Strathmore University

Law School

THE THRESHOLD FOR NATIONAL SECURITY AS AN EXCEPTION TO THE PRINCIPLE OF NON- REFOULEMENT: A KENYAN PERSPECTIVE

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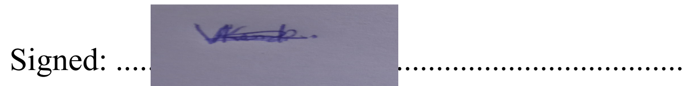
DECLARATION

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



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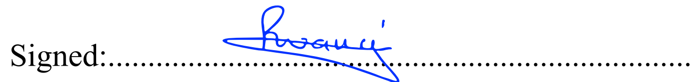

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3. European Court of Human Rights in Babar Ahmad And Others V. The United ,ECtHR Judgement of 10 April 2012
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4. Convention Against Torture or Other Cruel, Inhuman or Degrading treatment, 10 December 1984, 1465 UNTS 85.
5. European Convention on Human Rights, 4 November 2000, ETS 17
6. International Covenant On Civil and Political Rights, l9 December 1966, 999 UNTS 171.
7. Universal Declaration of Human Rights, 10 December 1948, 217 A(III) UNTS

List of Abbreviations

AU African Union

CAT The 1987 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

EAC	East African Community
OAU	Organisation of African Unity
UN	The United Nation
UNHCR	The United Nation High Commission for Refugees

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ABSTRACT

This research provides a critical analysis of the government's directive to close Dadaab and Kakuma refugee camps. Further the research seeks to explain how the directive violates the principle of non-refoulement established under Article 33 of the 1951 Convention of Relating to the Status of Refugees. It is also established under the 1967 Protocol relating to the Status of Refugees. The research focuses on national security as an exception to the principle of non-refoulement, and the threshold required for it. The main objective of this research is to establish whether the threat to national security meets the threshold required by law for the violation of the principle of non-refoulement. This will be achieved by analyzing statutes and regulations which prescribe the legal and regulatory framework for the ideal situation that is the upholding of the principle of non-refoulement. Based on the findings, the research will propose some recommendations for ensuring national security while still upholding the principle of non-refoulement. Ultimately, it is anticipated that this research will contribute to the scholarly research on the threshold required for refoulement on the basis of national security.

CHAPTER 1

INTRODUCTION

Kenya is host to approximately 676,332 refugees and asylum seekers as of October, 2023.[1] The large number of infants, children, and pregnant women among the refugees made the humanitarian response particularly challenging. Third world countries, Kenya being one of them, are among the poorest and least developed countries in the world, with limited resources to deal with the needs and challenges associated with hosting displaced people.[2] The refugee population in Kenya declined in 2016 from 553,900 to 451,100, a decrease of nearly 20 per cent[3]. This was mainly due to revivification exercises, returning refugees and, to a lesser extent, resettlement. However, due to the ongoing war in Ethiopia and Somalia, this number has risen drastically resulting in Kenya hosting the 10th-largest refugee population globally.

The global governance of refugee flows is a matter of international law, international norms, and international politics. Asylum seekers and refugees are thus deeply embedded in the international system. The 1951 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and 1967 Protocol constitute one of the greatest constraints on nation-state sovereignty in international law. The core of the international refugee system is one right that is the right of all individuals to apply for asylum. Additionally, one obligation is that countries respect the principle of non-refoulement. This is done by ensuring no state should return an asylum seeker to a country where he or she faces a well-founded fear of persecution. Behind the staggering numbers of displaced peoples are endless tales of human misery, fleeing violence, abandoning homes and families, and too often becoming beholden to traffickers who extort funds, torture migrants, pack huge numbers of human beings onto dangerous ships, and remove and sell their victims‘ organs. For most of these refugees, there is no simple solution to their plight. They are in what the legal community calls ―protracted situations in which they spend years, sometimes decades, as refugees with little chance for building anything approaching a decent life. It is a humanitarian disaster of

[1] United Nations High Commissioner for Refugees: Figures at glance.
[2] UNHCR, Global Trends: Displacements in 2016, p. 7.
[3] Nancy Agutu, ‘Kenya repatriates 33,800 to Somalia’ on 21 June 2017,https://www.the-star.co.ke/news/2017-06-21-kenya-repatriates-33800-to-somalia/> on 20th December, 2023.

immense proportions. This research contends to discuss and explore the involuntary repatriation of refugees upon the foreclosure of the camps which is contrary to the 1951 Convention and 1967 Protocol.

1.1 Background

Kenya is signatory to a number of international treaties applicable to individuals seeking asylum and protection. For instance, Kenya acceded to the 1951 United Nations Convention Relating to the Status of Refugees on May 16, 1966, and to the 1967 Protocol in 1981.[4] Kenya is also a state party to the 1969 African Union (AU) (formerly known as the Organization of African Unity, OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, which it signed in September 1969 and ratified in June 1992.[5] In addition, Kenya acceded to the 1984 Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment in February 7 1997.[6] Of particular relevance to refugee issues is a provision in the Convention on non-refoulement, which states that, ―no State Party shall expel, return 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. Based on the above, it is clear that Kenyan law has established the principle of non-refoulement.

However, in March 2021, the Kenyan government issued a 14-day ultimatum to the United Nations High Commissioner for Refugees (UNHCR) to develop a plan to close the Kakuma and Dadaab refugee camps in the country. The Dadaab and Kakuma refugee camps host an average of 430,000 refugees and asylum-seekers of more than 15 nationalities.[7] If the UNHCR was to miss the deadline, the Kenyan government had threatened to forcibly return refugees to unsafe countries. The UNHCR presented the government with a plan upon the closure of the camps at the beginning of April 2021. The UNHCR's plan, in support of the Government of Kenya, included enhancing voluntary

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[4] States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol, UNHCR, <http://www.unhcr.org/3b73b0d63.html> .

[5] Ratification Table: AU Convention Governing Specific Aspects of Refugee Problems in Africa, African Commission on Human and Peoples' Rights, <http://www.achpr.org/instruments/refugee-convention/ratification/> .

[6] Status: Kenya, United Nations Treaty Collection, <https://treaties.un.org/Pages/ViewDetails.aspx?src=treaty&mtdsg_no=iv-9&chapter=4&lang=en> .

[7] UNHCR, "Kenya: UNHCR presents sustainable and rights-based solutions for refugees residing in camps"<https://www.unhcr.org/ke/19945-kenya-unhcr-presents-sustainable-and-rights-based-solutions-for-refugees-residing-in-camps.html> on 20th December,2023.

repatriation in safety and dignity, while taking into account the movement restrictions related to the then ongoing COVID-19 pandemic. It also included a provision of alternative-stay arrangements to refugees from the East African Community (EAC). This would represent a major opportunity for refugees to become self-reliant and contribute to the local economy. They also had a plan to accelerate the issuing of national ID cards to over 11,000 Kenyans who have previously been identified as registered in the refugee database, and continuation of the vetting process for others in similar circumstances.

Lastly, the plan included resettlement to third countries for a small number of refugees who are not able to return home and face protection risks.

This sudden call to shut down the camps prompts a discussion regarding their closure, most importantly by those who will be directly impacted by it. Kakuma Refugee Camp is located in north-western Kenya and was established in 1992. As of January 2021, the refugee and asylum-seeking population is mainly made up of people who had fled from South Sudan, Somalia, and Ethiopia. The Dadaab refugee complex in Garissa County, eastern Kenya, was created around the same time as Kakuma. Dadaab is mainly populated by refugees and asylum seekers who escaped a protracted civil war in Somalia as well as natural disasters such as drought. Around 150,000 Somali migrants are said to have crossed the border into Kenya and made their way to the Dadaab refugee camps after the famine in Somalia.

Since then, the nation has seen a rise in terrorist attacks and situations of insecurity, which has sparked a discussion about whether to prioritize maintaining national security or defending the rights of refugees. Kenya started "Operation Linda Nchi" in October 2011, a campaign that suggested that Al-Shabaab's presence on Kenyan territory may have resulted from migration across the porous border.[8] Following a string of assaults in 2012, the government implemented the forced camping policy for refugees, and in 2014, it issued a decree directing urban refugees to migrate to the designated camps.[9] Kenya has been the target of numerous terrorist attacks such as the Garissa University attack in eastern Kenya, near the border with Somalia which took place on the 2nd April, 2015. The attackers killed 147 and injured 79 before detonating suicide vests when cornered by security forces. *Al-Shabaab* claimed responsibility for the attack, which is believed to have been

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[8] Halsey, 'Repatriation: Kenya's Attempt to Send Somali Refugees Home', 2013 Heritage Institute for Policy Studies, pg 9.

[9] Press Statement, Cabinet Secretary for Interior and Coordination of National Government, Refugees and National Security Issues on March 26, 2014.

planned by a Kenyan,one Mohamed Kuno.[10] In May 2021 the government of Kenya ordered the closure of Dadaab refugee camps. Al Shabaab claimed responsibility for many terror incidents that occurred in Kenya, some of which were allegedly organized in the Dadaab refugee camp, where Al Shabaab sympathizers are allegedly hiding.

This background has prompted this research whose main objective is to establish whether the government directive to close Dadaab and Kakuma refugee camps violates the principle of non-refoulement, and if it did, whether it is justified.

