

A Critical Analysis of Kenya's Forced Encampment Policy for Urban Refugees

By Martha Marrazza

Abstract:

The Government of Kenya recently announced a forced encampment policy for urban refugees. The policy and proposed implementation plan has three main components: the forced eviction of refugees from urban areas; the forced encampment of refugees in Kenya; and the eventual return of refugees to their home countries. This article will argue that the government directive and proposed implementation plan is in breach of Kenya's international human rights obligations because it is overtly discriminatory; violates Article 3 and 26 of the 1951 Convention Relating to the Status of Refugees and Article 11(1) of the 1966 International Covenant on Economic, Social and Cultural Rights; and potentially violates Kenya's *non-refoulement* obligations.

Introduction

In December 2012, Kenya's Department of Refugee Affairs (DRA) announced a forced encampment policy for urban refugees. While Kenya hosts over 450,000 refugees in Dadaab Refugee Camp and over 101,000 refugees in Kakuma Refugee Camp, there are approximately 56,000 refugees residing in urban areas in Kenya (UNHCR-Kenya 2013; Fleming 2013). The Government of Kenya's recent forced encampment policy targets such urban refugees, citing security concerns as a motive for the policy.

Although the Government of Kenya has had a *de facto* encampment policy for refugees since the early 1990s, the encampment of refugees has never been fully enshrined in law (Campbell et. al 2011). While the movement of refugees in the camps in Dadaab and Kakuma has been restricted, the restrictions have proved less rigorous than they appear (Campbell et. al 2011). In fact, according to a 2011 paper produced by UNHCR's Policy Development and Evaluation Service (PDES), 'In practice, refugees in Nairobi are not at risk of compulsory relocation to the camps' (Campbell et. al 2011).

However, the December 2012 forced encampment policy articulated by the DRA states that all Somali asylum seekers and refugees in urban areas must move to Dadaab Refugee Camp and that all other asylum seekers and refugees in urban areas must relocate to Kakuma Refugee Camp. Additionally, the forced encampment policy orders that the registration of asylum seekers and refugees in urban areas be halted and that all urban registration centres be closed.³³ Finally, regarding service provision for urban refugees, the policy states that

³³ According to UNHCR's website, refugee registration refers to 'the recording, verifying, and updating of information on people of concern to UNHCR so they can be protected and UNHCR can ultimately find durable solutions' (UNHCR 2013). Registration provides refugees with an official record of their status, which helps

‘UNHCR and other agencies serving asylum seekers and refugees stop providing all direct services to refugees with immediate effect’ (Department of Refugee Affairs 2012).

After providing background on the Government of Kenya’s directive and elaborating on the current refugee situation in Kenya, this article will offer a brief critique of the directive and proposed implementation plan on legal grounds. The directive and proposed implementation plan has three main components: 1) the forced eviction³⁴ of refugees from urban areas; 2) the forced encampment of refugees in Kenya; and 3) the eventual return of refugees to their home countries. This article will argue that the government directive and proposed implementation plan is in breach of Kenya’s international human rights obligations because it is overtly discriminatory; potentially violates Articles 3 and 26 of the 1951 Convention Relating to the Status of Refugees (hereinafter Refugee Convention) and Article 11(1) of the 1966 International Covenant on Economic, Social and Cultural Rights (CESCR); and potentially violates Kenya’s *non-refoulement* obligations as well.

Contextualising the Government of Kenya’s forced encampment policy for refugees

The refugee situation in Kenya and recent government directive is informed by regional security dynamics in the Horn of Africa. In neighbouring Somalia, famine and protracted conflict perpetrated by groups like Al Shabaab, an Islamist insurgent group with ties to Al Qaeda, has resulted in massive displacement (Ploch 2010). In fact, over 900,000 Somalis currently live as refugees in Kenya, Ethiopia, Djibouti, and Yemen alone (European Commission 2011). Given the emergence of Al Shabaab in East Africa, coupled with the large-scale displacement of Somalis into Kenya, the Government of Kenya is concerned about ‘possible terrorist movement across Kenya’s porous border with Somalia’ (Ploch 2010). Al Shabaab also recruits among members of the Somali diaspora (Ploch 2010), which has further increased suspicion of Somali refugees in Kenya.

