THE COUNTER-TERRORISM CHALLENGE IN IMPLEMENTATION OF THE NON-REFOULMENT PRINCIPLE IN REFUGEE LAW IN KENYA

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G62/10950/2018

RESEARCH THESIS SUBMITTED IN PARTIAL FULFILLMENT FOR THE AWARD OF A DEGREE IN MASTERS OF LAW

October 2020

1 DECLARATION

I, **OTIENO PEGGY ACHIENG,** hereby declare that this is my original work submitted in partial fulfilment for the award of a degree in Masters of Law and that it has not been submitted for a diploma, degree, or post-graduate certification to any institution of higher learning.

Signed ……Peggy Otieno…… Date 15th November 2021……..

OTIENO PEGGY ACHIENG

DR. KEN OBURA

Signature......Ken...... Date 2021/11/15......

2 DEDICATION

This work is dedicated to all Kenyan refugees struggling to either find a home, be accepted and settle in, or are hopeful that their countries will be reinstated to stability enough for them to return to a place they once called home.

3 ACKNOWLEDGEMENT

I express and offer my deepest thankfulness and appreciation to The Almighty God for providing me with knowledge, wisdom, understanding and patience during this eye opening experience. Special thanks to Dr. Ken Obura, for his consistent guidance, mentorship and his patience while enabling me get the best out of this Research Paper. To my family, beginning with my parents Mr Wallace C.O Ngolo and Ms Peres Abeka (an international expert with UNHCR for the conflict and disaster uprooted persons) I am indebted for believing in my capability and investing their resources to see me through this degree program. I would like to appreciate my brothers, Elvis Otieno and Given Otieno for the constant encouragement and easy time through it all. Lastly, I would like to earnestly thank Susan Afandi for being the most supportive and understanding house manager and a real sister.

4 LIST OF STATUTES

1. Constitution of Kenya, 2010
2. Refugee Act, 2006
3. Refugee Bill 2019
4. Immigration Act, 2011

5 LIST OF INTERNATIONAL INSTRUMENTS

1. UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189
2. UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, December 2011, HCR/1P/4/ENG/REV. 3
3. UN High Commissioner for Refugees (UNHCR), UNHCR Note on the Principle of Non-Refoulement, November 1997
4. Organization of African Unity (OAU), Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention"), 10 September 1969, 1001 U.N.T.S. 45
5. UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85
6. Migration Policy Framework for Africa and Plan of Action (2018 – 2030)
7. UN General Assembly, Declaration on Territorial Asylum, 14th December 1967
8. UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171
9. UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III)
10. Canadian Charter of Rights and Freedoms, s 7, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

6 LIST OF CASES

1. Constitutional Petition 227 of 2016, Kenya National Commission on Human Rights & another v Attorney General & 3 others [2017] eKLR
2. Prosecutor v. Anto Furundzia, ICTY, 1998
3. N- A- M- v. Michael Mukasey, Attorney General of the United State
4. Suresh v Canada (Minister of Citizenship and Immigration)
5. Germany - Federal Administrative Court, 22 May 2012, 1 C 8.11
6. Mansour Ahani v. Canada
7. Germany – Federal Administrative Court, 24 November 2009, 10 C 24.08
8. Kituo Cha Sheria & 8 others v Attorney General [2013] eKLR
9. Bilal Ahmed Kelik VS Republic
10. Fatuma Ismail & 30 Others v Director of Immigration & another [2014] eKLR
11. Ali Ahmed Saleh v Republic [2016] eKLR
12. Refugee Consortium of Kenya & another v Attorney General & 2 others [2015] eKLR
13. Adel Mohammed Abdulkader Al-Dahas V the Commissioner of Police & 2 Others [2003] EKLR

7 ABBREVIATIONS

AU	African Union
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979
CSIS	Canadian Security Intelligence Service
CSO	Civil society organization
ICCPR	UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966,
ICU	Islamic Courts Union
KI	key informants
NGO	Non-Governmental Organization
OAU	Organization of African Union
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees

8 ABSTRACT

The study will examine various instruments both international and national as well as court decisions from various jurisdictions in the attempt to find a middle ground between public interest and national security as well as the government's compliance with the international law provisions on human rights, refugee protection and the rule of law. It will use examples of threat for closuring Dadaab Refugee camp to draw lessons learnt and challenges as well as draw recommendations on how such a situation such as the Kenyan one would have been handled best by a host nation. The paper therefore focuses on examination of the legal regime concerning refugees; counterterrorism and the non-refoulment principle as well as a Non-doctrinal research will focus on social, economic and political aspects of counter-terrorism and the non-refoulment principle. The study focuses on the Natural law theory, the Human rights school of thought as well as sociological jurisprudence which explore the importance of analysing law from a moral point of view while considering refugees' human rights and how they can integrate into a society while considering its socio-economical background. It concludes that, there exists solid legal regimes dealing with refugee protection especially regarding the Non-refoulment principle, and various jurisdictions have dealt with scenarios where the Non-refoulment principle has been contravened, however, it has proved difficult for Kenya to strike the abovementioned desired balance. The Kenyan government should put in place measures that will consider refugees as resources rather than a threat to territorial integrity because they have become a vital component in a number of economies and also expedite amendments to the refugee act to streamline registration of the refugees in the country.

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CHAPTER ONE

INTRODUCTION

1.0 Introduction

Time and again, individuals escape their countries due to of political unrest, protracted conflicts, and natural disaster in search for protection and support from the worldwide community. A great number of people worldwide have been displaced including immigrants refugees and internally displaced persons, due to mandatory migration. Every minute 20 people are coerced to leave their homes making the worldwide total of displaced persons to stand at over 65 million of which 10 million are stateless and 22 million refugees.[1]

Kenya being an asylum state for Somali refugees among others has overtime suffered of trans-boundary terrorism. The government had perceived the-over-two decades Dadaab and Kakuma refugee camps as hide outs for terrorists, especially the Alshabaab terrorist group. Planning and executing a huge number of terrorist attacks, including the Westgate attack in 2013 was done in Dadaab. [2] Alshabab terror network confirmed responsibility of the attack in Dusit D2 Hotel in Riverside, Nairobi in the most current terrorist attack in Kenya. Through their spokesperson, the militant group confirmed that they were conducting an operation in Nairobi, Kenya. In efforts to end terrorism, around April 2014 Kenya detained at the Kasarani stadium in an operation around over 3,000 people aiming to flash out Muslim militants. The crackdown resulted to dozens without proper identification being deported to Somalia.

International refugee law and other conventions uphold voluntary repatriation.[3] It also establishes the non-refoulment concept [4] which states that where an individual faces severe

[1] United Nations, Department of Economic and Social Affairs, Population Division (2017). International Migration Report 2017: Highlights(ST/ESA/SER.A/404). Pg 8

[2] https://www.independent.co.uk/voices/as-the-kenyan-minister-for-national-security-heres-why-im-shutting-the-worlds-biggest-refugee-camp-a7020891.html

[3] UN General Assembly, Convention Relating to the Status of Stateless Persons, 28 September 1954, United Nations, Treaty Series, vol. 360, p. 117, available at: https://www.refworld.org/docid/3ae6b3840.html [accessed 5 October 2021]

risks of persecution they cannot be deported, extradited or otherwise transferred to that country or frontier. Undeniably, the United Nations conventions and General Assembly resolutions encourage states to ensure that any counter-terrorism procedures should be in compliance with their responsibilities under international law.[5] "***The United Nations Global Counter-Terrorism Strategy***" emphasizes that there is mutual complementarity between operative counter-terrorism efforts and safeguarding of the human rights.[6] Consequently, complaisance with Human rights norms at the international level is state responsibility in countering terrorism and as well as upholding their commitment to international law.

1.1. Historical Background

1.1.1. Counter-terrorism vs Human Rights

International law requires countries to empower and protect the human rights while combating terrorism. National counter-terrorism strategies should attempt to prevent terrorist attacks and prosecute those who commit them, as required by human rights provisions and the rule of law.[7] As an ultimate basis for anti-terrorism, the international community is devoted to espousing measures that safeguard the protection and promotion human rights laws and the rule of law, by the adoption of "***United Nations, General Assembly, Global Counter-Terrorism Strategy September. A/RES/60/288***".[8] The strategy obliges member States to conform to assigned duties under international law, particularly international humanitarian law, and human rights laws and refugee law while taking counter-terrorism measures. Further the United Nations Security Council (UNSC) calls upon nations in

[4] UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: https://www.refworld.org/docid/3be01b964.html [accessed 5 October 2021] Art 33(1)
[5] Human Rights and Terrorism, GA Res 50/186 preamble 13 and 14 and operative 3
[6] United Nations, General Assembly, Global Counter-Terrorism Strategy September. A/RES/60/288
[7] UN Office of the High Commissioner for Human Rights (OHCHR), Fact Sheet No. 32, Human Rights, Terrorism and Counter-terrorism, July 2008, No. 32 available at: https://www.refworld.org/docid/48733ebc2.html [accessed 5 October 2021]
[8] ibid

ensuring that forming several of its resolutions, counter-terrorism measures are at per with international human rights, refugee and humanitarian law.[9]

As regards refugee status and asylum, the 1951 Convention relating to the Status of Refugees contains provisions to ensure that those who have induced, facilitated or perpetrated terrorist acts are not guaranteed international refugee protection. The position of the Office of the ***"United Nations High Commissioner for Refugees (UNHCR)"***[10] is that refugee mechanisms are not available to perpetrators of terrorism acts in order for them to find an avenue to achieve impunity.[11]

1.1.2. The Non-refoulment Principle

As stated by Tamás Molnár, ***"1892 Geneva Session of the Institut de Droit International (Institute of International Law)"*** ruling was that except when the conditions guarantee provided referring to extradition are fully observed a refugee should not be expelled and delivered to another state that pursued him.[12] The non-refoulement principle was obviously a subject of discussion in most international accords during the time between the two World Wars, mandating that the refugees should not be deported back to their countries.[13]

Post World War II, many people were seeking asylum from the extreme effects of the six-year turmoil, in quest for prospects of settling in searching for a settlement opportunity in a conducive host nation. In that period, prohibition of refoulment was recognized in the first instance in the realm of humanitarian international laws and ware formed under Article 45

[9] Security Council resolutions 1456 (2003), annex, para. 6, and 1624 (2005), para. 4

[10] Office of the United Nations High Commissioner for Refugees. 1972. UNHCR. [Geneva]: [United Nations High Commissioner for Refugees].

[11] the United Nations High Commissioner for Refugees: UNHCR, "Addressing security concerns without undermining refugee protection – a UNHCR perspective" (November 2001)

[12] *Règles internationales sur l'admission et l'expulsion des étrangers (Rapporteurs : MM. L.-J.-D. Féraud-Giraud et Ludwig von Bar)*, Article 16

[13] Molnar, Tamas, The Principle of Non-Refoulement Under International Law: Its Inception and Evolution in a Nutshell (January 2016). Corvinus Journal Of International Affairs (COJOURN) Vol. 1 (2016), Available at SSRN: https://ssrn.com/abstract=2807437

"1949 Geneva Convention relative to the Protection of Civilians Persons in Time of War"[14] which provided that "a protected person shall not in any condition be sent to a country where he or she believes that there are possibilities of facing persecution for his or her political or religious beliefs and opinions."[15]

The principle of non-refoulement, gained general recognition within the universal level and affirmative legal reinforcement in Article 33 of the ***"1951 Geneva Convention relating to the Status of Refugees"***.[16] However, in article 33 (2) of the 1951 Convention, non-refoulement principle has exceptions based on rational grounds for "regarding the refugee as a threat to national security, such as if the refugee has previously been convicted of a serious crime that will put the community of the host state in danger". Refoulment of a refugee may take place if a competent authority has reached a conclusion as per the rule of law and includes citizens' rights under first amendment.[17] The application of the limitations of the non-refoulment principle as a matter of critical emphasis should be exercised based on other Human Rights as espoused in the "***Convention against Torture (CAT)"***[18] and the ***"International Covenant on Civil and Political Rights"***[19], with absolute protections.[20]

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[14] International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287, available at: https://www.refworld.org/docid/3ae6b36d2.html [accessed 7 October 2021]

[15] Supra n12

[16] UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: https://www.refworld.org/docid/3be01b964.html [accessed 7 October 2021]

[17] Article 10, UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III)

[18] UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: https://www.refworld.org/docid/3ae6b3a94.html [accessed 7 October 2021]

[19] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171

[20] Supra n7

1.1.3. The Origin of Al-Shabaab Terrorist Group

The Al-shabaab terror group founded by four Somali jihadists began in 2002 where three of them still lead the group. They were all part of terrorist training in Afghanistan before founding the group a Salafist enforcer militia for the Islamic Courts Union (ICU).[21]

ICU was ousted from Mogadishu by Ethiopia, a larger part of the Christian nation after their invasion of Somalia in December 2006.[22] A majority of the ICU escaped to neighbouring countries where the Al-shabaab moved to the south and started organizing militia attacks consisting of not only bombings but also assassinations resulting to a complete insurgency having power to control areas in central and southern Somalia.[23] The terrorist group finally cornered the Transitional Federal Government (TFG) protected by African Mission in Somalia (AMISOM) troops inside a few blocks of Mogadishu.[24] The group's core force is strong and has a significant number of militants[25], allowing it to carry out brutal operations, as proven by a series of vehicle bombs and executions. [26]

1.1.4. Terrorism in Kenya

The first terrorist attack in history in Kenya was in 1980 at Norfolk Hotel. Both U.S. Embassy based in Kenya and in addition to the one in Tanzania were bombed in 1998. Further, an Israeli owned hotel was bombed by three suicide bombers resulting to death of 11 Kenyans, 3 Israelis and wounding dozens.[27] With the entry of Kenyan Military in Somalia

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[21] Graham Turbiville, Josh Meservey, James Forest, Countering the al-Shabaab Insurgency in Somalia: Lessons for U.S. Special Operations Forces
[22] C Felter, J Masters, MA Sergie - Council on Foreign Relations, 2018 <https://www.cfr.org/backgrounder/al-shabab>
[23] ibid
[24] "Somalia and the Shabab: It's Not over Yet." The Economist, October 6, 2012. <http://www.economist.com/node/21564258>
[25] Graham Turbiville, Josh Meservey, James Forest, Countering the al-Shabaab Insurgency in Somalia: Lessons for U.S. Special Operations Forces
[26] "Somalia Facing Increase in al-Shabaab Violence." UPI, May 7, 2013. http://www.upi.com/Top_News/Special /2013/05/07/Deadly-bombings-hit-drive-to-save-Somalia/UPI-14451367957432/.
[27] Kenya National Human Rights Commission report on securing national security & protection of human rights a comparative analysis of the efficacy of counter terrorism legislation and policy

after the abduction of an aged tourist in the coast, the Al-Shaabab's related attacks intensified. Since 2011, Kenya has realized an increase in terrorist attacks.

