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Reconciling Refugees Right to Non-Refoulement and Repatriation of Refugees as a Counterterrorism Measure intended to Uphold National Security in Kenya

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Abstract

This paper seeks to conceptualize and discuss the interplay between the need to uphold national security through counterterrorism measures like repatriation of refugees and refugees' right to non-refoulement as codified by various laws. In doing so this paper will analyze the delicate balance that Kenya has to always maintain when repatriating refugees as a counter-terrorism measure while upholding refugees' right to non-refoulement.

Indeed, this discourse is timely considering that the government of Kenya has many times sought to close down Dadaab Refugee Camp, after terming it a breeding ground for terrorists.

1.0 Introduction

Over the past decade, millions of refugees have fled their countries of origin and asked for asylum in Kenya. Some of these refugees do not receive asylum, and later like in the case of Dadaab Refugee camp the government seeks to repatriate them, or they are denied basic rights of residency and even some forced into enclosed camps.[1]

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[1]Gerver, Mollie (2016), Refugee repatriation and the problem of consent. British Journal of Political Science

The 1951 Convention relating to the Status of Refugees defines a 'refugee' as *"someone who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality, and is unable to or, owing to such fear, is unwilling to avail himself the protection of that country."*

This definition has also been replicated in the Refugee's Act 2006 of the Laws of Kenya.[2] Kenya has a large number of refugees from neighboring countries mostly from Somalia. The refugee debate focuses on migration, forced migration. It is a discourse on human rights. It concerns duties that countries owe foreigners under international law and the rights of such persons including refugees. Alienage usually is a characteristic of refugees.[3] Fundamentally, this paper seeks to conceptualize and discuss the interplay between the need to uphold national security through eradicating terrorism and the right of refugees to non-refoulement.

2.0 Reconciling Refugees Right to Non-Refoulement and Repatriation of Refugees as a Counterterrorism Measure

A country's national security is its ability to protect itself from the threat of violence or attack.[4] One of the major threats to national security in Kenya is terrorism. The rise in terrorism in Kenya has been linked with an influx of refugees in Kenya.[5] Terrorism as a concept, has received a variety of definitions.

[2]Refugees Act No. 13 of 2006 Laws of Kenya.
[3]Kariuki Muigua, Protecting Refugees Rights In Kenya: Utilizing International Refugee Instruments, The Refugee Act 2006 And The Constitution Of Kenya As Catalysts.
[4]<*https://www.collinsdictionary.com/dictionary/english/national-security*>lastly accessed on 17th January 2022
[5]Constitutional Petition No. 227 of 2016

The United Nation has defined it as a collective term of criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes.[6]
In the book *'Terrorism in the Twenty-First Century helps readers understand terrorism, responses to it, and current trends that affect the future of this phenomenon',* Combs describes terrorism as a synthesis of war and theater, a dramatization of the most proscribed kind of violence, which is perpetrated on innocent victims, played before an audience in the hope of creating the mood of fear for political purposes.[7]

A terrorist act has also been defined by the Kenyan Prevention of Terrorism Act,[8] as an act or threat of action which among other things, creates a serious risk to the health or safety of the public or prejudices national security or public safety, carried with the aim of destabilizing social institutions and intimidating or causing fear among members of public or compelling governments to do or refrain from any act.[9]

From the above, it is evident, that the character of terrorism is a combination of well-orchestrated war and extreme violence which is perpetrated on innocent victims with the intention to propagate certain ideologies.[10]

By inference, therefore, terrorism may not be completely classified as either exclusively an ordinary criminal act with penal consequences or as an act of warfare that ought to be governed by the norms and rules of war.[11]Indeed, the Global Terrorism Index (GTI) 2016 report highlighted terrorism as a complex and rapidly changing concept.[12]

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[6]The United Nations General Assembly *A/RES/49/60* (1995)
[7]Cynthia C. Combs *Terrorism in the Twenty-First Century helps readers understand terrorism, responses to it, and current trends that affect the future of this phenomenon* (Taylor & Francis, 2015)
[8]The Prevention of Terrorism Act No. 30 of 2012, Laws of Kenya
[9]Ibid, Section 2
[10]Andrea Bianchi, Yasmin Naqvi, *Enforcing International Law Norms Against Terrorism* (Hart Publishing, 2004) 5
[11]Ibid No.10
[12]Institute for Economics and Peace *The Global Terrorism Index 2016* (2016)14

This line of thought is also accentuated by Brian Jenkins[13] who opines that if terrorism is viewed as a crime, normal procedures for handling crimes (arrests, gathering evidence and putting suspects on trial) will ensue.

