THE PRINCIPLE OF NON-REFOULMENT; AN INHERENT OBLIGATION ON A STATE

By Joshua Malidzo nyawa

'Today, some of the wealthiest among us are challenging this ancient principle [the protection of refugees], casting refugees as gate crashers, job seekers or terrorists. This is a dangerous course of action, short-sighted, morally wrong, and – in some cases – in breach of international obligations'[1].

INTRODUCTION

It's not only some of the wealthiest but even some of the third world countries are hell bent on extraditing the refugees living in their countries[2]. Just as a man who is about to drown will clutch at anything in order to ensure that he or she does not die, the principle of non refoulment[3] is that grass that can save a man from drowning, Despite being a 'bare-bones entitlement', **Hathaway** is of the view that the principle of non refoulment is the refugee's most sacred protection[4]. The principle of non-refoulment is the doctrine that is central to refugee protection and its basic premise is prohibiting the return of an individual to a country in which he or she may be

[1] Antonio Guterres, United Nations High Commissioner for Refugees, http://www.unhcr.org/55842cb46.html last accessed 2017-07-28.

[2] In 1996 the UNHCR Executive Committee in Conclusion No. 79(XLVII) 1996 stated;
Distressed at the widespread violations of the principle of non refoulment and of the rights of refugees, in some cases resulting in loss of refugee lives, and seriously disturbed at reports indicating that large numbers of refugees and asylum-seekers have been refouled and expelled in highly dangerous situations;

[3]See Lambert, H., 48 *International and Comparative Law Quarterly*, 1999, p-519; see also Islam, Md. Towhidul., 'Protection of Refugees against Refoulement' in *The Dhaka University Studies. Pan-F \vl. Xv (l):* 215-238, June 2004. Where Helene Lambert says that the principle includes and refers to expulsion, deportation, removal, extradition, sending back, return or rejection of a person from a country to the frontiers of a territory where there exists a danger of ill-treatment, i.e. persecution, torture or inhumane treatment

[4]J Hathaway, 'Leveraging Asylum' (2009-10) 45 TILJ 504-5.

Electronic copy available at: https://ssrn.com/abstract=3081488

persecuted.[5] The principle of non-refoulment creates an obligation on the state not to refoul; return or forceful evict refugees and even asylum seekers, In *Mutombo v Switzerland,* the Committee held that Switzerland had an obligation to refrain from expelling complainant Balabou Mutombo to Zaire, or to any other country where he runs a real risk of being expelled or returned to Zaire or of being subjected to torture[6] and in **Saadi v Italy**, the Court stated[7]:

Since protection against the treatment prohibited by Art 3 is absolute, that prohibition imposes an obligation not to ... expel any person who, in the receiving country, would run the real risk of being subjected to such treatment. As the Court has repeatedly held, there can be no derogation from the rule....

Bacaian is of the view that the principle of non refoulment is the cornerstone, he states that;

Refugee law imposes a clear and firm obligation on States: under the principle of non-refoulment no refugee should be returned to any country where he or she is likely to face persecution. This is the cornerstone of the *regime of international* protection *of refugees*[8]

THE PRINCIPLE OF NON REFOULMENT

The principle is said to be derived from the French word 'refouler' which means to drive back, to force back or to refuse entry[9]According to Goodwin-Gill 'refouler', means 'to drive back or to

[5] Bacaian L.E, —*The Protection of refugees and their right to seek asylum in the European Union||*, Institut Européen De L"université De Genève Collection Euryopa Vol. 70 - 2011
[6] *Mutombo v Switzerland* (n 91 above). See also *Pauline Muzonzo Paku Kisoki v Sweden*, Communication No. 41/1996, U.N. Doc. CAT/C/16/D/41/1996 (1996).
[7]Joint dissenting opinions of judges Tulkens, Bonello, and Spielman in *N v United Kingdom* (2008) 47 EHRR 39 (ECtHR) at Para 138.
[8] Bacaian L.E, —*The Protection of refugees and their right to seek asylum in the European Union||*, Institut Européen De L"université De Genève Collection Euryopa Vol. 70 - 2011
[9] Terrel P (ed) *Harrap's shorter dictionnaire* (1996).

Electronic copy available at: https://ssrn.com/abstract=3081488

repel, as of an enemy who fails to breach ones' defenses'[10] Weissbrodt and Hortreiter are also of the opinion that the word 'refouler' means literally to drive back or repel[11]Garner defines refoulement as expulsion or return of a refugee from one state to another[12] while Sir Elihu Lauterpacht and Daniel Bethlehem define the principle of non refoulement as;

Non-refoulement is a concept which prohibits States from returning a refugee or asylum seeker to territories where there is a risk that his or her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion.[13]

Therefore, refoulment in refugee law for the purposes of this article means the expulsion of persons who have the right to be recognized as refugee or an 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. The principle of non-refoulement prohibits the expulsion, extradition, deportation, return or otherwise removal of person in any manner whatsoever to a country or territory where he/she would face a real risk of persecution or serious harm[14]

The cornerstone of refugee protection is the principle of *non-refoulement*, the rights of refugees and basic human rights are inextricably linked[15]. Today's human right abuse is tomorrow's

[10] GS Goodwin-Gill (1996) Second Edition 167. RL Newmark (1993) 71 *Washington University Law Quarterly* 833 845. P 117

[11] D Weissbrodt and I Hörtreiter (1999) 5 *Buffalo Human Rights Law Review* 1 2.