It has been asserted by the Kenyan government that most of the terrorist attacks conducted by the Alshabaab was in reprisal to the Operation Linda Nchi, a strategic military mission between Somali and Kenya [28]

Kenyan security experts attribute most of the attacks to radicalized Kenyan youth and Somali refugees. These include the Garrissa University attack in 2015, the Mandera quarry mines and bus attacks which left over hundred people killed.

1.2. Statement of Problem

Somali refugees are in a state of quagmire based on Kenyan counter-terrorism laws and policies. They are a constant target when it comes to implementation of Counterterrorism measures in Kenya which results to forced repatriation and violation of the Non-refoulment principle. Kenya's counter-terrorism operations are fundamentally flawed because they violate customary international laws. People seeking Asylum and international refugees who came from Somalia experience several challenges in this age of trans-boundary terrorism. They have become easy prey in the Kenyan government's unlawful and violent extraterritorial deportation campaign, and they are constantly targeted by the state's callousness and indiscriminate attacks, which are backed by draconian counter-terrorism laws and policies.

Evidence is the 2017 threat to cease operations of the Dadaab refugee camp, the crack downs in Eastleigh area, Nairobi in efforts to smoke out terrorists and the 2014 Kasarani Stadium detention as well as deportation of Somali refugees due to national security and the increase in terrorism attacks.

[28] ibid

Political unrest, civil strife, natural disasters, and war among others have led to a number of individuals crossing the boarders in search of asylum in neighbouring states. The non-refoulment dictrine is codified in international laws that is also ***jus cogens*** and states *"no Contracting State shall expel a refugee in any manner whatsoever to the limits of countries where his life or freedom would be jeopardized on the basis of race, religion, nationality, membership of a specific social group, or political opinion."*[29]

"Article 33 (2) of the 1951 Convention" provides for the "*exceptions to the principle of non-refoulement*"[30] which states as follows; *"a refugee can be expelled based on reasonable grounds for regarding them as a danger to the security of the country, and if he or she was previously convicted of a serious crime, that poses a danger to the State*." The decision to refoul a refugee should be arrived upon by an adept authority according to the law and with compliance with international law obligations. Kenya has an obligation to establish reasonable grounds for expelling the Somali refugees and while doing so it should note that compliance with the Rule of Law, international law, and Human rights laws are essential.
Kenya has ratified international instruments on refugee protection including the doctrine of non-refoulment, and has further enshrined that international law shall form part of its constitution.[31] The Principal Secretary for Interior in 2014, Dr Karanja Kibicho indicated that the Al Shabaab terrorist group had taken advantage of Dadaab refugee camp's overcrowded and under-resourced conditions to recruit and strategize.[32] The debate on closure of the camp was received with a lot of legal resistance where Justice Mativo ruled that *"the government's decision to close down the camp especially targeting Somali refugees is an act of group persecution, illegal, discriminatory and therefore unconstitutional. It was further ordered*

[29] Art 33(1), Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: https://www.refworld.org/docid/3be01b964.html [accessed 5 October 2021]
[30] Ibid
[31] Article 2(5)(6), Kenya: The Constitution of Kenya [Kenya], 27 August 2010, available at: https://www.refworld.org/docid/4c8508822.html [accessed 5 October 2021]
[32] https://www.independent.co.uk/voices/as-the-kenyan-minister-for-national-security-heres-why-im-shutting-the-worlds-biggest-refugee-camp-a7020891.html

that the Department of Refugee Affairs which was arbitrarily closed down should be re-opened to continue coordinating refugee affairs.”[33]

1.3. Statement of Objective

The following are the objectives of the study:

1. To analyse existing international legal standards for the limitation of the right against non-refoulment
2. To review the compliance of Kenya's law and practice with the set international standards on the non-refoulment principle
3. To make recommendations towards achieving a middle ground between national security and refugee protection.

1.4. Research Questions

1. What are the limitations of the right against non-refoulment based on international legal standards?
2. What does Kenya's law and practice provide regarding compliance with the set international standards on the non-refoulment principle?

1.5. Hypothesis

It is hypothesized that states have not found instrumental, the existence of international legal regimes and court decisions on non-refoulment. As a result, achieving a balance between public interest and national security, as well as the government's conformity to international laws obligations on rule of law, refugee protection, and human rights, has proven difficult.

[33] Constitutional Petition No. 227 of 2016, Kenya: High Court, 9 February 2017 , Kenya National Commission on Human Rights & another v Attorney General & 3 others [2017] eKLR

1.6. Justification of the Study

Not much has been written about the non-refoulment principle with regard to counterterrorism especially the Somali refugees situation and the "Dadaab refugee camp" in Kenya. The study will attempt to achieve a middle ground between public interest and national security as well as the government's conformity to the international law provisions on Human Rights, refugee protection and the Rule of Law. The Kenyan government raised reasonable concerns; however their approach was unconstitutional and violated international law.[34] That notwithstanding, the "***1951 United Nations Convention relating to the Status of refugees"***, provides that *"the benefit of the non-refoulment principle 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......"*[35]

1.7. Literature Review

This review will be conducted as per themes; human rights and anti-terrorism and as non-refoulment principle and repatriation. It will attempt to identify the gaps in the available literature that this study will address.

1.7.1. Counter-terrorism vs Human Rights

Terrorism and anti-terrorism efforts adopted by states can negatively impact on Human Rights and society operations. Productive anti-terrorism efforts and Human rights are compatible and mutually reinforcing.[36] ***Alex Conte*** in his article anti-terrorism and human rights affirms this hence underscores the need to reinforce close observation of the detention

[34] Kenya National Commission on Human Rights & another v Attorney General & 3 others, Petition No. 227 of 2016, Kenya: High Court, 9 February 2017, available at: https://www.refworld.org/cases,KEN_HC,58a19f244.html [accessed 9 November 2021]

[35] Article 33(2), UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: https://www.refworld.org/docid/3be01b964.html [accessed 5 October 2021]

[36] UN Office of the High Commissioner for Human Rights (OHCHR), Fact Sheet No. 32, Human Rights, Terrorism and Counter-terrorism, July 2008, No. 32 available at: https://www.refworld.org/docid/48733ebc2.html [accessed 5 October 2021]

centres and to avoid indiscriminate deportation of suspects where they risk percussion face serious violation of the Non-refoulment principle.

Counter-terrorism methods that adhere to human rights avoids some roadblocks and may be effective in future for wen purposed to win ideological war against terrorists compared to violating human rights.[37] The international community has also pledged to put in place efforts that prioritize human rights laws and also the rule of law as the cornerstones of counter-terrorism efforts.[38]

"Fact Sheet No. 32 of the Office of the United Nations High Commissioner for Human Rights",[39] Counter-terrorism and Terrorism are concepts of non-derogation from human rights." ***"International Covenant on Civil and Political Rights"*** [40] where state security is threatened. Derogations from certain human rights, for instance *"the right to life, freedom from torture or other cruel, inhuman, or degrading treatment or punishment, prohibition of slavery as well as servitude, freedom from imprisonment for breach of contract, freedom from retrospective penalties, the right to be recognized as a person before the law, and freedom of thought, conscience, and religion, are all prohibited"*.[41]

Adinoyi Adavize Julius in his project paper "Impact of Terrorism on Human Rights in Africa: The Case Study of Counterterrorism in Kenya, 1998 -2014" expresses that Kenya has been subjected to a steady stream of terror assaults that have blatantly violated human rights.[42] "Most scholars regard terrorism as a politically motivated approach involving the threat or use of force or violence in which the quest of publicity plays a crucial role," according to Adinoyi.[43] "In order to effectively manage terrorism as a conflict, it is necessary to address the core causes of terrorism, which will considerably diminish the growth and

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[38] Supra n32
[39] Supra n7
[40] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171
[41] Art 4 (2), Supra n40
[42] Adinoyi Adavize Julius, "*Impact Of Terrorism On Human Rights In Africa: The Case Study Of Counterterrorism In Kenya, 1998 -2014*" , P3
[43] Ibid

spread of terror acts in the long run, as opposed to military and traditional tactics, which only lower terror acts in the short term".[44] It's also worth noting that such considerations not always taken into account alone will not be enough to resolve the conflict, but combining the efforts of all parties involved will. To sustain worldwide social, cultural and economic stability, community and national policymakers must work together Political and economic stability are essential. [45]

Finally Adinoyi says in his paper that terrorism has posed a global danger to peace, security and prosperity governments and also human and individuals rights are respected to stop terrorists.[46] Terrorist operations led to significant influence on people all across the world, notably on the continents of Asia and Africa. Such effects have been felt in Asia, for example, in the Philippines, Lebanon, Iraq, and Syria.[47]

Gregory Maggs in his article How Legal are Counterterrorism measures states that the government in fighting against terrorism takes certain measures to secure citizens. However, certain efforts are questioned as to whether they are lawful or unlawful. Since there are no laws that govern what counterterrorism measures a government is supposed to take that will be seen as lawful, the question then asked is whether the laws of enforcement are to apply or will it be the laws of war. The characterization approach does not bring about satisfactory results as there are a lot of disputes that arises whenever a government decides to respond with either law enforcement measure over the military action or vice versa. [48]

This can be sorted out by formulating specialized standards which are to be used to assess government responses to terrorism. These standards should also embody the rules to apply in order to make decisions on what measure to take. These standards are to be formulated in a way that allows for policy considerations and will do away with doubts on the legality of

[44] Supra n40
[45] Ibid
[46] UNSC., Resolution 1456 of January 20, 2003 (United Nation Security Council Rule of Law, 2003). p3
[47]Supra n3, P4
[48] Gregory E. Maggs, Assessing the Legality of Counterterrorism Measures Without Characterizing Them as Law Enforcement or Military Action, 80 Temp. L. Rev. 661 (2007)

responses taken. It is advised against the use of characterization approach to determine what rules are to apply so as to come up with a policy perspective that will be utilized in evaluating strategies or efforts by a government as bad results will be yielded creating a new conflict.[49]

Bandyopadhyay S, Sandler T, in his book the role between defensive and pre-emptive Counterterrorism efforts seeks to counter that decisions on measures to go with are done independently but argues that there is in fact interdependence as a targeted country's foreign interest will be considered. This places a target in that foreign country thus the home country liaises and compares the cost differences of the measures they both have in place in order to settle for a measure that will work to their advantage. [50]

1.7.2. The Non-refoulment Principle and Repatriation

The non-refoulement principle forbids nations from sending a a refugee to a country that the security of their life is not certain.[51] In her article Non-refoulment and National Security, Ingrid Holms suggests that "*article 33 of the 1951 Refugee Convention be read in conjunction with article 1F of the same convention, which states that if an asylum seeker or refugee has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn*".[52]

Ingrid, further describes who a refugee is Pursuant to Article 1A(2) of the ***"1951 Refugee Convention"***, and amended by Article I(2) of the ***"1967 Protocol".*** [53]Refoulement is not allowed to the "frontiers of territories where his life or freedom would be threatened..." it fails to simply apply to the refugees' states. This indicates that refoulement to countries

[49] ibid
[50]Bandyopadhyay S, Sandler T, 'The interplay between pre-emptive and defensive Counterterrorism Measures: A two-stage game' Economica[(2011)].
[51] Article 33, UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: https://www.refworld.org/docid/3be01b964.html [accessed 5 October 2021]
[52] Ingrid Holms, Non-refoulment and National Security, 2015
[53] UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: https://www.refworld.org/docid/3be01b964.html [accessed 7 October 2021]

where the individuals safety is jeopardized is banned.[54] Ingrid wonders if the national security exception to non-refoulement provides for the use of a balancing act in international law.[55] ***Tufyal Choudhury*** and ***Helen Fenwick*** opine in their article "the impact of counter-terrorism measures on Muslim communities" state that "*there is a risk that Muslims in contemporary Britain might turn into the new suspect community. Policymakers and agents are wrestling with the old dilema: it's obviously true that most of those associated with terrorist activities are Muslim, and that counter-terrorism measures are probably going to target Muslims*".[56] Counter-terrorism operations are aggravating Muslims' fears that they are labelled as a"suspicious group". Majority of the participants indicated that counter-terrorism policy and law added to anti-Muslim animosity by portraying Muslims to be "suspect community" and developing an environment mistrust toward them, without naming specific laws or policies.[57] ***Frances Nicholson*** and ***Judith Kumin*** state that "*when a country adopts the 1951 Convention or the 1967 Protocol, it agrees to protect refugees on its territory and under its authority in accordance with the requirements of the treaties. The prohibition of refoulement applies to any form of removal through coercion, including deportation, expulsion, extradition, informal transfer or "renditions," and non-admission at the border, even if a state is not a party to the Convention or Protocol because it is a norm of customary international law and thus binding on all States*".[58] The doctrine of **"non-refoulement"**, established within the auspices of ***"the 1951 Convention/1967 Protocol"***, is an especially significant and cannot be derogated from as a component of international refugee protection. Torture, cruel, brutal, or humiliating treatment are all prohibited under the ***"International***

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[54] UN High Commissioner for Refugees (UNHCR), Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, December 2011, HCR/1P/4/ENG/REV. 3, available at: https://www.refworld.org/docid/4f33c8d92.html [accessed 5 October 2021]

[55] Supra n46

[56] Choudhury, Tufyal and Fenwick, Helen (2011) 'The impact of counter-terrorism measures on Muslim communities.', Project Rep ort. Equality and Human Rights Commission , Manchester.