1.2 Problem Statement

Section 29 of the Refugees Act 2021, mandates that no person shall be refused entry into Kenya, expelled, extradited from Kenya or returned to any other country or be subjected to any similar measure if, as a result of such refusal, expulsion, return or other measure, such person is compelled to return to or remain in a country where the person's life is threatened.[11] However, even with this being guaranteed by the law, refugees still face and live in fear of being forced to return to their country especially with the government announcing the closure of the two major camps in Kenya; Dadaab and Kakuma. The closure of these camps leaves the refugees with minimal options and ultimately, pushes the refugees to go back into environments marked by ongoing conflict, political instability, and dire human rights violations. The government's reason for closure is national security as it is an exception to the principle of non-refoulement. However, the threat in Kenya does not meet the standard for refoulement.

This research seeks to analyse national security as an exception to refoulement and the threshold required for it to be accepted.

1.3 Research Objectives

The general objective of this research is to establish whether the threat to national security meets the threshold required by law for the violation of the principle of non-refoulement.

Other objectives include;

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[10] Pate, Amy, and Michael Jensen, Erin Miller. 2015. "Background Report: Al-Shabaab Attack on Garissa University in Kenya." College Park, MD. April.
<http://www.start.umd.edu/pubs/STARTBackgroundReport_alShabaabGarissaU_April2015.pdf>

[11] Section 29, The Refugees Act 2021.

1. To analyse international law to establish whether the right to freedom from refoulement is a non-derogable right.
2. To analyse Kenyan Refugee law to investigate/ establish whether the right to freedom from refoulement is a non-derogable right.
3. To assess national security as an exception to the principle of non-refoulement.
4. To determine ways of dealing with conflicting rights as well as national security while upholding the principle of non-refoulement.

1.4 Research Questions

The main question for this research is whether the threat to national security met the threshold required for the government to order a closure of the camps. From this question,

1. To what extent does the principle of non-refoulement qualify as a non-derogable norm under international law?
2. Does Kenyan law recognise the principle of non-refoulement as a non-derogable right?
3. Does the violation of the principle of non-refoulement meet the proportionality test required under Article 24 of the constitution for the limitation of a right?
4. What can the government do to ensure national security without violating the principle of non-refoulement?

1.5 Hypothesis

The closure of refugee camps violates the principle of non-refoulement and the refoulement in question does not meet the proportionality test required to justify the limitation to the principal.

1.6 Justification of the Study

This research will provide possible solutions and recommendations on how the state can ensure national security while still upholding the principle of non-refoulement thus creating a better environment for the refugees and focusing more on their needs.

Despite the existence of the Refugees Act and international conventions for the protection of refugees, there is still a lot that needs to be done in this field. There is limited scholarly work on this

topic hence this research will contribute to the work and will offer the government alternate methods to ensure national security without violating refugee rights.

1.7 Theoretical Framework

The first theory that this research will be relying on is the classical realism theory. Legal realism is a school of thought in jurisprudence that emphasizes the importance of understanding law through its practical effects and social context rather than treating it as an autonomous set of abstract rules.The realist takes the view that the international system is defined by anarchy, that is in the international system there is a lack of a central authority.[12] This means that states are sovereign and thus autonomous of each other with no inherent structure. The states when in an anarchical nature are therefore bound only by forcible coercion or their own consent.[13] The realists 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. The power referred to in realism can either be military, economic or diplomatic.[14] 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.

For the realist there are four primary assumptions. These include; First, survival is the principle goal of every state. For states therefore, foreign invasion and occupation are the pressing threats that any state faces.[15] Thus, for the international system to be anarchic, states must possess the authority to protect themselves and further the material interests that are essential to their existence. The second assumption given by realists is that states are logical entities. For realists, this means that when states realise that their primary objective is to live, they will take all necessary steps to assure their existence. Third, realists contend that the world is dangerous and unpredictable. They say this because they assume that every state has some military capability and that no state is fully aware of what its neighbours are planning. Fourth, they conclude by assuming that in such a world, the big powers ,that is states with most economic clout and especially those that possess military might, that

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[12] Slaughter A, International Relations Principle Theories, Max Plank Encyclopedia of Public International Law, Oxford University Press, 2011.

[13] Tuckness, Alex, "Locke's Political Philosophy", The Stanford Encyclopedia of Philosophy (Summer 2024 Edition), Edward N. Zalta & Uri Nodelman (eds.), <https://plato.stanford.edu/archives/sum2024/entries/locke-political/>.

[14] Slaughter A, International Relations Principle Theories, Max Plank Encyclopedia of Public International Law, Oxford University Press, 2011.

[15] Sandrina Antunes and Isabel Camisão, 'Introducing Realism in International Relations Theory'Feb 27 2018 E-International Relations <https://www.e-ir.info/2018/02/27/introducing-realism-in-international-relations-theory/>.

are decisive.[16] For the realist therefore, 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.

The second theory that I will rely on is the human rights theory. Human rights theory is a framework that posits the existence of inalienable and universal rights that every human being is entitled to, regardless of nationality, race, religion, or any other status.[17] It is grounded in the idea that these rights are inherent and indivisible, forming the basis for human dignity and freedom. Central to this theory is the notion that human rights encompass civil, political, economic, social, and cultural dimensions, all of which are necessary for the holistic development of individuals. The Universal Declaration of Human Rights (UDHR) and subsequent international covenants articulate these principles, affirming that states are obligated to respect, protect, and fulfill these rights within their jurisdictions.[18] Human rights theory thus serves as a moral and legal benchmark against which the actions of states and other actors can be evaluated to ensure the protection and promotion of human dignity.

Building on this foundation, human rights theory emphasizes the universality, interdependence, and indivisibility of rights. The theory holds that the violation of any right affects the enjoyment of others, making it essential to address all dimensions of human rights concurrently. It also insists that these rights are non-derogable and should be upheld even in states of emergency or crisis. By framing rights as universal and non-negotiable, human rights theory sets limits on state sovereignty, asserting that states have a duty to uphold these rights not only for their citizens but also for all individuals under their jurisdiction.[19] This global perspective requires states to act in accordance with international human rights norms, ensuring that all individuals can live with dignity, security, and freedom from fear and want.

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[16] Art, R. J, "To What Ends Military Power?" 4 International Security 4, 1980 <https://doi.org/10.2307/2626666> .
[17] UNFPA, 'Human Rights Principle', <https://www.unfpa.org/resources/human-rights-principles#:~:text=Human%20rights%20are%20universal%20and,religious%2C%20cultural%20or%20ethnic%20background>.
[18] Universal Declaration of Human rights
[19] General Assembly resolution 53/144Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms

In the context of refugee law, human rights theory plays a critical role in shaping the standards and obligations that govern the protection of refugees.[20] Refugee law can be seen as a subset of human rights law, designed to provide safety and asylum to those fleeing persecution and serious harm that threaten their fundamental rights. The 1951 Refugee Convention, for example, must be interpreted in light of human rights principles, as the rights enshrined in international human rights instruments, such as the UDHR, inform the definition of "persecution" and guide the treatment of asylum seekers and refugees. A human rights-based approach to refugee law ensures that states' responses to refugees are not merely discretionary acts of generosity but are rooted in the legal and moral obligation to protect individuals whose rights are under threat. This integration of human rights into refugee law solidifies the normative basis for refugee protection, emphasizing that the provision of asylum is a necessary response to human rights violations and a reaffirmation of global solidarity and justice.

1.8 Literature Review

1.8.1 The Principle of Non-Refoulement

The principle of non-refoulement is a fundamental aspect of refugee law that safeguards refugees from being forcibly returned to areas where they might face injury or danger. "No State shall return a refugee to where his life or freedom would be threatened," according to Torn Clark and Francois Crepeau's 1951 Convention and International Human Rights Law. This is the essence of the non-refoulement principle.[21] The UNHCR Guidance Note on Extradition and International Refugee Protection states that the principle of non-refoulement is a core principle from which no exemption is allowed because it is part of customary international law and thus binding on all States, including those that have not yet become parties to the convention and protocol.[22] The author subsequently outlines the exceptions to the principle, which are applicable only if it is demonstrated that the refugee presents a current or future threat to the national security of the host country. Additionally, for the community danger exception to be relevant, the refugee in question must have been convicted of a crime of a particularly serious nature. It is essential to determine that, considering the crime and

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[20] James C. Hathaway, 'The Relationship between Human Rights and Refugee Law: What Refugee Law Judges Can Contribute: In The Realities of Refugee Determination on the Eve of a New Millennium: The Role of the Judiciary, 80-90. Haarlem, The Netherlands: International Association of Refugee Law Judges,1999.

[21] Clark T and Crepeau F, Mainstreaming Refugee Rights: The 1951 Convention and International Human Rights Law.

[22] UNHCR Guidance Note on Extradition and International Refugee Protection.

conviction, the refugee poses a significant current or future threat to the community of the host country. Therefore, refoulement should be regarded as the final option for addressing the risk to the security or community of the host state.

The Jus Cogens Nature of Non-Refoulement by Jean Allain, emphasizes on the non-derogability aspect of the principle stating that non-refoulement is not only recognized as part of customary international law[23] but is also a norm of jus cogens hence cannot be deviated from or violated despite the circumstances surrounding the situation.[24] In 1996, the UNHCR Executive Committee concluded that non-refoulement had acquired the status of a norm of jus cogens when it determined that the 'principle of non-refoulement is not subject to derogation' .[25] In the protection of refugees and their right to seek asylum in the European Union,[26] It states that the principle of non-refoulement compels all States, even those that are not party to the 1951 Refugee Convention, to respect it from the very moment a person claims protection. It is also commonly held that this principle applies independently of any formal determination of refugee status by a State hence applies as soon as an asylum seeker claims protection.[27] The Cartagena Declaration on Refugees emphasizes non-refoulement as a cornerstone of the international protection of refugees stating that the principle is imperative with regard to refugees, hence should be acknowledged and observed as a rule of jus cogens.[28] Jean states that as long as the non-derogable nature of non-refoulement is insisted on, then its status is secure, a position that contradicts the G S GoodwilGill, Mainstreaming refugee rights in so far as we discuss the jus cogens nature of non-refoulement.
Jean is however supported by the UN Convention Against Torture which includes an explicit right against non-refoulement. The international conventions, as well as the other authors recognize the importance of this principle as part of international customary law, and that it has acquired the status of a norm of jus cogens hence cannot be derogated.