[12] Garner BA (ed) *Black's law dictionary* Eighth Edition (2004).

[13] Lauterpacht. E and Bethlehem.D , *—The scope and content of the principle of non-refoulement: Opinio* ,www.unhcr.org accessed on 27th June, 2015

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

[15] Janeth Apelles Chambo,The Principle Of Non-Refoulement In The Context Of Refugee Operation In Tanzania

refugee movements[16]the respect to the principle of non refoulment is as such at the core of being a refugee. It creates an obligation on the states, **Reinhard Marx** notes that

"Refugee law imposes a clear and firm obligation on States: under the principle of non refoulment no refugee should be returned to any country where he or she is likely to face persecution. This is the cornerstone of the regime of international protection of refugees"[17]

This principle has been laid out in various international and regional instruments[18]; It is enshrined in Article 33 of the 1951 Convention, which is also binding on States Party to the 1967 Protocol.5 Article 33(1) of the 1951 Convention[19] provides:

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

The protection against *refoulement* under Article 33(1) seems to apply to any person who is a refugee under the terms of the 1951 Convention[20], that is, anyone who meets the requirements of the refugee definition contained in Article 1A(2) of the 1951 Convention (the "inclusion" criteria) . It follows that the principle of *non-refoulement* applies not only to recognized

[16] Amnesty International 'Refugees: Human rights have no borders' *AI Index: ACT 34/03/97*.
[17] Reinhard Marx, "Non-refoulement, Access to Procedure and Responsibility for Determining Refugee Claims" in Selina Goulbourne*, Law and Migration,* Edward Elgar Publishing, Cheltenham, 1998, p. 96.
[18] International Covenant on Civil and Political Rights (ICCPR): Article 13, UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Article 3(1), Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention): The principle of non-refoulement is enshrined in Article 2(3) refoulement in the OAU Convention.
The Charter of Fundamental Rights of the European Union: Article 19(2) of the Charter talks and emphasizes about non-refoulement.
American Convention on Human Rights: Article 22(8),
[19] UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol at Para 5
[20] ibid

refugees[21], but also to those who have not had their status formally declared[22] The principle of *non-refoulement* is of particular relevance to asylum-seekers. Given that a person is a refugee within the meaning of the 1951 Convention as soon as he or she fulfills the criteria contained in the refugee definition, refugee status determination is declaratory in nature: a person does not become a refugee because of recognition, but is recognized because he or she is a refugee[23] This principle applies to both direct and indirect refoulment ,The prohibition of *refoulement* , as noted by **UNHCR** and scholars , It applies not only in respect of return to the country of origin or, in the case of a stateless person, the country of former habitual residence, but also to any other place where a person has reason to fear threats to his or her life or freedom related to one or more of the grounds set out in the 1951 Convention, or from where he or she risks being sent to such a risk.[24] The language of article 33 and of complementary regional instruments is nevertheless broad and unequivocal. It prohibits both the expulsion of a refugee from a contracting State and the return of a refugee to a territory where his or her life or freedom would be endangered[25]

[21] As such persons may be refugees, it is an established principle of international refugee law that they should not be returned or expelled pending a final determination of their status.

[22] This has been reaffirmed by the Executive Committee of UNHCR, for example, in its Conclusion No. 6 (XXVIII) "*Non-refoulement*" (1977), Para. (c) (Reaffirming "the fundamental importance of the principle of *non-refoulement* … of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognized as refugees."). The UNHCR Executive Committee is an intergovernmental group currently consisting of 70 Member States of the United Nations (including the United States) and the Holy See that advises the UNHCR in the exercise of its protection mandate. While its Conclusions are not formally binding on States, they are relevant to the interpretation and application of the international refugee protection regime. Conclusions of the Executive Committee constitute expressions of opinion which are broadly representative of the views of the international community. The specialized knowledge of the Committee and the fact that its conclusions are reached by consensus adds further weight. UNHCR Executive Committee Conclusions are available at http://www.unhcr.org/cgi-bin/texis/vtx/doclist?page=excom&id=3bb1cd174 (last visited on 26 July 2017).

[23] See: UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, 1979, Reedited Geneva 1992, Para. 28.

[24] See: UNHCR, *Note on Non-Refoulement* (EC/SCP/2), 1977, Para. 4. See also P. Weis, *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr. Paul Weis*, Cambridge University Press, Cambridge (1995), at p. 341

[25] Ibid ft 22

The prohibition of *refoulement* to a country where the person concerned would face a real risk of irreparable harm such as violations of the right to life or the right to be free from torture or cruel, inhuman or degrading treatment or punishment extends to all persons who may be within a State's territory or subject to its jurisdiction, including asylum seekers and refugees[26],and applies with regard to the country to which removal is to be effected or any other country to which the person may subsequently be removed[27]. The principle therefore creates an obligation on a state, and this is evident in the various instruments, for example In article 3 of the *Convention relating to the International Status of Refugees*[28], the contracting parties undertook not to remove resident refugees or keep them from their territory, "by application of police measures, such as expulsions or non-admittance at the frontier (refoulment), unless dictated by national security or public order. The central features of *non-re foulement* are also present in the 1969 American Convention on Human Rights, article 22(8) of which declares,

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

[26] For States Party to the ICCPR, this has been made explicit by the Human Rights Committee in its *General Comment No. 31, on the Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004 *s*, Para. 10 ("… [T]he enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. …").

[27] See: *General Comment No. 31 on the Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004

[28] 159 LNTS no. 3663; official text in French.

