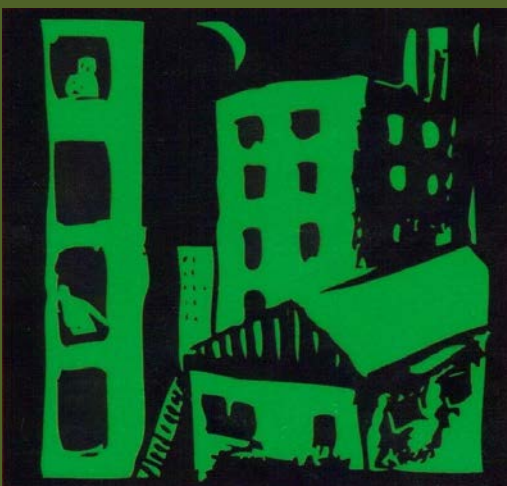


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An evaluation of Kenya's parallel legal regime on refugees, and the courts' guarantee of their rights

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1 INTRODUCTION

The Constitution of the Republic of Kenya 2010 (Constitution) provides that general rules of international law such as customary international law form part of the laws of Kenya.¹ Articles 2(5) and (6) provides that “[t]he general rules of international law shall form part of the law of Kenya...Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.”

These provisions indicate that the general rules of international law or treaties and conventions that have been

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¹ Art 2(5).

ratified may apply in Kenya. The general rules of international law apply if a norm has achieved the status of *jus cogens* or *erga omnes*.² The Kenyan courts have cautiously created inroads into the application of international customary law so as to uphold Article 2(6) of the Constitution. Two recent decisions are instructive on the courts' position on the status of diplomatic immunity, with regard to *jus cogens*. In *Elkana Khamisi Samarere, Jeremiah Omwoyo v The Nigerian High Commission*,³ the claimants sought terminal benefits and damages due to a summary dismissal by the respondent.⁴ The respondent's representatives did not file a response and declined to attend the proceedings until the Court ruled on its jurisdiction to hear and determine the claim.⁵ This conduct showed that diplomatic immunity could be used to disregard another jurisdiction's judicial process.⁶ This argument is beyond the scope of this article, and shall not be dealt with here. The Court dismissed the application because the respondent enjoyed diplomatic immunity unless it was revoked by the Republic of Nigeria.⁷ The cumulative effect of the dismissal of this petition showed the application of general rules of international law in Kenya.

In *Talaso Lepalat v The Embassy of the Federal Republic of Germany, the Attorney General and the National Cohesion and Integration Commission*⁸ the petitioner challenged the applicability of diplomatic immunity where the respondent embassy violated her right to privacy.⁹ It was argued that this violation suffocated the development of international criminal law through the shielding of diplomats from accountability for their human rights violations before the domestic courts.¹⁰ The exercise of diplomatic immunity clashed with a person's rights of access to a court, a remedy and effective protection by the law, and the need to uphold the general rules of

² Colangelo A "Jurisdiction, immunity, legality, and jus cogens" (2013) 14 *Chicago Journal of International Law* 53 at 53; Shelton D "Peremptory international law - jus cogens: a general inventory - jus cogens: international law and social contract" (2016) 110 (2) *American Journal of International Law* 398 at 398; Hathaway J *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press 2005) at 363- 369.

³ [2013] eKLR at 1.

⁴ Paragraph 1.

⁵ Parapraps 2-3.

⁶ Compare *Twictor Investments Ltd v The Government of the United States of America* [2003] eKLR 1, where the respondent filed a reply indicating it would argue that the Kenyan courts did not have jurisdiction to try it.

⁷ Paragraph 5. The Vienna Convention on the Law of Treaties 1155 UNTS 331, Art 32. This position would be different if Kenya had an Act regulating the immunities of diplomats from other States. The Privileges and Immunities Act, Cap 179 s 15 and schedule 1.

⁸ High Court Constitutional Petition 398 of 2014.

⁹ Paragraph 1. Constitution, Art 31.

¹⁰ *Talaso Lepalat* para 12.

international law in Kenya.¹¹ The Court dismissed the petition to enforce diplomatic immunity as a rule of general international law.¹² This trajectory indicates that the courts are inclined to uphold the use of international law.

The second principle of *erga omnes* applies if States Parties are interested in the enforcement of a given rule.¹³ With regard to this principle, international law applies in Kenya if the treaties or conventions have been ratified. Some of the ratified treaties include the United Nations Convention Relating to the Status of Refugees (Refugee Convention)¹⁴ and the International Covenant on Civil and Political Rights (ICCPR).¹⁵ This flexibility in the application of international law under the Constitution of 2010 is a departure from the Constitution of Kenya 1969, which did not have this provision. International customary law, which forms part of the general rules of international law, applies in Kenya although it has not been ratified or acceded to in a treaty.¹⁶ However, the author is not aware of any decision that has applied *erga omnes* in the international context.

A recognised refugee and his family are entitled to the rights and subject to the obligations contained in international instruments to which Kenya is a party.¹⁷ Kenya is a party to the Refugee Convention,¹⁸ and the Protocol Relating to the Status of Refugees (Protocol).¹⁹ It is also a State Party to the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.²⁰ Other international instruments to which Kenya is a signatory include the International Covenant on Civil and Political Rights²¹ and the African Charter on Human and Peoples' Rights.²² These treaties play a

¹¹ *Talaso Lepalat* para 12.

¹² *Talaso Lepalat* para 38.

¹³ John D *International law, a South African perspective* 3 ed (Cape Town: Juta 2006) at 43.

¹⁴ Adopted 28 July 1951, entered into force 22 April 1954 189 UNTS 137.

¹⁵ Adopted 16 December 1966, entered into force 23 March 1976 999 UNTS 171.

¹⁶ Plagman H "The status of the right to life and the prohibition of torture under international law: its implications for the United States" (2003) *Journal of Institute of Justice & International Studies* 172 at 172.

¹⁷ Constitution Arts 19(3) (a) & (b) & 21(1). Refugees Act Chap 173 s 16 (1).

¹⁸ *Acceded to on the 16 May 1966.*

¹⁹ *Adopted 16 December 1966, entered into force 4 October 1967) 606 UNTS 267.*

²⁰ Adopted 10 September 1969 by the Assembly of Heads of State and Government, entered into force 20 June 1974 CAB/LEG/24.3. Rebecca W *International human rights texts and materials* (London: Sweet & Maxwell 1997) at 359.

²¹ ICCPR .

²² ACHPR. Kenya is also party to the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976). For a complete list of the international instruments to which Kenya is a party, see Introduction to the Kenya Law Treaties and Agreements Database at <http://kenyalaw.org/treaties/> (accessed 7 April 2017).

complementary role in ensuring the protection of refugees. Kenya does not have any reservations or interpretative declarations in relation to the implementation of the above treaties. Since it acquired independence from Britain in 1963, Kenya did not have a law to specifically deal with the issue of refugees. Between 1967 and 1976 it used the Aliens Restriction Act²³ and the immigration Act²⁴ to cater for the situations of refugees.

The Constitution of the Republic of Kenya of 1969 did not provide for the direct application of international treaties, conventions, or general rules of international law. This position was buttressed by the Judicature Act, which recognised the Constitution, written laws, common law, doctrines of equity, statutes of general application and customary law as the applicable law in Kenya.²⁵ As a result, international law would be applied if it was ratified or domesticated by an Act of Parliament. This lack of a constitutional provision changed with the adoption of the Constitution of 2010.

The enactment of the Refugee Act in 2006 formed the ratification of the Refugee Convention. The process of ratification of international law in Kenya after 2010 should be clarified. As noted earlier, the Constitution provides that treaties that have been ratified become law.²⁶ This provision appears to conflate the application of principles of international law, because of Article 2 (6) of the Constitution notwithstanding Parliament's power to make law. The Constitution provides "[n]o person or body other than Parliament has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation."²⁷

A fusion of these two provisions²⁸ shows that the power to enact laws lies with Parliament. It follows that the applicability of the rules of international law should be subjected to the legislative process.²⁹ The Treaty Making and Ratification Act³⁰ bridges this gap through a procedure for the ratification of an international treaty. It requires

²³ Chapter 173.

²⁴ Chapter 172.

²⁵ Judicature Act Chap 8 s 3.

²⁶ Constitution Art 2(6).

²⁷ Constitution Art 94(5).

²⁸ Articles 2(6) & 94(5).