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[23] G S Goodwill-Gill, The Refugee in International Law, 2"d edn, 1996, pg 166.
[24] Allain J, The Jus Cogens Nature of Non-Refoulement.
[25]Executive Committee Conclusion 79, General Conclusion on International Protection, 1996.
[26]The protection of refugees and their right to seek asylum in the European Union, Institute Europeen De L' universite De Geneve, Collection Euryopa, Vol 70- 20 II.
[27] Marx R, "Non-refoulement, Access to Procedure and Responsibility for Determining Refugee Claims" in Selina Goulbourne, Law and Migration, Edward Elgar Publishing, Cheltenham, 1998, p 96.
[28] Cartagena Declaration on Refugees, Adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984.

1.8.2 Non-refoulement with Respect to National Security

National security means a status in which the regime, sovereignty, unity, territorial integrity, welfare of the people, sustainable economic and social development, and other major interests of the State are relatively not faced with any danger and not threatened internally or externally, and the capability to maintain a sustained security status.[29] The Perspectives on Refoulement in Africa by Olivia Bueno recognizes non-refoulement as the cornerstone of the international regime of refugee protection.[30]If violated then any discussion on other rights of refugees is rendered moot. In Africa, the principle is enshrined in the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, and in the African Charter on Human and Peoples' Rights which encourage States to call on the international community for assistance should they need it as an alternative to refoulement. This happened in 2012 when President Mwai Kibaki requested the international community for assistance as the question of refugees is a collective one and was not meant to place a burden on one State at the risk of it's own security.[31] Kenya's directive to close Dadaab and Kakuma will not be the first such instance in Africa. In 1995 Tanzania closed its borders and stopped admitting refugees despite the 50,000 Rwandan refugees fleeing renewed violence.[32] Tanzania was estimated to be hosting 500,000 refugees when the government stated that it was unable to accept any more on account of the dangers posed to the environment, regional tension and national security. This state of affairs continued throughout 1995 and 1996, with the border remaining closed to Rwandan refugees.[33] In Kenya, the Convention Against Torture negates the argument posed by the African countries in the early and mid-1990's making the government directive a violation of non-refoulement.

Terrorism and the Non-Derogability of non-refoulement by Rene Bruin and Kees Wouters is of the view that laws allow for the violation of non-refoulement when there is a risk to the national security of a State, and further provides that this principle should not encourage impunity but should be used to safeguard the welfare of the vulnerable refugees.[34]

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[29] Lilly Evie, "National Security | Definition, Policy & Importance" <https://study.com/academy/lesson/the-economics-of-national-security-policy.html> on 20th December 2023.

[30]Bueno 0, Perspectives on Refoulement in Africa, (Research and Communications Coordinator), InternationalRefugee Rights Initiative, Originally Presented At The Canadian Council For Refugees Conference, Toronto, and June 17, 2006.

[31]<https://reliefweb.int/report/kenya/kenya-government-committed-giving-refugees-decent-amenities-somalia-crises-worsening>

[32] Boed R, 'State of Necessity as a Justification for Internationally Wrongful Conduct' (2000) 3 Yale Human Rts. and Dev.LJ I.

[33] Boed R, 'State of Necessity as a Justification for Internationally Wrong/it! Conduct' (2000) 3 Yale Human Rts. & Dev.LJ I.

[34] Bruin Rand Wouters K, Terrorism and the Non-Derogability of non-refoulement.

A research paper titled Non-Refoulement and National Security: A Comparative research of UK, Canada and New Zealand by Hanxiao Li also provides the link between non-refoulement and national security, and gives instances where the law, court or State practice upheld either of the two and the reason for it.[35] It concludes by providing that the international obligation on prohibition of torture is absolute, making non-refoulement a non-derogable principle, even amidst claims of threat to national security. While the burden can be eased by other States helping and shouldering this responsibility, it does not give States the luxury of returning refugees to their country of origin without their consent.

The Court in the past had been of the opinion that non-refoulement was an absolute right regardless of who the potential victim of torture, inhuman or degrading treatment is or what they may have done. In the case of the European Court of Human Rights in Ahmad v UK, however the court found that there would be no breach in extraditing a number of terrorist suspects to face trial and probable imprisonment in 'super-maximum security' detention facilities in the United States of America.[36]This decision goes against the view of this research as I am of the belief that the March 2021 directive by the government of Kenya to close both camp Dadaab and Kakuma amounted to a violation of non-refoulement.

1.9 Methodology

This research will rely on doctrinal legal research methodology. It is a methodology that analyzes the underlying legal principles of the existing legal rules and formulates legal doctrines. The chosen methodology gets data from primary legal sources and secondary sources. The primary sources include a review of the legal and regulatory framework on refugee law in Kenya, while the secondary sources encompass the existing literature in textbooks, journal articles, theses, research and working papers, institutional reports, newspaper articles and online resources relevant to the research. This methodology necessitates an introspective analysis of the legal doctrine. Attention is given to the process of development of legal doctrine and legal reasoning.

It also includes an analysis of refugee laws (both national and international laws), multiple scholars and relevant case law. It draws from this, analyzing and critiquing where it can in the quest to find out whether the threat to national security meets the threshold required by law for the violation of the

[35] Hanxiao Li, Non-Refoulement and National Security: A Comparative Study of UK, Canada and New Zealand.
[36] Babar Ahmad And Others V. The United ,ECtHR Judgement of 10 April 2012.

principle of non-refoulement. This method also includes an analysis of case law in Kenya which shows the court's view on the principle of non-refoulement.

This methodology is best suited for this research as it is not as time consuming and does not require a lot of resources such as monetary resources to carry out the research.

1.10 Assumptions

This research will adopt the assumption that the information relied upon when carrying out this research is accurate. It also assumes that the laws on the subject will not be amended in the course of the research.

1.11 Limitations

The research encounters various limitations such as time constraints and limited scholarly work on the limitation of the freedom from refoulement on the basis of national security which will make it difficult to expound on limitations of the right.

However this does not hinder the exhaustion of the subject matter and the necessary solutions.

1.12 Chapter breakdown

Chapter One: Introduction

It introduces the research explaining what the research is about, the history and justification of the research.

Chapter Two: The principle of non-refoulement

This chapter introduces the principle of non-refoulement as well as the May 2016 governmental directive to close down the Dadaab and Kakuma refugee camps. It will include a discussion on whether the principle is a non derogable right under international law. It will also include an analysis of the government's directive to close the camps and the steps taken in the achievement of this directive.

Chapter Three: The Current Legal Framework on Refugee law

This chapter examines the legal provisions of a number of statutes relevant to the research such as the refugee Act 2021 and other international statutes like the UN Convention against Torture. In order to establish whether the right to freedom from refoulement is a non-derogable right.

Chapter Four: National Security as a limitation to the principle

This chapter discusses national security as a limitation to the principle of non-refoulement. It includes the discussion on the proportionality test to the limitation of a right and the requirements under international law for refoulement. It analyzes whether the government's directive meets these requirements.

Chapter Five : Conclusion and Recommendations

This chapter serves as a concluding chapter to the research and includes proposed recommendations. It will mark the end of the dissertation.

CHAPTER 2

THE PRINCIPLE OF NON-REFOULEMENT

2.1 Introduction

In this chapter, I shall explore the background that led to the creation of the principle of non refoulement. Further, it will highlight what the exceptions to strict compliance with the principle are while considering whether the norm has achieved the status of customary international law. In addition to this, it will also include an analysis of the government's directive to close the camps and the steps taken in the achievement of this directive. I will then conclude by considering whether or not the principle can be derogated, taking into consideration that it is a principle that is considered to be of jus cogens application.

2.2 History of the principle

The principle first emerged at the initiative of the international societies of international lawyers who produced an international regulation on the reception and expulsion of foreigners in 1892.[37] Another name for the regulation is Règles Internationales sur l'admission et l'expulsion des étrangers. The International Regulations on the Admission and Expulsion of Foreigners were produced with some consideration that although states have sovereignty over their territories (thus the right to recognize or not recognize the existence of foreigners or only recognize them under certain conditions), countries in the world, based on humanitarian principles, are obliged to exercise this right by respecting the rights and freedoms of foreigners who wish to enter their territory.[38] In other words, the rights of the state also need to be balanced with the principles of humanity and justice by taking into account the security of the state, and the rights of foreigners. With these considerations in mind, this regulation formulates several principles that can be used as a reference for every legal action in the future. One of the principles stipulated in the regulation is the principle of non refoulement.

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[37] James A. R. Nafziger. "The General Admission of Aliens under International Law." The American Journal of International Law, vol. 77, no. 4, 1983, pp. 804–47. JSTOR, <https://doi.org/10.2307/2202535>. On 3 Oct, 2024.
[38] Heribertus Untung Setyardi, 'The Origins of the Non-Refoulement Principle and Refugee Admission Considerations in the Refugee Protection Framework' 7 Atma Jaya Yogyakarta University Law Journal 2, 2023.