Brian Jenkins argues that, characterizing terrorism as a crime provokes problems of international cooperation.[14] This is in contradistinction to characterizing terrorism as acts of war which classification appeals to international cooperation.[15]

On the flip side, is the basic principle of refugee law is, non-refoulement which prescribes that no refugee should be returned (refouled) to a country where he or she is likely *to face persecution or other ill treatmen*t.[16] This principle encompasses not only a duty of the state not to return a refugee to another country where he/she faces danger but also a duty not to reject the entry of a refugee at the border of the receiving state.[17]

The principle of non-refoulement imposes an obligation on states not to refoule, or return, a refugee to "the frontiers of territories where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion."[18]

[13]Boaz Ganor, *The Counter-Terrorism Puzzle: A Guide for Decision Makers* (Transaction Publishers, 2011) 8
[14]Boaz Ganor, *The Counter-Terrorism Puzzle: A Guide for Decision Makers* (Transaction Publishers, 2011) 8
[15]Richard Jackson, *Writing the War on Terrorism: Language, Politics and Counter-terrorism* (Manchester University Press, 22 Jul 2005) 3
[16]Guy S. Goodwin-Gill, Jane McAdam, The Refugee in International Law (Oxford University Press, 2007) 201
[17]Andreas Zimmermann, Jonas Dörschner, Felix Machts, *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (OUP Oxford, 2011) 1368
[18]1951 Convention relating to the Status of Refugees, Article 33(1)

The principle of *non-refoulement* is often regarded as one of the most important principles of refugee and immigration law.[19] The principle of non-refoulement has evolved into a norm of customary international law, as such states are bound by it whether or not they are party to the Convention relating to the Status of Refugees (following as "1951 Convention").[20]

The principle of non-refoulement has acquired the status of a ***jus cogens***(it is a fundamental principle of international law which is accepted by the international community of states as a norm from which no derogation is ever permitted).[21]Hence, as a part of *customary and treaty la***w**, all countries are legally bound by the prohibition of returning refugees in any manner whatsoever to countries or territories where their lives or freedom may be threatened because of their race, religion, nationality, membership in a particular social group or political opinion, which is the cornerstone of international protection.[22]

Over time the government of Kenya has insisted that as a counter-terrorism measure there is need to repatriate refugees in Kenya. [23] This has led to the government proposing the closure of Dadaab Refugee camp.[24] The government of Kenya in its statement 'Government statement on refugees and closure of camps' stated "*owing to national security, hosting of refugees has come to an end and that the Department of Refugee Affairs (DRA) has been disbanded."*[25]

[19]JUDr. Kamil Šebesta, The principle of non-refoulement. What is its standing in international law? <*http://www.elaw.cz/clanek/the-principle-of-nonrefoulement-what-is-its-standing-in-international-law*> accessed on 27/1/2022

[20] JUDr. Kamil Šebesta, The principle of non-refoulement. What is its standing in international law? <*http://www.elaw.cz/clanek/the-principle-of-nonrefoulement-what-is-its-standing-in-international-law*> accessed on 27/1/2022

[21]Prosper Weil, Towards Relative Normativity in International Law? Page 423

[22]JUDr. Kamil Šebesta, The principle of non-refoulement. What is its standing in international law? <*http://www.elaw.cz/clanek/the-principle-of-nonrefoulement-what-is-its-standing-in-international-law*> accessed on 27/1/2022

[23]Constitutional Petition No. 227 of 2016

[24]Ibid No. 23

[25]Constitutional Petition No. 227 of 2016

This indicates the conflict that exists between the need to uphold national security, through repatriation of refugees, as a means of combating terrorism and the need not to violate the rights of refugees as encapsulated in the existing legal framework governing refugees in Kenya.

In repatriation of refugees as a counter-terrorism measure, the question arises as to whether there is a violation of the seminal principle of non-refoulement by the government.

Reconciling these two divergent positions is vital in the human rights discourse especially considering that principle of non-refoulement is universally acknowledged as a human right.

The argument propounded by the government of Kenya is that 'national security' is an exception to the general principle of non-refoulement. In 1977, the European Court of Justice ruled that *"there must be a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society*."[26]

It follows from state practice and the Convention *travaux* preparations that criminal offences without any specific national security implications are not to be deemed threats to national security, and that national security exceptions to *non-refoulement* are not appropriate in local or isolated threats to law and order.

