

**THE UNIVERSITY OF NAIROBI  
INSTITUTE OF DIPLOMACY AND INTERNATIONAL STUDIES**

**THE KENYAN LAW ON REFUGEES AND ITS COMPLIANCE WITH  
THE PRINCIPLE OF NON REFOULEMENT //**

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**R50/67273/2013**

**A research Project Submitted in Partial Fulfillment for the award of Master  
of Arts Degree  
in International Studies of the Institute of Diplomacy and International  
Studies, University  
of Nairobi**

**August, 2015**

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## DECLARATION


I declare that, this project is my own original work and has not been presented for award of any degree in any University.

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This research project has been submitted for examination with my approval as the University supervisor.

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## **DEDICATION**

I dedicate this work to the development of the principle of non refoulement and protection of refugees in the world over.

## **ACKNOWLEDGMENT**

I owe great acknowledgment to my family members that have had to bear with me during the preparation of this document. Further, it does not escape me that I am deeply indebted to my supervisor Mr. Odimmasi who has been of great assistance to me as I conceptualized and wrote the paper

## **LIST OF LAWS AND CONVENTIONS**

**The Constitution of Kenya**

**The Refugee Act, 2006**

**Refugees (Reception, Registration And Adjudication) Regulations, 2009**

**American Convention on Human Rights, 1969**

**African Charter of Human and Peoples' Rights, 1981**

**Convention Relating to the Status of Refugees, 1951**

**European Convention on Human Rights, 1950**

**Geneva Convention, 1959**

**Hong Kong Bill of Rights Ordinance**

**International Covenant on Civil and Political Rights, 1966**

**Montevideo Treaty on International Penal Law, 1889**

**Protocol Relating to the Status of Refugees, 1967**

**United Nations Convention Against Torture, 1984**

## **LIST OF CASES**

**Adel Mohammed Abdulkader Al-Dahas V The Commissioner Of Police & 2 Others [2003] Eklr**

**Amuur V. France. Case 17/1995/523/609. European Court of Human Rights, June 25, 1996**

**Immigration and Naturalization Service v. Cardoza-Fonseca, 480 U.S. 421, 1987**

**Petition Number 19 of 2013 consolidated with Petition 115 of 2013, Kituo Cha Sheria & 8 others v Attorney General [2013] eKLR**

**Petition No. 628 OF 2014, consolidated Petition No. 630 of 2014 and Petition No. 12 of 2015, Coalition For Reform And Democracy (CORD) & 2 others v Republic of Kenya & Another.**

**Sale v. Haitian Centers Council, Supreme Court Of The United States, 509 U.S. 155 (1993)**

## **LIST OF ABBREVIATIONS**

<b>ACHPR</b>	-	<b>African Charter of Human and Peoples' Rights</b>
<b>CAT</b>	-	<b>International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</b>
<b>CFA</b>	-	<b>Court of Final Appeal</b>
<b>CRSR</b>	-	<b>Convention Relating to the Status of Refugees</b>
<b>ECHR</b>	-	<b>European Court of Human Rights</b>
<b>ECHR50</b>	-	<b>European Convention on Human Rights</b>
<b>HCJ</b>	-	<b>High Court of Justice</b>
<b>HKBORO</b>	-	<b>Hong Kong Bill of Rights Ordinance</b>
<b>HKSAR</b>	-	<b>Hong Kong Special Administrative Region</b>
<b>ICCPR</b>	-	<b>International Covenant on Civil and Political Rights</b>
<b>INA</b>	-	<b>Immigration and Nationality Act</b>
<b>OAU</b>	-	<b>Organisation of African Unity</b>
<b>UNHCR</b>	-	<b>United Nations High Commissioner for Refugees</b>
<b>USA</b>	-	<b>United States of America</b>



## **ABSTRACT**

The Principle of Non Refoulement has long been held as the cornerstone of refugee protection. It has been codified in various international instruments having first been conceptualized and included in the Convention Relating to the Status of Refugees of 1951. The reasoning behind the principle is the fact that refugees or persons seeking asylum shall not be returned to countries where the risk to their lives arose. The fact that the principle is considered to be the cornerstone of refugee protection has caused it to gain the status of a customary international law and more to that, it is now considered a *jus cogens*/ peremptory norm. Due to this status that the principle has attained, it means that under International Law the principle is one that cannot be derogated from. Derogation of the principle is however provided for when the individual that seeks protection of the principle raises a threat that is considered by the host country to amount to a threat against that state's national security.

The research shall establish that the Kenyan law on refugees does comply with the principle of non refoulement despite the fact that various arms of government have failed to fully comply with the principle. It shall also be observed that in complying with the principle the Kenyan law has made an effort to expand the scope of application of the principle. This is because the Kenyan law on refugees has included asylum seekers who seek admission into Kenya as part of the beneficiaries of the principle on non refoulement.

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# 1 CHAPTER 1

## 1.1 INTRODUCTION

This chapter shall provide a brief background to the study. It will also seek to look at various literature that has been provided relating to the principle of non refoulement and identifying the gaps in the literature. The chapter will then provide the theoretical framework that shall inform the research and the methodology of the research which will be adopted by the researcher. It shall conclude by providing a brief chapter outline on how the researcher shall undertake the study.

## 1.2 BACKGROUND TO THE STUDY

The UNHCR( United Nation High Commission on Refugees) in 2009 reported that the number of worldwide refugees stood as at 15.2 million.<sup>1</sup> The refugees are taken up by a host of countries and it is noted that many of them flee to neighbouring countries to find protection. However, others, attracted by a higher standard of living, prefer western countries as destinations.<sup>2</sup> In 2009 the number one refugee hosting country in the western world was Germany, followed closely by the United States, the United Kingdom, France and Canada.<sup>3</sup>

Refugees have been part of Kenya from as long as Kenya has been an independent State, that is from as far back as 1963.<sup>4</sup> The reason for this is pegged on the fact that Kenya plays an

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<sup>1</sup> Bacaian L.E, "*The Protection of refugees and their right to seek asylum in the European Union*", Institut Européen De L'université De Genève Collection Euryopa Vol. 70 - 2011

<sup>2</sup> Ibid

<sup>3</sup> Ibid

<sup>4</sup> Mwalimu C.M, "*Refugees and State Security: Kenya's obligation under International Humanitarian Law and the Impact of the Law on State Security*", [www.academia.edu](http://www.academia.edu), accessed on 31/3/2015

important role as a refugee receiving country, due to its relative political stability and geostrategic position of being surrounded by countries with unstable and repressive regimes.<sup>5</sup>

The fact that refugees have been within the Republic of Kenya has resulted in the government moving a step forward and creating a law for governing refugees' activities. In addition to this, the law provides a guide on how refugees should be handled by the Kenyan government while they continue to be hosted within its borders.

Kenya's substantive law on refugees was enacted in 2006 and is referred to as the Refugee Act, 2006. The purpose of the act is provided for in the long title of the Act, which states that

*'An Act of Parliament to make provision for the recognition, protection and management of refugees and for connected purposes.'*<sup>6</sup>

In as much as there has been a law enacted to deal with issues of refugees within Kenya, the question raised is whether the existence of the law has automatically resulted in compliance by the Kenyan Government to the provisions of the law and international law related to refugees.

It is best to appreciate the fact that the Kenyan law though being enacted vide the Refugee Act in 2006, is well informed by the myriad of international instruments relating to refugees. Over and above being informed by the international instruments Kenya, by virtue of being signatories to the instruments, is bound by those provisions.

However, in spite of the fact that there exists codified law in the form of the Refugee Act 2006 and the binding nature of the international instruments there are instances of Kenya being

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<sup>5</sup> Freudenthaler E, *Refugee Rights In Kenya Between Theory And Practice*, Stichproben. Wiener Zeitschrift Fur Kristische Afrikastudien. No. 23/2012, Vol. 12. 107-133

<sup>6</sup> Long title, Refugee Act, 2006

deemed as not to be complying with various provisions of the international instruments relating to the status of refugees. For instance, having been recently faced with a varied number of terrorist attacks, some of which have included but not limited to the Westgate mall attack of 2013 and the Mandera quarry attacks of 2014, the Kenyan government has taken steps aimed at protecting its citizens through enhanced security measures. These proposed security measures have included acts such as changes to the Refugee Act, under the Security Laws (Amendment) Act 2014, to include a limitation to the number of refugees and asylum seekers that may be admitted into and continue to be remain within the borders of the Republic of Kenya at any given time.<sup>7</sup> The reasoning behind creating such drastic changes to the Refugee Act was pegged on the notion that there was a need to create stringent rules governing security for Kenya and one of the means involved a reduction in the number of the refugees as it was perceived that their presence precipitated the existence of terrorist activities.<sup>8</sup>

Though there have been instances of the government's non compliance there have also been instances where it is evident that the Refugee Act has assisted in protecting the refugees that are hosted. For instance, through the Act there was established a Department of Refugees Affairs which assists in the determination of the status of refugees and asylum seekers and whose primary function is the administration, coordination and management of refugee matters.<sup>9</sup>

The principle of non-refoulement prohibits the expulsion, extradition, deportation, return or otherwise removal of person in any manner whatsoever to a country or territory where he/she

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<sup>7</sup> Section 58, The Security Laws (Amendment) Act, 2014

<sup>8</sup> Petition No. 628 OF 2014, consolidated Petition No. 630 of 2014 and Petition No. 12 of 2015, Coalition For Reform And Democracy (CORD) & 2 others v Republic of Kenya & Another.

<sup>9</sup> Speech by Prof George A.O. Magoha, Vice- Chancellor, University of Nairobi, during a forum on Asylum space in Kenya: Where we are and Where we are heading, at University of Nairobi Multi Purpose Hall 8-4-4 Building. June 18, 2015

would face a real risk of persecution or serious harm.<sup>10</sup> This principle is one that has been set out in various international instruments on refugees and it is now becoming a norm that is considered as *Jus cogens*.<sup>11</sup>

It would follow that the principle non refoulement being a peremptory norm and one that states are expected to comply with, it follows therefore, that Kenya, being a contracting party to the Convention that established the principle and further, being a signatory to international instruments relating to refugees, would comply with this fundamental norm. However, this is not the case. Kenya has in many instances failed to comply with this principle through various acts such as border closure, this act prevents the refugees from gaining access to Kenya and they are thus exposed to the risk and harm of persecution. A second act of non compliance with this fundamental provision is where Kenya introduced the provision limiting the number of refugees that can be within the borders of Kenya to 150,000 at any given time, unless under special circumstances. This provision, now nullified by a decision of the High Court of Kenya for being inconsistent with the international instruments that Kenya is signatory to, went against the principle of non- refoulement as it would have meant that the existing refugees would have had to be repatriated to comply with this requirement of the law.

Compliance with the principle has been facilitated by the Kenyan Courts who have always been quick to rectify a situation where the state has acted in contravention of the principle. A case in point is where the Court in *CORDE & 2 OTHERS v Republic of Kenya & Another* held that the provisions of the Security Laws (Amendment) Act, 2014 that contravened the principle of non-refoulement were a nullity and went ahead to nullify the same.

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<sup>10</sup> Ibid

<sup>11</sup> Farmer A, *Non-Refoulement And Jus Cogens: Limiting Anti-Terror Measures That Threaten Refugee Protection*, Georgetown Immigration Law Journal, 2009, Vol23:1



It is therefore evident from the conduct of the various arms of government that the Kenya has had instances where it has complied with the principle and other instances where it has failed to comply with the principle of non-refoulement.

### **1.3 STATEMENT OF THE PROBLEM**

Kenya is a signatory to various international and regional instruments that govern the refugees. In addition, it has also regulated refugee affairs by enacting the Refugee Act. It would be expected that due to the existence of the various law and treaties that govern the issues relating to refugees then Kenya would be complying with laws legislated and treaty obligation. However, this is not always the case. The State has at times failed to comply with its treaty obligations and national legislation on matters relating to the principle of non-refoulement.

This paper shall therefore seek to analyse the laws relating to refugees in Kenya with an aim of investigating the instances that Kenya has complied and failed to comply with the principle of non-refoulement. Further, the paper will further investigate the reasoning that has been advanced for complying or not complying with the principle of non-refoulement. The paper will also look into the role international law has played in guiding Kenya's compliance with the principle of non-refoulement.

The Paper will offer a comparative analysis of other states compliance with the principle of non-refoulment with an aim of establishing whether the reasons for compliance and non compliance by Kenya are valid and further whether there are exceptions to complying with the principle that are excusable by the international community.

It is the hope of this study that once analysis of the current laws on refugees vis a vis other countries' experience on application of the principle, the Kenyan government will be best placed

to comply with the principle and further in the instance that it does not comply valid and justifiable reasons can be provided that do not put the Kenyan government at crossroads with its international obligation to comply.

#### **1.4 RESEARCH OBJECTIVES**

1. To analyze the development and the current status of the principle of non refoulement
2. To analyze the Kenyan law on refugees and its compliance and non compliance with the principle of non refoulement
3. Analysis of other states compliance and non compliance with the principle of non refoulement

#### **1.5 RESEARCH QUESTIONS**

1. Whether there exist exceptions to strict compliance with the principle of non refoulement
2. Does the Kenyan law on Refugees comply with the principle of non refoulement and what obligations does Kenya have to ensure compliance with the principle
3. When does Kenya derogate from the principle of non-refoulement and whether such derogation can be excusable in the international system.

#### **1.6 JUSTIFICATION OF THE STUDY**

This study is crucial as it will identify whether or not the Kenyan law relating to refugees complies with international instruments relating to refugees and more specifically with the principle of non-refoulement. It will offer an opportunity to explore the means by which Kenya can use excusable and justifiable exemptions to complying with the principle without drawing sharp criticism from the international community.

The paper will also analyze the application of the principle in Kenya and whether Kenyan Law and jurisprudence on the principle of non-refoulement can contribute to academia and allow for research on new concepts that may have not been addressed. Therefore, the paper will introduce new concepts that will be beneficial to scholars and allow for further development of the principle of non refoulement based on the current application of the principle.

## 1.7 LITERATURE REVIEW

Etymologically, the word *refoulement* comes from the French word “*refouler*” (*return*), meaning “*retourner vers l’endroit d’où l’on était parti*” or forcing a person to return to the place where he had left from.<sup>12</sup>

The principle of non-refoulment is the doctrine that is central to refugee protection and its basic premise is prohibiting the return of an individual to a country in which he or she may be persecuted.<sup>13</sup> This definition has been derived from the wording of the refugee convention which states;-

*“No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”<sup>14</sup>*

It is appreciated that the principle has been part of international law and the relation between states for a long period of time as it is evident that under the League of Nations way back in 1933, the League adopted the convention relating to the international status of refugees, which

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<sup>12</sup> See note 1

<sup>13</sup> Ibid

<sup>14</sup> Article 33 (1), The Refugee Convention, 1951

convention made explicit reference to non refoulment.<sup>15</sup> The convention under Article 3 provided that;

*“Each of the Contracting Parties undertakes not to remove or keep from its territory by application of police measures, such as expulsions or non-admittance at the frontier (refoulement) refugees who have been authorised to reside there regularly, unless the said measures are dictated by reasons of national security or public order.”<sup>16</sup>*

From the wording of the Article 33 of the Refugee convention of 1951 it is evident that it is the state that has responsibility not to refoul any person and such responsibility makes the host country liable for any acts that may occur to the refouled individual in the event that they were to be expelled and put in harms way. The same approach to state responsibility is also seen under the convention adopted by the League of nation. This position on state responsibility has also been noted by *Livia Elena Bacaian* who states ;

*“Refugee law imposes a clear and firm obligation on States: under the principle of non-refoulement no refugee should be returned to any country where he or she is likely to face persecution. This is the cornerstone of the regime of international protection of refugees”<sup>17</sup>*

Due to the continued use of the principle and its wide applicability the principle of non-refoulment has begun to be appreciated as a peremptory norm (a norm that is widely accepted and should not be deviated from). This means that the principle of non-refoulment has been followed to the extent that it is now believed to be synonymous to customary international law. This acceptance of the principle as a *jus cogens* norm was highlighted in 1984, through the

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<sup>15</sup> Ibid

<sup>16</sup> See note I

<sup>17</sup> Ibid

Cartagena Declaration, when the Central American states, Panama, while in Mexico labeled the principle of non-refoulement as a cornerstone of the international protection of refugees.<sup>18</sup> They further stated that this principle is imperative in regard to refugees and in the present state of international law should be acknowledged as *jus cogens*.<sup>19</sup>

### 1.7.1 Laws governing the principle

The principle of non-refoulment has been codified in many texts in the world over. The texts include the international conventions and national legislations of the various individual states. The first law that we can identify that specifically deals with the Convention Relating to the Status of Refugees of 1951, which under Article 33(1) provides for non refoulment and goes ahead under Article 33(2) to provide for exceptions that may allow for refoulment to be undertaken by a host country. Amongst the regional instruments, it is noted that the Convention Governing the Specific Aspects of Refugee problems in Africa under Article 2 provides for terms that are a derivative and almost similar to those provided for by the Convention Relating to the Status of Refugees.<sup>20</sup> In addition to that convention, the African Charter on Human and People rights recognizes, under Article 12(3) the right when persecuted to seek and obtain asylum in other countries.<sup>21</sup> Form the wording of the charter it is evident that the principle of non-refoulment need not be specifically worded but can be inferred by the intention of the text. This is because, the article does not state that a party may not be refouled but rather provides that an individual fleeing persecution may seek asylum in another state when faced by persecution. The inference here is that, the individual fleeing persecution shall not be refouled.

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<sup>18</sup> Ibid

<sup>19</sup> See note 7 pg 7

<sup>20</sup> Goodwin – Gill G.S., the 1967 Declaration on territorial Asylum, United Nations Audiovisual Library of International Law, 2012

<sup>21</sup> Ibid

The 1969 American convention on Human Rights likewise recognizes and upholds the principle of non-refoulment Under Article 22 paragraph 7 and 8 it, the American Convention on Human Rights, recognizes the right of the individual to seek and be granted asylum in a foreign territory and not be returned to a country regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status or political opinions.<sup>22</sup>

In Europe the Principle was reflected in the decisions and recommendations of the Council of Europe Parliamentary Assembly and the Committee of Ministers.<sup>23</sup> The European Union's Charter of Fundamental Rights provides under Article 18 and 19 that the right of asylum is guaranteed and further, that no individual may be removed to a state where he or she faces a serious risk of the death penalty, torture or other inhuman or degrading treatment or punishment.<sup>24</sup>

Other instruments that provide for the principle include; The 1984 Convention Against Torture under article 3, The Convention for protection of All Persons from Enforced Disappearance under Article 16, Articles 6 and 7 of the 1966 International Covenant on Civil and Political Rights, the 1984 Cartagena Declaration on Refugees.<sup>25</sup>

### 1.7.2 Non Refoulment as a *Jus Cogens* norm

*Jus cogens* is a latin word. It is defined as a mandatory norm of general international law from which no two or more nations may exempt themselves or release one another.<sup>26</sup> From the

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<sup>22</sup> See note 19

<sup>23</sup> Ibid

<sup>24</sup> Ibid

<sup>25</sup> Ibid

<sup>26</sup> Garner B.A., *Black's Law Dictionary*, St Paul, Minnesota, 7<sup>th</sup> Edition, 1999

definition, it is identified that the norm is one that is applicable under international law. Further, it is one that states cannot by their conduct or through other actions purport not to comply with. This means that they are norms that are non derogable. A *jus cogens* norm is also referred to as a peremptory norm.

