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Implications of James Dak's 2016 deportation to South Sudan by the Kenyatta government in violation of international refugee law

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Summary: *This article discusses James Gatdet Dak's 2016 deportation from Kenya to South Sudan where he was imprisoned for two years for several offences he allegedly had committed in relation to the civil war in that country. It provides an understanding of the circumstances that led to deportation and violation of Dak's right to refugee protection. The article makes three principal arguments. First, the Kenyatta government carried out the deportation in violation of international and regional refugee laws. Particularly, the Kenyatta government violated the principle of* non-refoulement*, which is now considered to have become a peremptory norm of international law from which no derogation is permitted. Second, Dak had suffered persecution at the hands of South Sudan's authorities because of his political opinion. Third, the injustice Dak had suffered entitles him to a remedy from the Kenyan government, which he could potentially pursue through the African Commission on Human and Peoples' Rights' complaint process. Although a considerable period has elapsed, the African Commission's flexible approach to the relevant admissibility criterion should be able to accommodate his complaint.*

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Key words: *refugees; deportation; violation; Kenya; South Sudan; African Commission; delay*

1 Introduction

An event that struck at the heart of international refugee law occurred in Kenya in 2016. The Kenyatta government deported a refugee, James Gatdet Dak, back to South Sudan – his country of nationality – after having granted him refugee protection by issuing him with the applicable visa in 2015. Dak was arrested on arrival in South Sudan and imprisoned for two years for several offences he allegedly had committed in relation to the 2016 violence outbreak between the government of South Sudan and the Sudan People's Liberation Movement-In Opposition (SPLM-IO). As will be discussed more fully below, the offences ranged from 'treason', 'publishing or communicating false statements prejudicial to Southern Sudan' to 'undermining the authority of or insulting the President [of South Sudan]'.[1]

The Kenyatta government was no more than equivocal in explaining what prompted the deportation. In a press statement issued immediately after Dak had left Kenya, the government spokesperson, Eric Kiraithe, simply stated that Dak had become 'an inadmissible person' in Kenya and, as a result, his visa was cancelled, making him liable to deportation.[2]

Whatever wrong Dak may have committed, it is clear that the deportation was carried out in violation of Kenya's protection obligations to asylum seekers and refugees. Kenya is party to the 1951 United Nations (UN) Convention Relating to the Status of Refugees,[3] and its 1967 Protocol Relating to the Status of Refugees.[4] Kenya is also party to the 1969 Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in

1 Penal Code Act 2008 secs 64, 75 & 76. Reference to 'Southern Sudan' in sec 75 of the Penal Code Act speaks to the fact that this law was enacted during the interim period (2005 to 2011) but has remained in force in the post-separation period. Art 198 of the Transitional Constitution 2011 mandates all laws of the former Southern Soudan to remain in force unless they have been repealed.

2 'Fears after Kenya deports South Sudan rebel spokesman' *Aljazeera* 4 November 2016, https://www.aljazeera.com/news/2016/11/fears-kenya-deports-south-sudan-rebel-spokesman-161104164614835.html (accessed 3 October 2024).

3 Convention Relating to the Status of Refugees (Refugee Convention) opened for signature 28 July 1951, 189 UNTS 150, entered into force 22 April 1954.

4 Protocol Relating to the Status of Refugees (Refugee Convention) opened for signature 31 January 1967, 606 UNTS 267, entered into force 4 October 1967.

Africa.[5] These treaties were given effect through the enactment of Kenya's Refugees Act, 2006, which was repealed by the Refugees Act, 2021.[6] Thus, the treaties were binding on the Kenyatta government.

This article discusses James Gatdet Dak's 2016 deportation from Kenya to South Sudan, providing an intersection of international law and domestic law of both Kenya and South Sudan. It is organised in four parts. The first part discusses the circumstances around the deportation. The second part provides an overview of the refugee protection regime and discusses Kenya's refugee protection obligations under the Refugee Convention and its Refugee Protocol, as well as the OAU Refugee Convention. The point here is to demonstrate that the Kenyan government acted in violation of its refugee protection obligations to Dak in forcefully removing him from its territory. In particular, the Kenyatta government violated the *non-refoulement* principle enshrined in the Refugee Convention, which is now regarded as *jus cogens*, or a peremptory norm of international law from which no derogation is permitted.

The third part discusses the persecution Dak had suffered at the hands of South Sudan's authorities. This is evidenced in large part by the fact that he was imprisoned for two years for offences that were likely politically motivated (not to mention the appalling conditions of the Juba Blue House prison in which he was placed).[7] The offences were likely politically motivated in the sense that Dak was affiliated with the SPLM-IO and had been openly critical of the government of South Sudan since the civil war first broke out in 2013.

The final part looks at the question of what recourse, if any, Dak may have against the Kenyan government for violating his refugee protection right. There are two options to consider. The first regards local remedies that Dak may seek from Kenya's immigration and administrative bodies and courts. The second invokes the possibility of Dak bringing a complaint before the African Commission on Human and Peoples' Rights (African Commission) against the Kenyan government. The article also serves analytical purposes, providing an understanding of the vague circumstances that led to deportation and violation of Dak's refugee protection right.

5 Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted 10 September 1969, UNTS 14691, entered into force 20 June 1974 (OAU Refugee Convention).

6 The Refugees Act 13 of 2006 was repealed in 2021 by the Refugees Act 10 of 2021; see sec 42.

7 'South Sudan: Inaction on dire security agency abuse' *Human Rights Watch* 14 December 2022, https://www.hrw.org/news/2020/12/14/south-sudan-inaction-dire-security-agency-abuse (accessed 2 October 2024).

2 Circumstances around the deportation

James Gatdet Dak is a national of South Sudan and is a journalist by trade. He joined the SPLM-IO in 2013 following the outbreak of the civil war in South Sudan. He served in the SPLM-IO as Dr Riek Machar Teny's press secretary (Dr Teny is the leader of the SPLM-IO).[8]

Dak escaped to Kenya with his family in 2013 after having survived the alleged targeted killing of the members of his Nuer ethnic group by the government of South Sudan.[9] The Kenyatta government granted him protection and he was registered as a refugee in 2015.[10] He returned to Juba with Dr Teny in 2016 for the formation of the first transitional government of national unity mandated by the Agreement on the Resolution of the Conflict in the Republic of South Sudan, 2015.[11] A few weeks later he returned to Nairobi to be with his family.[12]

In early November 2016 the Kenyan police officers went to his residence in Nairobi and arrested him. He was deported to South Sudan the following day. The government spokesperson, Eric Kiraithe, held a press conference immediately after Dak's departure, stating that '[Dak] became an inadmissible person, so we cancelled his visa and he was taken to his country of origin'.[13]

The official fell short of clarifying how Dak became 'an inadmissible person' in Kenya, leaving room for speculation. For example, it was alleged that Dak's deportation had to do with an opinion he published on social media in which he commended the sacking of General Johnson Ondieki, the Kenyan military officer who was in

8 Dr Teny is also the first Vice-President in South Sudan's Revitalised Transitional Government of National Unity formed in 2020 after the peace agreement – Agreement on the Resolution of the Conflict in the Republic of South Sudan – was revitalised in 2018.

