

**THE LACUNA BETWEEN THE PRINCIPLE OF NON-REFOULEMENT AND ITS  
INTERPRETATION IN THE COURTS AND THE STATES**

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**DECLARATION**

I, NZOMO CATHERINE MUNANIE, 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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## **ABSTRACT**

The main aim of this research is to look into the principle of non-refoulement and how it's interpreted by both courts and states so as to find out whether there is a lacuna that exists. The objectives of the study were: to outline the threats facing the principle and the possible solutions, the scope of the principle, the principle in relation to the UNHCR, Kenyan Government and other stakeholders that are involved in refugee management. The objectives were also inclusive of identifying the controversial nature of the principle, analyzing the court decisions, state approaches and history of the same principle. The final objective was advocating of better ways to deal with conflicting rights and fill gaps that may be existent. The principle is outlined in the United Nations Convention Relating to The Status of Refugees. This study made was carried out by use of qualitative methodology which was inclusive of desktop research, data analysis and library research and focused on books, journals and precedent on the study. Databases that were used include JSTOR and Hein Online. The study recommends the use of a balanced approach in cases whereby competing interests appear.

## **LIST OF ABBREVIATIONS**

<b>OAU</b>	Organisation of African Unity
<b>UNHCR</b>	United Nations High Commissioner for Refugees
<b>RSD</b>	Refugee Status Determination
<b>DRA</b>	Department of Refugee Affairs
<b>NGOs</b>	Non- governmental Organisations

## **LIST OF CASES**

1. *Hilal vs The United Kingdom*, ECtHR Judgement on 6 June 2001.
2. *Kituo cha Sheria and 8 Others vs The Attorney General*, [2013], eKLR.
3. *Immigrations vs Naturalization Service vs Aguirre-Aguirre*, United States Supreme Court, Judgement on 3 May 1999.
4. *Suresh vs Canada*, [2002], 1 S.C.R 3, 2002 SCC 1, Judgement on 11 January 2002.
5. *Agiza v. Sweden*, United Nations Committee Against Torture, Comm No. 233/2003, (24 May 2005).
6. *Chahal vs The United Kingdom*, ECtHR Judgement on 15 November 1996.
7. *European Roma Rights Centre and Others vs The Immigration Officer at Prague Airport and The Secretary of State For the Home Department*, United Kingdom: Court of Appeal Judgement of 2003, EWCA Civil 666.
8. *Regina v Immigration Officer at Prague Airport and Another*, EX Parte European Roma Rights Centre and Others, (2005) 2 AC 1.
9. *Chris Sale, Acting Commissioner, Immigration and Naturalization Service, et al. v. Haitian Centers Council Inc. et al*, United States Supreme Court Judgement of 21 June 1993, Case 509 US 155.
10. *Hirsi Jamaa and Others vs Italy*, ECtHR Judgement of 23 February 2012.
11. *Immigration Naturalization Service vs Cardoza- Fonseca*, United States Supreme Court Judgement of 9 March 1987, Case 480 U.S 421.

## **LIST OF LEGAL INSTRUMENTS**

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

*International Covenant On Civil and Political Rights*, 19 December 1966, 999 UNTS 171.

2. *Convention Governing the Specific Aspects of Refugee Problems in Africa*, 10 September 1969, 1001 UNTS 45.

3. *Convention Against Torture or Other Cruel, Inhuman or Degrading treatment*, 10 December 1984, 1465 UNTS 85.

4. *Universal Declaration of Human Rights*, 10<sup>th</sup> December 1948, 217 A(III) UNTS

5. *European Convention on Human Rights*, 4 November 2000, ETS 17



## **CHAPTER 1**

### **1.1 INTRODUCTION TO THE STUDY**

This study mainly sought to look into the refugee law, the principle of non-refoulement to be precise and its scope. The principle of non-refoulement is found under section 18 of the Refugees Act 2006<sup>1</sup> and Chapter IV of the Constitution of Kenya 2010.<sup>2</sup>

This study focused on the history of the principle, interpretation, and the competing rights in relation to case studies so as to suggest solutions on how to solve the problems in this specific field.

### **1.2 BACKGROUND OF THE STUDY**

The term refugee “applies to a person who owing to external aggression, occupation and foreign domination has or seriously disturbing events in his country is compelled to leave his place of habitual residence in order to seek refuge at another place outside his country of origin or nationality.”<sup>3</sup> The term refugee is also defined by the 1969 OAU Convention and the 1967 Refugee Protocol.

Kenya hosts a large number of refugees. For example, the neighboring countries like Somalia and South Sudan have experienced ongoing civil wars causing the displacement of large numbers of asylum seekers. According to the United Nations High Commissioner for Refugees (UNHCR), “there were a total of 625,250 refugees and asylum seekers in the country in 2014. This figure increased to 650,610 in 2015.”<sup>4</sup>

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<sup>1</sup> Section 18, *The Refugees Act*, (Act No. 13 of 2006).

<sup>2</sup> Chapter IV, *Constitution of Kenya* (2010).

<sup>3</sup> Article 1, *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137.

<sup>4</sup> ‘Refugee Law and Policy: Kenya, 21 June 2016’, <https://www.loc.gov/law/help/refugee-law/kenya.php> on 2 September 2017.

The origin of the principle of non-refoulement is the 1933 Convention followed by Article 33(1) of the 1951 United Nations Convention on Refugee Status which states that: “No contracting state shall return a refugee in any manner to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of particular social group or social opinion.”<sup>5</sup> The other conventions include the 1969 OAU Convention and the 1967 Refugee Protocol. The UNHCR plays an important role in relation to refugees.

Article 13 of the ICCPR also states that “anyone who is lawfully within the territory of a state shall not be expelled from that state without due process.”<sup>6</sup> A refouler is also defined under the Article 3(1) of the Convention against Torture and other Cruel, Inhuman Degrading Treatment whereby the main factor that should be looked at is whether there is serious pattern of torture by the state in question.<sup>7</sup>

### **1.2.1 Refugee Law in Kenya**

Refugees in Kenya primarily reside in the Dadaab refugee complex

which is in Garissa County and consists of five camps:

- Dagahaley
- Hagadere
- Ifo, Ifo II
- Kambios

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<sup>5</sup> Article 33(1), *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137.

<sup>6</sup> Article 13, *International Covenant On Civil and Political Rights*, 19 December 1966, 999 UNTS 171.

<sup>7</sup> Article 3(1), *Convention Against Torture or Other Cruel, Inhuman or Degrading treatment*, 10 December 1984, 1465 UNTS 85.

- Kakuma Refugee Camp located in Turkana County.<sup>8</sup>

Kenya is signatory to a number of international treaties applicable to individuals seeking asylum and protection. “For instance, it acceded and ratified the 1951 United Nations Convention Relating to the Status of Refugees on May 16, 1966, and its 1967 Protocol in 1981.<sup>9</sup> Kenya is also a state party to the 1969 African Union (AU) (formerly known as the Organisation 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.”<sup>10</sup> In addition, Kenya acceded to the 1984 Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment in February 1997 and ratified it in 21/02/1997.

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

Some refugees come from really dangerous places, they cannot be returned to these places which raises the question of whether the state is bound to keep the refugees. Currently this principle is being faced by threats whereby national security isn't the main issue and this study found solutions for this.

According to the OAU the grant of asylum to refugees and humanitarian Act that should not be considered unfriendly by any member of state.<sup>11</sup> There is also need to deal with conflicting rights in relation to the non-refoulement principle.<sup>12</sup>

<sup>8</sup> 'Refugee Law and Policy: Kenya, 21 June 2016', <https://www.loc.gov/law/help/refugee-law/kenya.php> on 2 September 2017.

<sup>9</sup> 'States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol', UNHCR, April 2015, <http://www.unhcr.org/3b73b0d63.html> on 1<sup>st</sup> Feb 2017.

<sup>10</sup> '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/> on 1 February 2017.

<sup>11</sup> Article 2(para 2), *Convention Governing the Specific Aspects of Refugee Problems in Africa*, 10 September 1969, 1001 UNTS 45.

