RECONCILING NATIONAL SECURITY CONCERNS WITH REFUGEES' RIGHT TO NON- REFOULMENT

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DECLARATION

I, ASYAH MOHAMED AHMED declare that this dissertation entitled "RECONCILING NATIONAL SECURITY CONCERNS WITH REFUGEES' RIGHT TO NON-REFOULMENT"
This is my own work, that it has not been submitted for any degree or examination in any other university or institution, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

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ACKNOWLEDGEMENT

DEDICATION

ABSTRACT

The non-refoulement principle is the hallmark of international refugee law. It is a basic principle that ensures security for refugees from returning to nations where persecution is feared. This principle is acknowledges as forming a crucial part of refugee law, human rights law and customary international law. Article 33 of the 1951 UN Convention on the Status of Refugees as read together with UN Convention Against Torture, international, regional and sub regional instruments to which Kenya is a signatory, embody the principle. Under domestic law, section 18 of the Refugees Act of 2006 protects the right to non-refoulement.

The essence of Kenya's rejection of the non-refoulement principle, however, started in 1998 when terrorists bombed the US embassy, killing 216 individuals. The bombers were thought to be members of the Al Qaeda party in Somalia. Terrorist attacks in Kenya include the 2013 Westgate Mall raid that killed 67 people and the 2015 Garissa University terrorist attack that killed 147 learners. The government decided that the reception of refugees in the country must come to an end because of these assaults that prejudice national security. The Kenyan government's choice regarding the deportation of all refugees back to their nation and the closing down of the Daadaab refugee's camp raised a lot of controversy since the state intervention breached the non-refoulement principle.

The aim of this research is to determine whether in Kenya, domestic security and the non-refoulement law conflict. Furthermore, this research addresses whether Kenya fulfills its non-refoulement obligations and whether problems of national security can be resolved with the concept of non-refoulement. This paper ends with several recommendations for reconciling domestic safety with the concept of non-refoulement. This research concludes with multiple suggestions on how to reconcile national security with the non-refoulement principle. These recommendations include voluntary refugee repatriation, Individual prosecution of suspects of terror and adequate border screening of migrants before being permitted in the country.

TABLE OF ABBREVIATIONS

DRA:	Department of Refugee Affairs
DRC:	Democratic Republic of Congo
ICCPR:	International Covenant on Civil and Political Rights
KNCHR:	Kenya National Commission on Human Rights
UN:	United Nations
UDHR:	Universal Declaration of Human Rights
UNHCR:	United Nations High Commission for Refugees

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CHAPTER ONE: BACKGROUND OF THE STUDY

1.1.Background to the Study

The UN 1951 Convention on the Status of Refugees defines refugees in article 1 thereof as:

"a person who is outside his/her country of nationality or habitual residence; has a well-founded fear of persecution because of his/her race, religion, nationality, membership in a particular social group or political opinion; and is unable or unwilling to avail himself/herself of the protection of that country, or to return there, for fear of persecution."[1]

Therefore, the Convention grants a person who has lost the security of his or her state of origin or nationality *the status of a refugee*. It is basically the loss, or lack, of state security that makes it possible for refugees to have international protection. There are two groups of refugees accepted by Kenya: statutory refugees and *prima facie* refugees. The former category applies to a person who has "a well-founded fear of being persecuted for reasons of race, religion, sex, nationality, membership of a particular social group or political opinion," whereas the latter relates to a person who, "owing to external aggression, occupation, foreign domination or events seriously disturbing public order in any part or whole of his country of origin or nationality is compelled to leave his place of habitual residence."[2]

Since the 1960s,[3] Kenya has accommodated many East African and Horn of Africa refugees. In Sudan, following General Jafaar Numeiry's military takeover of the State in 1969, most of the first refugees arrived in Kenya in the 1960s from Sudan.[4] Asylum seekers from Uganda arrived from Kenya in the 1970s and 1980s because of the many massacres committed by Idi Amin and

[1]Article 1(2) of the United Nations Convention on the Status of Refugees (1951)
[2] https://www.loc.gov/law/help/refugee-law/kenya.php (accessed on 15th January, 2021)
[3] K, Oluoch, 'Reconciling security concerns and refugee protection' (2017) 5(1) *Journal on History and Political Science* 29
[4] As above, pg 29

followed by the civil war in Uganda.[5] These first arriving refugees were permitted to live in any portion of the nation; they were entitled to work and education.

However, refugee inflows from neighbouring nations such as Somalia, Eritrea and Djibouti have increased since the 1990s.[6] By 1992, Kenya had about 400,000 refugees due to these influxes, the bulk of whom were from Somalia.[7] Data by the United Nations High Commissioner for Refugees (UNHCR) indicates that in 2015 there were 650,610 refugees in Kenya.[8] The same study shows that approximately 70% of migrants are Somalis and the rest are from South Sudan, Ethiopia, Congo and Uganda.

Kenya's tide of refugees resulted to refugee camps being built. The larger refugee population lives in the refugee camps of Dadaab in Garissa County and Kakuma in Turkana County. More than 50,000 refugees resided in Nairobi, in relation to the refugee camps. Prior to 2006, Kenya's refugee response was largely handled under the Alien Restriction Act. The United Nations High Commissioner for Refugees (UNCHR) was primarily responsible for the provision of legal protection and assistance to refugees. In 2006, Kenya enacted the Refugees Act, which incorporated provisions of the UN Convention on the Status of Refugees as well as the OAU Refugee Convention. Currently, Kenya's refugee response is headed by the Department of Refugee Affairs (DRA) established under the Refugees Act with support from the United Nations High Commissioner for Refugees (UNHCR).[9]

As earlier alluded to, Kenya is a signatory of a number of international conventions which serves both a status and rights-based instrument and is underpinned by a number of fundamental principles, most notably non-discrimination, non-penalization and non-refoulement aimed at protecting refugees. These are:

1. The UN Convention on the Status of Refugees of 1951;
2. The 1967 Convention and Protocol to the Refugee Status,

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[5] As above
[6] E Campbell 'Urban refugees in Nairobi: problems of protection, mechanisms of survival and possibilities for integration' (2006) 19(3) *Journal of Refugee Studies* 399
[7] See note 6 above, pg 400
[8] United Nations High Commissioner for Refugees (UNHCR), Global Appeal 2014–2015: Kenya 2 (Dec. 1, 2013), http://www.unhcr.org (accessed on 3rd August, 2019)
[9] https://www.loc.gov/law/help/refugee-law/kenya.php (accessed on 15th January,2021)

3. The 1969 Convention on the Specific Aspects of Refugee Problems in Africa Organization for African Unity, and
4. The 1984 Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment.

In 2006[10], Kenya adopted the Refugee Act establishing a Ministry for Refugee Affairs in relation to these international means to handle refugee affairs in the region. These tools offer refugees different freedoms, including the right of association, the right of ownership, access to judiciary, freedom of motion, the right to work and, the right to non-refoulement is the most relevant most. There is no need to deport a refugee to countries where repression is feared.

Although in the nation refugees are received for purely humanitarian reasons and freedoms are granted, safety problems have arisen in Kenya. These safety issues include terrorism, militancy, and weapons proliferation. The nation has been subjected to a number of severe terrorist attacks. Terrorists are allegedly disguised as refugees living in the refugee camps.

The essence of Kenya's rejection of the non-refoulement principle, however, started in 1998 when terrorists bombed the US embassy, killing 216 individuals.[11] The bombers were thought to be members of the Al Qaeda party in Somalia.[12] An example of terror attacks that occurred in Kenya include the Westgate Mall raid that killed 67 people[13] and the Garissa University in which 147[14] students were killed in 2015. The Kenyan government's choice regarding the deportation of all refugees back to their nation and the closing down of the Daadaab refugee's camp raised a lot of controversy since the state intervention breached the non-refoulement principle.