²⁹ For an extensive discussion of the application of international law in Kenya before and after 2010, see Ambani JO "Navigating past the 'dualist doctrine': the case for progressive jurisprudence on the application of international human rights norms in Kenya" in Killander M (ed) *International law and domestic human rights litigation in Africa* (Pretoria: Pretoria University Law Press 2010) 30; Kabau T & Njoroge C "The application of international law in Kenya under the 2010 Constitution: critical issues in the harmonisation of the legal system" (2011) 44 (3) *Comparative and International Law Journal of Southern Africa* 293 at 293-310.

³⁰ Act 45 of 2012.

the Cabinet to approve the proposal to ratify a treaty, and forwards it and the memorandum to Parliament.³¹

Since late 2011, Kenya has been a victim of various terror attacks. The decision to send troops to Somalia to quell the security threats has largely orchestrated these attacks.³² The Government of Kenya announced that it would send troops to Somalia to beef up the African Mission in Somalia (AMISOM) to help in rebuilding the Somali State.³³ Al-Shabaab warned the Government not to get involved in the Somali crisis, a warning that the latter ignored.³⁴ Statistics show that the country has had 112 terror attacks between 2011- 2014 in which hundreds of people have died, and others have been injured.³⁵ The latest attack, considered the worst in nearly two decades, took place at Garissa University, in Northeastern Kenya, on 2 April 2015 leaving 147 people dead.³⁶

The Government has linked these terrorist attacks to the refugee migration patterns from Somalia. These patterns followed the breakdown of the Somali State in the late 1980s, and the subsequent fall of Said Barre's regime.³⁷ This was reflected in the collapse of the structure, authority, legitimate power, law, and political order.³⁸ As a result of the anarchy and lawlessness, Al-Shabaab was a product of the unification of militant groups, such as, Al-Itisaam and Takfir we Hijra, that sought to establish Sharia law in Somalia.³⁹ It adopted terrorist tactics as a way of enforcing the Sharia law, which led to the migration from Somalia to the neighbouring States like Kenya.⁴⁰ The Government believes that the terrorist attacks are as a result of terrorists, who have

³¹ Part III Treaty Making and ratification Act.

³² McGregor A "After Garissa: Kenya revises its security strategy to counter Al-Shabaab's shifting tactics" (2015) 8(8) *Terrorism Monitor* at 8.

³³ McGregor (2015) at 8.

³⁴ Staff Reporter "Kenya ignored listed Garissa as hotspot" *The East African* 3 April 2015 available at www.theeastafrican.co.ke/news/Travel-advisory-Kenya-ignored-listed-Garissa-as-hotspot-/2558-2675608-5t90kjz/index.html (accessed 27 September 2016).

³⁵ *2011 Country Reports on Terrorism* 17; *2012 Country Reports on Terrorism* 20; *2013 Country Reports on Terrorism* 26 available at www.heinonline.org (accessed 18 March 2015); *Country Reports on Terrorism 2013- Kenya* available at www.refworld.org (accessed 18 March 2015).

³⁶ Josh L & Holly Y '147 dead, Islamist gunmen killed after attack at Kenya college' *Cablesat News Network* 3 April 2015 available at <http://edition.cnn.com/2015/04/02/africa/kenya-university-attack/> (accessed 10 August 2015).

³⁷ Rutherford K *Humanitarianism under fire: The US and UN intervention in Somalia* Sterling: Kumarian Press 2008) at 5.

³⁸ A De Waal *Islamism and Its Enemies in the Horn of Africa* (Bloomington: Indiana University Press 2008) at 2.

³⁹ De Waal (2008) at 48.

⁴⁰ De Waal (2008) at 22, 31.

infiltrated the country under the guise of being individuals who are seeking recognition as refugees.⁴¹

Kenya has been a recipient of thousands of refugees from Uganda, Eritrea, and Somalia.⁴² This has raised the number of refugees to about 594,000, especially those fleeing violence and insecurity in Somalia.⁴³ Most of the refugees stay in camps, and those who are able to fend for themselves have settled in urban centres.⁴⁴ As a result of the increasing number of refugees in Kenya's urban centres, the country enacted the Security Laws (Amendment) Act,⁴⁵ to limit the number and movement of refugees in the country. The examination of the government policy on refugees leading up to the enactment of the Security Laws (Amendment) Act places the arguments of this article into perspective.

2 THE GOVERNMENT POLICY ON REFUGEES

2.1 The integration policy

The government policy on refugees has evolved through two stages. The first stage was the integration policy used between 1963 and 1991, because of the low number of refugees in the country.⁴⁶ Most of these refugees were from Uganda and some of them had relatives in Kenya, making it easy to integrate them into Kenyan society. The Government played a direct role in using local integration and self-sufficiency for incoming refugees.⁴⁷ This policy enabled refugees to settle in urban centres rather than in camps. This was because the number of refugees was as low as just 20,000.⁴⁸

⁴¹ De Waal (2008) at 22, 31.

⁴² For a breakdown on the number of refugees from these countries in given periods, see Elliott H "Refugee resettlement: the view from Kenya - Findings from field research in Nairobi and Kakuma refugee camp" (2012) San Domenico di Fiesole: European University Institute at 4.

⁴³ UNHCR "Number of refugees in the country as at January 2016, in Kenya's comprehensive Refugee Programme 2016" at 9 Available at <http://reliefweb.int/> (accessed 17 April 2017).

⁴⁴ Report of the Inter-Agency Retreat on Urban Refugees organised by UNHCR and RCK at the Norfolk Hotel in August 2005 available at <https://www.scribd.com/document/286670586/Urban-Refugees-in-Nairobi-doc> (accessed 24 May 2017).

⁴⁵ Act 19 of 2014.

⁴⁶ Crisp J "A state of insecurity: the political economy of violence in refugee -populated areas of Kenya" New Issues in Refugee Research Working Paper no. 16 (1999) at 17.

⁴⁷ Verdirame G "Field report. Human rights and refugees: the case of Kenya" (1999) 12(1) *Journal of Refugee Studies* 54 at 67.

⁴⁸ Maina A "Development of refugee law in Kenya" (2016) *World Policy Blog*, 29 March 2016 available at <http://www.worldpolicy.org/blog/2016/03/29/development-refugee-law-kenya> (accessed 11 July 2016).

Between 1963 and 1993, Kenya did not adequately implement international treaties that related to refugees.⁴⁹ This deficiency was evident in the application of the existing laws. It used the Aliens Restriction Act of 1993⁵⁰ and the Immigration Act of 1967⁵¹ to protect refugees and asylum seekers in Kenya. These laws were applied exclusively for immigration matters relating to non-citizens and without regard to the protection needs of those involved. However, they did not incorporate the terms of the Refugee Convention and its Protocol. For instance, the Aliens Restriction Act was enacted to govern non-citizens and "aliens", including refugees, in direct response to the migration of Uganda refugees during the regimes of Idi Amin and Obote.⁵² There is little information about the mode of integration of refugees before 1991 as regards its application in the administrative structure of Kenya's municipalities and cities.⁵³

Other jurisdictions, like Uganda, use a dual approach in handling the refugee issue. They offer camps for refugees who need support from the United Nations High Commission for Refugees (UNHCR) and other stakeholders.⁵⁴ Uganda also offers integration to refugees who are able to fend for themselves.⁵⁵ Its approach to the refugee issue embraces all asylum seekers regardless of their nationality or ethnicity, allows the enjoyment of the rights to employment and the freedom of movement, and offers land to refugee families for agricultural use.⁵⁶ In collaboration with UNHCR, the Uganda Government engages various stakeholders, such as, district leadership, line ministries, and communities that host refugees.⁵⁷ Uganda's approach presents other imperative measures that aid the refugees' resettlement and productivity in society.

⁴⁹ Hyndman J & Nylund BV "UNHCR and the status of prima facie refugees in Kenya" (1998) 10 *International Journal of Refugee Law* 21 at 29.

⁵⁰ Alien Restriction Act Chap 173.

⁵¹ Immigration Act Chap 172.

⁵² Odhiambo E "Past reflections, future insights: African asylum law and policy in historical perspective" (2007) 19 (1) *International Journal of Refugee Law* 51 at 59.

⁵³ Kagwanja PM "Ethnicity, gender and violence in Kenya" (2000) 9 *Forced Migration Review* at 23-25. Kiswii EM "Refugee influx and (in) security: Kenya's Experiences, 1991-2012" Unpublished Masters Thesis, University of Nairobi, 2013 at 4.

⁵⁴ Dryden-Peterson S & Hovil L *Local integration as a durable solution: refugees, host populations and education in Uganda* (Geneva: United Nations High Commission for Refugees 2003) at 5. Kiapi A "The legal status of refugees in Uganda: a critical study of legislative instruments" In Gingyera-Pincywa AG (ed) *Uganda and the problem of refugees* Kampala: Makerere University Press 1998) at 49.