Non-refoulement existed as a prominent legal concept for over fifty years before being codified during the postWorld War II period.[39] Non-refoulement was formally codified in the 1951 Geneva Convention Relating to the Status of Refugees, specifically in Article 33.[40] The above provision of Article 33 of the 1951 Geneva Convention makes it clear that the 1951 Geneva Convention does not entitle any state to expel or return refugees to the frontiers of territories where their life and freedom would be threatened for reasons of race, religion, nationality, membership of a particular social group or political opinion, in any manner whatsoever. However, this is excluded where there are sufficiently compelling reasons for that state to consider that the refugee concerned constitutes a threat to the security of the state in which he or she is located, or a danger to the society of that state following a conviction by a final judicial decision of a particularly serious criminal offense.

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[41]. Garner defines refoulement as expulsion or return of a refugee from one state to another.[42] 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.

The cornerstone of international refugee law is the principle of non-refoulement. This principle is considered foundational because it protects refugees and asylum seekers against their forceful return to a country where they have a reason to fear persecution and the possibility of their life being in danger.[43] Furthermore, this principle is essential as it embodies the purpose of refugee protection which is the safeguarding of vulnerable individuals by ensuring that they are adequately protected beyond the borders of their state of refuge.

This principle of non-refoulement is enshrined in Article 33(1) of the Refugee Convention as follows; ***"No Contracting State shall expel or return (refouler) a refugee in any manner***

[39] Heribertus Untung Setyardi, 'The Origins of the Non-Refoulement Principle and Refugee Admission Considerations in the Refugee Protection Framework' 7 Atma Jaya Yogyakarta University Law Journal 2, 2023.

[40] Article 33, 1951 Geneva Convention

[41] Chambo J.A, 'The Principle Of Non-Refoulement In The Context Of Refugee Operation In Tanzania', LLM dissertation, University of Pretoria, 31st October, 2005, pg 9.

[42] UNHCR Access to territorial and non refoulment <https://emergency.unhcr.org/protection/legal-framework/access-territory-and-non-refoulement#:~:text=The%20principle%20of%20non%2Drefoulement%20obliges%20States%20not%20to%20expel,other%20form%20of%20serious%20harm>.

[43] UN High Commissioner for Refugees (UNHCR), UNHCR Note on the Principle of Non-Refoulement, -, November 1997, <https://www.refworld.org/policy/legalguidance/unhcr/1997/en/36258> .

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".[44]
Non-refoulement is a crucial protection under international human rights, refugee, humanitarian, and customary law. It is considered a part of customary international law (Jus Cogens), binding on all states, whether or not they are parties to the Geneva Refugee Convention and Protocol. The non-refoulement principle is considered to form part of customary international law, based on consistent state practice and a recognition by states that the principle has a normative character. This recognition further solidifies the importance of the principle in international law and its acknowledgment in the 1951 Convention on the Status of Refugees.

2.3 Customary law and the principle

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. The elements of custom include; duration, Uniformity/consistency of the practice, generality of the practice and Opinio juris. 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. The ICJ has two methods in approaching opinion juris. The first of which is where the Court assumes the existence of opinion 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. 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. The choice in approach is dependent upon the nature of the issues in question and the discretion of the Court. 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.
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.

[44] Article 33, Refugee Convention, 1951.

The expression of the principle as a norm- creating character in several international instruments and a number of Conclusions of the UNHCR Executive Committee. There is evidence showing that the principle is already widespread and representative. 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. 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. 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.

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 widespread applicability coupled with the opinio juris and consistent practice related to it. It is worthwhile to note that despite the fact that there exist writers who hold the view that the principle of non refoulement has not achieved customary law status, they form the minority. The general consensus and that of mine 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.

Under Customary International Law, a refugee is a person running away from intolerable conditions and situations that are related to conflict. According to the background of the study the term refugee as outlined in the 1951 United Nations Convention Related to Refugees refers to

> "***a person who as a result of events occurring and owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or owing to that fear, sis unwilling to avail himself of the protection of that country.*** "

Under, Article II(3) of the 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa, no person shall be returned, rejected or expelled from a member state of the convention to territories where his/her life will be threatened through racial, religious persecution, national and political opinion and persecutions.

The status of a refugee is not permanent as he/she may be repatriated but they must receive the same treatment as the citizens of the receiving country. To determine whether or not one can acquire refugee status, governments apply the Refugee Status Determination (RSD) legal process. The Department of Refugee Affairs (DRA) headed by a Commissioner of Refugees also has the overall responsibility for all administration, coordination and management of refugee matters. Both processes mentioned above enable an asylum seeker to acquire recognition as a refugee. A person may cease to be a refugee at the receiving country due to specific circumstances under The Refugee Act (2006).

According to Professor Guy Goodwin-Gill, non-refoulement is a fundamental basis of international refugee law. The application of this provision requires an individualized determination by the country of asylum that the individual concerned constitutes a present or future danger to the security of the community of the host country. ln some instances this principle is breached for example in the Hila vs The United Kingdom case whereby the European Court of Human Rights judged that the applicant's deportation would breach Article 3 of the European Convention on Human Rights. The 1951 Convention does not limit the protection in relation to the period that the refugee stays. It prohibits the return of the asylum seekers in any manner whatsoever to the territories where they had been persecuted. This includes "extradition, expulsion, deportation or rejection." The granting of refugee status by a country is discretionary but the principle of non- refoulement is binding and considered to be compulsory. According to Siraj Sait: "States can retain the strictest controls regarding economic immigrants, but the principle of non-refoulement obliges them not to arbitrarily reject asylum claims from forced immigrants."

2.4 The principle of non-refoulement as jus cogens

A norm of *jus cogens* application is also referred to as a peremptory norm. 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. 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. 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.

For a norm to be established as a *jus cogens* there is need for a consensus on the normative level, whereby a norm is examined to ascertain whether it qualifies as a *jus cogens*, and on a categorical level, which focuses on the basic nature and the factors that make a peremptory norm. As has been asserted above the principle of non-refoulement is customary international law and is therefore binding on all States regardless of their specific assent. This is evidence that it has been accepted by the international community. In addition to this, the principle has been established as non-derogable due to its importance. The non-derogability of a norm emphasises the special status of the right as it cannot be set aside even in situations that would justify derogation from others. According to Allain this is proof that the principle is a *jus cogens* because not only has it been accepted by the international community but it has also been established as a non-derogable principle. He further argues that any doubt with regard to this acceptance as a result of the increased violations of the principle are irrelevant due to the fact that State practice need not be in rigorous conformity with the rule for it to emerge as *jus cogens*. This principle has achieved this status as a result of its inseparable link to the observance of basic human rights such as the right to life and the freedom from torture. The establishment of non-refoulement as a *jus cogens* norm necessitates that those exceptions are circumscribed or limited which therefore limits the subsequent deviations from the principle as well.

The recognition of the principle as a *jus cogens* norm adds to its protective character. This is because the recognition of the principle as a norm from which no derogation is permissible enforces the observance of basic human rights that are foundational to refugee protection, furthermore, it prevents the return of these refugees to a situation where their rights are likely to be violated.

2.5 Exemptions to the principle

The non-refoulement obligation under international human rights law does not permit exceptions as the obligation is considered absolute. This was intended to be the case in international refugee law however, States had concerns about the attrition of their sovereignty if this was the case. It was on this basis that the exception provided in Article 33(2) of the Refugee Convention was included.

Article 33(2) provides that the principle of non-refoulement may be limited in instances where there are reasonable grounds for considering a refugee as a danger to the security of the country that is giving him refuge or that the refugee has been convicted of a serious crime which constitutes a danger to the community of that country. These exceptions can also be referred to as the national

security and public order exceptions. When it applies, it does not exclude a person from being a refugee if they meet the definition in Article 1A(2). Rather, it takes away the key protection afforded to refugees by the principle of non-refoulement. In addition to this, Section 3 (1) (c) (g) of the Immigration Act states that a person, or a member of a class of persons, whose presence in Kenya is declared by the Minister to be contrary to the national interests.

From these two exceptions to apply, it is evident that the refugee has to pose a material prospective danger to the country of refuge. Therefore, the danger cannot be a mere possibility as it has to be supported by evidence. In addition to this, the national security exception requires the State to establish 'reasonable grounds' for its application. The provision does not establish what exactly a 'reasonable ground' is hence leaving it up to the discretion of the States which leads to several interpretations. According to some authors, the broad application subsequently affords the State a wider discretion when establishing what the 'reasonable grounds' are. On the other hand, some authors like Sir Elihu Lauterpacht and Daniel Bethlehem suggest that the margin of appreciation is limited as it requires the relevant authorities to actively address the questions on what constitutes the future risk, which needs to be supported by evidence[45].

These exceptions for a long time have been recognized as potential justifications for derogation. This is an egregious position because these exceptions do not permit derogation based on the fact that the Vienna Convention on the Law of Treaties requires that these exceptions be read restrictively. This is illustrated where the requirement for danger in establishing these exceptions requires a test of proportionality. This test requires that the danger posed by the refugee should not be less than the possible danger the refugee will face if returned to the territory they fled from. This can be attributed to the humanitarian nature of the principle which requires a restrictive interpretation of the exceptions in order to limit the return of refugees from to countries where their lives and freedoms are at risk.

Apart from the proportionality test, Article 24 of the Constitution of Kenya provides a threshold for the limitation of a right. It states that

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[45] Sir Elihu Lauterpacht and Daniel Bethlehem, The Scope and Content of the Principle of Non-Refoulement: Opinion, Cambridge University Press, June 2003,< https://www.refworld.org/reference/research/cup/2003/en/49371> accessed 04 December 2024.