In Africa this obligation is reflected in regional instruments which include ; Article II(3) of the 1969 Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU69)[29] declares that;

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

The African Charter of Human and Peoples‟ Rights of 1981 (ACHPR81) under Article 12(3) focuses specifically on asylum and goes ahead to state that „*Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions*[30]

THE PRINCIPLE OF NON REFOULEMENT AS PART OF CUSTOMARY INTERNATIONAL LAW

For a rule to become part of customary international law, two elements are required: consistent State practice and *opinio juris*, that is, the understanding held by States that the practice at issue is obligatory due to the existence of a rule requiring it[31]. International customary law is therefore created if these two components are combined – consistent state practice this means that States have started to act in a similar way although there is no legal rule that obliges them to do so. And secondly States must be convinced that it is a rule to act in that way and that this rule is

[29] 1001 U.N .T.S. 45.

[30] Goodwin-Gill Guy S. and McAdam J., *The Refugee in International Law*, New York, Oxford University Press, 3rd Edition, 2011 pg 210

[31] See: International Court of Justice, *North Sea Continental Shelf, Judgment,* 1969 ICJ Reports, and page 3, Para. 74. See also International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, 1984 ICJ Reports, page 392, Para. 77.

binding. This is called *opinio juris*[32] and can be derived from evidence of a general practice or is proven when there is a consensus in the literature[33]; **Dina Imam Supaat** argues that the principle of non refoulement has now obtained the status of Customary International Law. He argues that

…The principle of non- refoulement as widely practiced around the world is said to have developed into a rule of customary international law and is thus binding upon all states[34]

While UNHCR is of the view that the prohibition of *refoulement* of refugees, as enshrined in Article 33 of the 1951 Convention and complemented by *non-refoulement* obligations under international human rights law, satisfies these criteria and constitutes a rule of customary international law[35].UNHCR justifies this view and notes *inter alia*, UNHCR has closely followed the practice of Governments in relation to the application of the principle of *non-refoulement*, both by States Party to the 1951 Convention and/or 1967 Protocol and by States which have not adhered to either instrument. In UNHCR's experience, States have overwhelmingly indicated that they accept the principle of *non-refoulement* as binding, as demonstrated, *inter alia*, in

[32] Duffy, Aoife, *Expulsion to Face Torture? Non-refoulement in International Law*, 2008, 20 (3), International Journal of Refugee Law, p 384

[33] G. GOODWIN-GILL and J. Macadam, *The Refugee in International Law*, Oxford, Oxford University Press, 2007, 346

[34] Supaat D.I., „*Escaping The Principle Of Non Refoulement*", International Journal of Business, Economics and Law, Volume 2, Issue 3 (June) 2013 pg 1

[35] See: UNHCR, *The Principle of Non-Refoulement as a Norm of Customary International Law,* Response to the Questions posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93 (available at: http://www.unhcr.org/home/RSDLEGAL/437b6db64.html, last accessed on 30 JULY 2017); UNHCR, *Note on the Principle of Non-Refoulement (EU Seminar on the Implementation of the 1995 EU Resolution on Minimum Guarantees for Asylum Procedures)*, 1 November 1997 (available at: http://www.unhcr.org/home/RSDLEGAL/438c6d972.html, last accessed on 30JULY 2017). *See also* New Zealand Court of Appeal, *Zaoui v. Attorney General*, 30 September 2004, (No 2) [2005] 1 NZLR 690, Para. 34 ("The prohibition on refoulement, contained in art 33.1 of the Refugee Convention, is generally thought to be part of customary international law, the (unwritten) rules of international law binding on all States, which arise when States follow certain practices generally and consistently out of a sense of legal obligation.") and Para. 136 ("The Refugee Convention is designed to protect refugees from persecution and the non-refoulement obligation is central to this function. It is non-derogable in terms of art 42.1 and, as discussed above at Para [34] has become part of customary international law."). *See also* E. Lauterpacht and D. Bethlehem, *supra* footnote 13, paras. 193–219; G. Goodwin-Gill, *The Refugee in International Law*, 2nd edition, Oxford University Press (1996), at pp. 167–171.

numerous instances where States have responded to UNHCR's representations by providing explanations or justifications of cases of actual or intended *refoulement*, thus implicitly confirming their acceptance of the principle[36]. At the regional level, the customary international law character of the principle of *non-refoulement* has also been re-affirmed in a Declaration adopted by Latin American States participating at a gathering to celebrate the twentieth anniversary of the 1984 Cartagena Declaration[37] the view that the principle of non refoulment has attained the customary international law status was expressed in the **Asylum Case** where the International Court of Justice (ICJ) stated[38];

The party which relies on Custom … must prove that this custom is established in such a manner that it has become binding on the other party… that the rule invoked… is in accordance with a constant and uniform usage practiced by the States in question, and that this usage is the expression of a right appertaining to the state granting asylum and a duty incumbent on the territorial state. This follows from Article 38 of the Court, which refers to international custom as evidence of a general practice accepted as law

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[36] As noted by the International Court of Justice in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.)*, Merits, 1986 ICJ Reports, page 14, Para. 186, "[i]n order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent which such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule."