The first attempt at affirming the peremptory nature of the principle of non refoulement was by the UNHCR Executive Committee.<sup>27</sup> The committee, discussing the UNHCR advisory opinion on the extraterritorial application of the non refoulement obligation under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, in Conclusion No. 25 (XXXIII) of 1982 stated that;

*"In UNHCR's experience, states have overwhelmingly indicated that they accept the principle of non- refoulement as binding as demonstrated, inter alia, in numerous instances where States have responded to UNHCR's representations by providing explanations or justifications of cases of actual or intended refoulement, thus implicitly confirming their acceptance of the principle."*<sup>28</sup>

This statement exposed and laid the foundation of having the principle of non refoulement being viewed as a principle is *jus cogens*. Subsequently, in 1989 the Executive Committee did invite states to avoid actions that resulted in refoulement situations because the actions would be deemed as contrary to fundamental prohibitions against these practices.<sup>29</sup> In 1996 the principle was reaffirmed and elevated to the level of a peremptory norm when the Executive Committee in Conclusion No. 79(XLVII) 1996 stated;

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<sup>27</sup> Trevisanut S. ' *The Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection*', Max Planck Yearbook of United Nations Law, Volume 12,2008, pg 205-246

<sup>28</sup> Ibid

<sup>29</sup> Ibid

*“Distressed at the widespread violations of the principle of non refoulement and of the rights of refugees, in some cases resulting in loss of refugee lives, and seriously disturbed at reports indicating that large numbers of refugees and asylum-seekers have been refouled and expelled in highly dangerous situations; recalls that the principle of non-refoulement is not subject to derogation”.*<sup>30</sup>

Non refoulement as a *jus cogens* norm enforces observance of the basic human rights that underlie refugee protection, because it fundamentally prevents refugees from being returned to situations where they would face violations of those rights.<sup>31</sup> From this we get an understanding as to why it is important to consider non refoulement as peremptory or *jus cogens* norm. The reasoning behind it is an appreciation that refugees, people seeking asylum and those that have not had their status identified are a vulnerable group of persons who deserve international protection. The fact that it is impossible to have an international police to ensure that states comply with international law, means that it is important to have a set international principles that states cannot derogate from. This ensures that states will at all times accord the vulnerable group of persons with protection at all times as it is an internationally accepted norm that they so act.

The arguments that support non refoulement as a principle of *jus cogens* application take the view that non refoulement meets both the requirements of a *jus cogens* norm, in that it is accepted by the international community of states as a whole as a norm from which no derogation is permitted.<sup>32</sup> Acceptance according to the proponents is seen in the international

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<sup>30</sup> See note 23

<sup>31</sup> See note 11

<sup>32</sup> Ibid



community when the norm is viewed as one which is part of customary international law.<sup>33</sup> In support of this proposition the practice in Latin America such as the Cartagena Declaration, the work done by scholars and further conclusions arrived to by the Executive Committee point to the fact that there is general consensus of states.<sup>34</sup> Orakhelashvili supports the proposition that the principle is a peremptory norm. He argues that the peremptory character of the norm is reinforced by its inseparable link with the observance of basic human rights such as the right to life, freedom from torture, and non discrimination.<sup>35</sup>

Those that are of a contrary opinion, such as Bruin and Wouters, argue that the major practical problem remains the burden of proof to be able to actually characterize the obligation of non refoulement as a peremptory norm of general international law and to claim this in a court of law. Others argue that state practice does not yet support full acceptance of non refoulement as *jus cogens*.<sup>36</sup> The arguments by these authors are that state practice in the context of terrorism undermines the notion that non refoulement has acquired the status of *jus cogens* norm.<sup>37</sup> This is due to the fact that states when they exercise their right to protect their citizens in the event of terrorist attacks and threats of terrorist attacks will in most instances either enact laws, or undertake certain actions that will undermine the principle of non refoulement. Taking their cue from these actions, the arguments against the norm as being peremptory are based on the opinion that state practice has been inconsistent. The inconsistency is based on the fact that states will do acts that undermine the principle of non refoulement. The argument therefore is, lack of consistency in state practice precludes the principle from enjoying the status of *jus cogens* peremptory norm.

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<sup>33</sup> Ibid

<sup>34</sup> See note 11

<sup>35</sup> Ibid

<sup>36</sup> Ibid

<sup>37</sup> Ibid

### 1.7.3 Exceptions to the principle of non-refoulement

Despite the fact that the principle of non refoulement has been accepted as a binding principle that should not be derogated from there have been many instances where it has been disregarded by states and refugees have been refouled. There are two distinct areas in which the law on non refoulement of refugees has been derogated. The first area relates to counter-terrorism efforts post 11 September and the handling of national security cases involving persons alleged to be international terrorists.<sup>38</sup> The second area relates to more diffuse concerns unrelated to national security, brought about by the general hysteria concerning the perceived high numbers of asylum seekers in the United Kingdom and the tactics employment by the Government to reduce these levels as quickly as possible.<sup>39</sup>

From the observations that are made above the question then that follows is, whether there are exceptions to the principle of non- refoulment? The answer to this is in the affirmative. It is observed that national security and public order have long been recognized as potential justification for derogation.<sup>40</sup> The Refugee Convention itself provides for instances when the principle may be avoided. Such an instance is seen in the convention where it is stated;

*The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or*

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<sup>38</sup> Non- Refoulement Under Threat, proceedings of a Seminar held Jointly by The Redress Trust (REDRESS) and The Immigration Law Practitioners' Association(ILPA), 16 May, 2006, Matrix Chambers, London.

<sup>39</sup> Ibid pg 4

<sup>40</sup> Goodwin-Gill Guy S. and McAdam J., *The Refugee in International Law*, New York, Oxford University Press, 3<sup>rd</sup> Edition, 2011 pg 234-pg 235

*who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.*<sup>41</sup>

It is evident from the text that a receiving country may refoul when there is a present danger that the individual seeking asylum or refugee status will pose a security threat. Further, the exception allows for derogation in a situation in where the refugee has been convicted of an offence and a final judgment has been entered. The standard set is not that of an ordinary offence but it needs to be one that is serious in nature as to cause the receiving state to view the individual as posing a threat to its security.

Of importance to note is that, the exceptions to non-refoulement are framed in terms of the individual and whether he or she may be considered a security risk is necessarily left to the judgment of the State authorities.<sup>42</sup>

#### **1.7.4 Measures that don't amount to refoulement**

It is possible for states to deny admission in ways that do not amount to breach of the principle. For example, stoways and refugees rescued at sea may be refused entry; refugee boats may be towed back out to sea and advised to sail on; and asylum applicants may be sent back to transit or safe third countries.<sup>43</sup> Another means by which states have adopted and which does not amount to refoulement is where state authorities may induce expulsion through various forms of threat and coercion.<sup>44</sup> One such example lies in the United States of America ( USA) where a court found that a substantial number of Salvadoran asylum seekers were signing 'voluntary

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<sup>41</sup> Article 33(2), Refugee Convention, 1951

<sup>42</sup> See note 21 pg 235

<sup>43</sup> See note 1 pg 268

<sup>44</sup> Ibid

departure' forms under coercion, including threats of detention, deportation, relocation to a remote place, and communication of personal details to their government.<sup>45</sup>

### 1.7.5 The Kenyan Case

It is appreciated that Kenya has had refugees for as long as it has been an independent state.<sup>46</sup> However, legislation relating to the status of refugees and their consequent treatment while in Kenya was only enacted in 2006 after sustained advocacy from UNHCR (United Nations High Commission on Refugees) and civil organizations.<sup>47</sup> The Kenyan government when dealing with refugees has adopted an open door policy approach, this means that the government has allowed for the free flow of refugees in the country and in addition to this, the refugees are then awarded full socio economic rights.<sup>48</sup>

On the principle of non return/non refoulement of refugees the Kenya Refugee Act under Section 18 provides that:-

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

*(a) The person may be subject to persecution on account of race, religion, nationality, membership of a particular social group or political opinion;*

*or*

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<sup>45</sup> See note 4

<sup>46</sup> Ibid

<sup>47</sup> Ibid

<sup>48</sup> Ibid

*(b) The person's life, physical integrity or liberty would be threatened on account of external aggression, occupation, foreign domination or events seriously disturbing public order in part or the whole of that country."*

This means that when making the law, the drafters had put into consideration the requirement by both international custom and convention's requirement not to refoul any person that comes into the country whether legally or illegally. The question that is then raised is, whether or not Kenya complies with the principle of non refoulement taking into consideration that it has enacted the Refugee Act, 2006 and in addition to this it is a signatory to International Conventions that advocate for the principle. The answer to this lies in looking at how various arms of government have dealt with the issue of non-refoulement when it arises.

In *Kituo Cha Sheria & others v Attorney General [2013] eKLR*, which is one amongst many decisions in which the Kenyan judiciary has been called upon to make a determination as to whether certain acts by executive arm of the government can be justified or are in violation of the principle, in this case the court held that a government directive directing that urban refugees be relocated to refugee camps was an act that amounted to indirect refoulement of refugees. The court in its decision noted that such a policy does not in itself violate the principle of non-refoulement but it may have an unintended consequence of violating the principle because it leaves the refugee or asylum seeker with options that may lead to their persecution.

In *CORD & 2 Others v Republic of Kenya & Another*<sup>49</sup> the court was tasked with the duty of making a determination as to whether section of the Security Laws(Amendment) Act 2014, which Act was an enactment of the national assembly, was in tandem with the principle of non-

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<sup>49</sup> See note 8

refoulement. The court in arriving at its decision noted that an attempt at limiting the number of refugees that are present in Kenya at any one time to 150,000 was in breach of the principle non refoulement.<sup>50</sup> For that reason the offending section of the Act was determined as being a nullity and was consequently nullified.

When writing their respective judgments, it is worth noting that the judges decisions were informed by the national legislation on refugees that has been enacted. Further, the judges were cognizant of the fact that Kenya is a signatory to various international conventions and their protocols and for that reason Kenya has an obligation to comply with contents of these instruments.

On 11<sup>th</sup> April, 2015 Kenya's Deputy President Hon. William Ruto stated that the UNHCR had three months within which to close Dadaab and make alternative arrangements for its residents otherwise, Kenya would relocate the refugees themselves.<sup>51</sup> If the government was to make good the threat of relocating the refugees this would be tantamount to refouling refugees which would be going against the principle of non refoulement. This is due to the fact that Kenya cannot guarantee that wherever the refugees will be relocated to, they are not likely to suffer persecution.

In addition to threatening to relocate refugees from the Dadaab refugee camp if the camp is not closed within 3 months, the 3 months was to run from 11<sup>th</sup> April, 2015, the government in March 2015 declared that it was going to build a wall along the border it shares with Somalia.<sup>52</sup> The reasoning behind building the wall was highlighted by the Cabinet Secretary Internal Security, Major General (Rtd) Joseph Nkaiserry, He is quoted as stating;

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<sup>50</sup>See note 8

<sup>51</sup>11<sup>th</sup> April, 2015 issue nation online newspaper, [www.nation.co.ke](http://www.nation.co.ke) accessed on 15<sup>th</sup> April , 2015

<sup>52</sup> Ibid

*“Mandera and Bulahawa are almost merged and you cannot tell which is which. Now we want to put up a wall a border point one and close the border. That will reduce the porous border entries into our country.”<sup>53</sup>*

The main purpose for building the wall, as seen from his statement, was closing the border. This will definitely mean that asylum seekers and refugees cannot come into Kenya to seek protection. Therefore, limiting the entry into the country of displaced persons, more specifically refugees, would be an act that goes against the principle of non-refoulement.

From the above observation of the various instances Kenya, through its various arms of government, has had to deal with the principle of non-refoulement, it is evident that there are certain acts and measures undertaken by either the executive or legislative arms that are in complete violation of the principle. However, the judicial arm of the Kenyan government has helped in giving guidance on the application of the principle on non-refoulement and ensuring compliance of the same. The Kenyan judiciary in making decisions relating to the principle of non-refoulement has come up with the concept of indirect refoulement. By coming up with the concept, it shows that the Kenyan judicial system is assisting in the development of the principle by looking at ways in which refoulement may occur and in the process guide the protecting of this fundamental principle of refugee law.

## **1.8 GAPS IN THE RESEARCH**

What emerges from the literature is the fact that the principle of non refoulement has been discussed as applying to circumstances where a refugee or an asylum seeker is being forced out of a country. However, the writer opines that a definition of the principle of non refoulement

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<sup>53</sup> 24<sup>th</sup> June, 2015, issue of the business daily online newspaper, [www.businessdailyafrica.com](http://www.businessdailyafrica.com) accessed on 15<sup>th</sup> April, 2015

should in addition to having a definition where persons are removed from a country include a definition where individuals are refused entry into a country.

Whereas most of the literature talks of a definition of non refoulement to include the non return of persons, this study will seek to establish how the scope of application of the principle can be extended to include a person wishing to gain entry into a country, more specifically whether or not such an individual is to be a beneficiary of the principle of non refoulement as they await entry into a country.

## **1.9 THEORETICAL FRAMEWORK**

This paper shall be guided in its writing by more than one theory of international relation, the reason for this is the fact that the paper is based on principles of international law. The principles of international law are informed by the different theories of international relations depending on the situation that the actors in the international arena are faced with. To allow for a chance to view the interplay with the various theories of international relations the writer shall look at the presumptions of the main theories of International relations. The main theories of international relations according to this paper include Realism, Institutionalism and liberalist.

### **1.9.1 Realism**

The realist take the view that the international system is defined by anarchy, that is in the international system there is lack of a central authority.<sup>54</sup> This means that states are sovereign and thus autonomous of each other with no inherent structure. The states when in an anarchical

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<sup>54</sup> Slaughter A, *International Relations Principle Theories*, Max Plank Encyclopedia of Public International Law, Oxford University Press, 2011.



nature are therefore bound only by forcible coercion or their own consent.<sup>55</sup> The realist go further to argue that in the state of anarchy state power is the only variable of interest because it is only through power that states defend themselves and hope to survive.<sup>56</sup> The power referred to in realism can either be military, economic or diplomatic.<sup>57</sup> This power according to the realist is of no consequence unless the power can be used to coerce others and bend their will to act as you wish. Realism therefore, emphasizes the distribution of coercive material capacity as the determinant of international politics.<sup>58</sup>

For the realist there are four main presumptions. These include; First, survival is the principle goal of every state.<sup>59</sup> For states therefore, foreign invasion and occupation are the pressing threats that any state faces.<sup>60</sup> For this reason, anarchy in the international system necessitates that states have sufficient power to defend themselves and advance their material interests necessary for survival.<sup>61</sup> Second, Realist put forth the presumption that states are rational actors.<sup>62</sup> This to realists means; states faced with the fact that survival is their main goal, states will act as best as they can to ensure that they survive. Third, realists argue that the world is uncertain and dangerous.<sup>63</sup> They say so because it is their presumption that all states possess some military capacity and no states knows what its neighbors intend precisely.<sup>64</sup> Fourth, their final presumption is that in such a world it is the great powers, that is states with most economic clout and especially those that possess military might, that are decisive.<sup>65</sup> For the realist therefore,

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<sup>55</sup> Ibid

<sup>56</sup> Ibid

<sup>57</sup> Ibid

<sup>58</sup> Ibid

<sup>59</sup> Ibid

<sup>60</sup> Ibid

<sup>61</sup> See note 41

<sup>62</sup> Ibid

<sup>63</sup> Ibid

<sup>64</sup> Ibid

<sup>65</sup> Ibid

states may create international law and institutions and may enforce the rules they codify, however, it is not the rules themselves that determine why a state acts in a particular way, but rather the underlying material interests and power relations.<sup>66</sup>

### 1.9.2 Institutionalism

Institutionalists share many of realism's presumptions about the international system, more specifically that it is anarchic, that States are self-interested, rational actors seeking to survive while increasing their material conditions, and that uncertainty pervades relations between countries.<sup>67</sup> The difference in the two theories is the fact that the institutionalism relies on the microeconomic theory and the game theory to come to the conclusion that co-operation between states is possible.

For institutionalist, they firmly believe that institutions, which they define as a set of rules, norms, practices and decision making procedures that shape expectations, can overcome the uncertainty that undermines co-operation.<sup>68</sup> The institutionalists provide three explanations as to how institutions assist in overcoming the uncertainty that undermines co-operation. First, is the fact that institutions extend the time horizon of interactions, creating an iterated game rather than a single round.<sup>69</sup> For instance, countries agreeing on ad hoc tariffs may indeed benefit from tricking their neighbours in any one round of negotiations, however, countries that know that they must interact with the same partners repeatedly through an institution will instead have incentives to comply with agreements in the short term so that they might continue to extract the

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<sup>66</sup> Ibid

<sup>67</sup> Ibid

<sup>68</sup> See note 41

<sup>69</sup> Ibid

benefits of co-operation in the long term.<sup>70</sup> Institutions, in this instance, enhance the utility of good reputation to countries; they also make punishment more credible.<sup>71</sup>

The second argument advanced in support of institutionalism is that institutions increase information about state behavior.<sup>72</sup> Institutions collect information about state behavior and often make judgments of compliance or non compliance with particular rules.<sup>73</sup> This means that the uncertainty, which is viewed by realist as an inhibition to co-operation, is dealt with because the state knows that it will not be able to get away with it if they do not comply with a given rule.<sup>74</sup>

Third, institutionalists argue that institutions increase efficiency.<sup>75</sup> The reasoning behind this logic is the fact that it is appreciated that it would be very expensive for states to negotiate with each other on an ad hoc basis and therefore, through institutions the transaction costs is reduced by providing a centralized forum where states can meet.<sup>76</sup> The institutions in this instance also provide focal points, these are established rules and norms, that allow a wide array of states to quickly settle on a certain course of action.<sup>77</sup> In conclusion therefore, institutionalism as a theory provides an explanation for international co-operation based on the same theoretical assumptions that lead realists to be skeptical of international law and institutions.<sup>78</sup>

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<sup>70</sup> Ibid

<sup>71</sup> Ibid

<sup>72</sup> Ibid

<sup>73</sup> Ibid

<sup>74</sup> Ibid

<sup>75</sup> Ibid

<sup>76</sup> Ibid

<sup>77</sup> See note 41

<sup>78</sup> Ibid

### 1.9.3 Liberalism

This theory holds the view that the national characteristics of individual states matter for their international relations.<sup>79</sup> The theory contrasts with the Realist and institutionalist theory that argue that all states have the same goals and behavior, that is the states are self interested actors pursuing wealth or survival.<sup>80</sup> One of the proponents of this theory is Andrew Morvcsik who has developed a general liberal theory of international relations that is based on three core assumptions.<sup>81</sup> The first assumption is the fact that individuals and private groups, not states, are the fundamental actors in world politics; second, states represent some dominant subset of domestic society, whose interest they serve and third, the configuration of these preferences across the international system determines state behavior.<sup>82</sup> It is argued that liberal theories are useful source of insight in designing international institutions, such as courts, that are intended to have an impact on domestic politics or to link up to domestic institutions.<sup>83</sup>

### 1.9.4 Interplay of the theories

Due to the existence of international instruments that clearly spell out that it is contracting parties to the convention that are bound to comply with the requirement not to refoul. It follows then that it is states that are the centre of compliance with the principle of non-refoulement. This means that the realist theory of international relations will apply in ensuring compliance of the principle of non-refoulement because one of its major tenets is that states are the primary actors in international relations and from the foregoing its evident that states are the main target in ensuring that the principle of non-refoulement is complied with.

