5Eke&ptb=A80CDF13-ED9E-401C-9301-1A9DDB669A8D&n=783973c2&ind=&tpr=hpsb&trs=wtt&cn=ke&ln=en&si=intl&brwsid=bb2879ea-f8a9-458d-a84a-25f072a2e3b2&st=hp&searchfor=refugee%20Act%20in%20Kenya>> [accessed 4 April 2017].

(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 to 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.

(2) A person shall be a prima facie refugee for purposes of this Act if such person owing to external aggression, occupation, foreign domination or events seriously disturbing public order in any part or whole of this country of origin or nationality is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.²⁰⁰

Such argumentation leads us to another question related to the legal meaning of a “refugee camp”. Generally, a refugee camp is defined as a temporary settlement built to receive refugees and people in refugee-like situations. Refugee camps usually accommodate displaced persons who have fled their home country, but there are also camps for internally displaced persons.²⁰¹

The legal interpretation of a refugee does not reflect a refugee as a criminal offender²⁰² rather as one who takes refuge²⁰³ or a person who has fled from some

²⁰⁰ ‘Kenya Law Cases Database’.

²⁰¹ ‘Meaning of a Refugee Camp - Google Search’
<https://www.google.com/#q=meaning+of+a+refugee+camp&*> [accessed 10 March 2017].

²⁰² ‘MyWay’
<<http://int.search.myway.com/search/GGmain.jhtml?p2=%5EAAZ0%5Exdm249%5ETTAB02%5Eke&pb=A80CDF13-ED9E-401C-9301-1A9DDB669A8D&n=783973c2&ind=&tpr=hpsb&trs=wtt&cn=ke&ln=en&si=intl&brwsid=bb2879ea->

danger or problem, seeking refuge from war, political oppression, religious persecution, or a natural disaster²⁰⁴. The perception purporting that Dadaab is a camp hosting suspects of terrorism is, therefore, incorrect and prejudice to the rights of such persons as founded in the Bill of Rights of the Constitution of Kenya²⁰⁵ as it transpires in the ruling of Justice Majanja as follows:

“... the Government Directive, contained in the Press Release and correspondence dated the 18th December 2012 and 16th January 2013 respectively, threatens the rights and fundamental freedoms of the petitioners and other refugees residing in urban areas and is a violation of the freedom of movement under Article 39, right to dignity under Article 28 and the right to fair and administrative action under Article 47 (1) and violates the State’s responsibility towards persons in vulnerable situations contrary to Article 21 (3).

Proposed implementation of the Government Directive, contained in the Press Release and correspondence dated the 18th December 201 and 16th January 2013 respectively, is a threat to the non-refoulement principle contained in section 18 of the Refugees Act, 2006.²⁰⁶

The Government Directive, contained in the Press Releases and correspondence dated the 18th December 2012 and 16th January 2013 respectively, be and is hereby quashed”.²⁰⁷

f8a9-458d-a84a-25f072a2e3b2&st=hp&searchfor=refugee%20Act%20in%20Kenya> [accessed 4 April 2017].

²⁰³ ‘Refugee’, *The Free Dictionary*.

²⁰⁴ ‘Refugee’.

²⁰⁵ ‘The Constitution of Kenya 2010 - Google Search’ <https://www.google.com/#q=The+Constitution+of+Kenya+2010&*> [accessed 4 April 2017].

²⁰⁶ ‘Kenya Law Cases Database’.

²⁰⁷ ‘Kenya Law Cases Database’.

Dadaab refugee camp turned to be a permanent home for the so called refugees. Any plan to repatriate the refugees from the designated camp back to their state of origin would only require legal framework and clear measures within the concept of refugee law and acceptable to the legal principles of humanitarian and human rights. Some definitions refer to a refugee camp as a shelter for persons displaced by war or political oppression or for religious beliefs and a shelter becomes temporary or transitory housing for homeless or displaced persons.²⁰⁸ Following such definition, a refugee camp²⁰⁹ should not be allowed to become a permanent complex and home town for persons who are not citizens.

Decision to close the camp²¹⁰ is more linked to the threat of terrorists that are perceived to come from the neighbouring Somalia and use the camp as a refuge and a convenient place to plan attacks as had been explained earlier. However, the rationale of terrorism is not sufficient ground to close down the camp meant for temporary shelter or housing for persons who have been displaced. Such decision would prejudice their human rights and humanitarian rights according to the refugee convention given that the Horn of Africa is still fragile and is faced by realities that may trigger off persons who escape to save their lives.

²⁰⁸ 'Refugee Camp', *TheFreeDictionary.Com* <<http://www.thefreedictionary.com/refugee+camp>> [accessed 4 April 2017].

²⁰⁹ 'Refugee Camp'.

²¹⁰ 'Government Statement And Update On The Repatriation Of Refugees And Scheduled Closure Of Dadaab Refugee Camp'.