9 On the alleged targeted killing of the Nuer people during the 2013 war, see HF Johnson *South Sudan: The untold story from independence to civil war* (2018).

10 V Nyamori 'Kenya: Global compact on refugees must be quickly anchored in national policy *Amnesty International* 24 December 2018, https://www.amnesty.org/en/latest/news/2018/12/kenya-global-compacton-refugees-must-be-quickly-anchored-in-national-policy/ (accessed 3 October 2024); T Odula & J Lynch 'Kenya deports South Sudan's rebel official' *Daily Herald* 4 November 2016, https://www.dailyherald.com/article/20161104/news/311049975/ (accessed 4 October 2024).

11 Agreement on the Resolution of the Conflict in the Republic of South Sudan, 2015.

12 LG Gatluak 'Review and analysis of my painful story' *Sudan Tribune* 25 November 2019, https://sudantribune.com/spip.php?article68582 (accessed 4 October 2024).

13 'Fears after Kenya deports South Sudan rebel spokesman' *Aljazeera* (Doha) 5 November 2016, https://www.aljazeera.com/news/2016/11/fears-kenya-deports-south-sudan-rebel-spokesman161104164614835.html (accessed 4 October 2024).

charge of the UN peacekeeping forces during the formation of South Sudan's unity government in 2016.[14] General Ondieki was sacked for failing to protect civilians during the J1 Incident (J1 is the name of South Sudan's state house and it was where the incident occurred). The sacking of General Ondieki reportedly angered the Kenyatta government for multiple reasons. One is that the dismissal was unfair as General Ondieki had been in the job for just three weeks before the J1 Incident.[15]

It is also possible that Dak was deported at the request of the South Sudan authorities. Immediately after the J1 Incident, the authorities in South Sudan named him as one of the people who had disseminated false information that led to the incident (clashes between the government and the SPLM-IO forces). This accusation was based on a text message Dak sent to his colleagues in the SPLM-IO during a meeting of the presidency at the state house.[16] In the text message, which he also posted on Facebook but removed it some time after that, Dak informed his colleagues that the meeting was a set-up to arrest Dr Teny.[17]

The SPLM-IO forces, which were stationed in Juba, also received this news. A large number of soldiers was sent to the state house to rescue Dr Teny.[18] On arrival, they forcefully attempted to enter the state house but the presidential guards denied them access.[19] They felt frustrated and started shooting, and a fierce fight ensued.[20] Literally, the matter turned into a shoot-out. A total of 230 lives were lost, most of whom (190) were from the SPLM-IO.[21]

A few hours after the situation was brought under control, President Kiir and his two Vice-Presidents[22] emerged and jointly gave a press conference. They stated that they had no idea about what had happened and called for calm in the nation, as well as

14 P Lang 'UN chief used Lt-General Ondieki as a sacrificial lamb' *Daily Nation* (Nairobi) 28 November 2016, https://www.nation.co.ke/news/UN-chief-faulted-over-sacking/1056-3466998yswdv7z/index.html (accessed 2 October 2024).
15 'Kenya withdraws troops from UN mission in South Sudan' *Aljazeera* 3 November 2016, https://www.aljazeera.com/news/2016/11/kenya-withdraws-troops-mission-south-sudan161102165506898.html (accessed 2 October 2024).
16 J Koinange Interview with Salva Kiir Mayardit on 3 August 2016, https://www.youtube.com/watch?v=hOQEyFk-4do (accessed 2 October 2024).
17 'Battle in Juba: Eight questions for confused observers' *Radio Tamazuj* 11 July 2016, https://radiotamazuj.org/en/news/article/battle-in-juba-8-questions-for-confused-observers (accessed 4 October 2024).
18 Koinange (n 16).
19 As above.
20 As above.
21 As above.
22 Dr Riek Machar Teny and Dr James Wani Igga are two of the five Vice-Presidents of South Sudan mandated by the peace agreement.

announcing an investigation into the matter.[23] Dr Teny himself spoke at that press conference and condemned the incident, calling it 'an interruption' of the peace process.[24]

Dr Teny and his colleagues in the SPLM-IO strongly denied that the text message was the cause of the J1 incident, stating the government had concocted the situation to derail peace. One thing that is clear, however, is that the Kenyatta government acted in disregard of its obligations in expelling Dak from its territory without a valid reason.

3 Refugee protection regime: An overview

The problem of refugees first came to the attention of the international community in the post-World War II era.[25] In response, the League of Nations (a precursor to the UN) adopted a number of instruments.[26] However, these instruments did not resolve the problem of refugees as they were intended to deal only with refugee problems from specific countries on a temporary basis.[27] A more comprehensive international instrument, defining the 'legal status of refugees', as such, was needed.[28] This saw the adoption of the Refugee Convention in 1951. The Convention defines a refugee broadly as a person who

> owing to 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 or is unwilling to avail himself of the protection of that country.[29]

The Refugee Convention covered only the refugee crises existing at the time of its adoption.[30] This suggests that the state parties did not want to bind themselves with indefinite protection obligations to refugees. As the refugee problem continued to escalate, as endless violent conflicts continued to displace more and more people around the world, it became necessary to extend the application of the Refugee Convention. This saw the adoption of the 1967 Refugee

23 R Nield 'Fighting in South Sudan on eve of fifth anniversary' *Aljazeera* 9 July 2016, http://www.aljazeera.com/news/2016/07/clashes-sudan-eve-independence-anniversary-160708195049321.html (accessed 3 October 2024).
24 As above.
25 United Nations High Commissioner for Refugees *Handbook on guidelines and procedures and criteria for determining refugee status* (2011) 5 (UNHCR Handbook).
26 Arrangements of 12 May 1926, 30 June 1928, and the Conventions of 28 October 1933, 10 February 1938, and the Protocol of 14 September 1939.
27 G Jagger 'On the history of international protection of refugees' (2001) 83 *International Review of the Red Cross* 730.
28 UNCHR Handbook (n 25) 5.
29 Art 1A(2) Refugee Convention.
30 UNHCR Handbook (n 25) 6.