Furthermore, although the State has laid down various systems, such as the migrants ' camps and the temporary transfer policies, and attempted to reduce the number of migrants in Kenya, its legal difficulties before the courts and resistance have been severely thwarted by civil culture and

[10] Refugee Act, 2006
[11] GL Heath & DK Tarus, Christian responses to terrorism: the Kenyan experience (2017)21
[12] B Rene & K Wouters,' Terrorism and the non-derogability of non-refoulement'(2003) 15(1) *International Journal of Refugee Law*, 5
[13] See note 11 above 21
[14] As above (n 9 above) 21

by the global communal. For example, in the *Kenya National Commission on Human Rights & another v Attorney General & 3 others [2017] eKLR* case, [15]Human rights organisations effectively called into question the state's policy to close of the Dadaab refugee Camp in Garissa and the restriction of movement for refugees on the grounds of national security to neutralize the state's attempts to ensure peoples' protection.

In addition, in the case of *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya &10; others [2015] eKLR*[16], it challenged the lawfulness of the Security Laws Amendment Act 2014, in its attempt to amend the Refugee Act, the High Court decided that Article 48 of the Act violated the principle of international non-refoulement.

It is said that recent terrorist attacks have forced Kenya to make changes to its refugee policy. However, there seem to be conflict of law between the legislative and executive. Therefore, legal and policy structure of Kenya is still lacking and so the government needs to make suggestions about how to tackle this problem by providing a detailed policy in relation to the refugees' status.

1.2.Literature Review

A lot of ink has been spilled on the question of protection of refugee rights under domestic and international law. Nevertheless, there is still a dearth in the literature on the problem of balancing the protection of refugees and national security, particularly in view of the advent of modern terrorism. Most of the debates on this topic even in the judiciary are about advancing more rights for refugees, while the equally important dispute of national security is often ignored. For example, one scholar has retorted that, "National security concerns, real or imagined, often trump human rights… It need not be this way."[17]

[15] Kenya National Commission on Human Rights & another v Attorney General & 3 others [2017] eKLR
[16]Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya &10; others [2015] eKLR
[17] JI Goldenziel 'The Curse of the nation-state: Refugees, migration, and security in international law' (2015) 48 *Arizona State Law Journal* 581

The exception to national security is altered by government in order to elude its obligation to protect stateless and refugee individuals.[18] The first shortcomings to be addressed by this study is the reality that the focal point is on defending the freedoms of refugees rather than maintaining the advantages of national security of the target nations, such as Kenya. In similar terms, Kenya has little help and is often not as strongly involved as it should during terrorist attacks, including its internal security, amid protecting the refugees as a worldwide issue.

As Murillo briefly notes, issue of immigrant safety and state safekeeping are not exclusive or adversarial yet it should reinforce and complement each other.[19] States should therefore use just and efficient working processes in lieu of immigrant status in order to reinforce their domestic safety.[20] Murillo claims that since refugee rights and national security rights are complementary, governments must adopt systemic or regulatory frameworks and public policies to safeguard refugees in ways that ensure their own safety.[21]

The outcome of Murillo's debate is that States can still retain their national security concerns without simply restricting their rights to refugees by appropriate use and implementation of refugee legislation. Kerwin claims that national security and preservation of refugees is not deemed conflicting states ' aims but complimentary, and claims that protecting refugees can assist promote the safety of the target nations and the refugees themselves.[22]

Kerwin further notes that, some policies that can contribute to the balance of national security and safety for refugees if adopted by States include fostering national cohesion and community engagement, assuring identity preservation, enhancing data sharing among law enforcement agencies, strengthening border security, and reinforcing intelligence collection.[23]

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[18] D Phulwary 'Refugee rights vis-à-vis security of State: Striking a balance between both' (2013) Refugee Rights Conference, Hyderabad 1

[19] JC Murillo 'The legitimate security interests of the state and international refugee protection' (2009) 6(10) *International Journal on Human Rights* 117

[20] See note 19 above, pg 118

[21] As above, pg 118

[22] D Kerwin, 'How robust refugee protection policies can strengthen human and national security' (2016) 4(3) *Journal on Migration and Human Security* 84

[23] See note 22 above, pg 108

Other strategies to help protect refugees and national security of States include programs for refugee resettlement, integration, voluntary and growth aid, reliable refugee return, peace building and dispute avoidance, rebuilding and democracy, and.[24] In addition, generous strategies to protect refugees can assist promote national security through solid processes and policies for examining refugees.[25]

It is also essential to emphasize the obligation of the State to remove refugees on account of national security, according to Articles 32(1) and 33(2) of the Convention on the Status of Refugees. Such expulsions shall be carried out exclusively where a refugee can be identified on rational basis as a danger to the security of the host country or where a refugee is accused of an especially serious crime which jeopardizes culture.

According to Mutwiri, in his research in Kakuma Refugees Camp on the task of refugees in weapons production, he concludes that refugees are both victims of the trade and small-scale perpetrators that contribute to fuel the terrorist funding in Kenya.[26] Besides, Jackeline claims in her dissertation that in those refugees' camp site next to conflict-rocked nations such as Somalia, it's simple for extremists to take advantage of the camps as way of recruiting people to attack the host nation.[27] Kenya can therefore take sensible steps to safeguard its domestic safety in contrast to terrorism by limiting access of migrants or elseousting those migrants if believes a danger to domestic safety.

According to Balaban and Mielniczek, two primary components must be encountered or demonstrated in creating the validity of internal security measures to send back migrants to their nations of origin.[28]One of the elements is the ongoing objective observable risk of harm, which

[24] As above, pg 118
[25] As above, pg 120
[26] MM Mutwirii 'the role of refugees in the proliferation of small arms and light weapons: The case of Kakuma, Kenya' unpublished degree Moi University, 2014
[27] N Jackline 'National security and legal protection of refugees in the horn of Africa: A case study of Kenya's Dadaab refugee camp' unpublished research project, University of Nairobi, 2016
[28] M Balaban and P Mielniczek 'Balancing national security and refugee rights under public international law' (2017) *Proceedings of the 2017 Winter Simulation Conference* 4105

includes both long-term threats and immediate threats against internal security.[29] In addition, the damage must concern the country and its people as a whole.[30]

Consequently, considering that the Treaty of 1951, grants States the rights to expel refugees, the circumstances under which such deportation is warranted must be determined by States, in particular where internal security is involved. The decision by Kenya to repatriate a refugee can only be reversed and reverted legally when it appears that the grounds for the expulsion of a refugee are not valid or acceptable because the government has behaved unwillingly or arbitrarily, or whether there is no basis for finding a refugee a danger.

However, it's almost always justifiable to repel refugees given the risk presented to inner safety by terrorists. Neither does Holm indicate the sort of deeds which fall under the range of internal security exception nor create the required amount of proof in accordance with Article 33(2) of the Refugee Convention.[31] The reality that the Convention merely stipulates there are "sensitive reasons" demonstrates the accessibility of documents to comprehensive application and scrutiny, therefore governments should be allowed towards taking advantage of this domestic safety exception in order to further their lawful aspirations.[32]

Holm quotes the case of *Suresh v Canada (MCI)* [33]whereby a "balancing function" between the expulsion freedoms of migrants and the state's obligation to protect its people was supported by the Supreme Court of Canada. In this situation, the Court indicated also that the States' responsibility to counter terrorism and to protect the public against the certain statuses of a refugee for which the State receives compensation is necessary. In other cases,the balance procedure is a matter of burden of proof whereby the State will determine if a refugee is fairly moved as regards the safety threat.

