

The State of Exception and Legal Ambiguity: The Kenyan Forced Encampment Directive for Urban Refugees

By Sinmi Akin-Aina

Giorgio Agamben defines a state of exception as the point of fissure between political fact and the rule of law. I argue that this state of exception has characterized the government of Kenya's treatment of urban refugees, specifically in light of the recent forced encampment government directive issued on March 26th, 2014. The state of exception is often borne of tense political moments and, as stated by Agamben, is a paradigm of modern democratic statecraft, specifically in the current temporal and geographical context of the Global War on Terror. This however results in the flagrant flouting of international law, and the invariable re-victimization and persecution of refugees.

Introduction

In this study, I use Agamben's conceptualisation of the state of exception to explore the government of Kenya's present and historical treatment of urban refugees, particularly in the wake of the 2013 Westgate Mall attack and in light of Kenya's historically fractious relationship with local and refugee Somali populations. A state of exception is defined by Agamben, as a political action or dictate by an executive or state body, which contravenes the rule of law of that same state (Agamben 2005). The current state of exception is embodied by the most recent government of Kenya directive, which seeks to expel all refugees currently residing in cities to camps, as well as to halt the processing and provision of refugee related programs. Thus, the government of Kenya's issuance of the forced encampment directive is in direct contravention of national and international human rights law.

The first section of this paper provides a general introduction and history of urban refugees in Kenya, the recent government directive, and how it can be typified as a state of exception that endangers all urban refugees. The following section elaborates on Agamben's concept of the state of exception, providing examples to elucidate his theory. Next, I frame the government directive as an emerging reactionary and discriminatory policy implemented in a bid to ensure national security in light of Al-Shabaab attacks, most recently on the 23rd of March 2014, at a church in Mombasa (The Star 2014). The concept of the state of exception is particularly useful, as it sheds light on the possibility that such flagrant flouting of the rule of law by an executive or military power is not just a display of force and order in the face of perceived chaos, but a carefully crafted political strategy.

Urban Refugees in Nairobi

The population of urban dwellers (refugee and non-refugee) in Sub-Saharan Africa is expanding at a rapid rate. It is estimated that over half of the population in the region will be residing in urban areas in two decades (UNHCR 2006). This trend is also reflected in the population of refugees in Sub-Saharan Africa, as well as globally (Pavanello et al. 2010). Up to half of the 10.5 million refugees global reside in cities and towns, with one-third living in camps. By 1980, Kenya was host to about 12,000 refugees, mostly from Uganda, today, the number sits at 550,980 registered refugees, making it one of the top 10 major refugee-hosting nations in the world (UNHCR 2014) (UNHCR Nairobi 2004 as cited in Campbell 2006). There is scarce knowledge about how many they are, who they are, where they are, where they come from, how they survive and earn a living, their refugee status is also unknown. UNHCR estimates, 50,800 mostly Somali refugees currently reside in Nairobi (UNHCR 2014).

Kenya has long had a fractious relationship with both its Kenyan ethnic Somalis and the Somali refugee population. From independence in 1963 until 1992, the North-eastern Province, bordering Somalia, where the Dadaab refugee camp is located, was placed under a state of emergency (Abdi 2006). This was due to irredentist claims on the region and its ethnic Somali population by Somalia. The Somali state called for the inhabitants of the North-eastern Province, then called the Northern Frontier District to secede from Kenya and join Somalia, Djibouti and parts of the Ethiopian Ogaden to form 'Greater Somalia' (Abdi 2006, Hakhe 2014).

In the 1990s under President Arap Moi's single-party rule, a period of 'swoops' and forcible repatriations were carried out against both the Kenyan ethnic Somali population and Somali refugees. Ethnic Somalis living in the city as well as in North-eastern Province were subject to harassment and arrest. Individuals were required to show birth certificates, ID papers or a passport to prove that they were not illegal and had a right to reside in Kenya. Those unable to demonstrate Kenyan citizenship were forcibly repatriated (Veney 2007). Large numbers of ethnic Somalis were forcibly taken back to Somalia, many of whom had never been, had been born in Kenya or lived in Kenya the majority of

their lives. During the swoops around 3,500 Kenyan citizens of Somali origin were forcibly repatriated (Veney 2007).