United Nations High Commissioner for Refugees (herein UNHCR), also known as the UN Refugee Agency has recommended that refoulement should only be considered when one or several convictions are symptomatic of the basically criminal, incorrigible nature of the person and where other measures, such as detention, assigned residence or resettlement in another country are not practical to prevent him or her from endangering the community.

[26]Reg. vs. Bouchereau, 2CMLR 800

Articles 31 and 32 of the Convention relating to the Status of Refugees provides that, a State should allow a refugee a reasonable period of time and all necessary facilities to obtain admission into another country, and initiate *refoulement* only when all efforts to obtain admission into another country have failed.

As a general rule, the principle of non-refoulement is enshrined under Article 33 of the 1951 Convention Relating to the Status of Refugees(herein Convention)[27] which provides that no Contracting State shall expel or return 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.

Within the framework of the 1951 Convention/1967 Protocol, the principle of *non-refoulement* constitutes an essential and non-derogable component of international refugee protection.

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 Conclusions since 1977. [28]Similarly, the General Assembly has called upon States *"to respect the fundamental principle of non-refoulement, which is not subject to derogation.*"[29]

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[27]UN General Assembly, *Convention Relating to the Status of Refugees*, (United Nations, Treaty Series, 1951)
< *http://www.refworld.org/docid/3be01b964.html*> accessed 19/1/ 2022 Article 33

[28]Executive Committee of UNHCR, for example, in its Conclusion No. 6 (XXVIII), paragraph (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."

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

The 1951 Convention and its 1967 Protocol are the core of international refugee law they are the only universal treaties that define a specific legal regime for those in need of international protection. However, there are other universal documents regarding the non-refoulement principle.

The protection against *refoulement* under Article 33 of the 1951 Convention Relating to the Status of Refugees, applies to any person who is a refugee under the terms of the 1951 Convention that is, anyone who meets the requirements of the refugee definition contained in *Article 1A(2) of the 1951 Convention* (the "inclusion" criteria)[30] and does not come within the scope of one of its exclusion provisions.[31]

[30] Under this provision, which is also incorporated into Article 1 of the 1967 Protocol, the term "refugee" shall apply to any person who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his [or her] nationality and is unable or, owing to such fear, unwilling to avail him [or her]self of the protection of that country; or who, not having a nationality and being outside the country of his [or her] habitual residence is unable or, owing to such fear, unwilling to return to it"

[31]Exclusion from international refugee protection means denial of refugee status to persons who come within the scope of Article 1A (2) of the 1951 Convention, but who are not eligible for protection under the Convention because:

- They are receiving protection or assistance from a UN agency other than UNHCR (first paragraph of Article 1D of the 1951 Convention); or because

-They are not in need of international protection because they have been recognized by the authorities of another country in which they have taken residence as having the rights and obligations attached to the possession of its nationality (Article 1E of the 1951 Convention); or because

-They are deemed undeserving of international protection on the grounds that there are serious reasons for considering that they have committed certain serious crimes or heinous acts (Article 1F of the 1951 Convention).

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.[32]

It follows that the principle of *non-refoulement* applies not only to recognized refugees, but also to those who have not had their status formally declared.[33] The principle of *non-refoulement* is of particular relevance to asylum-seekers. 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.[34]

The *non-refoulement* obligation under Article 33 of the 1951 Convention is binding on all organs of a State party to the *1951 Convention and/or the 1967 Protocol*[35] as well as any other person or entity acting on its behalf.[36]

The principle of non-refoulement as contained in the *1951 Convention* is not an *unqualified* principle. There are *three exceptions to* the principle of non-refoulement. These exceptions are codified in *Article 1 (F) and Article 33 (2) of the 1951 Convention*.[37] It ought to be emphasized that the application

[32] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, 1979, Reedited Geneva 1992, paragraph 28.

[33] 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

[34]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

[35]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.

[36]Ibid No.35

[37]JUDr. Kamil Šebesta, The principle of non-refoulement. What is its standing in international law? Lastly accessed on19/1/2022

of these *exceptions* under *Article 33(2)* [38]requires an individualized determination by the country in which the refugee is that he or she comes within one of the two categories provided for under *Article 33(2) of the 1951 Convention*.[39]

The provisions of *Article 33(2) of the 1951 Convention* do not affect the host State's non-refoulement obligations under international human rights law, which permit no exceptions. Thus, the host State would be barred from removing a refugee if this would result in exposing him or her, for example, to a substantial risk of torture. Similar considerations apply with regard to the prohibition of refoulement to other forms of irreparable harm.