In his studies, Njogu recommends a civil rights approach for the collective repatriation programme as portion of the balance system and an option to prisons for refugees, for example

[29]See note 28 above
[30]As above
[31] I Holm 'Non-refoulement and national security' unpublished master's thesis, Lund University, 2015
[32] See note 28 above
[33][2002] 1 S.C.R. 3

integration..[34]In the light of the complementary and supplemental nature of national security and private security of migrants, Ahmed states should ensure the embedded application of the balance test and also implement the burden-sharing concept in order to tackle the problem in one nation that has to endure the expenditures of accommodating migrants.[35]

In conclusion, according to the findings of my literature review, it is evident that the writers' hypothesis arises some serious concerns towards the national security despite the existence of both international and national legal structures. The delinquent is that Kenya's responsibilities under the international legislation clashes with its security concerns thus need for equilibrium. By housing large group of refugee safety problems have risen in Kenya such as terrorism militancy and weapons proliferation, and thus need for a detailed policy in order to avoid conflict of law between the legislation and the executive.

1.3.Problem Statement

The main legal documents that form the basis of refugees' rights are the 1951 Refugee Convention and its 1967 Protocol. The fundamental precept is non-refoulement, which states that a refugee should not be returned to a country in which his or her life or freedom is adversely threatened. Therefore, it outlaws States parties from sending back refugees to regions where their fundamental rights and freedoms would be infringed, or likely to be infringed, threatened or violated by any means.[36] Similarly, the 2006 Refugee Act of Kenya captures the doctrine of non-refoulement and spells out;

"[n]o person shall be refused entry into Kenya, expelled, extradited from Kenya or returned to any other country or to subjected [sic] any similar measure if doing so would result in the persecution of the person or endanger his life, physical integrity, or liberty."[37]

[34] V Njogu 'Encampment policies, protracted refugee situation, and national security concerns: The challenges of refugee protection in Kenya' Unpublished master's thesis, Central European University, 2017
[35]Ahmed, an 'Individual protection versus national security: a balancing test concerning the principle of non-refoulement' (2016) 21(5) *Journal on Humanities and Social Science* 30-40
[36] 1951 Convention Article 33 (1)
[37] Refugee Act Section 18

Nonetheless, the exception to the fundamental principle is that refugees are allowed on basis of national security or public order where there are rational grounds for considering a refugee as a risk to the safety of the host nation to send back an asylum-seeker.[38] Similarly, the Refugee Act of 2006 offers that, in relation to the removal of a person's refugee status, the Department of Refugee Affairs (DRA) may return back an asylum- seeker if it considers there is necessity "on the grounds of national security or public order."[39] However, irrespective of the existence in both the international and national legal structures of such a definite legal structure for migrant security, the delinquent is that Kenya's responsibilities under international migrant legislation clash with its inner security concerns.

Although the country has a legal duty to protect and not deport refugees unless a legitimate justification exists, many refugees are seen, on the other hand, as threats to their national security. The issue to be explored in this investigation therefore consists of how Kenya can balance domestic safety problems and its obligation towards the international norm where it forbids a host state to transfer or displace asylum-seekers in areas that have or are probable to be violating, infringing or endangered with their fundamental rights and liberties.

1.4.Theoretical Framework

The study is based on three main theories: the theory of natural law, classical legal realism and theory of human rights.

1.4.1. Human Rights Theory

Using this theory in explaining the importance of protecting the rights of refugees, humans are blessed with rights and fundamental freedoms simply because they are human. Article 1 of the Universal Declaration of Human Rights[40] states that, "All human beings are born free and equal in dignity and rights; they are endowed with reason and conscience and should act towards each

[38] 1951 Convention Article 32 (1) & (2) and Article 33 (2)
[39] Refugee Act Section 34
[40]1948

other in a spirit of brotherhood."[41] Furthermore, Article 28 of the Constitution of Kenya, 2010, spells out that, "Every person has inherent dignity and the right to have that dignity respected and protected."[42]

Hence the law of refugees is based under this assumption and that refugees should appreciate their rights as they're human-beings. This will, therefore, be necessary to evaluate the compliance of the declaration with the non-refoulement principle and the existing problems facing the implementation of the principle.

1.4.2. Classical Legal Realism Theory

To attain domestic peace and safety, this theory can be used as a rationalization for State action. Legal realism is established on three premises: statistics, existence, and self-help.[43]Statist recognizes that countries are the key players on the global scene and that other global structures such as the United Nations are treated on a secondary basis as to whether they are helpful in achieving domestic goals and interests. Government is supreme thus has to guarantee citizens ' subsistence, additionally, countries embrace self-help processes in order to achieve this. National interests take priority over global interests, therefore, deemed secondary to the nations.

Kenya, therefore, is viewed as a self-help instrument for achieving nationwide safety by choosing to repatriate refugees. The national government is the duty bearer thus owes its people an obligation towards preserve domestic peace and safety, according to the theory of classical realism. The international community owes the obligation to accommodate refugees and therefore the obligation is secondary and national safety takes priority over the protection of refugees.

[41]Article 1, United Nations Universal Declaration on Human Rights
[42] The constitution of Kenya, 2010
[43] Classical legal realism theory

1.4.3. Natural law theory

The non-refoulement principle is the cornerstone of international protection for refugees. It is enshrined in Article 33 of the Convention of 1951, which also applies to States Parties to the Protocol of 1967.[44] Therefore, it inclines so much to the principle of natural justice and has so much to do with the sociological and historical schools of thought as it concerns human mobility and by extension, socio-economic problems. Yet the same concept of non-refoulement borrows so much from the realistic American school of thought.

The protagonists of constitutional law, civil liberties and the entire natural justice theory, have insisted on the human dignity.[45] In its early stages, those who coined natural law such as St. Thomas Aquinas had highlighted the component of law backed by good reason in relation to nature.

Therefore, one could argue that humanity is imbued with the power of reason and it is from this conception that one can conveniently claim that the principle of non- refoulement opposes any act that would compromise human dignity. Furthermore, the constitution of Kenya spells out that "every person has inherent dignity and the right to have that dignity respected and protected."[46]

Any state act that may infringe on the individual or group freedom or civil liberty would be construed as in violation of the natural rights of which all human beings are stakeholders. The conceptualization of the topic under discussion makes pragmatic argument that has been echoed in the thoughts of John Locke in the medieval time. The school of thought insists on the ability to enjoy human rights. He advocated for the free will of the people to design their constitution and in liberty appoint the sovereign.

[44] Article I (1) of the 1967 Protocol provides that the States Party to the Protocol undertake to apply Articles 2–34 of the 1951 Convention

[45] Alexander Betts, 'Human Rights and Refugees, Internally Displaced Persons and Migrant Workers: Essays in Memory of Joan Fitzpatrick and Arthur Helton. Edited by Anne F. Bayefsky.' Journal of Refugee Studies, 20.1 (2007), 149-51

[46]Article 28, 2010

Locke purports that even refugees and asylum seekers are human beings whose natural rights must be respected by any sovereign state in the principles of *Jus gentes* or what is later known as the international law. The principle of non- refoulement can be seen as *Jus cogens*. Thus, it cannot be contracted out, given the fundamental values it upholds.

1.5.Research Questions

This paper will seek to answer the following research questions:

1. To what degree is Kenya compliant with its international commitments to secure the right to non-refoulement of refugees?
2. Is domestic security in conflict with Kenya's right of refugee non-refoulement?
3. Whether it is necessary to strike a balance between the protection of refugee rights and the protection of national security in Kenya
4. How is the state going to guarantee refugees and citizens ' security?
5. What are the legal difficulties facing the Government of Kenya?

1.6.Research Objectives

Closely related to the research questions are the following research objectives which this dissertation will work towards:

1. To determine whether Kenya fulfills its international law commitments in relation to the protection of refugees.
2. To assess the legal structure with regard to non-refoulement in Kenya.
3. To explore the threats to domestic security posed by refugees in Kenya.
4. To tackle how national security and non-refoulement can be reconciled.
5. To establish a common ground in securing the efforts of the government towards the security of refugees and the citizens.

1.7.Justification of the Study

The focus of this dissertation is to help explore Kenya's existing policy and legal structures concerning national security conservation and the preservation of refugees' rights to non-refoulement. In this way, the paper would highlight gaps or gaps in the existing security process for the rights of refugees while also ensuring that safety concerns are addressed.