"A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

a. the nature of the right or fundamental freedom;
b. the importance of the purpose of the limitation;
c. the nature and extent of the limitation;
d. the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
e. the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose."

In Kenya, the principle of non-refoulement is expressly provided for in the Refugee Act. In addition to the international treaties that Kenya has ratified as they too form part of Kenyan law by Article 2 of the Constitution. The principle can also be inferred by dint of Article 25 of the Constitution which provides that freedom from torture and cruel, inhuman or degrading treatment or punishment fall under the rights and freedoms that cannot be limited. Kenya is a signatory to the Refugee Convention and hosts a large number of refugees. However, there have been attempts to close down the refugee camps in the past. These past developments are indicators of the Kenyan government's need for an improved and efficient way to respond to refugee influx. The government directive to close the Dadaab refugee camps by November 2016 brought about issues, the main being fear and panic of the refugees in Dadaab due to the looming 'deadline'. This prompts the need to analyze the directive to establish whether it violated the principle of non-refoulement, or whether the steps taken in the implementation of the directive violated the said principle. There have been reports by organizations including the Human Rights Watch explaining the situation in the camps when the directive was issued. They revealed that some refugees returned to Somalia due to the pressure upon them by the government given the uncertainty of their future in the camps, the reduced food portions that were given to them, and the opportunity to take advantage of the subsidy given to returnees by the government to aid them as settle down, which would have been foregone. These factors amount to indirect pressure for the refugees to return which amounts to refoulement, and an indirect violation of the principle of non-refoulement.

The reports and interviews by key informants with officials from the Refugee Affairs Secretariat, the body that was established to continue with the mandate of DRA, stated that the ongoing repatriation is voluntary and the directive was issued to encourage and hasten the process of the already ongoing voluntary repatriation that had been taking place since 2013, stemming from the tripartite agreement. Given the circumstances and justification by the government, the directive came about due to concerns over national security, not to facilitate the voluntary repatriation process.

2.6 Conclusion

The essence of the non-refoulement principle has been the protection of the refugees since its inception. The safeguarding of refugees, though at the center of the principle, has been breached by States who rely on the exceptions outlined in Article 33(2) of the Refugee Convention. Despite this reliance, the exceptions do not provide an absolute mechanism by which States can circumvent their obligations. This is because the principle has acquired jus cogens status which means that these exceptions have to be interpreted restrictively in order to ensure the ultimate protection of the refugees. From the analysis of the principle, this chapter has proved that the principle has achieved the status of jus cogens as a result of its inseparable link to the observance of basic human rights such as the right to life and the freedom from torture.

This protective character is further evidenced by the fact that the establishment of risk of torture, cruel, inhuman and degrading treatment is pertinent to the application of the principle.

The next chapter shall explore the current legal framework on Refugee law both domestic law and international law that are relevant to the research such as the Refugee Act 2021.

CHAPTER THREE

LEGAL FRAMEWORK OF THE PRINCIPLE OF NON REFOULEMENT IN KENYA

3.1 Introduction

The previous chapter introduced the principle of non refoulement and has established that the principle has acquired jus cogens status which means that these exceptions have to be interpreted restrictively in order to ensure the ultimate protection of the refugees. This chapter shall therefore discuss how this principle is established in the Kenyan legal system.

The principle of non-refoulement prohibits states from returning a refugee or asylum seeker to a territory where his or her life or freedom would be threatened.[46] The principle is expressed in Article 33 of the 1951 Refugee Convention, which states that:

> ***1. 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.***
> ***2. 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.***

The first paragraph of the article sets out the prohibition on refoulement, while the second paragraph lists the exceptions to the principle. In the context of the 1951 Refugee Convention Article 1F is also relevant when addressing the exceptions to non-refoulement. Article 1F of the 1951 Refugee Convention states that:

> ***"The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:***
> ***(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;***

[46] Lauterpacht and Bethlehem, 2003, p. 89.

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
(c) he has been guilty of acts contrary to the purposes and principles of the United Nations."

As seen by the wording of the article, it excludes the individual from the Convention. As a result, Article 33 will not be applicable, nor will any other articles of the Convention.

Article 33(1) sets out the prohibition of refoulement. The wording of the provision should be interpreted within the context of the treaty as a whole.[47]

The object and purpose of the 1951 Refugee Convention is also relevant for the interpretation of the provision. The wording "in any manner whatsoever" means that the prohibition must be interpreted expansively.[48] The choice of words suggests that all types of removal of a person is included, without regard to the formal description (deportation, expulsion, return, rejection etc.). Furthermore, there is no indication that the prohibition does not include extradition.[49] There is no general right to asylum in international law. However, this does not mean that states can reject asylum seekers who have a well-founded fear of persecution at the frontier. States may in these cases remove the asylum seeker to a safe third country or adopt another solution that does not amount to refoulement.

The protection of Article 33(1) is afforded to the refugee. Pursuant to Article 1A(2) of the 1951 Refugee Convention, and amended by Article I(2) of the 1967 Protocol, a refugee is

> **"a person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it".**

However, the prohibition on refoulement does not only apply to those who have been formally recognized as refugees, as this recognition is usually a result of domestic law. The wording of Article

[47] Lauterpacht and Bethlehem, 2003, p.108.
[48] Lauterpacht and Bethlehem, 2003, p.112.
[49] The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis, 1990, pp. 341-342.

1A(2) tells us that the Convention applies to any person ”owing to a well-founded fear of being persecuted…”. This means that any person who has satisfied the conditions of Article 1A(2) is a refugee under the Convention, whether or not the person has been recognized as such by domestic law.[50] Subsequently, refugees who are illegally residing in the country of refuge will also be included. For this reason, the term ’refugee’ will from now on be used in this dissertation with regard to persons who satisfy the conditions of Article 1A(2), regardless of any domestic recognition. Refoulement is prohibited to the "frontiers of territories where his life or freedom would be threatened…". This does not only include the refugee's country of origin. The reference is made to the plural – "territories". This means refoulement is prohibited to any territory in which the person will risk his or her life or freedom. The word "territories" is used instead of "countries" or "states", implicating that the legal status of the territory is irrelevant. The prohibition also includes removals to a third state if there is a risk of the individual being removed from there to a territory where he or she would be at risk – so-called chain-refoulement. "Where his life or freedom would be threatened" is directly related to the definition of a refugee in Article 1A(2) – ”well-founded fear of persecution". Consequently," where his life or freedom would be threatened" should be read to include the territories in which the person has a "well-founded fear of persecution". Similarly, the nature of the threat – "on account of his race, religion, nationality, membership of a particular social group or political opinion" imports the wording of the definition in Article 1A(2).

The provision binds the Contracting States, which refers to all the states party to the Convention. Pursuant to Article I(1) of the 1967 Protocol, it also refers to all states party to the Protocol whether or not they are party to the Convention. In line with general principles of state responsibility, the provision applies to all organs of the contracting State or other persons or bodies exercising governmental authority. It also includes organs of other states, private
undertakings, or other persons acting on behalf of a contracting State or in exercise of the governmental activity of that state. The application is not constricted to the conducts occurring within the territory of the Contracting State. In general, states are responsible for conduct in relation to persons who are subject to their jurisdiction. Both the Human Rights Committee and the European Court of Human Rights have addressed the more precise meaning of
this phrase.[51]

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[50] See Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, 2011, para. 28.

[51] Loizidou v. Turkey and Lopez Burgos v. Uruguay.

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."***[52]

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 the domestic front, however, Kenya lacked any national refugee legislation until 2007, when the Refugee Act came into force.[53]

This chapter shall explore the Kenyan law on refugees, more specifically, what it provides for in respect to the principle of non refoulement.

3.2 Application of The Principle Before 2006

It noted that the Refugee Act came into force in 2006 which was later repealed by the Refugee Act 2021. Prior to this, the principle of non refoulement was said to be only applicable in Kenya after the

[52] 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.

[53]<https://www.rckkenya.org/maximizing-your-blogs-reach-seo-tips-for-bloggers/#:~:text=National%20Security%20versus%20Refugee%20Protection,with%20exclusion%20and%20cessation%20clauses> .

Convention had been domesticated into Kenya‟s law.[54] 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**.[55] 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 was no evidence at the time that the Convention had been incorporated into Kenya‘s municipal law, or domesticated. However, 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. 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 2021, the Refugees (General) Regulations, 2024 and other sources of the law on refugees including 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 29 of the Refugee Act 2021. The section provides that;

> **"(1) No person shall be refused entry into Kenya, expelled, extradited from Kenya or returned to any other country or be subjected to any similar measure if, as a result of such refusal, expulsion, return or other measure, such person is compelled to return to or remain in a country**
> **where—**
> **(a) the person may be subject to persecution on account of race, religion, nationality, membership of a particular social group or political opinion; or**

[54]Article 2, Constitution of Kenya (2010).
[55]Adel Mohammed Abdulkader Al-Dahas V The Commissioner Of Police & 2 Others [2003] eKLR.

(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 orwhole of that country.

(2) The benefit of subsection 1 may not, however, be claimed by a refugee or asylum seeker whom there are reasonable grounds for him or her being regarded as a danger to the national security of Kenya".[56]

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 29 specifically uses the words non refoulement, therefore it 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 29 that specifically prohibits the refoulement of persons, there are other sections of the law that do not specifically prohibit refoulement but upon reading them an inference of non refoulement can be drawn from the wording. For instance, Section 22(1) provides that;

"A person who has applied for recognition as a refugee, and every member of his or her family shall have the right to remain within Kenya;

(a) until such person has been recognised as a refugee under that section;

(b) in the event of the application of such person being unsuccessful, until such person has had an opportunity to exhaust his right of appeal this Act;

(c) where such person has appealed under section 14, and his or her appeal has been unsuccessful, until such person has been allowed a reasonable time, not exceeding sixty days to seek admission to a country of his or her 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 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 14 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.