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<sup>79</sup> Ibid

<sup>80</sup> Ibid

<sup>81</sup> Ibid

<sup>82</sup> Ibid

<sup>83</sup> Ibid

Realists argue that in the international system there exist anarchy, which means that there is no hierarchical power arrangement of states and no state can police the other or act as a police over the international system. The net effect of this is that no state can therefore ensure compliance of the international principle of non-refoulement. In this instance, compliance can be brought about through reliance on the institutionalist theory. This is because under the theory of institutionalism, state compliance is brought about due to the fact that states in the international system will repeatedly interact with each other. This repeated interaction creates incentives that compel states to ensure they comply with the principle because states are aware that they have international obligations that other states within the international system expect them to fulfill. Institutionalism and realism at this point integrate to cause compliance due to the fact that a state's compliance is necessitated by the inherent nature to survive in the international system which is also influenced by the continued interaction with other states.

With respect to the liberal theory, it causes compliance due to the fact through it institutions such as courts are created which as is seen in the Kenyan case ensure compliance with the principle. In addition to this, the liberal theory comes into play due to the fact that it appreciates that there exists non-state actors that cause both compliance and non compliance of the principle of non refoulement. Some of these non state actors include international organizations, for instance the African Union.

Having regard to the foregoing, this paper shall be informed by the interplay of the 3 theories as highlighted above in seeking to understand the principle of non-refoulement and whether or not Kenya complies with it.

## **1.10 HYPOTHESIS**

Kenya has enacted a law to govern refugees and their affairs while within Kenya. One of the key provisions of this law is protection of refugees through the principle of non-refoulement. In as much as there has been a law established enshrining this principle, Kenya, through the executive and legislature, has on many occasions failed to comply with this principle. The Judicial arm of government has however acted as a check to these breaches. In addition to acting as a check, the judiciary has also assisted in the development of the principle through interpreting it based on the circumstances surrounding the Kenyan law.

## **1.11 METHODOLOGY OF THE RESEARCH**

This section provides research methodology for this study. It is presented in the following sequence: the proposed research design, population sample, data collection procedures and data analysis procedures.

### **1.11.1 Proposed Research Design**

This paper shall primarily rely on collection of qualitative data to assist in analysis of the compliance or lack thereof.

### **1.11.2 Population Sample**

The primary focus of this paper shall be Kenya, data shall be collected from publications, research papers and judgments delivered from institutions that have had an opportunity to deal with refugee affairs and the law relating to them.

### **1.11.3 Data Collection**

This paper shall rely on secondary data collection. The secondary data shall be collected through reading of various journals, books, articles (both scholarly and newspapers) on refugee affairs and various decided cases touching on the issues relating to the principle of non-refoulement.

### **1.11.4 Data Analysis**

Based on the collected data the paper will analyse and provide a factual interpretation based on the results arrived at and draw a conclusion and possible recommendations.

### **1.11.5 Scope of the study**

This paper shall look at the principle of non refoulement and its application in Kenya.

### **1.11.6 Limitations**

The researcher shall not be in a position to visit areas that are at the border which would therefore mean that the data that is published may not be as accurate as what the actual situation is on the ground in relation to the principle of non-refoulement.

## **1.12 Chapter Outline**

Chapter 2 of the research shall look at the principle of non refoulement generally. It will begin by providing the general background to the principle of non refoulment by offering a glimpse at the origins of the rule its definitions. The scope of application of the principle will also be observed in this chapter and the various conventions and agreements where the principle has been codified. The chapter will then look how the principle of non refoulement has now been

considered as part of customary international law and conclude by looking at how the principle has achieved the status of peremptory norm.

Under chapter 3 the research shall focus on the Kenyan law on refugees and the application of the principle of non refoulement in Kenya. Since the Kenyan refugee law came into existence in 2006, the chapter shall look at the law applicable prior to 2006 and the application of the law after 2006. The chapter shall then conclude by looking at Kenya's compliance with the principle of non refoulement.

Chapter 4 of the paper will provide a comparative study as to the application of the principle in Kenya and other countries. It will begin by looking at the various approaches that states have taken in applying the principle of non refoulement and conclude by looking at application of the principle in three countries; that is Hong Kong, Israel and United States of America.

Chapter 5 of the paper will provide the conclusions and recommendations that the researcher has arrived at while underrating the research.



## CHAPTER 2

### 2 THE PRINCIPLE OF NON REFOULMENT

#### 2.1 INTRODUCTION

In this chapter, the writer shall explore the background that led to the creation of the principle of non refoulement. It will further, highlight what the exceptions to strict compliance with the principle are while considering whether the norm has achieved the status of customary international law. It will then conclude by considering whether or not the principle can be derogated from, taking into consideration that it is a principle that is considered to be of *jus cogens* application.

##### 2.1.1 Background to the Principle of non refoulment

The term refoulement in refugee law means the expulsion of persons who have the right to be recognised as refugee.<sup>84</sup> The term refoulement is derived from the French word '*refouler*' which is defined to mean "*to drive back, to force back or to refuse entry*"<sup>85</sup> writers such as Weissbrodt and Hortreiter hold the opinion that the word *refouler* means literally to drive back or repel.<sup>86</sup> Garner defines refoulement as "*expulsion or return of a refugee from one state to another*".<sup>87</sup> It follows therefore, that non refoulement would mean that the persons who have a right to be recognized as refugees should not be expelled, forcibly removed or driven back.

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<sup>84</sup> Chambo J.A, '*The Principle Of Non-Refoulement In The Context Of Refugee Operation In Tanzania*', LLM dissertation, University of Pretoria, 31<sup>st</sup> October, 2005, pg 9

<sup>85</sup> *Ibid*

<sup>86</sup> *Ibid*

<sup>87</sup> *Ibid*

## 2.1.2 Origins of the Rule

It is argued that, the idea that a state ought not to return persons to other states in certain circumstances is one that is of recent origin.<sup>88</sup> In the past what was common was existence of formal agreements between sovereigns for the reciprocal surrender of subversives, dissidents and traitors.<sup>89</sup> In the early to mid nineteenth century, the concept of asylum and the principle of non-extradition of political offenders began to emerge, where the territorial sovereign would accord to these offenders protection.<sup>90</sup> The reasoning then, was that the principle behind non extradition reflected popular sentiments that those fleeing their own governments for political reasons were worthy of protection.<sup>91</sup>

It is only after the First World War that international practice begun to recognize an emerging principle of non return of refugees and in 1933 the first reference to the principle that refugees should not be returned to their country of origin occurred in an international instrument.<sup>92</sup> This instrument was the Convention Relating to the International Status of Refugees. Article 3 of the Convention Relating to the International Status of Refugees provided that the contracting parties undertook not to remove resident refugees or keep them from their territory, by application of police measures, such as expulsion or non admittance at the frontier (refoulement), unless dictated by national security or public order.<sup>93</sup> Article 3 of the Convention further provided, under the second paragraph, that each state undertook in any case not to refuse entry to refugees

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<sup>88</sup> Goodwin-Gill G.S., '*The Principle of Non-Ref: Its Standing and Scope in International Law*', A Study prepared for the Division of International Protection Office of the United Nations High Commissioner for Refugees, July 1993. Pg 6

<sup>89</sup> See note 6

<sup>90</sup> Ibid

<sup>91</sup> Ibid

<sup>92</sup> Ibid

<sup>93</sup> Ibid

at the frontiers of their countries of origin.<sup>94</sup> It is worthwhile to note that only eight countries ratified this Convention; three of them, by reservations and declarations, emphasized their retention of sovereign competence in the matter of expulsion.<sup>95</sup> However, the United Kingdom on its part expressly objected to the principle of non-rejection at the frontier.<sup>96</sup>

In Germany, agreements regarding refugees that were present within the country during the period of 1936 and 1938 contained limitations on expulsion or return.<sup>97</sup> The instruments provided that refugees who were required to leave a contracting state were to be allowed a suitable period to make arrangements.<sup>98</sup> Therefore, the principle behind the instruments was that lawfully resident refugees were not to be expelled or sent back across frontier save for reasons of national security or public order.<sup>99</sup> It is noted that in Germany, at the instance the exceptions to the rule were to be applied, the government undertook not to return the refugees to the German Reich unless they (the refugees) had been warned and they had refused to make the necessary arrangements to proceed to another country or to take advantage of the arrangements made for them with that object.<sup>100</sup> The focus during this period was principally improving administrative arrangements to facilitate local integration and resettlement; the need for protective principles began to emerge, but limited ratifications of instruments containing equivocal and much qualified provisions effectively prevented the consolidation of a formal principle of *non-refoulement*.<sup>101</sup>

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<sup>94</sup> See note 6

<sup>95</sup> Ibid

<sup>96</sup> Ibid

<sup>97</sup> Ibid

<sup>98</sup> Ibid

<sup>99</sup> Ibid

<sup>100</sup> Ibid

<sup>101</sup> Ibid

After the Second World War, a new era began. In February 1946, the United Nations General Assembly expressly accepted that refugees or displaced persons who have expressed valid objections to returning to their country of origin should not be compelled to do so.<sup>102</sup> This was followed by the creation of the International Refugee Organization as a specialized agency, charged with resolving the problems of displacement left from the Second World War, the Universal Declaration of Human Rights proclaimed the right to seek and to enjoy asylum from persecution.<sup>103</sup>

The word *refoulement* was included in the final document of the 1951 Convention. It is noted that during the Conference of Plenipotentiaries the Swiss delegate Mr Zutter thought that the wording of Article 28, which is the now Article 33(1), left room for various interpretations.<sup>104</sup> According to the delegate the words ‘expel’ and ‘return’ were open to different interpretations.<sup>105</sup> The said Article 28 of the draft document of the 1951 Convention provided that;

*No Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality or political opinion.*<sup>106</sup>

In Zutter’s opinion the word ‘expulsion’ relates to a refugee already admitted into a country, whereas, the word ‘return’ had a vague meaning and could not be applied to a refugee who had not yet entered the territory of a country.<sup>107</sup> For this reason the Article 33(1) would not create any obligations for states parties to admit asylum seekers in case of mass influx, which resulted in

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<sup>102</sup> See note 6

<sup>103</sup> Ibid

<sup>104</sup> Ibid

<sup>105</sup> Ibid

<sup>106</sup> See note 1

<sup>107</sup> Ibid

inclusion of the word *refoul* in the final draft of the 1951 Convention because its non-conclusive meaning and it could not be necessarily applicable to a person who is outside the territory of the state party.<sup>108</sup> This action led to the final article reflecting what the delegates agreed at the conference and the suggestion by the President of the Plenipotentiaries to include the French word '*refoulement*' after the English word '*return*' was unanimously adopted.<sup>109</sup>

### 2.1.3 Definitions of the principle of non *refoulement*

Sir Elihu Lauterpacht and Daniel Bethlehem define the principle of non *refoulement* as;

*"Non-refoulement is a concept which prohibits States from returning a refugee or asylum seeker to territories where there is a risk that his or her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion."*<sup>110</sup>

Their definition is derived from the wording of the principle of non *refoulement* which is enshrined in Article 33 of the Convention Relating to the status of refugees (CSR51) which provides as follows;

*"No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."*<sup>111</sup>

It is also important to note that the short title of the Article 33 of the Convention is titled "*prohibition of expulsion or return (refoulement.)*" This highlights that the principle of non

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<sup>108</sup> Ibid

<sup>109</sup> Ibid

<sup>110</sup> Lauterpacht. E and Bethlehem.D , "*The scope and content of the principle of non-refoulement: Opinion*" [www.unhcr.org](http://www.unhcr.org) accessed on 27<sup>th</sup> June, 2015

<sup>111</sup> Article 33 (1), The Refugee Convention, 1951

refoulement is a prohibition against returning a refugee to a place where there life and liberty face the threat of persecution.

It is for this reason that this paper adopts and considers the definition put forth by Bethlehem and Lauterpacht as the definition of choice for non-refoulement. According to this paper non refoulement is defined as;

*Non-refoulement is a concept which prohibits States from returning a refugee or asylum seeker to territories where there is a risk that his or her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion.*

#### **2.1.4 Conventions and Agreements relating to the principle**

As has already been discussed the main Convention that provides for the protection of refugees through the principle of non refoulement is the 1951 Convention Relating to the Status of Refugees and its 1967 protocol. In addition to these two, there are various other conventions that have come into force that provide, highlight and emphasize the importance of the non refoulement principle.

This principle is expressed powerfully in Article 3 of the 1984 UN Convention against Torture (CAT 84).<sup>112</sup> Article 3 provides that;

- 1. No state shall expel, return (refouler) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.*

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<sup>112</sup> See note 40 pg 208

2. *For the purposes of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the States concerned of a consistent pattern of gross, flagrant or mass violation of human rights.*

The wording of this article is similar to the provisions of article 33(1) of the 1951 CRSR, that prohibit refoulement in instances where the life of the refugee is at threat. The article specifically provides that;

*“No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”<sup>113</sup>*

A reading of the CAT84 shows that it’s Article 3 heavily influenced by the provisions of Article 33(1) of the 1951CRSR.

The 1966 International Covenant on Civil and Political Rights (ICCPR66) also prohibits refoulement of individuals. Under Article 7 of ICCPR66 it is provided that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.<sup>114</sup> It is noted that that Article 7 contains an implied prohibition of non refoulement.<sup>115</sup> It is argued that the obligation not to refoul arises out of a reading of Article 7 and Article 2(1) which requires states to guarantee the Covenant’s rights to all persons who may be within the territory and to all persons subject to their jurisdiction, including refugees and asylum seekers.<sup>116</sup> The duty not expel, deport, extradite or otherwise remove a person from their territory, where there are

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<sup>113</sup> Article 33 (1), The Refugee Convention, 1951

<sup>114</sup> See note 40

<sup>115</sup> Ibid

<sup>116</sup> Ibid

substantial grounds for believing that there is a real risk of irreparable harm also applies to states.<sup>117</sup> The application applies to irreparable harm that may be suffered either in the country to which removal is to be effected or in any country to which the person may be subsequently be removed.<sup>118</sup>

This shows that there are certain conventions that may not specifically provide for the term refoulement. However, this does not mean that the principle is not contemplated, but a reading of that convention in light of the prevailing circumstances can allow for an inference of the principle of non refoulement to be made. In such an instance where the inference is made, states may be obliged to comply with the provisions of the convention taking into account that they are signatories to the convention that is subject to the broad interpretation.

Non refoulement is provided for under Article 45 of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War.<sup>119</sup> Article 45 provides in part "*Protected persons shall not be transferred to a Power which is not a party to the Convention...*"<sup>120</sup>

Regional instruments have also embodied non refoulement within themselves. For instance Article II(3) of the 1969 Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU69) declares that;

*"No person shall be subjected... to measures such as rejection at the frontier, return or expulsion, which would compel him to return or remain in a territory where his life, physical integrity or liberty would be threatened."*

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<sup>117</sup> Ibid

<sup>118</sup> See note 40 pg 209

<sup>119</sup> Ibid

<sup>120</sup> Ibid



The American Convention on Human Rights of 1969 provides for non refoulement.<sup>121</sup> Under Article 22(8) it is provided that;

*"In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in of danger being violated because of his race, nationality, religion, social status or political opinions."*<sup>122</sup>

The African Charter of Human and Peoples' Rights of 1981 (ACHPR81) under Article 12(3) focuses specifically on asylum and goes ahead to state that *'Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions.'*<sup>123</sup> In the Americas, regional protection of asylees goes back to the 1889 Montevideo Treaty on International Penal Law, Article 16 proclaims that Political refugees shall be afforded an inviolable asylum and under Article 20 excludes extradition for political crimes.<sup>124</sup> It is observed that these regional instruments have been widely accepted with no reservations recorded or attempted in respect of the basic principle of non return.<sup>125</sup>

The principle of non refoulement has also been reflected in Article 3 of the 1950 European Convention on Human Rights (ECHR1950), which prohibits removal to torture or cruel, inhuman or degrading treatment or punishment.<sup>126</sup> The European Court of Human Rights has held that the extradition or expulsion of a person will breach Article 3, of the ECHR1950, where there are substantial grounds for believing that he or she faces real risk of being subjected to torture or

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<sup>121</sup> See note 40 pg 210

<sup>122</sup> Ibid

<sup>123</sup> Ibid

<sup>124</sup> Ibid

<sup>125</sup> Ibid

<sup>126</sup> Ibid

to inhuman or degrading treatment or punishment in the receiving State.<sup>127</sup> A reading of the above expressions of Article 3 shows the centrality and the burden placed upon States to ensure that at any instance that a person is being removed from its jurisdiction, the life of such a person shall not be placed in harms way, which harm includes torture, persecution or other inhuman acts.

A distinction is brought out between the wording of Article 3 of the ECHR1950 and that of the CRSR1951. The distinction arises in that, the wording and intention of Article 3 of the ECHR1950 are absolute and do not contemplate any exceptions to the principle, on the hand the provisions of Article 32 and 33 of the CRSR provide exceptions to the principle of non refoulement.<sup>128</sup>

It is therefore evident that many conventions appreciate the importance of protecting refugees and some even extend to protecting asylees. In their protection of these groups of people they bring forth the importance of the principle of non refoulement that is aimed at preventing the placing of individuals in countries where their life is in danger of facing irreparable harm.

### **2.1.5 Exceptions to the principle of non-refoulement**

In as much as the States are obligated to comply with the principle of non refoulement it is also appreciated that there are instances that would warrant for states not to comply with the principle. This derogation from the principle was envisaged in the drafting of the 1951 Convention Relating to the Status of Refugees and the exceptions to strict compliance with the principle are highlighted in Article 32 of the Convention Relating to the Status of Refugees which provides that;

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<sup>127</sup> See note 40

<sup>128</sup> Ibid

1. *The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.*
2. *The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.*
3. *The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.*

Article 33(2) of the CRSR 51 also provides an exception to the principle of non refoulement. It provides that;

*'The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.'*

A reading of the exceptions espoused in the convention highlights the fact that the drafters ensured that in the event a state intended to excuse itself from the obligations raised in Article 33(1), such excusal would be according to certain set standards.

The first exemption to strict compliance with the principle was on the grounds that if a state intended to refoul a person within their territory, that state had to show that this individual was a threat to that state's national security and public order. This is highlighted under Article 32(1).