However, the analysis would shed more light on the correct definition of the international refugee law non-refoulement policy and how the national security exceptions could be so clarified that they are not condemned as a pretext for the host country, Kenya, for violation of the rights of refugees. The paper is in general an opportunity for Kenya to reconcile itself to its safety issues with the ban on returns and deportations of refugees under international law without creating conflicts of law.

1.8.Hypothesis

This is assumed to be so;

1. By housing big numbers of refugees in its regions, Kenya fulfils its global duty to safeguard the freedoms of refugees.
2. The freedom of refugees not to refoule is in conflict with this national security and
3. This strikes an equilibrium between defending Kenya's internal security and its freedom of non-refoulement for refugees.

1.9.Research Methodology

In this dissertation, I will concentrate on primary and secondary sources, i.e. international, national and regional instruments for refugee legislation. The key sources are the 1951 Convention on the Status of Refugees, the 1967 Protocol on the Status of Refugees, the 1969 Convention on the Refugee Organization of the African Union and the 2006 Refugee Act.

In addition, I will be using lists of reputable writers who come from the books, journals, jurisprudence and Internet whose studies aim to rationalize the notion of non-refoulement, its reasons, and its global practice. As well as from credible internet research from reputable sources online, from different authors who wrote about this study. Furthermore, the stance as to whether a compromise could be reached between internal security and the criterion of non-refoulement.

1.10. Limitations of the Study

The nature of refugee law in essence, requires some degree of commitment and, hence, it would require time. However, the primary constraint of the study is that the researcher is not in a position to visit the border regions, which would mean that the reported data might not be as reliable as the real situation on the ground with respect to the concept of non-refoulement.

1.11. Chapter Breakdown

Chapter one: This chapter includes the background of the study, problem statement, research objectives, justification of the study, research questions, hypothesis, theoretical framework, research methodology and literature review.

Chapter two: The chapter discuss the legal context of the norm of Non-Refoulement, the scope of its application, the principle of non-refoulement, international agreements and regional instruments, the exceptions to the doctrine.

Chapter three: The chapter explores the doctrine of non- refoulement in context to national laws, , national refugee laws, exceptions to national safety emphasis, the jurisprudence, and case research showing Kenya's adherence with or non-compliance.

Chapter four: In this chapter it focuses the qualitative research on the application of the non-refoulement principle by doing a comparative analysis with the case of Hong Kong.

Chapter five: The chapter ends with possible suggestions as well as conclusions towards its findings.

CHAPTER TWO

2.0 THE LEGAL CONTEXT OF THE NORM OF NON-REFOULEMENT

2.0.1 Introduction

The concept and latitude of refoulement as a principle of international law are discussed in this chapter. This questions the acceptability and scope of the definition under international customary law.The chapter also discusses the numerous international and regional frameworks that establish the concept of non-refoulement.Finally, the chapter discussed the limits on national security from the right to non-refoulement.

2.1 The principle of non- refoulement

"Non-refoulement" is derived from the French word repel or return.[47] Bethlehem and Lauterpacht defines it as:

".....is a concept which prohibits states from returning a refugee or asylum seeker to territories Where there is a risk that his or her life or freedom would be threatened on account of race, Religion, nationality, membership to a particular social group or political opinion."[48]

The following definition is based on Article 33(1) of the United Nations Convention on Refugees Status[49] obliging States Parties not to:

".....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 to a particular social group or political opinion."[50]

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[47] http://www.elaw.cz/clanek/the-principle-of-nonrefoulement-what-is-its-standing-in-international-law (accessed 15 February 2020)

[48] E. Lauterpacht & D Bethlehem, The scope and content of the principle of non-refoulement: Opinion (2003)89

[49] 1951

The definition of refugees is also meant to shield refugees from expulsion from persecution, torture or mistreatment to their countries of origin.[51]A general practice recognized as law under Article 38 of the Statute may be enforced by the International Court of Justice for international standards.[52]In the view of the United Nations High Commissioner for Refugees, the principle of non-refoulement meets standard international law requirements.[53] This is because State parties are consistent in their practice, thus, a normative nature.[54]

The Doctrine has been included in numerous international and regional treaties, accepted by several accepting countries, including the 1951 UN Convention on the Status of Refugees ratified in April 2015 by 145 states because it is unreserved.[55]Article 42 specifies that no State may restrict the rights of Article 33 which, at the time of signature, ratification or accession, provides refoulement.[56]

Therefore, the concept can be inferred that, irrespective of whether or not they are party to the 1951 Treaty concerning Refugee Status, they have developed into a standard international norm which makes them binding states.[57]The definition is thus the basis of universal refugee law which has established normative customary law.

2.2 Scope of application to the principle of non-refoulement

The complexity of the design implementation was explored extensively by numerous scholars. Many scholars claim that, according to Article 33(1) of the UN convention on refugees, the concept relies solely on cases of nationality, ethnicity and race, representatives of a particular

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[50]Article 33(1) of the 1951 Refugee Convention
[51]GSG Goodwin-Gil & J McAdam, The refugee in international law 3rd edition (2007) 201
[52]https://www.refworld.org/docid/437b6db64.htm l(accessed 17 February 2020)
[53] (n 52 above)
[54] (n 52 above)
[55]https://www.unhcr.org/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html(accessed 16 February 2020)
[56]Refugee Convention Article 42
[57]http://www.elaw.cz/clanek/the-principle-of-nonrefoulement-what-is-its-standing-in-international-law(accessed 16 February 2020)

social group or political opinion.[58] Other authors argue that the application of the concept extends only to individuals officially identified in the host state as refugees.

Chambo[59] states, for instance, thatthe implementation of the non-refoulement principle depends solemnly on the sovereign determination of the host country whether refuge is granted or not. It implies, however, that when the hosting country has decided to provide for arefugee, theoretical application continues.

Hathaway claims, however, that both migrants and asylum-seekers are guaranteed by the non-refoulement clause.[60] He claims that, before the host state officially decides, the theory continues granting refugee status and that asylum-seekers may be adversely affected by denial of rights in the absence of a decision of refugee status.[61]

In addition, both,Goodwin-gill and McAdam argued that not only refugees but asylum seekers and people who are prima facie believed to have refugee status are identified.[62] Goodwin-gill and McAdam,further claims that the term concerns asylum seekers and does not address the way applicants are accessing the territory of the host State, whether or not their access to the host country is legal.[63]What is critical is how agents respond to the presence of asylum seekers by repelling State agency interference as they return him or her to their homes where the fear of persecution remains sound and solid.[64]

The above debate thus derives that the term non-refoulement does not apply exclusively to refugee claimants, but is also a security promise, if a reasonable fear of torture exists when repatriated in your country of origin.

[58] TW Ranja, 'The Kenyan law on refugees and its compliance with the principle of non-refoulement' unpublished master thesis University of Nairobi, 2015 53
[59] CJ Apelles,' The principle of non-refoulement in the context of refugee operation in Tanzania' unpublished master thesis University of Pretoria, 2005
[60] See note 58 above
[61] As above
[62]GSG Goodwin-Gil & J McAdam , The refugee in international law 3 rd edition (2007) 233
[63] See note 62 above
[64] As above

2.3 International and Regional Instruments

The concept is provided for by various international agreements and regional instruments. These are;

2.3.1 1951, UN Convention

This provides for the internationally and domestically rights and protection of refugees. The Convention had been ratified by 145 States by April 2015.[65] Thus, the high level of ratifications means a degree of acceptance in those Countries. It provides a range of constitutional rights for refugees, including freedom from discrimination, religion, citizenship, working privilege, freedom of association, access to courts and the right to education. Above all it sets out the right to refoulement in the Treaty of 1951.

