

**NON-REFOULEMENT: COMMENTARY ON THE PROPOSED CLOSURE OF
DADAAB REFUGEE CAMPS**

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By

Joan Kiama

Adm No - 082403

Prepared under the supervision of

Mr. Allan Mukuki

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Declaration

I, Joan Kiama 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.

Signed: 

Date: 28.05.2018

This Research Proposal has been submitted for examination with my approval as University Supervisor.

Signed: 

Date: 29/5/18

Mr. Allan Mukuki

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To the Lord Almighty for His love, guidance, strength and protection

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To the refugees who I talked to, thank you

To my family and friends, your support means a lot. Thank you for always being there

Dedication

To all the refugees who have been affected by the directive, the brave souls who have willingly returned and the brave ones who are here. May peace and blessings be with you always

List of abbreviations

CAT	The 1987 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
DRA	Department of Refugee Affairs
OAU Convention	1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa
RAS	Refugee Affairs Secretariat
RSD	Refugee Status Determination process
UNHCR	The United Nation High Commission
1951 Convention	1951 Refugee Convention relating to the status of refugees
2006 Refugee Act	The Kenyan 2006 Refugee Act

Abstract

Kenya has been hosting refugees since the 1960s with their population at the time being less than 5,000. Since then the number of refugees in the country has grown with Dadaab refugee camp being among the largest in the world.

Changes in Kenya's refugee policies have been prompted by the debate on the balance between protection of refugees vis-à-vis security management. In May 2016 the government issued a directive ordering the closure of Dadaab refugee camp arguing that the camp was being used as a terrorism safety-net. Such a move can have a number effects including the possible violation of international laws following the principle of non-refoulement.

Kenya is a signatory to a number of conventions, has the 2006 Refugee Act, and is also party to the Kenya-Somalia-UNHCR tripartite treaty which attempted to structure a procedure on how the voluntary repatriation of Somali refugees would be done. In light of this, the government directive seemed like a rushed statement that does not abide by the rules and procedures set out in the aforementioned laws.

This dissertation establishes a nexus between the duty of Kenya to uphold the laws governing refugee related issues, whether the government directive violated any such laws, and whether the directive was justified.

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1. CHAPTER ONE

1.1 Introduction

The Refugee Act defines a refugee as a person who, *owing to a well-founded fear of being persecuted for reasons of race, religion, sex, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.*¹ Kenya has been hosting refugees since the 1960s² with their population at that time being less than 5,000 persons. Until the 1980s, there were no refugee camps hence refugees could settle in any part of the country. Camps were later established due to an influx of refugees,³ and since then the number of refugees in the country has grown with Dadaab refugee camps, being among the largest in the world.⁴

Changes in current refugee policies⁵ have been prompted by the debate on the balance between the protection of refugees vis-à-vis national security management.⁶ In 2012, the government and media reported that the violence in the refugee camps and the environs, as well as in Eastleigh,⁷ could be as a result of the large number of Somali refugees living in camps and urban settings in Kenya.⁸ This led to the forced encampment policy.⁹ As per the press statement by the Department

¹ Section 3 of our Refugee Act, No 13 of 2006, the 2014 edition.

A similar view can be found on article 1 of the 1951 Convention relating to the Status of Refugees.

² Refugees from Uganda, Ethiopia and Somalia. More information can be found on <http://www.ckadvocates.co.ke/2014/06/refugee-law-in-kenya/> accessed on 13.11.2016.

³ More information can be found on <http://www.ckadvocates.co.ke/2014/06/refugee-law-in-kenya/> accessed on 13.11.2016.

⁴ Kenya hosts a large asylum-seeking and refugee population, which at present is managed jointly by the country's Department of Refugee Affairs (DRA) and the United Nations High Commissioner for Refugees (UNHCR) under the 2006 Refugees Act and the 2009 Refugees Regulations. Kenya recognizes two classes of refugees: prima facie refugees and statutory refugees. All asylum seekers go through an initial registration they are screened for their eligibility to seek asylum and to obtain accelerated processing. This is followed by an interview. For more information, visit <https://www.loc.gov/law/help/refugee-law/kenya.php>.

⁵ In March 2014, the government again issued a directive ordering urban refugees to go to and remain in designated camps. Citing security and logistical challenges resulting from the presence of refugees and asylum seekers in urban areas, the directive provided that all refugees residing outside of the designated refugee camps must return to the camps immediately; all Kenyans must report refugees and illegal immigrants they encounter outside of camps; and an additional five hundred law enforcement officers were going to be deployed mainly to Nairobi and Mombasa "to enhance security and surveillance."

This can be seen on the Press Statement, Cabinet Secretary for Interior and Coordination of National Government, Refugees and National Security Issues (Mar. 26, 2014).

⁶ A similar view is seen at <http://foreignpolicy.com/2016/07/21/the-worlds-largest-refugee-camp-is-invited-to-please-shut-down-kenya-somalia-dadaab/> accessed on 13.1.2016.

⁷ A Somali-dominated neighborhood of Nairobi.

⁸ Plotch 2010 as seen in Oxford Monitor of Forced Migration Vol 3, No 1, *A Critical Analysis of Kenya's Forced Encampment Policy for Urban Refugees* by Martha Marrazza.

⁹ The attacks were attributed to Al Shabaab as per the Kenyan government.

Oxford Monitor of Forced Migration Vol 3, No 1, *A Critical Analysis of Kenya's Forced Encampment Policy for Urban Refugees* by Martha Marrazza.

of Refugee Affairs, the policy directly resulted from the 'rampant insecurity in the refugee camps and urban areas'.¹⁰ Despite this measure, Kenya remained the target of terrorist attacks¹¹ such as the one on Westgate shopping mall that left 67 people dead,¹² the Mpeketoni attack, and the Garissa University attack in 2015 that killed 147.¹³

In May 2016 the government issued another directive ordering the closure of Dadaab refugee camp and the disbandment of Department of Refugee Affairs (DRA)¹⁴ arguing that the camp was being used as a terrorism safety-net.¹⁵ Such a move can have a number effects including the possible violation of international laws and the principle of *non-refoulement*. This dissertation discusses whether the government directive violated any such laws, and if it did whether the directive was justified.

¹⁰ Marrazza M, Oxford Monitor of Forced Migration Vol 3, No 1, *A Critical Analysis of Kenya's Forced Encampment Policy for Urban Refugees*.

¹¹ More information can be found on <http://www.aljazeera.com/news/2016/10/kenya-attack-12-killed-mandera-al-shabab-161025063500398.html> accessed on 22.01.2017.

¹² More information can be found on <http://www.bbc.com/news/world-africa-24189116> accessed on 22.01.2017.

¹³ More information can be found on <http://edition.cnn.com/2015/04/02/africa/kenya-university-attack/> accessed on 22.01.2017.

¹⁴ Which at that time had about 300,000 refugees, most of whom were from Somalia. More information can be accessed on <http://foreignpolicy.com/2016/07/21/the-worlds-largest-refugee-camp-is-invited-to-please-shut-down-kenya-somalia-dadaab/> accessed on 13.11.2016.

¹⁵ Some of the terrorist attacks have been said to have been planned from the Dadaab refugee camps. Other factors that could be considered for the government directive include the decrease in food rations from WFP, reduced funding from UNHCR, and the Federal Government of Somalia failing to diligently fulfill its duties as set out in the Tripartite Agreement.

1.2 Background of the study

The presence of Somali refugees in Kenya can be traced to 1991 when the Somali government collapsed and the civil war began.¹⁶ Within one year of the collapse, Kenya received about 285,000 Somali refugees¹⁷ and by 2006 the number had almost tripled.¹⁸ In 2011, following the famine in Somalia, an estimated 150,000 Somali refugees crossed the border into Kenya¹⁹ and found their way to the Dadaab refugee camps.²⁰

Since then, there have been increased cases of insecurity and terrorist attacks in the country leading to the debate between upholding the rights of refugees, and focusing on preserving national security.²¹ In October 2011, Kenya launched “Operation Linda Nchi” claiming that the presence of Al-Shabaab on Kenyan soil was possibly caused by movement across the porous border.²² In 2012, the forced encampment policy for refugees²³ was issued following a series of attacks,²⁴ and in 2014, a government directive ordering urban refugees to relocate to the designated camps.²⁵

Kenya has been the target of numerous terrorist attacks²⁶ such as the one on Westgate shopping mall that left 67 people dead,²⁷ Mpeketoni attack, and the Garissa University attack that killed 147²⁸ took place despite this arrangement.

¹⁶ *Hasty Repatriation: Kenya's attempt to send Somali refugees home*, Published in 2013 by the Heritage Institute for Policy Studies, pg. 9.

¹⁷ Kiama L, *the Gender Perspectives of Somali Refugees in Eastleigh, Nairobi City County, On Repatriation to Their Country*, Pg. 12.

¹⁸ Lindley A, *Between a Protracted and a Crisis Situation: Policy Responses to Somali Refugees in Kenya*, Refugee Survey Quarterly 2011, page 3.

¹⁹ *Asylum Under Threat – Assessing the protection of Somali refugees in Dadaab refugee camps and along the migration corridor*, 2012, Refugee Consortium of Kenya with the support of Danish Refugee Council, page 13.

²⁰ *Hasty Repatriation: Kenya's attempt to send Somali refugees home*, Published in 2013 by the Heritage Institute for Policy Studies, pg. 9.

²¹ A similar view is seen at <http://foreignpolicy.com/2016/07/21/the-worlds-largest-refugee-camp-is-invited-to-please-shut-down-kenya-somalia-dadaab/> accessed on 13.1.2016.

²² ‘Linda Nchi’ means ‘protect the country’

This is seen in *Hasty Repatriation: Kenya's attempt to send Somali refugees home*, Published in 2013 by the Heritage Institute for Policy Studies, pg. 9.

²³ Plotch 2010 as seen in Oxford Monitor of Forced Migration Vol 3, No 1, *A Critical Analysis of Kenya's Forced Encampment Policy for Urban Refugees* by Martha Marrazza.