Protocol under which states agreed to extend their protection obligations under the Refugee Convention to new refugees but without the 1951 dateline.[31]

Importantly, article 33(1) of the Refugee Convention enshrines *non-refoulement* – an inviolable principle of international law prohibiting all state parties from returning a refugee to a territory where they may face persecution:

> 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.

There are, of course, exceptions to these conventions, that is, grounds on which a state may expel a refugee from its territory.[32] These relate to security risks a refugee poses to the host country, for example, having been convicted of a serious crime and the potential to reoffend.[33] These grounds, however, are subject to *non-refoulement*, meaning that a state would be barred from expelling a refugee if there is a possibility that the expulsion would result in a risk of harm or torture.[34]

3.1 Kenya's obligation to protect refugees

Kenya is party to the Refugee Convention and its Refugee Protocol. Both documents have been incorporated into Kenya's domestic law through the enactment of the Refugees Act, 2021. The Refugees Act was first enacted in 2006 but it was repealed in 2021.[35] The new Act received presidential assent on 17 November 2021 and took effect on 21 February 2022.[36] All the claims or liabilities that arose under the previous Act are enforceable against the relevant authorities under the current Act.[37] In all likelihood, the revision of the Act was needed to give effect to articles 2(5) and (6) of the Constitution of Kenya,

31 As above.
32 See, eg, Refugee Convention art 33(2).
33 Refugee Convention arts 32(1) & 33(2).
34 See, eg, the United Nations High Commissioner for Refugees, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol (26 January 2007); Executive Committee of the United Nations High Commissioner for Refugees, Conclusion 6 (XXVIII) Non-Refoulement (1979) para (c); Executive Committee of the United Nations High Commissioner for Refugees, Conclusion 79 (XLVII) General (1996) para (j).
35 See Refugees Act sec 42.
36 See 'Refugees Act, 2021: a summarised and simplified version' (Kitua Cha sharia – Legal Advice Centre, 2021) 5-7, https://kituochasheria.or.ke/wp-content/uploads/2023/11/Refugees-Act-2021-plus-Cover-B_compressed.pdf (accessed 14 October 2024).
37 Sec 43(2) Refugees Act.

dealing with the incorporation of international treaties into Kenya's domestic law. By the operation of these constitutional provisions, Kenya is considered to have moved from a dualist to a monist state.[38]

Section 24 of the Refugees Act, 2021 makes clear Kenya's protection obligations to refugees:

> (1) Any person entering Kenya to seek asylum shall make his or her intention known immediately upon entry or within thirty days by reporting to the nearest reception centre or the nearest government administrative office.
> (2) Where a person is lawfully in Kenya and is subsequently unable to return to his country of origin for any of the reasons … the person shall, prior to the expiration of his lawful stay, present himself before an appointed officer and apply for recognition as a refugee, in accordance with the provisions of this Act.

Kenya has also ratified the 1969 OAU Refugee Convention. Article II of the Convention stipulates the member states' refugee protection obligations:

> (1) No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1and 2.
> (2) Where a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the OAU, and such other Member States shall in the spirit of African solidarity and international co-operation take appropriate measures to lighten the burden of the Member State granting asylum.

It is indisputably clear that the Kenyatta government owed protection obligations to Dak. As mentioned at the outset, Dak engaged Kenya's protection obligations in 2015 and went through all the legal procedures provided under the Refugees Act, 2006 to obtain his refugee protection visa. He was living in Nairobi as a peaceful and law-abiding person – at least the Kenyatta government provided no evidence that he posed a risk to Kenya's national security and safety to warrant his forceful removal, namely, to invoke the exceptions to the refugee conventions. He was not even given a written notice before his visa was cancelled as the Refugees Act, 2006 required.[39] He also was not given an opportunity to be heard, to which he was

38 See also M Mwagiru 'From dualism to monism: The structure of revolution in Kenya's constitutional treaty practice' (2011) 3 *Journal of Language, Technology and Entrepreneurship in Africa* 144-155.
39 Secs 11 & 12 Refugees Act, 2006; secs 17(2)(a)-(c) Refugees Act, 2021.

entitled under both the Refugees Act, 2006 and the Constitution of Kenya.[40]

In short, the Kenyatta government violated its protection obligations to Dak, both in terms of cancelling his visa without a valid reason and not affording him an opportunity to make representation. Consequently, it also violated *non-refoulement*, which is now regarded as a norm of customary international law and as having acquired a *jus cogens* status, meaning that states are not at liberty to derogate from it under any circumstances.

3.2 *Non-refoulement* as a norm of customary international law

First, it may be useful to have some understanding of customary international law. Customary international law has been defined as a 'law derived from the consistent conduct of states acting out of the belief that the law required them to act that way'.[41] In other words, it is a law based on states' consent expressed through practice. This view is reflected in the Statute of the International Court of Justice (ICJ) (Statute). For example, article 38 of the Statute stipulates that, in adjudicating disputes between states, the ICJ shall apply

(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
(b) international custom, as evidence of a general practice accepted as law;
(c) the general principles of law recognized by civilized nations.

In the famous *North Sea Continental Shelf* cases,[42] in which the parties requested the ICJ to determine the rules of international law applicable to their delimitation disputes, the ICJ interpreted article 38 of the Statute as containing two principal elements of customary international law, namely, state practice (what states do, sometimes referred to as the objective element); and *opinio juris*, being the recognition and acceptance of practice by the community of nations (the subjective element). The Court found that, although there have been cases where states had delimited their boundaries using the equidistance method, such practice (*opinio juris*) could not be established in the present case. It explained how state practice and *opinio juris* give rise to the customary international rule:[43]

40 See Constitution of Kenya, 2010 sec 50.
41 S Rosenne *Practice and methods of international law* (1984) 55.
42 *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands* (Advisory Opinion and Orders) [1969] ICJ Rep 4.
43 *North Sea Continental Shelf Cases* (n 42) 77.

> Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, ie, the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitati*s.

In short, a norm becomes customary international law if states have accepted it and abide by it.