⁵⁵ Dryden- Peterson & Hovil (2003) at 5.

⁵⁶ The World Bank/ UNHCR Report "An assessment of Uganda's progressive approach to refugees" available at <https://openknowledge.worldbank.org/handle/10986/24736> (accessed 24 May 2017).

⁵⁷ The World Bank/ UNHCR Report (2016) at ix.

2.2 The encampment policy

This forms the second stage in the evolution of the refugee regime. Kenya's encampment policy started around 1991 following the influx of refugees from Somalia and Sudan.⁵⁸ It grudgingly accepted the refugees from neighbouring countries on condition that they were settled in the distant refugee camps.⁵⁹ This indicates that the encampment system took root in Kenya following the influx of refugees in 1991.

Following the movement of refugees from Ethiopia, Sudan, and Somalia, the number of refugees increased to about 200,000.⁶⁰ It is important to note that unlike the periods of entry from Sudan and Somalia, the refugees from Ethiopia entered Kenya following the civil war between 1974- 1991.⁶¹ The UNHCR was left to cater for the refugees in the camps that were set up at Dadaab in Garissa County and Kakuma in Turkana County.⁶² The Government's change of its position ended the integration and started the encampment policy. This new policy perceived refugees as transitory and as a result the lasting solution was repatriation.⁶³ The policy required the settlement of refugees in camps where their movements were controlled.⁶⁴ A refugee was not at liberty to leave a camp unless there was a valid reason to do so.⁶⁵

The enactment of the Refugee Act of 2006 embraced the encampment policy. In its definition of refugee status, it provides for both statutory and prima facie refugees.⁶⁶ It establishes institutions to manage refugee affairs in the country, like the Department

⁵⁸ US Committee for Refugees, *World Refugee Survey* Washington DC (1996).

⁵⁹ Hyndman & Nylund (1998) at 22.

⁶⁰ As of June 2006, Kenya was host to 206,000 refugees from Burundi, Democratic Republic of Congo, Eritrea, Ethiopia, Rwanda, Somalia, Sudan and Uganda. See UNHCR "2005 global refugee trends: statistical overview of populations of refugees, asylum-seekers, internally displaced persons, stateless persons, and other persons of concern to UNHCR" available at www.unhcr.org/statistics/unhcrstats/4486ceb12/2005-global-refugee-trends-statistical-overview-populations-refugees-asylum.html (accessed 11 July 2016).

⁶¹ Immigration and Refugee Board of Canada "The Horn of Africa: Somalis in Djibouti, Ethiopia and Kenya 1 February 1991" available at <http://www.refworld.org/docid/3ae6a80f30.html> (accessed 24 May 2017).

⁶² Maina (2016).

⁶³ Rose J "Social technology and refugee encampment in Kenya" (2012) 25 (20) *Journal of Refugee Studies* at 221.

⁶⁴ Rose (2012) at 221.

⁶⁵ The Refugees Act requires in s 17 that a refugee seek permission from the RCO if he wants to leave the refugee camp. According to Paul Mwangi, a former Refugee Officer, the liberty to leave without permission is constrained to a 40 km radius around the camp.

⁶⁶ See, Refugees Act s 3.

of Refugee Affairs⁶⁷ and the Refugee Affairs Committee.⁶⁸ Although the Refugee Act provides for the rights to movement and work, the application of the encampment policy has changed the perception that Kenyans have about refugees.⁶⁹ They view refugees as a security threat and as persons who take their jobs.⁷⁰ Although the Refugee Act has various rights that refugees enjoy,⁷¹ it is a daunting task to enjoy them, due to the policy.⁷²

Various stakeholders have stated that the stance taken by the Government lacks human rights protection.⁷³ Other scholars have called on the dissident voices to consider other relevant issues like limited resources, porous boundaries and the mass movement of asylum seekers that have compromised the level of protection offered to those who seek alternative safety Kenya.⁷⁴ The fight against terrorism has also taken centre stage in the endeavours by the Government to control the refugees.⁷⁵ With the use of the encampment policy as the basis for the parallel regime, the author argues that the chronological developments between 2011 and 2015 by the Executive and Legislature, on the one hand, and the Judiciary, on the other, have exacerbated the parallel rift in the refugee regime.

⁶⁷ See, Refugees Act s 6. The Refugee Affairs Board was disbanded in August 2016 following Kenya's decision to close the camps. The decision was still under review at the time of writing this article.

⁶⁸ See the Refugees Act s 8.

⁶⁹The policy has led to xenophobic tendencies against refugees, available at <http://www.humanrightsfirst.org/2013/02/08/new-encampment-policy-fuels-xenophobia-in-kenya> (accessed 27 September 2016).

⁷⁰ Rose (2012) at 221.

⁷¹ See the Refugees Act s 16.

⁷² "Asylum under threat; assessing the protection of Somali refugees in Dadaab refugee camps and along the migration corridor" available at

http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0ahUKEwjAidSV877PAhVC7R4KHeDHDQsQFgguMAI&url=http%3A%2F%2Freliefweb.int%2Fsites%2Freliefweb.int%2Ffiles%2Fresources%2FAsylum_Under_Threat.pdf&usg=AFQjCNElBoJZMMlBi6zv82emKGxn0cQMAg&sig2=DvFwbjkcPplBN2JUtr4Fw&bvm=bv.134495766,d.dmo&cad=rja (accessed 3 October 2016).

⁷³ Crisp J "A state of insecurity: the political economy of violence in Kenya's refugee camps" (2000) 99 (397) *African Affairs* 601 at 601-632. Martha M "A Critical Analysis of Kenya's Forced Encampment Policy for Urban Refugees" (2014) available at <http://oxmofm.com/wp-content/uploads/2014/01/MARTHA-MARRAZZA-A-Critical-Analysis-of-Kenya%E2%80%99s-Forced-Encampment-Policy-for-Urban-Refugees.pdf> (accessed 27 September 2016).

⁷⁴ Odhiambo (2007) at 51.

⁷⁵ See the directives discussed below.

The decision to close refugee reception centres is not limited to Kenya. In other jurisdictions like South Africa, the closures have also been contested in court.⁷⁶ While Kenya's position (as will be discussed) largely hinges on security and the effect of the decisions on the constitutional rights of refugees, South Africa questions the constitutionality of the Executive's operation of the centres in disregard of the rights of persons other than the refugees.⁷⁷ In *410 Voortrekker Road Property Holdings CC v Minister, Department of Home Affairs and others*,⁷⁸ the applicants sought an order to close the refugee offices in Cape Town, because its operations violated their right to freedom to trade, and other zoning statutory requirements.⁷⁹ The Court held that although the Department of Home Affairs was fulfilling its mandate to regulate the status of refugees, it had to do so within the law.⁸⁰ It followed that the operation of an office in disregard of the land zoning statutory requirements, and violation of the rights of other persons who were resident and conducting business in Maitland were unlawful.⁸¹ This decision illustrates the need for all individuals and organs of Government in any society to uphold the constitutional virtues by.

2.2.1 *Is encampment justified?*

The Kenyan Government supports the encampment policy because the presence of refugees is ephemeral and that the lasting solution for them is repatriation.⁸² Consequently, they stay in camps and their movement is restricted.⁸³ Other jurisdictions, like South Africa, have enacted a liberal refugee policy that maximises freedom and protection by promoting refugees' temporary integration into local communities.⁸⁴ This has guaranteed the enjoyment of all rights as provided for in the South African Refugees Act.⁸⁵ These include the rights to employment,⁸⁶ basic health services and basic primary education,⁸⁷ freedom of movement, and security of person.⁸⁸

⁷⁶ *Minister of Home Affairs and others v Scalabrini Centre, Cape Town and others* [2013] 4 All SA 571 (SCA), *Minister of Home Affairs and others v Somali Association of South Africa Eastern Cape (SASA EC) and another* [2015] 2 All SA 294 (SCA).

⁷⁷ Refugees Act s 8(1).

⁷⁸ [2010] 4 All SA 414 (WCC).

⁷⁹ Paragraph 6.

⁸⁰ Paragraph 55.

⁸¹ Paragraph 85.

⁸² Rose (2012) at 221.

⁸³ Rose (2012) at 221.

⁸⁴ Landau L "Protection and dignity in Johannesburg: shortcomings of South Africa's urban refugee policy" (2006) 19(3) *Journal of Refugee Studies* 308 at 308.