The Forced Encampment Directive

On March 26th, 2014, the Kenyan government issued a forced encampment directive for all refugees living in urban areas to relocate to camps. Joseph Ole Lenku, the Interior Minister stated:

All refugees residing outside the designated refugee camps of Kakuma and Dadaab are hereby directed to return to their respective camps with immediate effect. Any refugee found flouting this directive will be dealt with in accordance with the law. Consequently, all refugee centres in urban areas – Nairobi, Mombasa, Malindi, Isiolo and Nakuru – are hereby closed. (UNHCR 2014)

In addition, the directive ordered an immediate halt to all refugee registrations and service provision (Asylum Access 2013). A tripartite agreement was signed earlier in the year between Kenya, the Somali Transitional Federal Government, and the United Nations High Commissioner for Refugees, for the subsequent repatriation of one million Somali refugees to Somalia (Human Rights Watch 2014). The government directive effectively renders refugees in Kenya extremely vulnerable to a host of human rights abuses, some of which include: assault by policemen and security forces, extortion, sexual and gender-based violence and a violation of the principle of *non-refoulement*, forcing them back to a state that is insecure, unstable, and ill-equipped to receive them (Asylum Access 2013).

States of Exception

Italian philosopher Giorgio Agamben advanced the notion of the state of exception as a means to explain the legitimization and co-optation of political instruments and actions by an executive body or ruler that was often at odds with the rule of law. His most obvious example was in Nazi Germany, where, upon being handed power, Hitler pronounced the Decree for the Protection of the State. This invalidated the articles of the Weimar Constitution addressing personal liberties thus, using the state of exception as a means to erode personal liberties while simultaneously cementing and legitimizing state power (Agamben 2005).

Agamben also points to the state of exception as occurring in periods of intense political crises as a means to establish order in the midst of chaos:

One of the elements that make the state of exception so difficult to define is certainly its close relationship to civil war, insurrection and resistance. Because civil war is the opposite of normal conditions, it lives in a zone of undecidability with respect to the state of exception, which is state power's immediate response to the most extreme internal conflicts. (Agamben 2005:2)

As such, during periods of political turmoil, internal conflict and popular resistance, governments employ a state of exception as a strategy to enforce order and fix 'social problems'. Lastly, Agamben describes the state of exception as the dominant technique of government in contemporary politics, in this era of the Global War on Terror:

The immediately biopolitical significance of the state of exception as the original structure in which law encompasses living beings by means of its own suspension emerges clearly in the "military order" issued by the president of the United States on November 13, 2001, which authorized the "indefinite detention" and trial by "military commissions" of non citizens suspected in involvement in terrorist activities...What is new about President Bush's order is that it radically erases any legal status of the individual, thus producing a legally unnameable and unclassifiable being...Neither prisoners nor persons accused, but simply "detainees", they are the objects of a pure de facto rule. (Agamben 2005:3)

History of the Directive

On September 21st 2013, Al Shabaab militants laid siege to the Westgate mall in downtown Nairobi. At the end of the three day raid, there were seventy two casualties (BBC 2014). Al Shabaab the Islamic militant group that claimed responsibility for the attacks, and several since is a local offshoot of Al Qaeda that has concentrated its terrorist operations in East Africa, in Somalia, and most aggressively in Kenya, particularly Nairobi and Mombasa. In the aftermath of the Westgate Mall attack much of the rhetoric by Kenyan public officials conflated refugees with terrorists. Asman Kamama, Chairman of the Administration and National Security Committee stated:

We have information that quite a number of crooks planned a terror attack from a refugee camp in Northern Kenya. We need to consider relocating all the refugees. The United Nations should take them to other countries... (Walada 2013)

Kenyan officials were of the belief that the terror attacks were orchestrated within refugee camps, and upon completion, the perpetrators merged seamlessly into refugee communities in urban areas.

In December 2012, the government of Kenya announced a directive that would compel all refugees inhabiting urban areas to relocate to border camps. The directive was also designed to shut down all registration and provision of services to refugees in the urban centres of Nairobi, Isiolo and Mombasa. Local NGO Kituo Cha Sheria issued a challenge to the forced encampment directive before the High Court of Kenya; on January 23rd the court issued orders to halt the enactment of the policy. On July 26th, 2013, the High Court of Kenya repealed the government's encampment directive (Asylum Access 2013). The directive was challenged on the basis that it violated the basic freedoms enshrined within the Kenyan Constitution, the Refugee Act, 1996, and a range of international human rights instruments. The High Court of Kenya found the policy to be in breach of both domestic and international law, stating:

First, the policy is unreasonable. 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. 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. (Asylum Access 2013)

The Court also declared:

Every person who acquires refugee status under our law is entitled to be treated as such. The Government Directive in this respect, being a blanket directive, is inconsistent with the Act and international law. It amounts to taking away accrued or acquired rights without due process of law...I find and hold that a government directive which has no regard for the urban refugee is arbitrary and discriminative (Asylum Access 2013)