The principle of *non-refoulement* is considered a norm of customary international law on the basis that it is enshrined in a number of international conventions that states have ratified.[44] These include the Refugee Convention and its Refugee Protocol, the Convention against Torture (CAT),[45] and the International Convention against Enforced Disappearance.[46] In addition, the UN General Assembly has passed numerous resolutions in which it has consistently reemphasised the fundamental importance of *non-refoulement*.[47] The General Assembly's resolutions may not be binding on states, but they certainly are relevant considerations in determining the 'existence or emergence of *opinio juris'*.[48]

Perhaps most important, conventions are now understood as 'norm-creating' rules. In the *North Sea Continental Shelf* case, for example, the ICJ stated that conventions no doubt are 'norm-creating' as they imply state practice and *opinio juris.* The Court noted that Denmark and The Netherlands had argued that

> [e]ven if there was at the date of Geneva Convention no rule of customary international law in favour of equidistance principle … such rule has come into being since the Convention, partly because of its own impact, partly on the basis of subsequent state practice – and that this rule, being a rule of customary international law binding on

44 UNHCR Handbook (n 25) 66.
45 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted 10 December 1984, entered into force 26 June 1987 1465 UNTS 65 (CAT) art 3(1).
46 International Convention for the Protection of All Persons from Enforced Disappearance adopted 20 December 2006, entered 23 December 2010 2716 UNTS 3 (Convention against Enforced Disappearance) arts 16(1) & (2).
47 UNGA Res 57/187, 18 December 2002; UNGA Res 54/146, 22 February 2000; UNGA Res 55/74, 12 February 2001; UNGA Res 56/137, 19 December 2001; UNGA Res 57/187, 18 December 2002; UNGA Res 58/151, 22 December 2003; UNGA Res 59/170, 20 December 2004; UNGA Res 60/129, 20 January 2006; UNGA Res 61/137, 25 January 2007; UNGA Res 62/124, 24 January 2008; UNGA Res 63/148, 18 December 2008; UNGA Res 63/127, 15 January 2009; UNGA Res 65/194, 28 February 2011; UNGA Res 64/127, 15 January 2010; UNGA Res 66/133, 19 March 2012; UNGA Res 67/149, 6 March 2013; UNGA Res 68/141, 8 January 2014; UNGA Res 69/152, 17 February 2015.
48 General Assembly (Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion) [1996] ICJ Rep 226, paras 70-71.

> all [parties], should be declared applicable to the delimitation of the parties' respective continental shelf areas in the North Sea.[49]

The Court further stated that the Convention (the Geneva Convention) 'has passed into the general corpus of international law, and is now accepted as such by the *opinio juris'*.[50] In what perhaps is the most authoritative part of the judgment on this issue, the Court stated: 'There is no doubt that this process [referring to the process by which conventions are adopted] … constitutes one of the recognized methods by which new rules of customary international law may be formed.'[51]

There also is a wealth of scholarly opinion supporting the view that *non-refoulement* has passed into the realm of customary international law, thereby binding all states. For example, Lauterpacht and Bethlehem, in their 2003 report on the 'scope and content of … *non-refoulement* in international law', found that *non-refoulement* has a treaty-based norm-creating character and enjoys 'widespread and representative support'.[52] They concluded on that basis that 'it must be regarded as a principle of customary international law'.[53] Similarly, Costello and Foster, investigating this very same issue, concluded that there is strong evidence, from widespread state practice and *opinio juris,* pointing 'to the establishment of *non-refoulement* as a norm of customary international law'.[54]

The recognition of *non-refoulement* as a norm of customary international law is rendered absolutely necessary by the fundamental importance of the rights and values it protects, especially for the most-at-risk members of the human community. This understanding raises an important question, namely, whether *non-refoulement* has also attained the status of *jus cogens* (norms from which no derogation is permitted), or whether it remains a *jus dispositivum* (a law subject to the discretion of states).[55]

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49 *North Sea Continental Shelf Cases* (n 42) [70].
50 *North Sea Continental Shelf Cases* (n 42) [71].
51 As above.
52 E Lauterpacht & D Bethlehem *The scope and content of the principle of non-refoulement: Opinion* (2003) 147.
53 Lauterpacht & Bethlehem (n 52) 149.
54 K Costello & M Foster '*Non-refoulement* as custom and *jus cogens*? Putting the prohibition to the test' in M Heijer & H Wilt (eds) *Netherlands yearbook of international law* (2015) 286; *Encyclopaedia of public international law* (1985) 456.
55 J Allain 'The *jus cogens* nature of *non-refoulement*' (2001) 13 *International Journal of Refugee Law* 533, 534.

3.3 Is *non-refoulement* a *jus cogens* norm?

The term *jus cogens (*or *ius cogens),* sometimes referred to as a peremptory norm, is Latin and means 'coercive law'.[56] It is derived from the idea central to 'Roman law that certain legal rules cannot be contracted out, given the fundamental values they uphold'.[57] This idea has been accepted by the international community of nations, making *jus cogens* a core principle of the international legal regime. This recognition is most evidenced in article 53 of the Vienna Convention on the Law of Treaties (VCLT):

> A treaty is void, if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purpose 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 from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

In addition, there are a number of international conventions that are regarded as enshrining *jus cogens* principles. These include those prohibiting genocide, crimes against humanity, war crimes,[58] torture[59] and slavery.[60] These acts are treated as imposing non-derogable obligations on states.[61]

The prevailing view is that *non-refoulement* has attained the status of *jus cogens* norms. In its series of declarations, for example, the Executive Committee of the High Commissioner's Programme (Executive Committee) has stated that *non-refoulement* is progressively gaining a *jus cogens* status.[62] This is most explicit in its General Conclusion on International Protection (GCIP) 79 which states, in part, that '*non-refoulement* is not subject to derogation'.[63]

56 PE Nyah & P Butt *Concise Australian legal dictionary* (2004) 244.
57 A Lagerwall '*Jus cogens*' *Oxford Bibliographies* 2015, http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0124.xml#obo-9780199796953-0124-div1-0005 (accessed 3 October 2024).
58 Rome Statute of the International Criminal Court (2002) arts 6, 7 & 8.
59 Art 2(2) Convention against Torture.
60 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery adopted 7 September 1957, entered into force 30 April 1957 226 UNTS 3 art 9.
61 Human Rights Committee General Comment 29 (XXIX), 'Derogations during a State of Emergency (Article 4)' (2001) 9.
62 UNHCR Executive Committee Conclusion 25 (XXV), 'General Conclusion on International Protection' (1982); UNHCR Executive Committee 55 (XL), 'General Conclusion on International Protection' (1989).
63 UNHCR Executive Committee 79 (XLVII) 'General Conclusion on International Protection General' (1996).