⁸⁵ Act 130 of 1998 s 27(b).

⁸⁶ Section 27(f).

⁸⁷ Section 27(g).

This liberal policy has its own challenges, such as, conversion of these legal entitlements into effective protection, institutional failures, denial of social services and abuse of refugees by law enforcement agents.⁸⁹

It may be argued that when a State undertakes a positive obligation to counter the full range of obstacles that prevent asylum seekers and refugees from securing effective protection, a liberal policy is better than the encampment policy. This position is given against the backdrop of the protection of refugee rights as an international obligation.⁹⁰ However, a subjective evaluation of a country's state of the economy and the refugee caseload should be considered in the evaluation of its willingness to protect refugee rights.

First, a recent World Bank Report indicates that the Kenyan economy's steady economic growth of 5.6 per cent per annum is expected to rise to 6 per cent per annum in 2017.⁹¹ Despite this growth, the Report shows that there is unemployment among the youth in high productivity jobs and foresees the absorption of nine million youth in the informal sector by 2026.⁹² The refugees' plight is not included within these projections. This shows that the country's priorities target the improvement of the lives of its citizens, to the exclusion of the refugees.

Secondly, the Ministry of Education indicates that the provision of access to education for children as at 2011 stood at 41.8 per cent. This is an indication that 49.2 per cent of children did not have access to education.⁹³ In light of this shortfall, it may be argued that it is irrational for the Government to be expected to support the refugees' enjoyment of the right of access to education, despite the plight of its own citizens. This is exacerbated by a shortage of 70,420 teachers as in June 2012.⁹⁴ This lack of access to education coupled with the lack of teachers for the current enrolment posit a bigger problem for the refugees. The teachers in the refugee camps lack training and

⁸⁸ Landau (2006) at 308.

⁸⁹ Landau (2006) at 308.

⁹⁰ Goodwin-Gill GS & McAdam J *The refugee in international law* 3 ed (Oxford: Oxford University Press 2007) at 47, 453.

⁹¹ Kiringai JW, Sanchez P & Maria L "Kenya - economic update : kazi ni kazi - informal should not be normal" (2016) available at

<http://documents.worldbank.org/curated/en/888091467988907587/Kenya-Economic-update-kazi-ni-kazi-informal-should-not-be-normal/> (accessed 18 April 2017).

⁹² Kiringai, Sanchez & Maria (2016) at x & xii.

⁹³ Education Sector Report, *Education Sector 2013/14-2015/16 Medium Term Expenditure Framework 27* at www.education.go.ke/index.php/downloads/file/95-education-sector-report-fy-2013-14 (accessed 18 April 2017).

⁹⁴ Education Sector Report (2016) at 41.

experience.⁹⁵ While it affects the refugees, it is not in tandem with the forecasts for economic growth by the Government with regard to its citizens.

Thirdly, the Ministry of Health states that the country has an estimated of 16.8 health workers per 10,000 people, which is below the World Health Organisation standard of 22.⁹⁶ The situation is dire in the refugee camps, which have few medical personnel to deal with the refugee population.⁹⁷ These challenges facing the Government orchestrate the use of the encampment policy for refugees. They are continually viewed as unwelcome guests in the host nation, which is a degradation of their dignity.⁹⁸ It is clear that a subjective evaluation of Kenya's plans for its economy may not envisage the refugees.

The point of departure lies in an objective evaluation of the Government's position. It is reluctant to recognise the input of refugees to the economy. This reluctance starts with the lack of a systematic registration model for the urban refugees who stay in the urban centres.⁹⁹ This renders them ineligible for assistance from the UNHCR because, theoretically, they do not exist.¹⁰⁰ However, research indicates that they have contributed to the economy through their engagement in the informal sector.¹⁰¹ For instance, the presence of refugees in Eastleigh between 1990 and 2008 has transformed it from a residential to a commercial area.¹⁰² This urban refugee economy indicates that refugees are engaged in various formal and informal economic

⁹⁵ UNHCR "Education Strategy 2012-2016" at 3 available at <http://unhcr.org/> (accessed 18 April 2017).

⁹⁶ Ministry of Health "Government. lays strategies to reduce health disparity" 30 March 2016, available at <http://www.health.go.ke/2017/03/govt-lays-strategies-to-reduce-health-disparity/#> (accessed 18 April 2017).

⁹⁷ UNHCR "Information on refugee camps" available at <http://www.unhcr.org/ke/wp-content/uploads/sites/2/2016/08/Visitors-Information-Pack-Dadaab-Refugee-Camps.pdf> (accessed 18 April 2017).

⁹⁸ In the South African case of *Watchenuka and Another v. Minister of Home Affairs* 2003 (1) SA 619 (C), the Court overturned a decision that prohibited new asylum seekers from working or studying on the ground that this was a violation of the right to human dignity.

⁹⁹ Campbell EH "Urban refugees in Nairobi: Problems of protection, mechanisms of survival, and possibilities for integration" *Journal of Refugee Studies* (2006) 19(3) at 400.

¹⁰⁰ Campbell (2006) at 400.

¹⁰¹ Wagacha JB & Guiney J (2008) "The plight of urban refugees in Nairobi, Kenya" in David H (ed) *Refugee rights: ethics, advocacy, and Africa* (Washington DC: Georgetown University Press 2008) 97.

¹⁰² Pavanello S, Elhawary S & Pantuliano S *Hidden and exposed: urban refugees in Nairobi, Kenya* (London: Overseas Development Institute 2010) at 23.

activities.¹⁰³ In addition, the movement of refugees from the camps to the urban centres is informed by the need for better education, medical and social services.¹⁰⁴

The objective and subjective evaluations of Kenya's economy create a paradox, which depicts two scenarios. First, it shows the Government's attempt to improve the economy. Secondly, it shows the perceived "irrational requirement" by the Government to improve the lives of refugees. This situation is solved by the movement of refugees to urban centres in search of better services and their subsequent engagement in economic activities.

In addition, there are administrative exceptions to the encampment policy, such as refugees who are undergoing resettlement interviews or processing, or requiring specialised medical care or studying in urban centres.¹⁰⁵ The need to balance Kenya's economic challenges, on the one hand, and the refugee caseload and its effect on the community, on the other, requires an objective, rather than a subjective approach.

The current encampment policy has a number of disturbing features, which affect the enjoyment of rights by refugees. First, it represents a determination to resist the integration of refugees into the economic and social life of the country.¹⁰⁶ Secondly, it has led to the maintenance of large refugee camps in remote areas that are close to the refugees' countries of origin.¹⁰⁷ Dadaab is located in Turkana County, while Kakuma is located in Garissa County. For the Somali refugees, these camps are close to the Somali border. Thirdly, Kenya maintains the assumption that it is the responsibility of the UNHCR and other stakeholders in the international community to care for the refugees, pending their repatriation.¹⁰⁸ This creates an immense burden on all stakeholders to ensure that refugees enjoy their rights. Fourthly, the policy does not provide a conducive environment for the maintenance of refugee protection and security.¹⁰⁹ The refugees are obliged to remain in areas, which have traditionally been insecure, where the rule of law is weak, and where the perpetrators of violence can act with a high degree of impunity.

The refugees are obliged to live in very trying circumstances, which increases their propensity for, and vulnerability to violence. Their flight from protracted and brutal forms of armed conflict to camps that limit their freedom of movement and

¹⁰³ For a detailed evaluation of refugee economies, see generally Betts A, Bloom L, Kaplan J, & Omata N (*Refugee economies: forced displacement and development* Oxford: Oxford University Press 2016).

¹⁰⁴ Pavanello, Elhawary & Pantuliano (2010) at 14.

¹⁰⁵ Pavanello, Elhawary & Pantuliano (2010) at 13.

¹⁰⁶ See a discussion below on the policy directives and enactment of the Security Law (Amendment) Act 19 of 2014.

¹⁰⁷ See text at 113- 114 below.

¹⁰⁸ UNHCR "Voluntary repatriation of Somali refugees from Kenya Operations Strategy 2015- 2019" (2015) at 18, available at <http://www.unhcr.org/5616280b9.pdf> / (accessed 27 September 2016).

¹⁰⁹ Martha (2014) at 1.

engagement in economic or educational opportunities, indicates no immediate prospect of a solution to their plight.¹¹⁰ These disturbing features create agitation from international organisations and civil society to check the Government's policy in ensuring the protection of the rights of refugees.