Justice Mativo's ruled against the decision by the government of Kenya to close the Dadaab refugee camp²¹¹ considering non-refoulement principle²¹² as a type of *jus cogens* norm.²¹³

4.6. Cessation Clause

Refugee Act under section 5 states as follows:

A person shall cease to be a refugee for the purposes of this Act if that person—

a) voluntarily re-avails himself of the protection of the country of his nationality;

(b) having lost his nationality, voluntarily re-acquires it;

(c) acquires the nationality of another country and enjoys the protection of the country of his new nationality;

(d) voluntarily re-establishes himself in the country which he left or outside which he remained owing to fear of persecution;

(e) can no longer, because circumstances in connection with which he was recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality; or

²¹¹ Sinmi Akin-Aina, *The State of Exception and Legal Ambiguity: The Kenyan Forced Encampment Directive for Urban Refugees* (Oxford Monitor of Forced Migration, 2014) <http://oxmofm.com/wp-content/uploads/2014/05/The-State-of-Exception-and-Legal-Ambiguity-The-Kenyan-Forced-Encampment-Di-rective-for-Urban-Refugees_Sinmi-Akin-Aina-.pdf> [accessed 16 May 2017].

²¹² Ranja.

²¹³ 'Constitutional Petition 227 of 2016 - Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/131173/?platform=hootsuite>> [accessed 10 March 2017].

(f) has committed a serious non-political crime outside Kenya prior to his admission to Kenya as a refugee;

(g) having lost his nationality, continues to refuse to return to the country of his former habitual residence:

Provided that the provisions of this paragraph shall not apply to a person who has compelling reasons arising out of previous persecution for refusing to avail himself or herself the protection of the country of nationality or to return as the case may be.²¹⁴

In the laws of the Republic of Kenya the legal requirements for cessation of a refugee status, are clear and conforms with the international refugee law. However, the last clause provides that there must be compelling reasons arising out of previous persecution for refusing to avail himself or herself to the country of nationality to return as case may be. The spells out clearly the conditions under which the status can cease to exist and in this case it can include the decision to close the camp and repatriate refugees in disregard to the protection provisions.

The status of refugee is not permanent once granted. It can cease according to the UN Refugee Convention of 1951 which reads in part as follows:²¹⁵

“Under Article 1C of the 1951 Convention, refugee status may cease either through the actions of the refugee (contained in sub-paragraphs 1 to 4), such as by re-establishment in his or her country of origin, or through fundamental changes in the objective circumstances in the country of origin upon which refugee status was based (sub-paragraphs 5 and 6). The latter are commonly referred to as the “ceased

²¹⁴ <http://www.kenyalaw.org/lex//actview.xql?actid=No.%2013%20of%202006>.

²¹⁵ Goodwin-Gill and McAdam.

circumstances” or “general cessation” clauses. Article 1C (5) and (6) provides that the 1951 Convention shall cease to apply to any person falling under the terms of Article 1 (A)”.²¹⁶

Generally, the spirit of the refugee law is that the refugee will eventually be able to return to his or her habitual home country and shall not be subjected to threat of persecution or discrimination whatsoever. In this perspective, the permanent refugee status is not what the law expects but temporary refugee status that may cease based on the grounds provided for by the refugee law.²¹⁷

However, studies reveal that the state has obligations towards refugees when circumstances change.²¹⁸ The changed circumstances in Somalia is associated with the decision to repatriate refugees and close the camp. In addition, the state’s sovereignty is threatened by growing numbers of revoked refugees and asylum seekers. Refugee cessation clause based on *changed circumstances* is well intended. The study reveals that there is call for concerted efforts from the United Nations and stakeholders.²¹⁹

²¹⁶ ‘Kenya Law Cases Database’.

²¹⁷ Refugees, ‘Refworld | The Leader in Refugee Decision Support’.

²¹⁸ Munywoki.

²¹⁹ Munywoki.

CHAPTER FIVE

5.0 Summary, Conclusion & Recommendations

The Discussion on the new challenges facing the principle of non-refoulement in the refugee law takes into account modern situations of violence that displace and create risk to so many civilians across the world. The most serious challenge under allegation in this work is trans-boundary and international act of terrorism in the 21st Century that see many civilians fleeing their habitats for refuge in foreign countries.

Such challenges have interfered so much with the jurisprudence of the refugee law. Some governments and states have come up with anti-refugee policies that deny such populations fleeing from danger and threats in their country of origin rights to asylum or make it very difficult for such people to settle in their territories.

This research has chosen to narrow this research to the situation facing Somali refugees in the Dadaab Camp in Kenya. This is a case study that seeks to provide more knowledge in the research gap in the area as has been discussed under chapter iii and iv.

5.1 Summary

Under Chapter one, the research has provided an overall study background and motivations for this particular research area. It includes the statement of the problem, the research objectives, research questions, the hypothesis of the research questions, limitations, scope and the research methodology and core theory.

Chapter two is on the literature review that has been carefully selected for perusal and academic analysis of the principle of non-refoulement in the refugee law. It is an old

principle that has been debated for so long. There is so much literature on the principle but I have decided to limit it to some few fundamental publications that are relevant to the topic in question.