## **1.4 OBJECTIVES**

### **1.4.1 Main Objective:**

The main objective was to outline the threats facing the principle of non-refoulement and the possible solutions and to also identify the scope of the principle of non-refoulement. It was also to look into the approaches of the principle by courts and states. The principle in relation to the role of the UNHCR, Kenyan Government and other stakeholders in refugee management including the existent gaps.

### **1.4.2 Specific Objectives:**

1. Identifying the controversial nature of the diplomatic assurances.
2. Analyzing the court decisions, state approaches and the history of the principle.
3. Advocating for better ways to deal with the conflicting rights if they are existent and the gaps between the principle and its interpretation.

## **1.5 RESEARCH QUESTIONS**

- 1) What are the threats facing the principle of non-refoulement?
- 2) What are the state approaches to the non-refoulement principle, implementation in relation to the role of the UNHCR, Kenyan Government and other stakeholders in refugee management?
- 3) Is there a lacuna between the principle of non-refoulement and interpretation by courts and states? What are the possible solutions?

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<sup>12</sup> Vijay Padmanabhan, 'To Transfer or not to Transfer: Identifying and Protecting Human Rights Interests in Non-Refoulement', 80 *Fordham Law Review*, 1 (2011), 112.

## **1.6 SIGNIFICANCE OF THE STUDY**

The study aimed at finding ways to fill in the gaps in non-refoulement and solving the problem of the principle in relation to competing rights thus creating a better environment for the refugees and focusing more on their needs. It also looked into the effects of a state taking in refugees.

This is because 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. The research that was carried out will enable this to happen.

## **1.7 LITERATURE REVIEW**

### **1.7.1 State views and practice of the principle of Non-Refoulement**

The principle of non-refoulement has been expounded on in different dimensions by several scholars. The literal works will be expounded on under this section.

According to the book titled *The Refugee in International Law* the state views fall into two broad categories which include:

- General endorsements of the principle for instance the comment by the US coordinator of refugee affairs stating that that it was tragic for refugees to be returned to their homes without the reassurance of whether or not they will face persecution.<sup>13</sup>
- Specific comments address the specific application of the principle and the problems that face them in relation to conflicting rights.<sup>14</sup>

The aspect that is brought out is that in imposing the principle on states, makes it harder in cases of terrorism for instance to identify whose rights are being obscured. This suggests that due to

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<sup>13</sup> Guy S, Goodwin Gill, Jane Mc-Adam, *The Refugee in International Law*, 3ed, Clarendon Press, Oxford ,1996, 218.

<sup>14</sup> Guy S, Goodwin Gill, Jane Mc-Adam, *The Refugee in International Law*, 218.

the fact that this principle is a duty to protect, it should outline the limitations that arise due to conflicting rights.<sup>15</sup>

This shows that there is a gap between the principle itself and how it is interpreted which is an aspect that this dissertation will rely on.

### **1.7.2 Misinterpretation of Refugee Law by states**

In the article *Why Refugee Lives Matter*<sup>16</sup> the author outlines how states have distorted the Refugee Convention and interpreted it as one that should be the last resort. Governments have also stigmatized these refugees which is against the law. The other issue that arises is that these governments further go ahead to justify their actions stating that: “such action is rational protection on their end, namely the reallocation of resources towards meeting their needs of the overwhelming majority of refugees.”<sup>17</sup>

He further states that governments rely on the aspect of illegality to make it an excuse not to take in the refugees which is illegal due to the fact that the refugees are immune to this according to the Refugee Convention. The states are expected to treat as non-transgressors and as just asylum seekers who have no wrong intentions. However, this brings up the question of how the state should treat the transgressors.

According to him, the refugees should not be stigmatized, instead they should be protected because they are not ‘less-deserving’ due to fleeing from their land. He states that so as to reinvigorate the international law regime several steps have to be carried out. These include;

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<sup>15</sup> Vijay Padmanabhan, ‘To Transfer or not to Transfer: Identifying and Protecting Human Rights Interests in Non-Refoulement’, 112.

<sup>16</sup> James C Hathaway, ‘Why Refugee Law Still Matters’, 8 *Melbourne Journal of International Law* (2007), 89.

<sup>17</sup> James C Hathaway, ‘Why Refugee Law Still Matters’, 89.

- Acknowledgement that there is no legal prohibition in limiting refugee status and the rights attached to it.
- Acknowledgement that governments may allocate the responsibility to protect refugees among themselves
- “Moving from a unilateral, state by state system of refugee law implementation to a common but differentiated responsibility kind of system”<sup>18</sup>

However, the principle of non-refoulement for instance has several threats that face it such as terrorism which end up being overlooked as it's a *jus cogens* norm that cannot be violated. In cases whereby the refugees are terrorists for instance, the states are put in a tight spot. There is also controversial nature of diplomatic assurances in relation to the principle of non-refoulement.

The dissertation relied on this due to the fact that it outlined the gaps that states have in relation to the implementation of refugee law.

### **1.8 HYPOTHESIS**

This study:

- Came up with solutions to the gaps related to the non-refoulement principle
- Suggested ways to deal with conflicting rights in relation to the principle.

### **1.9 THEORETICAL FRAMEWORK**

The first theory that this dissertation relied on is the *natural law theory* which brought out the aspect of natural rights. According to Locke certain rights exist due to the presence of higher absolute laws governing human beings. Natural rights are inalienable. The refugee non-

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<sup>18</sup>James C Hathaway, 'Why Refugee Law Still Matters', 98.

refoulement right may be considered as an inalienable right.<sup>19</sup> This applied to the study in that the refugees should be treated fairly and their lives should not be put at risk by returning them to the dangerous places that they are from. It also applied in that some refugees end up engaging in wrongful acts such as terrorism which are wrong according to the natural law. It should enable them to make use of their conscience which binds them so as to make the right decisions. This will enable them to prevent the states from having a difficult time in the interpretation of the non-refoulement principle. The theory should be applied by both the state and the refugees. Refugee rights are human rights thus they need to be respected.

The second theory that this dissertation relied on is *positivism*. According to Bentham “the laws in that society are a subset of the sovereign's *commands*: general orders that apply to classes of actions and people and that are backed up by threat of force or sanction.”<sup>20</sup> This related to the study in that the state has to balance the state interests with the protection and needs of the refugees. At times the presence of the refugees may directly affect the state interests such as the security of the state being threatened through terror attacks initiated by refugees. However, the states still end up having to let the refugees stay due to the fact that they cannot be returned to a worse place where they may face torture.

The dissertation relied on these theories to help outline the application and gaps in the principle of non-refoulement. It also outlined the rationale of the principle in relation to the theories.

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<sup>19</sup> ‘Natural Law Theories’, Stanford Encyclopedia of Philosophy 5 February 2007, <https://plato.stanford.edu/entries/natural-law-theories/> on 2 September 2017.

<sup>20</sup> ‘Legal Positivism, Stanford Encyclopedia of Philosophy’ Stanford Encyclopedia of Philosophy , 3 January 2003, <https://plato.stanford.edu/entries/legal-positivism/> on 2 September 2017.

### **1.10 ASSUMPTION**

There is the assumption that the access of information in relation to this study will not be problematic.

### **1.11 METHODOLOGY**

This section captured the research methodology, data collection methods and data collection tools that were used. The research applied qualitative methodology.

The qualitative methodology was by data analysis, desktop research, library research which focused on books, journals and precedent on the issue. I consulted literature on the subject by studying books and using the internet as a source of secondary data. The databases that used include JSTOR and Hein Online.

### **1.12 STATEMENT OF LIMITATIONS**

There was limited scholarly work on the threats affecting the topic which will made it difficult to expound on all the possible threats. It limited the study but did not hinder with the exhaustion of the subject matter and the necessary solutions.

### **1.13 CHAPTER BREAKDOWN**

**Chapter One** focused on:

1. Introduction to the study
2. Background of the study
3. Statement of the problem
4. Objectives
5. Research Questions
6. Significance of the study

7. Literature Review
8. Hypothesis
9. Theoretical Framework
10. Assumptions
11. Methodology
12. Statement of Limitations

**Chapter Two:** It made use of the methodology stated above to acquire information. It looked into the concept of a refugee, the principle of non-refoulement and the threats facing the principle of non-refoulement. The threats were divided into two categories which include major and minor threats. It further expounded on the cases in relation to the principle of non-refoulement

**Chapter Three:** It dealt with the approaches to the principle of non-refoulement by both states and the courts. It also dealt with the role of the UNHCR and other stakeholders inclusive of the Kenyan Government in the principle of non-refoulement and their efficiency in upholding the principle.