In determining what amounts to national security Grahl-Madsen has suggested that security should be construed as follows: if a person is engaged in activities aiming at facilitating the conquest of the country where he is staying or a part of the country, by another state, then such a person is deemed to be threatening the security of the former country.<sup>129</sup> This position according to Grahl-Madsen also applies if such an individual works for the overthrow of the government of his country of residence by forceful or other illegal means.<sup>130</sup> Other acts that would be considered as acts affecting national security would be espionage, sabotage of military installation and terrorist activities.<sup>131</sup>

It is however noteworthy, that neither the concept of national security nor danger to national security is defined in the convention relating to the status of refugees. Therefore, such a definition would be left to the host state to make a determination whether or not the refugee or the person seeking asylum has engaged in activities that would be deemed to be a threat to the national security of the host state.

Lauterpacht and Bethlehem argue that it would be inappropriate for state to remove an individual pursuant to Article 33(1) on the grounds that the said individual constituted a threat to another state or international community generally.<sup>132</sup> To them the threat to national security has to accrue to the host state only and not to a third party (state). On the other hand Hathaway invokes

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<sup>129</sup> See note 40 pg 236

<sup>130</sup> Ibid

<sup>131</sup> See note 40

<sup>132</sup> Ibid

a contrary argument, his is based on the modern approach to national security, which permits refoulement where presence of refugees or their actions give rise to an objectively reasonable, real possibility of directly or indirectly inflicted substantial harm to the host state's most basic interest, including the risk of an armed attack on its territory or its citizens, or the destruction of its democratic institutions.<sup>133</sup>

This approach to defining national security takes into consideration the fact that the threat to the national security is not caused by the individual engaging in acts that are considered affecting the national security of the host state, but also the fact that individual's presence in the country may result in a second state attacking the host state in an attempt to capture or kill the individual. This act that may be undertaken by a second state would amount to a threat to the national security of the host state.

This paper adopts the view that is postulated by Hathaway, this is because in the changing world which is now fast becoming a global village and also with the continued raise of crimes such as terrorism, the national security of a state may be threatened by a terrorist who is resident within a state though not committing his terrorist acts within the host state.

As per the wording of the Article 32(2), a state cannot just say that an individual is a threat to its national security and immediately cause the refoulement of such individual. The state upon establishing that the individual is a threat to its national security, it should proceed to present the individual before a body that is by law mandated to make a determination as to whether such individual is a threat to the national security, in most cases the body mandated is the judiciary. Such an individual is to be accorded the benefit of due process, which means that they are also

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<sup>133</sup> Ibid

entitled to defend themselves and prove that they do not constitute a threat to the national security of the host state. If upon being granted a fair hearing the individual is found to be a threat within the meaning of Article 32(3), they shall be granted a period within which they are to apply and await admission into a third state while they are still resident within the host state.

A reading of Article 33(2) shows that other than national security a person that has been convicted and final judgment entered against them for a serious crime is estopped from seeking protection under the principle of non refoulement. However the specificity of the crime has not been indicated within the convention and it can only be inferred from a reading of the convention or an understanding as to what amounts to serious crimes within the international community.

Therefore, it is only within the meaning of Article 32 and 33(2) that the principle of non-refoulement can be exercised and continue to hold water under the international community. Any other attempt would require proper justification to be deemed as having been fair and justiciable.

#### **2.1.6 Scope of the principle**

There has been debate amongst writers who argue that the principle of non refoulement is only dependent on the instances provided under Article 33 (1) that is, the refugee's life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. More specifically, that the principle is only applicable to individuals that have been formally recognized as refugees and no other persons.

For instance according to Chambo J.A<sup>134</sup>, the net effect of the Convention was that non refoulement was independent of any sovereign decision of the host state on whether or not to grant asylum, which according to the writer implies that the moment an individual's asylum

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<sup>134</sup> See note 1

application is accepted, the principle of *non refoulement* is activated.<sup>135</sup> Others like Hathaway argue that the principle of non refoulement also applies to asylum seekers.<sup>136</sup> Hathaway holds the view that the duty of non refoulement inheres on a provisional basis even before the refugee status has been formally assessed by a state party.<sup>137</sup> He further argues that because it is one's *de facto* circumstances, not the official validation of those circumstances that gives rise to the convention's refugee status, genuine refugees may be fundamentally disadvantaged by the withholding of rights pending status determination.<sup>138</sup>

Goodwin-gill and McAdam on their part hold the view that the principle of non refoulement extends not only to refugees but also to asylum seekers and those persons with a presumptive or prima facie claim to refugee status.<sup>139</sup> They argue that this approach to the principle was highlighted by the UNHCR Executive committee which stressed in Conclusion No.6 (1977) that;

*'... reaffirming the fundamental importance of the principle of non refoulement...irrespective of whether or not the individuals have been formally recognized as refugees.'*<sup>140</sup>

Goodwin-gill and McAdam further highlight that the principle of non refoulement applies to asylum seekers and it is not concerned with the legal or migration status of the asylum seeker.<sup>141</sup>

This means that the principle is not concern with how the asylum seeker comes within the territory or jurisdiction of the state, but rather what counts is what results from the actions of state agents.<sup>142</sup> In the event that the state agents forcibly repatriate the asylum seeker to a country

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<sup>135</sup> Ibid

<sup>136</sup> Murati A., '*Legal Rights and Obligations of States with Regard to Interception at Sea: Extraterritorial Application of the Principle of Non-Refoulement*', LLM Thesis, Lund University, Spring 2012 pg 13

<sup>137</sup> Ibid

<sup>138</sup> Ibid

<sup>139</sup> See note 40 pg 233

<sup>140</sup> Ibid

<sup>141</sup> See note 40 pg 233

<sup>142</sup> Ibid

where he or she has a well founded fear of persecution or faces substantial risk of torture, then this action by the state agents amount to refoulement which is contrary to the principle and international law.

The extension of the principle of non refoulement to other individuals that have not acquired the status of refugees has been highlighted and given force by the international principle of complementary protection. Complementary protection has been defined as states' protection obligations arising from international legal instruments and custom that complement or supplement the 1951 Refugee Convention.<sup>143</sup>

The clearest and least controversial treaty based sources of complementary protection under international human rights law are Article 3 of the Convention Against Torture (CAT84) which prohibits the removal to state sanctioned torture, Article 7 of the ICCPR66 which precludes removal to torture or cruel, inhuman or degrading treatment or punishment and finally the ECHR50, for member states of the Council of Europe under Article 3 which prohibits removal to torture or inhuman or degrading treatment or punishment.<sup>144</sup> In practical application, an individual facing removal contrary to the above mentioned treaty obligations may be able to take their case directly to one of the treaty monitoring committees.<sup>145</sup> However while the treaty monitoring committees may find that the states have violated their obligation towards the principle of non refoulement there is no guarantee that a state will follow the views.<sup>146</sup>

It is therefore safe to conclude that the principle of non refoulement does not apply strictly to those individuals that have acquired the status of refugee. The principle extends to those

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<sup>143</sup> Ibid pg 285

<sup>144</sup> Ibid

<sup>145</sup> See note 40 pg 296

<sup>146</sup> ibid



individuals that have not acquired the status of refugees, but have a well founded fear of persecution or torture if they are repatriated to a state that has given rise to their fear based on the principle of complementary protection.

## **2.2 THE PRINCIPLE OF NON REFOULEMENT AS CUSTOMARY INTERNATIONAL LAW**

In this section we shall provide a brief explanation as to how customary international law is created and go ahead to look at whether or not the principle of non refoulement can be deemed as having gained such status.

### **2.2.1 Customary International Law**

Customary international law is defined under Article 38 of the Statute of the International Court of Justice. It makes reference to international custom as evidence of general recognition accepted as law.<sup>147</sup> The elements of Custom include; duration, Uniformity/consistency of the practice, generality of the practice and *Opinio juris*.

No particular duration is required provided that consistency and generality of a practice are proved. The time element has not been emphasized by the International Court.<sup>148</sup> Consistency and Uniformity were highlighted in the Asylum Case where the International Court of Justice (ICJ) stated;

*'The party which relies on Custom ... must prove that this custom is established in such a manner that it has become binding on the other party... that the rule invoked... is in accordance with a constant and uniform usage practiced by the States in question, and that this usage is the*

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<sup>147</sup> Brownlie I., ' *Principle of Public International Law* ', Oxford University Press, 7<sup>th</sup> Edition, 2008 pg 6

<sup>148</sup> Ibid

*expression of a right appertaining to the state granting asylum and a duty incumbent on the territorial state. This follows from Article 38 of the Court, which refers to international custom as evidence of a general practice accepted as law.*<sup>149</sup>

Generality of the practice on its part refers to an aspect that complements consistency which ideally tends to look at how many states protest or are not in agreement with the principle or the abstention from protest by a substantial number of states in face of practice followed by some others.<sup>150</sup>

*Opinio juris* is defined by the International Court as general practice accepted by law, it is also defined as the practice that is required by, or consistent with international law.<sup>151</sup> The ICJ has two methods in approaching *opinio juris*.<sup>152</sup> The first of which is where the Court assumes the existence of *opinio juris* on the bases of evidence of general practice or a consensus in the literature, or the previous determinations of the Court or other International tribunals.<sup>153</sup> The second, which is used in a minority of instances is where the Court adopts a more rigorous approach and has called for more positive evidence of the recognition of validity of the rules in question in the practice of states.<sup>154</sup> The choice in approach is dependant upon the nature of the issues in question and the discretion of the Court.<sup>155</sup>

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<sup>149</sup> See note 64 pg 7

<sup>150</sup> Ibid

<sup>151</sup> Ibid

<sup>152</sup> Ibid

<sup>153</sup> Ibid

<sup>154</sup> Ibid

<sup>155</sup> Ibid

A state can however be excused from an obligation imposed by international custom if they are able to prove that they are a persistent objector to the creation of the custom. A persistent objector is a state that may contract out of custom in the process of formation of the custom.<sup>156</sup>

### 2.2.2 Non Refoulement as Customary International Law

Having looked at how customary international law comes about and the ways a state can contract out of it. The question that we set out to explore here is whether the principle of non refoulement is one that can now be termed as Customary International Law.

Dina Imam Supaat argues that the principle of non refoulement has now obtained the status of Customary International Law. He argues that “...*The principle of non- refoulement as widely practiced around the world is said to have developed into a rule of customary international law and is thus binding upon all states.*”<sup>157</sup>

Supaat goes further to list state expressions and statements acknowledging the obligatory nature of the rule or *opinio juris*. The list includes;

- a. the unanimous view conveyed by state representatives during the UN Conference on the Status of Stateless Persons, which stated that the provision of non- refoulement in the Convention was taken as a demonstration and representation of a generally accepted principle of non- return.
- b. Provision of non-return is embodied in various international treaties apart from the CRSR.

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<sup>156</sup> See note 64 pg 11

<sup>157</sup> Supaat D.I., ‘*Escaping The Principle Of Non Refoulement*’, International Journal of Business, Economics and Law, Volume 2, Issue 3 (June) 2013 pg 1

- c. The UNHCR and states around the world continue to protest and object to any breach of the non- refoulement principle or any conduct that amount to non- refoulement.
- d. Article 33 of the refugee Convention is considered to have a norm- creating character, which also form the foundation of a customary law.<sup>158</sup>

There are practices that Supaat believes cause the principle of non refoulement to have met the requirements of generality and uniformity of state practices of non refoulment. These practices include;

- a. States' ratification and accession to one or more international or regional instrument that embody the rule of non refoulement
- b. States' membership in international and regional organisations that adopt non- legal document containing provisions of non- refoulement effect
- c. State incorporation of the said treaties above into municipal laws either by adopting the whole treaties; or legislating the rule into constitutions; or enacting legislations which incorporate provisions of the treaties especially the principle of non- refoulement.
- d. State actual practices of not rejecting, removing and returning refugees within their territory to a frontier where the refugees will be persecuted or their life and liberty are at risk of persecution, torture or any inhumane and degrading treatment.<sup>159</sup>

According to Supaat the principle is of the status of customary international law because it has met the customary law elements of which are *opinio juris* and uniform and general application.

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<sup>158</sup> See note 74

<sup>159</sup> Ibid

In determining whether the principle of non refoulement has now crystallized into Customary Law, writers look at the application of the principle in light of the elements creating a custom. These writers conclude that the principle has now become customary law based on the following three arguments;

First, is the expression of the principle as a norm- creating character in several international instruments and a number of Conclusions of the UNHCR Executive Committee.<sup>160</sup> Second, they assert that there is evidence showing that the principle is already widespread and representative.<sup>161</sup> This is derived from the fact that the principle is contained in many binding instruments and that when these are combined; about 90% of all UN members are parties to one or more of these conventions and treaties. Furthermore, there was no evidence of opposition from states who are not party to any of the legal and non-legal instruments.<sup>162</sup>

The third element, consistent practice and general recognition of the rule, are shown in the participation of states in binding and non-binding instruments as discussed earlier in the second element.<sup>163</sup> Furthermore, about 80 states have incorporated the principle in their national legislation, and membership of the UNHCR's ExCom is taken as sufficiently representative of states as to constitute generality.<sup>164</sup>

Based on the three elements the principle of non refoulement can be said to have crystallized to customary international law due to its general and wide spread applicability coupled with the *opinio juris* and consistent practice related to it.

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<sup>160</sup> See note 74

<sup>161</sup> *ibid*

<sup>162</sup> *Ibid*

<sup>163</sup> *Ibid*

<sup>164</sup> *Ibid*

In as much as the principle is viewed as being part of customary international law there exists certain scholars who hold the contrary view. For instance Hathaway argues that the principle of non refolement has not attained the status of customary law. Hathaway argues that there is insufficient evidence to establish the principle of non refolement, however narrowly defined, as customary international law.<sup>165</sup> Hathaway's main argument against the principle of non refolement gaining the status of customary international law is premised on the fact that states have been seen to violate the principle hence state practice cannot be deemed as being consistent.<sup>166</sup> This according to Hathaway is indicative of the fact that the principle is yet to achieve the status of Customary international law. As to whether this argument holds water we look at the response given to this argument by writers, for instance in rebutting Hathaway's argument, Goodwin-gill argues that the ICJ has affirmed that state practice does not have to be entirely consistent for a norm of customary international law to be established.<sup>167</sup> Instead, state conduct that is inconsistent with a particular customary principle should generally be treated as a breach of that principle, not as an indication of a new rule.<sup>168</sup>

It is worthwhile to note that despite the fact that there exist writers who hold the view that the principle of non refolement has not achieved customary law status, they form the minority. The general consensus is that this principle has attained the status of customary law and the argument of inconsistent practice falls flat on its face when put up against the rebuttal of Goodwill-gill.

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<sup>165</sup> See note 40 pg 351

<sup>166</sup> Ibid

<sup>167</sup> Ibid

<sup>168</sup> Ibid

### 2.3 PRINCIPLE OF NON REFOULEMENT AS *JUS COGENS*

A norm of *jus cogens* application is also referred to a peremptory norm.<sup>169</sup> These norms are defined as rules which no derogation is permitted and which can be amended only by a new general norm of international law of the same value.<sup>170</sup>

A *jus cogens* norm has also been defined as a norm that is accepted by the international community of States as a whole as a norm from which no derogation is permitted.<sup>171</sup> A *jus cogen* norm is viewed by scholars of customary international law as a norm that has achieved such prominence that it exists beyond the treaty regime, superseding state consent.<sup>172</sup> Further, it is argued that *jus cogens* norms are considered a central part of the international legal order, and as such, they are beyond the law of treaties and supersede agreements between states.<sup>173</sup>

Establishment of peremptory norms does not require judicial pronouncement.<sup>174</sup> But rather, *jus cogens* or peremptory norms are created when a consensus emerges on two levels: first, on a categorical level focusing on the basic nature of peremptory norms and factors that make those norms peremptory, and second, at a normative level, examining whether a norm that categorically qualifies as part of *jus cogens* is so recognized under international law.<sup>175</sup>

The first attempt at affirming the peremptory nature of the principle of non refoulement was by the UNHCR Executive Committee (UNHCR ExCom).<sup>176</sup> The committee, discussing the UNHCR advisory opinion on the extraterritorial application of the non refoulement obligation

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<sup>169</sup> Evans M.D., '*International Law*', Oxford University Press, 3<sup>rd</sup> Edition, 2003 pg 146

<sup>170</sup> Ibid

<sup>171</sup> See note 38 pg 22

<sup>172</sup> Ibid

<sup>173</sup> Ibid

<sup>174</sup> Ibid

<sup>175</sup> Ibid

<sup>176</sup> Trevisanut S. '*The Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection*', Max Planck Yearbook of United Nations Law, Volume 12,2008, pg 205-246

under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, in Conclusion No. 25 (XXXIII) of 1982 stated that;

*“In UNHCR’s experience, states have overwhelmingly indicated that they accept the principle of non- refoulement as binding as demonstrated, inter alia, in numerous instances where States have responded to UNHCR’s representations by providing explanations or justifications of cases of actual or intended refoulement, thus implicitly confirming their acceptance of the principle.”<sup>177</sup>*

This statement exposed and laid the foundation of having the principle of non refoulment being viewed as a *jus cogen* principle. Subsequently, in 1989 the Executive Committee did invite states to avoid actions that resulted in refoulement situations because the actions would be deemed as contrary to fundamental prohibitions against these practices.<sup>178</sup> In 1996 the principle was reaffirmed and elevated to the level of a peremptory norm when the Executive Committee in Conclusion No. 79(XLVII) 1996 stated;

*“Distressed at the widespread violations of the principle of non refoulement and of the rights of refugees, in some cases resulting in loss of refugee lives, and seriously disturbed at reports indicating that large numbers of refugees and asylum-seekers have been refouled and expelled in highly dangerous situations; recalls that the principle of non-refoulement is not subject to derogation”.*<sup>179</sup>

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<sup>177</sup> See note 23

<sup>178</sup> Ibid

<sup>179</sup> See note 38



In as much as it is argued by some writers such as Orakhelashvili and Jean Allain that the principle has achieved the status of *jus cogens*, there are writers that hold a contrasting opinion. Some of these writers include Bruin and Wouters.

Jean Allain argues that non-refoulement is a *jus cogens* norm because it is accepted by the international community of States as a whole as a norm from which no derogation is permitted.<sup>180</sup> In support of his argument that the principle is widely accepted internationally; he argues that the norm prohibiting refoulement is part of customary international law.<sup>181</sup> He also points to state practice in Latin America (including the Cartagena Declaration), to the work of other scholars, and to Executive Committee conclusions, which he labels as relevant because they reflect the consensus of states.<sup>182</sup>

Bruin and Wouters, who differ with the argument that the norm has achieved the status of *jus cogens* in reviewing Allain's argument, argue that the major practical problem remains the burden of proof to be able to actually characterize the obligation of non-refoulement as a peremptory norm of general international law and to claim this in a court of law.<sup>183</sup> Other arguments in support of the assertion that the principle of non refoulement is yet to achieve the status of *jus cogens* include; state practice, with respect to terrorism, does not yet support full acceptance of non-refoulement as *jus cogens*.<sup>184</sup> The reasoning behind this is noted in the fact that terrorists are forcibly transferred to countries where they have a well founded fear of persecution. This is because terrorists are refouled based on the exception provided under

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<sup>180</sup> See note 38

<sup>181</sup> Ibid

<sup>182</sup> Ibid

<sup>183</sup> Ibid

<sup>184</sup> Ibid

Articles 33(2)<sup>185</sup> and 32 of the CRSR51, which allows states to refoul when there is a threat to the states' national security.