On March 26th 2014, the Kenyan government re-issued its forced encampment directive after an attack on a church in Mombasa. Up to four thousand refugees have been detained and 400 deported, in what the Kenyan Security Forces are calling Operation Usalama Watch (Aljazeera 2014). Arrests have targeted Somalis living in the Eastleigh neighbourhood of Nairobi, both refugees and ethnic Somalis. Refugees were initially held in Pangani police station where:

Detainees had no room to sit...the cells were filthy with urine and excrement. Police were also holding detainees beyond the twenty-four hour limit prescribed under Kenyan law. (Aljazeera 2014)

In a move reminiscent of other states of exception, such as the internment and concentration camps during World War Two, refugees are now being corralled and held in Nairobi's Kasarani stadium. There, they are detained, screened and cross-examined, those without identity cards are charged with 'unlawful presence' and others with 'residing outside designated areas without authority (Migiro 2014). Most are sent to the overpopulated and under resourced Dadaab refugee camp, designed to accommodate 170,000 refugees, but which currently caters to 400,000 (Human Rights Watch 2014). Some refugees are deported back to Somalia, a country with internal turmoil and a large and growing internally displaced population (Migiro 2014).

The Encampment Directive as a State of Exception

The State of Exception is a particularly useful frame to contextualize the actions of the Kenyan government. As stated by Agamben, it is used to legitimize, maintain and consolidate state power, it is a tactic used in the era of the Global War on Terror, and lastly it often occurs in moments of tense social and political conflict to enforce or redress the social order.

Firstly, the state of exception is used as a means to legitimize and consolidate state power. The fact remains that whether or not the government of Kenya believes that refugees are a real national security threat, there are numerous underlying factors that belie this narrative and the government directive. The show of martial force draws attention away from the fact that this is a new government, plagued by infighting whose legitimacy has been called into question both internally and internationally (Rawlence 2014). The President Uhuru Kenyatta and his deputy president William Ruto are under investigation by the International Criminal Court for inciting election violence (Langat 2014). Additionally, the government of Kenya has also been under attack for its inability to ensure national security, and roust Al Shabaab both in Somalia and on Kenyan soil (Rawlence 2014). Thus, the show of force demonstrated by the directive

could be interpreted as a form of misdirection to draw attention away from the government's poor performance. As journalist Kwamchetsi Makokha aptly put:

It appears that the wide net cast by the government to capture terrorists is a major international public relations exercise, visible but not substantive—no terrorist activities have been unearthed, no plans or terrorist attacks have been revealed. (Kushkush 2014)

Secondly, as stated by Agamben, the state of exception is a strategy employed to wage the Global War on Terror. During which, the unlawful detention, torture, killing and arrests of individuals believed to be national security threats is normalized as state action. Such is the case with the detention of refugees at Kasarani and the shoot to kill command by the Inspector General of police who said:

You are justified to use your firearm effectively, you have no control over where the bullet will hit. It can hit the head or heart even when your aim is to disable. (Rawlence 2014)

Lastly, the state of exception is employed in moments of intense political and social conflict to establish order and deal with 'social problems'. In this particular case, it is being used by the Government of Kenya as a means to address what it believes to be its 'refugee issue'. As stated previously Kenya is one of the top 10 refugee hosting nations in the world, however, with a refugee protection system that is woefully under resourced and overburdened. Whether real or imagined, the contention that refugee communities harbour terrorists serves two main purposes. First, it is an appropriate means of justification to corral and control the urban refugee population. Second, it is a means to shift the responsibility of refugee protection and care back to the countries of origin, or to another third country.

Conclusion

As such, the state of exception calls attention to the Kenyan government's underlying imperatives with the issuance of the forced encampment directive, none of which prioritize the care and protection of refugees or adherence to international human rights conventions. Furthermore, in light of this marked absence of any evidence, the continued arrest, abuse, and detention of refugees is particularly problematic. As stated by UNHCR Researcher Gerry Sampson:

The authorities have failed to show, as international law requires, that the plan was either necessary to achieve enhanced national security, or the least restrictive measure to address national security concerns. (Human Rights Watch 2014)

Thus, what occurs is the flagrant and persistent abuse, detention and deportation of refugees with no thought paid to international human rights law or indeed the commitments undertaken by Kenya as a refugee-hosting nation. The Kenyan government is treating refugees less like vulnerable individuals under their protection but as scapegoats, pariahs and pawns in a political game.

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