The ICJ's position remains less clear on this matter. However, some of its decisions have been interpreted as recognising *non-refoulement* as a *jus cogens.* One such decision is the Questions Relating to the Obligation to Prosecute or Extradite (*Belgium v Senegal*) in which it stated:[64]

> The prohibition of torture is part of customary international law and it has become a peremptory norm *(jus cogens) …* That prohibition is grounded in a widespread international practice and on the *opinio juris* of states. It appears in numerous international instruments … and it has been introduced into the domestic law of almost all states; finally, acts of torture are regularly denounced within national and international fora.

It has been argued that since *non-refoulement* shares certain features with the prohibition of torture, it should be accorded the same *jus cogens* status.[65] Strong support for this argument can also be found in the decisions of regional judicial bodies. (Regional jurisdiction can be relevant to international legal obligations in many ways. For example, for an international custom to develop, it must involve all of the major regions of the world.)

The European Court of Human Rights (European Court), in particular, has given a persuasive opinion on why *non-refoulement* has the same status as *jus cogens*. This is most evident in its 2012 decision of *Hirsi v Italy*.[66] This case concerned an application brought by 24 applicants (11 Somali nationals and 13 Eritrean nationals) claiming that their transfer to Libya by Italian authorities violated article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms and article 4 of its Protocol 4.[67] The applicants were basically alleging a violation of *non-refoulement.*

In a lengthy judgment analysing applicable human right instruments, both domestic and international, the European Court upheld the applicants' claim. The decision was hailed as historic and a huge success for refugees and international human rights organisations.[68] On *non-refoulement*, the Court elaborated:[69]

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64 *Belgium* v *Senegal* [2012] ICJ Rep 422, 457, 99.
65 Costello & Foster (n 54) 309; T Molnar 'The principle of *non-refoulement* under international law: Its inception and evolution in a nutshell' (2016) 1 *Cojourn* 51, 54.
66 *Hirsi Jamaa & Others v Italy* [2012] ECR 1.
67 Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols 11 and 14 adopted 4 November 1950, entered into force 3 September 1953 ETS 5.
68 'Italy: "Historic" European Court judgment upholds migrants' rights' *Amnesty International* 23 February 2012, https://www.amnesty.org/en/latest/news/2012/02/italy-historic-european-court-judgment-upholds-migrants-rights/ (accessed 3 October 2024).
69 *Hirsi* (n 66) [64].

> The prohibition of *refoulement* is a principle of customary international law, binding on all states, even those not parties to the United Nations Convention Relating to the Status of Refugees or any other treaty for the protection of refugees. In addition, it is a rule of *jus cogens*, on account of the fact that no derogation is permitted and of its peremptory nature, since no reservations to it are admitted.

In support of the European Court's decision is persuasive scholarly opinion. Allain, for example, has argued strongly that '*non-refoulement* is … a norm which cannot, in any circumstances, be overridden. All states are bound to respect the obligation not to *refoule* individuals … either unilaterally, bilaterally or multilaterally.'[70] Costello and Foster hold very much the same view:[71]

> Much of th[e] evidence … leads to the conclusion that [*non-refoulement*] is ripe for recognition as a norm of *jus cogens*, due to its universal, non-derogatory character. In other words, it is a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted.

The main insight from this body of opinion is that *non-refoulement* is now recognised and accepted as a norm of customary international law and as having acquired a *jus cogens* status. *Non-refoulement* is provided for in Kenya's 2021 Refugees Act, as follows:[72]

> (1) 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.
>
> (2) The benefit of subsection 1 may not, however, be claimed by a refugee or asylum seeker whom there are reasonable grounds for him or her being regarded as a danger to the national security of Kenya.

The implication for Kenya is that, since *non-refoulement* lies at the heart of its Refugees Act, the Kenyatta government, in deporting Dak on unjustifiable grounds, violated *non-refoulement* as a *jus cogens* principle of international law from which no derogation is allowed.

70 Allain (n 55) 541.
71 Costello & Foster (n 54) 273.
72 Sec 29 Refugees Act, 2021.

The Kenyatta government was determined to deport Dak to the point that it was unwilling to consider other options. For example, it was reported that Dak pleaded to be given some time to seek admission into another country[73] – a right granted by the Refugee Convention[74] and the OAU Refugee Convention.[75] In addition, a number of leading international human rights organisations, including Amnesty International and the United Nations High Commissioner for Refugees (UNHCR), intervened in an attempt to stop the deportation, arguing that Dak could face severe persecution in South Sudan – all to no avail.[76] However, this is not an isolated case. Kenya's country reports show that the Kenyan government has consistently failed to ensure adequate protection for refugees and asylum seekers on its shores.[77]

4 *South Sudan v James Gatdet Dak*: A politically-motivated case?

Immediately after arriving in South Sudan in 2016, Dak was arrested by the National Security Service personnel and was kept in prison for two years without having been convicted by a court of law. (The NSS has power to arrest a person with or without a warrant, depending on the nature of the offence committed or suspected to be committed.)[78] In February 2018 Dak was brought before the High Court of South Sudan charged with treason, 'sedition',[79] and undermining the authority of or insulting the President of South Sudan.[80] The case has not been made public as South Sudan's courts have yet to develop digital means of recording and reporting cases.

73 LG Gatluak 'Review and analysis of my painful story' *Sudan Tribune* (Paris) 25 November 2019, https://sudantribune.com/spip.php?article68582 (accessed 2 October 2024).
74 Art 32(3) Refugee Convention.
75 Arts II(4) & (5) OAU Refugee Convention.
76 'Deportation of South Sudanese opposition spokesperson: A chilling assault on refugee rights' *Amnesty International* 4 November 2016, https://www.amnestyusa.org/press-releases/kenya-deportation-of-south-sudanese-opposition-spokesperson-a-chilling-assault-on-refugee-rights/ (accessed 3 October 2024).
77 Kenya's 2022 Human Rights Report, https://www.state.gov/wp-content/uploads/2023/02/415610_KENYA-2022-HUMAN-RIGHTS-REPORT.pdf (accessed 3 October 2024).
78 Secs 54 & 55 National Security Service Act 2014.
79 The Penal Code refers to this offence as 'publishing or communicating false information prejudicial to South Sudan', but here it is referred to as 'sedition' for ease of exposition.
80 'James Gatdet Dak former Machar's spokesperson is sentenced to death by hanging within 15 days' *South Sudan Liberty News* 12 February 2018, http://www.southsudanliberty.com/news/index.php/latest-news/1703-james-gatdet-dak-former-machar-s-spokesperson-is-sentenced-to-death-by-hanging-within-15-days (accessed 3 October 2024).