Despite the fact that the norm is not considered by all writers as being a norm of *jus cogens*, a majority of the writers believe that it has achieved the status of a peremptory norm. This paper having observed the contrasting views, hold the view that the principle of non refoulement indeed has achieved the status of a peremptory norm. This is because the principle is widely accepted by the international community. The widespread acceptance has resulted in its codification through various international instruments. The state practice so far has been to ensure its compliance noting that it is referred to as the cornerstone of refugee law. The principle of non-refoulement is considered as the cornerstone of the international legal regime for refugee protection, and forms a fundamental part of the 1951 Convention.<sup>186</sup> Since the principle was enshrined in the 1951 Convention, no new principle has been drafted that has changed the obligations of non refoulement, which makes the principle maintain its status as a general norm of international application from which derogation is not permitted. This ideally has resulted in the norm being considered as *jus cogens* or a peremptory norm.<sup>187</sup>

## 2.4 CHAPTER SUMMARY

The international community through international institutions has caused the codification of the principle of non refoulement. This codification has had the net effect of causing the principle to be considered as one which states have look to when they are dealing with matters of refugees.

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<sup>185</sup> Article 33(2) of the Convention Relating to the Status of Refugees provides that; "*The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.*"

<sup>186</sup> See note 38

<sup>187</sup> Ibid

This results in the uniform application of the principle which is consistent amongst all countries.

The Uniform application by the states thus results in the principle being deemed as forming part of international customary law.

The fact that states have continued interaction with each other in the international arena causes states to begin respecting the application of the principle, not because there is oversight by one state over another but rather because of a need by states to appear, within the international community, as respecting the principle. Such recognition of the obligations created by the principle of non refoulement and in addition to this, the principle taking the shape and form of international human rights, has caused most state not to derogate from the intent of the principle. Codification of the norm and viewing it as a fundamental human right, has caused it to be viewed as a peremptory or *jus cogens* norm.

However, the fact that there exist exceptions with strict compliance with the principle under Article 33(2) and Article 32 raises questions as to whether the principle is one that cannot be derogated from. The response to this is in the negative, no derogation is permitted, this is due to the fact that derogation would be applicable where an individual deserving of the protection under Article 33(1) is denied such protection on grounds other than those provided for under Article 32 and 33(2). Therefore, the principle continues to maintain its status as peremptory norm because the act of refoulement is specifically defined and derogation from that strict description is what is prohibited by the principle of non refoulement.

It is therefore safe to conclude that the principle of non refoulement is a fundamental principle of Refugee law which is now considered as part customary international law and is a norm that is peremptory in nature. Having, taken such a prominent role in the protection of not only refugees

but also individuals deserving of its protection and who do not fall within the definition of refugees, the principle of non refoulement is a norm that requires strict compliance by states within the international community whether or not the individual states have domesticated the norm within their national laws.

## CHAPTER 3

### 3 THE KENYAN LAW ON REFUGEES AND THE PRINCIPLE OF NON REFOULMENT

#### 3.1 INTRODUCTION

Justice David Majanja, of the High Court of Kenya, while making a determination as to whether certain actions by the Kenyan government had violated International Human Rights laws relating to refugees, made the following observation in the opening remarks of his judgment;

*“Kenya currently hosts an estimated 600,000 registered refugees and asylum seekers drawn from, among others, Somalia, Ethiopia, Eritrea, Sudan, Rwanda, Burundi and the DRC. Hence the refugee question in Kenya is not an idle one. It is inextricably linked to geopolitical factors within the Eastern Africa region dating back to the 1970’s. The political coup in Uganda in the 1970’s, the overthrow of the Siad Barre regime in the 1990’s Somalia after a long civil war, the civil war in Sudan, the collapse of the Mengistu regime in Ethiopia after a long civil war, the 1994 Rwandan genocide and the decade long conflict in the Democratic Republic of Congo have led Kenya to accommodate refugees from all these countries.”<sup>188</sup>*

His choice of words is important as it sets the tone for this chapter. This is because he notes that with the large number of refugees drawn from different countries, refugee issues in Kenya are significant and cannot be ignored. Kenya is a signatory to the 1951 UN Refugee Convention and its 1967 Protocol, as well as the 1969 OAU Refugee Convention. It is also a signatory to other international and regional human rights instruments that are relevant to refugee protection. On

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<sup>188</sup> High Court of Kenya Constitutional and Human rights Division Petition Number 19 of 2013 consolidated with Petition 115 of 2013, *Kituo Cha Sheria & 8 others v Attorney General* [2013] eKLR

the domestic front, however, Kenya lacked any national refugee legislation until 2007, when the Refugee Act came into force.<sup>189</sup>

This chapter shall explore the Kenyan law on refugees, more specifically, what it provides for in with respect to the principle of non refoulement. The paper will then seek to explore whether or not Kenya complies with the principle and finally it will seek to establish what role Kenya has in the development of this principle.

### 3.2 APPLICATION OF THE PRINCIPLE BEFORE 2006

It noted that the Refugee Act came into force in 2006. Prior to this the principle of non refoulement of non refoulement was said to be only applicable in Kenya after the Convention had been domesticated into Kenya's law.<sup>190</sup> Further, conventions were deemed to be subordinate to the Kenya Constitution and therefore, compliance with the principle was subject to what the constitution provided. This position was highlighted by Justice Kubo in, *Adel Mohammed Abdulkader Al-Dahas V The Commissioner Of Police & 2 Others [2003] Eklr*

*"...But there is another problem in the stand taken by the applicant that the Convention and the Convention only is the one legal instrument or mechanism under which a foreigner or alien like himself should be dealt with while in Kenya. There is no evidence that the Convention has been incorporated into Kenya's municipal law, or domesticated. It cannot be validly contended that Kenya is impotent to deal with aliens who enter and stay in the country in violation of its existing national laws. There is no vacuum in this broader regard..."*

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<sup>189</sup> See note 4

<sup>190</sup> Domestication of international law is the process of incorporating international conventions and treaties, of which a state is a party, into a State's domestic laws so that the rights and duties contained in such treaties may become applicable and enforceable domestically in the States concerned.

According to this Court, Kenya has sufficient mechanisms to deal with the issue of refugees and in that regard the fact that Kenya had not domesticated the Refugee Convention meant that Kenya had no obligation to comply with its provisions.

### **3.3 KENYA'S LAW ON REFUGEES**

The primary source of the Kenyan law on refugees is the Refugee Act of 2006 and the Refugees (Reception, Registration And Adjudication) Regulations, 2009 other sources of the law on refugees include the Constitution of Kenya, International and Regional Conventions and decisions by the Courts.

#### **3.3.1 Principle of non refoulement under the Kenyan Refugee Act**

The principle of non refoulement is specifically provided for in Section 18 of the Refugee Act 2006. The section provides that;

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

*(a) the person may be subject to persecution on account of race, religion, nationality, membership of a particular social group or political opinion; or*

*(b) the person's life, physical integrity or liberty would be threatened on account of external aggression, occupation, foreign domination or events seriously disturbing public order in part or the whole of that country.”*

It is evident that the drafters of the law had been influenced by the wording of Article 33 of the Convention Relating to the Status of Refugees. The Kenyan Refugee Act under Section 18 does not specifically use the words non refoulement, the short title referring to the section states “*Non-return of refugees, their families or other persons*” It therefore does not leave room for ambiguity as to its meaning and intent, which is, to prohibit the refoulement of the persons where they are likely to face persecution or suffer other in human acts.

Other than Section 18 that specifically prohibits the refoulement of persons, there are other sections of the act that do not specifically prohibit refoulement but upon reading them an inference of non refoulement can be drawn from the wording. For instance, Section 12(1) provides that;

*“Notwithstanding the provisions of any other Law, any person who has applied under section 11<sup>191</sup> for recognition of his status as a refugee and every member of his family, may remain in Kenya—*

*(a) Until such person has been recognized as a refugee in terms of that section;*

*(b) In the event of the application of such person being rejected, until such person has had an opportunity to exhaust his right of appeal;*

*(c) 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.”*

A reading of this section shows that the principle of non refoulement can be inferred from its wording. This is because it is evident that when the refugee status of the individual is being

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<sup>191</sup> Section 11 of the Refugee Act provides the procedures for refugee recognition in Kenya.



determined, the individual whose status is being determined is allowed to remain within Kenya pending their status determination. Further, protection of the individual is specifically provided under Section 12(1) (c) where it is seen that even when an individual refugee's appeal has been rejected the government is obligated not to immediately have them leave the country but rather give the individual ninety days within which to seek admission in a country of their choice.

The inference that is drawn from this section with respect to non refoulement is the fact that Kenya cannot force an individual into a country where they have a well founded fear of persecution or torture irrespective of the fact that they have failed to be granted the refugee status, which shows that the Kenyan law respects the principle non refoulement.

Under the Refugees Regulations of 2009 an inference of the principle of non refoulement is evident when it is provided under Regulation 47(3) 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."*<sup>192</sup>

The inference that is made here is similar to that which is drawn from a reading of Section 12(1)(c). That is, Kenya will at no point expel an individual into a country where the individual feels that their life is in danger of persecution, torture or other inhuman acts. The Kenyan position, according the regulations, is that the individual is to be accorded the opportunity to make a decision as to which country they would want to relocate to and the Kenyan government is to host them until such a time that they are accepted by a third state in which they wish to relocate to and seek protection.

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<sup>192</sup> Regulation 47(3), Refugees (Reception, Registration And Adjudication) Regulations, 2009

### 3.3.2 Exceptions to the principle under the Kenyan Refugee Act

In as much as the Refugee Act and the Refugees Regulations provide for the principle of non refoulement, they also provide for the exceptions to the principle of non refoulement. This means that the Act and its regulations borrow heavily from the CRSR51. For the refugee to be expelled under the Refugee Act of 2006, it is provided that such expulsion shall be as follows;

*'Subject to section 18(1) and subsection (2) of this section, the Minister may, after consultation with the Minister responsible for matters relating to immigration and internal security, order the expulsion from Kenya of any refugee or member of his family if the Minister considers the expulsion to be necessary on the grounds of national security or public order.'*<sup>193</sup>

*'Before ordering the expulsion from Kenya of any refugee or member of his family in terms of subsection (1) of this section, the Minister shall act in accordance with the due process of law.'*<sup>194</sup>

Similar to the CRSR51 the Kenyan law also envisages national security as the main reason under which refoulement can be allowed. However, refoulement can only be exercised in accordance with the due process of the law. Due process involves making an application under Section 11 of the Act to the Commissioner for Refugee Affairs.<sup>195</sup> In the event that the commissioner does not grant the refugee the status they had applied for the commissioner will inform the applicant in writing.<sup>196</sup> The due process does allow the applicant upon his request being turned down to lodge

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<sup>193</sup> Section 21(1) Refugee Act, 2006

<sup>194</sup> Section 21(2) Refugee Act, 2006

<sup>195</sup> Section 11(1) Refugee Act, 2006 , Any person who has entered Kenya, whether lawfully or otherwise and wishes to remain within Kenya as a refugee in terms of this Act shall make his intentions known by appearing in person before the Commissioner immediately upon his entry or, in any case, within thirty days after his entry into Kenya.

<sup>196</sup> Section 11(6)(b)

an appeal, with the Appeals board created under Section 9<sup>197</sup> of Refugee Act, within 30 days of receipt of the decision of the Commissioner.<sup>198</sup> Due process under the Act accords an individual if dissatisfied with the decision of the Appeals Board with a second appellate avenue, this time before the high Court of Kenya.<sup>199</sup> If an appeal at this instance is unsuccessful the aggrieved individual does not automatically get refouled as they are allowed a period within which to stay in Kenya as they seek admission to a country where they will be hosted.<sup>200</sup>

In as much as exceptions to the principle have been espoused in the act, the act does not contemplate an instance where the refugee will be caused to leave the country unceremoniously. The makers of the act envisioned a situation where the law would protect the individual from being returned into a country where their life would be subject to harm in any way whatsoever. This is because it avails a situation where an individual whose refugee status has been revoked or whose application has been rejected will be granted safe passage into third countries where they would not likely be refouled back to the state in which their well founded fear of persecution arose.

Under the Refugee Regulations the principle of non refoulement is also seen as having a caveat in its application in Kenya on similar grounds as that seen under Section 21 of the Refugee Act 2006. That is, on the ground of national security<sup>201</sup>. Regulation 47 of the Refugee Regulations

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<sup>197</sup> Section 9(1), Refugee Act, 2006, There is established a Board to be known as the Refugee Appeal Board to consider and decide appeals under this Act

<sup>198</sup> Section 10(1), Refugee Act, 2006

<sup>199</sup> Section 10(3), Refugee Act, 2006

<sup>200</sup> Regulation 47(3) Refugee Regulations, 2009 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.

<sup>201</sup> National Security has been defined in Article 238 of the Kenyan Constitution as "*the protection against internal and external threats to Kenya's territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity, and other national interests.*"

provides the general grounds for expulsion and the procedure to be followed when such grounds are established, it specifically provides that;

1. *A refugee or a member of his family may be expelled from Kenya on grounds of national security or public order.*
2. *The Minister shall issue an order to a refugee whose refugee status has been terminated to leave the Country.*
3. *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.*
4. *A refugee may be permitted to effect his own removal under an expulsion order.”*

It is evident therefore, that the principle of non refoulement may be escaped only under the exceptions provided under statute and the procedures to be followed in the event that expulsion or refoulement was to be undertaken should only be as provided. Any act of expulsion that is contrary to this procedure<sup>202</sup> and provisions of the law would therefore be in cross purpose with the internationally set principle of non refoulement.

### **3.3.3 Principle of Non refoulement in the Kenyan law other than in the Refugee Act**

Though the Refugee Act of 2006 has set the pace and laid the foundation for the principle of non refoulement under the Kenyan law, it is worth noting that the Kenyan law relating to refugees and the principle of non refoulement is drawn from other sources. For instance under the Kenyan

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<sup>202</sup> The procedure that is followed in this Act is ensuring that the party that is to be removed is informed of the Commissioner of Refugee Affairs' decision promptly and in writing and is further accorded an opportunity to appeal the Commissioner's decision. Further, the procedure ensures that refoulement is not undertaken while the asylum seeker is awaiting a determination of the appeal lodged.

Constitution under Article 2, Kenyan law is seen to be influenced by international treaties under conventions that Kenya has ratified and further, general rules of international law that exist.<sup>203</sup>

This means that the international law principle of non refoulement can be seen to be drawn from the conventions relating to the status of refugees and other conventions that specifically prohibit refoulement of individuals. The fact that the principle of non refoulement is a principle that has now achieved the status of *jus cogens* and more to that is now considered a principle of customary international law means that it has met the requirements of Article 2(5) of the Constitution of Kenya, that provides that general rules of customary international law shall guide the rule of law in Kenya. Further, the existence of the varied conventions relating to the same principle allows it obtain firm grounding in the Kenyan Law under Article 2(6) of the Constitution of Kenya.

Some of the applicable international law conventions that provide for the principle of non refoulement and which Kenya is a signatory to include; The Convention Relating to the Status of Refugees of 1951 and the Protocol Relating to the Convention of 1967, the OAU Convention of 1969, the African Charter of People and Human Rights amongst others.

It is therefore evident from the foregoing, that the Kenyan law has embraced the principle of non refoulement, be it through domesticating the principle in its legislation, through Section 18 of the Refugee Act of 2006, or by ratifying conventions and treaties that prohibit any form of refoulement or through observance of generally accepted international principles of law.

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<sup>203</sup> Article 2(5) and Article 2(6), Constitution of Kenya 2010,

### **3.3.4 Scope of Application of the principle of non refoulement under the Kenyan Refugee Act**

Section 18 of the Refugee Act provides that *“No person shall be refused entry into Kenya, expelled, extradited from Kenya or returned to any other country or to subjected any similar measure if, as a result of such refusal, expulsion, return or other measure, such person is compelled to return to or remain in a country...”*

The wording of this section is very specific as to who shall be afforded protection under the principle of non refoulement under the Kenyan Law. Its application is not only extended to refugees and other persons within Kenya but also individuals that are not resident in Kenya who may wish to seek protection under the principle.

When the Act provides that *“No person shall be refused entry into Kenya...”* and *“...Such person is compelled to.....or remain in a country”* it means that the Country will not put in place measures that will cause a person not to come into the country and get an opportunity to be afforded the protection from persecution. Therefore, any act that denies entry of individuals as asylum seekers or refugees into Kenya would be contrary to the application of the principle of non refoulement as espoused in the Refugee Act of Kenya.

The Kenyan Act makes reference to a person who seeks to be extradited. It extends protection to these persons and provides that such persons are afforded protection under the principle of non refoulement, if such return of the individuals would give rise to the threat of persecution.

The wording of Section 18 of the Refugee Act and that of Article 33(1) of the Convention Relating to the Status of Refugees stand in contrast to each other. This is in terms of general scope of application of Section 18. The Kenyan Act has made an effort to extend the protection

of refugees and other persons under the principle of non refoulement, by including the fact that no person shall be refused entry into Kenya and further by specifically making reference to those that may be extradited amongst those that may seek protection. By including the provision not to refuse entry it has extended the scope of the principle which as conceived in Article 33(1) made reference to return and expel and made no mention of refusal of entry.

In addition to this, the Kenyan Act makes reference to the fact that it is generally applicable to all and sundry and not just the refugees and or asylum seekers, the wording of Section 18 commences as follows; "*No person shall...*" This means that it is not only restricted to refugees but also persons that are yet to be granted the status of refugees. The fact that it makes reference to not refusing entry means that it envisages a situation where an individual is resident in their home state but seeks to gain entry into Kenya and be afforded protection under the act, where they may have a well founded fear of being persecuted or their life is at threat.

The wording of Section 18 differs from that of Article 33(1) which makes reference to refugees by stating that "*No Contracting State shall expel or return ('refouler') a refugee...*" This shows that the principle is likely to be interpreted as applying to persons that have been granted the status of refugees. This is another stark difference in the wording of the principle, which shows that Kenya has extended the definition of the principle to include individuals that are not refugees.

### **3.4 KENYA AND ITS COMPLIANCE WITH THE PRINCIPLE OF NON REFOULEMENT**

Compliance in this section of the paper also has the meaning of looking at the non compliance with the principle. Therefore, compliance and non compliance with the principle of non

refoulement shall be looked at interchangeably in this section of the paper. This is because while one arm of government ensures compliance with the principle the other arms disregard and fail to comply with it. Therefore, it would be important to look at compliance and non compliance with the principle together.