²⁴ Between November and December 2012, there were five separate grenade attacks with the Kenyan-Somali Member of Parliament, Honorable Yusuf Hassan being one of the victims.

²⁵ This can be seen on the Press Statement, Cabinet Secretary for Interior and Coordination of National Government, Refugees and National Security Issues (Mar. 26, 2014).

²⁶ More information can be found on <http://www.aljazeera.com/news/2016/10/kenya-attack-12-killed-mandera-al-shabab-161025063500398.html> accessed on 22.01.2017.

²⁷ More information can be found on <http://www.bbc.com/news/world-africa-24189116> accessed on 22.01.2017.

²⁸ More information can be found on <http://edition.cnn.com/2015/04/02/africa/kenya-university-attack/> accessed on 22.01.2017.

In May 2016 the government of Kenya ordered the closure of Dadaab refugee camps.²⁹ Prior to this, Kenya had been the victim of a number of terror attacks which Al Shabaab took credit for, some of which have been said to have been planned in Dadaab refugee camp where Al Shabaab sympathizers are rumored to be hiding among the refugees.

A report by Human Rights Watch based on a visit to Dadaab in August 2016 described intimidation by the Kenyan government, silence over alternative options that would allow refugees remain in Kenya, inadequate information on conditions in Somalia, and the UN cash grant that the refugees would forfeit if they were to be deported rather than being repatriated; as factors that prompted many refugees in the camps to ‘volunteer’ to return to Somalia despite the threat of danger, persecution, and hunger.³⁰ The refugee rights director at Human Rights Watch stated that:

“The Kenyan authorities are not giving Somali refugees a real choice between staying and leaving, and the UN refugee agency isn’t giving people accurate information about security conditions in Somalia. An example of this would be the story of Amina, a 38-year-old single mother returned to her village, Bula Gudud, in January 2015 with her five children. When fighting erupted she fled to Kismayo and ended up in an informal displacement camp for IDPs where she resorted to carrying water to sell in the market in order to provide for her children. After a man in a government uniform raped her, a common occurrence in the unprotected and poverty stricken camps across the country, Amina gave up and 10 months ago begged her way back to Dadaab refugee camps where she found out that she is no longer a registered refugee.”³¹

It is against this background that this study was conducted to establish whether the government directive to close Dadaab refugee camps violates the principle of *non-refoulement*, and if it did, whether it is justified.

²⁹ This decision has been made by Government reflecting the fact that the camps have become hosting grounds for Al Shabaab as well as centres of smuggling and contraband trade besides being enablers of illicit weapons proliferation. More information can be found at <http://www.interior.go.ke/index.php/2015-02-28-06-43-54/news/98-government-statement-and-update-on-the-repatriation-of-refugees-and-scheduled-closure-of-dadaab-refugee-camp> accessed on 06.02.2017.

³⁰ <https://www.hrw.org/news/2016/09/14/kenya-involuntary-refugee-returns-somalia> accessed on 02.02.2017.

³¹ Bill Frelick – refugee rights director at Human Rights Watch

<https://www.hrw.org/news/2016/09/14/kenya-involuntary-refugee-returns-somalia> accessed on 02.02.2017.

1.3 Statement of problem

This dissertation examined whether the government directive to close Dadaab refugee camps (following the recent terrorist attacks) violates the principle of *non-refoulement*, and if it did whether it is justified.

1.4 Justification of the study

As per our laws and international law, a refugee is a person who:

(a) *owing to a well-founded fear of being persecuted for reasons of race, religion, sex, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or*

(b) *not having a nationality and being outside the country of his former habitual residence, is unable or, owing to a well-founded fear of being persecuted for any of the aforesaid reasons is unwilling, to return to it*³²

Applicable refugee law in Kenya include: several conventions,³³ the 2006 Refugee Act, and the Kenya-Somalia-UNHCR tripartite treaty³⁴ that provides a legal framework on how the voluntary repatriation of Somali refugees would be done. As per these laws, refugees are protected from *refoulement* which is their forceful return to their country of origin or anywhere else where they are in danger³⁵ of either persecution or torture. The principle of *non-refoulement* prohibits States from returning a refugee or asylum seeker to territories where there is a risk that his or her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion;³⁶ and it is a norm of customary international law.³⁷

³² Section 3 of our Refugee Act, No 13 of 2006, the 2014 edition.

³³ Such as the 1951 Geneva Convention relating to the rights of refugees, the additional protocols and the 1969 OAU Convention on Refugees.

³⁴ The 2013 tripartite agreement between the government of the republic of Kenya, the government of the federal republic of Somalia and the united nations high commissioner for refugees governing the voluntary repatriation of Somali refugees living in Kenya.

³⁵ Article 3 (1) of the Convention Against Torture includes an explicit right against *non-refoulement* :

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

³⁶ *The Scope and Content of the Principle of Non-Refoulement: Opinion*, Cambridge University Press, June 2003, available at: <http://www.refworld.org/docid/470a33af0.html> [accessed 23 January 2017].

³⁷ UN High Commissioner for Refugees (UNHCR), *UNHCR Note on the Principle of Non-Refoulement*, November 1997, available at: <http://www.refworld.org/docid/438c6d972.html> [accessed 23 January 2017].

In a report issued by the UN, States have the responsibility to protect (R2P) their citizens and ensure the security of the person and their human rights.³⁸ The State is also faced with the challenge of not violating R2P human rights while ensuring security.³⁹ The UDHR declares that, 'All human beings are born free and equal in dignity and rights'⁴⁰ and despite it not being binding, Kenya acceded and ratified specific instruments that contain those rights hence Kenya agreed to be a duty holder and to ensure the enjoyment of those rights within its jurisdiction by both Kenyans and non-Kenyans.⁴¹

That said, refugee camps are not permanent settlements but are meant to be a temporary humanitarian remedy availed to refugees and asylum seekers⁴² as the host State in collaboration with UNHCR seeks a more permanent solution to their plight. There are three durable solutions the refugee problem: voluntary repatriation, resettlement or integration. Of these, voluntary repatriation if possible is the preferred to local integration in the country of first asylum or resettlement in a third country of asylum. Repatriation is supposed to be voluntary and conducted in dignity and safety. In as much as the Kenyan government provides that the ongoing repatriation is voluntary, the refugees seem to be in fear, based on the August 2016 visit to Dadaab by Human Rights Watch where the refugees described some of the factors were prompting many camp residents to return now to Somalia, where they face danger, persecution, and hunger.⁴³

A similar view is provided on the International Migration Law Information Note, page 3. It can be accessed at <https://www.iom.int/files/live/sites/iom/files/What-We-Do/docs/IML-Information-Note-on-the-Principle-of-non-refoulement.pdf>

³⁸ *UN Responsibility to Protect: Report on the International Commission on Intervention and State Sovereignty* (ICISS, 2001) http://www.un.org/en/ga/search/view_doc.asp?symbol=A/57/303 accessed on 02.02.2017.

³⁹ Adinoyi Adavize J, *Impact of Terrorism on Human Rights in Africa: The Case Study of Counterterrorism in Kenya* (1998 -2014), pg 16.

⁴⁰ Article 1, *Universal Declaration on Human Rights* adopted by the United Nations General Assembly on 10 December 1948 at the Palais de Chaillot, Paris.

⁴¹ Nkirote L, *The Problem Of Insecurity In Kenya's Refugee Camps: A Case Of The Dadaab Refugee Camp A Dissertation Submitted In Partial Fulfilment Of The Requirements For Master Of Arts Degree In International Studies To The Institute Of Diplomacy And International Studies, University Of Nairobi*, pg 50.

⁴² More information can be found at <http://www.interior.go.ke/index.php/2015-02-28-06-43-54/news/98-government-statement-and-update-on-the-repatriation-of-refugees-and-scheduled-closure-of-dadaab-refugee-camp> accessed on 06.02.2017.

⁴³ These include:

- intimidation by the Kenyan government
- silence over alternative options that would allow them to remain in Kenya
- inadequate information on conditions in Somalia, and
- US\$400 UN cash grant they would forfeit if they were deported later this year.

More information can be found at <https://www.hrw.org/news/2016/09/14/kenya-involuntary-refugee-returns-somalia> accessed on 09.01.2017.

Following the OAU Convention recognizing *prima facie* refugees, the Kenyan government has been granting *prima facie* status excluding most asylum seekers from the standard protection offered by the individualized by the 1951 Convention regime.⁴⁴ *Prima facie* refugee status was established by the OAU Convention as a protection measure to complement the refugee status determination process of individual States, but it does not offer actions nor solutions for the refugees designated as such.⁴⁵ Majority of the refugees in Kenya are therefore not granted convention status, but rather temporary asylum that grants admission, protection against *refoulement* and respect for fundamental human rights, while awaiting a hoped-for safe return.⁴⁶ On 29th April 2016, the government revoked this status with respect to asylum seekers from Somalia requiring them to undergo the Refugee Status Determination process.⁴⁷ It however did not express as to the status of the already existing *prima facie* refugees in Kenya. Despite this, the principle of *non-refoulement* applies since it is a right granted to both refugees and asylum seekers, and the Convention against Torture affirms the non-derogable aspect of this principle.

It is against this background that this research sought to prove that the government directive did indeed violate the principle of *non-refoulement*.

1.5 Statement of Objectives

The main objective of this dissertation was to examine whether the government directive to close Dadaab refugee camps violated the principle of *non-refoulement*.

The specific objectives of the study were to:

- i) To understand whether the government directive to close down Dadaab refugee camp and the steps taken in the achievement of this directive violates refugee law.

⁴⁴ The *prima facie* regime can be defined as the determination of eligibility based on first impressions or in the absence of evidence in to the contrary, and it is generally applied in situations of mass movements on a group basis rather than by individual determination procedures that is the norm for determining Convention status.

⁴⁵ Hyndman J, *Managing Displacement. Refugees and the Politics of Humanitarianism*, Minnesota, University of Minnesota Press, 2000, pg 176.