**Chapter Four:** This chapter expounded on the findings. It expounded on the gaps that appeared in the topics above. It gave the possible solutions to fill this lacuna. This chapter basically dealt with recommendations and conclusion.

## **CHAPTER 2: REFUGEES, NON-REFOULEMENT AND THE THREATS FACING THE**

### **PRINCIPLE**

#### **2.1 CONCEPT OF A REFUGEE**

The 1933 Convention Relating to the International Status of Refugees is a milestone in the protection of refugees. The principle of non-refoulement acquired the status of international treaty law under the 1933 Convention.<sup>21</sup> Article 3 of the 1933 Convention outlines the principle of non-refoulement. The convention was ratified by nine states. Two treaties from Germany were formed. The treaties include: The Provisional Arrangement concerning the Status of Refugees signed in Geneva on 10<sup>th</sup> February 1936 and the Convention concerning the Status of Refugees signed on 10<sup>th</sup> February 1938. Both of them were based on the 1933 Convention. The International Refugee Organization was established in 1946 by Resolution 62(I) of the United Nations General Assembly with the main role of resettlement of refugees.

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, is unwilling to avail himself the protection of that country.”*<sup>22</sup>

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

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<sup>21</sup> Gilbert Jaeger, 'On the History of the International Protection of Refugees', 83 *International Review of the Red Cross*, (2001).

<sup>22</sup> Article 1A (2), *Convention Relating to Status of Refugees*, 28 July 1951, 189 UNTS 137.

convention to territories where his/her life will be threatened through racial, religious persecution, national and political opinion and persecutions.<sup>23</sup>

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).<sup>24</sup>

## **2.2 THE PRINCIPLE OF NON-REFOULEMENT**

Non-refoulement principle states that “No contracting state shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of particular social group or political opinion.”<sup>25</sup> It is under customary law thus considered to be binding to all states. Article 33(2) of the 1951 Convention stipulates that: “the benefit of Article 33(1) may not be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he/she having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country”.<sup>26</sup>

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<sup>23</sup> Article II (3), *Convention Governing Specific Aspects of Refugee Problems in Africa*, 10 September 1969, 1001 UNTS 45.

<sup>24</sup> Section 5, The Refugees Act, (Act No. 13 of 2006).

<sup>25</sup> Article 33(1), *Convention Relating to The Status of Refugees*, 28 July 1951 ,189 UNTS 137.

<sup>26</sup> Article 33(2), *Convention Relating to The Status of Refugees*, 28 July 1951 ,189 UNTS 137.

According to Professor Guy Goodwin-Gill, non-refoulement is a fundamental basis of international refugee law.<sup>27</sup>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.<sup>28</sup>In some instances this principle is breached for example in the *Hilal vs The United Kingdom* case<sup>29</sup> 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."<sup>30</sup> 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."<sup>31</sup>Over time new problems have come up in relation to the principle and new causative actions for the breach of the principle have also come up. The question that arises is what solutions the causative actions require and how they can be incorporated in relation to the principle. This will be outlined in the study.

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<sup>27</sup> Guy S, Goodwin Gill, Jane Mc-Adam, *The Refugee in International Law*, 217 .

<sup>28</sup> United Nations High Commissioner for Refugees 'UNHCR Note on Diplomatic Assurances and International Refugee Protection', August 2006,5.

<sup>29</sup> *Hilal vs The United Kingdom*, ECtHR Judgement on 6 June 2001.

<sup>30</sup> Ogoh Nwaeze, 'The Obligation of Non-Refoulement of Refugees and Asylum Seekers: Myth or Reality?', *University of Botswana Law Journal* (2014),16.

<sup>31</sup> Ogoh Nwaeze, 'The Obligation of Non-Refoulement of Refugees and Asylum Seekers: Myth or Reality?', 16.

### **2.2.1 Natural Law Theory**

According to this theory, refugee rights are supposed to be respected. Locke states that “human beings in their natural state are free and equal”. The natural law theory ensures the restriction of arbitrary power.<sup>32</sup> In relation to non-refoulement this outlines that refugee rights should not be infringed on and the refugees should be treated equally with the citizens of the host state. All their human rights should be upheld. This theory applies to this topic in the illustration of the gap between the principle and the interpretation in the court cases.

### **2.2.2 Positivism Theory**

This theory as stated in the previous chapter supports the balance of the state interests’ with the interests of the refugees. This is in relation to the serious threats that the state may face due to refugee influx. The balance should be done in a manner that ensures both parties do not end up facing unnecessary harm.

However, I will base my topic on the Natural Law theory.

## **2.3 THREATS FACING THE PRINCIPLE OF NON-REFOULEMENT**

The threats are social, political and economic. Refugee influx in a country may have macro-economic impacts on the host country. This is due to increased but uncompensated public expenditures to care and maintenance of the refugee population.<sup>33</sup> An example is the Daadab camp, Kenya whereby the impact has been felt by the country in terms of trading opportunities, decrease of food and commodity prices. It also leads to high national unemployment rates. Several questions arise in relation to this principle. For instance, what constitutes the statement

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<sup>32</sup>‘Natural Law Theories’, Stanford Encyclopedia of Philosophy 5 February 2007, <https://plato.stanford.edu/entries/natural-law-theories/> on 2 September 2017.

<sup>33</sup>‘The Impacts of Refugees on Neighboring Countries: A Development Challenge, 2011, World Development Report, July 29 2010.’ [http://siteresources.worldbank.org/EXTWDR2011/Resources/6406082-1283882418764/WDR\\_Background\\_Paper\\_Refugees.pdf](http://siteresources.worldbank.org/EXTWDR2011/Resources/6406082-1283882418764/WDR_Background_Paper_Refugees.pdf) on 17<sup>th</sup> August 2017.

“in dignity and in safety”? Or whether the decision is the sole prerogative of the host state. The international community has not elaborated what instances may be considered as breach of the principle thus raising a question on this law. The threats are outlined below by the use of case law and expounding on other principles related to the issue of non-refoulement that are affected. The main theories are in relation to national security and diplomatic assurances.

## **2.4 MAJOR THREATS**

### **2.4.1 Security threat and The Principle of Non-refoulement**

Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR) “*Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law*”. The right to security is outlined in the Universal Declaration of Human Rights under Article 3 which states that, “*Everyone has the right to life, liberty and security of person*”.<sup>34</sup>The right to security of the person is a universal right. The host states should ensure that this right is provided for due to the fact that human rights are inherent to all human beings.

The state has the responsibility to ensure that the citizens are secure. The sectors of security include, societal, economic and political security.<sup>35</sup>The issue of refugee influx in relation to insecurity has been crucial over the years. Refugees have a right to security in the host state. This raises the question of what measures should be taken whereby the presence of a refugee threatens the security of those in the host state. In cases whereby the refugee may face more danger at

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<sup>34</sup> Article 3, *Universal Declaration of Human Rights*, 10<sup>th</sup> December 1948, 217 A(III) UNTS.

<sup>35</sup> Buzan B, *Security, A New Framework for Analysis*, Lynne Rienner Publishers, USA, 1998.

his/her place of origin yet they are a threat to the security of the host state, what steps should be taken?

As outlined above, the 1951 Convention is the only treaty that provides for the expulsion of a refugee who is a threat to national security. However, before granting asylum, thorough examination to find out if the individual was involved in serious crimes is carried out. Refugee settlement has an impact on security not only at the refugee camps but nationally and internationally.<sup>36</sup> However there should be a consideration of the provision by the United Nations Human Rights Commission that states that these “*rights are inherent to all human beings, whatever our nationality or ethnic origin, color, religion, language, or any other status. We are equally entitled to our human rights without discrimination*”.

Under the Constitution of Kenya, Article 29 provides that “*every person has the right to freedom and security of the person*”. The Kenyan Government has had legitimate security concerns for the past few years. Kenya’s case of refugee-hosting has always resulted to a dilemma. The refugee influx in the Kenya-Somalia border is as a result of civil war in Somalia. Kenya has been attacked several times by Al-Shabaab which is a militant group based in Somalia. As a result of this, the security situation had become unbearable in 2013 after the Westgate Attack.