[57] ibid

[58] UN High Commissioner for Refugees (UNHCR), Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, 26 January 2007

Covenant on Civil and Political Rights (ICCPR)”.[59] Given that the right is absolute and covers refugees, Ingrid believes that “*the ICCPR does this in the form of a right, which establishes an affirmative responsibility on member states to protect the individual from such ill treatment by legislation and other necessary measures*”. Refoulement is expressly prohibited in Article 3.1 of the “***Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)”***.[60] The underlying peremptory rule is enforced by this clause.[61] National security grounds, however, cannot be used to justify a violation of Article 7.

It is the duty of hosting nations to ascertain that there is voluntary repatriation in dignity and safety to help reintegrate its own people because at the end of the day, every refugee wants to go back to their states of origin. The Humanitarian community and respective government agencies have supported repatriation for millions of refugees by offering protection and logistic support, as established by ***Mollie Gerver*** in the article Refugee Repatriation and Consent.

Jari Pirjola in his paper “Shadows in Paradise – Exploring Non-Refoulement as an Open Concept” expresses that the standard of non-refoulement comprises a conundrum. Countries focused on regarding the standard by entering the Refugee Convention and common freedoms shows, its substance isn't set up in worldwide law. All in all, states have focused on a standard the substance of which is vague. Since no normal definition exists, by and by, public and worldwide bodies have broad forces of watchfulness to offer substance to the terms ' oppression ' , ' torment ' , ' debasing ' or ' remorseless ' treatment.[62] Jari is of the opinion that Non-refoulement is a vague and open notion. Affirmation of the indeterminacy is significant, as open ideas never stay such by and by yet are constantly given with content or

[59] Article 7, UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171
[60] Supra n18
[61] Prosecutor v. Anto Furundzija (Trial Judgement), IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998, available at: https://www.refworld.org/cases,ICTY,40276a8a4.html [accessed 6 October 2021].
[62] Pirjola, Jari. “Shadows in Paradise – Exploring Non-Refoulement as an Open Concept.” International Journal of Refugee Law 19 (2007): 639-660.

deciphered. This methodology requires a further inquiry: how do understandings come to fruition and what sort of variables impacts them?[63]

Jessica Rodger in her research paper ***"Defining the Parameters of the Non-Refoulement Principle"***[64] Therefore, to build up whether the non-refoulement guideline has standard status we should take a glimpse at instances of where states have needed to manage refugee issues, explicitly cases including refoulement. This will likewise feature a portion of the key difficulties which face the guideline of non-refoulement today, both from a refugee and state viewpoint. She further states that the issue of immense magnitudes of refugees spilling out of a nation or nations all at once, for the most part because of war or ethnic purging, is not a new one. For sure it was the significant refugee crisis of WWII which provoked the international community to manage the displaced person issue through the 1951 Refugee Convention.[65]

1.7.3. Literature Gaps

The study acknowledges that there is expansive literature on refugee rights, human rights, anti-terrorism and also the rule of law. However, out of the literature that has been selected and reviewed, it is observable that certain gaps exist that the study will attempt to address. It is noteworthy that literature that exists does not address the concept of counter-terrorism hand in hand with the non-refoulment principle; they further have left out court decisions and other judicial adjudicative bodies in their works. Most available literature conceptualizes counter-terrorism hand in hand with international law, the Non-refoulment principle and human rights. Ingrid Holmes, is closest to achieving the said balance as she acknowledges that there needs to be such a balance, however she does not give recommendations on how this can be done.

Tufyal and Helen express in their writings that the Muslim community is always targeted with strict counterterrorism measures. They do not consider the fact that these targeted Muslims could be displaced persons, particularly victims who suffered because of the

[63] Ibid
[64] Brownlie, Ian. Brownlie's Principles of Public International Law. Oxford :Oxford University Press, 2012.
[65] Jessica Rodger, "Defining the Parameters Of The Non-Refoulement Principle" P4

violated Human Rights due to the said measures and violation of Non-refoulment. Frances and Judith also take the same route of avoiding issues to do with refugee protection and Human rights.

Adinoyi does not address how Counterterrorism measures affect adversely refugees, although he addresses how the said measures mostly violate Human Rights but has left out the *jus cogens* concept of Non-refoulment and instances of how counterterrorism measures can violate it.[66] Since there is a link between those concepts, it is critical to consider counter-terrorism, the non-refoulment principle, international laws, and human rights as a whole for purposes of developing and striking a balance between public interest and national security, as well as the government's conformity to the rule of law, international law provisions on refugee protections and human rights. Gregory Maggs analyses the balance between laws of enforcement and laws of wars while attempting to combat terrorism.[67] He however does not go further in conducting an analysis as to whether achieving such a balance would result to adherence of Human Rights and the Non-refoulment principle.

States practice for refoulment through court decisions based on national security threat has not been explored in the literature that has been review. Bandyopadhyay in his works brings about the issue of state's foreign interest while developing Counterterrorism measures. He however fails to analyse how a state's foreign interest may adversely affect Human Rights as well as refugee protection.

Refugee protection is address by Jari Pirjola as she talks about voluntary repatriation. The gap in her works is that she leaves out how Counterterrorism measures can result to forced repatriation which may result in refoulment. She also claims that Non-refoulment is an open and ambiguous concept[68]but does not demonstrate how Counterterrorism measures may take advantage of this. Jessica Rodgers establishes that Non-refoulment is a standard rule based on the conduct of states towards it. That concept is absolutely instrumental; however the gap

[66] Supra n35
[67] Supra n40
[68] Supra n51

observed is that she does not analyze instances where this standard rule may be derogated from.

The balance between public interest and national security as well as the government's compliance with the international law provisions on human rights and refugee protection may be achieved in future though court decisions of various states on the principle of non-refoulment and counter-terrorism. Kenya through a decision by Justice Mativo in ***"Kenya National Commission on Human Rights & another v Attorney General & 3 others"*** attempts to strike the desired balance. This paper seeks to address the gaps identified through analyzing Counterterrorism measures hand in hand with refugee protection particularly the Non-refoulment principle coupled with judicial decisions on the issues.

1.8. Theoretical Framework

International refugee law and its principles are mostly influenced by natural law theory, human rights school of thought and sociological approaches to law. All these theories are concerned with existence of human beings and their socio-economic and cultural interactions. In this context, the theories influence the existence of refugee camps, the responsibility of the host's nation as well as the livelihood of the refugees within the camps and their interactions with the host community.

1.8.1. Natural Law Theory

This theory is premised on the principle that the law and morality cannot be considered as separate disciplines. Scholars who subscribe to this school of thought include Thomas Aquinas and John Locke. According to Aquinas human beings have the capacity to apprehend those principles managing human conduct which reveal to us how we should live, what things we should esteem, what goods we should seek, and how we should order our lives.[69] Kenya in its endeavor to maintain national security dependent on the Somali refugee circumstance are under obligation to observe human dignity which is premised on natural law

[69] Ginna M. Pennance-Acevedo, St. Thomas Aquinas and John Locke On Natural Law (2017) ISSN 2300–0066

theory. John Locke stated that natural rights include life, liberty and property, where citizens have the right to enjoy human rights including slaves and citizens.[70] Therefore, every host state should respect the natural refugees rights which include upholding of the non-refoulment principle.

1.8.2. Human Rights School of Thought

This school of thought goes hand in hand with the natural law theory. The natural school ascertains that the most common and recognized definition of human rights are those rights one possesses for being a human being.[71] The universality of human rights is built into their very nature. Naturalists argue that human rights exist in the absence of social acknowledgement, despite the fact that recognition is ideal.[72] Refugees have human rights simply because they are humans. States that take in refugees have a responsibility to uphold human rights and preserve refugee rights. In addition, international law requires them to adopt procedures that promote universal human rights as a cornerstone of the efforts to eradicate terrorist operations

1.8.3. Sociological Jurisprudence

Sociological jurisprudence is premised on the interrogation of laws and their effects in a dynamic society. Law is supposed to consider the socio-economic environment of a society. Society is under no obligation to meet the requirements of the laws irrespective of their applicability. Roscoe Pounds a sociological jurisprudence scholar sensitizes on the relevance of the difference between “law in books” and “law in action”.[73] A host state in legislation of refugee laws should consider especially in camps their way of life and their socio-economic environment such that their applicability may be practical. The counterterrorism policies developed in Kenya should be practically applicable.

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[70] Opiyo Josephine Apondi, Discussing New Challenges Facing the Principle of Non Refoulment in the Refugee Law with Particular Reference to Kenya

[71] Dembour, Marie-Benedicte. 2010. “What Are Human Rights? Four Schools of Thought.” Human Rights Quarterly 32 (1): 1–20. doi:10.1353/hrq.0.0130.

[72] ibid

[73] Raymond Walks, Understanding Jurisprudence - An Introduction to Legal Theory, Third Edition, Page 164

1.9. Research Methodology

The proposed research will primarily use mixed research design which will involve the incorporation of doctrinal, non-doctrinal. As for doctrinal research, focus will be on a desk review of the legal framework concerning refugees, counterterrorism and the non-refoulment principle. Non-doctrinal research will focus on social, economic and political aspects of counter-terrorism and the non-refoulment principle. Secondary sources will include literature review from journals and reports from the United Nations, human rights organisations, national security institutions and previous research studies on the topic as well as international and national laws, declarations and judgments.

1.10. Limitations

International refugee law is broad in scope. In order to conduct an extensive research, limited resources such as time and finances would be necessary. Busy schedules of the key informants, sensitivity of the project vis a vis the security of the researcher would pose major challenges. Finally literature on the subject is limited.

1.11. Chapter Breakdown

The following is the chapter breakdown for the study:

Chapter 1: Introduction- Proposal

The following chapter mainly entails introduction to the research paper, and contains the proposal which is a blueprint of the study.

Chapter 2: The principle of non-refoulment and its limitation under international law

The following chapter elaborates and analyzes the global and regional instruments and jurisprudence of international/regional adjudicative bodies on the non-refoulment and its limitation.

Chapter 3: The law and practice of Kenya in respect of the principle of non-refoulment

This chapter involves analysis and discussion of the law, court interpretations, and practice in Kenya with respect to the non-refoulment principle.

Chapter 4: Conclusion and Recommendations

The chapter entails the various recommendations that this research shall propose and make a conclusion based on the observations from the data analysis.

CHAPTER TWO

THE PRINCIPLE OF NON-REFOULMENT AND ITS LIMITATION UNDER INTERNATIONAL LAW

2.0 Introduction

This chapter purpose is to elaborate and analyse the relevant international and regional instruments and jurisprudence of international/regional adjudicative bodies on the non-refoulment and its limitation.

2.1 International Instruments

2.1.1 1948 Universal Declaration of Human Rights [74]

"The United Nations General Assembly"[75] wrote and adopted the ***"Universal Declaration of Human Rights"***[76] declaration in 1948 to achieve a universal standard that would assure to protect the ultimate human rights. It articulated the essential values of freedom and human rights***. "The Universal Declaration of Human Rights, 1948"***[77] appreciates individual rights to seek refuge from subjugation from different states. It requires every state to guarantee refugees "the right to seek and enjoy asylum" without harassment, intimidation or arbitrary

[74] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: https://www.refworld.org/docid/3ae6b3712c.html [accessed 20 October 2021]
[75] UN General Assembly, *Resolution adopted by the General Assembly at its 107th plenary meeting.*, 19 December 1977, A/RES/32/174, available at: https://www.refworld.org/docid/3b00f11d68.html [accessed 20 October 2021]
[76] Supra n63
[77] Ibid

interference.[78] The rights on seeking and receiving asylum from persecutions are provided for in ***"Article 14 of the Universal Declaration of Human Rights"***.[79] Millions of people have received life-saving refugee fortification over the years in auspices of Article 14, which is specifically articulated in "the 1951 Refugee Convention." They've been given the opportunity for reforming their life, and many have returned to their nations since the threat is no more. The ability to seek refuge protection is not unrestricted. [80]

Asylum is not solely awarded to people to prevent prosecutions on "non-political crimes or activities antithetical to the United Nations' aims and ideals," according to Article 14. As a result, war criminals, as well as criminal are ineligible for refuge.[81] The United Nations General Assembly unanimously endorsed the ***"New York Declaration for Refugees and Migrants"*** Document in 2016 to enhance the concept of non-refoulment.[82]First, this was a call for all nations to join and embrace international refugee protection by adopting a Global Compact On Refugees framework, which would result in an equal share of duty, alleviating the burden of one or a few nations doing it alone. In addition, countries that are overwhelmed by the influx of refugees will get financial assistance from other countries.[83]

Second, it called for the establishment of a ***"Global Compact for Safe, Orderly, and Regular Migratory"***[84], which would allow countries to collaborate on solutions for respecting refugee rights, addressing security concerns, and establishing an orderly migration system.[85]Even in countries that adopt the progressive school of thought, there has been a gap in refugee-related

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[78] Art 14, ibid
[79] Supra n63
[80] ibid
[81] ibid
[82] ibid
[83] OHCHR. 2021. Universal Declaration of Human Rights at 70: 30 Articles on 30 Articles- Article 14. [online] Available at: <https://www.ohcr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23923&LangID=E> [Accessed 21 September 2021]
[84] International Legal Materials , Volume 58 , Issue 1 , February 2019 , pp. 160 – 194 DOI: https://doi.org/10.1017/ilm.2019.6
[85] Supra n 65

matters, as there are people who need help and aid from other countries, such as climate refugees, but they are not accommodated because they don't fit "the 1951 Refugee Convention's" definitions of "refugee" or the expanded forms of refugee protection.[86]

2.1.2 The 1951 Convention Relating to the Status of Refugees [87]

"The United Nations Convention relating to the Status of Refugees 1951"[88], is the base for international refugee protections today. The Convention become enforceable in April 22, 1954, and its 1967 Protocol expanded its scopes by removing the geographic and temporal limits hence giving it a universal coverage.

