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Using a Sledgehammer to Crack a Nut? Kenya's Approach to the Detention of Asylum Seekers and Refugees in Prisons and Police Stations

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Abstract

Article 19 of the International Covenant on Civil and Political Rights (ICCPR) provides that every person has the right to liberty and security of person. This right extends to asylum seekers and refugees and requires that they are not subjected to arbitrary detention such as detention that is disproportionate. In Kenya, the detention of asylum seekers and refugees is guided by Section 2 of the Refugees Act and Sections 4 and 12(3)(g) of the Persons Deprived of Liberty Act. These provisions provide for the administrative detention of asylum seekers and refugees in carceral institutions such as prisons and police stations. Using doctrinal analysis and qualitative research, this paper argues that this detention approach, which pursues administrative detention of asylum seekers and refugees through carceral facilities, is disproportionate. This is because the detriment to the right to liberty of asylum seekers and refugees outweighs the administrative benefits to be achieved by such detention. By being disproportionate, this approach contravenes Kenya's international obligations under the ICCPR. To resolve this, this paper recommends the adoption of a detention approach that is more likely to be proportionate by eliminating the use of carceral institutions in the detention of asylum seekers and refugees.

Key words: *Asylum seekers, refugees, right to liberty, detention, proportionality, prisons and police stations*

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I. Introduction

The right to liberty and security of person is entrenched in international human rights law.[1] The Universal Declaration of Human Rights (UDHR) and International Covenant on Civil and Political Rights (ICCPR) provide that no one should be subjected to arbitrary arrest, detention or exile.[2] The rights under the ICCPR, including this right to liberty and security of person, apply not only to citizens of states but also to refugees and asylum seekers.[3]

The prohibition of *'arbitrary'* detention means that detention is occasionally permissible in order to achieve particular aims.[4] This includes detention for purposes of immigration control,[5] known as immigration detention. Immigration detention refers to the holding of asylum seekers, refugees, stateless persons and other migrants, either on seeking entry to a state or while awaiting deportation, removal or return.[6] This detention is often of an administrative nature rather than a criminal nature as it is used to pursue other administrative purposes such as deportation, removal or determination of pending refugee status.[7] Criminal detention or security detention, on the other hand, is based on the ground that one has committed an offence or for reasons such as national security.[8] This study shall focus on the administrative detention of asylum seekers and refugees.[9] Detention, for the purposes of this paper, refers to the confinement in a closed

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1 Article 3, *Universal Declaration of Human Rights,* 10 December 1948 and Article 9, *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171. It is also recognised in regional human rights instrument and national laws – see Article 6, *African Charter on Human and Peoples' Rights*, 01 June 1981 and Article 29, *Constitution of Kenya* (2010).

2 Article 9, *UDHR* and Article 9, *ICCPR*.

3 *CCPR General Comment No. 35*, *Article 9: Right to liberty and security of persons*, 16 December 2014, 1, para. 3. See also, *CCPR General Comment No. 31, The nature of the general legal obligation imposed on state parties to the covenant*, 29 March 2004, 4, para. 10.

4 *Mohamed Feisal & 19 others v Henry Kandie, Chief Inspector of Police, OCS, Ongata Rongai Police Station & 7 others; National Police Service Commission & another (Interested Part)* (2018) eKLR.

5 *CCPR General Comment No. 8*, *Article 9: Right to liberty and security of persons*, 30 June 1982, para. 1.

6 Edwards A, 'Back to basics: The right to liberty and security of person and 'alternatives to detention' of refugees, asylum seekers, stateless persons and other migrants', United Nations High Commissioner for Refugees (UNHCR), Legal and Protection Policy Research Series, 2011, 8 -<https://www.unhcr.org/4dc949c49.pdf> on 20 December 2021.

7 Regional Mixed Migration Secretariat, *Behind bars: The detention of migrants in and from the East & Horn of Africa*, February 2015, 6; Human Rights Council, *Report of the Working Group on Arbitrary Detention*, 18 January 2010, A/HRC/13/30, 18, para. 58.