⁴⁶ Nkirote L, *The Problem Of Insecurity In Kenya's Refugee Camps: A Case Of The Dadaab Refugee Camp A Dissertation Submitted In Partial Fulfilment Of The Requirements For Master Of Arts Degree In International Studies To The Institute Of Diplomacy And International Studies, University Of Nairobi*, pg 41.

⁴⁷ The Kenya Gazette, Vol CXVIII—No 46 NAIROBI, 29th April, 2016, Published by Authority of the Republic of Kenya.

- ii) To establish whether there is a nexus between the duty of Kenya to uphold refugee laws when claiming threats to national security, hence whether the directive is justified.

1.6 Research Questions

- i) Was the government directive to close Dadaab refugee camps a violation of *non-refoulement*?
- ii) Was the government mandated to uphold the principle of *non-refoulement* when claiming that Dadaab is being used as a hideout by Al-Shabaab who are a threat to national security?

1.7 Literature Review

- a) The principle of *non-refoulement*

Non-refoulement is an integral principle of refugee law which protects refugees from being forcefully repatriated to where they may be harmed or in danger. *Mainstreaming Refugee Rights: The 1951 Convention and International Human Rights Law*, by Tom Clark and Francois Crepeau states that ‘No State shall return a refugee to where his life or freedom would be threatened’ which is the principle of *non-refoulement* in a nutshell.⁴⁸ The *UNHCR Guidance Note on Extradition and International Refugee Protection* asserts that principle of *non-refoulement* is a fundamental principle from which no derogation is permitted as it forms part of customary international law hence is binding on all States including those which have not yet become party to the conventions and/or protocol.⁴⁹ It then provides the permitted exceptions to the principle which apply only if it is established that the refugee poses a current or future danger to the national security of the host country; or for the danger to the community exception to apply then not only must the refugee in question have been convicted of a crime of a very grave nature, but it must also be established that, in light of the crime and conviction, the refugee constitutes a very serious present or future danger to the community of the host country hence *refoulement* should be the last possible resort for

⁴⁸ Clark T and Crepeau F, *Mainstreaming Refugee Rights: The 1951 Convention and International Human Rights Law*.

⁴⁹ UNHCR Guidance Note on Extradition and International Refugee Protection.

eliminating the danger to the security or community of the host country.⁵⁰ This dissertation agrees with the *UNHCR Guidance Note* and insists on the non-derogable aspect of *non-refoulement* as it is a norm of *jus cogens*.

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 law⁵¹ but is also a norm of *jus cogens* hence cannot be deviated from or violated despite the circumstances surrounding the situation.⁵² 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'.⁵³ In *the protection of refugees and their right to seek asylum in the European Union*,⁵⁴ 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.⁵⁵ 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.⁵⁶ The *Cartagena Declaration on refugees* emphasizes on *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*.⁵⁷ 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 Goodwill-Gill, *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, a position which this dissertation agrees with.

⁵⁰ UNHCR Guidance Note on Extradition and International Refugee Protection.

⁵¹ G S Goodwill-Gill, *The Refugee in International Law*, 2nd edn, 1996, pg 166.

⁵² Allain J, *The Jus Cogens Nature of Non-Refoulement*.

⁵³ Executive Committee Conclusion 79, General Conclusion on International Protection, 1996.

⁵⁴ *The protection of refugees and their right to seek asylum in the European Union*, Institute Européen De L'université De Genève, Collection Euryopa, Vol 70- 2011.

⁵⁵ Allain J, *The Jus Cogens Nature of Non-Refoulement*.

⁵⁶ 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.

⁵⁷ Cartagena Declaration on refugees, Adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984.

b) Non-refoulement with respect to national security

As to the debate between *non-refoulement* and national security, we begin by defining national security as a state or condition where the most cherished values and beliefs of a democratic way of life, in institutions of governance and unity, welfare and well-being of a nation and people are under a threat.⁵⁸ The *Perspectives on Refoulement in Africa* by Olivia Bueno recognizes *non-refoulement* as the cornerstone of the international regime of refugee protection.⁵⁹ If violated then any discussion on other rights protections of refugees is rendered moot.⁶⁰

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 also encourages states to call on the international community for assistance should they need it⁶¹ 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 their own security. Kenya's directive to close Dadaab 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.⁶² 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; and this state of affairs continued throughout 1995 and 1996, with the border remaining closed to Rwandan refugees.⁶³ The same approach was taken in Zaire in 1996 as a result of some of the problems Zaire was facing at that time.⁶⁴ Burundi, Tanzania and South Africa have also *refouled*⁶⁵ refugees before in the interest of national security. In Kenya, the Convention

⁵⁸ Threat to National Security, <http://www.dlsu.edu.ph/offices/osa/rotc/pdf/ms1/threat-NatlSecurity.pdf>

⁵⁹ Bueno O, *Perspectives on Refoulement in Africa*, (Research and Communications Coordinator), International Refugee Rights Initiative, Originally Presented At The Canadian Council For Refugees Conference, Toronto, and June 17, 2006.

⁶⁰ Bueno O, *Perspectives on Refoulement in Africa*, (Research and Communications Coordinator), International Refugee Rights Initiative, Originally Presented At The Canadian Council For Refugees Conference, Toronto, and June 17, 2006.

⁶¹ Bueno O, *Perspectives on Refoulement in Africa*, (Research and Communications Coordinator), International Refugee Rights Initiative.

⁶² Boed R, 'State of Necessity as a Justification for Internationally Wrongful Conduct' (2000) 3 Yale Human Rts. & Dev.LJ1.

⁶³ Boed R, 'State of Necessity as a Justification for Internationally Wrongful Conduct' (2000) 3 Yale Human Rts. & Dev.LJ1.

⁶⁴ Boed R, 'State of Necessity as a Justification for Internationally Wrongful Conduct' (2000) 3 Yale Human Rts. & Dev.LJ1.

⁶⁵ Bueno O, *Perspectives on Refoulement in Africa*, (Research and Communications Coordinator), International Refugee Rights Initiative.

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 also of the view that the laws allow for the violation of *non-refoulement* when there is a risk to the national security of the state, and further provides that this principle should not encourage impunity but should be used to safeguard the welfare of the vulnerable refugees.⁶⁶ A research paper titled *Non-Refoulement and National Security: A Comparative Study 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 two⁶⁷ and why this was so.⁶⁸ It concludes by providing that the international obligation on prohibition on torture is absolute,⁶⁹ 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 *Relatively Absolute? The Undermining of Article 3 ECHR in Ahmad v UK*, by Natasa Mavronicola and Francesco Messineo discusses the decision of the European Court of Human Rights in *Ahmad v UK*.⁷⁰ 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.⁷¹ In this case 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.⁷² This decision goes against the view of this dissertation as we are of the firm belief that the May 2016 directive by the government of Kenya amounted to a violation of *non-refoulement*.

⁶⁶ Bruin R and Wouters K, *Terrorism and the Non-Derogability of non-refoulement*.

⁶⁷ National security or *non-refoulement*.

⁶⁸ Hanxiao Li, *Non-Refoulement and National Security: A Comparative Study of UK, Canada and New Zealand*.

⁶⁹ Each state's approach is different so are their obligations due to the different Conventions that have been ratified by some but not all hence the balancing test is the most reasonable approach when deciding whether or not returning a person to potential danger.

Hanxiao Li, *Non-Refoulement and National Security: A Comparative Study of UK, Canada and New Zealand*.

⁷⁰ Mavronicola N and Messineo F, *Relatively Absolute? The Undermining of Article 3 ECHR in Ahmad v UK*.

⁷¹ Mavronicola N and Messineo F, *Relatively Absolute? The Undermining of Article 3 ECHR in Ahmad v UK*.

⁷² Mavronicola N and Messineo F, *Relatively Absolute? The Undermining of Article 3 ECHR in Ahmad v UK*.

1.8 Theoretical Framework

This study took on a theoretical framework by adopting both a positivist and realist approach.

It took on a positivist approach where it will rely on the law as it is. Based on the French philosopher August Comte, positivists believe that reality is stable and can be observed and described from an objective viewpoint hence positivism is concerned with uncovering truth.⁷³ Legal positivism then provides that⁷⁴ the law ought to be a legitimate institution.⁷⁵ Norms are legally valid only in virtue of having certain sources (such as judicial pronouncement or legislative enactment) and without regard for their merits; the relevant sources of law in each society are fixed by a contingent practice of officials of the legal system.⁷⁶ H.L.A Hart maintained that the very existence of a legal system depends on its being accepted. One of the most important contributions towards a “constitutional positivism” is in Ferrajoli’s theory of legal validity⁷⁷ which is a key concept for legal positivism. It states that a norm is legally existent on the basis of it belonging to a certain legal system hence jurists are able to identify valid law with merely positive law, i.e. the law enacted in a procedurally correct way.⁷⁸ In this dissertation, we look into the Refugee Act of 2006 alongside the provisions set out in various international laws which Kenya has ratified with the 1951 ratified convention, the 1969 OAU Convention, and the Convention against Torture being the primary legal instruments.

The research also decided on a realist approach where the law ought to keep up with the changing times hence the reference to the subsequent additional protocol of 1967 and the 2016 Refugee Bill. Realism is an approach to international relations that has developed through the work analysts that place themselves within a typical but diverse style or follow the tradition of analyzing possible outcomes.⁷⁹ The adoption of the scientific realist framework is based on the indispensability of theoretical entities whose presence makes a difference to what can be predicted, to what kinds of interventions can happen in the world, and to what corrections can be made to empirically

⁷³ Levine, 1988.

⁷⁴ Marmor A, *Legal Positivism: Still Descriptive and Morally Neutral* (forthcoming in the OXFORD JOURNAL OF LEGAL STUDIES) USC Legal Studies Research Paper No 05-16.

⁷⁵ Marmor A, *Legal Positivism: Still Descriptive and Morally Neutral* (forthcoming in the OXFORD JOURNAL OF LEGAL STUDIES) USC Legal Studies Research Paper No 05-16.