"Article 1(A)(2) of the 1951 Convention", as amended by its ***"1967 Protocol"***, entails universal and main definition of a refugee that relates to the governments stating that *"a refugee is someone who is unable or unwilling to return to their country of origin for the fear of being persecuted because of race, religion, nationality, membership of a particular social group, or political opinion"*.[89] The Convention involves rights-based both and status instruments, and bolstered by a several key principles, the notable of which are non-refoulement, non-discrimination and also the non-penalization.[90] The non-refoulement principle may not have any reservations or derogations due to its level of fundamentality and sensitivity.[91] It provides that *"nobody will evict or return a refugee beyond his or her will, in any way, to a location where the person's life or freedom is threatened"*.[92]

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[86] ibid

[87] UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: https://www.refworld.org/docid/3be01b964.html [accessed 20 October 2021]

[88] ibid

[89] ibid

[90] UN High Commissioner for Refugees (UNHCR), Information Note on Article 1 of the 1951 Convention, 1 March 1995, available at: https://www.refworld.org/docid/3ae6b32c8.html [accessed 20 October 2021]

[91] Art 7, UN General Assembly, Protocol Relating to the Status of Refugees, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, available at: https://www.refworld.org/docid/3ae6b3ae4.html [accessed 20 October 2021]

[92] Supra n79

Specifically, the Convention does not apply to perpetrators of crimes opposed to major non-political crimes, humanity, or acts that are in contrast to the United Nations' goals and objectives.[93]

"Article 2 of the Convention" gives duties to all refugees "to conform to the laws and regulations as well as to measures taken for the maintenance of public order within the country in which he finds himself".[94] Consequently, this puts on a refugee an obligation to adapt to the host country's laws including counter-terrorism measures while adhering to maintenance of public order and prevention of terrorism activities.

Refugees have the option to pick where they want to live, free of movement within the territory of asylum as supported by "Article 26 of the Convention". This places the duty of hosting states to allow refugees move freely in the country state so long as the movement is lawful. Refugees have a duty not to engage in unlawful activities as they exercise their freedom of movement.

A Contracting State "shall not expel a refugee who is lawfully in its territory except on the basis of national security or violation of public order[95] and in accordance with due process of law". Such a decision also conform to international law specifically the "***The Universal Declaration of Human Rights"*** states that *"everyone has the right to a fair and public hearing before an independent and impartial tribunal in the determination of his or her rights and obligations, as well as any criminal charge brought against them*".[96] If serious national security grounds demand it, the refugee has the right to produce evidence to clear himself, as well as to appeal to and be represented by a court.[97] If a refugee turns out to engage in terrorism within the host country, then due process should be adhered to while

[93] Supra n76
[94] ibid
[95] ibid
[96] Supra n93
[97] ibid

considering the option of expulsion.

2.1.2 International Covenant on Civil and Political Rights(ICCPR) [98]

"Article 12 of the Covenant" establishes freedom of movement. It expresses that "everyone lawfully within the territory of a State shall have freedom and choice of residence".[99] This freedom must not jeopardize states security, morals, public health or public order as well as the freedoms and rights for other people, and must be consistent with the Covenant's other rights.[100] Such provisions are also supported by regional Human Rights treaties. ***"Article 13 of the Covenant"*** emphasizes the need for a fair hearing and the importance of adhering to due process while expelling an alien.[101]The covenant fails to mention refugees specifically, but make reference to legal aliens in a country hence its application is to some degree constrained. It is significant in that it determines what move should be made before anybody can be coercively removed.

2.1.3 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa [102]

The term "refugee" is defined in this Convention as "every individual who leave their countries due to threats or oppressions over demographics issue such as race and religion. They can also depart form their nations due to nationality, social or political differences, and can't or, inferable from such dread, is reluctant to benefit himself of that nation's security," or lack nationality while being off the nation of his previous ongoing home because of such

[98] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: https://www.refworld.org/docid/3ae6b3aa0.html [accessed 20 October 2021]
[99] Art 12, ibid
[100] ibid
[101] ibid
[102] Organization of African Unity (OAU), Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention"), 10 September 1969, 1001 U.N.T.S. 45, available at: https://www.refworld.org/docid/3ae6b36018.html [accessed 20 October 2021]

occasions.[103] Further, a refugee can be each individual who, inferable from external hostility, occupation, remote mastery or occasions truly upsetting public order in part of whole of the nationality or birthplace, is constrained to leave his place of ongoing habitation so as to look for asylum in another other than the that of nationality or birth. This Convention brings along another angle for the meaning of the term refugee.[104]

"The 1969 Convention's non-refoulement provision" follows closely article 3(1) of "***the UN Declaration on Territorial Asylum"***.[105] In two crucial ways, this is expansive compared to "***1951 Convention's non-refoulement provision"***; nonetheless, the 1969 Convention does not go as far as many people believe.[106] Because it does not have a national security provision like its universal predecessor, the 1969 Convention expands non-refoulement. However, as numerous scholars have indicated, it fails to make non-refoulement absolute. The application of the 1969 Convention, and hence protection from refoulement, is terminated by articles I(4)(f) and I(4)(g) if "the individual concerned commits a serious non-political crime outside the country of refuge after being admitted as a refugee, or seriously violates the convention's purposes and objectives".[107] On article 1(2), it emphasizes the issue of "external aggression and foreign domination" which are not considered in ***"the 1951 Convention Relating to the Status of Refugees"*** and its ***"1967 protocol"***. Additionally, it highlights that the aggression may affect part or whole of the country.[108] ***"Article 3 of the Convention"*** compels a refugee to respect the laws of the host country especially laws enacted to promote public order. He must also refrain from engaging in any subversive activity against any OAU member state.[109] Although the non-refoulment principle is not directly stated in this convention, it does

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[103] Art 1, ibid
[104] Supra n91
[105] UN General Assembly, Declaration on Territorial Asylum, 14 December 1967, A/RES/2312(XXII), available at: https://www.refworld.org/docid/3b00f05a2c.html [accessed 20 October 2021]
[106] ibid
[107] Marina Sharpe, The 1969 African Refugee Convention: Innovations, Misconceptions, and Omissions (2012) 58:1 McGill LJ 95 https://www.erudit.org/en/journals/mlj/2012-v58-n1-mlj0390/1013387ar/
[108] Supra n 93
[109] ibid

provide for voluntary repatriation and emphasizes that no refugee shall be returned against his choice. [110] It further states that "*no individual will be subjected to measures by a Member State, such as dismissal at the border, return, or expulsion that would compel him to return to or remain in a domain where his life, physical integrity, or freedom would be jeopardized"*.[111] This Convention nonetheless, doesn't provide a basis of expulsion of a refugee and it also does not emphasize the need to adhere to the due process while expelling a refugee, hence providing a loophole for arbitrary arrest and illegal expulsion of refugees.

2.1.4 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [112]

Torture is also prohibited under customary international law, and has been elevated to the status of a peremptory jus cogens or the rule of international law. It contains a restriction on refoulement if there is a risk of torture, as well as any type of compelled return when there is a risk of torture. All countries, including those that have not signed the necessary instruments, are bound by this. This convention expects states to take successful measures to forestall torture and restricts states to move individuals to any nation where there is reason to accept they will be tortured.

The convention further indicates that due process should be followed by a capable power while ousting a displaced person. It gives that the able authorities will consider every single pertinent thought including, the presence in the State worried of a reliable example of gross and mass infringement of human rights.

[110] Art 5, Supra n91
[111] Art 2(3), Supra n 91
[112] UN General Assembly, *Status of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment : resolution / adopted by the General Assembly*, 15 December 1989, A/RES/44/144, available at: https://www.refworld.org/docid/3b00efef7c.html [accessed 20 October 2021]

It is anyway accentuated in the show that no extraordinary conditions at all, regardless of whether a condition of war or a danger of war, inside political unsteadiness or some other open crisis, might be summoned as a justification of torture.[113] An instruction from a higher-ranking officer or a governmental authority cannot be used to justify torture,[114]therefore, senior government officials giving orders should not subject refugees to unlawful expulsion.

2.1.5 African Charter on Human and Peoples Rights [115]

"Article 12 of the charter" provides that *"every person has the freedom of movement and choice of residence provided he abides by the law*".[116] Further, *"every individual has the right to flee and go back to his country or any other country"*. This right is subject to legislative constraints imposed for national security, law and order, public health, or morals considerations. [117]

The freedom of movement should be exercised as per the laws of the state. Threats to national security may limit the freedom of cross border movement. The Charter establishes that *"every individual has the right, when aggrieved, to look for asylum in other states based on laws of those countries and International conventions and may just be expelled by temperance of a decision taken as per the law"*.[118]

2.1.6 UN General Assembly, Declaration on Territorial Asylum[119]

The Declaration provides that no a person seeking asylumshall be rejected at the frontier,

[113] Art2(2), Supra n101
[114] Supra n115
[115] Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: https://www.refworld.org/docid/3ae6b3630.html [accessed 20 October 2021]
[116] ibid
[117] ibid
[118] ibid
[119] Supra n94

expulsion or necessary return to any country where he risks persecution,[120] except for abrogating national security considerations or so as to protect the populace, as on account of a mass inundation of people.

Further if expulsion is justified, it shall think about conceding to the individual concerned, a chance, regardless of whether by method of provisional asylum or something else, of going to another State. This declaration introduces the concept of provisional asylum, or sending a person seeking asylum to another country if he poses a national security threat. States giving asylum will not allow people who have received haven to participate in exercises in opposition to the reasons and standards of the United Nations.[121] A asylum seeker under this declaration is under obligation not to participate in subversive activity, activities against public order or activities that tend to pose a threat to national security.[122]

2.1.7 Migration Policy Framework for Africa and Plan of Action (2018 – 2030)

In the twenty-first century, migration is a serious topic that presents policymakers with social, economic, and political concerns. In response to the issues, the OAU Council of Ministers approved Decision CM/Dec 614 (LXXIV) in July 2001 during the 74th Ordinary Session in Lusaka, Zambia, calling for the creation of a Migration Policy Framework.123

The framework provides for recommendations on dealing with the migration crisis with particular reference to refugees and asylum seekers. It is suggested that Africa create effective and equitable procedures for determining individual refugee status, including providing meaningful access to such procedures for refugees, which should include accessible, gender-responsive, and culturally relevant services and information.[124] It also

[120] Art 3, Ibid
[121] Art 4, Supra n94
[122] ibid
[123] Migration Policy Framework for Africa and Plan of Action (2018 – 2030), pg 16
[124] ibid

recommends that Africa should provide long-term solutions to evictees that offer opportunities for voluntary repatriation, local integration and resettlement.