8 Grant S, 'Immigration detention: Some issues of inequality' 7 *The Equal Rights* Review, 2011, 69.

9 An asylum seeker is a person who has left their country of origin and sought protection (asylum) in another country but is yet to be legally recognised as a refugee. Upon recognition, asylum seekers become refugees. See Amnesty International, 'Refugees, Asylum Seekers and Migrants' -<https://www.amnesty.org/en/what-we-do/refugees-asylum-seekers-and-migrants/> on 27 May 2024.

place where the persons are not allowed to leave at will, including in prisons and holding centres or facilities, among others.[10]

In Kenya, detention of asylum seekers and refugees is authorised by the Persons Deprived of Liberty Act which provides that detention facilities such as prisons may be used to hold refugees and asylum seekers when there is need for humanitarian assistance.[11] This has been supplemented by the Refugees Act of 2021 which provides for temporary accommodation of asylum seekers and refugees in transit areas including prisons, police stations, immigration detention centres and remand homes while awaiting either transfer to the designated areas, reception centres, settlement centres or pending repatriation and resettlement or health or security screening.[12] This study shall focus on prisons and police stations, as their use as detention centres for refugees and asylum seekers has been regularly condemned because they are criminal justice facilities.[13]

Detention of asylum-seekers and refugees needs to be in conformity with international human rights standards.[14] The 2012 United Nations High Commissioner for Refugees (UNHCR) Guidelines outline the necessary standards for detention of asylum seekers and refugees.[15] For example, the guidelines require that conditions of detention must be humane and dignified.[16] Guideline 8 contains specific metrics for measuring whether detention conditions are dignified and humane.[17] This requirement is in line with Article 10 (1) of the

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10 UNHCR, *Guidelines on the applicable criteria and standard relating to the detention of asylum-seekers and alternatives to detention*, 2012 -<https://www.refworld.org/docid/503489533b8.html> on 20 December 2021.

11 Sections 4 and 12(3)(g), *Persons Deprived of Liberty Act* (Act No. 23 of 2014).

12 Section 2, *Refugees Act* (Act No. 10 of 2021).

13 Human Rights Council, *Report of the Special Rapporteur on the human rights of migrants, François Crépeau*, 2 April 2012, A/HRC/20/24, 9, para 33. See also, Amnesty International, *Please take me to a safe place: The imprisonment of asylum seekers in Aotearoa, New Zealand*, 2021, 12.

14 Edwards A, 'Back to basics', 19.

15 UNHCR, *Guidelines on the applicable criteria and standard relating to the detention of asylum-seekers and alternatives to detention*, 2012.

16 UNHCR, *Guidelines on the applicable criteria and standard relating to the detention of asylum-seekers and alternatives to detention*, 2012, 29-31, para. 48.

17 These include but are not limited to (i) Asylum-seekers should be treated with dignity and in accordance with international standards, (ii) Detention of asylum-seekers for immigration-related reasons should not be punitive in nature, (iii) Basic necessities such as beds, climate-appropriate bedding, shower facilities, basic toiletries, and clean clothing, are to be provided to asylum-seekers in detention, (iv) Food of nutritional value suitable to age, health, and cultural/religious background, is to be provided, (v) All staff working with detainees should receive proper training, including in relation to asylum, sexual and gender-based violence, the identification of the symptoms of trauma and/or stress, and refugee and human rights standards relating to detention.

ICCPR which provides that everyone who is derived of their liberty should be treated with respect for the inherent dignity of their human person.[18]

Contrary to the requirement for conditions to be humane and dignified, the conditions in Kenyan prisons have been criticised as falling short of internationally acceptable standards, and that detention conditions are considered harsh and life threatening.[19] Prison conditions are characterised by overcrowding, poor diet, lack of clean water and poor sanitation, among others.[20] They expose asylum seekers and refugees to assault, sexual abuse, ill-health and limited legal assistance,[21] and asylum seekers and refugees often have their human rights violated as they are often held together with convicted persons despite the administrative nature of their detention.[22] Amnesty International has noted similar undignified conditions of detention of refugees and asylum seekers in police stations.[23] It is thus clear that the conditions in Kenyan prisons and police stations do not uphold the right to humane and dignified treatment,[24] and lead to other human rights violations.

The detention of asylum seekers and refugees, however, does not just need to meet the standard of humane and dignified conditions but also that of proportionality. The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (Siracusa Principles) provide that in limiting a right, 'the state shall use no more restrictive means than are required for the achievement of the purpose of the limitation'.[25] The UNHCR guidelines have echoed this requirement stating that detention of asylum seekers and refugees should be used only where it is proportionate to a legitimate purpose.[26]

In light of the inhumane and undignified detention conditions, the human rights violations in prisons and police stations, and the punitive treatment of

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18 Article 10(1), *ICCPR*.

19 Regional Mixed Migration Secretariat, *Behind bars: The detention of migrants in and from the East & Horn of Africa*, February 2015, 58-59.

20 United States Department of State, *Country reports on human rights practices for 2019: Kenya*, 2019, 6.

21 Regional Mixed Migration Secretariat, *Behind bars: The detention of migrants in and from the East & Horn of Africa*, February 2015, 58.

22 Kenya National Commission on Human Rights, *Survey report on the status of migrants in places of detention in Kenya,* October 2020, ix.