The other issue was the proliferation of small arms and light weapons by refugees. Somalia is a prominent source of weapons due to widespread armed conflict in the region.<sup>37</sup> The principle of non-refoulement and security threat clash in that, the aspect of refugees causing insecurity in the host state then leads to the dilemma on whether the refugees should be forcibly repatriated even when their former state is dangerous for them.

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<sup>36</sup> Gil Loescher, Ann Dull Loescher, *The Global Refugee Crisis*, ABC-CLIO Publishers, 1994.

<sup>37</sup> United Nations Institute for Disarmament Research, Small Arms Survey, ‘*The Scope and Implications of a Tracing Mechanism for Small Arms and Light Weapons*’, 2003, UNIDIR.

In the decided case of *Kituo Sheria and others vs the Attorney General* the Cabinet Secretary in charge of internal security had ordered all refugees in the ban areas to relocate to the refugee camps. The refugees claimed that their rights had been infringed on. The judge stated that Kenya is a signatory of a host of conventions and treaties dealing with refugees and their protection.<sup>38</sup> In the decided case of *Immigration and Naturalization vs Aguirre-Aguirre*<sup>39</sup> the defendant claimed asylum on the basis of probable death or imprisonment upon repatriation.<sup>40</sup> In the Aguirre decision the Ninth Circuit court of the United States, the court admits that the UNHCR handbook provides it with some guidance but its opinion implies that this court does not necessarily adhere to the 1951 Convention law in relation to the principle of non-refoulement. It fails to show the importance of the adherence to international law which poses a threat to the principle.

In the *Suresh case*, the Canadian Government had ordered for the deportation of the defendant back to Sri Lanka due to the fact that he was a member of a terrorist group. However, he was not taking part in the activities of the terrorist group. The Canadian Government considered him as a threat to national security. The main issue was that the defendant would face torture back in Sri Lanka which raised the question of whether a refugee should be deported to a place where he may face torture. The defendant stated that the Court had violated his freedom of expression under and his right to life, liberty and security under the Convention against Torture. The deportation of the defendant would also act as a violation of the principle of non-refoulement. However, the court stated that the defendant had not sufficiently established substantial grounds that he would face torture. It also stated that the principle of non-refoulement allows a balancing

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<sup>38</sup> *Kituo cha Sheria and 8 Others vs The Attorney General*, [2013], eKLR.

<sup>39</sup> *Immigrations vs Naturalization Service vs Aguirre-Aguirre*, United States Supreme Court, Judgement on 3 May 1999.

<sup>40</sup> Kathleen M Keller, 'Comparative and International Law Perspective on the United States (Non) Compliance with its Duty of Non-Refoulement', 199.

act between national security and the risk of ill-treatment.<sup>41</sup>The court in this case, stopped far short of constructing the principle of non-refoulement that could ensure the protection of refugees and other persons at risk from being deported to places where they are likely to face torture.<sup>42</sup>

In relation to matters to do with 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 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 which has been elaborated in relation to case law above. 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.<sup>43</sup>It 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 of whether there is a gap between the principle and its interpretation in the courts arises. 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 study.

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<sup>41</sup> *Suresh vs Canada*, [2002], 1 S.C.R 3, 2002 SCC 1, Judgement on 11 January 2002.

<sup>42</sup> Obiora Chinedu Okafor, 'Re-configuring Non- Refoulement – The Suresh Decision, Security Relativism and the International Human Rights Imperative', 15 *International Journal Refugee Law*, (2003), 14-15.

<sup>43</sup> Vijay M. Padmanabhan, 'To Transfer or Not to Transfer: Identifying and Protecting Relevant Human Rights Interests in Non-Refoulement', 117.

## **2.4.2 The Threat of Tension between the Principle of Non-refoulement and Diplomatic**

### **Assurances**

Diplomatic assurances as defined by the United Nations High Commissioner for Refugees is “*an undertaking by the receiving State to the effect that the person concerned will be treated in accordance with conditions set by the sending state, or more generally, in keeping with its human rights obligations under international law.*”<sup>44</sup> It refers to a situation whereby the government of a state wants to send a person back to his/her country of origin for a variety of reasons (including being a potential terrorist suspect or security threat to that country) imposes certain conditions on the government of the receiving state.<sup>45</sup> Under the UN Convention against Torture, Article 3 does not exclude the possibility of states resorting to diplomatic assurances. This in relation to extradition of a person in situations whereby they may face torture. The fact that there it’s not as such illegal to resort to assurances against torture does not speak to the variety of challenges associates with the functioning in practice which includes the principle of non-refoulement.

In situations where torture is a systematic practice in a country, there’s the likelihood of the government denying that these are acts of torture and claiming that they are actions of diplomatic assurance. However the principle of non-refoulement should be strictly observed and diplomatic assurances should not be resorted to.<sup>46</sup> In practice, diplomacy entails the tactful management of foreign relations to promote the overall interests of the state.

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<sup>44</sup> United Nations High Commissioner for Refugees ‘*UNHCR Note on Diplomatic Assurances and International Refugee Protection*’, August 2006,2.

<sup>45</sup> Yannick Ghelen, ‘Eroding the Absolute Character of the Principle of Non-Refoulement? A Comparative Study of the Use of Diplomatic Assurances Against Torture’, Published HR MA Thesis, Central European University, 29<sup>th</sup> November 2013,12.

<sup>46</sup> Theo van Boven, ‘Report of the Special Rapporteur on The Question of Torture’, United Nations High Commissioner for Refugees, (2004), 12.

In the case of *Agiza vs Sweden*<sup>47</sup> the two refugees from Egypt were repatriated based on the strength of assurances that were obtained from the Egyptian authorities and a request from the United States Central Intelligence Agency. The men claimed to have been tortured in Egypt yet the Swedish Ambassador claimed that looking into this would signal lack of trust in the Egyptian authorities. According to the Committee against Torture claimed that the crucial question was what the state party's government had reason to believe at the time of expulsion. The principle of non-refoulement clashes with diplomatic assurances in this case.

The use of diplomatic assurances to expel people who would be at risk of torture or ill-treatment in their receiving state is considered both a matter of principle and on practical grounds.<sup>48</sup> According to the *UNHCR Note on Diplomatic Assurances and International Refugee Protection*, diplomatic assurances should be given no weight when a refugee who enjoys the protection of Article 33(1) of the 1951 Convention is repatriated.<sup>49</sup> The host state must ascertain that the individual will not face risk of persecution for reasons of race, religion, nationality, membership of a particular social group in the receiving country. If these assurances do not meet the requirements, forcible removal of the refugee will be considered as illegal.<sup>50</sup>

In the case of *Chahal vs United Kingdom*,<sup>51</sup> the Indian Government gave assurances that the applicant would not suffer torture or persecution once taken back to India. However, the claimant complained that his deportation to India would result to risk of torture, inhuman degrading treatment or punishment which is prohibited under Article 3 of the European Convention on

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<sup>47</sup> *Agiza v. Sweden*, United Nations Committee Against Torture, Comm No. 233/2003, (24 May 2005).

<sup>48</sup> The Immigration Law Practitioner's Association (ILPA), '*UNHCR Non-Refoulement Under Threat*', Matrix Chambers, London, 2006, 17.

<sup>49</sup> United Nations High Commissioner for Refugees '*UNHCR Note on Diplomatic Assurances and International Refugee Protection*', August 2006, 13.

<sup>50</sup> United Nations High Commissioner for Refugees '*UNHCR Note on Diplomatic Assurances and International Refugee Protection*', August 2006, 14.

<sup>51</sup> *Chahal vs The United Kingdom*, ECtHR Judgement on 15 November 1996.

Human Rights.<sup>52</sup>The holding was that in line with the European Convention of Human Rights, there was violation of Article 3. The applicant should not have been deported to India on grounds that he would face torture there. This is breach of the non-refoulement principle. The UK failed to ascertain the risk of the deportation of the applicant but India is a rogue state actor in this case thus a threat to the principle of non-refoulement. The reliance on diplomatic assurances undermines the integrity of the principle of non-refoulement.

Hence, this raises the question of whether there's a gap between the principle of non-refoulement and the interpretation of the courts in relation to diplomatic assurances. What measures can fill this gap, if it's there and ensure that there's a balance on both sides?