4.1 Treason

Treason is a serious offence against the state in South Sudan. This is provided in section 64 of the Penal Code Act, 2008 (Penal Code). Section 64(1) of the Penal Code proscribes treason as an offence against South Sudan, punishable by death or life imprisonment. Section 64(2) specifies the elements of treason, which include overthrowing the President of South Sudan or conspiring with a foreign government to invade South Sudan. Section 64(3) provides for what may be taken as a lawful means by which a citizen can initiate certain actions intended to improve the system of governance.

The Court found Dak guilty of treason under section 64(2) of the Penal Code, that is, that he engaged in acts that were intended to overthrow President Salva Kiir Mayardit.[81] He was sentenced to death by hanging along with other prisoners, but the President intervened and pardoned them as part of his effort to restore peace in the country.[82] However, it is highly unlikely that the case of treason against Dak was proven or provable. This essentially was about the J1 incident which, as previously noted, has remained a subject of contention between the government[83] and the SPLM-IO.[84] In light of the politics involved in the case, it is difficult to see how the Court could have been satisfied beyond reasonable doubt that Dak had committed treason.

4.2 Sedition

It is an offence under section 75 of the Penal Code to publish or communicate false information that can cause public disorder or violence, among other things. This offence attracts a maximum penalty of 20 years' imprisonment.

Dak was charged with sedition based on the comment he published on social media in July 2016 and was sentenced to 20

81 'Quash death sentence for former opposition spokesman' *Amnesty International* 12 February 2018, https://www.amnesty.org/en/latest/news/2018/02/south-sudan-quash-death-sentence-for-former-opposition-spokesman/ (accessed 3 October 2024).
82 'Kiir orders release of James Gatdet and Machar's South African advisor' *Radio Tamazuj* 31 October 2018, https://radiotamazuj.org/en/news/article/kiir-orders-release-of-james-gatdet-and-machar-s-south-african-advisor (accessed 3 October 2024).
83 J Koinange Interview with Salva Kiir Mayardit (Part 1) on 3 August 2016.
84 J Young 'Isolation and endurance: Riek Machar and the SPLM-IO in 2016–17' (2017) *Small Arms Survey* 12.

years' imprisonment.[85] As mentioned at the outset, the comment was taken to be one of the series of events that sparked the J1 Incident:[86]

> BREAKING NEWS: Fighting erupted inside J1 ... The President and his commanders attempted to arrest the First Vice-President, Dr Riek ... This came after the President called for a meeting in his office with [his two Vice-Presidents]. This turned out to be a setup to arrest and possibly to harm Dr [Riek]. Fortunately, Dr [Riek's] bodyguards have managed to fight vigorously and rescued Dr [Riek]. He is now safe!

Nothing in this text has the effect of inciting violence. Dak was simply reporting what was already taking place at J1. What is more, the comment comes within the right to 'freedom of expression and media' provided in the Transitional Constitution of the Republic of South Sudan.[87] It is true, of course, that the government only gives lip service to freedom of expression.

4.3 Undermining the authority of or insulting the President

Finally, the Penal Code makes it an offence to undermine the authority of or insult the President of South Sudan.[88] Basically, it criminalises criticism of the President, which is what is dubbed as making a false statement that may cause 'hostility towards', or 'hatred, contempt or ridicule of … the President'.[89] Dak was sentenced to one year's imprisonment for insulting the President.

This article argues that insulting the President should not be prescribed as a legal offence in South Sudan for two principal reasons. First, the President of South Sudan is a political leader who makes decisions that affect the lives and interests of the South Sudanese people. As such, every South Sudanese is entitled to have a say in every political decision the President makes. Having a say in the President's decisions can lead to insult or criticism. In fact, insults are inevitable in the generally heated political discussion. To shield the President's decisions from being questioned or criticised is to deny freedom of expression and to ultimately hinder accountability.

Second, to regard the President of South Sudan as immune from public criticism is to place him above the law and politics.

85 'Machar's ex-spokesman sentenced to death in Juba' *Radio Tamazuj* 12 February 2018, https://radiotamazuj.org/en/news/article/machar-s-ex-spokesman-sentenced-to-death-in-juba (accessed 2 October 2024).
86 As cited in M Deng 'South Sudan v James Dak: A case of travesty of justice' (2018) *Sudd Institute* 1, 4.
87 Art 24 Transitional Constitution.
88 Sec 76 Penal Code.
89 Secs 76(a)(i) & (ii) Penal Code.

The President as a political leader is not the fountain of justice and his dignity cannot be protected by law. *Lese majeste* laws – laws protecting the dignity of a monarch – with which the Penal Code shares similarities, have no place in protecting the political executive from criticism.

However, even if these offences were sufficiently proven, Dak would still have been covered by the CoH agreement[90] signed between the government and the rebel groups.[91] Article 9(2)(c) of the CoH, for example, requires all the parties to the conflict to release the 'prisoners of war [and] all political prisoners and detainees'. Dak was a political prisoner within the meaning of article 9(2)(c) of the CoH agreement. A political prisoner, as defined by Amnesty International, is 'a member or suspected member of an armed political group who has been charged with treason or subversion'.[92]

The violation of Dak's refugee right, the pain and suffering he endured while in prison in South Sudan, and the embarrassment of having been treated like a criminal raise the question of what remedy he might be entitled to from the Kenyan government.

5 Could Dak be entitled to any remedy from the Kenyan government?

This part examines the possibility of exhausting remedies under Kenyan law, and the potential for Dak to successfully submit a communication to the African Commission. Submitting a complaint to the African Commission is possible because Kenya has ratified the African Charter on Human and Peoples' Rights (African Charter).

The process under the African Charter is that anyone seeking redress at the African Commission must first exhaust local remedies.[93] There are important reasons for this, one of which is to give a respondent state the opportunity to rectify the alleged violation.[94] Another reason is that domestic courts are well placed to undertake a 'fact-finding' task, although in authoritarian states it is difficult for courts to investigate governments' actions and to require governments to rectify their own violations of laws or human rights.[95]

90 Agreement on Cessation of Hostilities, Protection of Civilians and Humanitarian Access (CoH), 2017.
91 Arts 9(2)(b) & (c) CoH.
92 *International handbook* (2002) 21.
93 Art 56(5) African Charter.
94 See F Viljoen *International human rights law in Africa* (2012) 316.
95 As above.