Finally, African refugees are entitled to the same treatment as refugees from other parts of the world under international law, norms, and standards.[125]

[125] Migration Policy Framework for Africa and Plan of Action (2018 – 2030), pg 16

2.1.8 Commentaries on the "1951 Convention Relating to the Status of Refugees"[126]

The doctrine of non-refoulment is the cornerstone of international refugee protection. It's based on ***"Article 33 of the 1951 Convention"***, which also applies to those that have signed the ***"1967 Protocol"***.[127] Refoulement protection is provided in the form of a video. Article 33 (1) applies to everyone who is a refugee under the 1951 Convention in the sense that they do not come within the scope of any of its barring provisions.[128]The prohibition of refoulment to a risk of persecution in the sense of the international refugee law is relevant for all forms of violent deportation, which consists of deportation, expulsion, extradition, exchange of opportunities or "transfers" and non-admission at the border within the cases defined below. The phrasing of ***"Article 33 (1) of the 1951 Convention"***, which refers to expulsion or return, supports this.[129] It covers not only the return to one's homeland or, in the case of a stateless person, former habitual domicile, but also any other area where an individual has reason to fear threats to his or her life or freedom based on one or more of the grounds outlined in the 1951 Convention, or where he or she may be sent to such a threat. [130] Only in the situations expressly provided for in "Article 33 of the 1951 Convention" are exceptions to the non-refoulement principle permissible.[131]

The ban on refoulement has been interpreted by several courts and international human rights organizations to embrace a wide range of fatal human rights abuses, including *"torture and other cruel, inhuman, or degrading treatment, flagrant denial of the right to a fair trial, risks of violations of the rights to life, integrity, and/or freedom of the person, serious forms of*

[126] Supra n29
[127] art 3-34, Ibid
[128] UN High Commissioner for Refugees (UNHCR), Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, 26 January 2007, available at: https://www.refworld.org/docid/45f17a1a4.html [accessed 21 October 2021]
[129] ibid
[130] Ibid para.7
[131] Ibid para. 10

sexual and gender-based violence, and the death penalty or death row[132]*, female genital mutilation, or prolonged solitary confinement, among others".*[133]

International human rights guidelines give extra protection within this area. Article 3 of the ***"1984 UN Convention against Torture"*** specifies that *"no State Party shall expel, return ("refouler") or extradite someone to some other State in which there are massive grounds for believing that she or he might be in hazard of being subjected to torture".*[134] Similarly, Article 7 of the ICCPR has been construed as prohibiting individuals from being repatriated to countries where they may be tortured or persecuted.[135] In a regional context, the European Court of Human Rights has inferred that Article 3 of the ***"European Convention for the Protection of Human Rights and Fundamental Freedoms"***[136] obliquely prohibits "the return of any individual to an area or border where they are at a substantial risk of ill-treatment in violation of the prohibition on torture or inhuman or degrading treatment or punishment".[137] While ***"Article 33 (2) of the 1951 Convention"*** allows for exceptions to the norm of non-refoulement, international human rights law and the majority of regional refugee agreements establish a blanket prohibition with no exceptions.[138]

[132] Human Rights Committee, Judge v Canada, No. 829/1998, 20 October 2003, para 10.3; ECtHR, Soering v United Kingdom, No. 14038/88, 7 July 1989, para 111

[133] https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf

[134] UN High Commissioner for Refugees (UNHCR), UNHCR Note on the Principle of Non-Refoulement, November 1997, available at: https://www.refworld.org/docid/438c6d972.html [accessed 29 September 2021]

[135] M. Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (1993), Article 7 para. 21.

[136] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, available at: https://www.refworld.org/docid/3ae6b3b04.html [accessed 21 October 2021]

[137] Ibid para 22

[138] Supra n98

2.2 State Practice by Adjudicative Bodies on the Limitations of the Non-Refoulment Principle

Many individuals escape their countries of origin because of political unrest, protracted conflicts, and natural disaster in search for protection and assistance from the international community. This consequently gives states responsibilities to host them.

It is an international law obligation and standard that once a state admits an asylum seeker, they have a duty not to expel them or send them to frontiers that will pose a danger to their lives. However, there are situations that arise where states expel refugees based on threats on national security. "***Article 33 of the 1951 Convention*"**, as amended by its ***"1967 Protocol"***, provides for limitations of the non-refoulment principle, that state security threat can be a basis of expelling a refugee only if the duly prescribe procedure are adhered to.

This paper seeks to analyse different states decisions on limitation of the non-refoulment principle.

2.2.1 N- A- M- v. Michael Mukasey, Attorney General of the United State [139]

The principle inferred from this case was refoulment on the basis a person seeking asylum who was sentenced for a serious crime, posing a future hazard to the country of asylum. A thorough examination of all variables indicating whether the asylum applicant constituted a future threat to the asylum country must be carried out.

The immigration judge determined that Petitioner fulfilled the criterion of a refugee because she had been persecuted in her home country and was entitled to protection from

[139] UN High Commissioner for Refugees (UNHCR), UNHCR intervention before the United States Court of Appeals for the Tenth Circuit in the case of N- A- M- v. Mukasey, Attorney General, 19 June 2008, Case no. 08-9527 & 07-9580, available at: https://www.refworld.org/docid/48622dd72.html [accessed 20 October 2021]

deportation.[140] However, the judge dismissed Petitioner's request for protection, claiming that he had been sentenced for a "particularly heinous crime," posing a national security threat and public order.[141] However, despite the fact that she was found to be in need of refoulement protection, the decision to expel Petitioner without conducting a separate, individualized evaluation of whether she "constitutes a danger to the community" was in violation of Article 33, which forbids *"the return of a refugee to persecution unless it is determined that she poses a future danger to the community in which she resides"*.[142]

It was further held that *"the 1951 Convention is to ensure protection of the life and freedom of refugees, and any limitation to the non-refoulement principle must be interpreted in the most restrictive manner"*. The ordinary language of Article 33(2)'s "danger to the community" exceptions necessitate two separate evaluations. First, the individual requesting refugee status must have been convicted of a "especially heinous crime" by a final judgment. Second, an individual assessment should be done to determine whether the immigrant poses a future "threat to the community."[143]

In this research, the most important question is whether the refugee constitutes a future peril to the community.[144]

2.2.2 Suresh v Canada (Minister of Citizenship and Immigration) [145]

The principle construed in this case is that refoulement should be based on a compromise between the government's and the public's interests in the fight against terrorism or public interest and the fact that the refugee is not being deported to torture.[146] The principle further

[140] ibid
[141] ibid
[142] Art 33, Supra n 87
[143] Supra n143
[144] ibid
[145] Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3, 2002 SCC 1, Canada: Supreme Court, 11 January 2002, available at: https://www.refworld.org/cases,CAN_SC,3c42bdfa0.html [accessed 21 October 2021]
[146] ibid

emphasises that a refugee should be granted a chance to defend himself against the allegations levelled against them and also be given a chance to adduce evidence.

Suresh was a refugee in Canada because his life was at risk in Sri Lanka as a result of his role in the Tamil independence struggle.[147] Because he posed a security danger, his application for permanent residence status was denied, and he was deported. According to the "Canadian Security Intelligence Service (CSIS)", he was a enthusiast and fundraiser for the "Liberation Tigers of Tamil Eelam", a terrorist group in Sri Lanka.[148] Suresh had the opportunity to offer written and documentary evidence to the Minister, but he did not have the option to respond to the immigration officer's memorandum. [149]

The repatriation of a refugee to a nation where torture is a concern denies the refugee of their right to liberty and security of person, according to the Supreme Court.[150] Unless there are valid reasons for withholding information, such as the need to protect public security documents, a person facing deportation to torture under section 53(1)(b) of the Immigration Act must be provided with the documents on which the Minister is basing their decision, according to the court.[151]

Further, he should be given a chance to respond and challenge the information presented by the Minister. Suresh established a prima facie case that he would be tortured if he returned to Sri Lanka, according to the court.[152] As he was denied the procedural impartiality guaranteed by ***"the Canadian Charter of Rights and Freedoms"***[153], the issue must be sent back to the Minister for re-evaluation.[154]

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[147] "A sanctuary for refugees or a haven for terrorists?"
[148] Supra n147
[149] ibid
[150] ibid
[151] Supra n148
[152] ibid
[153] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 91(24).
[154] ibid

2.2.3 Germany - Federal Administrative Court, 22 May 2012, 1 C 8.11

In theory, residence permits should not be provided to foreigners who are likely to be deported. This is not applicable, however, to the granting of a residency permit to recognized refugees.[155]

The Applicant, a Turkish native with Kurdish ancestry, applied for a renewal of his residence status which was declined by the asylum authorities because it was alleged that he was part of since 2004 the "KONGRA-GEL (Kurdistan Workers' Party)", the successor organisation to the banned PKK but the Administrative Court ordered the authorities to keep the Applicant's status as a refugee.

The Applicant's appeal was upheld by the High Administrative Court, which ordered the Respondent to give the Applicant with residency documentation. The Applicant has been identified as a refugee and meets the residency requirements. Residency permits should not be provided to foreign nationals who are about to be deported. This does not apply to acknowledged refugees who are granted a residency permit.

The question of whether a refugee should be denied a residence permit due to his support for a terrorist organization can only be answered once the terrorist organization's activities have been verified.

2.2.4 Mansour Ahani v. Canada[156]

Principally, an alien legally in the domain of a State Party to the International Covenant on Civil and Political Rights[157] might be ousted dependent on a choice arrived at compliant with law and will, aside from where convincing national security reasons in any case require, be

[155] Residence Act (Aufenthaltsgesetz, AufenthG) 2018, Clause 5(4)
[156] Mansour Ahani v. Canada, CCPR/C/80/D/1051/2002, UN Human Rights Committee (HRC), 15 June 2004, available at: https://www.refworld.org/cases,HRC,4162a5a50.html [accessed 21 October 2021]
[157] Supra n98

permitted to present the reasons touching his expulsion, be represented and have his case revised, by a competent authority.[158]

Iranian national Mansour Ahani was detained at the "Hamilton Wentworth Detention Centre" in Hamilton, Ontario, pending the end of legal matter in the ***"Supreme Court of Canada"*** about his deportation. He claims to be a victim of violation by Canada of ***"the International Covenant on Civil and Political Rights'"*** paragraphs 2, 6, 7, 9, 13, and 14.[159] He was detained for being trained as an assassin as opined by the Iranian Ministry of Intelligence and Security hence was seen as a threat to national security hence inadmissible in Canada.
The United Nations Rights Committee determined that article 13 applied to the Minister's risk of harm decision, which resulted in expulsion.[160] The disappointment of the State gathering to provide him with procedural safeguards on the grounds that he had not established a risk of harm abused the commitment in article 13 to allow Mansour to submit reasons for his expulsion in light of the case against him and to have such complete entries investigated by an able position, with a chance to comment on the findings, according to the Committee.[161]
As a result, the Committee finds a violation of Covenant article 13 in connection with Covenant article 7. [162]

2.2.5 Germany – Federal Administrative Court, 24 November 2009, 10 C 24.08[163]

The principle inferred from this case is expulsion of refugees to combat terrorism should make observations as to whether the form of violence committed by the asylum seeker was towards innocent civilians or was as a means of self-defence during combat. In June 2001, a

[158] Art 13, ibid
[159] Supra n162
[160] art 13, Supra n162
[161] ibid
[162] ibid
[163] European Union Law > EN - Qualification Directive, Directive 2004/83/EC of 29 April 2004 > Art 8 > Art 8.1

Russian from Chechnya, made an application for asylum in Germany.

Since he was a member of the Chechen security forces, Russian security forces demolished his home while searching for him and the mother suffered a heart attack as a result of the tragedy. His brother advised him to flee. His application for the refugee status was rejected severally where on final appeal to the High Administrative Court of Hesse on 24 April 2008 he was granted refugee status. As much as he admitted to killing Russian soldiers it was held that the attack was not directed to a civilian population but was part of a combat mission.

2.2.6 Kenya National Commission on Human Rights & another v Attorney General & 3 others [2017] eKLR [164]

The principles emphasized by the decision of justice Mativo as regards expulsion of refugees are as follows; the right to lawful, reasonable and fair administrative action[165], Public participation, ban on torture, corrupting and cruel treatment and the doctrine of ultravires. On May, 6 2016 the Kenyan government issued a directive dissolving the "Department of Refugee Affairs (DRA)" and measures were being put in place to shut down Dadaab and Kakuma refugee camps due to national security threats. The government's decision violated the right to legitimate, reasonable, and fair administrative action because it neglected to consider country of origin information and lacked stakeholder input.[166] The Department of Refugees Affairs is only intended to be disbanded through a legislative process, which must also include public participation; issuing a directive disbanding the abovementioned entity was ultra vires the Minister's powers. Different International legitimate instruments ensuring refugees just as those precluding torture, remorselessness, debasing and barbaric treatment

[164] Kenya National Commission on Human Rights & another v Attorney General & 3 others, Petition No. 227 of 2016, Kenya: High Court, 9 February 2017, available at: https://www.refworld.org/cases,KEN_HC,58a19f244.html [accessed 21 October 2021]

[165] Kenya: The Constitution of Kenya [Kenya], 27 August 2010, available at: https://www.refworld.org/docid/4c8508822.html [accessed 16 October 2021]

[166] Art 47, Ibid

were contradicted by the undermined conclusion of camps and constrained repatriation.

Justice Mativo ruled that the decision by the then minister (Eng) Karanja Kibicho disbanding the ***"Department of Refugee Affairs"*** was ultra vires and in violation of the rule of law. The decree on Somali refugee repatriation was issued by General (RTD) Joseph Nkaissery was discretionary, oppressive and indignifying what's more, henceforth an infringement of Articles 27 and 28 of the constitution. He further ruled that, *"the directive was also a violation of article 2 (5) and 2 (6) of the constitution*[167] *and Kenya's International legal responsibilities under the 1951 UN Convention relating to the status or Refugees and the 1969 Organization of Africa Unity Convention Governing the Specific Aspects of Refugee in Africa".*[168]

2.3 Conclusion

"Article 32 of the 1951 Refugee Convention" generally provides lawful protection to refugees within a State from expulsion such that refoulment is only in exceptional scenarios and after due consideration of various circumstances by a competent authority. An expulsion order shall be paired with authority or confinement if absolutely necessary for grounds of national security or public order, and such care or detention should not be delayed unduly.[169] The decision to expel a refugee should be in accordance with international law and standards, particularly the ***"Universal Declaration of Human Rights"***, which states that everyone has the right to a fair and public hearing before an autonomous and fair court, in which his privileges and commitments are guaranteed, as well as any criminal allegations leveled against him. When a refugee poses a threat to national security, he or she should be allowed

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[167] Art 2(5),(6), Ibid

[168] Supra n87

[169] Executive Committee of the High Commissioner's Programme, Determination of Refugee Status No. 8 (XXVIII) - 1977, 12 October 1977, No. 8 (XXVIII), available at: https://www.refworld.org/docid/3ae68c6e4.html [accessed 21 October 2021]

to present evidence, appeal, and be represented before a competent body.