## **2.5 MINOR THREATS**

The minor threats include: the economic threat, the environmental threat and expedited removal.

To begin with, refugees are entitled to economic rights. Refugee influx leads to demand for food and other commodities, depletion of resources, rise of the prices of commodities especially in countries that are poorly resourced. This leads to some host states getting overwhelmed by the presence of the refugees which might lead to the need to repatriate the refugees. Tanzania is a victim of the economic threat that arises as a result of the presence of the refugees.

Secondly, the presence of large refugee influx has impact on the environment. The main impacts include: land degradation and water pollution which may lead to the spread of contagious diseases. This long term environmental degradation also leads to low productivity of the land. Shortage of land and natural resources is another issue brought about by refugee influx. These

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<sup>52</sup> Article 3, *European Convention on Human Rights*, 4 November 2000, ETS 177.

are problems faced by the host state. This raises the question of whether the refugees should be repatriated whereby the host state faces serious environmental threats.<sup>53</sup>

Thirdly, under expedited removal, the non-citizen is physically removed without going through the removal proceedings. The distinction between a political crime and a common crime is lost in the expedited process. This process is also likely to create serious violations of the principle of non-refoulement as the non-citizen in this case a refugee is not necessarily taken through the removal proceedings thus is unable to explain his fears in relation to persecution at his former state.<sup>54</sup>

In conclusion, these minor threats are causative actions that have led to the repatriation of refugees to their countries of origin due to the fact that the states end up getting overwhelmed which leads to the breach of the non-refoulement principle.

## **2.6 CONCLUSION**

Based on the major and minor threats that currently face this principle, there's need to incorporate ways to solve the upcoming threats in relation to it. The importance of this principle is brought out by its history which has been outlined and the causative actions in relation to that. In conclusion, the threats facing the principle of non-refoulement still remain complex today. The interpretation under international law and domestic law shows a gap between the two. The main way to resolve these issues is the United Nations High Commissioner for Refugees and the states cooperating and coming up with long term solutions for the controversial matters affecting

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<sup>53</sup> World Development Report 2011, 'The Impacts of Refugees on Neighboring Countries: Development Challenge', 29 July 2010, 14.

<sup>54</sup> Kathleen M Keller, 'Comparative and International Law Perspective on the United States (Non) Compliance with its Duty of Non-Refoulement', 1999, 203.

the principle. This then raises the question of whether the principle is under serious threat and if so how can this be solved.

**CHAPTER 3: APPROACH TO THE PRINCIPLE OF NON-REFOULEMENT,  
EFFECTIVENESS IN RELATION TO THE ROLE OF THE UNHCR, KENYAN  
GOVERNMENT AND OTHER STAKEHOLDERS IN REFUGEE MANAGEMENT.**

**3.1 INTRODUCTION**

The principle of non-refoulement has been approached in different ways by different states. The approaches include the absolute state sovereignty approach, the collective approach, safe third country approach, restrictive definitional approach, collective approach with a twist and the 'non-pronounced' customary approach. The role of the UNHCR and other stakeholders including the Kenyan Government and the NGOs is important so as to analyze the implementation of the principle of non-refoulement. The challenges facing these stakeholders also affect the implementation of the principle of non-refoulement. This chapter will seek to analyze the approaches to the principle of non-refoulement by different states, the challenges facing the stakeholders and finally conclude on the way forward in relation to these matters.

**3.2 APPROACHES TO THE PRINCIPLE OF NON-REFOULEMENT BY DIFFERENT  
STATES IN RELATION TO IMPLEMENTATION**

Different states have approached the principle of non-refoulement in diverse ways, which are outlined below:

**3.2.1 The Absolute State Sovereignty Approach**

This approach is defined as one that only applies when the person seeking refuge is able to successfully make it to the borders of the certain state in relation to the obligation set out under the 1951 Convention. The US and the UK use this approach.

This means that these states find no obligation under the 1951 Convention when a person seeking refuge.<sup>55</sup> The states that take this approach submit affirmatively that blocking refugees from reaching their borders is consistent with Article 33 of the obligations. This approach supports the crucial distinction between expelling a refugee who has gained access to a border of which Article 33 does not permit and actively inhibiting a refugee from accessing a border which Article 33 of the 1951 Convention Relating to the Status of Refugees permits.<sup>56</sup>

The States that use this approach follow several methods. The first method is sending national authorities of the receiving state to a country producing influx of refugees to implement pre-entry clearance procedures. These procedures allow the receiving state to be able to fore-stall the refugees flow by denying them the access to their borders before they leave their originating state.<sup>57</sup>

In the case of *Regina v. Immigration Officer at Prague Airport and another ex parte European Roma Rights Centre and Others* the case was about UK immigration control at the Prague airport. The appellants complained that the system set up by the respondent where the home officers were placed to pre-vet applicants for asylum from Romania were discriminatory in that more gypsies were refused entrance than others which was contrary to the obligations of the United Kingdom and in breach of Article 33 of the 1951 Convention. The court held that the actions of the respondent were in breach of their obligations.<sup>58</sup>

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<sup>55</sup>Ellen F. D'Angelo, 'Non- Refoulement: A Search for a Consistent Interpretation of Article 33' ,42 *Vanderbilt Journal of Transnational Law* (2009), 291.

<sup>56</sup>Ellen F. D'Angelo, 'Non- Refoulement: A Search for a Consistent Interpretation of Article 33' ,291.

<sup>57</sup> *European Roma Rights Centre and Others vs The Immigration Officer at Prague Airport and The Secretary of State For the Home Department*, United Kingdom: Court of Appeal Judgement of 2003, EWCA Civil 666.

<sup>58</sup> *Regina v Immigration Officer at Prague Airport and Another, EX Parte European Roma Rights Centre and Others*, (2005) 2 AC 1.

However, in the *Europa Roman Rights Centre and Others vs the Immigration Officer at Prague Airport and the Secretary of State for the Home Department* the court reasoned that no construction of Article 33 confers a right on refugees to access the territory of another country. The court noted that the Convention does not address the issue of whether the states should be obligated to help refugees to escape their country of origin rather it addresses only where the refugees should not be sent.<sup>59</sup>

The United States also practices the Absolute State Sovereignty Approach by taking active steps to prevent refugees from reaching their borders. In the *Sales vs Haitian case*, the Coast Guard was required to force the return all the passengers discovered illegally travelling by sea from Haiti to the United States before reaching its borders without determining whether they qualify as refugees. The Haitian Councils argued that this was in violation of Article 33 of the 1951 Convention. This is illustrated in the case of *Sale vs Haitian Centers Council* whereby the Supreme Court decided that the correct textual interpretation of Article 33<sup>60</sup> does not prohibit the United States from intercepting Haitian refugees before reaching the United States borders. The court held that “prevention of an aspiring asylum seeker from gaining access from his own country to its territory and on the other hand returning that person to their country is a crucial distinction”.<sup>61</sup> The US Supreme Court also held that Article 33 of the 1951 Convention “cannot apply extraterritorially given the parallel use of the terms expel or return and the negotiation history of the 1951 Convention Relating to the Status of Refugees”.<sup>62</sup> On the other hand, according to the *Hirsi and others vs Italy case*, the applicants (Libyans) stated that during the

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<sup>59</sup>Ellen F. D’Angelo, ‘Non- Refoulement: A Search for a Consistent Interpretation of Article 33’, 292.

<sup>60</sup>Article 33, *Convention Relating to Status of Refugees*, 28 July 1951, 189 UNTS 137.

<sup>61</sup> *Chris Sale, Acting Commissioner, Immigration and Naturalization Service, et al. v. Haitian Centers Council Inc. et al.*, United States Supreme Court Judgement of 21 June 1993, Case 509 US 155.