⁷⁶ *Public Law and Legal Theory*, the university of Chicago, working paper no 44.

⁷⁷ Ferrajoli L, *Diritto e ragione. Teoria del garantismo penale*, pp. 347–362, 898–922.

⁷⁸ Pino G, *The Place Of Legal Positivism In Contemporary Constitutional States*.

⁷⁹ *The Theoretical Frameworks of Feminism and Realism, Applied on the Humanitarian Intervention in Kosovo*.

established regularities.⁸⁰ Relative to these aims, there is simply no framework that can do a better job at achieving them than the realist one.⁸¹

1.9 Hypothesis

At the end of this study, the dissertation affirms that the 2016 government directive to close down Dadaab refugee camps violates the principle of *non-refoulement* as this principle is non-derogable. This is supported by the UN Convention against Torture⁸² as *non-refoulement* seeks to prevent the forceful return of a refugee to their country of origin where they may face the threat of torture. Article 3 of the Convention against Torture prohibits State Parties from expelling, returning ("refoule") or extraditing a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. It renders *non-refoulement* as a norm of *jus cogens* as it cannot be derogated from.

1.10 Assumptions

The assumptions adopted in this dissertation are that:

- i) The government's claims / allegations are true, that the Dadaab refugee camps are a hideout of Al-Shabaab militia and this is a threat to national security
- ii) The information relied upon when carrying out this research is accurate.

1.11 Research Design & Methodology

This section describes the methodology that was used in the study including desk research and interviews with officials from the relevant agencies on the ground that are involved with refugee affairs.

The desk research also involves 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 government directive was indeed a violation of *non-refoulement*, and if it was, whether it was justified. The advantage of using this method of research

⁸⁰ *The Theoretical Frameworks of Feminism and Realism, Applied on the Humanitarian Intervention in Kosovo.*

⁸¹ Psillos S, *Choosing the realist framework.*

⁸² It came into force in June 1987. Kenya ratified in 1997.

is that it does not limit one on the quantity of books or authors that one can use. It can however be draining and confusing when one stumbles upon books or journals that are not well researched and contradicts the basic underlying principles of the research.

The interviews with relevant officials will consist of both formal and informal interviews and these range from personal interviews in their offices to interviews conducted over the phone. The officials are persons from different agencies which interact with both urban refugees, and the refugees and asylum seekers in the camps including Dadaab refugee camp hence were in a good position to clarify the situation on the ground. Accessing these people may however be challenging.

1.12 Limitations

The Dadaab refugee camps are located in Garissa County and it is predominantly inhabited by Somali refugees and asylums seekers, and hosts refugees from other nationalities including South Sudan, Ethiopians, Eritreans, Democratic Republic of Congo persons etc.⁸³ This dissertation only looks at the government directive with regard to *non-refoulement*, it does not explore the other avenues of either possible human right violations such as freedom of movement, nor does it explore in depth into the other remedies available to the refugees especially Somali refugees.

Foreseeable challenges include the limited opportunity to have direct interviews with the refugees and asylum seekers in Dadaab. It would be advantageous to have an interview with an asylum seeker who voluntarily went back to Somalia but came back for one reason or the other. This may however be difficult since accessing them will be a challenge given the location of Dadaab and the security risks involved with accessing the camps. We will seek however seek the support of the major refugee agencies who operate in Dadaab⁸⁴ in an attempt to access to refugees in Dadaab using secondary means such as Skype and phone calls.

It might also be difficult to access the relevant government officials who are in charge of refugee related issues but this can be overcome by continuous requests for meetings and being persistent.

⁸³ Information obtained from the December 2016 UNHCR report.

⁸⁴ UNHCR and Refugee Affairs Secretariat (entity that has been appointed to replace DRA), Refugee Consortium of Kenya, Danish Refugee Council etc.

1.13 Chapter Breakdown

The objectives of this study shall be met within four chapters:

i) Chapter One – Introduction

It introduces the dissertation by explaining what the study is about, the history and justification of the study. It includes the sections set out in this proposal such as the:

- Background – it introduces the history of refugees in Kenya and give a brief description of the ongoing debate of national security vis-à-vis upholding international obligations.
- Statement of problem – the problem in a nutshell is the violation of the principle of *non-refoulement* by the May 2016 government directive.
- Justification of the study – Kenya is party to a number of international conventions provide for the principle of *non-refoulement* yet seems to be going against this by setting a limit as to the number of refugees that can be in the country at any given point as well as issuing the May 2016 directive ordering the closure of Dadaab refugee camps.
- Statement of Objective – the main objective of this dissertation is to determine whether the government directive violates the principle of *non-refoulement* and whether there is a nexus to uphold this principle when facing threats to national security.
- Research Question – the objective will be achieved by answering the two questions:
 - Whether the government directive to close down Dadaab refugee camps violates the principle of *non-refoulement*?
 - Whether the government is mandated to uphold this principle when claiming to be facing threats to national security?
- Literature Review – this section will analyze the main two areas in the study by analyzing the literature available on them.
- Theoretical Framework – it discusses the framework adopted by this study and why.
- Hypothesis – my hypothesis is that the government directive does not violate the principle of *non-refoulement* because both international conventions and national law allows for the limitation of this right based on threats to national security.
- Assumptions – it lists the assumptions adopted such as the belief that the information relied upon in is credible.

- Research Design & Methodology – it gives a guide as to how the research will be carried out in terms of method of research and data collection which in this case will consist of interviews as my primary source of data, and desk research and analysis and my secondary source.
- Limitations – it provides the foreseeable challenges and limits to the research such as not being able to directly interview the asylum seekers in Dadaab refugee camp who voluntarily went back to Somalia but came back for one reason or the other.
- Chapter Breakdown – it contains the titles of the four chapters that will be in the dissertation and gives a brief explanation of each.
- Time line/Duration – this sets out the approximate time that it will take to complete each chapter and the dissertations as a whole which is 10 months.
- Bibliography – is a list of all the authority relied upon in the course of the research.

ii) Chapter Two – The Government Directive

This chapter introduces the principle of *non-refoulement* as well as the May 2016 government directive. It will include a discussion on whether the directive itself, and the steps taken in the achievement of this directive violate the principle of *non-refoulement*.

iii) Chapter Three – Non-Refoulement v National Security

This chapter determines whether there is a nexus between the duty of Kenya to uphold the principle of *non-refoulement* when claiming that refugees in Dadaab refugee camps have led to increased threats to national security. It will discuss the general application of non-refoulement with regard to national security, and seek to establish the instances when the principle of *non-refoulement* can be derogated from or if it has acquired the status of a norm of *jus cogens*.

iv) Chapter Four – 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.

2. CHAPTER TWO

The principle of *non-refoulement* vs the government directive to close Dadaab Camp

2.1 Introduction

One of the most essential component of refugee law and the rights of asylum seekers is the protection against the forceful return of a person to a country where they have reason to fear persecution or would be in danger.⁸⁵

It has been said that the idea that a State ought not to return refugees or asylum seekers to other states in certain circumstances is one that is of recent origin⁸⁶ yet this is disputed as the principle has been practiced for years despite not being codified.

This chapter introduces the principle of *non-refoulement* as well as introduce the May 2016 government directive to close Dadaab refugee camp. It includes a discussion on whether the directive itself, and the steps taken in the achievement of this directive violate the principle of *non-refoulement*.

2.2 History and development of the principle of *non-refoulement*

This principle has been in play in the international arena and refugee law for years with the 1951 Convention on the Status of Refugees giving it universal recognition.⁸⁷ Reference to the principle can be traced back to the 1892 Geneva Session of the *Institut de Droit International* (Institute of International Law) where it was established that:⁸⁸ *a refugee should not by way of expulsion be delivered up to another State that sought him unless the guarantee conditions set forth with respect to extradition were duly observed.*⁸⁹

Coded reference to it was in the 1933 Convention relating to the International Status of Refugees which provided that *'the Contracting Parties undertake not to remove or keep from its territory by application of police measures, such as expulsions or non-admittance at the frontier (refoulement),*

⁸⁵ Note On Non-Refoulement (Submitted By The High Commissioner), EC/SCP/2, By UNHCR, 1977. Executive Committee Of The High Commissioner's Programme, Twenty-Eighth Session, Sub-Committee Of The Whole On International Protection

⁸⁶ Goodwin-Gill G S, *The Principle of Non-Ref: Its Standing and Scope in International Law*, pg 6.

⁸⁷ Article 33, *Convention Relating to The Status of Refugees*, 1951.

⁸⁸ *Règles internationales sur l'admission et l'expulsion des étrangers* 1892, Article 16.

⁸⁹ Molnar T, *The principle of non-refoulement under international law: Its inception and evolution in a nutshell*, pg 51.

refugees who have been authorized to reside there regularly, unless the said measures are dictated by reasons of national security or public order.

The Contracting Parties undertakes in any case not to refuse entry to refugees at the frontiers of their countries of origin. It reserves the right to apply such internal measures as it may deem necessary to refugees who, having been expelled for reasons of national security or public order, are unable to leave its territory because they have not received, at their request or through the intervention of institutions dealing with them, the necessary authorizations and visas permitting them to proceed to another country.'⁹⁰

The above definition however applied to specific countries in Europe hence the first context where the prohibition of *refoulement* was used universally was the field of humanitarian international law in Article 45 of the 1949 Geneva Convention relative to the Protection of Civilians Persons in Time of War where “*in no circumstances shall a protected person be transferred to a country where he or she may have a reason to fear persecution for his or her political opinions or religious beliefs*”.⁹¹

2.3 Modern understanding and application of the principle

The principle of *non-refoulement* is enshrined in both domestic and international laws, including the 1951 Convention on the status of refugees, the universally accepted basic refugee law, which states that ‘*No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.*’⁹²

Non-refoulement in a nutshell provides that no state shall return a refugee to where his life or freedom would be threatened.⁹³

The development of the international protection of human rights later broadened the scope of the application of *non-refoulement* beyond the framework of international refugee law. Indirectly, it can be inferred from Article 7 of the 1966 International Covenant on Civil and Political Rights

⁹⁰ Article 3 of *the Convention relating to the International Status of Refugees*, 1933. League of Nations, Treaty Series Vol CLIX No 3663.