For the reason for deciding if there are sufficient grounds for refouler, the competent authorities mandated with dealing with refugee crisis should investigate every significant thought including, the presence in the State worried of a reliable example of gross, blatant or mass infringement of human rights. Furthermore, to ensure that the non-refoulement principle is not violated, an extensive review of all circumstances suggestive of whether the refugee constitutes a future danger to the country of asylum must be done.

If there are claims that a refugee supports a terrorist organisation, the organization should be comprehensively scrutinized to verify the activities of the organization. In case a state justifies refouler of a refugee, it should consider granting to the refugee, an opportunity, whether by way of temporary asylum or otherwise, of going to another country.[170]

As regards issues of refouler based on national security, courts must exercise discretion while finding the right middle ground between the government's interest in combating terrorism and the refugee's interest in not being expelled from states or borders where they are possibly going to face torture and other human rights violations. In addition, courts have an obligation to provide the refugee being deported with the documentation that the competent authority is relying on, unless there are good reasons for withholding information, such as the need to protect public security papers.[171]

Finally, the plan to deport refugees should be made following the right to prompt, reasonable, legitimate, and equitable administrative action.[172] The decision should involve the necessary stakeholders as they forward their inputs. Grave decisions such as disbanding an entire Department of Refugees Affairs like in the Kenyan case must be preceded by public participation. It is noteworthy that decisions to expel a refugee should be reached upon by an

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[170] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: https://www.refworld.org/docid/3ae6b3712c.html [accessed 20 October 2021]

[171] Art 10, Ibid

[172] Supra n172

adept authority mandated to deal with such matters. This is because, if an authority acts beyond its mandate then the decision shall be considered ultra vires and shall also be considered to have been reached upon in contravention to the rule of law.

CHAPTER THREE

THE LAW AND PRACTICE OF KENYA IN RESPECT OF THE PRINCIPLE OF NON-REFOULMENT

3.1. Introduction

Refugee concerns in Kenya are significant and cannot be overlooked, given the high number of refugees from many countries. Kenya has ratified the "***1951 UN Refugee Convention***", as well as the "***1967 Protocol***" and the "***1969 OAU Refugee Convention***".[173]It forms part of to a number of other regional and also international human rights treaties relating to refugee protection. Kenya had no national refugee legislation until 2007, when the Refugee Act[174] was enacted. This Chapter will discuss the Kenyan legal framework on the Non-refoulment principle, different court interpretations and practice on the principle, focussing on the threatened closure of Dadaab refugee camp.

Before the Refugee Act 2006 came into force, the non-refoulment principle was not applicable as Kenya had not domesticated the 1951 Refugee Convention. Furthermore, conventions were considered as subservient to the Kenya Constitution; hence adherence to the principle was dependant on the stipulations of the constitution.

The principal source of the Kenyan law on refugees is the "***Refugee Act of 2006***"[175] and the "***Refugees (Reception, Registration and Adjudication) Regulations, 2009***".[176] In addition, it

[173] Supra n16
[174] The Refugees Act, 2006 [Kenya], No. 13 of 2006, 30 December 2006, available at: https://www.refworld.org/docid/467654c52.html [accessed 28 October 2021]
[175] ibid
[176]ibid

is important to recognize other sources of laws affectng refugees including "***the Constitution of Kenya***"[177], Regional and International Conventions and court rulings.

3.2. Kenyan Legal Framework on the Non-refoulment Principle

Refugee law development in Kenya has been characterized more by security concerns rather than protection.As much as the refugee situation has always been seen as transient, it has brought about national security concerns. Hence the refugee law is viewed as more of a mechanism of security. Although Kenya ratified "***the United Nations Convention Relating to the Status of Refugees on May 16, 1966***"[178], in Kenya, there was no such thing as a refugee law until 1967. It was a requirement by the independence constitution to domesticate the said law in order for it to be admissible in Kenya. It was achieved by inserting of Class M entry permits under the Immigration Act of 1967[179]. Despite the presence of the legal description of a refugee but no rights data provided. Non-refoulement, right to work and the freedom of movement were all but non-existent legal provisions. The bill never provided any long-term remedies to the refugee crisis. Until 2006, Kenya lacked a comprehensive legal framework governing refugees rights and status.

"The Refugees Act of 2006", which went into effect in 2007, specifies refugee statues made up of measures for exclusion and cessation[180]. It also explains refugees' and asylum seekers' rights and responsibilities.[181] The act also gives refugees the freedom to travel around and

[177] Kenya: The Constitution of Kenya [Kenya], 27 August 2010, available at: https://www.refworld.org/docid/4c8508822.html [accessed 23 October 2021]
[178] UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: https://www.refworld.org/docid/3be01b964.html [accessed 28 October 2021]
[179]Schedule, Classes of Entry, Immigration Act, 2010
[180] The Refugees Act, 2006 [Kenya], No. 13 of 2006, 30 December 2006, available at: https://www.refworld.org/docid/467654c52.html [accessed 2 November 2021]
[181] ibid

work. In contrast, the act's execution created a barrier to refugee access to this entitlement.[182] As much as the law provided the work and accessing work permits rights, ironically, it restricted the movement of refugees. Those who chose to live and work in cities without permission were subjected to constant harassment and intimidation. Al-Shabab attacks in Kenya escalated. As a result, the Kenyan government decided to block the Kenya-Somalia border in 2007.[183] The authorities responded by enacting harsher camping rules after the attacks continued unabated.

[182] Supra n185

[183] https://www.rckkenya.org/development-of-refugee-law-in-kenya/

3.2.1. The Constitution of Kenya 2010 [184]

The Constitution of Kenya is the supreme law of the land unifying citizens and state organs.[185] Considerably, ***"Article 2 (5) of the Constitution of Kenya 2010"*** provides that "*states that the general rules of international law shall form part of the law of Kenya*".[186] Further, article 2 (6) provides that "*any treaty or convention ratified by Kenya shall form part of the law.[187] Consequently, by virtue of this provision, treaties and conventions ratified by Kenya do not have to be domesticated for them to have the force of law*".[188] Treaties related to human rights and fundamental freedoms, on the other hand, are controversial as to whether they are self-executioning and other constitutional provisions compels the State on legislating international responsibilities as per human rights and fundamental freedoms.[189]Accordingly, customary law constitutes international law that Kenya is obliged to conform to as per its constitution. The non-refoulment doctrine is recognized worldwide as a customary law principle. Kenya has ratified the 1951 Refugee Convention which provides for non-refoulment under article 33 hence it has a duty to implement its provisions within the state hence honouring its international law obligations. When Kenya declared a command to shut down the Dadaab refugee camp and repatriate the refugees, it was a breach of the Kenyan Constitution, International Human Rights Law, and International Law.

While the constitution is crucial in expressing the obligations and rights of Kenyans, refugees, the specific frameworks for asylum-seekers and refugees provide detailed explanation of which freedoms refugees have and how closely Kenya complies to international standards.

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[184] Supra n182
[185] Ibid, Art 2(1)
[186] Ibid
[187] Supra n185
[188] ibid
[189] Ibid, Art 21(4)

3.2.2. Refugee Act, 2006

3.2.2.1 Definition of a Refugee[190]

The Refugees Act was enacted in 2006 but became operational in 2007. It was enacted in order to provide for the steps taken to recognize refugees, management and protect them. The Act defines a refugee under section 3 and further differentiates between "***a statutory refugee and a prima facie refugee***". It provides that, "*a person shall be a statutory refugee if such person*[191] *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*[192]*; or not having a nationality and being outside the country of his former habitual residence, is unable or, owing to a well-founded fear of being persecuted for any of the aforesaid reasons is unwilling, to return to it*".[193]

Subsection 2, emphasises on who a prima facie refugee is. It states that "*a person is a prima facie refugee if he or she is forced to flee his or her country of origin or nationality due to external assault, occupation, foreign dominance, or events significantly disrupting public order in any part or all of his or her country of origin or nationality".*[194]

Besides accepting the 1951 Refugee Convention's universal meaning of a refugee, this definition adds the elements of external aggression within a country, individual occupation, and foreign dominance. As a result, the scope of adherence to the Non-refoulement principle is broadened, because a person seeking asylum cannot be deported from a host nation if the reason for requesting refugee status is covered under ***"section 3(2) of the Refugee Act, 2006".***[195]

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[190] Art 3, Supra n185
[191] Sec 3(1), ibid
[192] ibid
[193] ibid
[194] Sec 3(2), ibid
[195] Supra n201

3.2.2.2 Disqualification from Grant of Refugee Status [196]

The act further gives provision on "***disqualification from grant of refugee status***". It states that "*a person is not a refugee if they have committed a crime against peace, a war crime, or a crime against humanity as defined in any international instrument to which Kenya is a party and which has been drawn up to make provision for such crimes; or they have committed a serious non-political crime outside Kenya prior to arriving in Kenya as a refugee; and has committed a serious non-political crime in Kenya after being admitted as a refugee; has committed acts contrary to the goals and principles of the United Nations or the African Union; or having more than one nationality, has not sought protection from one of the countries in which he or she is a national and has no valid reason, based on a well-founded fear of persecution*".[197] As a result, if it is proven that an applicant violated section 4 of the Refugee Act, they might be ejected from Kenya before being awarded refugee status. Kenya has put in place a circumstance that justifies a deviation from the non-refoulment standard.

3.2.2.3 Non-refoulment Principle

"Section 18 of the Act" provides for "***the principle of non-refoulment***" expressly[198]; however there are sections that do imply the same principle but are not express in their phrasing. "Section 12(1)" states that; "*Notwithstanding the provisions of any other Law, any person who has applied under section 11[199]for recognition of his status as a refugee and every member of his family, may remain in Kenya; until such person has been recognized as a refugee in terms of that section[200]; In the event of the application of such person being rejected, until such person has had an opportunity to exhaust his right of*

[196] Sec 4, ibid
[197] ibid
[198] Sec 18, Supra n202
[199]Sec 11, Supra n202
[200] ibid

appeal[201]*; where such person has appealed and the appeal has been unsuccessful, he shall be allowed reasonable time, not exceeding ninety days, to seek admission to a country of his choice*".[202]

Protection of a person seeking asylum is further provided under Section 12(1) (c) of the Act that "*even when an individual refugee's appeal has been rejected the government is obligated not to immediately repatriate them but rather give the individual ninety days within which to seek admission in a country of their choice*".[203] When it is established under Regulation 47(3) of ***"the Refugees Regulations of 2009"***, an interpretation of the doctrine of non-refoulement is clear that; "*where an order is issued to a refugee under sub-regulation (2), the Minister may allow, upon request from the Commissioner, additional time for the refugee to obtain approval to enter any country he has a right to enter*".[204] According to the law, the individual must be given the choice of a nation they prefer to relocate while the Kenyan government must house them and wait for a time when they are accepted by a third country to relocate and seek shelter.[205]

3.2.2.4 Cessation of Refugee Status

The act provides for circumstances where one can cease to be a refugee. "Section 5 of the Act" states that for "cessation of refugee status". Subsection (a) provides for "*voluntary repatriation*[206] *in safety and dignity which means the voluntary return of refugees to the country of origin*". This forms part of the three long-term remedies for refugees that has typically been highlighted. "***The United Nations High Commissioner for Refugees (UNHCR)"*** advocates voluntary repatriation as the best option for refugees if their return

[201] ibid
[202] ibid
[203] Sec 12, Supra n202
[204] Regulation 47(3), National Legislative Bodies/National Authorities, Kenya: Refugees (Reception, Registration and Adjudication) Regulations, 2009, 27 February 2009, available at: https://www.refworld.org/docid/4a1c0d782.html [accessed 28 October 2021]
[205] Supra n211
[206] Sec 5, Supra n202

home is safe and they can assimilate into their new country.[207] What this means for Kenya is that, in no way should they send a refugee home unless, they choose to do so voluntarily and in dignity and safety; their country should be safe enough for their return. Derogation from this provision would be breaching the customary law principle of non-refoulment and hence would not be in line with Kenya's international law commitments.

As per the act, "*a person ceases to be a refugee if he voluntarily re-acquires his nationality; consensually re-acquires his nationality after losing it; voluntarily acquires the nationality of another country and gets to enjoy the protection of that country; voluntarily re-establishes himself in the nation he left or outside of which he remained owing to fear of persecution; can no longer, due to circumstantial evidence*".[208]

Subsection (c) of the same section provides for "resettlement to a third country as a durable solution"[209]. Most refugees cannot head back home country because of continued conflicts, war and persecutions. Furthermore, majority stay in dangerous conditions and have unique needs that are achievable in the states they seek refuge. In such cases, the UNHCR assists refugees in resettling in a third country.[210] Third-country resettlement is the process of transferring refugees from one asylum nation to another that has the capacity to welcome them and, in the long run, provide them with permanent residence. This ensures the asylum state does not breach the non-refoulment principle by sending the asylum seeker back to their homes.