The Treaty prohibits the expulsion or return of refugees to countries which could endanger their lives or freedoms because of nationality, religion, ethnicity, political opinions or membership in a particular group as outlined in Article 33(1) of the United Nations Convention.

The grant of the right to non-refoulement shall not, unlike other clauses of the Convention, be contingent on the refugee having legal residency in the host state.[66] Importantly, if he returns to his country of origin, the lives or rights of the refugee would be threatened. Therefore, given that the country of origin has legitimate fear of persecution, an immigrant is not supposed to be deported regardless of whether his/her habitation is legal or not.

The doctrine is one of the elementary requirements of the Treaty to which no exceptions are permissible. States shall not be entitled to create exceptions to Article 33 for non-refoulement during signing, ratification or accession as contemplated under Article 42.[67]

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[65] https://www.unhcr.org/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html (accessed 19 February 2020)

[66] https://www.unhcr.org/excom/scip/3ae68ccd10/note-non-refoulement-submitted-high-commissioner.html (accessed 19 February 2020)

[67] 1951 Convention Article 42

2.3.2 Protocol Relating to the Status of Refugees, 1967

It has been ratified by 146 countries as of April 2015.[68] This means that it is widely accepted and applied worldwide. Article 2-34 is subject to article 1(1) of the Protocol to the implementation of the 1951 convention on refugees. Consequently, non-refoulement obliges which Countries to comply. However, Article VII forbids the Member States from reserving the limitation on non-refoulement clause.

2.3.3 UN Declaration on Territorial Asylum

This Resolution was adopted by the General Assembly in 1967. Article 3(1) provides, even when he or she is already on the territory of the country where he or she is seeking asylum, that no person may be deported or forced back into any country where he or she is at risk of being persecuted.[69] Therefore this article forbids the deportation of asylum seekers and refugees.

2.3.4 The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 entry into force 26 June 1987.[70] Its forbids State parties, if there is legitimate reason to believe that they are liable to coercion, to extradition or expel or return of a person to any Country.[71]Governments in the Member States are required to consider whether in the states where refugees are returning there are clear trends of human rights violations.[72]The Committee against Torture may recommend against returning refugees in the world where systemic practice exists in a nation, contrary to this rule the host State becomes a participant of the torture offence.[73]

[68]https://www.unhcr.org/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html (accessed 19 February 2020)
[69]UN Declaration on Territorial Asylum Article 3(1)
[70] https://www.ohchr.org/en/professionalinterest/pages/cat.aspx (accessed 14 January 2021)
[71]Convention against Torture Article 3(1)
[72]Convention against Torture Article 3(2)
[73]http://www.elaw.cz/clanek/the-principle-of-nonrefoulement-what-is-its-standing-in-international-law (accessed 20 February 2020)

Therefore, if refugees were returned to a nation which is not a party to this Treaty, the refugees would be *de jure* outside the security and remedies of the Convention.[74]The Committee on Torture held in *Mutumbo v. Switzerland* that the return of a non-Convention claimant from Zaire would, not only disclose a torture applicant, but also will exclude him from immunity in the Convention.[75]

In addition, Article 3(1) of this Convention provides that, in the absence of derogation, the 1951 Convention on refugees as torture is the absolute right and acquires status as a peremptory rule. The Convention against Torture thus provides refugees with greater protections in cases of torture, inhumane and degrading treatment.

2.3.5 International Covenant on Civil and Political Rights (ICCPR)

Article 13 of the ICCPR encompasses all individuals legally excluded from the territory of a State without due process. Moreover, Article 7 protects everyone from torture, inhuman and degrading treatment. When handling extradition and deportation proceedings, the Human Rights Council took the prohibition into account.[76]

In the *ARJ vs. Australia*, Committee on Human Rights, the State is found to be a violator of the Convention in situations where a State removes individuals from its territories under the Convention's rights and freedoms as a result.[77]The Committee in *C v. Australia* also ruled that Australia would breach Article 7 when a refugee was removed from his home country without first demonstrating that the conditions leading to the granting of refugee status had ceased to exist.[78]

[74]GSG Goodwin-Gil & J McAdam , The refugee in international law 3 rd ed (2007) 304
[75] Goodwin-Gil & McAdam , (n 74 above)
[76]http://www.elaw.cz/clanek/the-principle-of-nonrefoulement-what-is-its-standing-in-international-law (accessed 20 February 2020)
[77] Goodwin-Gil & McAdam , (n 74 above) 308
[78]GSG Goodwin-Gil & J McAdam , The refugee in international law 3 rd ed (2007) 308

2.3.6 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969

This ensures the rights of African refugees. Article 2 (3) prevents someone from being threatened with acts which include a rejection at the border, deportation or expulsion by a hosting country and thus from returning to a country where their lives, rights or physical integrity are under threat.[79]It also stipulates for refugees and asylum seekers the right to refoulement that is cast-iron.

Article 5, invites refugees to be repatriated on a voluntary basis rather than repatriated without their own free will and consent. The host nation and the country of origin are responsible for ensuring that refugees are fully repatriated.

2.3.7 African Charter on Human and Peoples' Rights, 1981

The Charter guarantees respect for human rights and freedom of movement. Besides, everybody has the right to return home.[80]Moreover, it grants all persons, under the laws of that country and international conventions, the right to obtain asylum in another country.[81]

2.4 Exclusions to the general rule

Under international law the right to refoulement is not absolute right. Exceptions to this definition are allowed in certain cases. In accordance with Article 33(2) of the Convention on the refugee, the derogation is provided for by the principle;

"The benefits of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to security of the country in which he is, or who, having been convicted of a final judgment of a particularly serious crime, constitutes a danger to the community of that country."[82]

[79] OAU Convention Article 2(3)
[80] African Charter on Human and Peoples' Rights Article 12(2)
[81] (n 75 above) Article 12(3)
[82] 1951 Refugee Convention

It further prohibits host states from ousting lawfully present refugees within their territories, except towards public order or internal security.[83]Under Article 33(2) of the Refugee Convention a country must prove that it constitutes a danger to national security if it wishes to expel an asylum seeker.

To decide what national security is, the individual must be shown to be engaging in acts to promote the takeover of another host country or part of the host State.[84]Someone is deemed to be a threat to internal security if their actions such as sabotage, espionage, terrorist activities and military installation are demonstrated. Moreover, if a person works to overthrow the host state government through unlawful means then that person is a danger to national security.[85]

Repatriating a refugee on the grounds that he poses a threat to another state or the international community at large would be inappropriate, thus, must be a threat to the security of the hosting country as discussed by Bethlehem and Lauterpacht.[86]

However, the Refugee Convention does not define national security, thus, making it discretional imposing a legitimate expectation. The person is entitled to be heard and fair administrative action, therefore, must be brought before a court of law orders to send the perpetrators back to their country of origin.

2.5 Conclusion

In conclusion, the doctrine was incorporated into a varies international and regional treaties adopted by several countries that have shown recognition, including the UN Convention on the Status of Refugees in 1951 ratified by 145 States in April 2015, which provides both internationally and domestically for the rights and protection of refugees. Furthermore, the doctrine have achieved the status of a customary international law standard thus irrespective of

[83] (n 78 above) Article 32
[84] GSG Goodwin-Gil & J McAdam , The refugee in international law 3rded (2007) 236
[85]Goodwin-Gil &McAdam (n 80 above)
[86] Goodwin-Gil &McAdam (n 80 above)

whether or not they are party to the 1951 convention, is binding, since it has developed into a standard international norm having achieved the status of customary international law standard.