The African Court on Human and Peoples' Rights (African Court) is also a potential legal avenue for Dak in seeking remedies from the Kenyan government. The African Court was established in 2006 pursuant to article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol) as a judicial arm of the African Union (AU). It has jurisdiction over all cases and disputes arising under the African Charter, the African Court Protocol, and other human rights instruments, and referred to it by the parties.[96] Although Kenya has also become a state party to the African Court Protocol, and thus falls under the jurisdiction of the African Court, it has not made the declaration to allow direct individual access to the Court. Therefore, any submission by Dak would have to go through the African Commission.

It should be noted that, while South Sudan has ratified the Refugee Convention and its Protocol, as well as the OAU Refugee Convention,[97] no action against it is likely to succeed. This is because South Sudan ratified these conventions almost two years after Dak was deported, meaning that they would not apply retroactively.[98] Also, given that Dak avoided death in South Sudan only through a presidential pardon, it would probably not be appropriate for him to consider taking legal action against the government of South Sudan, even though his conviction remains questionable. Another factor is that courts in South Sudan are not in a position to entertain an application of this kind. For one thing, they lack judicial independence, especially when it comes to matters involving the government.[99]

5.1 Exhausting remedies under Kenyan law

As Dak's refugee protection visa was cancelled on unspecified grounds, making him immediately liable to deportation, he could, as a first step, seek a review of the decision of Kenya's Commissioner for Refugee Affairs. As noted previously, all the claims that arose under the repealed Refugees Act, 2006 can be made under the Refugees

96 Art 4 African Court Protocol.

97 On South Sudan treaty status, see agreements and treaties ratified by South Sudan, https://mofaic.gov.ss/agreements-treaties-and-protocols/ (accessed 4 October 2024).

98 A Chua & R Hardcastle 'Retroactive application of treaties revisited: *Bosnia-Herzegovina v Yugoslavia*' (1997) *Netherlands International Law Review* 414-420.

99 C Rickard 'Sacking of 14 judges by South Sudan President unconstitutional: East African Court of Justice' *African Legal Information Institute* 30 July 2020, https://africanlii.org/articles/2020-07-30/carmel-rickard/sacking-of-14-judges-by-south-sudan-president-unconstitutional-east-african-court-of-justice (accessed 4 October 2024).

Act, 2021.[100] The Refugees Act grants the right to appeal the decision of the commissioner to the Refugee Status Appeals Committee.[101] If his application is unsuccessful, he could appeal to the High Court of Kenya.[102] The Court has jurisdiction over violations of rights contained in the constitutional Bill of Rights.[103] An example of these rights is 'fair hearing' which was denied to Dak notwithstanding being one of the key principles in the Kenyan Constitution and the International Bill of Human Rights, to which Kenya adheres.[104]

However, this option – appealing to the Refugee Status Appeals Committee or the High Court of Kenya – has no prospects of success because of the lapse of time. Appeals have to be made within 30 days of the cancellation of the refugee protection visa.[105] It is unlikely that the High Court or any other Kenyan court would accept an application from Dak brought under the Refugees Act outside the permitted timeframe.

In terms of the types of local remedies that could be awarded to Dak if the Appeals Committee or the High Court of Kenya were to review his case, the Refugees Act is silent. However, there are two other possible local remedies. The first could be a reinstatement of Dak's refugee status – that is, to be regranted a refugee protection visa – although the possibility of this is uncertain given that South Sudan has gained relative stability. The second could be a common law remedy, such as financial compensation for the violation of his human right and the suffering he endured as a result.[106]

Given that the time for seeking a review under the Refugees Act has long expired, the only option available to Dak might be to take the matter to the African Commission.

5.2 Lodging a complaint with the African Commission

The African Commission was established by the African Charter to protect and promote the human rights of the African people.[107] It serves as a quasi-judicial body along with African Court. As a quasi-

100 Sec 43(2) Refugees Act, 2021.
101 Secs 11 & 14(1) Refugees Act, 2021.
102 Sec 14(2) Refugees Act, 2021.
103 Sec 165 Constitution of Kenya.
104 Sec 50 Constitution of Kenya; the Universal Declaration of Human Rights 1948, the International Covenant on Civil and Political Rights 1966 and the International Covenant on Economic, Social and Cultural Rights 1966 form the International Bill of Rights.
105 As above.
106 On local remedies, see Viljoen (n 94) 316-319.
107 Art 30 African Charter.

judicial body, the Commission's decisions on communications are not legally binding on state parties.[108] As such, it relies on the goodwill of state parties for the implementation of its decisions. However, the Commission does take it upon itself to follow up with a respondent state to ensure that its decision (recommendation) is implemented.[109]

There are admissibility requirements that must be met to file an application with the African Commission. These requirements are contained in article 56 of the African Charter. The two most relevant requirements are that local remedies must be first exhausted, as discussed, and that the application must be filed 'within a reasonable period from the time local remedies are exhausted, or from the date the Commission is seized of the matter'.[110]

Unlike other regional conventions,[111] the African Charter takes a flexible approach to the submission of complaints. As Viljoen explains, there are factors favouring flexibility when assessing delay in submission, such as the complainants not knowing their rights under the African Charter or the existence of the African Commission; their particular circumstances such as being in detention and not able to submit a complaint on time; and a delay on the part of domestic courts in determining cases involving local remedies.[112] These reasons are consistent with the African Charter's overarching objective to ensure justice and fairness as a human rights instrument.

However, in recent times the African Commission has adopted a more rigid six-months period for the submission and receipt of communications. Its reasoning was that the six-months period is the 'usual standard', suggesting that the Commission intended to bring itself in line with other regional bodies.[113] However, any reliance on a fixed term is at odds with the wording of the African Charter, which allows for submissions within a reasonable period of delay.