<sup>62</sup>Ellen F. D’Angelo, ‘Non- Refoulement: A Search for a Consistent Interpretation of Article 33’, 293.

voyage the Italian authorities did not inform them of their destination and took no steps to identify them. This case was dealing with the issue of border access vs out of border access for refugees and what is really considered as a violation of the principle of non-refoulement the court held that it was up to the national authorities faced with a situation in which human rights were being systematically violated to find out about the treatment that the applicants would be exposed to after their return. It also found the violation of Article 3 of the ECHR due to the applicants being exposed to the risk of arbitrary repatriation.<sup>63</sup>

Both the US and the UK courts have similar views and principles of statutory construction and the effects of the preferred interpretation and they agree that no reasonable reading of Article 33 would support extra-territorial application of the application of the principle of non-refoulement. They both conclude that states have the right to take actions to prevent refugees from accessing their borders under the principle of non-refoulement. In relation to this approach, if the language of Article 33 prohibited states from preventing refugees' access to their territory, both the United States and the United Kingdom would be in violation of their non-refoulement duty. The states that subscribe the absolute state approach "interpret denying refugees' border access as consistent with the non-refoulement duty because they find no explicit or implied contrary intent in the 1951 Convention Relating to the Status of Refugees".<sup>64</sup>

Hence, from the analysis of the Absolute State Sovereignty Approach, Article 33 of the 1951 Convention does not shed clarity on the matter of the states from preventing the refugees from reaching their borders in the first place. However, it raises the question of whether it is a proper way to prevent refugees from accessing territories.

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<sup>63</sup> *Hirsi Jamaa and Others vs Italy*, ECtHR Judgement of 23 February 2012.

<sup>64</sup> Ellen F. D'Angelo, 'Non- Refoulement: A Search for a Consistent Interpretation of Article 33', 297.

### **3.2.2 The Collective Approach**

This approach is defined as one that involves use of mechanisms by states which are inclusive of multilateral and bilateral agreements in the relocation of refugees from one state to another. Canada and Australia apply this approach.

This approach follows two procedures which include the first country of arrival mechanism and the safe third country rule. The first country of arrival mechanism is exemplified by the European Union through the Dublin Convention. The requirement is that the first member state at whose border the applicant represents himself to be able to be responsible for reviewing the asylum claim and granting or refusing asylum. The safe third country rule allows states to send an applicant to another member country through which the applicant has passed so long as that country will review the applicant's asylum claim.<sup>65</sup> Both the agreements permit the states to redistribute the refugees to other safe states so as to make the responsibility of the allocation of asylum much better.

The scope of a country being considered as a safe third country is according to the following principles under Article 38(1) of the APD: no risk of serious harm, consider the principle of non-refoulement and ensure that life and liberty are not threatened. The provisions for the safe third country include that the individual asylum seeker should have the opportunity to be heard within the procedure and rebut the presumption that he/she will be protected and receive proper treatment in the state in question. The APD states that in such a procedure a transferring state may decline to undertake substantive assessment of the asylum claim and declare the application inadmissible.

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<sup>65</sup>Ellen F. D'Angelo, 'Non- Refoulement: A Search for a Consistent Interpretation of Article 33', 298.

The argument that supports the legality of this approach is that Article 33 of the 1951 Convention Relating to the Status of Refugees prohibits the states from expelling refugees to a territory where their life or freedom would be threatened but it does not impose the affirmative obligation to admit refugees into the receiving of the state's territory. Therefore the obligation to grant asylum does not exist. Due to this the states that apply this approach send refugees to third states as long as the third state does not expel the applicant to a fourth state that would endanger the applicant's life or freedom. As for Canada, the safe third country agreements can only be made with the countries that comply with Article 33 of the 1951 Convention Relating to the Status of Refugees. However some countries utilize the safe third country rule without the requirement that the third state must comply with Article 33 of the 1951 Convention Relating to the Status of Refugees for example Australia.

Hence, from the analysis of the collective approach, taking the refugees to another safe country is not a violation of Article 33 of the 1951 Convention Relating to the Status of Refugees. This is in relation to the fact that the refugees' freedom would not be violated on account of their freedom, race, religion, nationality, membership of a certain social group. This is a proper approach.

### **3.2.3 The Safe Country of Origin Approach**

The safe country of origin concept is a presumption that certain countries can be considered safe for their nationals. According to article 9 of the Asylum Procedures Directive (APD) it is defined as a place where there's generally and consistently no persecution. Article 30 of the APD is concerned with the national designation of third countries as safe countries of origin or part of a country being considered as safe.

The safe country of origin according to International Law (Geneva Convention) and EU Law (The Asylum Procedures Directive) is a country that's safe and generally has a democratic system that's consistent. EU candidates are usually safe due to the fact that they check whether these countries have fulfilled the Copenhagen criteria of guaranteeing democracy, human rights, rule of law and the respect for the protection of minorities.

A country is considered to be a safe country whereby on the basis of the legal situation, the application of the law within a democratic system and the general political circumstances it can be shown that there is generally and consistently no persecution, no torture, inhuman degrading treatment/punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict. The criteria to establish whether the state is safe is includes: whether the state observes human rights, respect for the principle of non-refoulement and provision for a system of effective remedies in relation to violation against the rights and freedoms.<sup>66</sup> This approach has the element of substantial, procedural and conceptual risks.

Hence, from the analysis of this approach and considering the risks that come with it, it seems to be partially risky to carry out but still is a good solution in the sharing of the burden of providing asylum to the refugees.

#### **3.2.4 The Collective Approach with a Twist**

It is a variation on the collective approach in that the states utilize procedural measures to avoid reviewing asylum claims applications, depriving the refugee of the opportunity to legally reside in the receiving state. This applies for some states including, but not limited to, France.

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<sup>66</sup> Asylum Identification Database Legal Briefing No.3, 'Safe Countries of Origin: A safe concept?', September 2015, 6.

France has transit zones which the French Constitutional Court declared to be legal by noting that an alien who has appealed for admission as an asylum seeker may be detained in the transit zones. The European Court of Human Rights has criticized the use of the transit zones in order to avoid the examination of asylum applications.<sup>67</sup>

Hence, from the analysis of this approach it is not a proper approach in relation to the principle of non-refoulement.

### **3.2.5 The Restrictive Definitional Approach**

This approach is similar to the absolute sovereignty approach. It is defined as one that exploits the ambiguous wording of the 1951 Convention. The United States applied this approach for the refugees that crossed the Cardoza-Fonseca border specifically. In the case of *The Immigration and Naturalization Service vs Cardoza-Fonseca*<sup>68</sup> the respondent was a Nicaraguan citizen who entered the United States as a visitor and stayed for a longer period than permitted thus the INS commenced her deportation proceedings. She claimed that she could not go back to Nicaragua because her brother had been tortured and imprisoned as a result of political activities thus her fear was that she would get tortured on going back there. The court held that she did not show clear probability of persecution. In relation to this case, the court by applying the two prong test for Article 33 held that not all applicants determined to be refugees would automatically receive non-refoulement protection. The two prong test entails establishing whether the individual is a refugee who can prove a well-founded fear and the secondly show that his life or freedom would be threatened if he/she returned to the originating state. The interpretation of the U.S Supreme Court was consistent with the absolute sovereignty approach.

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<sup>67</sup>Ellen F. D'Angelo, 'Non- Refoulement: A Search for a Consistent Interpretation of Article 33', 306.

<sup>68</sup>*Immigration Naturalization Service vs Cardoza- Fonseca*, United States Supreme Court Judgement of 9 March 1987, Case 480 U.S 421.

The analysis of this method is related to the wording of Article 33 of the 1951 Convention which is a justifiable way to view it. However, it raises the question of whether it's a proper way to prevent refugees from entering a state.

### **3.2.6 The 'Non-pronounced' Customary Approach to the Principle of Non-refoulement**

This is defined as the use of harsh ways so as to pressure refugees to repatriate. This approach has been applied by several states thus raising the question of whether non-refoulement is becoming a principle that's only upheld on paper. These countries include Kenya and Tanzania. The Kenyan example is in relation to the Somalian refugees when the government stated that it could no longer continue bearing the refugee burden. Hence, this method is not proper.