[37] Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America of 16 November 2004 (available at: http://www.unhcr.org/home/RSDLEGAL/ 424bf6914.pdf, last accessed on 30 October 2006), at preliminary Para. 7 ("*Recognizing* the *jus cogens* nature of the principle of *non-refoulement*, including non-rejection at the border, the cornerstone of international refugee law, which is contained in the 1951 Convention relating to the Status of Refugees and its Protocol of 1967, and also set out in Article 22 (8) of the American Convention on Human Rights and Article 3 of the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, …"). *See also* Section III(5) of the 1984 Cartagena Declaration on Refugees, *supra* footnote 26 ("…[The] principle [of *non-refoulement*] is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of *jus cogens*.").

[38] Columbia v Peru (1950)ICJ, available at http:// www.worldlii.org/int/cases/ICJ/1950/6.html

The principle of *Non-refoulement* is not only important as a treaty-based rule, however, but also as a principle of customary international law[39]. This principle is widely held to be part of customary international law, binding on all States irrespective of their ratification of or accession to international instruments[40]and according to multiple commentators, there is no doubt that *non-refoulement* is a rule of international customary law[41] Seline Trevisanut argues that the principle is unanimously considered to be a customary norm[42].Professor Goodwin Gill is an ardent proponent of this view. Commenting on a decision of the Supreme Court of the United States of America he said:

The principle of non-refoulment has crystallized into a rule of customary international law, the core element of which is the prohibition of return in any manner whatsoever of refugees to countries where they may face persecution. The scope and application of the rule are determined by this essential purpose, thus regulating state action wherever it takes place, whether internally, at the border, or through its agents outside territorial jurisdiction[43]

Grahl-Madsen observes in relation to the 1954 United Nations Conference on the Status of Stateless Persons that the principle of non-refoulement is 'an expression of a generally accepted principle'.[44] Moreover, there is general consensus amongst legal scholars[45] that non-refoulement

[39] Guy S. Goodwin-Gill, the Principle of *Non-Refoulement'.* Its Standing and Scope in International Law, *International Journal of refugee Law*
[40] ibid
[41] Duffy, Aoife, *Expulsion to Face Torture? Non-refoulement in International Law*, 2008, 20 (3), International Journal of Refugee Law, p 389, Lauterpacht, Sir Elihu and Bethlehem, Daniel, *The scope and content of the principle of non-refoulement: Opinion*, 2003, Refugee Protection in International Law: UNHCR's Global Consultations on International Protection, Cambridge University Press p 155; Allain, Jean, *The* Jus cogens *Nature of* Non-refoulement*,* 2001, 13 (4), International Journal of Refugee Law 538
[42] Seline Trevisanut, The Principle of Non-refoulment at Sea and the Effectiveness of Asylum Protection, A von Bogdandy and R. Wolfrum, (eds,) *Max Planck Yearbook of United Nations Law*, (2008) vol. 12, 2005.
[43] Guy S. Goodwin-Gill, *The Refugee in International Law* (2nd ed, 1998), p 143
[44] Atle Grahl-Madsen, 'The Emergent International Law relating to Refugees: Past – Present – Future', in

has now 'become binding as a matter of both treaty and customary law if not also as a so-called peremptory norm or jus cogens'[46]. A binding principle in international customary law, the principle of non-refoulment 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[47].

THE PRINCIPLE OF NON REFOULEMENT; IS IT NON DEROGABLE?

Most scholars have expressed the view that the principle is *jus cogens*[48]. In 1982, the UNHCR declared that the principle of *non-refoulement* was "progressively acquiring the character of a peremptory norm of international law"[49] and in an advisory opinion it concluded that, since the prohibition on torture is a rule of *jus cogens*, so is the prohibition to *refoule* an individual towards a country where he is at risk of being tortured[50]. The definition of jus cogens can be found in Article 53 of the Vienna Convention[51]*:*

For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm

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Peter Macalister-Smith and Gudmundur Alfredsson (eds), The Land Beyond: Collected Essays on Refugee Law and Policy by Atle Grahl-Madsen (The Hague: Martinus Nijhoff Publishers, 2001), pp.180–244 at p.205, quoting the Final Act of the United Nations Conference on the Status of Stateless Persons of 28 September 1954.

[45] See Ian Brownlie, Principles of Public International Law, 4th edn (Oxford: Clarendon Press, 1990), p.7, where the Jurist states that '[the International Court of Justice] is willing to assume the existence of an Opinio juris on the basis of . . . a consensus in the literature'. It ought to be noted that opinions of renowned jurists are recognized in Article 38(1)(d) of the Statute of the International Court of Justice as a general source Of international law.

[46] David Kennedy, 'International Refugee Protection', Human Rights Quarterly, Vol.8, 1 (1986), p.1 at pp.60–61

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

[48] Farmer A, *Non-Refoulment And Jus Cogens: Limiting Anti-Terrror Measures That Threaten Refugee Protection*, Georgetown Immigration Law Journal, 2009, Vol23:1

[49] 165 General Conclusion on International Protection No. 25 (XXXIII), EXCOM (19 October 1982).

[50] Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, UNHCR (26 January 2007), 11. Available at: http://www.refworld.org/docid/45f17a1a4.html (accessed 9 May 2015).

[51] Vienna Convention on the Law of Treaties 23 May 1969, (1980) 1155 UNTS 331.

from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

This acceptance of the principle as a *jus cogens* norm[52] was highlighted in 1984, through the Cartagena Declaration, when the Central American states, Panama, while in Mexico labeled the principle of non-refoulement as a cornerstone of the international protection of refugees[53]. They further stated that this principle is imperative in regard to refugees and in the present state of international law should be acknowledged as *jus cogens*."