3 THE EXISTENCE OF A PARALLEL REGIME

The Kenyan Government has merged its refugee policy with national security. This has been evident in the linking of the proliferation of arms and small weapons, and terrorism to the hosting of refugees.¹¹¹ They are perceived as threats to the security of Kenya, and the only rational choice is to use the encampment policy.¹¹² The subsequent discussion of the various directives by the Government is intended to evaluate its use of security concerns as the basis of its policies.

3.1 Analysis of the Government directive of 2012

On 18 December 2012, the Government issued a directive to stop the reception and registration of asylum seekers and refugees. It stated:

The Government of Kenya has decided to stop reception, registration and close down all registration centres in urban areas with immediate effect. All asylum seekers/refugees will be hosted at the refugee camps. All asylum seekers and refugees from Somalia should report to Dadaab refugee camps while asylum seekers from other countries should report to Kakuma refugee camp. UNHCR and other partners serving refugees are asked to stop providing direct services to asylum seekers and refugees in urban areas and transfer the same services to the refugee camps.¹¹³

According to the Government, urban refugees were evading registration, and that their relocation was in their best interest.¹¹⁴ This followed the application of the Refugee Act and the Refugees (Reception, Registration, and Adjudication) Regulations.¹¹⁵ These reasons by the Government do not resonate with their motive if they targeted Somali refugees, staying in Nairobi.¹¹⁶ While this decision targeted Somalis in Nairobi, it affected all other refugees who were residing in all urban centres other than Nairobi. The selective basis of this directive would not survive judicial scrutiny.

¹¹⁰ Crisp (1999) at 2.

¹¹¹ Omata N "Refugee economies in Kenya, preliminary study in Nairobi and Kakuma Camp" (2016) Refugee Studies Centre, Working Paper Series number 120 at 6.

¹¹² Omata (2016) at 6.

¹¹³ *Kituo Cha Sheria & 8 others v Attorney General* [2013] eKLR 2 (*Kituo Cha Sheria*).

¹¹⁴ *Kituo Cha Sheria* at 2.

¹¹⁵ Refugees Act ss 6, 17(f) & 25. The Refugee (Reception, Registration, and Adjudication) Regulations, Legal Notice 24 of 2009.

¹¹⁶ *Kituo Cha Sheria* at 3.

Under the Refugees Act, the Government may designate areas for the temporary stay of refugees, and refugee camps form part of the temporary areas. It states:

The Minister may, by notice in the Gazette, in consultation with the host community, designate places and areas in Kenya to be -(a) transit centres for the purposes of temporarily accommodating persons who have applied for recognition as refugees or members of the refugees' families while their applications for refugee status are being processed; or (b) refugee camps.¹¹⁷

The selective application of this directive was evident in a subsequent communication that hinted at the Somalis as the reason for the terror attacks, and the need to round them up.¹¹⁸ While the directive had the guise of upholding the law, it raises the question of discrimination, which affects the foundation of any refugee law regime.¹¹⁹ The Refugee Convention requires that refugees enjoy the same status as aliens if the latter enjoy a better status.¹²⁰ The ICCPR provides that all persons are equal before the law and are entitled to equal protection without discrimination.¹²¹ Equality is not tagged to one's citizenship, race, creed, or any other kind of status, but to one's humanity as a person.

The State has a positive duty to prohibit discrimination, and guarantee equal and effective protection before the law. The different legal qualifications on the entry of aliens and refugees infringe Article 26 of the ICCPR. The *travaux préparatoires* on Article 26 were inconclusive on the scope of the Article. Although the drafters did not consider the inclusion of an obligation with respect to matters provided for by legislation, they placed an obligation on the States Parties to pass legislation that prohibits discrimination.¹²² This obligation does not envisage a selective application of the policy to particular refugees. In its General Comment 18,¹²³ the Human Rights Committee (HRC) acknowledges that non-discrimination and equal protection before the law constitutes a basic and general principle relating to the protection of human rights. At its core, this policy perceives refugees as threats to the security of Kenya and they have to stay in camps.¹²⁴ It is imperative to evaluate the effect of the directive on the protection of the rights of refugees in Kenya.¹²⁵

¹¹⁷ Refugees Act s 16(2).

¹¹⁸ *Kituo Cha Sheria* at paras 3-6.

¹¹⁹ Dowd R "Dissecting discrimination in refugee law: an analysis of its meaning and its cumulative effect" (2010) 23(1) *International Journal of Refugee Law* 28 at 31.

¹²⁰ See Refugee Convention Art 7.

¹²¹ See ICCPR, Art 26.

¹²² Joseph S, Schultz J & Castan M *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* 2 ed (Oxford: Oxford University Press 2003) at 684.

¹²³ (Thirty-seventh session 1989) UN Doc HRI/GEN/1/Rev 6 at 146 (2003).

¹²⁴ Omata (2016) at 6.

¹²⁵ See text at 128- 150 below.

3.2 The Court's position on the directive

After the passing of the directive, Kituo Cha Sheria, a Non-Government Organisation that runs programmes designed to address the rights and welfare of refugees within the Republic of Kenya petitioned the High Court.¹²⁶ It sought a declaration that the directive violated the rights of refugees living in Kenya.¹²⁷ The petitioners stated that the directive violated Article 28 with regard to human dignity, and Article 47 with regard to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. They also added that the directive violated Article 39 with regard to the right to movement and Article 27 against arbitrary and discriminatory actions.

The Court stated that the application of this policy would lead to a violation of refugee rights.¹²⁸ The Court based its reasoning on five grounds:

First, the policy is unreasonable and contrary to Article 47(1). Second, it violates the freedom of movement of refugees. Third, it exposes refugees to a level of vulnerability that is inconsistent with the States duty to take care of persons in vulnerable circumstances. Fourth, the right to dignity of refugees is violated. Fifth, the implementation of the Government directive threatens to violate the fundamental principle of non-refoulement.¹²⁹

The Court's use of a human rights perspective was a departure from the Government's stand on security. While security was a cardinal issue in the protection of human rights, this administrative decision had to pass the constitutional standard of protection of human rights.¹³⁰ The Court used the right to a fair administrative action to establish if the relocation of the refugees to the camps without due process was constitutional.¹³¹

The Court recognised the right to freedom of movement as an issue that affects refugees in urban centres and stated:

As far as refugees are concerned, two conclusions may be drawn from Article 39 of the Constitution. First, although the right under Article 39(3) is limited to citizens, it does not expressly limit the right of refugees to move within Kenya guaranteed under Article 39(1). Second, it does not expressly recognise the right of refugees to reside anywhere in Kenya but more important the Constitution does not prohibit refugees from residing anywhere in Kenya.¹³²

¹²⁶ *Kituo Cha Sheria* at 3.

¹²⁷ *Kituo Cha Sheria* at 4.

¹²⁸ *Kituo Cha Sheria* at para 74. Other rights that were violated included the right to non-refoulement which is beyond the scope of this article.

¹²⁹ *Kituo Cha Sheria* at para 75.

¹³⁰ *Kituo Cha Sheria* at para 61, See Constitution Art 47.

¹³¹ *Kituo Cha Sheria* at para 62.

¹³² *Kituo Cha Sheria* at para 57.

It used a proactive method of interpretation that used a purposive approach to the interpretation of the Bill of Rights.¹³³ This interpretation recognised the peculiar status of refugees and the need to protect their right to freedom of movement. The directive connoted a limited interpretation of the right to freedom of movement from a security perspective and required the transportation of refugees from Thika Stadium to the camps.¹³⁴ The Court recognised refugees as vulnerable members of society.¹³⁵ The Court stated:

All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.¹³⁶

This provision recognises refugees as a group of persons who require protection from the Government. This protection extends to a positive obligation to address the needs of refugees. This duty requires the State Party to undertake actions to ensure that the refugees enjoy their rights.

The Court noted that the violation of the right to dignity emanated from the attempt by the Government to move refugees from areas where they were productively engaged to the camps.¹³⁷ The Court reiterated that “[f]amily, work, neighbours, and school all contribute to the dignity of the individual. The manner in which the Government directive is to be carried out undermines human dignity.”¹³⁸ The Court was of the view that human interaction is conducive to the dignity of refugees. This position indicated that the community environment was crucial to the wellbeing of refugees.

The Court indicated, that the Government did not justify that the relocation of the refugees was in consideration of the refugees’ welfare.¹³⁹ However, it was clear from the policy that the requirement for the refugees to move to the camps was due to issues of national security rather than the promotion of the welfare of all the refugees.¹⁴⁰ This was based on a communication from the Department of Refugee Affairs to the refugee camps that stated: “Following a series of grenade attacks in urban areas where many people were killed and many more injured, the Government has decided to stop registration of asylum seekers in urban areas with immediate effect.”¹⁴¹

¹³³ *Kituo Cha Sheria* at para 30, See Constitution Art 259(1). *R v Big M Drug Mart Limited*[1985] 1 SCR 295 at paras 116 & 117.