Nonetheless, different authors have discussed extensively the complexity of the concept implementation, hence establishing that the concept of non- refoulement doesn't not only extend to refugees but also to asylum seekers, the underlying proviso of which is a promise of security if there is a well-founded fear of torture when you are repatriated in your country of origin.
Both the international and regional conventions establish the concept of non- refoulement, thus forbids the Member States from reserving the limitation on non-refoulement clause as discussed above. However, this principle, in so many host nations, is not an absolute right, according to international law. Under Article 33(2) of the Refugee Convention, stipulates that the exception to the principle is provided that;

"The benefits of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to security of the country in which he is, or who, having been convicted of a final judgment of a particularly serious crime, constitutes a danger to the community of that country."[87]

Furthermore, the Refugee Convention prohibits host states from ousting legitimately present refugees within their territories, except for reasons of public order or national security, thus, has to demonstrate that that person impose a danger to the host State itself.[88]

[87] 1951 Refugee Convention Article 33(2)
[88] 1951 Refugee Convention Article 32

CHAPTER THREE

3.0 THE APPLICATION OF NON REFOULMENT IN KENYA

3.1 Introduction

"…the general rules of international law and any treaty or convention ratified by Kenya shall form part of the laws of Kenya." [89]

The basic principles of international law only apply when a clear norm has been met.[90]The judicial in Kenya have taken preliminary moves in respect of the application of customary international law to uphold Article 2(6) of the Constitution.[91]

As shown in Chapter 2 above, Kenya has signed a series of international and regional treatises concerning asylum seekers. Additionally, it has approved human rights agreements as well as resolutions on refugee rights, such as the International Covenant on Civil and Political Rights (ICCPR), the Universal Declaration of Human Rights (UDHR) among others.

Accordingly, Article 2(5) of the Constitution allows for this concept to be derogated from non-refoulement under international laws,[92] thus, is not permitted unless stated otherwise Kenya has a duty to comply with the terms**,** since, Customary International law has established the principle of non-refoulement.

This chapter includes the implementation of the Doctrine in Kenya as set forth in the Refugee Act of 2006, exceptions to the national security principle, jurisprudence and cases study which validate the compliance and non-compliance with the refoulement principle in Kenya.

[89]Constitution of Kenya 2010, Article 2(5,6)
[90] A Colangelo 'Jurisdiction, immunity, legality, and jus cogens' (2013) 14 *Chicago Journal of International Law* 53
[91]http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2077-49072017000100002#back_fn2 (accessed 9 March 2020)
[92]UN Refugees Convention, Article 42

3.2 The Doctrine of Non- Refoulement in Context to National Laws

The Refugee Act 2006 which became effective on 15 May, 2007[93], and the Refugees Regulations (Reception, Registration, and Adjudication), 2009, are the key sources of refugee law in Kenya. Kenya has tamed international rights for refugees with the enactment of the refugee legislation. It defines a refugee, as illustrated under Article 3 of the Act, as a person who-

> *"Owing to a well-founded fear of being persecuted for reasons of race, religion, sex, nationality, membership to 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 to the protection of that country."*[94]

It can be seen that Kenya cannot send refugees to countries at risk of persecution, torture or other acts of inhumanity as given in national law. Kenyan position is refugees should be given an opportunity to determine where to travel to as the government continues to host them before being accepted by the other State.[95] The Commissioner shall, in compliance with paragraphs 12(2) of the Refugee Act, have the authority to prolong the duration of 90 days if he is contented that the person will be admitted to another country of his choice.[96]

Nevertheless, the Act states that refugee evictions will take place as follows;

"…. the Minister may, after consultation with the Minister responsible for matters relating to immigration and internal security, order the expulsion from Kenya of any refugee or member of his family if the Minister considers the expulsion to be necessary on the grounds of national security or public order."[97]

[93]K Oluoch, *Implementation of international refugee law:* the case of Kenya(2017)199
[94] Refugee Act, Section 3(1)
[95]Ranja (n 58 above) 72
[96]Refugee Act, Section 12(2)
[97] Refugee Act, Section 21(1)

Nonetheless, section 11of the Act stipulates that the Minister shall act in accordance with the appropriate procedure of the legislation before the exile of a refugee,[98] which includes making a request to the Commissioner for Refugee Affairs.[99]If the applicant is not satisfied, he / she has the right within thirty days of receipt of the judgment of the Commissioner to challenge the Board of Appeal, pursuant to Section 9 of the Act.[100] Furthermore, they shall have the right to appeal further to the High Court if the decision of the Board of Appeal does not satisfy one.[101]If it's fails, an applicant shall not be expelled immediately, because they are entitled to stay for 90 days in a host country when they request entry to another country.[102]

Nevertheless, the Refugees Law also allows for the exception to non-refoulement by national security. Regulation 47 lays down that refugees or family members may be expelled from Kenya, either for national security or for the sake of public order. In any country in which the refugee plans to stay under Regulation 47(3) the Minister may give the refugee more time to get approval.[103]

The idea is therefore clearly restricted to national security and public order only. Moreover, care has to be taken before an individual refugee is removed from the territories of Kenya and therefore requires a long time to secure the asylum of another country to live in. Any deportation that is made divergent to the terms of the law is a violation to the normative law.

3.3 Exception to the Principle of Non-Refoulement

The key reason of repatriation, in compliance with Kenya law, is national protection for refugees who have or wish to obtain refugee status. The Constitution of Kenya, 2010, defines National security under Article 238 as-

[98] Refugee Act, Section 21(2)
[99] Refugee Act, Section 11(1)
[100] Refugee Act, Section 9,10
[101] Refugee Act, Section 10(3)
[102] Ranja (n 58 above)74
[103] Refugees Regulations, Regulation 47(3)

"the protection against internal and external threats to Kenya's territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity, and other national interests."[104]

Vungo reaffirmed that non-refoulement faces a variety of legal challenges following the frequently extremist attacks on State sovereignty,[105] thus, the compliance and non- compliance towards the principle is based on legal debates.[106]Due to the September 2001 incident in the US, a balance has been required between national security interests and international regulatory obligations throughout the world.

Based on these historical moments, Olagookum and White have argued, several nations, including Kenya, begun to investigate the existence within the borders, for example, refugees from suspected nations, for instance the Republic of Somalia.[107]

In August 1998, the US embassy was bombed by terrorists, which killed the lives of 216[108] and injured a lot of people.[109] It was believed the perpetrators were members of the al-Qaeda group in Somalia.[110] Nonetheless, there has been numerous terrorist attacks in Kenya that are believed to have been conducted by Al- Shabab such as the 2013 Westgate Mall attack, in which 67[111]people were lives were lost, and in 2015 Garissa University terrorist attack, in which 147[112] students were killed.

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[104] Constitution of Kenya, Article 238

[105]J Vungo,' Contemporary legal challenges to state obligations relating to refugee problems: the case of Kenya' University of Nairobi, 2007

[106] OJ Apondi 'Discussing new challenges facing the principle of non-refoulement in the refugee law with particular reference to Kenya' University of Nairobi, 2017 13

[107]O Olagookun& J White*, Including students from refugee backgrounds in Australian schools* (2017) 95

[108]GL Heath & DK Tarus, *Christian responses to terrorism: the Kenyan experience* (2017)21

[109]https://www.academia.edu/28245842/Kenya_Entangled_in_Proscribed_Crimes_of_Terrorism_and_Violations_of_Human_Rights_Law (20 March 2020)

[110]B Rene & K Wouters,' Terrorism and the non-derogability of non-refoulement' (2003) 15(1) *International Journal of Refugee Law*, 5

[111]Heath &Tarus (n 108 above) 21

[112]As above

3.4 Case Law on Non-Refoulement Principle in Kenya

Kenya has refugee regulations in effect, which can be seen to comply with international law in regards to doctrine of refoulement. In addition, the statutory term has strengthened the requirement to protect not only refugees but also asylum seekers by applying the concept of non refoulement. Furthermore, the adherence is shown when the judges agreed that the government's closure of Daadab refugee's camp and the return of Somalia for all Somali refugees constituted a breach of the non-refoulement principle in the Kenya case, the *National Commission on Human Rights and another V Attorney General & 3 others.*[113]

Thus, it was determined if the action of the Government infringed the non-refoulement principle. The court ruled that the government's policy in this petition violated the principle of non-refoulement and thus violated international law, convention and the obligations of the country pursuant to the various conventions to which it is a signatory.