The principle of non-refoulement is therefore said to be non-derogable, this view has been shared by different courts which have gone forward to hold that the principle is also linked to human rights[54]. **Orakhelashvilli** supports the proposition that the principle is a peremptory norm. He argues that the peremptory character of the norm is reinforced by its inseparable link with the observance of basic human rights such as the right to life, freedom from torture, and non-discrimination[55]. The ECtHR's jurisprudence on Article 3 ECHR was first established in 1989 in **Soering v. the United Kingdom**[56], an extradition case against the United Kingdom involving a German national accused of a capital offence in the United States. The ECtHR ruled against the extradition on the basis that:

[52] Titus Waweru Ranja, *The Kenyan Law On Refugees And Its Compliance With The Principle Of Non Refoulement,* p 20

[53] Bacaian L.E, *—The Protection of refugees and their right to seek asylum in the European Union||*, Institut Européen De L‟université De Genève Collection Euryopa Vol. 70 - 2011

[54] The absolute nature of the prohibition of *refoulement* to a risk of torture and other forms of ill-treatment under Article 3 of the ECHR has been affirmed by the European Court of Human Rights, for example, in *Chahal v. United Kingdom*, Application No. 22414/93, and 15 November 1996.

[55] Farmer A, *Non-Refoulment And Jus Cogens: Limiting Anti-Terror Measures That Threaten Refugee Protection*, Georgetown Immigration Law Journal, 2009, Vol23:1

[56] ECtHR, *Soering v. the United Kingdom*, No. 14038/88, Judgment of 7 July 1989.

"the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3 … and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country." (para.91, emphasis added).

The ECtHR also held in *Hirsi Jamaa and Others v. Italy*[57] that:

"expulsion, extradition or any other measure to remove an alien may give rise to an issue under Article 3 of the Convention, and hence engage the responsibility of the expelling State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country"

They hold that the right is non-derogable and applies in all circumstances[58], including in the context of measures to combat terrorism[59] and during times of armed conflict[60]. The most

[57] ECtHR, *Hirsi Jamaa and Others v. Italy*, No. 27765/09, Judgment [GC] of 23 February 2012. (para.114)
[58] See, for example, Human Rights Committee, *General Comment No. 29 on States of Emergency (Article 4),* U.N. Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, Para. 11; Human Rights Committee, *Concluding Observations/Comments* on Canada, U.N. Doc. CCPR/C/CAN/CO/5, 20 April 2006, Para. 15; Committee against Torture, *Gorki Ernesto Tapia Paez v. Sweden*, U.N. Doc. CAT/C/18/D/39/1996, 28 April 1997, Para. 14.5.
[59] See, for example, Committee Against Torture, *Agiza v. Sweden*, U.N. Doc. CAT/C/34/D/233/2003, 20 May 2005; Human Rights Committee, *Alzery v. Sweden*, U.N. Doc. CCPR/C/88/D/1416/2005, 10 November 2006; Inter-American Commission on Human Rights, *Report on the Situation of Human Rights of Asylum-Seekers within the Canadian Refugee Determination System*, 28 February 2000, para. 154. *See also* United Nations Commission on Human Rights, Resolution 2005/80 of 21 April 2005 on Protection of human rights and fundamental freedoms while countering terrorism; Security Council resolutions 1456 (2003) of 20 January 2003, 1535 (2004) of 26 March 2004, 1624 (2004) of 14 September 2005, the Declaration on Measures to Eliminate International Terrorism (annex to General Assembly resolution 49/60 of 9 December 1994), the Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism (annex to General Assembly resolution 51/210 of 17 December 1996), the 2005 World Summit Outcome (General Assembly resolution 60/1 of 16 September 2005) and the Plan of Action annexed to the United Nations Global Counter-Terrorism Strategy adopted by the General Assembly on 8 September 2006 (A/RES/60/288).
[60] International human rights law does not cease to apply in case of armed conflict, except where a State has derogated from its obligations in accordance with the relevant provisions of the applicable international human rights treaty (for example, Article 4 ICCPR). In determining what constitutes a violation of human rights, regard

significant authority confirming the non-derogable nature of the principle of non-refoulment is **Chahal**[61], the applicant an Indian national belonging to Sikh population, was suspected of having terrorist acts. He had asked for asylum in the U.K. Although, the British authority considered a balancing act between the national security of U.K.and the protection needs of Chahal to be necessary, the European Court ruled that" the absolute character of Article 3 does not permit deportation to if there is a real risk of being subjected to torture or inhuman or degrading" treatment or punishment, irrespective of the conduct of the applicant or a possible danger to the national security of the U.K. The Court concluded that 'if returned to India, Chahal would run a real risk of being subjected to torture or inhuman or degrading treatment or punishment. Therefore, the deportation would lead to a violation of Article 3 ECHR. The Court concluded that Article3 ECHR does not allow any balancing act between the security interests of State parties and the protection needs of individuals.