[56] Section 29, Refugee Act (2021).

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.

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.

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 CSR 51. For the refugee to be expelled under section 19 (1) of the Refugee Act of 2021, it is provided that such expulsion shall be as follows;

> **"Subject to section 29, the Cabinet Secretary may order the expulsion from Kenya of any refugee or member of his family if the Cabinet Secretary considers the expulsion to be necessary on the grounds of national security or public order."**

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. 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.[57] The due process does allow the applicant upon his request being turned down to lodge an appeal, with the Appeals board created under Section 14 (1) of Refugee Act, within 30 days of receipt of the decision of the Commissioner. 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.[58] 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.

[57] Section 12(5), Refugee Act 2021.
[58] Section 14 (2), Refugee Act 2021.

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 provides for 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 2021. That is, on the grounds of national security. Regulation 45 of the Refugee(General) Regulations provides the general grounds for expulsion and the procedure to be followed when such grounds are established, it specifically provides that;

> **"A refugee or a member of his or her family may be expelled from Kenya on grounds of national security, public order and public morality.**
>
> **(2)The Cabinet Secretary shall issue an order in writing to a refugee whose refugee status has been terminated to leave the country.**
>
> **(3)A refugee or asylum seeker shall be expelled on the grounds under section 19(2) of the Act when—**
>
> **(a)a person is convicted of breach to public order and morality;**
>
> **(b)has exhausted the appeal process.**
>
> **(4)The Commissioner shall notify the Cabinet Secretary when it comes to his or her attention of any refugee convicted under section make 19(2) of the Act."**[59]

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 these provisions of the law would therefore be in cross purpose with the internationally set principle of non refoulement.

[59] Regulation 45 of The Refugees (General) Regulations, 2024.

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

Though the Refugee Act of 2021 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 Constitution under Article 2, Kenyan law is seen to be influenced by international treaties and conventions that Kenya has ratified and further, general rules of international law that exist.[60]

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 to 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 Kenyan law has embraced the principle of non refoulement, be it through domesticating the principle in its legislation, or by ratifying conventions and treaties that prohibit any form of refoulement or through observance of generally accepted international principles of law.

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

The wording of section 29 of the Refugee Act 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

[60] Article 2(5) and Article 2(6) , Constitution of Kenya (2010).

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 29 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 29. 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 expulsion 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 29 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 29 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 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 refoulement is specifically provided for under Section 29 of the Refugee Act and its exceptions are espoused by 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 refoulement. It is also noted that the 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 refoulement 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 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 Kenya has made efforts at complying with it. The next chapter will therefore focus on the threshold of national security as an exception to the principle of non refoulement.

CHAPTER FOUR

ASSESSING NATIONAL SECURITY AS AN EXCEPTION TO NON REFOULEMENT

4.1 Introduction

The previous chapter found that the principle of non refoulement is established in Kenya's laws that is in the section 29 of the Refugees Act 2021 and the Refuges Regulation and in the conventions which Kenya has ratified and is implemented in the Kenya law under Article 2 of the Constitution of Kenya. The principle of non refoulement having been established as a jus cogens norm has national security as its exception.

In relation to matters to do with national security, in particular terrorism, most states take action even before the plot that they suspect may be caused by certain refugees is completed. Such cases also normally require a high burden of proof. This leads to most refugees not acquiring justice under the principle of non refoulement as they end up being repatriated to their former state on the basis of national security. States, especially host states, face a problem balancing their interests with the interests of the refugees which leads to bias on their end. This poses a threat to the principle. It also shows that there is the need for a balancing test in relation to this principle. This test should be applied in that none of the parties ends up facing unnecessary infringement on their rights. lt also raises the question of which right will have to give in relation to security. Several states appear to be torn between the right to security and the violations of the refugee conventions that deal with non-refoulement. Does the right to security of the person merge with the principle of non-refoulement?

Hence, from the above analysis, the question that arises is whether there is a gap between the principle and its interpretation. The other question that arises is whether this threat justifies the breach of the principle of non-refoulement which I'll seek to answer in this chapter.

4.2 National Security As An Exception To The Principle

For the refugee to be expelled under the Refugee Act of 2021, it is provided that such expulsion shall be as follows;

> ***(1) Subject to section 29, the Cabinet Secretary may order the expulsion from Kenya of any refugee or member of his family if the Cabinet Secretary considers the***

expulsion to be necessary on the grounds of national security or public order. (2) Subject to subsection 19(1) a refugee or an asylum seeker engaging in a conduct that is in breach or is likely to result in breach of public order or contrary to public morality under the law irrespective of whether the conduct is linked to his claim for asylum or not, may be expelled from the Kenya by an order of the Cabinet Secretary.[61]

Similar to the 1951 Refugee Convention, 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 12 of the Act to the Commissioner for Refugee Affairs.[62] 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.[63] The due process does allow the applicant upon his request being turned down to lodge an appeal, with the Appeals board created under Section 11 of Refugee Act, within 30 days of receipt of the decision of the Commissioner.[64] 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.[65] 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.

The Refugee Regulations section 45 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 19 of the Refugee Act 2021. That is, on the grounds of national security. 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.**"[66]

[61] Section 19 (1), (2) Refugee Act, 2021.
[62] Section 12 (1) Refugee Act, 2021.
[63] Section 12(5), Refugee Act, 2021.
[64] Section 11, Refugee Act, 2021.
[65] Section 14 (2), Refugee Act, 2021.
[66] Article 238 Constitution of Kenya (2010).

It is evident therefore, that the principle of non refoulement may be escaped only under the exceptions provided under statute mentioned above and in chapter 3. 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 and provisions of the law would therefore be in cross purpose with the internationally set principle of non refoulement.

4.2 The Government's directive

In January 2007, in response to security concerns the Kenyan government officially closed the Kenya-Somalia border.[67] 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. However, the border closure did have the effect of having Somali refugees forcibly returned back to their country. 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. 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. 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.[68] 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 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 100 km from Somalia.[69] 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. The governor of Lamu county at the time, 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. 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

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[67] Addressing the Humanitarian Crisis on the Kenya/Somalia Border', March 2009, <www.oxfam.org> on 5th November, 2024.
[68] Andrew McGregor, "After Garissa: Kenya Revises Its Security Strategy to Counter al-Shabaab's Shifting Tactics", 7 April 2015, Terrorism Monitor Volume: 13 Issue: 8.
[69] Wafula P, "Kenya plans great wall to block terror" Mail and Guardian 10th April 2015, <www.mg.co.za> on 11th November,2024.

certain instances actually gone ahead to close the border between Kenya and Somalia. The border between Kenya 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 29 of the Kenyan Refugee Act, 2021, 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.

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 to occur at the same time because non compliance is kept in check by other government institutions which cause compliance with the principle.

In addition, 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 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."

This press release was subsequently followed by a letter by the then Permanent Secretary in the Ministry of Special Programmes that read in part; relocation of urban refugees to officially designate camps. The government intended 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.

On 11th 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.[70] The statement made by Kenya's deputy president drew sharp criticisms from various quotas. 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,[71] The Human Rights Watch also did oppose the closure of the camps and on its part noted that the move 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. It is seen from the comments by members of the Human Rights watch that such a measure would result in 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 29 of the Refugee Act, which would be an act that would cause refugees to be returned to a place where they are likely to be persecuted. If this were to happen as a result of closure of the refugee camp then the principle of non refoulement would not have been complied with.

What is evident in all instances where the Kenyan Government has violated or threatened to violate the principle of non refoulement is the fact that national security has been the underlying reasons

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[70] <https://www.youtube.com/watch?v=0xP7e8wnaYA> .

[71] Dadaab refugee camp closure would risk 350,000 Somali lives, warns Amnesty online issue of The Guardian ,<www.theguardian.com> , on 11th November 2024.

why the 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"***.[72]

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, 2021. 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.

Under the Refugee Act 2021, Section 19 the exception to strict compliance with the principle is provided for that is national security or public order. For the drafters it was seen that national security was an issue that would allow Article 2(5) and Article 2(6), Constitution of Kenya 2010 for non compliance with the principle of non refoulement. The Section goes further to include being in breach of public order or contrary to public morality under the law is a second ground which would result in evading the strict compliance with the principle of non refoulement. Therefore, under the Kenyan law national security and breach of public order 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 breach to public order as one of its exceptions.

The African Human Rights Commission in the Institute for Human Rights and Development in Africa (on behalf of Sierra Leone refugees in Guinea)/Guinea (Communication No. 249/2002)

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[72] Petition No. 19 of 2013 consolidated with 115 of 2013, Kituo Cha Sheria & 8 others v Attorney General (2013)eKLR.

recognised that certain acts of a host state can lead to indirect refoulement of refugees. In the case, a radio announcement by the President of Guinea that Sierra Leonean refugees in Guinea should be arrested, searched and confined to refugee camps led to widespread discriminatory acts targeting Sierra Leonean refugees. As a result, many refugees were forced to flee back to Sierra Leone. The Commission held that such a situation created in the host state that makes the dangerous option of returning/fleeing to their country as the only option was a violation of the principle of non-refoulement. 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 principle of non refoulement.