The Kenyan Government officially shut down the Kenya-Somalia border in January 2007, with the aim of forcibly returning Somali refugees to their country due to national security.[114]However, it led to bribes being demanded from the frontier by Somalis and Kenyan Police, so that Somalis could reach Kenya, while those who couldn't bribe were exposed to inhumane conditions.[115]

In 2015, after the terrorist attack on Garissa University caused the killing of 147, the Government of Kenya announced its intention to build a wall across the border with Somaliawhich aims to minimizing illegal entry into the country.[116] However, the wall is the same as closing the borders so that refugees can be stopped from entering the country..

Closing a border means that the concept of non-refoulement, under Sec 18 of the Refugee Act does not comply, thus, violates any act restricting Kenya entry for refugees. Border closer thus

[113] (2017) eKLR
[114]Addressing the Humanitarian Crisis on the Kenya/Somalia Border', March 2009, www.oxfam.org (accessed 1 April 2020)
[115] (n 110 above)
[116] Ranja, (n 55 above)79

breaches the definition because it seeks to deny entry to Kenya to refugees. Therefore, the detention and deportation of refugees to their land where fear of persecution is a failure to honor the concept of refoulement.

Hence, regardless the national laws, the closure of the border as well as the arrest and deportation of refugees without a reasonable ground indicates non- compliance of the international norm. Moreover, on 22 December 2014 Kenya enacted Security Laws Act of 2014. Section 48 of the Act amended section 16 of the Refugee Act, 2006 to read as follows;

"The Refugee Act is amended by inserting the following new section immediately.
16A. (1) the number of refugees and asylum seekers permitted to stay in Kenya shall not exceed one hundred and fifty thousand persons

(2) The National Assembly may vary the number of refugees or asylum seekers permitted to be in Kenya."[117]

The fact that the number of refugees permitted to live in Kenya is limited to one hundred and fifty thousand is justified. It's reasonable, if the country has more refugees than the necessary, some will need to be pushed out of the country.

However, the problem is whether these amendments to the Refugee Act affect the Concept of non-refoulement and if so, this will constitute a breach of non-refoulement by moving refugees to unstable countries from Kenya under Section 18 of the Act .As explained in the case of *CORD and 2 others v. Republic of Kenya and Another*[118] the court stated that;

".....the amendment to the Refugee Act limits the number of refugees and asylum seekers permitted to stay in Kenya to 150,000. From the Attorney General's submissions, the country has between 450,000-583,000 refugees presently staying in Kenya……The question is how the government intends to get rid of the extra over 300,000 refugees. Therefore, for there to be 150,000 refugees, not only must there be no admission into the country, but there also has to be

[117] Refugee Act, Section 16A
[118] Coalition For Reform and Democracy (CORD) & 2 others v Republic of Kenya & Another, Petition No. 628 of 2014

expulsion of the extra refugees which will violate the principle of non-refoulement. The provision of section 48 of the Security Laws (Amendment) Act *as well as the provision of section 16A of the Refugee Act in our view is unconstitutional thus null and void."*[119]

It therefore indicates that the amendment to the Refugee Act was unconstitutional as the norm was assured only after the Court had intervened and violated the norm of non-refoulement.

3.5 Conclusion

The Kenyan Constitution lays down the constitution's supremacy, hence, spells out under Article 238[120] that;

"National security shall be promoted and guaranteed this includes the protection against internal and external threats to Kenya's territorial integrity and sovereignty, among other national interests."

This chapter demonstrates that Kenya violates the non-refoulement principle in the premise that the national security is at risk, provided that the government of Kenya needs to protect its people especially as terrorist attacks are ongoing in Kenya.

[119] Coalition For Reform and Democracy (CORD) & 2 others v Republic of Kenya & Another, Petition No. 628 of 2014
[120] CoK, Art 238

CHAPTER FOUR

4.0 THE APPLICATION OF NON REFOULEMENT: A CASE STUDY OF HONG KONG

4.0.1 Introduction

The non-refoulement policy is the foundation of asylum and international law on refugees. The principle can be said to have become a customary international rule of law.[121]In order to become part of customary international law, two components are necessary: clear State practice and opinion jurisdictions. In Article 33 of the1951 Convention, the doctrine of non-refoulement was explicitly codified.[122]When a government signs and ratifies an agreement, it accepts a legal obligation to ensure it has the means to apply it.

The theory of non-refoulement extends in situations where the applicant is already on the host country's territory or port of entry. An international refugee law principle is that applicants for asylum should not be returned and expelled until their status has been finally determined. If a States wish to reverse their obligations, after the Convention in 1951, they cannot act against the principle of refoulement. States also have no responsibility for transferring anyone to another country if it would expose them to serious human rights violations, including life at risk.

However, we should note that no legal obligation to grant asylum is established under the 1951 Convention. States may also select who is a refugee and could also deny the appeal for asylum seekers if the applicant does not meet the requirements of the refugee. The application of the non-refoulement principle thus requires an analysis of each individual's facts and circumstances before a decision is made.

4.1 The Scope of the Principle of Non Refoulement in Hong Kong

The non-refoulement concept in Hong Kong is well recognized. This is evident from the fact that, when a person resides within Hong Kong, the Hong Kong government has gone to the extent of developing regulations that will direct the application and grant of protection under the

[121] Goodwin-Gill and McAdam The Refugee in International Law 3rd ed 248
[122]Article 33(1) of the 1951 Convention

concept. However, the concept of non-refoulement is neither derived from the Refugee Convention nor from the 1967 Protocol.[123]

The United Nations Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, the International Covenant on Civil and Political Rights, the Hong Kong Immigration Act, CAP115 and the Hong Kong Bill of Rights Ordinance CAP 383 are the primary sources of the concept of non-refoulement in Hong Kong.

Article 3(1) of the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment of the United Nations provides:

"No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."[124]

Furthermore, Article 3 Section 8, of the Hong Kong Bill of Rights Ordinance provides that:

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."[125]

Although the principle of non-refoulement is not explicitly stated in this clause, however, it can be inferred by viewing the article as preventing a state from forcing a person to return to a country that is likely to be subjected to torture or barbaric inhuman and degrading treatment.

Drawing examples from applicable resources and case law,[126] a claimant who seeks to invoke protection under the principle of non refoulement shall meet two requirements;

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[123] https://www.immd.gov.hk/pdf/notice_non-refoulement_claim_en.pdf
[124] United Nations Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, Article 3(1)
[125] Hong Kong Bill of Rights Ordinance, Article 3 Section 8
[126] C and Others v. Director of Immigration and Another

"The ill-treatment (physical and/or mental suffering) he would face if expelled attains what has been called —a minimum level of severity and he/she faces a genuine and substantial risk of being subjected to such ill-treatment."

As a result a claimant may ceases to be protected if he/she does not meet the requirements. Therefore, the burden of proof lies on the claimant in order to be afforded non refoulement protection on any applicable grounds, were you to be expelled, returned or surrendered to a Risk State. A person claiming non-refoulement protection in Hong Kong must indicate in writing to an immigration officer his intention to request protection, which must include a general explanation of the reasons for the person claiming non-refoulement protection in Hong Kong. Conversely, the claimant may be moved to a specified country that not a risk State.[127]

In the case of *Ubamaka v the Secretary for Security [2013] 2 HKC 75 ("Ubamaka")*[128], inter alia, as read together with Section 8 of the Hong Kong Bill of Rights Ordinance, that there has to be a personal and/or substantial grounds believing that there are risk of irreparable harm. In this regard, the burden of proof is to the claimant, establishing his/her fundamental rights. Therefore they have an obligation to provide all material facts relevant to the claim and to comply with every requirement, procedure and conditions prescribed or required. In addition the residential address shall be known as well as the correspondence address- must notify in writing if there are any changes.