## **3.3 THE ROLE OF STAKEHOLDERS IN IMPLEMENTATION OF NON-REFOULEMENT UNDER REFUGEE LAW**

### **3.3.1 THE UNITED HIGH COMMISSIONER FOR REFUGEES (UNHCR)**

The UNHCR has both an advisory role and a supervisory role. For example in the United States, the UNHCR advises several government agencies such as the Immigration and Naturalization Service (INS), THE Department of State and the National Security Council on the compliance of international standards.<sup>69</sup> Under the advisory role the UNHCR also submits advisory opinions and briefs in individual cases before the US immigration courts, federal courts and the US Supreme Court sometimes. The body also advises the asylum seekers and participates in training events to

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<sup>69</sup>Karen Koning Abuzayd, 'UNHCR's Role in Asylum Processing and Results of UNHCR Monitoring in The United States', 22 *In Defense of the Alien* (1999), 194.

provide information on the principles of international refugee law. The supervisory role entails, the observation of asylum process.<sup>70</sup>

The UNHCR operates under the influence of major donor countries which brings up the question of whether the organization reflects the foreign policy priorities of these countries. According to the *Journal of International Affairs*, government funds in the general programs are not necessarily earmarked but the funds on the special programs reflect on the interests of the donors. Some operations reflect a kind of geopolitical interest.<sup>71</sup> This is one of the gaps in the effectiveness of the role of the UNHCR. The UNHCR has faced the weakness in the vast imbalance of its power relative to states. It also faces the challenge of defining its role in relation to broader demands of humanitarian assistance, conflict resolution, prevention and complex population movements.

In relation to expedited removal which has been discussed in the previous chapter as a threat to UNHCR is faced by several challenges. The challenges include: “lack of access of legal assistance, lack of access of telephones, poor medical and health care, mistreatment by detention officials, lack of access to interpreters, excessive solitary confinement, poor outside recreational facilities and confinement with dangerous criminals”.<sup>72</sup> The fear of persecution is also part of the challenges that the victims of expedited removal face which is directly related to the principle of non-refoulement. According to Sadako Ogata in *The Brown Journal of World Affairs*, “the UNHCR can monitor the movement and protection of concerns of the displaced populations and returnees and can lead delivery convoys of humanitarian assistance to those in need but faces the

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<sup>70</sup> Karen Koning Abuzayd, ‘UNHCR’s Role in Asylum Processing and Results of UNHCR Monitoring in The United States’, 195.

<sup>71</sup> Sadako Ogata, U.N High Commissioner for Refugees, ‘The Evolution of UNHCR’, *Journal for International Affairs* (1993), 422.

<sup>72</sup> Karen Koning Abuzayd, ‘UNHCR’s Role in Asylum Processing and Results of UNHCR Monitoring in The United States’, 199.

challenge of curbing the use of excessive force in situations of war”.<sup>73</sup> Hence, these challenges hinder with the duty to ensure that non-refoulement is well implemented.

### **3.3.2 UNHCR and other NGOs**

The question of how the UNHCR and other NGOs co-operate so as to implement the important laws in relation to refugee law is also important also in relation to implementation of non-refoulement. Are they companions or competitors in refugee protection? Humanitarian response is found on assistance and protection. In the mid-1990s, several NGOs blamed the UNHCR for focusing on the provision of assistance at the expense of their protection mandate mainly in Central Africa. In recent meeting between the UNHCR and other NGOs, they had a discussion of which they concluded that “at a time when international refugee protection is severely constrained for political and financial reasons, protection in the humanitarian sector is one of its weakest points”.<sup>74</sup> This means that there’s the need for the UNHCR to involve the other NGO’s more in decision making and delicate matters.

Hence, the analysis of the relationship between the UNHCR and other NGOs and the issues that have been outlined shows that the inconsistencies may affect the implementation of refugee which is inclusive of the principle of non-refoulement.

### **3.3.3 The Kenyan situation of refugees in relation to the Principle of Non-refoulement**

In spite of hosting large numbers of refugees over a long period of time, the Kenya Government has not to date developed very clear guidelines and policies on how to deal with the refugees in Kenya. In Kenya, widespread complaints have been made against the police by civil society,

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<sup>73</sup> Sadako Ogata, ‘The Limits of UNHCR’s Intervention in Post-Cold War Conflicts: An Analysis of the Kosovo Crisis’, 6 *The Brown Journal of World Affairs* (1999), 212.

<sup>74</sup> Ed Schenkenberg van Mierop, ‘UNHCR and NGO’s: Competitors or Companions in Refugee Protection?’, 1 February 2014 <https://www.migrationpolicy.org/article/unhcr-and-ngos-competitors-or-companions-refugee-protection> on 18 January 2018.

UNHCR, Human Rights Organization and international agencies due to the harsh treatment that refugees face. The refugees are vulnerable yet the police have been accused of committing atrocities and gross violations on the basic human rights of the refugees in the Kenyan camps.<sup>75</sup> In the practice of refugee law in Kenya, we have had a lot of inconsistency in relation to the police and the courts. When a refugee is arrested, either as a result of being found outside the camp or without any permit to stay out of the camp, the police in charge of immigration tend to treat these refugees as aliens despite their status.<sup>76</sup> Such a refugee is either handed over to the UNHCR or sent back to the refugee camp in the first instance or at other times is charged before a criminal court for the offence of being in the country illegally. Where the refugee pleads guilty to such a charge, as is usually the case, the court initially in recognition of the status of the accused, used to order the refugee to be taken back to the refugee camp but in recent times the practice has been to convict the accused and sentence him or her to serve some months in prison in addition to or as an alternative to the payment of a prescribed fine and after the sentence is served or the fine is paid, the accused is ordered to be repatriated back to his or her home country.<sup>77</sup> “This repatriation order is usually carried out by the police who escort the convicted refugee up to the No-Man’s Land in the border and order the person to go over to his or her home country. This repatriation order is usually made by the courts in total violation of the International Law Principle of non-refoulement, which forbids the forceful return of a refugee to his or her home

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<sup>75</sup> Ahmed Issack Hassan, ‘Refugees in Kenya and The Constitutional Review Process: The Way Forward’, 2002, <http://www.commonlii.org/ke/other/KECKRC/2002/12.html> on 18 January 2018.

<sup>76</sup> Ahmed Issack Hassan, ‘Refugees in Kenya and The Constitutional Review Process: The Way Forward’, 2002, <http://www.commonlii.org/ke/other/KECKRC/2002/12.html> on 18 January 2018.

<sup>77</sup> Ahmed Issack Hassan, ‘Refugees in Kenya and The Constitutional Review Process: The Way Forward’, 2002, <http://www.commonlii.org/ke/other/KECKRC/2002/12.html> on 18 January 2018.

country”.<sup>78</sup> The Kenyan Government also lacks clear policy regulating refugees who have stayed in the country for long periods.

According to Ekuru Aukot on his journal article titled A Conspiracy of Silence he states that the lack of sustainable solutions or amelioration of refugee problems despite the numerous refugee programs has escalated complaints from refugees that seek redress but are sidelined. Despite the constant complaints from the refugees there seems to be no forum of tabling and addressing their claims.<sup>79</sup> The second complaint raised by these refugees in the camps is on the policy of on incentives whereby they state that they are not paid for the services they render unlike their Kenyan counterparts. In the Kenyan context, pursuant to the UNHCR statute and regionally it would be wrong to think that the only other viable solution apart from resettlement is local integration in other forms. The refugee complaints raise the question of whether or not, other stakeholders in refugee protection see the refugees as equal to other Kenyans.<sup>80</sup>

The other matter of concern that is brought up is the competition for refugee assistance programs. In Kenya refugees have been classified as local, national, international, voluntary and private. However, they have had shortcomings in relation to their effectiveness. “Most of the programs that they tend to propose appear to be a matter of competition over refugee programs. Some NGOs have been seen to adopt an exclusionist policy towards the other stakeholders in the

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<sup>78</sup> Ahmed Issack Hassan, ‘Refugees in Kenya and The Constitutional Review Process: The Way Forward’, 2002, <http://www.commonlii.org/ke/other/KECKRC/2002/12.html> on 18 January 2018.

<sup>79</sup> Ekuru Aukot, ‘A Conspiracy of Silence- the Critical Fieldwork Memoirs on Refugee Protection in Kenya by Refugee Agencies and Stakeholders.’ 2 *East African Journal on Human Rights and Democracy* (3 September 2004), 262.