Ideally, for example, the interpretation of Article 33(2) of the *1951 Convention* envisions only an apprehension of future danger as an exception by which a State may refoule a refugee.[40] However, of significance to this paper is that even though past conduct is important in evaluating the possibility of future danger, the nature of *Article 1 (F) and Article 33 (2) of the 1951 Convention* exceptions is clearly prospective, that is future danger as opposed to primarily investigating an individual on the basis of his past conduct.[41]

In regards to conducts encompassing 'reasonable grounds' *the 1951 Convention* provides that the provisions of the Convention shall not apply to any person with respect to whom there are serious reasons for considering that he:- has committed a crime against peace, a war crime, or a crime against

[38]The 1951 Convention Relating to the Status of Refugees

[39] E. Lauterpacht and D. Bethlehem"The scope and content of the principle of *non-refoulement,* paragraph 145–192. *See also* "*Factum of the Intervenor, UNHCR, Suresh v. the Minister of Citizenship and Immigration; the Attorney General of Canada, SCC No. 27790*", Also in 14:1 International Journal of Refugee Law (2002).

[40]Ingrid Holm *Non-refoulement and national security* (Lund University, 2015) page 23

[41]Ingrid Holm *Non-refoulement and national security* (Lund University, 2015) page 23

humanity;[42]or has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee[43]; or has been guilty of acts contrary to the purposes and principles of the United Nations.[44]

The *exceptions to the principle of non-refoulement succinctly stated are: First,* the benefit of the principle may not be claimed by a refugee who may pose a danger to the security of the country in which he or she is present.[45] *Second*, the principle does not apply to a person who, having been convicted by a final judgment of a particularly serious crime constitutes a danger to the community of that country.[46]

Third, the benefit of the convention is to be denied to any person suspected of committing a crime against peace, a war crime, or a crime against humanity, a serious non-political crime outside the country of refuge, or acts contrary to the purposes and principle of the United Nations. [47]

These three exceptions *hence offer a leeway to refoul refugees as a means of upholding national security by states like Kenya.* The problem exists in interpretation and application of these salient non- refoulement principle exceptions, as a means of refouling refugees.

Over time, states' interpretation and application of these exceptions has come into question and even has been overruled by courts of law as was in the case of: *Kenya National Commission on Human Rights & another v Attorney General & 3 others [2017] eKLR.*[48]

[42]Article 1(F) of the 1951 Convention Relating to the Status of Refugees
[43]Ibid No. 42
[44]Article 1(F) of the 1951 Convention Relating to the Status of Refugees
[45]JUDr. Kamil Šebesta, The principle of non-refoulement. What is its standing in international law?
[46]Ibid No. 45.
[47]JUDr. Kamil Šebesta, The principle of non-refoulement. What is its standing in international law?
[48]Constitutional Petition No. 227 of 2016

In this case the government of Kenya was sued when it sought to refoul refugees by closing Dadaab Refugee camp as a counter-terrorism measure, arguing that it was harboring terrorist among other things. Among other issues, the Petitioners submitted that the act of labeling the refugees of Somali origin as terrorists was discriminatory. They contended that that act violated the principle of individual criminality.

The Petitioners stated that the decision to repatriate them was a violation of the provisions of *Articles 10, 2 (1), 94 (5), 129 (1) and 73* of the Constitution of Kenya 2010. The court was faced with inter alia, the following issues: - whether the decision to repatriate the refugees on account of national security violated the principle of non-refoulement; and whether the decision to repatriate refugees especially those of Somali origin was a violation of the rights to human dignity, fair administrative action, equality and freedom from discrimination.[49]

In this case, the High Court of Kenya held that the state could not refoule refugees from Dadaab refugee camp on basis of national security as an exception to non-refoulement principle. The Court held that the government of Kenya could only rely on the Article 33(2) exception as the act of refouling the refugees was an *ultima ratio* (the last recourse) in cases involving non-refoulement *vis a vis* national security concerns.