However, the claim towards the doctrine of non refoulement will be treated as withdrawn and must not be re-opened if one leaves Hong Kong for whatever Reasons. This demonstrate that the concept of non-refoulement applies only when the person seeking protection is within the borders of Hong Kong, and if he/she leaves the jurisdiction for whatever reason, their protection would cease and thus duty to protect such persons would lapse.

Nonetheless, the issue as to whether Hong Kong has "repudiated" the peremptory norm, is addressed from relevant instruments and case law. In the case of, *C and Others v. Director of*

[127] https://www.immd.gov.hk/pdf/notice_non-refoulement_claim_en.pdf (accessed on 19th January,2021)
[128] Ubamaka v the Secretary for Security [2013] 2 HKC 75 ("Ubamaka")

Immigration, HCAL 132/2006, para. 138 (C.F.I. Feb. 18, 2008) (Legal Reference System) (H.K.), the court reiterated that it was the 'clear intention' of the government and legislature that refugees 'shall not be accorded any special rights' and that the issue should be left to the 'unfettered discretion' of the internal security board.

This brings rise to exceptions under the general rule. These exceptions make it possible to exclude the claimant from its jurisdiction, even though there are explanations for the possibility of persecution. These are;

1. Significant reasons exist to consider that a person has ordered, incited, supported or otherwise engaged in the persecution of another person infringing there fundamental rights and freedoms;
2. The person has been convicted of a serious crime under the Hong Kong Special Administrative Region and/or elsewhere;
3. There are justifiable grounds to believe that the person is a danger to security of the Hong Kong Special Administrative Region; or
4. The person is not eligible to be recognized as a refugee or for non refoulement protection because he/she falls within the exceptions to international protection.

In conclusion, it is evident that the principle is respected in Hong Kong but under strict laws. Despite the fact that such protection in Hong Kong is not exclusively guided by the provisions of the Refugee Convention, the establishment of a mechanism for applying for protection under that principle demonstrates conformity with that principle.

4.2 Conclusion

Indeed, it's evident that Hong Kong and Kenyan laws are similar in relation to the scope of the refugee protection but slightly different in relation to its application. However, it should be noted that, within Hong Kong, the exceptions to the principle of non-refoulement are comparable to those provided for in the Refugee Convention i.e. first, it is a threat to the host state's national security and, second, a threat to the public.

This proves that the concept is binding but not exclusive because, when national security is threatened, the country can consider alternative options, such as voluntary return, local integration, relocation and safe third country agreements. Moreover, the Minister for Internal Security must expressly state that a third country is actually safe before an asylum seeker is authorized to seek security in that country.

Since Kenya is partially the largest recipient of asylum applications worldwide, therefore, a balance can be established between implementation and non-fulfillment of the non-refoulement law, without prejudicing human fundamental rights and independence.

CHAPTER FIVE

5.0 CONCLUSION AND POSSIBLE SOLUTIONS

5.0.1 Introduction

The doctrine of non-refoulement was incorporated into a varies international and regional treaties adopted by several countries that have shown recognition, including the UN Convention on the Status of Refugees in 1951 ratified by 145 States in April 2015,which provides both internationally and domestically for the rights and protection of refugees. Furthermore, the doctrine have achieved the status of a customary international law standard thus irrespective of whether or not they are party to the 1951 convention, is binding, since it has developed into a standard international norm having achieved the status of customary international law standard.

However, this principle, in so many host nations, is not an absolute right, according to international law. Under Article 33(2) of the Refugee Convention, stipulates that the exception to the principle is provided that;

"The benefits of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to security of the country in which he is, or who, having been convicted of a final judgment of a particularly serious crime, constitutes a danger to the community of that country."[129]

This study concludes that while the Kenyan government, UNHCR, and other actors took substantial steps to implement international legislation on refugees, especially the non-refoulement principle, much remains to be done to fully implement the Kenyan principle. Kenya has taken a significant step towards upholding the concept of non-refoulement by signing international conventions and regional refugee instrument. In 2006, the State has adopted its own Refugee Act allowing for non-refoulement in compliance with Article 18.

[129] 1951 Refugee Convention Article 33(2)

Consequently, Kenya has set out refugee legislation to comply with the application of the doctrine of non-refoulement. Compliance can be seen where the courts in the case of *Kenya National Commission on Human Rights & another v Attorney General & 3 others*, showed that the amendment of the Refugee Act was unconstitutional, since the principle was only ensured after the intervention of the Court.

Nonetheless, the Kenyan Constitution lays down the constitution's supremacy, hence, spells out under Article 238[130] that;

"National security shall be promoted and guaranteed this includes the protection against internal and external threats to Kenya's territorial integrity and sovereignty, among other national interests."

The article demonstrates that Kenya violates the non-refoulement principle in the premise that the national security is at risk, provided that the government of Kenya needs to protect its people especially as terrorist attacks are ongoing in Kenya. Thus, the government and the legislative seem to be conflicting.

It is evident that the government has breached the principle of non-refoulement by closing Daadab refugee camps and ordering all Somali refugees to be returned to Somalia. This signifies a degree of non-compliance with the principle still exists in Kenya. Non-compliance with the international standards can only be allowed if the State can demonstrate that a possible threat to the nation is present since the government is entitled to provide its citizens with security as discussed in Chapter 3.

It must nevertheless meet the reasonable standards and must therefore adhere to the statutory requirement for fair administrative action. All refugees who accuse them of being a threat to national security must not be blankly dismissed. Therefore, the burden of proof lies with the prosecutor. Any refugee accused of a threat to national safety must be duly charged and

[130]CoK, Art 238

convicted before being deported from the country, as specified in Chapter 4 of the Constitution, 2010.

Hence, the conflict can be resolved multiple suggestions on how to reconcile national security with the non-refoulement principle, through policies that can contribute to the balance of national security and safety for refugees

5.1 Possible Solutions

There seem to be a conflict of law thus recommendations can also be discussed as regards the balance between upholding the concept of non-refoulement and maintaining national security in Kenya:

1. The relevant government bodies must establish a detailed policy to that effect in order to ensure that the concept of non-refoulement is completely enforced in Kenya. The presence of national refugee legislation is only enforced continuously until this is accomplished. However, the application is contradictory since the legislative allows the Refugee Act and the Refugee Regulations, while the Executive provides for the camps of refugee to be closed, to have closed borders while returned to their countries.

2. The international community needs to concentrate on resolving conflicts in the countries of refugee homes to speed up volunteer repatriation as a permanent solution.[131] Nonetheless, war causes should be addressed on an appropriate basis, so as to enable refugees to return once peace is maintained. Moreover, as a governance to eliminate conflicts that cause citizens in other States to flee to and look for shelter, African countries should reinvent themselves.

3. The host countries are constantly hosting refugees. As a result the international community should fulfill its legitimate duty to share burdens through financial and humanitarian assistance. Financial aid will reduce the host state's economic costs, thus, aim to develop and empower refugees economically in order to reduce their dependence.

[131] K Oluoch, *Implementation of international refugee law:* the case of Kenya(2017)369

This ensures the refugees to spend and produce revenue streams so that all arrangements do not depend on the host state.

4. Refugees are repatriated voluntarily; this refers to refugees who are voluntarily returning to their home countries. UNHCR encourages voluntary repatriation as an alternative for refugees if the conditions for the reintegration of repatriated refugees into their country of origin are secure.[132]
5. Anyone who is charged with helping terrorist groups such as Al Shabaab should be personally investigated, prosecuted and punished under Kenya law, once found guilty, they are deported from Kenya.
6. The border police must thoroughly examine a person so that they do not smuggle illegal weapons into the country where terrorists can operate, pending the admission to enter the counrty. Thus, the officers bear the duty of care to establish national security.

[132] https://definitions.uslegal.com/v/voluntary-repatriation/ (accessed 24 June, 2020)

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