⁹¹ Molnar T, *The principle of non-refoulement under international law: Its inception and evolution in a nutshell*, pg 52.

⁹² Article 33, *Convention Relating to The Status of Refugees*, 1951.

⁹³ Clark T and Crepeau F, *Mainstreaming Refugee Rights: The 1951 Convention and International Human Rights Law*.

banning torture as per the interpretation of the Human Rights Committee monitoring the implementation of the Covenant that was assigned to the article concerned, in their General Comments No 20 and No 31 as well.⁹⁴

In 1977, the UNHCR ExCom concluded that the implementation of the principle of *non-refoulement* did not require the formal recognition of refugee status, and later on that the principle included non-rejection at frontiers adding that access to fair and effective asylum procedures should also be ensured.⁹⁵

2.4 Regional application

Looking at the regional levels, the principle appears in binding international legal instruments.

In the African continent, Article II (3) of the 1969 OAU Convention governing the specific aspects of refugee problems in Africa broadens the 1951 Convention prohibition to include: rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened.⁹⁶

In the Americas, Article 22 (8) of the 1969 American Convention on Human Rights on the other hand refers to *non-refoulement* as a purely human rights obligation. In Latin America, the 1984 Cartagena Declaration, reiterating the significance of the principle of *non-refoulement*, gave emphasis to it as a cornerstone of the international protection of refugees.

In addition, the general prohibition of *refoulement* implicitly follows from Article 3 of the 1950 European Convention on Human Rights declaring the prohibition of torture as an absolute right. The European Court of Human Rights ruled that both extradition⁹⁷ and expulsion⁹⁸ violated Article 3 of the Convention banning torture if there were reasonable grounds to assume actual danger that the person concerned would be subjected to torture or inhuman or other degrading treatment or punishment in the receiving State. It however departs from this decision in *Ahmad v UK*,⁹⁹ where

⁹⁴ See also: Betlehem & Lauterpacht, 2003, pg 92; and Goodwin-Gill & McAdam, 2007, pg 209.

⁹⁵ Molnar T, *The principle of non-refoulement under international law: Its inception and evolution in a nutshell*, pg 52.

⁹⁶ No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2.

⁹⁷ In *Soering v The United Kingdom*, Council of Europe: European Court of Human Rights, judgment of 7 July 1989.

⁹⁸ In *Chahal v The United Kingdom*, Council of Europe: European Court of Human Rights, judgment of 15 November 1996,

⁹⁹ *Babar Ahmad and others v UK* ECtHR Judgment of 10 April 2012, App No's 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09.

the Court found that there would be no breach of Article 3 of the ECHR in extraditing terrorist suspects to face trial and probable imprisonment in ‘super-maximum security’ detention facilities in the United States of America.

2.5 Situation in Kenya

2.5.1 Background

Somali refugees have been in Kenya since 1991 when the civil war began¹⁰⁰ resulting in about 285,000 Somali refugees,¹⁰¹ a number which had almost tripled by 2006. An estimated 150,000 Somali refugees came to Kenya¹⁰² in 2011 as a result of the famine and found their way to the Dadaab.¹⁰³

Since then, there have been increased cases of insecurity and terrorist attacks in the country bringing leading to the debate between upholding the rights of refugees, and focusing on preserving national security.¹⁰⁴ In 2012, the forced encampment policy for refugees¹⁰⁵ was issued following a series of attacks,¹⁰⁶ and in 2014, the government issued another directive ordering urban refugees to relocate to the designated camps.¹⁰⁷ Despite these measures, Kenya has been the target of numerous terrorist attacks¹⁰⁸ such as the Westgate attack that left 67 people dead.¹⁰⁹

On 10th November 2013, the government of Kenya, the federal government of Somalia and UNHCR signed *The Tripartite Agreement for Repatriation of Somali Refugees from Kenya* which provided a structure for the voluntary repatriation of Somali refugees from Kenya. This was the first legal step taken in the realization of the voluntary repatriation of Somali refugees, a move that was taken positively by all affected parties since it would lessen the refugee burden that Kenya

¹⁰⁰ *Hasty Repatriation: Kenya's attempt to send Somali refugees home*, Published in 2013 by the Heritage Institute for Policy Studies, pg. 9.

¹⁰¹ Kiama L, *the Gender Perspectives of Somali Refugees in Eastleigh, Nairobi City County, On Repatriation to Their Country*, Pg. 12.

¹⁰² *Asylum Under Threat – Assessing the protection of Somali refugees in Dadaab refugee camps and along the migration corridor*, 2012, Refugee Consortium of Kenya with the support of Danish Refugee Council, page 13.

¹⁰³ *Hasty Repatriation: Kenya's attempt to send Somali refugees home*, Published in 2013 by the Heritage Institute for Policy Studies, pg. 9.

¹⁰⁴ A similar view is seen at <http://foreignpolicy.com/2016/07/21/the-worlds-largest-refugee-camp-is-invited-to-please-shut-down-kenya-somalia-dadaab/> accessed on 13.1.2016.

¹⁰⁵ Plotch 2010 as seen in Oxford Monitor of Forced Migration Vol 3, No 1, *A Critical Analysis of Kenya's Forced Encampment Policy for Urban Refugees* by Martha Marrazza.

¹⁰⁶ Between November and December 2012, there were five separate grenade attacks with the Kenyan-Somali Member of Parliament, Honorable Yusuf Hassan being one of the victims.

¹⁰⁷ This can be seen on the Press Statement, Cabinet Secretary for Interior and Coordination of National Government, Refugees and National Security Issues (Mar. 26, 2014).

¹⁰⁸ More information can be found on <http://www.aljazeera.com/news/2016/10/kenya-attack-12-killed-mandera-al-shabab-161025063500398.html> accessed on 22.01.2017.

¹⁰⁹ More information can be found on <http://www.bbc.com/news/world-africa-24189116> accessed on 22.01.2017.

was shouldering while adhering to the set international rules, and would only apply to the refugees that were willing to return. It was also meant to solve the question of terrorists hiding in Dadaab but this was not the case since the Mpeketoni attack, and the Garissa University attack that killed 147 took place despite this arrangement.

In May 2016, the government issued the directive ordering the closure of Dadaab refugee camps since some of the attacks had been said to have been planned in Dadaab refugee camp where Al Shabaab sympathizers were rumored to be hiding among the refugees, in addition to it being a center of smuggling and contraband trade besides being enablers of illicit weapons proliferation.¹¹⁰

2.5.2 The government directive

In Kenya, the principle of *non-refoulement* is expressly provided for in the Refugee Act¹¹¹ 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.

The government directive to close the Dadaab refugee camps by November 2016 brought about many 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*, a violation of *non-refoulement*.

¹¹⁰More information can be found at <http://www.interior.go.ke/index.php/2015-02-28-06-43-54/news/98-government-statement-and-update-on-the-repatriation-of-refugees-and-scheduled-closure-of-dadaab-refugee-camp> accessed on 06.02.2017.

¹¹¹ Section 18, *Refugee Act*, 2006.

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 2013,¹¹² 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.

RAS stated that the refugees were not forced to sign up for the program, and that those who did and backed out were not forced to uphold their previous decision to return to Somalia. They stated that they worked closely with UNHCR to ensure the process adhered to the international standards and obligations given that repatriation should be voluntary. The fact that the UN High Commissioner for Refugees Filippo Grandi visited Dadaab in December 2017 and did not voice concerns or reservations with the process was seen as validation that the ongoing process adhered to the necessary requirements and that it was not *refoulement* but was voluntary repatriation. The late Hon. Nkaissery, in his capacity as the Cabinet Secretary of Internal Security at the time, had also visited Dadaab on World Refugee Day and assured the refugees that no one was going to force them home, supporting the argument that the repatriation process was voluntary.

With the facts presented as such alongside the claim that the government issued the directive in the interests of national security it would appear as if their claim was justified and supported by law given the exception in article 33 of the 1951 Convention

2.6 Conclusion

In summary, the principle of *non-refoulement* provides that no state shall return a refugee to where his life or freedom would be threatened and it plays a vital role in refugee law as it protects both refugees and asylum seekers from being forcefully returned to where they are at risk of being tortured, hence is a cornerstone for refugee law.

The 1951 Convention Relating to the Status of Refugees provides for it in article 33. It also providing for the circumstances when it can be derogated from which is when there are reasonable grounds for regarding the refugee(s) as a danger to the security of the country in which he is. The directive by the government of Kenya cited national security concerns, which as per the 1951

¹¹² Based on an interview with one of the officials.

Convention is line with the law as it is a valid reason for the derogation of Article 33. There have been a number of cases such as *Ahmad v UK* which support this stance, that migrants who are a threat to security ought to be extradited or repatriated as per the laws without considering the consequences that they may face once returned. This is supported by States which seek to protect their own interests, usually their internal security. This seems to justify the directive and ongoing repatriation given that representatives of the international community do not seem to have reservations on how the process is being done.

3. CHAPTER THREE

The principle of *non-refoulement* vs national security

3.1 Introduction

Over the years, both conventions and case law have provided that the principle of *non-refoulement* ought to be protected as ferociously as the prohibition against torture. The non-derogable character of the prohibition on *refoulement* is affirmed in Article VII(1) of the 1967 Protocol and in the 1987 Convention against Torture which prohibit State parties from forceful repatriation rendering the principle of *non-refoulement* a peremptory norm. The 2016 government directive hence seems to violate this as it provides for a situation of involuntary repatriation. The government justified their directive by citing national security concerns following the numerous terrorism attack that it suffered. This is however no longer a blanket claim that can be used by States with regard to the violation of the prohibition against torture where *non-refoulement* falls.