It is notable that this discourse of interpretation and application of non-refoulement principle exceptions, has existed since the making of the *1951 Convention Relating to the Status of Refugees*.
States like Israel, the United Kingdom and Switzerland are documented to have frowned against the inclusion of the exception into the Convention during the preparatory work to the 1951 Convention Relating to the Status of Refugees.[50]

[49]*Kenya National Commission on Human Rights & another v Attorney General & 3 others* [2017] eKLR
[50]UN High Commissioner for Refugees (UNHCR), *The Refugee Convention, 1951: The Travaux préparatoires analyzed with a Commentary by Dr. Paul Weis,*

In the same vein, other states have also depicted a modern-day tendency of evading the rationale behind the principle of non-refoulement by relying on the *Article 1 (F) and Article 33 (2) of the 1951 Convention*.

For example, in *Suresh*[51] and *Wellington*[52]cases at European Court of Human Rights, Canada and the United Kingdom have been documented to have placed a significant reliance on the national security concerns at the expense of upholding the right to non-refoulement.[53]

States have misinterpreted and misapplied exceptions to the principle of non-refoulement as codified under *Article 1 (F) and Article 33 (2) of the* 1951 Convention Relating to the Status of Refugees in *two ways*: - by interpreting these exceptions to apply to past conducts of a refugee;[54] and by misinterpreting 'reasonable grounds' set out under *Article 1 (F) and Article 33 (2)* of the 1951 Convention.

These interpretations and applications by states fall short of the threshold outlined under *Article 33(1)* of the *1951 Convention Relating to the Status of Refugees*, which sets out the general rule of non-refoulement of refugees. For example, in *Bundesrepublik Deutschland v B and D*, B had claimed asylum in Germany for supporting armed guerrilla warfare in Turkey.[55]

(1990) <*http://www.refworld.org/docid/53e1dd114.html*> Lastly accessed on 19/01/2022

[51]*Suresh vs. Canada (Minister of Citizenship and Immigration*)1 S.C.R. 3, 2002 SCC 1, Canada: Supreme Court, 11 January 2002

[52]*R (on the application of Wellington) (FC) v. Secretary of State for the Home Department* (Criminal Appeal from Her Majesty's High Court of Justice), UKHL 72, United Kingdom: House of Lords (Judicial Committee), 10 December 2008

[53]Ibid, see Suresh and Wellington cases

[54]See inference from Bundesrepublik Deutschland v B and D, CJEU - C-57/09 and C-101/09

[55]Bundesrepublik Deutschland v B and D, CJEU - C-57/09 and C-101/09

The *German Bundesamt* rejected his application for asylum on the basis that he had committed a serious non-political crime.[56] Later the Administrative Court annulled that decision and said his removal to Turkey was prohibited.[57] From the foregoing, it is evident that the possibility of a deviation from the general obligation not to refoule a refugee under Article 33(1) is highly limited by the 1951Convention Relating to the Status of Refugees.

From the foregoing it is clear that repatriation of refugees as a counter-terrorism measure to uphold national security in Kenya, must be informed and/or fall under the exceptions to the principle of non-refoulement as codified under *Article 1 (F) and Article 33 (2) of the* 1951 Convention which Kenya is a signatory to. Any other repatriation of refugees outside the exceptions to the principle of non-refoulement as codified under *Article 1 (F) and Article 33 (2) of the* 1951 Convention is illegal. Indeed, to perpetuate the same the government of Kenya would be violating the seminal principle of non-refoulement as codified under *Article 33 (1) of the* 1951 Convention. To avoid any abuse in the interpretation of these exceptions under *Article 33(2) and 1(F)* of the 1951 Convention Relating to the Status of Refugees the courts exist to independently interpret whether governments actions are a violation of the seminal principle of non-refoulement.

This was manifested in the *Constitutional Petition No. 227 of 2016*[58] where the Court held that the government of Kenya could only rely on the Article 33(2) exception as the act of refouling the refugees was an *ultima ratio* (the last recourse) in cases involving non-refoulement *vis a vis* national security concerns.[59]

[56]Bundesrepublik Deutschland v B and D, CJEU - C-57/09 and C-101/09
[57]Ibid No.56
[58]Kenya National Commission on Human Rights & another v Attorney General & 3 others [2017]eKLR
[59]Ibid No.58

However, it is worrying as described by *Faye Jacobsen*,[60] that the real state of affairs is that States are relying more on the exceptions as a general rule as a justification for refoulement processes.[61]This reliance on the exceptions under Article 33(2) and 1(F) of the 1951 Convention Relating to the Status of Refugees as a point of departure and a primary consideration has transformed the general rule into an 'exception'. This is a discrepancy which must be deliberately curtailed by courts and the international community at large.