Chapter three is dedicated to research methodology adopted by this study. It explains the topic, research design, methods and research tools that I find relevant to justify the discussions. The same chapter has illustrated the theoretical framework and the testing of such framework to justify the outcome.

Chapter four is the core chapter in which I have discussed the research findings in details making reference to the case law available and some fundamental debates around the principle of non-refoulement.

Chapter five is the final chapter comprising of the summary, conclusion and some recommendations of the study.

The work ends with a selected list of bibliography that has been used in the content as citations and references to show objectivity and empirical cases from other sources.

5.2 Conclusion

In conclusion, the constitutional petition ruling by the honourable court has re-affirmed the principle of non-refoulement and state obligations by thwarting the government directives to close the Dadaab refugee camp.²²⁰ It is clear, therefore, that such decision would prejudice human rights of refugees and infringe on their constitution Bill of Rights to fundamental freedoms.

²²⁰ ‘Constitutional Petition 227 of 2016 - Kenya Law’.

The government must make decisions that are fair, legal and informed by the constitutionalism and natural justice thereof. Policy decisions must not be irrational and un-proportional in their nature in order to avoid unnecessary judicial review that may quash them for applying *ultra vires* powers or abuse of office. The same sentiment has been observed by other authors and this includes identifying who meets the definition of refugee.²²¹

Is it legally sustainable to use terrorism as excuse to violate the norm of non-refoulement? We can safely argue that it is not legally sustainable to reinforce the directive of the closure of the Dadaab refugee camp based on the threat of national security²²² as has been ruled by the court.²²³

Is it constitutional for the Republic of Kenya to reverse the customary international law of refugees by sending the refugees of Somali origin by closing the Dadaab Camp? It is unconstitutional for the Republic of Kenya to violate the Bill of Rights entrenched in its constitution by closing Dadaab refugee camp.

In the traditions of *opinion juris* under the customary international law, one state cannot unilaterally change the course of practices by other member states without being blamed for acting wrongfully and contrary to the principle of the customary international law *opinio juris sive necessitates* (an opinion of law or necessity) or belief that the action was carried out as a legal obligation.

²²¹ Steven N. Choka, 'The Dawn of a New "Error"? A Review of Kenya's Legal Framework for Refugee Status Determination' (University of Nairobi, 2011) <<http://erepository.uonbi.ac.ke:8080/xmlui/handle/11295/16371>> [accessed 9 May 2017].

²²² Lawrence M. Mulatya, 'Asylum and National Security in Kenya' (University of Nairobi, 2014) <<http://erepository.uonbi.ac.ke:8080/xmlui/handle/11295/75961>> [accessed 9 May 2017].

²²³ 'Petition 19 & 115 of 2013 - Kenya Law'.

In the opinion of law it is not constitutional to repatriate refugees with no proper evidence to that effect and strict liability of the provisions of the Bill of Rights. It is equally illegal to forcefully send a refugee back to his or her home state against his or her will (sending one to face persecution or consequences in the state of origin).

Does Kenya violate refugee law by forcefully sending or deporting refugees with right to stay within the Kenya territory? The Republic of Kenya would be on the wrong side of the UN Convention of 1951 on the status of refugees of which it is a signatory, as well it is against the letter and spirit for the Protocol of 1969 on the status of refugees and the African Charter of Human and People's Rights of 1986.

For how long should a refugee camp be allowed to exist? It is not defined the space of time unless it is stipulated in bilateral or multilateral agreements as of how long such a shelter should exist. The question raised in this research is not the site or the structure of the camp but the individuals permanency. As long as the camp may be kept operational the beneficiaries are not meant to make it their permanent home.

5.3 Recommendations

Basing our recommendations on the findings of this research, the following are the response that is informed by the literature on the Non-refoulement Principle:

- 1) Non-refoulement²²⁴ Principle is a pre-emptory norm in the customary international law and governments may derogate it, or, make laws going against it.

²²⁴ United Nations High Commissioner for Refugees, 'Note on Non-Refoulement (Submitted by the High Commissioner)', *UNHCR* <<http://www.unhcr.org/excom/scip/3ae68ccd10/note-non-refoulement-submitted-high-commissioner.html>> [accessed 10 March 2017].

- 2) The established Dadaab refugee camp supported by the international community should not be closed but its beneficiaries should not be permanently detained there as well.
- 3) The best thing the government of Kenya should do is to expedite the asylum seeking process and to award those who merit it the status to live, work and stay in Kenya.
- 4) Only refugees willing and have applied to be given chance to go back to their country can be assisted through a tenable legal framework to do so guaranteeing them protection and security as required by the returnee rights.
- 5) The Republic of Kenya ought to revise its Refugee Act of 2006.
- 6) The Republic of Kenya can make use of refugees as a resource and not a threat to its territorial integrity.
- 7) The department of national security in relationship to foreigners can improve on the intelligence services and work in meaningful collaboration with the government of Somalia where Al-Shabaab originate from.

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