The Human Rights Committee has also stated in absolute terms that the *non-refoulement* principle *"should not be subject to any balancing with considerations of national security or the type of criminal conduct an individual is accused or suspected of."*[62] Accordingly, even if a State determines that a migrant poses a security threat to the sending State, *"[t]he nature of the activities in which the person engaged is not a relevant consideration"*[63] the proponents of the

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must be had to international humanitarian law, which operates as *lex specialis* to international human rights in law during a time of armed conflict. This has been confirmed, *inter alia*, by the International Court of Justice in its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996, para. 25; and the judgement of 19 December 2005 in *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, paras. 215–219. *See also*, for example, Concluding Observations of the Human Rights Committee, United States of America, U.N. Doc. CCPR/C/USA/CO/3/Rev.1, 18 December 2006, para. 10; Human Rights Committee, *General Comment No. 31*,

[61] *Chahal v United Kingdom*, (15 November, 1996), ECtHR, Appl. No. 22414/93; *See* also *Ahmed v Austria*, (17 December, 1996), Appl. No. 25964/94

[62] CCPR, *Maksudov and Rakhimov v. Kyrgzstan,* Communication No. 1461, 1462, 1476 1477/2006, 31 July 2008, U.N Doc. CCPR/C/93/D/1461, 1462,1476& 1477/2006, at 12.4.

[63] CAT, *Aemei v. Switzerland,* Communication No. 34/1995, 29 May 1997, U.N. Doc. CAT/C/18/D/34/1995, at 9.8.

non derogable nature of the principle claim that there is no need for balancing the principle with other considerations. While other proponents are of the view that if the principle is derogable, then we can discuss other rights, such a view is propounded by **Bueno** who holds that

The right to non-refoulment, the right not to be returned to a country where one might face persecution, is the cornerstone of the international regime of refugee protection, if the right to non refoulement is violated and a refugee is expelled from the country of asylum, any discussion of other rights protections is rendered moot[64].

The argument that the principle to non-refoulment is non-derogable seems to find its support under the 1969 Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa[65] and The African Charter of Human and Peoples' Rights of 1981[66], under these regional convention and charter, the principle of non refoulement is provided for in absolute terms with no chance for an exception. UNHCR has expressed itself on clear terms that within the framework of the 1951 Convention/1967 Protocol, the principle of *non-refoulement* constitute an essential and non-derogable component of international refugee protection[67]. The central importance of the obligation not to return a refugee to a risk of persecution is reflected in Article 42(1) of the 1951 Convention and Article VII(1) of the 1967 Protocol, which list Article 33 as one of the provisions of the 1951 Convention to which no reservations are permitted. The fundamental and non-derogable character of the principle of *non-refoulement* has also been reaffirmed by the Executive Committee of UNHCR in numerous

[64] Olivia Bueno, *Perspectives On Refoulement In Africa,* Originally Presented At The Canadian Council For Refugees Conference, Toronto, June 17, 2006, p 2
[65] See Ft 28
[66] See ft 29
[67] See ft 19 at para 12

Conclusions since 1977.[68] Similarly, the General Assembly has called upon States "to respect the fundamental principle of *non-refoulement*, which is not subject to derogation."[69]

I however find this argument to be fundamentally flawed, although the principle of non-refoulment is important, the principle is derogable in nature and as such it has limitations, although it is a customary rule that has developed in international refugee law , it also permits exceptions to *non-refoulement* for national security and public safety reasons[70].

LIMITATIONS TO THE PRINCIPLE OF NON-REFOULEMENT AND THE KENYAN EXPERIENCE

Exceptions to the principle of *non-refoulement* under the 1951 Convention are permitted only in the circumstances expressly provided for in Article 33(2)[71], which stipulates that:

[68] See, for example, Executive Committee of UNHCR, for example, in its Conclusion No. 6 (XXVIII) "*Non-refoulement*" (1977), para. (c) (Reaffirming "the fundamental humanitarian principle of *non-refoulement* has found expression in various international instruments adopted at the universal and regional levels and is generally accepted by States."); Conclusion No. 17 (XXXI) *"Problems of extradition affecting refugees"* (1980), at. Para (b) (reaffirming "the fundamental character of the generally recognized principle of *non-refoulement.");* Conclusion No. 25 (XXXIII) *"General"* (1982), Para. (B) (reaffirming "the importance of the basic principles of international protection and in particular the principle of *non-refoulement* which was progressively acquiring the character of a peremptory rule of international law."); Conclusion No. 65 (XLII) *"General"* (1981), Para. (c) (Emphasizing "the primary importance of *non-refoulement* and asylum as cardinal principles of refugee protection…"); Conclusion No. 68 (XLIII) *"General"* (1982), Para. (f) (Reaffirming "the primary importance of the principles of *non-refoulement* and asylum as basic to refugee protection); No. 79 (XLVIII) "*General*" (1996), Para. (j) (Reaffirming "the fundamental importance of the principle of *non-refoulement*); No. 81 (XLVIII), *supra* footnote 14, Para. (l) (recognizing "the fundamental importance of the principle of *non-refoulement*"); No. 103 (LVI) *"Provision of International Protection Including Through Complementary Forms of Protection*" (2005), at (m) (calling upon States "to respect the fundamental principle of *non-refoulement*") UNHCR Executive Committee Conclusions are available at http://www.unhcr.org/cgi-bin/texis/vtx/doclist?page=excom&id=3bb1cd174 (last visited on 26 October 2006)

[69] See, for example, A/RES/51/75, 12 February 1997, Para. 3; A/RES/52/132, 12 December 1997, at preambular Para. 12

[70] Lauterpacht and Bethlehem, 2003, pp. 149-150.