¹³⁴ *Kituo Cha Sheria* at para 49.

¹³⁵ *Kituo Cha Sheria* at para 34.

¹³⁶ *Kituo Cha Sheria* at para 34. See Art 21(3) Constitution.

¹³⁷ *Kituo Cha Sheria* at para 68.

¹³⁸ *Kituo Cha Sheria* at para 68.

¹³⁹ *Kituo Cha Sheria* at para 82.

¹⁴⁰ *Kituo Cha Sheria* at para 85.

¹⁴¹ *Kituo Cha Sheria* at para 5 . See also para 49.

The respondent did not provide proof that the refugees were responsible for the attacks.¹⁴² In addition, the directive violated the freedom of movement of refugees. This right ensured that the refugees would have a decent living and at the same time contribute to the welfare of the Kenyan society. In *Kituo Cha Sheria*, the petitioners were contributing to the economy and as a result, any implementation of the directive would be detrimental to the welfare of urban refugees.¹⁴³ The Court stated:

The proposed implementation of the Government directive is that it is a threat to the rights of refugees. First, the policy is unreasonable and contrary to Article 47(1). Second, it violates the freedom of movement of refugees. Third, it exposes refugees to a level of vulnerability that is inconsistent with the State's duty to take care of persons in vulnerable circumstances. Fourth, the right to dignity of refugees is violated...¹⁴⁴

This stand by the Court showed a parallel perspective to the Government's enforcement of the encampment policy. By its nature this decision evaluated the effect of the directive on the rights of refugees. The Court sought to avert the constitutional violations posed by the directive. The reparations by the Court required the Government to restitute the rights of refugees. The decision provided:

The Government directive, contained in the Press Release and correspondence dated the 18th December 2012 and 16th January 2013 respectively, threatens the rights and fundamental freedoms of the petitioners and other refugees residing in urban areas and is a violation of the freedom of movement under Article 39, right to dignity under Article 28 and the right to fair and administrative action under Article 47(1) and violates the State's responsibility towards persons in vulnerable situations contrary to Article 21(3).¹⁴⁵

The Court added that "[t]he Government directive, contained in the Press Releases and correspondence dated the 18th December 2012 and 16th January 2013 respectively, be and is hereby quashed."¹⁴⁶ The cumulative effect of these reparations was to offer protection to refugees from a human rights perspective.

There were media reports that some Somali refugees intended to return to Mogadishu to avoid the Government policies to force them to the camps.¹⁴⁷ A number of Somali refugees signed repatriation forms to return to Somalia because security officers

¹⁴² *Kituo Cha Sheria* at para 88.

¹⁴³ *Kituo Cha Sheria* at para 82.

¹⁴⁴ *Kituo Cha Sheria* at para 75.

¹⁴⁵ *Kituo Cha Sheria* at para 100 (a).

¹⁴⁶ *Kituo Cha Sheria* at para 100 (c).

¹⁴⁷ "New encampment policy fuels xenophobia in Kenya" available at <http://www.humanrightsfirst.org/2013/02/08/new-encampment-policy-fuels-xenophobia-in-kenya/> (accessed 27 September 2016).

who visited Dadaab told the refugees to leave or be forced out when the camp closes.¹⁴⁸ The directive created a ripple effect with the logical position of forcing refugees to leave Kenya.

3.3 Analysis of the Government directive of 2014

By Gazette Notice No. 1927¹⁴⁹ the Government, acting through the Cabinet Secretary designated areas as refugee camps. The Gazette Notice provided as follows:

In exercise of the powers conferred by section 16(2) of the Refugees Act, 2006, the Cabinet Secretary for Interior and Coordination of National Government designates the areas specified in the schedule as Refugee Camps

SCHEDULE

1. The Ifo 1 and Ifo 2 and Dagahaley in Dadaab Ward of the Dadaab Sub-County in Garissa County.
2. Hagardera and Kambioos in Jarajilla Ward of the Fafi Sub-County in Garissa County
3. Kakuma of Kakuma Ward in the Turkana West Sub-County in Turkana County.¹⁵⁰

Subsequently, on 26 March 2014, the Government issued a directive on refugee and national security issues.¹⁵¹ It was premised on the position that refugees were residing in urban centres, other than Dadaab and Kakuma refugee camps.¹⁵² It directed that the urban refugee registration centres be closed, and refugees moved back to the camps.¹⁵³ This was followed by a deployment of the police to ensure the observance of this directive.¹⁵⁴ The refugees were expected to relocate to the camps for registration, or renewal of their documents. Their relocation from urban centres to the refugee camps subjected the refugees to the discretion of the Refugee Camp Officer (RCO). The only exception to movements outside the camps was limited to a 40 kilometre radius around

¹⁴⁸Mohamed H “UN: Somali refugees leaving Kenya due to threats, pressure” *Voice Of America* July 2016 available at <http://www.voanews.com/a/somali-refugees-leaving-kenya-due-to-threats-and-pressure-un-says/3480706.html/> (accessed 27 September 2016).

¹⁴⁹ Government directive issued on 26 March 2014 and titled, “*Press Statement by Cabinet Secretary for Interior and Coordination of National Government on Refugees and National Security Issues*” reproduced in *Samow Mumin Mohamed & 9 others v Cabinet Secretary, Ministry of Interior Security and Co-Ordination & 2 others* [2014] eKLR 2, (*Samow Mumin Mohamed*).

¹⁵⁰ *Samow Mumin Mohamed* at 2.

¹⁵¹ Press Statement by Cabinet Secretary For Interior & Coordination of National Government on Refugees and National Security issues on 26th March 2014.

¹⁵² Paragraph 1.

¹⁵³ Paragraph 1.

¹⁵⁴ Paragraph 3.

the camp.¹⁵⁵ This directive was another attempt by the Government to enforce the strict application of the encampment policy.

3.4 The Court's position on the directive

Following the directive, Samow Mumin Mohamed and other refugees¹⁵⁶ petitioned the High Court claiming that the Gazette Notice was unconstitutional and that the directive violated their fundamental rights and freedoms.¹⁵⁷ The petitioners sought orders that the directive violated the petitioners' rights under the Constitution.¹⁵⁸ The rights that the petitioners claimed had been violated by the directive included: the right to equality and freedom from discrimination, the right to human dignity, freedom and security of the person, and the right to privacy. Other rights included freedom of movement and residence, the right to own property, the right to fair administrative action and the right to a fair hearing.¹⁵⁹ In their petition dated 2 May 2014 they sought a declaration that the directive violated the rights under Articles 25, 27, 28, 29, 31, 39, 40, 47, 49 and 50 of the Constitution.¹⁶⁰ They also sought a declaration that any act undertaken by the respondents pursuant to Gazette Notice No. 1927 and the directive issued on 26 March 2014 was unconstitutional, null and void.¹⁶¹ The Court stated:

The general principle of law is that a party who moves the court for the enforcement of fundamental rights and freedoms under Article 22 of the Constitution must state his claim with such precision as regards the right violated and demonstrate how it has been violated in relation to him.¹⁶²

This rule implies that the petitioners had to show that the directive would affect their rights as refugees, as a basis for the relief that was sought. In contrast with *Kituo Cha Sheria*, the petitioners neither established a basis for persecution if they returned to the refugee camps nor showed that their businesses would be disrupted if they moved to the camps. Other than the right to movement and an administrative action, the Court did not find a violation of other rights of the petitioners.¹⁶³

¹⁵⁵ Interview with Migwi Paul, former Refugee Officer, Kenya, 10 September 2016.

¹⁵⁶ *Samow Mumin Mohamed* at 1.

¹⁵⁷ *Samow Mumin Mohamed* at para 4.

¹⁵⁸ *Samow Mumin Mohamed* at para 16.

¹⁵⁹ *Samow Mumin Mohamed* at para 16.

¹⁶⁰ *Samow Mumin Mohamed* at para 16.

¹⁶¹ *Samow Mumin Mohamed* at para 16.

¹⁶² *Samow Mumin Mohamed* at para 17. This position is reiterated in *Anarita Karimi Njeru v Republic* (No. 1) [1979] 1 KLR 154 and *Mumo Matemu v Trusted Society of Human Rights Alliance and 5 Others* CA Civil Appeal No. 290 of 2012 [2013] Eklr at para 41.