4.3 The threshold for National security as an exception

Article 24 of the Constitution states the requirements under which a right may be limited. Article 24(1) provides as follows;

> ***"(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—***
> ***(a) the nature of the right or fundamental freedom;***
> ***(b) the importance of the purpose of the limitation;***
> ***(c) the nature and extent of the limitation;***
> ***(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and***
> ***(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose."***[73]

[73] Article 24 Constitution of Kenya (2010).

4.3.1 Nature of rights

Under this principle, limitations of rights are based on the weight rights hold and this makes it difficult to justify the infringement of a right that weighs more than a lesser right. In this case, the challenge lies in assessing the importance of a certain right in the overall constitutional scheme in order to justify its limitation. In a South African case **S v Makwanyane**, the court stated that “the rights to life and dignity are the most important of all human rights and the source of all other personal rights in Chapter Three. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others. And this must be demonstrated by the state in everything that it does, including the way it punishes criminals. This is not achieved by objectifying murderers and putting them to death to serve as an example to others in the expectation that they might possibly be deterred thereby."

Moreover, it is important for the laws on limitation to draw a distinction between the objective and subjective contents of a right. The objective content refers to the values and practices that are typical of a free, democratic, and constitutional state. If this essence of the objective content of a right is negated, the objective content is lost. The subjective content of a right refers to those values and practices which particular individuals and groups enjoy. Once they are barred from enjoying such rights as a consequence of limitation, the essence of the subjective content of the right is lost.[74]

The principle of non refoulement is deeply rooted in the universal values of human dignity and protection against inhuman treatment. It reflects foundational norms of international human rights and refugee law, particularly in instruments like the 1951 Refugee Convention and the Convention Against Torture. The principle safeguards democratic states' commitment to humanity and non-discrimination. If the principle is denied universally, the state risks negating its obligations under international law, threatening the constitutional essence of human rights protections. Therefore, non-refoulement has significant objective content. Its subjective dimension applies when considering individual refugees' cases.

4.3.2 Importance of the purpose of the limitation

Every measure of a limitation ought to serve a specific purpose that will appear reasonable to the citizens of a state due to compelling circumstances. Consequently the moral preference of a specified

[74] Gerhard Erasmus, Limitation And Suspension in Dawid Van Wyk et al, Rights and Constitutionalism: The New South African Constitutional Legal Order, (1994).

community fails to qualify as one of the justifiable grounds for limiting rights of individuals based on what only constitutes positive cultural practices even if the right to culture is invoked.[75]

Therefore the question that may arise would be what purposes should a court consider as a justifiable ground of limitation? In answering this, the ideal approach would be for the court to subject the purposes to the rule of judicial notice. It is through judicial notice that the purposes serving as important object of government may be authoritatively attested and hence cannot be reasonably doubted. Such purposes may include: protection of the administration of justice; protection of rights of others; compliance with constitutional obligations; prevention of illegal entry to a country; and complying with a state's international obligation.[76]

Similar to the above, is the stricter test that addresses the issue of limiting illimitable rights that cannot be subjected to the laws of general application other than legal rules laid down in the constitution and the Bill of Rights.[77] Limiting illimitable rights is usually through interpretive clauses subject to strict scrutiny review.[78] The notion of strict scrutiny arises from equal protection jurisprudence, where its application is based on legislations involving nationality or basic human rights; intermediate review (usually consists of legislations pertaining to gender, alienage and illegitimacy); and rationality review (for all general legislations). Therefore for a law limiting a right to be justifiable, it has to show that a compelling state interest is involved and secondly, the said law was narrowly tailored to serve that interest.

From the government's directive, the law limiting the non-refoulement right on the basis of national security is justifiable in the interest of the public. However, there are questions as to whether the law was tailored to serve specifically that purpose or for political reasons. The government sending troops to Somalia to majorly ensure that they retain their power and control over certain cities near the border shows that there are other motives to the directive other than national security. Hence the need to analyse the purpose for limiting the right to ensure that it is not to serve personal or political reasons.

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[75] National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC) Para 37.
[76] Iain Currie & Johan De Waal, The Bill of Rights Handbook, (2005) 178-179.
[77] Lourens Du Plessis& Hugh Corder, Understanding South Africa's Transitional Bill of Rights, (1994).
[78] Lourens Du Plessis& Hugh Corder, Understanding South Africa's Transitional Bill of Rights, (1994).

4.3.3 Nature and extent of the limitation

Great importance lies in assessing the manner in which limitation affect the exercise of rights. The reason behind this is that the limitation should not be more excessive than what is warranted by the purpose that the limitation seeks to achieve. A good example would be assessing the harm non refoulement would have if it were used to achieve national security and public order; yes it would have achieved one purpose but fails to achieve the other due to its irreparable effect towards the right to life and the right to dignity.[79]

4.3.4 The relation between the limitation and its purpose

Under Article 24(1)(e) there must be a relation between the limitation and its purposes and whether there are less restrictive means to achieve this purpose. Could the protections and promotion of the welfare of refugees be achieved by less restrictive means other than sending all urban refugees irrespective of their individual circumstances to camps? Are there less restrictive administrative interventions that can be undertaken by the Department of Refugee Affairs to eliminate the administrative challenges it anticipates in processing refugees and asylum seekers in urban centres?

In **Samuel Manamela & Another v The Director-General of Justice**, the Constitutional Court of South Africa, in considering the limitation clause which is in pari materia to Article 24, cautioned against using the factors set out therein as a laundry list. The exercise, it noted, should be approached substantively by balancing the rights and limitations against the values underlying the Constitution and the Bill of Rights. The Court stated as follows; "It should be noted that the five factors expressly itemized in section 36 are not presented as an exhaustive list. They are included in the section as key factors that have to be considered in an overall assessment as to whether or not the limitation is reasonable and justifiable in an open and democratic society. In essence, the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list. As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the

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[79] S v Manamela 2000 (3) SA 1 (CC) Para 34

ultimate values to be protected.Each particular infringement of a right has different implications in an
open and democratic society based on dignity, equality and freedom. There can accordingly be
no absolute standard for determining reasonableness. This is inherent in the requirement of
proportionality, which calls for the balancing of different interests. The proportionality of a
limitation must be assessed in the context of this legislative and social setting."

Proportionality has to lie between the harm done by the limitation and the beneficial purpose that the said law is meant to achieve. If the said law fails to serve the desired purpose it may not be termed as a reasonable limitation to right. The directive in this case was issued for the purpose of protecting national security and promoting public order, it however fails to achieve the goal of deterrence (as aforementioned) and it ends up putting the lives of people at a stake based on a mere possibility of good arising from it.

Using the proportionality test, we have to balance the rights of the refugees with that of the citizens of the nation as they have a right to security under Article 29 of the constitution. This is a bit challenging because it all comes down to the right to life of both the refugees and the citizens and human dignity. Human dignity is considered as an overriding political principle that underlies the constitutional framework, as the key basis for the interpretation and application of enforceable rights. As a concept it is distinguished from other recognized human rights as encompassing freedom and equality as its major pre-conditions. It is through these preconditions that help define it as: prohibiting inhumane treatment; a guarantee of individual self-fulfilment; protecting group-identity; and satisfying the needs of individuals. Under the laws of limitation, human dignity should be directed as one of the mechanisms for societal equalization in modern constitutions. As a result, human dignity acts as a source of a state's duty and as means of setting appropriate constrains on human persons.[80]

From this, resulting in refoulement may lead to the loss of human dignity of the refugees. This is because when the refugees are refouled, they face the risk of death in their country while citizens may also face the risk of death during the terrorist attacks. However, the state has repeatedly failed to

[80] Margit Cohn & Dieter Grimm, 'Human dignity' as a constitutional doctrine in Mark Tushnet et al, Routledge Handbook of Constitutional Law, (2013).

show that the attacks are being planned in the refugee camps or that the attackers come from the camps leading to question if their goal will be achieved through this method.

4.3.5 Less restrictive means to achieve the purpose

The purpose of a limitation fails the test of proportionality if there is presence of other means to achieve the same ends with the limitation with or without restricting the rights in a minimal manner. Therefore the presence of a less restrictive means (but equally effective) would act as a suitable alternative to achieve the same intended purpose as the prior limitation.
In this case I would think that there are other ways of ensuring national security that does not require the refoulement of refugees. For example, the government could increase the security measures around the borders of the country. This can be done by deploying officers to those areas to ensure that all who enter the country and are in need of refuge are properly registered and vetted to ensure that they are not a security threat to the country.