<sup>80</sup> Ekuru Aukot, ‘A Conspiracy of Silence- the Critical Fieldwork Memoirs on Refugee Protection in Kenya by Refugee Agencies and Stakeholders.’ 2 *East African Journal on Human Rights and Democracy* (3 September 2004), 262.

management of refugee matters instead of working together and cooperating in refugee protection”.<sup>81</sup>

Corruption also appears in relation to the abuse of refugees’ labor rights contrary to the provisions on wage-earning employment under the 1951 Convention on the Status of Refugees and considering the aspect of equality.<sup>82</sup> It is clear that the enforcement of laws so as to eventually ensure proper protection of refugees depends on the good will to make a good environment for the refugees from the donor agencies, governments, NGOs and individuals. “The perception of refugees as a burden as opposed to them being human beings facing human rights problems also contributes to the sense of insecurity that one may have while fleeing from the fear of persecution”.<sup>83</sup>

The above analysis of the Kenyan situation shows that there are several issues that need to be addressed so as to ensure that there is proper implementation of the principle of non-refoulement.

### **3.4 CONCLUSION**

In conclusion, the absolute state sovereignty approach and the restrictive definitional approach are justifiable but they are not proper methods to approach the Principle of Non-refoulement. This is because these states prevent the refugees from getting to their borders in the first place yet these states may be the closest safe place for them. The ‘non-pronounced’ customary approach is also improper due to the use of harsh methods so as to pressure the refugees to repatriate. The collective approach, collective approach with a twist and the safe country of

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<sup>81</sup> Ekuru Aukot, ‘A Conspiracy of Silence- the Critical Fieldwork Memoirs on Refugee Protection in Kenya by Refugee Agencies and Stakeholders.’, 257.

<sup>82</sup> Ekuru Aukot, ‘A Conspiracy of Silence- the Critical Fieldwork Memoirs on Refugee Protection in Kenya by Refugee Agencies and Stakeholders.’, 268.

<sup>83</sup> Ekuru Aukot, ‘A Conspiracy of Silence- the Critical Fieldwork Memoirs on Refugee Protection in Kenya by Refugee Agencies and Stakeholders.’, 272.

origin are proper methods. This is because they ensure that the refugee is being taken back to a safe place.

The gaps that appear in relation to the UNHCR and fulfilling its role need to be filled so as to ensure the efficiency of the implementation of laws on refugee protection such as the principle of non-refoulement. The relationship of the UNHCR and the other NGOs and how they work needs to be looked into also so as to ensure efficiency in the implementation of the principle of non-refoulement for example. The gaps in the UNHCR in performing its role and other stakeholders need to be filled so as to ensure that the principle of non-refoulement does not appear as only a law that's on paper and to ensure that the problems that arise in its implementation are solved. Do some of the refugee agencies also need to re-conceptualize their programs need to improve refugee protection? Do the stakeholders in forced migration and human rights studies also need re-ordering? These are the questions that this study seeks to give answers and solutions to.

## **CHAPTER FOUR: RECOMMENDATIONS AND CONCLUSION**

### **4.1 INTRODUCTION**

The study started with the question of whether there is a lacuna between the principle of non-refoulement and the interpretation in courts and by state. The second chapter then outlined the major threats and minor threats and outlined cases to the threats. The third chapter dealt with approaches to the principle of non-refoulement by different states. It also dealt with the role of the UNHCR and the relation to NGOs and the issues that arise. The Kenyan situation was also outlined in this chapter. In the chapters above it is clear that there is a gap between the principle of non-refoulement and the interpretation in the courts.

This chapter will deal with recommendations to the threats facing the principle of non-refoulement, recommendations on the approaches by different states, recommendations on the Kenyan situations and on the challenges facing the UNHCR and NGOs,

### **4.2 RECOMMENDATIONS ON THE THREATS FACING THE PRINCIPLE OF NON-REFOULEMENT**

According to this study, it is clear that the principle of non-refoulement is under serious threat and there's a lacuna between the principle and its interpretation in the courts.

#### **4.2.1 The Security Threat**

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.<sup>84</sup>

States should also ensure that they provide proper jobs for refugees so as to lower the chances of the refugees engaging in criminal activities.

#### **4.2.2 The Diplomatic Assurances Threat**

Diplomatic assurances have a level of bilateral obligation but they do not guarantee protection for the refugees who are transferred back to where they were from with this as the reason as to why they are repatriated. States should ensure that the decisions to repatriate refugees on the basis of diplomatic assurances go through independent and impartial reviews. The use of a

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<sup>84</sup> Obiora Chinedu Okafor, 'Re-configuring Non- Refoulement – The Suresh Decision, Security Relativism and the International Human Rights Imperative', 39.

balancing approach in relation to the principle of non-refoulement and diplomatic relations would also be a solution to this threat.

#### **4.2.3 Minor Threats**

As mentioned in Chapter 2, the minor threats include the economic threat, environmental threat and expedited removal. As for the economic threat the solution would be the states coming up with ways to tax the refugees so as to ensure that they help reduce the economic burden on the states. The solution to the environmental threat would be dispersing refugee settlement so as to reduce the effects on the environment in situations where the refugees are crowded at a certain camp. As for expedited removal the solution would be states coming up with a system that ensures that the refugee goes through removal proceedings before being taken back to their state of origin so as to ensure that there is no violation of the principle of non-refoulement.

#### **4.3 RECOMMENDATIONS ON THE APPROACHES OF NON-REFOULEMENT BY DIFFERENT STATES**

The fact that there are many approaches to the principle of non-refoulement by different states shows that there is the lack of uniformity in this area. This is a matter that needs attention and ensuring uniformity of the approaches would be a solution to improve the issues that come along with how different countries approach this principle. This would ensure a uniform understanding of Article 33 of the 1951 Convention leading to reduction of the gap between the principle itself and how the courts interpret it with relation to the diverse approaches of different states.

It is with no degree of doubt that the diverse interpretations of Article 33 of the 1951 Convention Relating to the Status of Refugees undermine the principle of non-refoulement plus the binding force of the treaty. Incorporating uniformity will ease the imposition of obligations by the 1951

Convention Relating to the Status of Refugees.<sup>85</sup> Implementing uniformity in the approaches by states will ensure that the success of an asylum claim will not be highly dependent on the refugee's state of entry.

#### **4.4 RECOMMENDATIONS ON THE CHALLENGES FACING THE UNHCR AND**

##### **NGOs**

There is the need for the UNHCR and the other NGOs collaborate in a much more coherent manner. Despite the fact that NGOs do not have a protection mandate, they can still help UNHCR by being present in relation to monitoring, preparing reports and contributing in relation to those affected by forced displacement.<sup>86</sup>

The UNHCR can generally include the NGOs more on protection in refugee situations where it seems practical for them to seek the help. The UNHCR should also ensure that it engages in dialogues with NGOs to explain the rationale for its decisions and policies. All these will ease the implementation of the principle of non-refoulement in relation to refugee protection.

#### **4.5 RECOMMENDATIONS ON THE KENYAN SITUATION**

In order to solve the issues facing Kenya as a country in the implementation of the principle of non-refoulement under refugee protection, several steps need to be taken. The recommendations are as follows: The government should ensure that it establishes certain points as refugee reception where the preliminary vetting of the refugees can be carried out before the final

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<sup>85</sup> Ellen F. D'Angelo, 'Non- Refoulement: A Search for a Consistent Interpretation of Article 33', 311.

<sup>86</sup> Ed Schenkenberg van Mierop, 'UNHCR and NGO's: Competitors or Companions in Refugee Protection?', 1 February 2014 <https://www.migrationpolicy.org/article/unhcr-and-ngos-competitors-or-companions-refugee-protection> on 20 February 2018

decision on their status can be made.<sup>87</sup> There is need for Kenya to ensure that its refugee regime is grounded in fundamental human rights values.

#### **4.6 CONCLUSION**

In conclusion, it is clear that there is a lacuna between the interpretation by the courts and states in relation to the principle of non-refoulement in relation to case law and state approaches. The recommendations listed above will be a step to ensuring that these gaps are filled and a broad step towards the achievement of smooth implementation of the principle of non-refoulement. Making this principle less rigid will also assist states in the approaches of implementing it. This way the gaps will be filled in.

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<sup>87</sup> Ahmed Issack Hassan, 'Refugees in Kenya and The Constitutional Review Process: The Way Forward', 2002, <http://www.commonlii.org/ke/other/KECKRC/2002/12.html> on 18<sup>th</sup> January 201

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