3.2 Legal Confirmation

The *Jus Cogens Nature of Non-Refoulement* by Jean Allain, emphasizes on the non-derogability aspect of the principle stating that *non-refoulement* is part of customary international law¹¹³ and is a norm of *jus cogens* hence cannot be deviated from or violated despite the circumstances surrounding the situation.¹¹⁴

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 is not subject to derogation’.¹¹⁵ In *the protection of refugees and their right to seek asylum in the European Union*,¹¹⁶ 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.¹¹⁷ This applies independently of any formal determination of refugee status by a State hence the principle of *non-refoulement* applies as soon as an asylum seeker claims protection.¹¹⁸

A further prominent step in this direction was taken when the Convention against Torture provided that *no State shall expel, return or extradite a person to another State where there are substantial*

¹¹³ G S Goodwill-Gill, *The Refugee in International Law*, 2nd edn, 1996, pg. 166.

¹¹⁴ Allain J, *The Jus Cogens Nature of Non-Refoulement*.

¹¹⁵ Executive Committee Conclusion 79, General Conclusion on International Protection, 1996.

¹¹⁶ *The protection of refugees and their right to seek asylum in the European Union*, Institute Européen De L’université De Genève, Collection Euryopa, Vol 70- 2011.

¹¹⁷ Allain J, *The Jus Cogens Nature of Non-Refoulement*.

¹¹⁸ 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.

*grounds for believing that he would be in danger of being subjected to torture, and for the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.*¹¹⁹

This has been applied in many cases such as: *Ahmed v Austria*¹²⁰ where the Austrian Government took the position that since the State authority of Somalia had ceased to exist, the Somali applicant could no longer fear ill-treatment as prohibited by Article 3 upon return. The Commission rejected that argument stating that it was sufficient that those who hold substantial power within the State, even though they are not the Government, threaten the life and security of the applicant.¹²¹

In *HLR v France*¹²² the Commission held that the risk of ill-treatment by a powerful and structured criminal organization in Colombia, against whom it was unlikely that the Government of Columbia would be able to offer adequate protection, was sufficient to qualify under Article 3.¹²³

In *Saadi v Italy*, the Grand Chamber of the European Court of Human Rights held that Article 3 of the European Convention on Human Rights (ECHR) is an absolute right in all its applications, including *non-refoulement*, regardless of who the potential victim of torture, inhuman or degrading treatment is, what she may have done, or where the treatment at issue would occur.¹²⁴

3.2.1 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa

The OAU Convention expands the scope of *non-refoulement* by availing its protection to a broader category of people as it expands the definition of refugee to include those fleeing war and internal disturbances. The principle is absolute in the Convention, it provides for voluntary repatriation but does not provide for a situation which can lead to the expulsion of a refugee or asylum seeker, unlike the 1951 Convention.

¹¹⁹ Article 3 of the *Convention against Torture*, 1984.

¹²⁰ *Ahmed v Austria*, 24 ECtHR judgment of 1997, at para 68.

¹²¹ Weissbrodt D and Hortreiter I, *The Principle of Non-Refoulement: Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties*, University of Minnesota Law School, pg 33.

¹²² *HLR v France*, Commission Report of 1995, App No 24573/94.

¹²³ Weissbrodt D and Hortreiter I, *The Principle of Non-Refoulement*, pg 33.

¹²⁴ *Saadi v Italy*, 49 ECtHR Judgment of 2009, 30.

3.2.2 *Convention against Torture (CAT)*

CAT came into entry in 1987 and provides an absolute prohibition against torture, in addition to defining torture. In article 3, it prohibits state parties from refouling a person where there are substantial grounds for believing that they would be in danger of being subjected to torture. In essence, it provides an absolute prohibition against refoulement seeing as the provisions of CAT are absolute and cannot be derogated from making the principle a norm of *jus cogens*.

3.2.3 *2006 Refugee Act in Kenya*

The Kenyan Refugee Act provides that no one shall be refused entry, be expelled, extradited or returned to any other country if the person may be subject to persecution or the person's life, physical integrity or liberty would be threatened on account of external aggression, occupation, foreign domination or events seriously disturbing public order in part or the whole of that country.

While it also provides that the Minister may - after consultation with the Minister responsible for matters relating to immigration and internal security - order the expulsion from Kenya of any refugee or member of his family if the expulsion is necessary on the grounds of national security or public order; this contradicts Article 2 (5) of the Constitution which provides for the application of the OAU Convention, ICCPR and CAT.

3.2.4 *Customary international law*

Customary international law evolves from the practice of States.¹²⁵ For a law to acquire this status, there are elements to be considered, these are State practice and *opinio juris*.¹²⁶

Authors such as Orakhelashvili and Jean Allain argue that the principle of *non-refoulement* forms not only part of customary international law, but has achieved a *jus cogens* status. Other authors like Bruin and Wouters hold a contrary opinion.¹²⁷ Jean Allain argues that *non-refoulement* is a *jus cogens* norm because it is accepted by the international community of States as a whole as a norm from which no derogation is permitted.¹²⁸ He also points to state practice in Latin America

¹²⁵ M Dixon, *Textbook on International Law*, pg 32.

¹²⁶ M Dixon, *Textbook on International Law*, pg 32 - 37.

¹²⁷ Waweru T, *The Kenyan Law on Refugees and Its Compliance with the Principle of Non Refoulement*, page 64.

¹²⁸ Waweru T, *The Kenyan Law on Refugees and Its Compliance with the Principle of Non Refoulement*, page 64.

(including the Cartagena Declaration), to the work of other scholars, and to Executive Committee conclusions, which he labels as relevant because they reflect the consensus of states.¹²⁹

Bruin and Wouters, who differ with the argument that *non-refoulement* has acquired the status of *jus cogens*, argue that the major practical problem remains the burden of proof to characterize the obligation of *non-refoulement* as a peremptory norm of general international law and to claim this in a court of law.¹³⁰

With regard to this argument, the court in *the North Sea Continental Shelf case*¹³¹, identified three elements that which determine whether a norm or principle is considered to form part of customary international law:¹³²

- First, the conventional rule should, at all events potentially, be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law.
- Secondly, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected.
- Thirdly, within whatever period has passed since the first expression of the conventional rule, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.

a) *Norm creating character*

The conventional expression of the principle of *non-refoulement* in instruments such as the 1951 Convention, the ICCPR, OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa, ECHR, the American Convention on Human Rights, and the Convention against Torture are of a norm-creating character. The principle is also reflected in a number of important non-binding international texts such as the Declaration on Territorial Asylum adopted

¹²⁹ Waweru T, *The Kenyan Law on Refugees and Its Compliance with the Principle of Non Refoulement*, page 64.

¹³⁰ Waweru T, *The Kenyan Law on Refugees and Its Compliance with the Principle of Non Refoulement*, page 64.

¹³¹ *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v Netherlands)*, ICJ Reports 1969, p3, International Court of Justice (ICJ), 20 February 1969

¹³² *The scope and content of the principle of non-refoulement: Opinion of Sir Elihu Lauterpacht and Daniel Bethlehem*, pg 143.

by the United Nations General Assembly in 1967. Other instruments of a similar character include the Asian- African Refugee Principles, the Cartagena Declaration, and various expressions of the principle by the Council of Europe.¹³³

The interpretation of the prohibition of torture or cruel, inhuman or degrading treatment, or punishment contained in Article 3 of the Convention Against Torture, Article 3 of the European Convention on Human Rights, Article 7 of the ICCPR, and Article 5 of the African Charter on Human and People's Rights, confirms the normative and fundamental character of this principle by prohibiting torture.¹³⁴

b) *Widespread and representative state support*

The extent of state participation on the 1951 Convention, 1967 protocol, the Convention against torture, and the regional laws indicate acceptance of the principle of *non-refoulement*.¹³⁵ Because of its wide acceptance, it is UNHCR's considered view, supported by jurisprudence and the work of jurists, that the principle of *non-refoulement* has become a norm of customary international law.¹³⁶

c) *Consistent practice and recognition of the rule*

This amounts to state practice and *opinio juris*. State practice can be seen by the express incorporation of this principle in the domestic and regional laws of the various states be it as part of their refugee law, bill of rights or in the provisions prohibiting torture.¹³⁷ *Opinio juris* is seen by virtue of this principle creating legal obligations on the states, and the states being bound by it. Following the reasoning in the *North Sea Continental Shelf* judgment, we can surmise that the

¹³³ *The scope and content of the principle of non-refoulement: Opinion of Sir Elihu Lauterpacht and Daniel Bethlehem*, pg 144.

¹³⁴ *The scope and content of the principle of non-refoulement: Opinion of Sir Elihu Lauterpacht and Daniel Bethlehem*, pg 144.

¹³⁵ *The scope and content of the principle of non-refoulement: Opinion of Sir Elihu Lauterpacht and Daniel Bethlehem*, pg 144.

¹³⁶ Kenya National Commission on Human Rights & another v Attorney General & 3 others [2017] eKLR, Constitutional Petition No. 227 of 2016.

Justice J.Matavo referred to the fact that UNHCR and its Executive Committee have even argued that the principle of non-refoulement is progressively acquiring the character of *ius cogens*; see Executive Committee Conclusion No. 25 para. (b); UN docs. A/AC.96/694 para 21.; A/AC.96/660 para. 17; A/AC.96/643 para. 15; A/AC.96/609/Rev.1 para. 5.

¹³⁷ *The scope and content of the principle of non-refoulement: Opinion of Sir Elihu Lauterpacht and Daniel Bethlehem*, pg 148.

principle of *non-refoulement* has acquired the status of customary international law hence is binding on all states whether they are party to the relevant conventions or not.