¹⁶³ *Samow Mumin Mohamed* at para 17. Constitution Art 22. The Court referred to *Anarita Karimi Njeru v Republic*, and *Mumo Matemu v Trusted Society of Human Rights Alliance and 5 others*, which require a petitioner to state with clarity the nature of the right and how it has been violated against him.

While *Kituo Cha Sheria* contested the closure of the urban refugee centres, *Samow Mumin Mohamed* questioned the constitutionality of refugee camps and the subsequent directive by Government requiring the refugees to relocate from the urban centres.¹⁶⁴ However, these two decisions had similar material facts which were instructive for the outcome. First, they both contested the rationale of the Government to move the refugees to the camps.¹⁶⁵ All the petitioners claimed that their accrued rights with regard to their families, businesses, and professional work would be affected by the directives.¹⁶⁶ They both claimed that the right against discrimination under Article 27 of the Constitution was violated.¹⁶⁷ In addition, all the petitioners indicated that the actions of the Government in the directive violated their right to just administrative action under Article 47 of the Constitution.¹⁶⁸

In *Kituo Cha Sheria*, the Court found that the government did not justify the limitation of the petitioners' rights, and subsequently violated their rights to human dignity, freedom of movement and against discrimination.¹⁶⁹ In *Samow Mumin Mohamed*, the petitioners failed to indicate how the Government's designation of camps violated their rights.¹⁷⁰ Consequently, the Court did not find a violation of the right to human dignity, freedom and security of a person, privacy, rights of arrested persons and the right to a fair hearing.¹⁷¹ The different views by the Courts on the Government's failure to justify its actions in *Kituo Cha Sheria*, and the failure by the petitioners to justify the effect of the directive on them in *Samow Mumin Mohamed* should not be taken as a depiction of an intra-parallel regime by the Courts.

These divergent views indicate that, first, it is the duty of the court to adjudicate cases that raise issues of constitutional rights. Secondly, an individual has an obligation to state his or her claim with precision. The Court reiterated its duty to interpret the Constitution in a way that promotes its purpose, values and principles, and advances the rule of law and the protection of human rights.¹⁷² However, it indicated that the performance of this role requires that a petitioner seeking the enforcement of rights and duties, states the claim precisely with regard to the nature of the violation and its effect on him or her.¹⁷³ The petitioner had to be affected by the directive, and not rely on probable causes that were not linked to his position. It is argued that these decisions

¹⁶⁴ *Samow Mumin Mohamed* at paras 1-5.

¹⁶⁵ *Kituo Cha Sheria* at para 10 and *Samow Mumin Mohamed* at para 9.

¹⁶⁶ *Kituo Cha Sheria* at para 13 and *Samow Mumin Mohamed* at para 5.

¹⁶⁷ *Kituo Cha Sheria* at para 11 and *Samow Mumin Mohamed* at para 7.

¹⁶⁸ *Kituo Cha Sheria* at para 11 and *Samow Mumin Mohamed* at para 8.

¹⁶⁹ *Kituo Cha Sheria* at para 10.

¹⁷⁰ *Samow Mumin Mohamed* at para 9.

¹⁷¹ *Samow Mumin Mohamed* at para 30.

¹⁷² *Kituo Cha Sheria* at paras 30- 33.

¹⁷³ *Samow Mumin Mohamed* at para 17

neither refuted the existence of a parallel regime between the Executive and the Judiciary nor pointed to an intra-parallel regime within the Judiciary. This case is instructive in showing that the courts make their decision on a case-by-case basis, with due regard to the effect of the decision on the provisions of the Refugee Act.

3.5 Analysis of the enactment of the Security Laws (Amendment) Act

On 16 December 2014, the Executive with the aid of the Kenya National Assembly enacted the Security Laws (Amendment) Act 19 of 2014 (SLAA). This law amended 22 provisions of other Acts of Parliament.¹⁷⁴ The Refugees Act was amended in sections 11, 12, 14 and an introduction of section 16A. One of these sections provided:

(1) The number of refugees and refugees and asylum seekers permitted to stay in Kenya shall not exceed one hundred and fifty thousand persons.

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

(3) Where the National Assembly varies the number of refugees or asylum seekers in Kenya, such a variation shall be applicable for a period not exceeding six months only.

(4) The National Assembly may review the period of variation for a further six months.¹⁷⁵

This section required Kenya to reduce the number of refugees to 150,000. The implementation of this section required the country to get rid of 480,000 refugees.¹⁷⁶

¹⁷⁴ The affected provisions in the other Acts included the Public Order Act Cap 59 (ss 3,7,8,9,11,12,13,17,19 & 21), the Penal Code Act Cap 63 (ss 66A,128A & 251A), the Criminal Procedure Act Cap 75 (ss 36A, 42A, 118A, 343, 344, 345,348A, 364 & 379A), the Extradition (Contiguous and Foreign Countries) Act Cap 76 (s 2), the Registration of Persons Act Cap 107 (ss 8,14 & 19), the Evidence Act Cap 80 (ss 20A, 33(1), 25A, 59A, 63A & 78A), the Prison Act Cap 90 (ss 36A & 70A), the Firearms Act Cap 114 (ss 2, 3 & 4), the Radiation Protection Act Cap 243 (s 5), the Traffic Act Cap 403 (ss 5, 12 & 118), the Investment Promotion Act, 2004 Cap 485 (s 30), the Labour Unions Act 12 of 2012 (ss 54A, 54B, 54C & 56), the National Transport Safety Authority Act 33 of 2012 (s 26), the National Intelligence Service Act 28 of 2012 (ss 2, 4, 5, 6A, 10, 11C, 36, Part V of s 42, 64, 65 & 74), the Prevention of Terrorism Act 30 of 2012 (ss 3, 9A, 12A, 12B, 12C, 12D, 23, 30A, 30B, 30C, 30D, 30E, 30F, 32, 33, 35, 36(1), 36A, 38, 39, 39A, 41 & 48A), Security Laws Act (ss 40A, 40B & 40C), the Kenya Citizenship and Immigration Act 12 of 2011 (ss 5A, 5B, 5C, 5D, 7, 31(1), 33, 39, 40, 41(1), 47, 54 & 56(2)), the National Police Service Act 11A of 2011 (ss 10, 12, 15, 17, 18, 29, 76A, 87, 88, 94 & 95A), the Public Benefits Organisation Act 18 of 2013 (s 6) and the Civil Aviation Act 21 of 2013 (s 61A).

¹⁷⁵ Refugees Act, s16A.

¹⁷⁶ This would be the approximate remainder of the 630,000 refugees currently in Kenya, as per the UNHCR's "Statistical summary as of August 2012: Refugees and asylum seekers in Kenya" available at <http://data.unhcr.org/horn-of->

The application of this new section would retrospectively affect the extra 480,000 refugees and asylum seekers. Consequently, unless the section was applied retrospectively, it would be a redundant section, as it would not have the legal effect of reducing the ceiling to 150,000.

A look at the drafting history of the SLAA reveals that the drafters did not debate a plan of reducing the number of refugees to the required legal minimum.¹⁷⁷ While they argued that the reduction of the number was in line with international standards, they did not refer to them to justify this figure.¹⁷⁸ A retrospective application of the law would amount to a violation of the principle of non-refoulement. This principle is beyond the scope of this article, and shall not be dealt with herein.

Sections 16A, 11, 12 and 14 had the effect of keeping the refugees in camps and limiting their movements until their applications were decided. While it is true that the freedom of movement may be a justifiable limitation under the Constitution.¹⁷⁹ a look at the geographical location of these camps may lead to a different conclusion. First, Dadaab Camp in Garissa County is 474 km from Nairobi, 569 km from Mombasa, and 454 km from Malindi, yet it is just 80 km from Somali border.¹⁸⁰ With regard to Kakuma, it is 723 km from Nairobi, 566 km from Nakuru, and 477 km from Kitale, yet it is just 130 km from the border with Southern Sudan and about 95 km to the Ugandan border.¹⁸¹ Other than the distant location of the camps, there are security threats involved if one is travelling to Dadaab. According to Damieen MS,¹⁸²

africa/documents_search.php?Page=1&Country=110&Region=&Settlement=0&Category=3/ (accessed 20 September 2016).

¹⁷⁷ *Parliament of Kenya Hansard* dated 30 December 2014 is silent on this issue available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwi05ZjT5r7PAhVGfH4KHSTfdPwQFggcMAA&url=http%3A%2F%2Fwww.parliament.go.ke%2Fthe-senate%2Fhouse-business%2Fhansard%2Fitem%2Fdownload%2F474_a2e5aac4fdc787b6220a2f58eeb79bff&usg=AFQjCNG3xeVGAossZB4CEv2enuQDPkIFlg&sig2=lRsnZNTsne1JB9NbQSPdcQ&bvm=bv.134495766,d.dmo/ (accessed 2 January 2015).