The provision of section 5 of the Act "*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*".[211]

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[207] ibid
[208] ibid
[209] ibid
[210] https://www.unhcr.org/resettlement.html
[211] Supra n213

"The United Nations High Commissioner for Refugees (UNHCR)" has described non-refoulement as the cornerstone of asylum and international refugee law. "Articles 33 and II (3) of the UN Convention" and "the OAU Convention", respectively, contain these provisions and states, "*the principle prohibits the return of persons to countries or territories where their lives or freedom may be threatened for reasons of race, religion, nationality, political opinion or membership of a particular social group*". The abovementioned provisions are not quite express on the principle of non-refoulment, however, ***"section 18 of the Act"*** expressly states that "*no person shall be denied entry into Kenya, expelled, extradited from Kenya, returned to any other country, or subjected to any other 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 the person may be persecuted on account of race, religion, nationality, membership of a particular social group, or political opinion; or the person's life, physical integrity, or liberty are*".[212] Furthermore, the Commissioner of Refugee Affairs has the authority to nullify a person's refugee status when reasonable explanations to believe one are a threat to a community in the country or overall national security.[213]

Once the Commissioner is convinced that "*there are reasonable grounds for believing that a person who has been recognized as a refugee should not have been so recognized or has ceased to be a refugee he shall revoke such recognition and shall notify the person concerned in writing of the decision together with the reasons*".[214] Evidently, such decisions while derogating from the non-refoulment principle should be reached upon establishment of reasonable grounds that warrant expulsion and once the affected individual is notified of such

[212] Sec18, Supra n 202
[213] Sec 19, ibid
[214]ibid

a decision in writing and with reasons therein. Section 18 of the Act is the exemption of the general rule of non-refoulment.

A refugee who is reasonably suspected of being a threat to ‘s security if found guity of criminal operations by a final decision, constitutes harm to the states community, may not claim non-refoulement. “*The non-refoulement principleis not therefore absolute, national security and public order are allowable exceptions*”[215]but importantly, the application of these exceptions is directed at the person rather than the group. As a result, a state cannot turn away or prohibit access to entire groups of individuals, as Kenya has done on occasion.

3.2.2.5 Gaps Identified in the Implementation of the Refugee Act 2006

In practice, asylum seekers arriving in Kenya report to the UNHCR or the Department of Refugee Affairs in one of four major areas: Nairobi, Dadaab, Kakuma, or Lokichoggio. Other public authorities ('designated officers') would be formed by gazette in addition to the Commissioner for Refugees to whom asylum seekers could notify their presence, according to the Act. As of now, no such appointments have been set up, and asylum seekers are constrained to just recording their presence at the five locations listed above.

Asylum seekers are still detained and prosecuted, notably those without legal documentation and those of Somali descent. Asylum seekers from Somalia are always met with a first and more difficult hurdle: admission. Anyone who has a legitimate fear of persecution should be permitted to seek asylum. An assessment of a person's claim should determine their status as refugees, therefore those seeking asylum should not be barred from entering the country or from entering at any other time until their status is determined. States should have procedures or arrangements in place to identify refugees and asylum seekers.

[215]Goodwin-Gill, G. S. &Mc Adam J. (2007).The Refugee in International Law, pp.234-235. Oxford University Press

Kenya's response to this issue, particularly in relation to Somali refugees, has not always been legal. Kenya has used a variety of measures against the conventions and the law over the years, ranging from simple refoulement to more nuanced activities such as closing borders and heightened enforcement of security. Furthermore, on May 6, 2016, the Kenyan government issued orders stating that, based on the states security threats refugee hosting had to come to an end at some point, that DRA had been disapproved and the government planned to close Kakuma and Dadaab camps.

3.2.3. The Refugee Bill, 2019

The Bill introduced the Secretariat of Refugee Affairs. The Secretariat was to comprise of the office of the "**Commissioner for Refugee Affairs.**"[216]It further set aside a section on part 3 of the Bill on Application for refugee status. It mandated the Secretariat for determining refugee's status as asylum seekers.

The Bill introduced on Section 18 Institution of proceedings for unlawful presence in Kenya.[217] It asserted that, "*despite the provisions of the Kenya Citizenship and Immigration Act, no deliberations shall be brought against any person or member of his or her family for unauthorised access or existence within Kenya if the person has made a bona fide application for refugee recognition and, where suitable, has had an opportunity to exhaust his or her right of appeal; or has become a Kenyan citizen*".[218] Therefore, it brought about the aspect of right to appeal and the fact that their application to be refugee are determined. The Bill was not quite express on the principle of Non-refoulment but it introduced provisions that would enable its adherence. It further emphasized that "*once a person's refugee status is cancelled*

[216] Sec 9, Kenya: The Refugees Bill, 2019 [Kenya], 26 July 2019, available at: https://www.refworld.org/docid/601157cc4.html [accessed 30 October 2021]
[217] Sec 18, ibid
[218] ibid

then such decision would not affect their entire family that whose refugee status had already been determined or those who derived their status from the person".[219]

The UNHCR and other humanitarian and civil society organizations concerned the bill is part of a bigger and more gradual shift toward a leaner and more constrained asylum policy. Given the current climate of public antagonism and distrust towards Somali immigration, passage of the bill further marginalizes refugees from Somalin. President Uhuru Kenyatta vetoed the bill, which would have given five thousand camping refugees the ability to utilize the lands for domestic and commercial operations.

3.3. Kenyan Practice by adjudicative bodies on the Limitations of the Non-refoulment Principle

3.3.1. Background

Somalis in Kenya have lived in a harsh atmosphere for an extended period. Based on a series of terrorist strikes in the final months of 2012, human rights violations became common, notably targeting Somali asylum seekers in Eastleigh, a Nairobi neighborhood mostly populated by Somalis. Arbitrary detention, extortion, harassment, and assault were all perpetrated against them. As a first step toward repatriation, the President's Office ordered for the collection of 18,000 refugees who were to be detained in the Thika football stadium outside Nairobi, and later taken to camps. Throughout 2013, there has been a growing call for Kenya's refugee camps to be closed, Members of Parliament and the Cabinet Secretary for the Interior and National Government, for example, who stated that "all the camps should be closed, and the debate on whether it is appropriate has been passed by time."[220]

The rights of the asylum seekers and also refugees are rapidly being eroded, particularly their freedom of movement, while many refugees and asylum seekers are victims of violated

[219] Sec 21, ibid

[220] UNHCR RefugeesDaily, Lenku now ordersall refugeecampsclosed, 24.11.13, http://www.unhcr.org/cgi-bin/texis/vtx/refdaily?pass=463ef21123&id=5292f28d5

human rights.[221]Insecurity, continued human rights violations, and pathetic living circumstances in Kenya have all played a role in encouraging people's decision to return to Somalia.[222]

Returns is only voluntary, according to UNHCR, if favorable "pull-factors" in the refugees' country are the "overriding element in the refugees' decision to return rather than probable push-factors. Push factors include rights abuses, and when refugees are ‘subjected to pressures and restrictions and confined to closed camps”.[223]

Other adjudicative bodies in Kenya have made various decisions regarding the lack of conformity to Non-refoument principle and non-voluntary repatriation, however, the land mark decision by the High Court of Kenya concerning arbitrary and illegal expulsion of Kenya’s refugees who are somalin’s was the case of “***Kenya National Commission on Human Rights & another v Attorney General & 3 others [2017] eKLR”***.[224]Justice Mativo emphasized that *“the decision made to disband the Department of Refugee Affairs was ultra vires and violates the rule of law”*. The directive issued on the repatriation of the asylum seekers and refugees of Somali origin on Articles 27 and 28 of the constitution were violated because General (RTD) Joseph Nkaissery's actions were arbitrary, discriminatory, and humiliating.[225] It was held that “*the right to a fair administrative action granted by Article 47 of the constitution was denied, violated, and infringed upon when the Government of the*

[221] UN High Commissioner for Refugees (UNHCR), Handbook - Voluntary Repatriation: International Protection, January 1996, available at: https://www.refworld.org/docid/3ae6b3510.html [accessed 30 October 2021]
[222] Supra n233
[223]ibid
[224] Kenya National Commission on Human Rights & another v Attorney General & 3 others, Petition No. 227 of 2016, Kenya: High Court, 9 February 2017, available at:
https://www.refworld.org/cases,KEN_HC,58a19f244.html [accessed 30 October 2021]
[225] Art 27,28 Kenya: The Constitution of Kenya [Kenya], 27 August 2010, available at:
https://www.refworld.org/docid/4c8508822.html [accessed 30 October 2021]

Republic of Kenya decided to close Daadab refugee camp without allowing stakeholders and affected parties an opportunity to make submissions".[226]

3.3.2. Fatuma Ismail & 30 Others v Director of Immigration & another [2014] eKLR [227]

Justice Muya in his revision of this case emphasizes on the principle of recognition of refugee prima facie status, as well as validity of a Refugee Certificate pending the determination of the status by the Department of Refugee Affairs. He further noted that it was not proper case for revision but in acknowledgement of the International norm of non-refoulement, the Court will only interfere with that part of Sentence which ordered repatriation.

This revision was in respect of Kwale Principal Magistrate's Criminal case No. 273 of 2014, Kwale Criminal Case No. 275 of 2014 and Kwale Principal Magistrate's Court Criminal Case No. 277 of 2014 wherein the thirty (30) applicants were charged with "*the offence of unlawfully being present in Kenya contrary to Section 53(i) (j) as read with Section 53(2) of the Kenya Citizenship and Immigration Act*".[228]The orders that were sought were for the setting aside of the order of repatriation and the refund of fines already paid and that the Applicants are handed over to the Department of Refugee Affairs or UNHCR for onward transmission to the Refugee Camps. They pleaded guilty and were fined Ksh. 40,000/= in default six months in prison. It is contended that the learned trial magistrate failed to uphold Sec 3(2) of the Refugee Act which recognizes prima facie Refugee status. There was no evidence that the Applicants had been in Kenya for more than thirty (30) days period which they were supposed to use to formalise their stay in the state. Further it is argued that some of the applicants had applied to the Department of Refugee Affairs for recognition as refugees and had been issued with Refugee certificates hence their repatriation is contrary to the

[226] Supra n236
[227]CRIMINAL REVISION NO. 27 OF 2014[2014] eKLR
[228] Sec 53, No 12 of 2011

requirements of ***"Section 18 of the Refugee Act"*** as well as the settled non-refoulement concept enshrined in International Refugee law.

3.3.3. Ali Ahmed Saleh v Republic [2016] eKLR[229]

Justice Dulu in the appeal put emphasis on the principle of exclusion from receiving refugee status and repatriation to a country where an individual is a refugee rather than his country of origin where he fled because of eminent danger of persecution. He emphasized that because the appellant was already a refugee in Somalia, he could not apply for asylum in Kenya unless he was outside his state of citizenship and unable or unwilling to look for help in Somalia due to "*a well-founded fear of persecution based on race, religion, sex, nationality, membership in a particular social group, or political opinion*".[230] The trial Magistrate by ordering for the appellant be repatriated back to a state where he fled due to persecution violated the refoulement principle, which is also prohibited in section 18 of the Kenyan Refugee Act[231].

The appellant was charged in the Chief Magistrate's Court at Garissa for "*being unlawfully present in Kenya contrary to Section 53(1)(j) as read with section 53(2) of the Kenya Citizenship and Immigration Act*".[232]On 23rd June 2016 at Hagadera market within Garissa County being a Yemeni National was found to be without a valid travel authorization, illegally present in Kenya. He was also charged with a second count of failing to report entry to an Immigration Officer Contrary to Section 59 of ***"the Kenya Citizenship and Immigration Act 2011"***, Regulation 16(1) (a) as read with regulation 16(6) and Regulation 57 of the Kenya Citizenship and Immigration Regulations 2012.

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[229]CRIMINAL APPEAL NO. 69 OF 2016
[230] ibid
[231] Supra n202
[232]Sec 53, Kenya Citizenship and Immigration Act (No. 12 of 2011)

It was clear that the appellant did not have any official visa to enter into Kenya. He was found in the heart of Kenya at Dadaab (Hagadera). He stated that he was coming to Kenya to seek medical attention; however he did not say that he informed anybody in Kenya that he was coming to seek medical attention. He did not say that he so informed the UNHCR in Somalia, who were his hosts.There is no indication that he made any attempt to approach UNHCR in Kenya or at Dadaab Refugee Camp though he was already a refugee in Somalia.

It must be stated here that though the appellant was a refugee in Somalia, he was not a refugee in Kenya and other countries of the world. His refugee status was in Somalia. That was not permission for him to cross into other countries without complying with the relevant laws. It was an offence for him to come into Kenya without a visa. The appellant herein was ordered to be repatriated to Yemen where he claimed in court that he had fled due to insecurity. He also showed through documents that he had acquired Refugee status in Somalia. It was thus wrong for the learned Magistrate to have ordered that he be repatriated to Yemen where his life was under threat. The repatriation order to Yemen violated both international law and Kenyan law.

3.3.4. Refugee Consortium of Kenya & another v Attorney General & 2 others [2015] eKLR [233]

In determining this case, Justice Lenaola considered the principle of vulnerable persons while the Kenyan government conducted internal security operations. Human Rights violations can result to repatriation of refugees. The condition in the host country may be too hostile that the asylum seekers and refugees result to flee back to their countries where in the first place they fled from claiming persecution.