3.2.5 Inconsistent practice

Negative and inconsistent State practices have been seen as acts of violation of the principle rather than denial of obligation as seen in the following instances:

- The Tampa incident in Australia - The Norwegian freighter carrying Afghanistan refugees whom they saved at high seas was not allowed to disembark despite concern over the welfare and health of the refugees as well as the crew.¹³⁸ The incident attracted responses from international community and led to the Australian House of Representative enacting new laws to validate their actions.¹³⁹ Australia never denied its responsibility not to refouler the refugees but asserted that the refugees should not be allowed to enter Australia illegally.¹⁴⁰
- One of the shocking instances of enforced return occurred in Burundi in June 2005. Between March and June of 2005, UNHCR estimated that 8,000 Rwandan Hutus had entered Burundi looking for asylum after expressing concerns about the implementation of the *gacaca* court system, a traditional dispute resolution mechanism designed to promote justice and reconciliation following the 1994 genocide.¹⁴¹ Many of the asylum seekers alleged that *gacaca* were being unfairly manipulated by Tutsi to persecute any Hutu, regardless of whether or not they had taken part in the genocide; claims which the Rwandan government disputed asserting that the fears of Hutus were based on unsubstantiated rumors or, more sinisterly, a desire to evade justice.
The illegal immigrants, about 5000 Rwandans, were then deported with eyewitnesses reporting that they observed asylum seekers jumping out of trucks to avoid deportation.¹⁴² The process violated the principle of *non-refoulement*.
- Following the influx of Rwandan refugees after the 1994 genocide, Tanzania closed it border. UNHCR and the government of Tanzania issued a statement in December 1996,

¹³⁸ Imaam D, *Escaping the Principle of Non- Refoulement*, Faculty of Syariah and Law Universiti Sains Islam Malaysia, 2013

¹³⁹ Imaam D, *Escaping the Principle of Non- Refoulement*, Faculty of Syariah and Law Universiti Sains Islam Malaysia, 2013

¹⁴⁰ Imaam D, *Escaping the Principle of Non- Refoulement*, Faculty of Syariah and Law Universiti Sains Islam Malaysia, 2013, page 89.

¹⁴¹ Bueno O, *Perspectives on Refoulement in Africa*, International Refugee Rights Initiative, 2006, pg 4.

¹⁴² Bueno O, *Perspectives on Refoulement in Africa*, International Refugee Rights Initiative, 2006, pg 4.

declaring that Rwanda was safe leading to approximately 470,000 refugees were repatriated before the end of the year.¹⁴³ In 2002, the Tanzanian Minister for Home Affairs directed that Rwandan refugees be repatriated by the end of the year and that anyone refusing to return would be interrogated and have steps taken against them.¹⁴⁴ Former president, Jakaya Kikwete, called for repatriation, claiming that Burundi was peaceful therefore Burundian refugees had no reasons to continue living in refugee camps.¹⁴⁵ This hostility was echoed at the local level, where the district coordinator for Kibondo in 2005 ordered all Burundian refugees to produce letters explaining why they could not return.¹⁴⁶

3.3 The Kenyan Context

Seeing as the principle is non-derogable, Kenya's claim that refugees in Dadaab pose a threat to national security carries no weight as per its international obligations. Given the jus cogens nature of this principle and its status in international law, any measure taken by a State to force refugees and asylum seekers directly or indirectly to return to their country of origin where they fear persecution or may be in danger is seen as an act of refoulement hence a violation of their international duties and obligations.

This is further supported by the Constitutional Petition No 227 of 2016 that determined whether the government's decision violated the principle of *non-refoulement*, whether the decision violated the refugees' right to fair administrative action, and whether the decision violated the constitutional rights of said refugees.¹⁴⁷ The court held that the directive was unconstitutional and void, and that it violated their right to fair administrative action. Onto the question of fair administrative action, the 2006 Refugee Act established the Department for Refugee Affairs (DRA), under the Ministry of State for Immigration and Registration of Persons, as the government agency responsible for all administrative matters concerning refugees in Kenya and the co-ordinate activities and programs relating to refugees.¹⁴⁸ This included developing policies, seeking durable solutions, coordinating

¹⁴³ Bueno O, *Perspectives on Refoulement in Africa*, International Refugee Rights Initiative, 2006, pg 5.

¹⁴⁴ Bueno O, *Perspectives on Refoulement in Africa*, International Refugee Rights Initiative, 2006, pg 5.

¹⁴⁵ Bueno O, *Perspectives on Refoulement in Africa*, International Refugee Rights Initiative, 2006, pg 5.

¹⁴⁶ Bueno O, *Perspectives on Refoulement in Africa*, International Refugee Rights Initiative, 2006, pg 5.

¹⁴⁷ *Kenya National Commission on Human Rights & another v Attorney General & 3 others*.

¹⁴⁸ S6 of the Refugee Act, 2006.

international assistance, issuing travel documents and managing the refugee camps.¹⁴⁹ The vision was for DRA to take over from UNHCR as lead agency on refugee issues in Kenya.¹⁵⁰

Prior to the directive, the Refugee Status Determination process (RSD) was done by both UNHCR and DRA. The 2016 directive not only stated that the Dadaab refugee camp ought to be closed but also disbanded DRA hence limiting the RSD process.¹⁵¹ This was both unconstitutional and a violation of the right to asylum. As per Kenyan laws, an institution that was established by an Act of Parliament can be disbanded if the provision establishing it is repealed, the Act establishing it repealed, or amended by another Act of Parliament, which was not the case in this situation. The situation is further aggravated by the fact that UNCHR was stopped from continuing with the RSD process which essentially left asylum seekers stranded as well as the returnees who had gone to Somalia but opted to return to Dadaab. Lack of registration and the acquisition of proper documentation bars them from accessing food rations, medical services, government institutions, educational facilities and employment opportunities. While this may not violate the principle of *non-refoulement* directly, it infringes on their dignity and puts them at risk of deportation on the claims of them being illegal migrants or illegally present in Kenya effectively putting them in harm's way; in addition to frustrating their lives and stay in the camp.

Interviews with officials from the Human Rights Watch and UNHCR revealed that some of the returnees, approximately 400-500 (out of the 66,611 returnees in 2016 & 2017), who had gone to Somalia returned to Kenya stating that the situation in Somalia was not as was portrayed by the Kenyan government. They lacked access to food, access to facilities such as hospitals, and were faced with harsh living conditions forcing some to live in the IDP camps in Somalia. The difference in the education system also poses a challenge as some of them were in the middle of pursuing their education while in Kenya, or had children/relatives who were continuing with their education. As such, the voluntary repatriation process left them in a more vulnerable situation as they were no longer refugees in Kenya hence when they returned they had to begin the registration process afresh despite the DRA having been disbanded, RAS not registering new refugees and UNHCR being unable to conduct them at that moment.

¹⁴⁹ H Elliott, *Refugee resettlement: the view from Kenya, Findings from field research in Nairobi and Kakuma refugee camp*, Country of First Asylum, Research Report 2012/01, pg 7.

¹⁵⁰ Interview with DRA official in Nairobi as per H Elliott, *Refugee resettlement: the view from Kenya, Findings from field research in Nairobi and Kakuma refugee camp*, Country of First Asylum, Research Report 2012/01, pg 7.

¹⁵¹ 2016 Government directive.

3.4 Conclusion

The 2016 directive does violate the principle of *non-refoulement* given the numerous reports by human rights organizations highlighting the plight that some refugees face as they feel pressurized to leave. While there are a number of such cases, it does not amount to the whole process being an illegality considering that there were voluntary repatriations prior to the directive, but it does make us question the willingness of those who have been repatriated post 2016.

While Kenya's actions and the court held that the directive was unconstitutional and a violation of the principle of *non-refoulement*, it does not negate the whole process as some are being repatriated willingly and interviews show that the pressure the refugees felt placed upon them by the government is no longer there. In as much as some are still uncertain as to their future, interviews show that they seem aware of their rights and the fact that they should not be forced to return to an unsafe place given that they mentioned that some of the returnees in Somalia either ended up as IDPs or return to Dadaab given the unfriendly environment and lack of access to basic amenities and facilities.

4. CHAPTER 4 – CONCLUSION AND RECOMMENDATIONS

4.1 Introduction

Based on the discussion above we affirm that *non-refoulement* is a fundamental principle in refugee law. The 2016 government directive to close Dadaab camps violates it as it indirectly forces Somali refugees to return to Somalia by among others: putting a cap on how many refugees can be in Kenya at any given moment, and a time limit during which Somali refugees from Dadaab ought to have returned to Somalia which the Kenyan government declared safe for civilian habitation.

The directive was highly criticized by human rights organizations and the international community given that Kenya has ratified the 1951 Refugee Convention, the OAU Convention, CAT and has the 2006 Refugee Act; all of which protect this right. The 1951 Convention and the Kenyan 2006 Refugee Act provide for situations where refoulement may take place, which is in the occasion that the refugee is a threat to the safety of the community. Based on this, the directive by the Kenyan government to shut down Dadaab refugee camps is justified given that their reason for this was in the interests of national security. This comes after rumours that some terror attacks had been said to have been planned in Dadaab and that is it a recruitment ground for the Al-Shabaab.¹⁵²

The 1969 OAU Refugee Convention however does not envision a situation in which refugees can be *refouled* and the CAT classifies *refoulement* as an act of torture.¹⁵³ Based on these two, particularly the Convention against Torture, we can ascertain that the principle of *non-refoulement* is a non-derogable principle hence Kenya cannot justify the directive citing threats to national security. This is supported by the Kenyan High Court decision in 2017 declaring the directive unconstitutional and void since the protection against torture is provided as a right which cannot be limited.

Prior to the directive there were a number of willing returnees who were helped by UNHCR and the government to go back to Somalia given the Tripartite agreement that was signed by Kenya, Somalia and UNHCR to guide the repatriation process. Since the directive was issued, there have been numerous refugees who ‘volunteered’ to return to Somalia which they had been assured was safe. Amnesty International confirms that the thousands of Somali refugees who were indirectly

¹⁵² <http://www.theeastafrican.co.ke/news/Efforts-to-lower-refugee-numbers-run-into-challenges--/2558-4077072-b0dq0c/index.html> accessed on 15.01.2018.