Kenyan government officials and the media often assert that violence in the refugee camps and in Eastleigh, a Somali-dominated neighbourhood of Nairobi, can be attributed to the high populations of Somali refugees living in camps and urban settings in Kenya. After a series of grenade attacks in Eastleigh in recent months, the Government of Kenya attributed the attacks to Al Shabaab and used the attacks to justify the December 2012 forced encampment policy for refugees. According to the DRA’s press statement, the policy directly resulted from the ‘rampant insecurity in the refugee camps and urban areas’ (Department of Refugee Affairs 2012).

protect refugees against *refoulement* and arbitrary detentions. Registration also gives refugees access to certain services and assistance, and it is essential for determining which durable solution is most appropriate for refugees (UNHCR 2013).

³⁴ The term ‘forced eviction’ is used to describe the Government of Kenya’s plan to relocate urban refugees from cities to camp settings because it accurately describes the policy, and because there is a legal framework surrounding forced evictions. According to the Office of the High Commissioner for Human Rights, the practice of forced evictions is defined as ‘the removal of individuals, families or communities from their homes, land or neighbourhoods, against their will, directly or indirectly attributable to the State’ (OHCHR 1993).

Furthermore, in the weeks following the directive, a 16 January 2013 letter from the Ministry of Provincial Administration and Internal Security regarding the government's plan for implementing the policy was leaked to the press (Iringo 2013). According to the letter, the government planned on ultimately returning refugees to their home countries after sending them to Dadaab or Kakuma. The letter states:

The Government intends to move all the refugees residing in Urban areas to the Dadaab and Kakuma Refugee Camps and ultimately, to their home countries after the necessary arrangements have been put in place. The first phase which is targeting 18000 persons will commence on 21st January, 2013. (Iringo 2013).

Predictably, UNHCR and other refugee-serving organisations in Kenya have swiftly and forcefully criticised the Government of Kenya's new forced encampment policy and proposed implementation plan. In a briefing on 25 January 2013, UNHCR spokesperson Melissa Fleming stated that UNHCR had serious concerns with the policy 'from the protection, human rights and humanitarian point of view' (Fleming 2013). Other organisations, such as Human Rights Watch, Amnesty International, and Refugees International, have condemned the policy as discriminatory and unlawful (Achilles 2012; Human Rights Watch 2013; Teff and Yarnell 2013).

In response to the directive, the legal aid non-governmental organisation Kituo cha Sheria filed a case opposing the government's policy. Judge David Majanja of the Kenyan High Court, issued a conservatory order on 4 February 2013 to temporarily prevent state actors from implementing the directive. A follow-up hearing was scheduled for 19 February 2013, and UNHCR and the Katiba Institute have been added to the case as *amici curiae*.

Critique of the Government of Kenya's forced encampment policy and proposed implementation plan

Kenya's forced encampment policy is discriminatory

Most basically, the Government of Kenya's directive is overtly discriminatory.³⁵ According to the International Convention on the Elimination of All Forms of Racial Discrimination (1966), discrimination is defined as:

...Any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

The directive is discriminatory on two levels: first, it targets refugees (specifically urban

refugees), and secondly, it differentiates between refugees from Somalia and refugees from other countries.

The forced eviction component of the policy explicitly discriminates against refugees, specifically urban refugees. In contrast to some forced eviction policies that are applied to all inhabitants of a certain area regardless of their immigration status, the Government of Kenya's policy would target urban refugees if implemented. While forced evictions may be legal in certain circumstances,³⁶ commentary on Article 11 of CESCR states, 'where evictions do occur, appropriate measures are taken to ensure that no form of discrimination is involved' (OHCHR 1997). Since the Government's forced eviction policy would only be applied to refugees rather than to all inhabitants of a certain neighbourhood or district, the policy involves a form of discrimination.

Furthermore, the Government of Kenya's forced encampment policy is potentially in violation of Article 3 of the Refugee Convention, which states that 'The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin'. By differentiating between Somali refugees and refugees from other countries, the Government of Kenya is effectively discriminating against refugees on the basis of their country of origin.

The discriminatory nature of the Government of Kenya's forced encampment policy, both against urban refugees in general and against Somali refugees in particular, is therefore problematic and potentially in violation of the Refugee Convention and of CESCR.