[233] Refugee Consortium of Kenya & another v Attorney General & 2 others, Petition No. 382 of 2014, Kenya: High Court, 18 December 2015, available at: https://www.refworld.org/cases,KEN_HC,56e02bc14.html [accessed 30 October 2021]

In "Petition No.19 & 115 of 2013 Kituo cha Sheria and Others vs Attorney General [2013] eKLR (Kituo case)" [234]Court held that "*refugees fall within the category of vulnerable persons recognized by Article 20(3) of the Constitution since they have been forced to flee their homes as a result of persecution, human rights violations and conflict*".[235] The Court held that "*refugees or those close to them have been victims of violence on the basis of very personal attributes such as ethnicity or religion and that they are vulnerable due to lack of means, support systems of family and friends and by the very fact of being in a foreign land where hostility is never very far*".[236]

The judge also believes the "best interests of the child" to be the most significant principle to adress children's rights. This is a universal standard which has its origins in family law and is a guiding principle in decisions to be made about children. The Kenya constitution under Article 53(2) provides that "*a child's best interests are of paramount important in every matter concerning the child and the Children Act in turn at Section 4(2) provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, Court of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration*".[237]

On March 26, 2014, the Cabinet Secretary of the Ministry of Interior and National Co-Ordination called for press release reminding the public that all refugees residing outside of the permitted refugee camps as outlined in Gazette Notice No.1927 should go back to their assigned camps with immediate impatct. As a result, all refugee registration canters in urban areas have been ordered to close.

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[234] Kituo Cha Sheria and others v. The Attorney General, Kenya: High Court, 26 July 2013, available at: https://www.refworld.org/cases,KEN_HC,51f622294.html [accessed 30 October 2021]
[235] ibid
[236] ibid
[237] Sec 4(2), The Children Act, 2001 [Kenya], No. 8 of 2001, 31 December 2001, available at: https://www.refworld.org/docid/47975f332.html [accessed 30 October 2021]

On or around April 5, 2014, the government initiated "Operation Usalama Watch," an internal security operation conducted by the police near Eastleigh Estate and other localities thought as being "hideouts" for unrecognized immigrants. The purpose of this Operation, as was noted in the Independent Policing Oversight Authority's Report dated 14th July 2014, was to "flush out Al-Shabaab adherents/aliens and search for weapons, improvised explosive devices (IEDs)/explosives and other arms so as to detect disrupt and deter terrorism and other organized activities …"

On or about 4th May 2014, the 2nd Petitioner, along with parents of other minors, were arrested at Antioch Church in Kasarani and detained at Kasarani Police Station for three days. At the time of arrest, most of the parents had left their children at home to attend a Church service. The 2nd Petitioner and the other parents while at the Church were informed that they were going to the police station to have their refugee status documents verified. This was done, but they held back as much they complained to have toddlers who required their care. They were forcibly relocated to Daadab Refugee Camps, leaving the children behind. The aforementioned behaviours are what prompted the current Petition.

3.3.5. Adel Mohammed Abdulkader Al-Dahas V the Commissioner of Police & 2 Others [2003] EKLR [238]

In general, people moving from their country for whatever reason must enter another country and surrender himself to the security and immigration agents of the host state when they enter the other country, without or with the requisite entry documents. As a result, any person who enters Kenya unauthorized, or who enters Kenya without a valid visas, legal permits or pass as specified by the Immigration Act, and who illegally stays in Kenya may not qualify for refugee status. Failure to which, the individual is eligible to repatriation, hence not in violation of the non-refoulment principle.

[238] MISC CIV APPLI 1546 OF 2004[2003] EKLR

The repealed Kenyan Immigration Act, provided that "*the Minister may, by order in writing, direct that any person whose presence in Kenya was, immediately before the making of that order, unlawful under the Act, or in respect of whom a recommendation has been made to him under Section 26 A of the Penal Code*"[239], shall be released from Kenya and indefinitely remain out of the nation or for the term specified in the order.[240] Furthermore, according to "*article 31 of **the 1951 UN Convention on the Status of Refugees**, contracting States shall not impose penalties on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves to the authorities without delay and show good cause for their illegal entry or presence"*.[241]

In this case, the Applicant never arrived in Kenya as an asylum seeker or refugee. He entered Kenya without notifying Kenyan immigration authorities or asking asylum, rather addressing the Interested Party and claiming refugee statuses .

The Applicant went underground between the 13th of December 1999 and the 21st of April 2001, a period of about 678 days, until he was tracked down by Immigration authorities on the 21st of April 2001 at a Madrasa School in Eastleigh, a Nairobi suburb. When the Applicant was apprehended, he had a Passport No. 100604262, which had been issued in Denmark under Najjir Sharbebi Essa, not the Applicant. Further verification by Kenyan officials with the Royal Danish Embassy revealed that the alleged passport had been misplaced in Denmark and the Applicant had false document.

Following investigations by security forces and the Kenyan Police, it was unearthed that the Applicant had travelled to Somalia with 9 other Iraqi nationals for unclear reasons and not

[239] Sec26A [Rev. 2012] Penal Code CAP. 63 P6-1 - ILO
[240] Section 8 (1), the Immigration Act
[241] Art 31, Supra n16

stated in the Applicant's Affidavit, and that the 9 had then got into Kenya unlawfully as individuals.

Following his arrest, the Applicant was charged with possessing a falsified document, being illegally present in Kenya, misidentifying as an alien, and failing to notify the relevant Immigration Office of his admission into Kenya. The Applicant pleaded guilty to all counts and received a sentence of four months in prison or a penalty of Kshs.8,000/=, which he paid.

Conclusion

The Kenyan Refugee Law and the non-refoulement principle are reviewed in this chapter, with a focus on Section 18 of the Refugee Act[242] and its anticipations within the Act and the Refugee Regulations. Moreover, it notes that by virtue of "*article 2 of the Constitution of Kenya 2010*"[243] the international law forms part of Kenyan laws and therefore advised to obey specifically with *"article 33 of the 1951 Refugee Convention"*.[244]

The chapter further considers various decisions of Kenyan judicial bodies on the comformity to the non-refoulment principle. Various principles established by the judges are evident from the discussion of the decisions. They emphasize that Kenya in compliance of the non-refoulment principle, are to adhere to fundamental issues like;

a) Once a person seeking asylum finds his way across the frontiers of a state with or without proper entry documents they should present themselves to the security or immigration proxies of that state.
b) In the unique circumstance that an asylum seekers or refugees have to be repatriated, the government should consider the needs of vulnerable persons. The Constitution of Kenya 2010, provides under article 21(3) that "*all State organs and all public officers*

[242] Supra n229
[243] Art 2, Kenya: The Constitution of Kenya [Kenya], 27 August 2010, available at: https://www.refworld.org/docid/4c8508822.html [accessed 30 October 2021]
[244] Supra n16

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"[245]

c) The principle of recognition of refugee prima facie status[246], as well as validity of a Refugee Certificate pending the determination of the status by the Department of Refugee Affairs

d) Disqualification from grant of refugee status and repatriation to a country where an individual is a refugee rather than his country of origin where he fled because of eminent danger of persecution

e) Expulsion decisions should be based on the right to fast, efficient, reasonable, lawful, and just administrative action. As they submit their inputs, the decision should include all required parties.

[245] Art 21(3), Kenya: The Constitution of Kenya [Kenya], 27 August 2010, available at: https://www.refworld.org/docid/4c8508822.html [accessed 30 October 2021]
[246] Sec 3(2), Supra n201

CHAPTER FOUR

4. CONCLUSION AND RECOMMENDATIONS

4.1. Conclusion

The goal of the study was to establish whether Kenya follow non-refoulement concept and its limitations in providing for national security, given that it is a signatory to several international treaties that do, as well as the condition that it domesticated the principle via *"Section 18 of the Refugee Act"*.[247] The paper also sought to establish whether Kenya through its legal framework and various judicial decisions achieved a balance between compliance with its international commitment of the Non-refoulment norm and maintaining national security through its various security measures.

In order to achieve this purpose, the research began by looking at the various international agreements in which the non-refoulement principleis enshrined. The principle is primarily established in "*The Refugee Convention*"[248], also called "*the Convention Relating to the Status of Refugees*[249]", that was therefore ratified by 1951, as well as the 1967 Protocol that Relates to the Status of Refugees and the "*1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa*"[250], according to the research.

The Paper then looked at the principle's scope of applicability, recognizing that it refers to refugees, asylum seekers, and other people whose statuses are being assessed. The research further went ahead and focussed on exceptions and limitations to the principle falling within two categories which are national safety and security and public order. The exceptions are provided for all established in the international instruments concerning refugee protection and

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[247] Supra n229

[248] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: https://www.refworld.org/docid/3be01b964.html [accessed 30 October 2021]

[249] Ibid

[250] Organization of African Unity (OAU), *Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention")*, 10 September 1969, 1001 U.N.T.S. 45, available at: https://www.refworld.org/docid/3ae6b36018.html [accessed 30 October 2021]

is domesticated in Kenya through the Refugee Act. Whereas the non-refoulement principle has exceptions, it has been founded that Article 33(2) and (3) require that the judgment to expel be made by a duly competent body; in most cases, an extradition order is issued by the Court of Law or the department in charge of for refugee programs.

Furthermore, if an extradition order is issued, the refugee or asylum seeker should be given a fair amount of time to seek admission into a third country, as well as a sufficient amount of time to defend themselves and appeal the decision.[251]The paper has also recognized that in any case a state has not ratified or is not a party to the conventions providing the principles, since the non-refoulement principle has attained the stature of customary international laws and are a peremptory norm of jus cogens application, it has a responsibility to follow it.

Kenya's refugee statute, implemented in 2006, was greatly impacted by the language of ***"Article 33 of the Refugee Convention"***.[252] According to the study paper, Kenya did not have substantive laws on the refugees previous to the enactment of the Act, and any duties to comply with the concept were based on the independence constitution and subject to Kenya's domestication of the Refugee Convention. As much as Kenya domesticated Refugee laws, and its obligation under article 2(5)(6) of its constitution on international law forming part of its laws, it has had a severe challenge in compliance with the Non-refoulment principle. It has attempted to regulate the refugee population by closing the border, attempting to close the Dadaab refugee camp, repatriating urban refugees back to the camps, and amending the law. The activities were found to be in violations of the non-refoulment principle enshrined in the Kenyan Refugee Act and various conventions, according to the investigation Kenya is a party to.

According to the paper, Kenyan law has contributed to forming of the non-refoulement concept by enacting the Refugee Act. Asylum seekers who plan to enter Kenya have the

[251] Art33, Supra n258
[252] ibid

opportunity for claiming non-refoulement protection as provided under Kenyan law under the Refugee Act. Because Article 33 was written with the limited scope of application to individuals deported from a country rather than people who wished to be in it, this is therefore a development of the non-refoulement principle.[253]Kenya's adherence to the non-refoulement principle is assured by the country's commitment to follow international law and the concept's mandatory nature.

The study has answered the primary research issues it set out to investigate. These questions were; what are the limitations of the right against non-refoulment based on international legal standards and what does Kenya's law and practice provide regarding compliance with the set international standards on the non-refoulment principle?

With respect to the limitations of the right against non-refoulment based on international legal standards, the paper has established various international standards and instruments on the non-refoulment principle as well as its limitations, the main guiding provision being article 33 of the Refugee Convention. Moreover, the Refugee Act of Kenya was drafted though majorly facilitated by the ***"Article 33 of the Refugee Convention"***.[254] In Kenya, exceptions to strict adherence to the concept have been developed based on states security, where the nation' security is threatened by an attack or an external aggression on the sovereignty of Kenya while at the same time threatening public order. These are the exceptions established in the document under Kenyan law that allow for departure of the concept. In some circumstances where Kenya has attempted to deviate from the concept of non-refoulement, Kenyan courts have deemed derogations from the standard to break the non-refoulement principle and void under the international system. The security amendment laws, for example, were found by Kenyan courts to be in violations of the non-refoulement principle and hence not forgivable under international law. Further, the courts in Kenya have

[253] Supra n 260
[254] ibid

made effort to establish equilibrium between limitation of the non-refoulment principle based on the states security threat as a ground and its compliance. This paper has established that for the right to non refoulment to be limited based on the public order and states security threat as grounds, a competent body has to investigate the situation and due process has to be followed to reach a decision to expel a refugee hence achieving the aforementioned desired balance.

Fair, legal, and well-informed judgments should be made by the government. Policy decisions should be sensible in order to avoid unnecessary court examination, which could result in them being overturned for operating outside of their authority and abusing their position.

4.2. Recommendations

As established by this paper, Kenya has had challenges complying with the non refoulment principle although courts have tried to find a middle ground between compliance with the principle and its limitations. Consequently, the following are recommendations that the author suggests to ensure compliance of the non-refoulment principle;

1. Because refugees have become a vital component of many economies, they should be viewed as resources rather than a threat to territorial integrity. For example, Somali refugees have made significant contributions to economic growth in Kenyan through the established businesses. Kenya should adhere to the non-refoulement principles and allow the Somali people to stake their investments in the nation due to the predictability of the law.Strict adherence to the principle ensures consistency in the application of the law, which benefits the Kenyan economy by increasing migrant investor confidence.
2. To avoid gaps in receiving and registration of refugees parliament should expedite amendments of the Refugee Act 2006 through the Refugee Bill 2019. This Bill

introduces reception for refugees, control of designated areas and implementation of durable solutions which the Act is not clear about. In this regard, asylum seekers will go through a stricter reception and registration process hence avoiding admission of terrorists and persons likely to disturb public order therefore balancing national security protection and the duty to adhere to the customary international norm of non refoulment.

3. Kenya should adhere to international law's voluntary repatriation norms. Only refugees willing and those who have applied for a chance to return to back to their nations and supported by the tenable legal frameworks for security and protection purposes.
4. Refugee camps should not be closed down as this would result to a negative impact. International relations between the host nation and foreign state where the refugees are fleeing from would be affected negatively. Shutting down of a refugee camp is in contravention with the non-refoulment principle.
5. In this study, more research on Kenya's broader usage of the non-refoulement concept is advocated, with the purpose of discovering whether there could be a new method to implementing the principle of non-refoulement, particularly with regard to national security and public order concerns.

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