### 3.4.1 Border Closure

In January 2007, in response to security concerns the Kenyan government officially closed the Kenya-Somalia border.<sup>204</sup> The closing of the border did not have the intended effect of preventing an average of over 5,000 Somalis from crossing into Kenya each month to seek refuge, but it had significant negative impacts on the rights and protection of these refugees.<sup>205</sup> However, the border closure did have the effect of having Somali refugees forcibly returned back to their country.<sup>206</sup> The closure also resulted in people smuggling from within Somalia and the solicitation of bribes by Kenyan police and others in the area between the border and Dadaab.<sup>207</sup> In as much as there was solicitation of bribes to enable persons gain entry into Kenya, those who could not afford to pay the bribes were subjected to serious police abuses during their arrest, detention and deportation.<sup>208</sup>

In 2015, after the Garissa University attack that resulted in the death of 147 university students, the Kenyan government through some of its leaders stated that Kenya intended to build a wall along the Kenya – Somalia border. For instance, it was reported that Joseph Nkaissery, Kenya's interior Cabinet secretary, told journalists that in a bid to reduce illegal border entries the wall

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<sup>204</sup> 'Addressing the Humanitarian Crisis on the Kenya/Somalia Border', March 2009, [www.oxfam.org](http://www.oxfam.org) accessed on 26<sup>th</sup> July, 2015

<sup>205</sup> Ibid

<sup>206</sup> Ibid

<sup>207</sup> Ibid

<sup>208</sup> See note 204



would start in the town of Mandera in the North near the borders of Somalia and Ethiopia, and end in Wajir in the Northeast about 100km from Somalia.<sup>209</sup> The minister is further quoted as stating that "*Mandera in Kenya and Bula Hawa in Somalia are almost merged and you cannot tell which is which.*"<sup>210</sup> The governor of Lamu county, Issa Timamy, told journalists that the wall will be made of concrete fencing and further that he had been briefed about the initiative and said the wall was expected to be completed before the end of 2015<sup>211</sup>.

Building the wall has the same effect as border closure and from the foregoing it is evident that Kenya has over the years made attempts at closing the border and has in certain instances actually gone ahead to close the border between Kenya and Somalia. The border between Kenya and Somalia always seems to be affected in the event of border closure because Somalia has contributed to a large number of refugees that are within Kenya and further, the fact that terrorism seems to find home in Somalia, taking into consideration that there has not been an effective government in Somalia since the country fell into civil war.

Border closure is categorized under non compliance with the principle of non refoulement. This is because Section 18 of the Kenyan Refugee Act, 2006, provides that "*No person shall be refused entry into Kenya, expelled, extradited from Kenya or returned to any other country or to subjected any similar measure if, as a result of such refusal, expulsion, return or other measure, such person is compelled to return to or remain in a country...*", A reading of this section shows that any attempt at refusing entry of an individual goes against the principle of non refoulement as espoused by the Kenyan view of what refoulement amounts to.

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<sup>209</sup> Wafula P, "*Kenya plans great wall to block terror*" Mail and Guardian 10<sup>th</sup> April 2015, [www.mg.co.za](http://www.mg.co.za) accessed on 26<sup>th</sup> July, 2015

<sup>210</sup> Ibid

<sup>211</sup> Ibid

The consequences of the border closure which involve arrest, detention and subsequent deportation of the persons are also seen as going against the principle of non refoulement. This is because at the instance that a person is being deported , they will be taken back to their home state and this may be a country that gave rise to their well founded fear of persecution and these persons may in fact be tortured or subjected to inhuman treatment.

From the foregoing it is evident that despite the fact that Kenya has enacted a law that specifically provides for non refoulement of individuals the border closure and threat to close the border continues to be a live issue. It is also evident that the compliance and non compliance with the principle of non refoulement continues occur at the same time because non compliance is kept in check by other government institutions which cause compliance with the principle.

#### **3.4.2 Amendments to the Law**

On 22<sup>nd</sup> December, 2014, the Security Laws(Amendment)Act of 2014 became law and through Section 48 of the afore mentioned act, the Refugee Act of Kenya 2006 was amended. The specific Section that Section 48 amended was Section 16 of The Refugee Act, 2006. The Section was amended to read as follows;

*"The Refugee Act is amended by inserting the following new section immediately.*

*16A. (1) The number of refugees and asylum seekers permitted to stay in Kenya shall not exceed one hundred and fifty thousand persons*

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

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

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

The question that is asked is whether these changes to the Refugee Act have any effect to the principle of non refoulment. The answer is in the affirmative. The reason for this is that by limiting the number of refugees that may continue to be present within Kenya at any given ime has the consequent effect of limiting the entry of new refugees into the Kenya and further, those that are present in Kenya that exceed the set number of one fifty thousand would have to be forced out of the country in order to comply with the law. By forcing out the excess refugees Kenya would be refouling people as they cannot guarantee that where they were to go would be a safe third state, which is contrary to the principle as espoused in the Refugee Act and also in the Refugee Convention of 1951.

This position was highlighted in *CORD & 2 Others v Republic of Kenya & Another*<sup>212</sup> where the Court stated as follows

*“... Non-refoulement is also expressed in Article 3 of the 1984 UN Convention against Torture; Article 11(3) of the 1969 OAU Convention; Article 12(3) of the 1981 African (Banjul) Charter of Human and Peoples’ Rights; and Article 22(8) of the 1969 American Convention on Human Rights, among others.*

*Thus, both domestically and internationally, the cornerstone of refugee protection is the principle of non-refoulment the principle that no State shall return a refugee in any manner*

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<sup>212</sup> See note 8

*whatsoever to where he or she would be persecuted. This principle is widely held to be part of customary international law.*

*What emerges from these international covenants and instruments is that a refugee is a special person in the eyes of the law, and he or she must be protected. Further, since Kenya is a signatory to the regional and international covenants on the rights of refugees set out above, which are now, under the Constitution, part of the law of Kenya, she is bound to abide by them. The question is the extent to which she is bound...*

In this introductory note in the Court's holding, what emerges is the fact that the Court appreciates that Refugee Law is set out in various international instruments and conventions. The Court goes ahead to indicate that in as much as the international conventions exist, refugee protection has now taken the form of a customary international rule, therefore, even in the absence of the international and domestic laws codifying it, there are obligations that accrue to a state to ensure protection of refugees whether or not they are signatories to the various conventions. The judges went ahead to state that Kenya was a signatory to the conventions and it had even gone a step further at stating, in its constitution, that it was bound by these international conventions that it was a party to. The conclusion drawn from this introductory remarks by the Court was that Kenya had committed itself to be bound by the obligations resulting from the Conventions relating to refugees.

The Court went further to note that;

*...The amendment to the Refugee Act limits the number of refugees and asylum seekers permitted to stay in Kenya to 150,000. From the AG's submissions, the country has between 450,000 – 583,000 refugees presently staying in Kenya. One must ask, as do the*

*petitioners and some of the interested parties, how the government intends to get rid of the extra 300,000 – 433,000 refugees. Mr. Njoroge argued, citing the US example, that it is in order to set a refugee policy, and that the US sets a limit on the annual number of refugee admissions. These are figures of refugees to be admitted into the U.S and maintained there during the year.<sup>213</sup> That may well be so, but we have not been shown any legislative framework in the United States or any other country where the number of refugees entering any countries has been set.*

*A reading of the provisions of Section 18A<sup>214</sup> of the Refugee Act shows that the intention is not to cap the number of refugees being admitted into Kenya but those allowed to stay. As Kenya already had 450,000 – 583,000 refugees, it means that for the country to reach the 150,000, not only must there be no admission of refugees, but that there has to be expulsion of about 430,000 refugees. The effect of Section 18A is to violate the principle of non refoulment, which is a part of the law of Kenya and is underpinned by the Constitution. The provisions of Section 48 of SLAA, as well as the provisions of Section 18A of the Refugee Act, are in our view, unconstitutional, and therefore null and void.<sup>215</sup>*

This decision of the High Court goes to show that the amendment to the law was contrary to the principle of non refoulement and it is only after the intervention of the Court that compliance of the principle was ensured. At this particular instance, it is evident that when the legislature and the executive arms of government proceeded to draft and subsequently enact the Security

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<sup>13</sup> The government in making its submissions in support of the decision to amend the law had taken USA absolute sovereignty approach in application of the principle of non refoulement which had resulted in USA applying a policy of intercepting asylum seekers boats in the High Seas and returning them to their home country. USA interpretation of the return policy was that the Refugee Convention did not prevent a state from preventing the entry of asylum seekers but only prevented the return of the asylum seekers once in the country.

<sup>14</sup> Section 18A of the Security Amendment Act is the Section that amended the Refugee Act by stating that at any given time the total number of refugees in Kenya would be 150,000.

<sup>15</sup> See note 8

amendment law of 2014 they were ill informed as they failed to recognize that Kenya is a signatory to international treaties and conventions that recognized the principle of non refoulement and to which the country was obligated to comply with.

The Court correctly noted that the law as drafted would automatically have meant that the refugees that exceeded 150,000 in number would have had to be removed from Kenya in order to comply with the provision of the law limiting the number of refugees.<sup>216</sup> The act of removing these refugees would have amounted to refoulement which is contrary to the principle of non refoulement.

This meant that the attempt at limiting the number of refugees to remain in Kenya at one fifty thousand was contrary to the principle of non refoulement and this act by the government through enactment of a law was consequently declared unconstitutional by the court and was stopped from being operative in Kenya. As previously seen in this paper it is very difficult in Kenya for compliance and non compliance to be looked at separately, this is because at the instance that an arm of government begins to avoid compliance with the principle, the judiciary steps in and ensures compliance with the principle.

### **3.4.3 Closure of Refugee Camps**

On 11<sup>th</sup> April, 2015 Kenya's Deputy President Hon. William Ruto stated that the UNHCR had three months within which to close Dadaab and make alternative arrangements for its residents otherwise, Kenya would relocate the refugees themselves.<sup>217</sup> The statement made by Kenya's

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<sup>16</sup> It is important to note that the mode of determining those who were to remain and those that were to be removed was never addressed. This may have resulted into profiling and discriminative acts being undertaken in arriving at a decision as to who was to be removed or not.

<sup>17</sup> See note 51

deputy president drew sharp criticisms from various quarters. Those criticizing the move noted the following;

Médecins Sans Frontières (MSF) an international organization through Charles Gaudry, MSF's head of mission in Kenya while opposing the closure of the camps noted that *"Such a drastic measure in an impossibly short timeframe would deprive generations of refugees of any choices for their future,"*<sup>218</sup> The Human Rights Watch also did oppose the closure of the camps and on its part noted that, *"This is a move that would punish hundreds of thousands of people, forcing them to return to a country where safety and medical care is far from guaranteed, and in some places is non-existent."*<sup>219</sup>

It is seen from the comments by members of the Human Rights watch that such a measure would result in the undermining the principle of non refoulement. This is because closure of the refugee camp would fall under the definition of "other measure" that is provided under section 18 of the Refugee Act, which would be an act that would cause refugees to be returned to place where their likely to be persecuted. If this were to happen as a result of closure of the refugee camp then the principle of non refoulment would not have been complied with.

#### **3.4.4 Relocation of Urban Refugees to Refugee Camps**

It is noted that relocation of urban refugees has the effect of creating a situation in which refugees will be compelled to leave a country and in the alternative be forced by the Country hosting them to leave the country if they fail to relocate from urban areas to refugee camps. These acts would be in complete violation of the principle of non refoulement as such orders

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<sup>218</sup> Dadaab refugee camp closure would risk 350,000 Somali lives, warns Amnesty online issue of The Guardian [www.theguardian.com](http://www.theguardian.com), accessed on 26<sup>th</sup> July, 2015

<sup>219</sup> Ibid

being made a government have the capability of indirectly leading to refoulement of refugees or other persons.

Sometime in 2013 the Kenyan government issued the following press release;

*“The Government of Kenya has decided to stop reception, registration and close down all registration centres in urban areas with immediate effect. All asylum seekers/refugees will be hosted at the refugee camps. All asylum seekers and refugees from Somalia should report to Dadaab refugee camps while asylum seekers from other countries should report to Kakuma refugee camp. UNHCR and other partners serving refugees are asked to stop providing direct services to asylum seekers and refugees in urban areas and transfer the same services to the refugee camps.*

*Signed*

*Ag. COMMISSIONER FOR REFUGEE AFFAIRS.* <sup>220</sup>

This press release was subsequently followed by a letter by then Permanent Secretary in the Ministry of Special Programmes that read in part;

***RELOCATION OF URBAN REFUGEES TO OFFICIALLY DESIGNATE CAMPS***

*The government intends to move all refugees residing in Urban areas to the Dadaab and Kakuma Refugee Camps and ultimately to their home countries after the necessary arrangements*

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<sup>220</sup> Petition No. 19 of 2013 consolidated with 115 of 2013, *Kituo Cha Sheria & 8 others v Attorney General [2013] eKLR*



*are put in place. The first phase which is targeting 18000 persons will commence on 21st January 2013... ”<sup>221</sup>*

The effect of the press statement and the letter by the Permanent Secretary was to have all the refugees that were residing outside the refugees camps to return to the camps for later return to their home country. These statements were declared to be contrary to the principle of non refoulment by the High Court of Kenya which ruled that the statements were in breach of the principle of non refoulment, in arriving at its decision the court made the following observations;

*“...The respondent has made it very clear that it does not intend to violate the non-refoulement principle. While I accept this position, violation of the principle may be indirect and may be the unintended consequence of a policy that does not, on its face, violate the principle... The proposed implementation of the Government Directive is that it is a threat to the rights of refugees. First, the policy is unreasonable and contrary to Article 47(1). Second, it violates the freedom of movement of refugees. Third, it exposes refugees to a level of vulnerability that is inconsistent with the States duty to take care of persons in vulnerable circumstances. Fourth, the right to dignity of refugees is violated. Fifth, the implementation of the government directive threatens to violate the fundamental principle of non-refoulement... ”<sup>222</sup>*

To the Court, though the press release and the letter did not by themselves cause refoulment to occur they had an indirect consequence of causing violation of the principle of non refoulment due to the acts that followed the announcements. This decision shows that the Kenyan law on refugees has the capacity to develop the principle of non refoulement because it expands the scope of non refoulement to include indirect refoulement, which will be a concept that will aid in

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<sup>221</sup> See note 220

<sup>222</sup> See note 220

protecting the rights of refugees and other persons when certain acts do not fall as clear acts of refoulement.

### **3.4.5 Reasons for Kenya's Refoulement of Refugees and other persons**

What is evident in all instances where the Kenyan Government has violated the principle of non refoulement is the fact that national security has been the underlying reasons why government has violated the principle. For instance with respect to Relocation of refugees the Department of Refugee affairs, through the commissioner for refugee, issued a statement on 10th December 2012 which stated that

*"Following a series of grenade attacks in urban areas where many people were killed and many more injured, the government has decided to stop registration of asylum seekers in urban areas with immediate effect. All Asylum Seekers should be directed to Dadaab and Kakuma refugee camps for Reception, Registration and Refugee Status Determination, Issuance of Movement Passes for non-resettlement cases should also stop immediately. In addition, the government shall put in place necessary preparation to repatriate Somali refugees living in urban areas..."<sup>223</sup>*

It is clearly evident that the motivating factor in this instance was a need to protect the people of Kenya from attacks. Be as it may, such a blanket view of the refugees as being the main cause of attacks was ill advised. This is because the government had not complied with the procedures of due process that it had espoused in the Refugee Act, 2006. It is for this reason that the court made a ruling that this action was in contravention of the principle of non refoulement despite the fact that the government had put national security as a justification of its actions.

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<sup>223</sup> See note 220

Under the Refugee Act 2006, Section 19 the exception to strict compliance with the principle is provided for. The section reads as follows;

*'The Commissioner may withdraw the refugee status of any person where there are reasonable grounds for regarding that person as a danger to national security or to any community of that country.'*<sup>224</sup>

For the drafters it was seen that the national security was an issue that would allow for non compliance with the principle of non refoulement. The Section goes further to include the fact that posing a danger to a community is a second ground which would result in the evading the strict compliance with the principle of non refoulement.

Therefore, under the Kenyan law national security and threat to a community are the main exceptions that would warrant refoulement of an individual who is within Kenya or who intends to make their way into Kenya. The exceptions provided under the Kenyan act are a development of the exceptions as provided in the Refugee Convention because they have been domesticated to suit the Kenyan scenario by including the threat to a community as one of its exceptions.

### **3.5 CHAPTER SUMMARY**

The chapter sought to explore the Kenyan Law on refugees and what it provides in relation to the principle of non refoulement. This chapter has been able to establish that the principle of non refoulment is specifically provided for under Section 18 of the Refugee Act and its exceptions are espoused both the Act and the Refugee Regulations. Further, the Act and the regulations have been drafted in such a way as to ensure that both refugees and those that have not gained the status of refugees are both protected by the principle of non refoulment. It is also noted that the

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<sup>224</sup> Section 19, Refugee Act, 2006

international law on refugees has by virtue of Article 2 of the constitution been made part of Kenyan law. This has had the effect of ensuring that in the event that Kenya is silent on the principle of non refoulement the international law will and acts of non refoulement will be inexcusable.

With respect to compliance with the principle, it is evident that having in place laws that support non refoulment does not necessarily mean that observance of the principle will automatically happen. Kenya has made attempts and has actually in certain instances, through the legislature and the executive, undermined the principle of non refoulement. However, the strict observance with the principle has been facilitated by the judiciary that has acted as a watchdog over the principle.

Development of the principle of non refoulement by the Kenyan law has happened on three fronts. The first, is through the legislature which has increased the scope of application of the principle to include the those seeking to come into the country and further that the principle of non refoulement applies to persons facing the threat of extradition. The second, is through the judiciary that has ruled that refoulement can be caused by the indirect acts of a state. This has assisted in developing the principle as there has been a shift from looking at acts that are prima facie acts of refoulement to appreciating that there may be indirect consequences of actions by a state or its organs that may result in refoulement of an individual. Third, is the fact that Kenya has extended the exception to non refoulement to include; the threat to a community which is in addition to the exception already in existence under the Refugee Convention which is a threat to national security.

In conclusion therefore the law on refugees and the principle of non refoulement in Kenya is well established, despite the fact that strict compliance with the law has not been observed by various state organs. Further, due to the interactions with the international system the Kenya has made efforts at complying with it.

## CHAPTER 4

### 4 APPLICATION OF THE PRINCIPLE OF NON REFOULEMENT IN OTHER COUNTRIES

#### 4.1 INTRODUCTION

This chapter shall look at the principle of non refoulement and its application in other countries. It will begin by looking at the different approaches that states have taken in applying the principle of non refoulement within their domestic laws and thereafter look at specific country applications of the principle of non refoulement. This will enable the paper provide a comparative analysis of the application of the principle under the Kenyan law and the application under other countries' legal regime.