[71] See ft 67 at Para 10

"The benefit of [Article 33(1)] may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he [or she] is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

Article 33 (2) of the 1951 Refugee Convention therefore allows exceptions to the principle of *non-refoulement* when the refugee represents a danger to the security of the country or has been convicted for a particularly serious crime[72]. In Kenya, the domestication of the principle is refoulement is captured by **section 18 of the Refugee Act 2006.** The section provides:

'. No person shall be refused entry into Kenya, expelled, extradited from Kenya or returned to any other country or to subjected any similar measure if, as a result of such refusing, expulsion, return or other measure, such person is compelled to return to or remain in a country where- (a) the person may be subject to persecution on account of race, religion, nationality membership of a particular social group or political opinion; or (b) the person's life, physical integrity or liberty would be threatened on account of external aggression, occupation, foreign domination or events seriously disturbing public '

The Kenyan high court have discussed the principle to non- refoulement in the following cases;

[72] Article 33 (2) reads as follow: "The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final Judgment of a particularly serious crime, constitutes a danger to the community of that country."

In *CORD & 2 others v Republic of Kenya & Another*[73], a petition that was filed by the opposition coalition seeking the declaration of the amendment to the security law, the Court stated as follows

… Non-refoulement *is also expressed in Article 3 of the 1984 UN Convention against Torture; Article 11(3) of the 1969 OAU Convention; Article 12(3) of the 1981 African (Banjul) Charter of Human and Peoples' Rights; and Article 22(8) of the 1969 American Convention on Human Rights, among others. Thus, both domestically and internationally, the cornerstone of refugee protection is the principle of* non-refoulment *the principle that no State shall return a refugee in any manner whatsoever to where he or she would be persecuted. This principle is widely held to be part of customary international law. What emerges from these international covenants and instruments is that a refugee is a special person in the eyes of the law, and he or she must be protected. Further, since Kenya is a signatory to the regional and international covenants on the rights of refugees set out above, which are now, under the Constitution, part of the law of Kenya, she is bound to abide by them. The question is the extent to which she is bound……The respondent has made it very clear that it does not intend to violate the non-refoulement principle. While I accept this position, violation of the principle may be indirect and may be the unintended consequence of a policy that does not, on its face, violate the principle… The proposed implementation of the Government Directive is that it is a threat to the rights of refugees. First, the policy is unreasonable and contrary to Article 47(1). Second, it violates the freedom of movement of refugees. Third, it exposes refugees to a level of vulnerability that is inconsistent with the States duty to take care of persons in vulnerable circumstances. Fourth, the right to*

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

dignity of refugees is violated. Fifth, the implementation of the government directive threatens to violate the fundamental principle of non-refoulement[74]

In **KITUO CHA SHERIA**[75] where the government had sought to refoul refugees in the daadab camp on the basis of insecurity and terrorism[76], the court expressed itself in the following terms;

Before I deal with the specific facts of this case, it is important to understand the status of refugees in Kenya. Kenya is a signatory to a host of Conventions and treaties dealing with refugees and their protection. These include the following;

(a) The 1951 Convention Relating to the Status of Refugees ("1951 Convention"),

(b) The 1967 Protocol relating to the Status of Refugees

(c) The 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa ("AU Convention"). [77]

The court went ahead to discuss the principle of non-refoulment in the words;

One of the fundamental principles in international refugee protection is the obligation of non-refoulement to be found in ***Article 33(1)*** *of the* ***1951 Convention*** *which provides as follows;*

1. No Contracting State shall expel or return (—refouler‖) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. 2. The

[74]See also , *Kituo Cha Sheria & 8 others v Attorney General [2013] eKLR*
[75] ibid
[76] The letter expressly states, *—The Government intends to move all refugees residing in urban areas to the Daadab and Kakuma Refugee Camps and ultimately to their home countries after necessary arrangements are put in place.*

[77] Ibid

benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.‖ ***Article 2(3)*** *of the* ***AU Convention*** *provides that, _No person shall be subjected by a Member State to measures...which would compel him to return or remain in a territory where his life, physical integrity or liberty would be threatened....' States are prohibited from removing, deporting or repatriating refugees from where they are to the States of origin without following due process. This principle is so fundamental that it is considered a customary law norm. It is considered the cornerstone of international refugee protection (see* ***Encyclopedia of Public International Law Max Planck Institute for Comparative Public Law and International Law, Amsterdam, New York, 1985), vol. 8, p. 456****).*

The non-refoulement principle is incorporated in ***section 18*** *of* ***the Act*** *which states as follows;*

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

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

(b) The person's life, physical integrity or liberty would be threatened on account of external aggression, occupation, foreign domination or events seriously disturbing public order in part or whole of that country.[78]

While discussing how the limitations of the principle can be invoked, the court had this to say;

Where national security is cited as a reason for imposing any restrictive measures on the enjoyment of fundamental rights, it is incumbent upon the State to demonstrate that in the circumstances, such as the present case, a specific person's presence or activity in the urban areas is causing danger to the country and that his or her encampment would alleviate the menace. It is not enough to say, that the operation is inevitable due to recent grenade attacks in the urban areas and tarring a group of person known as refugees with a broad brush of criminality as a basis of a policy is inconsistent with the values that underlie an open and democratic society based on human dignity, equality and freedom. A real connection must be established between the affected persons and the danger to national security posed and how the indiscriminate removal of all the urban refugees would alleviate the insecurity threats in those areas. Another factor, connected to the first one is the element of proportionality. The danger and suffering bound to be suffered by the individuals and the intended results ought to be squared. [79]

It is observed that national security and public order have long been recognized as potential justification for derogation[80] but there is need for a restrictive interpretation of the limitations, In