¹⁵³ Article 3.

pressured into leaving the Dadaab camp in Kenya were facing famine, starvation and renewed displacement in Somalia¹⁵⁴ due to insecurity.

This questions the voluntariness of the repatriation process but representatives from UNHCR and RAS assured us that the refugees who volunteer are counselled first to ensure that they are returning voluntarily. While this seems to make the process transparent and ensure Kenya does not refouler any refugee, the circumstances being a decrease in food ratio, the time limit set by the government, disbandment of DRA and stopping of registration of new refugees, stipend they forfeit should they refuse to return 'voluntarily' and assured education upon their return bring about an image of coercion or indirect pressure.

Despite the directive violating of the principle of *non-refoulement*, the Kenyan government has taken steps to make the process seem transparent as they continue looking for durable solutions to the refugee issue. In March 2017, there was an IGAD Summit in Nairobi which lead to the *Nairobi Declaration on Durable Solutions for Somali Refugees and Reintegration of Returnees in Somalia* which aim to provide protection and deliver durable solutions for refugees, particularly the Somali refugees in the region.¹⁵⁵

4.2 IGAD Summit

The annex contains a pledge made by Kenya to the effect that Kenya should continue allocating funds for the development of infrastructure and provision of social amenities in refugee camps and refugee hosting areas; we should also continue providing access to education and healthcare services to the refugee population in the country; and aid the refugees with legitimate claims to citizenship and/or residency in Kenya acquire said status.¹⁵⁶ These are measures that will look into the social and economic welfare of the refugee population in the country as they will be able to pursue their education, develop skills and use that as a means of sustaining their livelihood which essentially reduces their dependency on the government and positively contributes to Kenya's economy.

¹⁵⁴ Somalia: Refugees pressured to leave Dadaab return to insecurity, famine and hunger, 21 December 2017 <https://www.amnesty.org/en/latest/news/2017/12/somalia-refugees-pressured-to-leave-dadaab-return-to-insecurity-famine-and-hunger/> accessed on 15.01.2018.

¹⁵⁵ <http://crrf.unhcr.org/en/documents/details/24> accessed on 16.01.2018.

¹⁵⁶ [Annex to the Declaration] Nairobi Comprehensive Plan of Action for Durable Solutions for Somali Refugees, pg 12 & 13.

The Summit concluded by way of proposing solutions that will help address the main issues faced by stakeholder. These include:

- *Solutions for Somalia:* for the neighbouring community to support the Federal Government of Somalia through regional engagement in the development of its security institutions to ensure stability in Somalia. Somalia and refugee hosting countries in turn are to facilitate the voluntary return of Somali refugees by addressing the root causes of displacement.¹⁵⁷ This builds to the next point which is the need to scale-up stabilisation and reconstruction efforts in Somalia to ensure the provision of basic services and livelihoods. This will help with the process of reintegrating the returnees and IDPs into the country which in turn will help with the growth, development and economic stabilization of Somalia.¹⁵⁸
- *Solutions for Refugees:* for the IGAD Community to strengthen the protection of refugees and respond effectively to the famine in the region to prevent new forced displacement such as the one seen in 2011 with regard to the famine in Somalia.¹⁵⁹ The community should also seek to maintain the asylum space and, with the support of the international community, improve the living conditions of refugees and host communities by enhancing education, training and skills development for refugees to reduce their dependence on humanitarian assistance, and prepare them for gainful employment.¹⁶⁰ This lead to the discussion on States to progressively provide alternative arrangements to refugee camps and facilitate their integration into national development plans and access to services.¹⁶¹ There is also a need to look into the welfare of Somali refugee women which can be done by mainstreaming gender in all instruments, policies, programs and action plans focused on bringing durable solutions for refugees.¹⁶²

¹⁵⁷ Nairobi Declaration on Durable Solutions for Somali Refugees and Reintegration of Returnees in Somalia Nairobi, Kenya, 25th March 2017, pg 4 – 9.

¹⁵⁸ Nairobi Declaration on Durable Solutions for Somali Refugees and Reintegration of Returnees in Somalia Nairobi, Kenya, 25th March 2017, pg 4 – 9.

¹⁵⁹ Nairobi Declaration on Durable Solutions for Somali Refugees and Reintegration of Returnees in Somalia Nairobi, Kenya, 25th March 2017, pg 4 – 9.

¹⁶⁰ Nairobi Declaration on Durable Solutions for Somali Refugees and Reintegration of Returnees in Somalia Nairobi, Kenya, 25th March 2017, pg 4 – 9.

¹⁶¹ Nairobi Declaration on Durable Solutions for Somali Refugees and Reintegration of Returnees in Somalia Nairobi, Kenya, 25th March 2017, pg 4 – 9.

¹⁶² Nairobi Declaration on Durable Solutions for Somali Refugees and Reintegration of Returnees in Somalia Nairobi, Kenya, 25th March 2017, pg 4 – 9.

- *On Support to Host Countries to Protect and Assist Refugees:* they are to maintain protection in countries of asylum, enhance security within refugee camps and other refugee populations; and foster national unity and social cohesion that strengthen peaceful co-existence between Somali refugees and host communities.¹⁶³
- *On Regional Cooperation on Durable Solutions for Refugees:* It was agreed that the community would continue providing asylum to persons in need of protection; support the Federal Government of Somalia to organise a National Forum on refugees and IDP solutions in line with the National Development Plan; and mobilize resources that will be used towards the development of regional stability and the implementation of durable solutions, including safe, sustainable and voluntary return of refugees.¹⁶⁴
They would also work towards strengthening the existing regional mechanisms, including the IGAD Ministerial Committee on refugees and migrants, to coordinate, implement and monitor commitments to durable solutions for Somali refugees.¹⁶⁵

4.3 Proposed recommendations include:

❖ *The government revoke the directive and follow the recommendations set out by the high court.*
In their decision, the high court declared the directive disbanding DRA void; declared the directive on the intended repatriation of refugees and asylum seekers as arbitrary, unconstitutional and a violation of articles 27 and 28 of the Constitution; declared the decision by the government to collectively repatriate refugees in Dadaab as a violation of the principle of *non-refoulement*; a declaration that the targeting of Somalia refugees is an act of group persecution, is illegal, discriminatory and unconstitutional.

The effect of this is that the refugees in Dadaab cannot be refouled, coerced or convinced to return to Dadaab, the same which ought to be communicated to the refugees and implemented as such.

❖ *The government to stop coercing refugees to sign up for the voluntary repatriation service.*

¹⁶³ Nairobi Declaration on Durable Solutions for Somali Refugees and Reintegration of Returnees in Somalia Nairobi, Kenya, 25th March 2017, pg 4 – 9.

¹⁶⁴ Nairobi Declaration on Durable Solutions for Somali Refugees and Reintegration of Returnees in Somalia Nairobi, Kenya, 25th March 2017, pg 4 – 9.

¹⁶⁵ Nairobi Declaration on Durable Solutions for Somali Refugees and Reintegration of Returnees in Somalia Nairobi, Kenya, 25th March 2017, pg 4 – 9.

This was done through means such as disbanding DRA which was the government agency responsible for refugee affairs including registration; preventing the registration of new refugees by organizations such as UNHCR and RAS; reducing funds that should be allocated to the welfare and survival of refugees although this came about due to a decrease in the funds allocated by the international community; restricting the refugees to the camps where they have no means of gainful employment and where the resources and opportunities available are limited as compared to those available in the urban areas; having a rigorous process of getting a work permit when one has the status of refugee; accusing them and Dadaab as a community of being responsible for the terror attacks that plagued the country; stating that Somalia is safe and that the refugees who willingly return will get a stipend and receive free education once they settle in Somalia etc. Such measures influenced the decision of many who felt as though they were unwanted and ought to return on their own terms than be taken back by force. This amounts to coercion marring the voluntary repatriation process.

❖ *A legal aid clinic or legal aid day in the camps*

This will be an avenue where refugees will be made aware of their rights under the 2006 Refugee Act as well as the other international instruments which apply to them that Kenya has ratified. This will ensure their legal needs and questions on the ongoing process are answered and the correct information on their rights disseminated such that it is clear that they cannot and are not being forced to leave the camps and return to Somalia. This will be instrumental in ensuring the ongoing voluntary repatriation process is free, fair and complies to the international standards without people doubting its validity or the voluntariness of the refugees.

❖ *The government to look for other durable solutions for the refugee question*

Local integration, voluntary repatriation and resettlement have been the main three durable solutions when dealing with forced migration. Kenya has and is facilitating the process of voluntary repatriation back to Somalia; it is an ongoing process, one which has raised a number of questions, criticisms, comments and even praise.

We are however not limited to implementing one durable solution hence the proposal to adopt local integration considering the presence of Somali Kenyans. Local integration has been successfully rolled out and implemented in various countries such as Uganda, and it seems to be working so far. The same can be implemented in Kenya for the refugees who are unwilling and

unable to return to their country of origin, and have established their ties here hence cannot be easily relocated to a third country.

- ❖ *Implementing the action plan in the IGAD Nairobi Declaration on Durable Solutions for Somali Refugees.* The proposed solutions aim to provide protection and deliver durable solutions for refugees, particularly the Somali refugees in the region.¹⁶⁶

¹⁶⁶ Nairobi Declaration on Durable Solutions for Somali Refugees and Reintegration of Returnees in Somalia Nairobi, Kenya, pg 4 – 9.
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Questionnaire

1. What is your opinion on the government directive?
2. Was it justified?
3. Does it violate the principle of *non-refoulement* or the Convention Against Torture?
4. Does Dadaab pose a threat to national security?
5. What should be done to address the refugee issue?
6. What do you think of the ongoing voluntary repatriation process?
7. Is it really voluntary?
8. What is your opinion on the situation in Somalia? Is it safe?
9. What of the reports by Human Rights Watch stating that Somalia isn't safe, and that the returnees end up as IDPs or come back to Kenya seeking asylum all over again?
10. Should the principle of non-refoulement be upheld when there is a risk to national security?