3.0 Conclusion

To maintain the delicate balance between repatriating refugees as a counter-terrorism measure intended to uphold national security, while on the other hand upholding refugees' right to non-refoulement, Kenya must deliberately seek to act within the confines of the 1951 Convention Relating to the Status of Refugees and other enabling laws. Indeed, as demonstrated above this balance is more often than not maintained by courts as it was in *Constitutional Petition No. 227 of 2016*[62]

[60]Anette Faye Jacobsen Human Rights Monitoring: A Field Mission Manual (BRILL, 25 Jun 2008)
[61]Ibid No.60
[62] Kenya National Commission on Human Rights & another v Attorney General & 3 others [2017]eKLR

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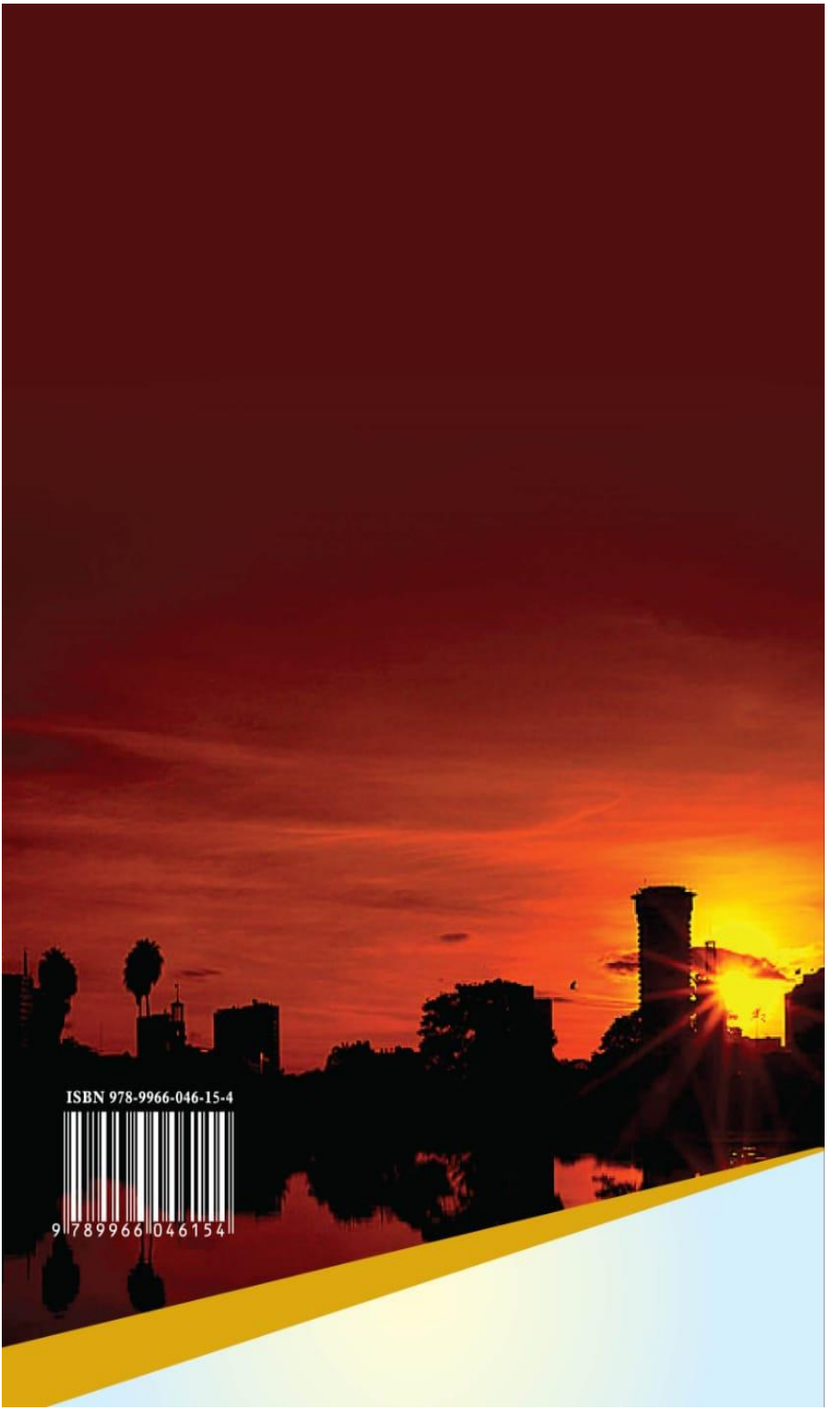
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