#### 4.2 STATES APPROACHES IN APPLYING THE PRINCIPLE OF NON REFOULEMENT

There exist four distinct approaches to the domestic application of the principle of non refoulement within states and states legislation.<sup>225</sup> While these approaches exist, it is important to note that these approaches vary without clear guidelines for the best, or even sufficient, implementation of non refoulement in domestic legal systems and in addition to this, implementation of the approaches fall along a spectrum, ranging from heavily restrictive border access to loosely restrictive border access.<sup>226</sup> These approaches include; the absolute state sovereignty approach, collective approach to non refoulement, the collective approach with a twist and finally the restrictive definitional approach.

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<sup>225</sup> D'Angelo E.F, '*Non-Refoulement: The Search for a Consistent Interpretation Of Article 33*' *Vanderbilt Journal Of Transnational Law*, Vol. 42:279 May, 2009

<sup>226</sup> Ibid

#### 4.2.1 The absolute state sovereignty approach

The absolute state sovereignty approach holds the view that a state's non-refoulement obligation, under the Refugee Convention of 1951, is applicable only when a person seeking refugee status successfully makes it to their borders.<sup>227</sup> The adherents of this principle hold the view that states have no obligation towards facilitating the arrival of refugees into their territory and affirmatively preventing potential refugees from reaching their borders is also consistent with Article 33 obligations.<sup>228</sup>

Some of the measures and methods that have been adopted by the state adherents to this approach include; sending the national authorities of the receiving state to a country producing an influx of refugees to implement pre-entry clearance procedures, this is a measure that has been adopted by the United Kingdom.<sup>229</sup> A second measure that has been adopted is, as seen by the USA, where the state takes active measures to prevent refugees from reaching their borders.<sup>230</sup> Access denial procedures are other measures that have been used by states that follow this approach in applying the principle of non refoulement within their jurisdictions. Some of these access denial procedures include the use of visa controls.<sup>231</sup>

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<sup>227</sup> See note 42

<sup>228</sup> The view by these states is that no obligation is placed on any State by Article 33 to assist any asylum get to their territory and any measures that they undertake to prevent the asylum seekers from getting to their countries is consistent with the Refugee Convention.

<sup>229</sup> The pre-clearance policy was to the effect that the British government would place immigration officials at airports for the officials to make a determination if the person flying into their country would seek asylum. If the officials determined that the person was likely to seek asylum they would not permit the person to travel to the United Kingdom.

<sup>230</sup> One of the preventative measures taken by the United States is stopping the boats that are carrying asylum seekers while they are at the High Seas and still not within the territorial jurisdiction of the US and returning the captured persons back to their countries of origin.

<sup>231</sup> D' Angelo notes that the denial of visas to persons from countries that provide a mass influx of asylum seekers has the potential of reducing the traffic of asylum seekers into the country where they seek to gain refugee protection status.

The British Courts, in the European Roma Rights case, while making a determination in support of the United Kingdom's decision to send its authorities for purposes of pre entry screening reasoned that;

*'... that no permissible construction of Article 33 confers a right on refugees to access the territory of another country...the 1951 Convention does not address whether states should be obligated to help refugees escape their country of origin; rather, it addresses only where refugees must not be sent...'*<sup>232</sup>

A reading of this excerpt, from the decision of the Court, reveals that, according to the British, the Refugee Convention only applied when an asylum seeker was to be returned to a state where their well founded fear of persecution arose. In the Court's view the acts by the British government were in compliance with the provisions of Article 33 as the refugees were not being returned.

This approach to the application of the principle of non refoulement holds the view that compliance with the principle of non refoulement does not include an obligation being placed on the states to facilitate access to their countries, neither does it place an obligation to the states to make it possible for the refugees or asylum seekers to find their way to states. To the adherents of this approach protection the principle only arises where the refugees or asylum seekers are within the borders of a country. Therefore, any acts that prevent and ensure that the refugees or asylum seekers do not enter within their borders do not amount to non compliance with the

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<sup>232</sup>The case concerned UK immigration control at Prague airport. The vast majority (if not all) Czech nationals applying for asylum were Roma. Few of these applications were successful - only about 6% at the beginning of 2001. By agreement with the Czech authorities, UK immigration intermittently operated checks at Prague airport before people boarded flights to the UK. Leave to enter was granted to passengers who satisfied officers that they intended to visit the UK for a purpose within the Immigration Rules. Others were refused leave to enter, including passengers who said that they intended to claim asylum in the UK or who the officers concluded were intending to do so. If officers refused leave to enter, this effectively prevented the person from boarding the plane to the UK.



principle. A reading of Article 33(1) would reveal that this approach is in contravention of the principle of non refoulement. This is because if the risk country is that which the refugees are being forced to continue residing in, then indirectly refoulement has occurred by refusing them access to a safe country.

#### 4.2.2 The collective approach to non refoulement

This approach involves a series of mechanisms used by states which have been included in multilateral and bilateral agreements which have the effective of having the refugees relocated from one state to another.<sup>233</sup> This procedure is also known as refugee redistribution.<sup>234</sup> It is observed that refugee redistribution follows two main procedures, these are 'the first country of arrival rule' and the second is 'safe third country rule'.<sup>235</sup> The first country of arrival rule requires the first member state at whose border the applicant presents himself to be responsible for reviewing the asylum claim and granting or refusing asylum.<sup>236</sup> On the other hand the safe third country rule allows states to send an applicant to another member country through which the applicant has passed so long as that country will review the applicant's asylum claim.<sup>237</sup> It is argued that these agreements allow for the redistribution refugees to safe countries of asylum in order to better allocate the responsibility of providing asylum.

The proponents that support the legality of the collective approach to non refoulement argue that in as much as the Refugee Convention, under Article 33, prohibits states from expelling refugees to a territory where their life or freedom would be threatened, non refoulement does not impose

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<sup>233</sup> See note 42

<sup>234</sup> Ibid

<sup>235</sup> Ibid

<sup>236</sup> This approach has mainly been used in the European Union, It established that, by default, the first Member State an asylum-seeker entered is responsible for examining their application for international protection. This means that an asylum-seeker who moves to another Member State is automatically transferred back to the Member State at the EU's external borders for reviewing of their protection application.

<sup>237</sup> See note 42

an affirmative obligation to admit refugees into the receiving state's territory. The logic and reasoning behind this approach is the fact that, third states send the asylum seekers to a fourth state in the belief that this fourth state will not expel the asylum seeker.

Canada which is a proponent of this approach in implementing the principle of non refoulement has in its Immigration Act, while domesticating the application of the principle, allowed for refusal to review an applicant's asylum claim if coming from a receiving state that has agreed to share the responsibility of examining asylum applications.<sup>238</sup> The Canadian Court of Appeals has pointed out that according to the Immigration Act, the safe third country agreements can only be made with countries that comply with Article 33(1) of the Refugee Convention, further the Court has held that Canada shares the responsibility for any breach when it sends an applicant to a safe third country that then violates the principle of non refoulement.<sup>239</sup>

In application of the safe third country rule, there are states that utilize the rule without a requirement that the third state comply with the Refugee Convention. For instance, Australia has does not require that the third countries that it enters into the agreements with be countries that comply with the principle and be parties to the Convention.<sup>240</sup> Be as it may, the Australian Courts have held that it is consistent with Article 33 to permit the receiving state's removal of an applicant to a third country if the third country has accorded the applicant effective protection.<sup>241</sup>

An Australian Court in support of this position made the following observation;

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<sup>238</sup> See note 42

<sup>239</sup> Ibid

<sup>240</sup> Ibid

<sup>241</sup> Ibid

*“So long as, as a matter of practical reality and fact, the applicant is likely to be given effective protection by being permitted to enter and live in a third country where he will not be under any risk of being refouled to his original country, that will suffice.”<sup>242</sup>*

It is argued that the ruling of the Court, has the effect of placing the onus on the sending country to assess and confirm the realistic situation and the current practices of the third country and determine whether there is a likely chance that the refugee will receive effective protection.<sup>243</sup>

The collective approach to non refoulement has the effect making it difficult to allocate responsibility where there is violation of the principle.<sup>244</sup> This approach has the capacity to be used by states to avoid obligations under the Refugee Convention and cause the indirect refoulement of refugees especially in instances where the third country does not adhere to the requirements set out in Article 33(1) of the Refugee Convention.

#### **4.2.3 The Collective Approach with twist**

This approach is a variation of the collective approach to non refoulement. It utilizes the procedural measures to avoid reviewing asylum claims applications, depriving the refugee of the opportunity to legally reside in the receiving state.<sup>245</sup> For example, France has designated portions of its territory as transit zones, usually around airports through which large portions of asylum applicants arrive.<sup>246</sup> In creating these transit zones the French government argued that national laws did not apply in these areas, which had the effect of rendering inapplicable any

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<sup>242</sup> See note 42

<sup>243</sup> Ibid

<sup>244</sup> The reason why the collective approach is seen as making it difficult to allocate responsibility is because, the question that is asked is who between the state that sent the asylum seeker to the third country and the third country that sent the asylum seeker to the fourth country is responsible in the event that the asylum seeker is persecuted in the fourth country.

<sup>245</sup> See note 42

<sup>246</sup> Ibid

guarantees provided to refugees under the French domestic law and French international obligations. This practice of creating transit zones though supported by the French Courts has been criticized by the European Court of Human Rights (ECHR). The ECHR when addressing the issue as to whether or not the transit zones fell under the jurisdiction of the French law made the following observations;

*"...Even though the applicants were not in France within the meaning of the Ordinance of 2 November 1945 [declaring the existence of transit zones], holding them in the international zone of Paris-Orly Airport made them subject to French law."<sup>247</sup>*

According to the Court, the fact that the transit zones are within France means that the transit zones are well within the jurisdiction of France's law and its international obligation to comply with the principle of non refoulement. It is therefore evident that, this approach allows for creation of procedural requirements in order to escape the principle of non refoulement. Though justifiable, it cannot hold water due to the fact that it is inexplicable how a specific part within a country can be deemed as not falling under the law of that country yet it is claimed to fall within the sovereign borders of that country.

#### **4.2.4 The Restrictive Definitional Approach**

This approach exploits the ambiguous wording of the Refugee Convention of 1951 to return certain refugees to their country of origin even after an affirmative finding of refugee status.<sup>248</sup>

The states that adopt this approach in applying the Refugee Convention hold the view that the principle of non refoulement allows for exceptions with regard to which refugees may or may

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<sup>247</sup> *AMUUR v. FRANCE*. Case 17/1995/523/609. European Court of Human Rights, June 25, 1996

<sup>248</sup> See note 42

not be *refouled*<sup>249</sup>. According to these states the refugees that may not be refouled are those that have been determined to have a well founded fear that their life or freedom would be threatened if they were to be returned. However, the Refugee Convention allows for the legal refoulement of refugees if the receiving state determined there is no threat to their life or freedom since the well founded fear required for refugee status is not by itself sufficient to prove an inherent threat to life or freedom.<sup>250</sup>

The USA Supreme Court has adopted this approach for refugees that have crossed the Border. In *Cardoza-Fonseca* case the Supreme Court pointed out that;

*"[art.] 33.1 requires that an applicant satisfy two burdens: first, that he or she be a 'refugee,' i.e., prove at least a 'well-founded fear of persecution'; second, that the 'refugee' show that his or her life or freedom 'would be threatened' if deported."*<sup>251</sup>

The reasoning of the court shows that although some applicants are classified as refugees they do not meet the two prong test that allows them to seek protection under Article 33(1).<sup>252</sup>

Taking the reasoning of the USA and the restrictive definition approach, it is evident that this approach offends the principle of non refoulement on the basis that it classifies the refugees into two categories, which the Refugee Convention, that gave rise to the protection Article 33(1), does not seek to do.

Having considered the four approaches to applying the principle of non refoulement within the domestic jurisdiction, it is evident that states have gone to great lengths to avoid the international

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<sup>249</sup> Ibid

<sup>250</sup> See note 42

<sup>251</sup> *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 1987

<sup>252</sup> Ibid

obligations under the Refugee Convention. These approaches though existing do not oust the *jus cogens* application of the principle of non refoulement neither do they oust the fact that the principle has achieved the status of customary international law. The effect of this is that compliance with the principle is compulsory unless under the exceptions created by international conventions and treaties, consequently rendering any application of the principle in a manner that offends the spirit of Article 33(1) in breach of the non refoulement principle.

### **4.3 SPECIFIC COUNTRY APPLICATION OF THE PRINCIPLE OF NON REFOULEMENT**

#### **4.3.1 Hong Kong**

The principle of non refoulement in Hong Kong is well established. This is evident from the fact that the Hong Kong government has gone to the extent of creating regulations that will guide the application and grant of protection under the principle while an individual is resident within Hong Kong.

In Hong Kong the principle of non refoulement is not derived from the Refugee Convention, CRSR51, neither is it derived from the 1967 Protocol relating to the same.<sup>253</sup> The primary source of the principle of non refoulement in Hong Kong is United Nations Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT Convention), the International Covenant on Civil and Political Rights (ICCPR), the Hong Kong Immigration Act, CAP115 and The Hong Kong Bill of Rights Ordinance CAP 383 (HKBORO).

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<sup>253</sup> Hong Kong Immigration department, 'Notice to persons making a refoulement claim', [www.immd.gov.hk](http://www.immd.gov.hk) accessed on 30<sup>th</sup> July, 2015

The provision of the CAT under which Hong Kong relies on in establishing the principle of non refoulement within its jurisdiction is Article 3(1) which provides that;

*'No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.'*

This provision though not under the Refugee Convention provides similar protection as the protection provided under Article 33(1) of the CRSR51.

Under the HKBORO in Article 3 Section 8, the principle of non refoulement is set out and it provides that;

*'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.'*

Though this article makes no specific mention of the principle of non refoulement, the principle can be inferred by viewing the article as preventing a state from forcing an individual to return to a country that is likely to subject them to torture or cruel inhuman and degrading treatment.

In Hong Kong in order for one to qualify for protection under Article 3 Section 8 of the HKBORO , the Court of Final Appeal (CFA) has ruled that;

*"A claimant who seeks to invoke the protection of BOR 3 must meet two main requirements;*

- a) The ill-treatment (physical and/or mental suffering) he would face if expelled attains what has been called "a minimum level of severity and*

b) *He faces a genuine and substantial risk of being subjected to such ill-treatment*<sup>254</sup>

It is also noted that the threshold is very high when a determination is being made as to who may seek protection under the principle of non refoulement. The CFA has ruled that a person seeking such protection as accorded under Article 3 Section 8 must show that there are substantial grounds for believing that if returned to a state that gave rise to the risk, they face a genuine risk of being subjected to torture.<sup>255</sup> Though the Hong Kong Ordinance does not derive its authority from the Refugee Convention it draws references from the Convention for instance when making a determination of what amounts to a persecution risk the HKBORO relies on the definition as provided under Article 33 of the CRSR51 it further draws reference from other relevant instruments and case laws when determining what amounts to a persecution risk.<sup>256</sup>

For instance, it is defined that, a person is considered as having a persecution risk for the purpose of his non refoulement claim if;

*'He, owing to a well founded fear of being persecuted can account of one or more of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of nationality and is unable, or, owing to such fear, is unwilling to avail himself of the protection of that country; and*

*His life or freedom would be threatened on account of his, race, religion, nationality membership of a particular social group or political opinion should be expelled or returned to the frontiers of a Risk State.*<sup>257</sup>

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<sup>254</sup> See note 253

<sup>255</sup> Ibid

<sup>256</sup> Ibid

<sup>257</sup> Ibid



It is appreciated that the inference of persecution that is relied on by the HKBORO is that which is contained in Article 33 of the Refugee Act.

Hong Kong law provides exceptions to the principle of non refoulement. These exceptions allow for the removal of an applicant from within its jurisdiction even where there exists grounds that give rise to the risk of persecution. Some of the exceptions include;

- a) *There are serious reasons for considering that the person has ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership of a particular social group, or political opinion;*
- b) *The person has been convicted of a particularly serious crime in the HKSAR ( Hong Kong Special Administrative Region) and/or there are serious reasons for considering that the person has been convicted of a particularly serious crime or has committed a serious non political crime elsewhere;*
- c) *There are reasonable grounds to believe that the person is a danger to security of the HKSAR; or*
- d) *The person is not eligible to be recognized as a refugee or for non refoulement protection as opined by the UNHCR or any other competent authority, because the person falls within the exceptions to international protection, including but not limited to applicable exceptions set out in the Refugee Convention or other applicable exceptions in law<sup>258</sup>*

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<sup>258</sup> See note 253

It is worth noting that the exceptions to the principle of non refoulement within Hong Kong are similar to those provided by the Refugee Convention and they are generally categorized into two. First is a threat to the national security of the host state and secondly, a threat to the community.

The scope of application of the principle in Hong Kong is limited only to those persons who seek protection under non refoulement while within Hong Kong. It is noted that, the claim for non refoulement can only be claimed by "*A person who is outside his country of his nationality and in Hong Kong*"<sup>259</sup> This limited scope of application of the principle is also evident where it is stated in the claim for refoulement protection that '*Your non refoulement claim will be treated as withdrawn and must not be re-opened if you leave Hong Kong for whatever Reasons*'<sup>260</sup> This goes further to show that the principle of non refoulement only applies where the person seeking its protection is within the boundaries of Hong Kong and if for any reason the person were to leave the Hong Kong region then their protection would cease and the obligation of Hong Kong to protect these individuals would lapse.

The Principle of non refoulement is respected in Hong Kong. This is because it is evident that in determination of a claim for protection under the principle of non refoulement, the applicant who is within Hong Kong will not be compelled to leave or have his person removed or returned to the country that give rise to the risk.<sup>261</sup> However, continued presence within the country is not protected where an order for removal has been made by a competent body.<sup>262</sup> It therefore means that, if an extradition order is granted, such an order supersedes the application of non

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<sup>259</sup> See note 253

<sup>260</sup> Ibid

<sup>261</sup> Ibid

<sup>262</sup> If a Court was to rule that an individual is to be extradited, the fact that this individual has lodged an application seeking non refoulement protection will not bar the state from complying with an order for extradition.

refoulement irrespective of whether the party's claim for non refoulement is pending determination.

In Hong Kong therefore, the principle of non refoulement is to a larger extent complied with. By creating the process for applying for protection under the principle it shows respect for the principle despite the fact that such protection in Hong Kong is not strictly guided by the provisions of the Refugee Convention.