The African Court's jurisprudence also is a relevant consideration in the scheme of things. Like the African Commission, the African Court

108 Viljoen (n 94) 339-343.
109 As above.
110 Art 56(6) African Charter.
111 Eg, under the American Convention on Human Rights art 46(1)(b), communications must be lodged within six months from the date of the alleged violation. See also European Convention on Human Rights art 35; the timeframe is four months; Protocol 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms art 4, https://rm.coe.int/168008483 (accessed 9 October 2024).
Art 56(6) African Charter.
112 Viljoen (n 94) 320.
113 *Majuru v Zimbabwe* (2008) AHRLR 146 (ACHPR 2008) para 109.

applies the same criteria in relation to admissibility of applications under article 56(6) of the African Charter, including that applications be filed within a reasonable period. While the Court has shown flexibility, there are also some inconsistencies in its approach to 'reasonable period'.[114] Nkhata argues that in some cases, the African Court seemed to have taken applicants' arguments for delay at face value, but in others it seemed to have rejected the same arguments without specifying the types of evidence it needed to justify the delay.[115] He concludes that the Court's approach creates incoherence and uncertainty in its jurisprudence.[116]

However, the African Court's overall approach is sympathetic to applicants as long as they can justify delay.[117] This is consistent with the intention of the drafters of the African Charter to not burden the Court with a fixed time frame within which applications should be filed. The Court's sympathetic or flexible approach may seem unfair to respondent states, but the objectives of the African Charter to ensure justice and fairness for all should always be borne in mind. Besides, domestic courts do not always administer justice impartially. This is particularly the case in states where courts lack independence, for example, South Sudan, although a South Sudanese applicant has yet to file an application in the African Court.

It has been eight years since the Kenyatta government deported Dak back to South Sudan in 2016. That is far beyond the six-months' time frame the African Commission has imposed under article 56 (6) of the African Charter. However, there are many factors that could work in Dak's favour in terms of persuading the Commission to allow him to file an application to seek remedies from the Kenyan government.

First, as he was in detention for two years (from November 2016 to November 2018), he could make a case that the time he should have filed an application with the African Commission began after he was released from detention on 2 November 2018. It has been five years and 10 months since he was released, which is within the period of delay that the Court allowed in many cases, for example, *Dexter*

114 WJ Nkhata 'What counts as a "reasonable period"? An analytical survey of the jurisprudence of the African Court on Human and Peoples' Rights on reasonable time for filing applications' (2022) 6 *African Human Rights Yearbook* 147-149.
115 As above.
116 Nkhata (n 114) 152-153.
117 See, eg, *Beneficiaries of Late Norbert Zongo & Others v Burkina Faso* (2011) (ACHPR 013/2011) para 124; *Christopher Jonas v United Republic of Tanzania* (2015) (ACHPR 011/2015) para 54; *Dexter Eddie Johnson v Republic of Ghana* (2017) (ACHPR 016/2017) paras 3-12.

Eddie Johnson v Republic of Ghana and *Werema Wangoko Werema and Waisiri Wangoko Werema v United Republic of Tanzania*.[118]

Second, he could argue that being far away in South Sudan and the African Commission being seated in Banjul in The Gambia in West Africa, he was not aware of the existence of the Commission and its role. Third, and the perhaps his strongest argument, he could argue that he could not return to Kenya to seek local remedies there to satisfy the requirements of article 56(5) of the African Charter, although the conditions imposed on him by the Kenyan government are not known, for example, how long he was barred from returning to Kenya.

There have been cases where the African Court considered geographical proximity to be a justifiable reason for the delay in filing an application. For example, in *Lucien Rashidi v United Republic of Tanzania*, which involved deportation, the Court held that since 'the applicant was deported within a week of the High Court's judgment and issuance of the Notice of Prohibited immigrant', '[h]e … lacked the proximity that was necessary to follow up on his requests to the domestic authorities'.[119] Finally, he could argue that he lacked legal representation. There is evidence for this. For example, he self-represented when he was being tried in South Sudan in 2018.[120]

In short, Dak could argue that his case comes within a reasonable period of delay, and is compelling by all accounts. A relevant consideration here also is the fact that he needed time to recover after he was released from jail as he may have been traumatised (South Sudan's Blue Prison where Dak was kept arguably is among the worst prisons in the world). On the other hand, he may have moved on in his life and, thus, may not be keen to file an application with the African Commission. This possibility renders highly unlikely the prospects for holding the Kenyan government accountable for serious violations of international and regional refugee laws. For Dak, it may mean that he will have to live with the injustices he had suffered for the rest of his life.

118 (2015) (ACHPR 024/2015) paras 48-50.
119 *Lucien Rashidi v United Republic of Tanzania* (2015) (ACHPR 009/2015) para 55.
120 Deng (n 86) 7-8.

6 Conclusion

It has been said that 'the refugee law remains the unwanted child of states'.[121] This to a degree is true. States have signed up to the 1951 Refugee Convention and its 1967 Refugee Protocol, yet in too many cases they have violated refugee protection rights these conventions provide. In some cases, this is done in the most blatant way. Such was the case with James Gatdet Dak, who was deported from Kenya to South Sudan in 2016 where he was charged and convicted of offences that arguably were politically motivated.

This article has sought to comment on Dak's deportation. It found that the Kenyatta government carried out the deportation in violation of international and regional refugee laws, namely, the Refugee Convention and its Refugee Protocol, the OAU Refugee Convention and the African Charter. Particularly, it found that the deportation violated the principle of *non-refoulement*, which is now believed to have become a peremptory norm of international law from which no derogation is permitted.

The article also argued that Dak had suffered persecution at the hands of South Sudan's authorities in at least two ways: (a) he was imprisoned for two years without having been formally convicted by a court of law; (b) his imprisonment was likely politically motivated because he is affiliated with the SPLM-IO – an armed opposition movement.

Finally, the article looked at the question of what recourse Dak may have against the Kenyan government for violating his refugee protection right. It is argued that Dak could seek a review of his deportation within Kenya's immigration bodies and courts and/or bring a complaint before the African Commission. However, the prospects for this are uncertain for two principal reasons. First, the time (30 days) for seeking a review of a cancellation of visa under Kenya's Refugees Act had long expired.

Second, the African Charter requires complaints to be filed within a reasonable period, which the Commission has determined to be a period of six months. This had also long expired. However, the African Commission allows complainants to invoke exceptional circumstances. Dak's circumstances are exceptional given that he

121 R Byrne & A Shacknove 'The safe country notion in European asylum law' (1996) 9 *Harvard Human Rights Journal* 184, 187.

was jailed for two years and needed some recovery after being released from jail as he may have been traumatised.

However, it may be the case that Dak has moved on in his life and does not wish to revisit the matter. This would mean impunity for the Kenyan government. However, the point in writing this commentary is less about seeking justice for Dak, but more about providing an analytical understanding of the contentious issues that led to deportation, and perhaps to create a wider awareness about violations of refugees' protection rights that go unpunished.