Secondly, the forced eviction provision of the directive is potentially in violation of standards for adequate housing recognised by international human rights law. Forced evictions violate the right to adequate housing outlined in Article 11(1) of the 1966 International Covenant on Economic, Social and Cultural Rights (CESCR). While some may argue that transferring refugees to alternative housing in a camp setting does not violate the right to adequate housing outlined in Article 11(1), UN Guidance on the Basic Principles and Guidelines on Development-Based Evictions and Displacement states that all persons have the right of resettlement to alternative land 'of better or equal quality' (OHCHR 1997b). In Kenya the refugee camps are so crowded and insecure that a forced encampment policy would result in a severe loss of services for most urban refugees (Human Rights Watch 2013; Therkelsen 2012; Teff et. al 2013).

Kenya's forced encampment policy potentially violates the freedom of movement rights of

³⁶ According to the Office of the High Commissioner for Human Rights, forced evictions can be consistent with international human rights standards in certain exceptional circumstances, including but not limited to: '(a) racist or other discriminatory statements, attacks or treatment by one tenant or resident against a neighbouring tenant; (b) unjustifiable destruction of rented property; (c) the persistent non-payment of rent despite a proven ability to pay, and in the absence of unfulfilled duties of the landlord to ensure dwelling habitability; (d) persistent antisocial behaviour which threatens, harasses or intimidates neighbours, or persistent behaviour which threatens public health or safety ...', etc. (OHCHR 1993).

refugees

Next, the forced encampment provision of the directive potentially violates the freedom of movement rights of refugees outlined in Article 26 of the Refugee Convention. According to Article 26, states should allow refugees lawfully within their territory the right to choose their place of residence and move freely within their territory. Domestic refugee legislation in Kenya similarly fails to provide legal justification for the encampment of refugees. Although refugee camps are mentioned in Kenya's Refugees Act (2006) (hereafter the Act), the Act does not provide an official encampment policy and fails to designate which categories of refugees should reside in camps (Elhawary et. al 2010). Therefore, the Government of Kenya does not have a legal basis for its forced encampment policy under domestic and international law.

Kenya's forced encampment policy and proposed implementation plan potentially violates Kenya's non-refoulement obligations

Third, the government's stated intention to return refugees to their country of origin potentially violates the *non-refoulement* principle enshrined in the Refugee Convention and customary international law. According to Article 33 of the Convention, states cannot expel or return ('*refouler*') refugees to countries or territories where they would face persecution. *Non-refoulement* is an essential and foundational principle of refugee protection, one that has been incorporated into Kenya's domestic refugee legislation. Thus, Permanent Secretary Iringo's letter stating that the Government of Kenya intends to return all urban refugees to their home countries without individual assessments as to whether there is a risk of persecution undermines Kenya's role as a country of asylum.

If implemented as planned, the Government of Kenya's forced encampment policy and push to return refugees to their country of origin would violate Kenya's *non-refoulement* obligations as a signatory of the Refugee Convention.

Conclusion

Overall, the Government of Kenya's security concerns do not justify the December 2012 forced encampment policy, which is discriminatory, illegal, and would displace tens of thousands of urban refugees, jeopardising their human rights, livelihoods, and access to critical services in the process. This article has argued that the directive and proposed implementation plan is in breach of Kenya's international human rights obligations. If carried out, the policy would forcibly evict urban refugees in a discriminatory manner; curb the freedom of movement rights of refugees; and potentially result in the illegal return of refugees to their country of origin. The High Court's preliminary ruling and the opposition from UNHCR and civil society organisations is promising. The Government of Kenya should heed the initial responses to the policy and withdraw the directive if they are committed to the human rights and protection of refugees.

Martha Marrazza is an American national who holds a BA in Religion and Political Science from Swarthmore College and an MSc in Forced Migration from the Refugee Studies Centre at Oxford University, where she concentrated on the US Refugee Admissions Program, specifically focusing on groups of special concern to the US. Since graduating she has been based in Nairobi, Kenya, first as a Project Developer for the International Organization for Migration (IOM), and currently as a Caseworker for the US Refugee Admissions Program.

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