#### 4.3.2 Israel

The Supreme Court of the State of Israel has established that the principle of non-refoulement applies in Israel under the Basic Law: Human Dignity and Liberty, which guarantees the basic right to life.<sup>263</sup> The principle of non-refoulement is binding on Israel on the basis of Israel's membership to the Refugee Convention of 1951 and its protocol, the Convention Against Torture of 1984 conventions and the various resolutions that have been ratified in the General Assembly relating to the principle of non refoulement.<sup>264</sup> Further, under the strength of international customary law, and in accordance with the basic right to life as established in the Basic Law: Human Dignity and Liberty Israel is bound by the principle of non refoulement.<sup>265</sup> This position was highlighted by the Israeli Courts when making a determination on the application of the principle of non refoulement in *HCI 4702/94 Al-Tai et al. v Interior Minister, Piskei Din 49(3) 843,848* the President of the Court, Aharon Barak, stated that;

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<sup>263</sup> Refugees' rights Forum, 'Policy Paper: The Principle of Non-Refoulement Of a Person to a Place in Which He Is Expected to Suffer danger to life, liberty, persecution or torture.' June 2008, [www.acri.org](http://www.acri.org) accessed on 30<sup>th</sup> July, 2015

<sup>264</sup> Ibid

<sup>265</sup> Ibid

*"A person is not to be expelled from Israel to a place in which he faces danger to his life or liberty. Any governmental authority – including the authority of expulsion in accordance with the Entry to Israel Law – must be exercised on the basis of the recognition of "the value of the human being, the sanctity of human life, and the principle that all persons are free" (Article 1 of the Basic Law: Human Dignity and Liberty). This is the great principle of non refoulement, according to which a person is not to be expelled to a place in which his life or liberty will be in danger. This principle is formalized in Article 33 of the Refugees Convention. It forms part of the domestic legislation of many countries that adopt the provisions of the convention but regulate the matter separately. It is a general principle that is not restricted solely to 'refugees.' It applies in Israel to any governmental authority relating to the expulsion of a person from Israel."*<sup>266</sup>

Despite being obliged by international obligations and the existence of a domestic law Israel has provided justifications that would warrant their actions of refouling persons that have come within its territory. The following two instances have been cited to show Israel's non commitment to the principle of non refoulement;

- a) In September 2004, Israel returned to Egypt eleven asylum seekers from Sudan. Israel relied on a promise secured through the mediation of the UN Commissioner for Refugees that the asylum seekers would not be harmed and would not be expelled from Egypt to Sudan. In practice these promises were broken; the asylum seekers were arrested in Egypt, suffered maltreatment, and seven of them were almost expelled to Sudan.<sup>267</sup>

It is evident in this example that the Israel relied on diplomatic assurances and guarantees, which is in line with the collective approach to non refoulement in its application of the principle of non

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<sup>266</sup> See note 263

<sup>267</sup> Ibid

refoulement. Though this approach was used, Israel failed to effectively assess Egypt's compliance with the obligations of Article 33, which resulted in breach of the principle as the asylum seekers were persecuted.

b) In August 2004, forty-eight asylum seekers were expelled from Israel, including eighteen minors, shortly after they entered the country. The expulsion was undertaken in accordance with the "hot return" policy approved by the attorney-general, who argued that a person who entered Israeli territory without permission may be removed, provided he is captured soon after the infiltration and the return is performed "within a measure of proximity to the time and place of seizure." Israel also based its actions on agreements reached by word of mouth between Prime Minister Olmert and Egyptian President Mubarak in accordance with which Egypt ostensibly promised that returned persons would not be harmed. Since their return to Egypt, the detainees have been held in detention and incommunicado, to the best knowledge of human rights organizations. The representatives of the UN High Commissioner for Refugees in Egypt have not been granted access to the detainees, some of whom have probably been expelled from Egypt to Sudan.<sup>268</sup>

In this instance Israel relied on both the absolute sovereignty approach, by use of the hot return policy, and the collective non refoulement approach, through the entering of an agreement between the Prime Minister of Israel and Egypt's President. Again due to Israel's failure to effectively assess the situation in Egypt the asylum seekers returned were subsequently ill treated.

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<sup>268</sup> It is evident that the Israeli government in applying the principle of non refoulement uses the absolute sovereignty approach by adopting preventative measures in seeking to reduce the number of asylum seekers.

Some of the justifications for failure to comply with the principle of non refoulement that have been advanced by the Israeli government include;

On 1 June 2006, the attorney-general expressed his opinion that the expulsion of a person seized within Israeli territory, close to the time and place at which the person crossed the border, “does not constitute expulsion, but rather the prevention of entry.” Accordingly, the attorney-general argued, there is no impediment to expelling such a person from Israel without any legal proceeding.”<sup>269</sup>

Other justifications that have been put forth for the Israeli’s actions are that those entering Israel are not asylum seekers and, therefore, there is no need to apply asylum procedures when dealing with such cases. This being the case, Israel has asserted that it is fully entitled to prevent people crossing its border and those that eventually do would be returned back to the country they have fled.<sup>270</sup>

Israel has also stated that where the asylum seekers or refugees who are not Egyptian nationals were to enter the country from Egypt, Israel would return them to Egypt which is a safe third country on the grounds that Egypt being a signatory to the Refugee Convention should be the country that the asylum seekers should have first sought protection.<sup>271</sup> The justification for such refoulement, according to Israel, is based on the notion that an individual that is fleeing is obliged to seek protection in the country they first enter into.<sup>272</sup> This argument when presented before the High Court of Justice in Israel was rejected by the Court. The president of the Court in making a determination that such action was against the principle of non refoulement noted that;

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<sup>269</sup> See note 263

<sup>270</sup> Ibid

<sup>271</sup> Ibid

<sup>272</sup> Ibid

*"Israel cannot free itself of responsibility by ensuring that a country to which a person is to be expelled will not harm him. Israel must continue to ensure that the said country will not expel the expelled person to another country that is liable to harm him. Accordingly, expulsion to a third country must be accompanied by the possibility of relying that the said country will not expel the expelled person to a country in which his life or liberty will be endangered."<sup>273</sup>*

According to the Judge, Israel could not escape its responsibility to the principle of non refoulement by claiming that Egypt being a signatory to the Refugee Convention would not *refoul* the individuals back to the risk country. The judge contended that Israel had an obligation to make sure that the country to which the asylum seekers were returned would not proceed to have the asylum seekers returned to the risk country.

The practice of diplomatic assurances and guarantees is a justification which Israel has relied on in order to avoid its obligations to the principle of non refoulement.<sup>274</sup> Diplomatic assurances and guarantees occur when a country is seeking the return of its citizens from the country in which they are seeking asylum by making assurances to the host state that the individuals if returned would not be subjected to any harm or cruel treatment. Based on this diplomatic assurances and guarantees, Israel in August 2007 returned 48 asylum seekers to Egypt. Upon the return of the 48 asylum seekers Egypt imprisoned them all and denied them access to the UN High Commission for Refugees, attorneys, or other human rights organizations. Further, of the 48 who were imprisoned, 20 of the refugees were later expelled into Sudan.<sup>275</sup>

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<sup>273</sup> See note 263

<sup>274</sup> The use of diplomatic assurances and guarantees shows that Israel also places reliance of the collective approach to non refoulement in applying the principle of non refoulement within its territory. This is because it allows for it to redistribute the asylum seekers and refugees within its territory to other states that it believes respect the obligations created by Article 33.

<sup>275</sup> See note 263

From the foregoing it is evident that Israel's actions of returning asylum seekers on the strength of diplomatic assurances was not justified and was in breach of the principle of non refoulement as espoused in the Refugee Convention to which Israel is a signatory.

What can also be concluded from a reading of the application of the principle of non refoulement within Israel is that Israel has adopted both the absolute state sovereignty approach and the collective approach to non refoulement when dealing with the obligation that are espoused by Article 33(1) of the Refugee Convention.

#### 4.3.3 United States of America (U.S.A.)

In 1900, the Supreme Court of the US held that it is bound by international law.<sup>276</sup> The court is noted as making the following statement in reference to application of international law within the United States of America;

*"International law is part of our law and must be ascertained and administered by courts of justice of appropriate jurisdiction as often as questions of right depending on it are duly presented for their determination."*<sup>277</sup>

With respect to treaties they are declared to be the law of the land by virtue of Article VI of the U.S.A Constitution. In addition to this, customary international law is considered as a type of federal common law which is supreme over state law based on Article VI of the Constitution.<sup>278</sup>

Despite the fact that the USA has declared that it is bound by treaties and customary law and that International law forms part of the applicable law in dealing with various cases, compliance with

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<sup>276</sup> Keller K.M, ' A Comparative and international law perspective on the United States non compliance with its duty of non refoulement', Yale Human rights and Development Journal, Vol.2, Issue 1 , Article 4, Yale Law School Legal Scholarship Repository, 1999

<sup>277</sup> Ibid

<sup>278</sup> Ibid



the principle of non refoulement by the USA has always had a troubled and contradictory history.<sup>279</sup>

In *Sale v Haitian Centers Council*<sup>280</sup>, organizations representing the Haitians challenged President Bush's new policy<sup>281</sup>. These organizations argued that President Bush's policy violated the Refugee Convention and the 1967 Protocol Relating to the Status of Refugees by which the United States agreed to abide by and section 243(h) (1) of the Immigration and Nationality Act of 1952 (INA) which implements the non-refoulement principle.<sup>282</sup> The U.S. Supreme Court upheld President Bush's interdiction program, returning the Haitian refugees to their homeland, and noted that it was enforceable because "*neither the 1951 Convention, the 1967 Protocol, nor section 243(h) (1) of the INA, was intended to apply beyond U.S. territory.*"<sup>283</sup>

According to the ruling by the majority of the Court, the fact that the Haitian refugees were interdicted while not within the USA territory, the principle of non refoulement did not apply and therefore USA had not breached the principle of non refoulement.

It is important to note that the decision of the Court was by a majority. However, Justice Blackmun (as he then was) provided a dissenting opinion to that adopted by the majority of the Court. In his dissenting opinion he noted that;

*"...Article 33.1 of the Convention states categorically and without geographical limitation: "No Contracting State shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race,*

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<sup>279</sup> See note 275

<sup>280</sup> Pizor A.G. ' *Sale v Haitian Centers Council: The Return of Haitian Refugees*' Fordham International Law Journal, Vol.17, Issue 4, Article 6, The Berkeley Electronic Press, 1993

<sup>281</sup> The policy was known as the interdiction program, the program was geared at compelling the U.S. Coast Guard to stop Haitian boats in international waters before they reached U.S. territory

<sup>282</sup> See note 275

<sup>283</sup> Ibid

*religion, nationality, membership of a particular social group or political opinion."* The terms are unambiguous. Vulnerable refugees shall not be returned. The language is clear, and the command is straightforward; that should be the end of the inquiry. Indeed, until litigation ensued, the Government consistently acknowledged that the Convention applied on the high seas...<sup>284</sup>

From the judges dissenting opinion and from a reading of the principle of non refoulement as espoused by Article 33(1) of the Refugees Convention, it is evident that the USA in engaging in the interdiction programme was in breach of the principle of non refoulement.

For the US the approaches to application of the principle of non refoulement fall under the absolute state sovereignty approach and the restrictive definitional approach. This is because USA believes that it is not in breach of the principle of non refoulment to prevent asylum seekers from making to within the borders of the USA and even if they do make it across the border protection under the Refugee Act is not automatic as the refugee has to prove that there exists a well founded fear and further, that if they were returned their life was actually threatened.

#### **4.4 CHAPTER SUMMARY**

It is evident that despite being aware of the principle of non refoulement and in certain instances making an effort at ensuring its compliance the governments of Hong Kong, Israel and the USA have failed to strictly comply with the principle. However, in as much as the certain arms of governments have failed to comply with the principle the judiciary is seen as being a strong protector of the principle and in most instances will question the acts of the other arms of government and in addition to this, the judiciary will cause compliance with the principle. It is

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<sup>284</sup> *Sale v. Haitian Centers Council*, SUPREME COURT OF THE UNITED STATES, 509 U.S. 155 (1993) , Associate Justice Blackmun, dissenting. [www.tjisl.edu](http://www.tjisl.edu), accessed on 3<sup>rd</sup> August, 2015.

only in the USA where the judiciary has been seen to rubber stamp acts that are in breach with the principle of non refoulement and the courts have gone further to give this acts the force of law within their jurisdiction by providing justifications for escaping the strict application of the principle.

This chapter set out to examine the application of the principle of non refoulement in other states and establish whether these states comply with the principle of non refoulement. Further, it set out to examine the different approaches in application of the principle of non refoulement. It is safe to conclude from the foregoing that compliance with the principle of non refoulment has been wanting. States that have an international obligation to comply with principle fail to comply with it when it best suits them and have even gone ahead to provide reasons for such non compliance which in their view are deemed justifiable.

Further, compliance with the principle of non refoulement has been determined as being dependant on the states' approaches in application of the principle. Though States have a free hand at choosing the approach that they would prefer in application of the principle, it is evident that the choice is highly motivated by the desire to avoid their international obligation to the Refugee Convention of 1951. Be as it may, it has been observed that some of the approaches are in complete violation of the principle of non refoulement.

## CHAPTER 5

### **5 CONCLUSION AND RECOMMENDATION**

#### **5.1 CONCLUSION**

The paper set out to explore whether or not Kenya complies with the principle of non refoulement taking into consideration it is a signatory to various instruments that provide for it and further, the fact that it has established the principle through Section 18 of the Refugee Act.

To achieve this goal, the paper begun discussing the principle of non refoulement by looking at the various international instruments within which it is codified. It was established that the principle is primarily established in The Refugee Convention, commonly known as the Convention Relating to the Status of Refugees which was ratified in 1951 and the 1967 Protocol Relating to the Status of Refugees. The Paper went ahead to look at the scope of application of the principle and has shown that the principle is applicable to asylum seekers, refugees and other persons whose status is yet to be determined.

The exceptions to the principle were highlighted and observed to fall within two categories the first is national security and the second, public order. In as much as there exist exceptions to the principle of non refoulement, it has been established that Article 33(2) and Article 33(3) provide that the decision to expel shall only be arrived at by a duly competent body, in most instances it is the Court of law that makes an extradition order or the relevant department in charge of refugee affairs in a country. Further, in the event that an extradition order has been granted the refugee or asylum seeker as the case may be should be granted reasonable time to seek admission into a third state.

The paper has also established that in the event that a state has failed to ratify or be a signatory to the conventions that establish the principle, the state under international law has obligations to respect and comply with the principle of non refoulement by the mere fact that the principle has achieved the status of a customary international law and more to that, the principle is a peremptory norm of *jus cogens* application. To this end therefore, every state is obligated to comply with the principle.

Having looked at the application of the principle in Kenya, it has been established that the Kenyan law on refugees, that was enacted 2006, borrowed heavily from the wording of Article 33 of the Refugee Convention. Further, the paper has established that prior to this enactment, Kenya had no substantive law on refugees and any obligations to comply with the principle, was subject to Kenya domesticating the Refugee Convention. Despite the fact that Kenya has enacted a law on refugees, compliance with the principle has been wanting. This is because Kenya has undertaken acts such as; border closure, urban refugee repatriation back to the camps, amendments to the law in an attempt to control the refugee population. These acts, the paper has established, have been contrary to the principle of non refoulement as provided in the Kenyan Refugee Act and in the various conventions Kenya is a party to.

Be as it may, the Kenyan Courts have been seen as the sole protector of the principle of non refoulement within the Kenyan jurisdiction as it has put in check all executive and legislative attempts that have been geared towards non compliance with the principle of non refoulement.

The paper has also seen that, the Kenyan law through the enactment of the Refugee Act has assisted in the development of the principle of non refoulement. The Refugee Act provides that asylum seekers that wish to enter Kenya can claim non refoulement protection under the Kenyan

law, this is a development of the principle of non refoulement due to the fact that the principle of non refoulement under Article 33 was prepared with its scope of application limited to those that were to be removed from a state not those that sought entry into it.

Having looked at the principle of non refoulement's application under other countries jurisdictions, what has emerged is the fact that though most countries are aware of their obligations to the international principle they often find means to avoid strict compliance with the principle. The means used in avoiding compliance with the principle vary with the approaches the countries adopt in applying the principle.

The four approaches in applying the principle of non refoulement cannot be seen to apply in Kenya. This is because, Kenya having enacted the Refugee Act and expanding the scope of application of the principle within its borders can be said to be using a new means of application, the application adopted by Kenya can be said to be a broad definition approach. This approach is seen to look at the principle of non refoulement and the intention of the drafters and applying it to the set of circumstances that are prevailing in Kenya. This approach allows for wider protection of individuals and asylum seekers that seek protection under the principle, who may not fall under the strict protection of Article 33. For instance, asylum seekers that are outside a state who seek protection from that state would gain protection under Kenya's broad application of the principle as is evidenced by a reading of Section 18 of the Refugee Act 2006 which provides in part that "*No person shall be refused entry into Kenya, expelled, extradited from Kenya or returned to any other country or to subjected any similar measure if, as a result of such refusal, expulsion, return or other measure, such person is compelled to return to or remain in a country...*". Kenya can therefore be said to have assisted in the development of the principle through providing a different approach to the application of the principle.

The paper has therefore provided answers to the key research questions that it had sought to examine. These questions were ; whether there exist exceptions to strict compliance with the principle of non refoulement, does the Kenyan law on Refugees comply with the principle of non refoulement ,whether Kenya has an obligation to comply with the principle of non-refoulement ,when does Kenya derogate from the principle of non-refoulement and whether such derogation can be excusable in the international system and finally, how does international law ensure Kenya's compliance with the principle of non-refoulment.

With respect to whether Kenyan law complies with the principle, the paper has established that compliance is wanting. This has established that, the Refugee Act was drafted having been heavily influenced by the Article 33 of the Refugee Convention and the Kenyan Courts have been steadfast at ensuring compliance with the Convention. Therefore, the Kenyan law does comply with the principle.

Exceptions to strict compliance with the principle in Kenya have been allowed on grounds of national security, where national security has been seen to be security that is viewed from the scope of external aggression or attack to Kenya's sovereignty, and threat to the public order. This are the two exceptions that the paper has established allow for derogation of the principle under the Kenyan law. It has been seen that in certain instances where Kenya has attempted to derogate from the principle under the exception of national security, the Kenyan court's, for instance in the security amendment laws case, has declared the derogation to be in contravention of the principle of non refoulement and not excusable under the international system.

The paper has established that by dint of section 18 of the Refugee Act, Kenya being a signatory to international conventions relating to the principle and the fact that the principle of non

refoulement has achieved the status of a *jus cogens* norm which is accepted as customary international law, Kenya has an international obligation to comply with the principle of non refoulement. This obligation to respect international law and the obligatory nature of the principle of non refoulement, ensures Kenya's compliance with the principle of non refoulement.

## 5.2 RECOMMENDATION

Having established that the principle of non refoulement is not fully complied with despite the fact that it is specifically provided for in Kenyan laws, the paper will offer recommendations on what the author feels would be appropriate to ensure compliance based on the finding of the research;

1. It is the recommendation of this paper that due to the fact that in the changing world and the fact that refugees have come to an integral part of many economies. For instance, the Somali refugees have contributed heavily in the growth of the Kenyan economy due to the various business ventures that they have set up more so in Eastleigh area, compliance with the principle of non refoulement should be strictly followed by Kenya to the extent that it would allow for the Somali community to invest more in the country due to the predictability of the law. The predictability in law gives investors confidence that they are not likely to be abruptly removed from the country and their investments getting lost. For this reason strict compliance with the principle provides certainty in the application of the law which would have the ripple effect of improving the Kenyan economy due to migrant investor confidence.
2. It is also the recommendation of this paper that more research could be undertaken on the area of broader application of the principle of non refoulement by Kenya with an aim of



establishing whether it could be a new approach to applying the principle of non refoulement.

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