4.4 Burden of proof lies on the State

Under this article, the State bears the burden of justifying that the directive to relocate and encamp urban refugees are in harmony with the limitation clause. That burden is expressed as follows, "**The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirement of this Article has been satisfied.**"
This approach and reasoning was adopted and applied in the case of **Randu Nzai Ruwa and 2 others v Internal Security Minister and another** where the court stated that although the State is not required to give a detailed account of its action it must do more than to merely assert that the action has met the threshold set by the Constitution.[81] It must place some evidence before court that will enable the court make a judicial assessment. If that evidence is classified or sensitive then it can be received behind closed doors. It is not enough to say, that the operation is inevitable due to recent grenade attacks in the urban areas and tarring a group of person known as refugees with a broad brush of criminality as a basis of a policy is inconsistent with the values that underlie an open and democratic society based on human dignity, equality and freedom. A real connection must be established between the affected persons and the danger to national security posed and how the

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[81] Randu Nzai Ruwa and 2 others v Internal Security Minister and another Mombasa HC Misc. No. 468 of 2010 [2012]eKLR

indiscriminate removal of all the urban refugees would alleviate the insecurity threats in those areas. The government in its statement or in the court case did not justify the national security threat with sufficient evidence. It used national security as a safety blanket without giving further evidence.[82] From the garissa attack, the government said that the terrorists used the camp as an organizing camp. However, after investigations, it was found that that was not the case. Though the Kenyan government continues to treat al-Shabaab as an external threat, from the investigations, there is evidence that the radical Islamist threat is an internal problem, albeit one inspired by al-Shabaab. The alleged planner of the attack, Mohamed Kuno (a.k.a. Mohamed Dulyadin; a.k.a. Gamadhere; a.k.a. Shaykh Mohamud), has strong connections to Kenya's ethnic-Somali community. Kuno worked as a teacher and principal of a madrassa in Garissa from 1997 to 2000, where he is remembered for his religious radicalism before his departure for Somalia. Once in Somalia, Kuno acted as a commander in some of the heaviest fighting in Mogadishu, and, for a time, even served in the al-Shabaab-allied Ras Kamboni Brigade under Shaykh Ahmed Mohamed Islam "Madobe," who ironically was the Kenyan-backed "president" of Jubaland. The former teacher is the prime suspect in the massacre of 28 Kenyan Christians in Mandera County in November 2014 and the killing of a further 36 Christian quarry workers in Mandera in December 2014. At present, Kano is responsible for al-Shabaab operations in Jubaland and Kenya. From this, it is clear that the issue at hand is not the refugee camps that causes insecurity but rather the lack of security within the Kenya- Somalia border.

The state, in the Kituo cha sheria case, having failed to produce evidence to show the relation between the limitation and the purpose of it failed to show that they met the threshold required under the law. Despite this case having been decided, it is important to note that the state continues to issue threats to the closure of the refugee camps, the most recent one being in March 2021 hence the need for this study.

4.5 Conclusion

From the foregoing discussion, it is evident that while national security concerns, particularly those related to terrorism, have often been invoked as an exception to the principle of non-refoulement, such measures frequently fail to meet the legal threshold required under international and domestic

[82]Kituo Cha Sheria & 8 others v Attorney General [2013] eKLR.

law. The principle of non-refoulement, recognized as a jus cogens norm, demands a high standard of proof and careful balancing of competing interests to ensure that the rights of refugees are not unduly infringed.

States, in their pursuit of safeguarding national security, must adhere strictly to the legal standards established under the Refugees Act 2021, the Refugees Regulations, and the international conventions to which Kenya is a party. Any derogation from this principle should only occur when justified by substantial evidence and in accordance with due process as articulated under Article 24 of the Constitution of Kenya, ensuring that both the state's security concerns, and the refugee's fundamental rights are considered. The failure to meet these standards by the government undermines the integrity of the principle of non-refoulement and risks perpetuating injustices against vulnerable individuals. Therefore, it can be concluded that national security measures that do not satisfy the requisite legal thresholds cannot be justified as legitimate exceptions to the principle of non-refoulement.

In the next chapter, I will offer recommendations and conclude this research having achieved its objective.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

This chapter summarizes the research findings and provides a detailed conclusion to the study, emphasizing the interplay between the principle of non-refoulement and national security concerns within Kenya's legal framework. In addition, it also offers recommendations to help in solving the problem.

5.1 Conclusion

The principle of non-refoulement is foundational to international refugee law, ensuring that states cannot return individuals to territories where they face threats such as persecution, torture, or other grave harm. Kenya, as a party to the 1951 Refugee Convention, the 1967 Protocol, and regional frameworks such as the 1969 OAU Convention, has enshrined this principle within its domestic legislation through the Refugee Act 2021. This research has critically examined the Kenyan government's directive to close the Dadaab and Kakuma refugee camps, highlighting the tension between national security concerns and obligations under international and domestic law.

The study found that Kenya's reliance on national security to justify actions potentially violating non-refoulement raises legal and ethical questions. Specifically, the government's claims lacked substantive evidence to meet the high thresholds established under international law. This analysis underscored the need for proportionality, clarity in legal interpretations, and adherence to procedural safeguards to prevent the erosion of refugee rights.

The legal problem explored in this research is whether Kenya's justification for closing its largest refugee camps aligns with legal thresholds for limiting the principle of non-refoulement. While national security is a legitimate state interest, its invocation must meet rigorous standards to avoid arbitrary actions. The Kenyan government's directive has raised concerns among human rights advocates and the international community, as it risks forcibly repatriating refugees to unsafe environments, contrary to international obligations. This dilemma reflects broader challenges faced by host countries in balancing their security concerns with humanitarian commitments.

This research established that non-refoulement is universally recognized as a jus cogens norm, binding all states irrespective of their treaty obligations. This status underscores its non-derogable nature and the limited scope for exceptions. Kenya’s Refugee Act 2021 incorporates non-refoulement but mirrors the 1951 Convention by allowing exceptions for national security and public order. However, these exceptions must be interpreted narrowly and applied only when backed by compelling evidence. The principle of non-refoulement can only be limited when such actions pass a proportionality test, ensuring that the restriction is necessary, reasonable, and the least harmful alternative. Instances of indirect pressure, such as reduced aid and coerced “voluntary” repatriation, effectively undermine non-refoulement, violating both Kenyan and international law. Kenya’s national security concerns, particularly related to terrorism and extremism, are legitimate but have been inconsistently linked to refugee populations without sufficient evidence.
This research identified a tendency to overgeneralize security threats, leading to blanket policies that disproportionately impact refugees. States, in their pursuit of safeguarding national security, must adhere strictly to the legal standards established under the Refugees Act 2021, the Refugees Regulations, and the international conventions to which Kenya is a party. Any derogation from this principle should only occur when justified by substantial evidence and in accordance with due process as articulated under Article 24 of the Constitution of Kenya, ensuring that both the state's security concerns, and the refugee's fundamental rights are considered. This study has proved the hypothesis that the closure of refugee camps violates the principle of non-refoulement and the refoulement in question does not meet the proportionality test required to justify the limitation to the principal to be true. The failure to meet these standards by the government undermines the integrity of the principle of non-refoulement and risks perpetuating injustices against vulnerable individuals. Therefore, it can be concluded that national security measures that do not satisfy the requisite legal thresholds cannot be justified as legitimate exceptions to the principle of non-refoulement.

Kenya’s judiciary has played a critical role in interpreting and enforcing non-refoulement obligations. Court rulings have often emphasized the importance of due process and the proportionality of limitations. In the Kituo cha sheria case, where the court ruled that the government's directive was in violation of the principle of non refoulement due to the lack of evidence to support their claims on the threat to national security. However, even with this ruling, the

government has continued issuing threats to the closure of the camps leaving the refugees living with tension hence the need for this research.

The findings of this research highlight the critical need for Kenya to uphold its non-refoulement obligations while addressing national security concerns through proportionate and evidence-based measures. The principle of non-refoulement, being a cornerstone of refugee protection, demands strict adherence to procedural safeguards and the proportionality test to ensure that any limitations are justified, lawful, and humane. Kenya must enhance legal clarity and policy consistency to reduce ambiguities in the application of national security exceptions.
In addition, it must promote less restrictive alternatives, such as integration and third-country resettlement, to address security concerns without violating fundamental rights. By doing so, Kenya can reconcile its dual obligations to safeguard national security and protect vulnerable populations. Upholding non-refoulement not only affirms Kenya's commitment to international law but also reinforces its role as a leader in regional humanitarian efforts. These measures will ensure a balanced approach that respects human dignity while addressing legitimate state interests. This dissertation hopes that the recommendations made will pave the way to further possible studies in analysing the protection of refugees and that the government will take the recommended measures to help protect the rights of refugees and the nation's security.

5.2 Recommendations

5.2.1 Burden sharing

Effective refugee protection requires collaboration with regional bodies like the African Union and international organizations such as UNHCR. Shared responsibility among states can alleviate the pressures faced by host countries like Kenya. Enhanced regional mechanisms for burden-sharing and resettlement can mitigate the impact of large refugee populations on host nations. This reduces the need for refoulment from a host country facing challenges like over population and secuirty risks.

5.2.2 Reinstating the security at Kenyan borders

States need to ensure that they balance the interests of the refugees with the interests of the state

in relation to security in that the principle of non-refoulement is customary law and thus has to be strictly followed. For states to achieve this they can put in place strict measures that will enhance security in relation to the risk of taking in refugees who may be detrimental to the security of the states.

The states need to ensure that their systems are more thorough and that there's proper registration of refugees. Proper registration will enable the states to be more accountable of the refugees that they have in their countries and also ease the monitoring of the refugees. States need to thoroughly examine refugees before granting asylum.

A balanced approach is applied in cases where competing interests appear. The application of a balanced approach in relation to the principle of non-refoulement would also help reduce the security threat. This is due to the fact that it will give states the discretion to determine how to trade off the duty to protect its people from refugees who pose a security threat and the duty to protect the refugees from the harm they may face if they are taken back to their state of origin. This balanced approach will help the courts in decision making in the process by accounting for all the relevant rights in deciding whether a refugee should be taken back to their state of origin. This approach would reduce the security threat concerns that faces some states that host refugees. States should also ensure that they provide proper jobs for refugees so as to lower the chances of the refugees engaging in criminal activities.

5.2.3 Diplomatic Assurances threat

Although diplomatic assurances carry some bilateral obligations, they do not ensure that refugees who are repatriated for this reason would be protected when they return to their home countries. When deciding whether to repatriate refugees, states should make sure that the decision is independent, unbiased reviews are conducted on the basis of diplomatic assurances. Balancing the principle of non-refoulement and diplomatic relations is a good method of ensuring the principle is strictly adhered to. This is because, the refugees would be assured of a safe environment upon their voluntary return.

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