¹⁷⁸ *Hansard* (2014).

¹⁷⁹ Constitution Art 24(1).

¹⁸⁰ Google Maps distance from Nairobi to Dadaab available at <http://www.google.co.za/maps/dir/Nairobi,+Kenya/Dadaab,+Kenya/@-0.5981683,36.3262869,7z/data=!3m1!4b1!4m13!4m12!1m5!1m1!1s0x182f1172d84d49a7:0xf7cf0254b297924c!2m2!1d36.8219462!2d-1.2920659!1m5!1m1!1s0x17f560af3337327b:0x2e8e491a3f22aa39!2m2!1d40.3190719!2d0.0925798> (accessed 11 August 2016).

¹⁸¹ Google Maps distance from Nairobi to Dadaab available at <http://www.google.co.za/maps/dir/Nairobi,+Kenya/Dadaab,+Kenya/@-0.5981683,36.3262869,7z/data=!3m1!4b1!4m13!4m12!1m5!1m1!1s0x182f1172d84d49a7:0xf7cf0254b297924c!2m2!1d36.8219462!2d-1.2920659!1m5!1m1!1s0x17f560af3337327b:0x2e8e491a3f22aa39!2m2!1d40.3190719!2d0.0925798> (last accessed 11 August 2016).

The presence of armed bandits and Islamist militias such as Al-Shabaab, as well as periodic outbreaks of clan feuding, means that the threat of violence against humanitarian workers is very real. The UN mission in Dadaab operates under UN phase three security restrictions stipulating travel by convoy and with an armed police escort, no free movement of staff without armed guards in the camps and a curfew for humanitarian workers, who have to be in a secure compound from 6 pm to 6 am to travel to Dadaab.¹⁸³

The requirement to move refugees to camps, where they would be susceptible to violence in the course of the journey and in the camps, reflected the Government's lack of appreciation of their vulnerability and dignity.

3.6 The Court's position on the Security Laws (Amendment) Act

After the enactment of the SLAA, the Coalition for Reform and Democracy (CORD) and others petitioned the High Court challenging the constitutionality of the SLAA.¹⁸⁴ The petitioners sought orders that sections 14 and 16A of the Refugee Act were unconstitutional because they negatively affected the rights of refugees and contravened Articles 2(5) and (6), 24(1) and 59(2)(g) of the Constitution, and Articles 3, 4(d), 32, 33 and 34 of the Refugee Conventions.¹⁸⁵ The preceding Articles from the Constitution deal with the obligation to apply international law in Kenya while ensuring that any human rights violations are justified under the Constitution. The Court noted that the general rules of international law, ratified treaties and conventions form part of the law of Kenya.¹⁸⁶ The Court declared that section 16A¹⁸⁷ of the Refugee Act was unconstitutional because, first, a refugee was a special person who had to be protected.¹⁸⁸ Secondly, that as a signatory to regional and international covenants; Kenya had to abide by them.¹⁸⁹ The Court stated that for the Government to reach the proposed statutory ceiling of 150,000, it had to stop the admission of refugees and to expel the extra 430,000 refugees (as the approximate number was then).¹⁹⁰

¹⁸² At the time of obtaining this information, Damien McSweeney was a lecturer in development studies at University College Cork. He was deployed to Dadaab as a member of Irish Aid's Rapid Response Corps to work with UNHCR in 2010. Available at <http://odihpn.org/magazine/conflict-and-deteriorating-security-in-dadaab/> (accessed 11 August 2016).

¹⁸³ McSweeney (2010).

¹⁸⁴ *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others (CORD)* [2015] eKLR at para 3.

¹⁸⁵ *CORD* at para 405.

¹⁸⁶ *CORD* at para 414.

¹⁸⁷ *CORD* at para 427.

¹⁸⁸ *CORD* at para 421.

¹⁸⁹ *CORD* at para 422.

¹⁹⁰ *CORD* at para 427.

With regard to section 47 of the SLAA that required that refugees stay in camps unless they had permission from a RCO, the Court stated:

The government has a duty to protect and offer security to refugees and it is, therefore, important that the Refugee Camp officer knows the whereabouts of each refugee. This can only be checked by the refugee seeking permission and a movement pass issued to her/him. This is also important for accountability purposes in light of the security concerns raised by the Attorney General.¹⁹¹

This position resonated with the discretionary powers of the RCO who performs the administrative and facilitative role in the refugees' enjoyment of their right to movement stated in *Samow Mumin Mohamed*¹⁹² and *Kituo Cha Sheria*.¹⁹³ The Court's silence on the role of the RCO was based on the parties' non-contestation of the officer's duties.¹⁹⁴ This showed that in the exercise of its protective role, the Government monitors the refugees' movements as a security concern. While an application of the principles in *Kituo Cha Sheria* and *Samow Mumin Mohamed* indicate that the RCO's discretion should not be unduly limited so as to affect the refugee's enjoyment of the right to freedom of movement, *CORD* highlights the need to address security concerns. It is therefore argued that the three cases illustrate the need for the RCO to balance his role in the monitoring of security concerns raised by Government in a manner that does not violate the rights of a refugee.

Therefore, it is argued that in *CORD*, the Court enhanced the position of international law as an approach to the protection of human rights in Kenya. Against this backdrop, the principles handed down in *Kituo Cha Sheria* and *Samow Mumin Mohamed* with regard to the use of the Constitution as the yardstick for questioning government policies were corroborated.

4 CONCLUSION

The three cases that contested the two directives and the enactment of the SLAA show the use of a human rights approach by the Judiciary in dealing with the refugees' rights. This is a departure from Government's position that uses security as the main objective in its policies. These cases present a chronological trajectory that enhances the protection of human rights. In *Kituo Cha Sheria*, the Court reiterates its mandate to interpret the Bill of Rights in a manner that promotes the values of the Constitution. In *Samow Mumin Mohamed*, the Court cautions petitioners to state the human rights violations with clarity. In *CORD*, the Court reiterates the need to uphold the application of international law by virtue of the current constitutional dispensation.

¹⁹¹ *CORD* at para 402.

¹⁹² *Samow Mumin Mohamed* at paras 23-24.

¹⁹³ *Kituo Cha Sheria* at paras 61-65.

¹⁹⁴ *CORD* at para 401.

The attack on Garissa University four months after the enactment of the SLAA is a clear indication that infringement of refugees' rights shall not defeat terrorism in Kenya.¹⁹⁵ A nuanced approach that requires each State Party to undertake to respect and to protect the rights of persons within its territory should be used.¹⁹⁶ The *travaux préparatoires* of Article 2 of the ICCPR indicate that enjoyment of civil and political rights is immediate and required immediate obligations on the part of the State.¹⁹⁷

The existence of a parallel regime is evident between the Government and the Judiciary. However, the courts' insistence on protecting the rights of the refugees is not enough to guarantee the enjoyment of rights by refugees, unless the Government changes its stance. This should be done by either using directives that engage with the due process before decisions are made, or by stopping the use of the encampment policy. The latter approach requires further research that is aimed at using one of these two options. First, the Government uses a policy that integrates refugees with Kenyan society. Secondly, the Government embraces a hybrid policy that uses encampment for refugees who cannot fend for themselves and integration for urban refugees who are able to fend for themselves as they contribute to the economy of the country. Subject to further research, any of these options places the rights of the refugees into perspective.

In the interim, the discretion of the RCO should not be unduly limited to particular grounds, such as, health, education and medical reasons. The denial of permission to leave the camp for valid reasons negatively affects the enjoyment of freedom of movement. The refugees may not earn a livelihood in the enjoyment of the right to life with regard to being able to get work and look after their children. Other rights which are affected are the right to education and the right to health.¹⁹⁸ The summative effect of this is that the refugees run the risk of being subjected to harsh conditions, because of their being refugees.

¹⁹⁵ Josh & Holly (2015).

¹⁹⁶ ICCPR Art 2(1).

¹⁹⁷ Doc A/C3/SR1181 in GAOR(XVII) Agenda Item 43 237 para 23; Doc A/C3/SR1257 in GAOR(XVIII) Agenda Item 48 238 para 12; Doc A/C3/SR1427 in GAOR(XXI) Agenda Item 62 para 2.

¹⁹⁸ See *Kituo Cha Sheria* at 2.