[78] Ibid para 43-46
[79] Ibid at para 87
[80] Goodwin-Gill Guy S. and McAdam J., *The Refugee in International Law*, New York, Oxford University Press, 3rd Edition, 2011 pg 234-pg 235

terms of derogation, **Goodwin-Gill & McAdam** wonder whether the "broadened principle of nonrefoulement under human rights law…[has] rendered Article 33(2) redundant?"[81]

There is need for balancing, to balance the principle of non-refoulement and national security, on this point, the ECTHR is of help, In ***Suresh case[82],*** the Supreme Court of Canada considered whether Canadian law precluded deportation to a country where Suresh ran a risk of being tortured. Related questions were concerned with when there is a danger to the national security of Canada (regarding combating terrorism) and whether mere membership of an alleged terrorist organization sufficed. The main legal issue indicated a balancing act between the protection needs of Suresh (that is, the risk of being tortured upon return) and the security interests of Canada. According to the Canadian Supreme Court, A balancing act is permitted but need to be in accordance with the principles of fundamental justice. These principles are defined by Canadian municipal law and applicable international law. In spite of small theoretical possibility to apply a balancing test the Supreme Court leaves the door open that 'in an exceptional case such deportation might be justified (...) in the balancing approach (...)' (paragraph 129).Ultimately, Suresh was deported to Sri Lanka, as he was a member of LTTE (a listed terrorist organization then in Canada), though he did not committed any act of violence in Canada.

In this case much of help is the individual analysis and not the group analysis, the application of this provision requires an individualized determination by the country in which the refugee is

[81] GS Goodwin-Gill and J McAdam, *The Refugee in International Law* (3rd edn, OUP 2007)243.
[82] Suresh v Canada, (11 Jan, 2002), Supreme Court of Canada, 2002 SCC 1, File no. 27790. Published on www/lexum.umontreal.ca/cscv-sec/en/rec

that he or she comes within one of the two categories provided for under Article 33(2) of the 1951 Convention[83]

CONCLUSION

"We cannot accept *refoulement*, we cannot accept that people's lives are put at risk. And we hope for strong messages from the European Union on this."[84]

I am also hoping or a strong message from the government of Kenya, a message showing the willingness to adhere to this fundamental principle. The prohibition of *refoulement* to a risk of serious human rights violations, particularly torture and other forms of ill-treatment, as also firmly established under regional human rights treaties[85].as it was shown in *Soering v the UK*[86]

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[83] For a detailed discussion of the criteria which must be met for Article 33(2) of the 1951 Convention to apply, *seeE. Lauterpacht and D. Bethlehem, "The scope and content of the principle of non-refoulement: Opinion", in E. Feller, V. Türk and F. Nicholson (eds.), Refugee Protection in International Law: UNHCR's Global Consultations on International Protection, Cambridge University Press, Cambridge (2003,* paras. 145–192. On the "danger to the security" exception, *see also* "*Factum of the Intervenor, UNHCR, Suresh v. the Minister of Citizenship and Immigration; the Attorney General of Canada, SCC No. 27790*" (hereinafter: "UNHCR, *Suresh Factum*"), in 14:1 International Journal of Refugee Law (2002).

[84] *Remarks by Mr. António Guterres, United Nations High Commissioner for Refugees, on the occasion of the European Union Council of Ministers of Justice and Home Affairs*, Luxembourg, 12 October 2005, available at < http://www.unhcr.org/435612ec4.html > [accessed on 23 October 2010].

[85] See, for example, the jurisprudence of the European Court of Human Rights, which has held that *non-refoulement* is an inherent obligation under Article 3 of the ECHR in cases where there is a real risk of exposure to torture, inhuman or degrading treatment or punishment, including, in particular, the Court's decisions in *Soering v. United Kingdom*, Application No. 14038/88, 7 July 1989 and subsequent cases, including *Cruz Varas v.* Sweden, Application No. 15567/89, 20 March 1991; *Vilvarajah et al. v. United Kingdom*, Application No. 13163/87 et al., 30 October 1991; *Chahal v. United Kingdom*, Application No. 22414/93, 15 November 1996; *Ahmed v. Austria*, Application No. 25964/94, 17 December 1996; *TI v. United Kingdom*, Application No. 43844/98 (Admissibility), 7 March 2000. In the Americas, see, for example, Article 22(8) of the 1969 ACHR ("In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.") or Article 13(4) of the 1985 Inter-American Convention to Prevent and Punish Torture ("Extradition shall not be granted nor shall the person sought be returned when there are grounds to believe that his life is in danger, that he will be subjected to torture or to cruel, inhuman or degrading treatment, or that he will be tried by special or ad hoc courts in the requesting State.").

[86] *Soering v the UK*, (1989) 11EHRR 439.

that a state would be in violation if its obligations under ECHR if it extradites an individual to a state, in this case the U.S.A., where that individual was likely to face inhuman or degrading treatment or torture contrary to Article 3 ECHR[87]

The Court said:

In the Court's view this inherent obligation not to extradite also intends to cases in which the fugitive would be faced in the receiving State by real risk of exposure to inhuman and degrading treatment or punishment prescribed by that Article.

States are prohibited from removing, deporting or repatriating refugees from where they are to the States of origin without following due process. This principle is so fundamental that it is considered a customary law norm[88]. It is considered the cornerstone of international refugee protection [89]

[87] ECtHR, *Soering v UK*. 7 July 1989

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

[89] see Encyclopedia of Public International Law Max Planck Institute for Comparative Public Law and International Law, Amsterdam, New York, 1985), vol. 8, p. 456).