23 Amnesty International, *Somalis are scapegoats in Kenya's Counter-Terror Crackdown,* 2014, 8.

24 Regional Mixed Migration Secretariat, *Behind bars: The detention of migrants in and from the East & Horn of Africa*, February 2015, 59.

25 Article 11, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984.

26 UNHCR, *Guidelines on the applicable criteria and standard relating to the detention of asylum-seekers and alternatives to detention*, 2012, 21, para. 34.

asylum seekers and refugees, this paper investigates whether Kenya's approach of detaining asylum seekers and refugees in prisons and police stations as endorsed by Section 2 of the Refugees Act and Sections 4 and 12(3)(g) of the Persons Deprived of Liberty Act contravenes the principle of proportionality and thus violates Kenya's international obligations under the ICCPR. The paper finds that this detention approach, which pursues administrative detention of asylum seekers and refugees through carceral facilities, is disproportionate as the detriment to the right to liberty of asylum seekers and refugees outweighs the administrative benefits to be achieved by such detention. This paper therefore goes beyond previous studies on the detention of asylum seekers and refugees in Kenya which have been limited to examining the conditions of detention in various detention centres.[27]

To demonstrate this claim, the paper proceeds as follows: Part II details the conceptual framework which the paper adopts, that is, the refugee/asylum seeker as a person. This concept depicts the refugee as a legal and vulnerable person. Part III assesses the trend of the criminalisation of migration, asylum seekers and refugees and posits that Kenya has joined in this trend. It then posits that Kenya's approach to the detention of asylum seekers and refugees under the two statutes entrenches this criminalisation. Part IV then analyses the proportionality of this approach using the proportionality test and other tests developed by scholars such as Michael Flynn and Delphine Nakache. Part V then investigates the consequences of a conflict between Kenya's domestic law and international obligations and how such a conflict should be resolved. Part VI will then offer recommendations on how Kenya can take up a detention approach which is proportionate to its aims and Part VII will conclude the paper.

II. Conceptual Framework: The Refugee/Asylum Seeker as a Person

This concept depicts the refugee/ asylum seeker as a non-criminal and vulnerable person and advances that any measures or policies taken by the state should be in accordance with this perspective of the refugee/asylum seeker.

[27] See for example, Kiama L and Likule D, 'Detention in Kenya: Risks for refugees and asylum seekers', 44 Forced Migration Review, 2013, 34 – 35 and Amnesty International, Somalis are scapegoats in Kenya's CounterTerror Crackdown, 2014, 8. See also, Regional Mixed Migration Secretariat, Behind bars: The detention of migrants in and from the East & Horn of Africa, February 2015, 55 - 64.

i. The Refugee/Asylum Seeker as a Non-Criminal (Legal) Person

Despite the persistent rhetoric to the contrary,[28] the refugee/asylum seeker is a *non-criminal* individual.[29] This is in comparison to, for example, 'unlawful non-citizens' such as those who overstay their visas,[30] and prisoners who are detained as a result of committing a crime.[31] The characterisation of asylum seekers as *non-criminal* is based on the fact that seeking asylum is not an unlawful act, pursuant to the right to seek asylum in another country.[32] This right, which is entrenched in Article 14 of the UDHR, entitles asylum seekers to enter a state without any authorisation as long as they are seeking protection.[33] As such, even in the event of entry into a host country without fulfilling various formal requirements, asylum seekers are not criminals.[34] As for refugees, being granted refugee status constitutes legal recognition as an individual in need of international protection hence one cannot be an 'illegal refugee'.[35]

Given this non-criminal status, refugees and asylum seekers should not be treated as criminals.[36] For opponents of the detention of asylum seekers and refugees, this means that asylum seekers and refugees should not be deprived of their liberty through detention at all.[37] For others such as the International Commission of Jurists (ICJ), this means that the use of detention is permissible but the place and conditions of detention must bear in mind that the detention is of persons who have not committed criminal offences but rather of persons who have fled from their countries in fear of their lives.[38]

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28 See for example, 'Migrants, asylum seekers, refugees and immigrants: What's the difference?' International Rescue Committee, 22 June 2018 -<https://www.rescue.org/article/migrants-asylum-seekers-refugees-and-immigrants-whats-difference> on 12 February 2022 and 'Are asylums seekers illegal?' Asylum insight: Facts and Analysis, 20 October 2014 -<https://www.asyluminsight.com/are-asylum-seekers-illegal> on 12 February 2022.

29 Strange C, 'Asylum-seekers and national histories of detention' 48(4) *Australian Journal of Politics and History*, 2002, 511, 514.

30 Strange C, 'Asylum-seekers and national histories of detention', 512.

31 Ilareva V, 'Immigration detention in international law and practice: In search of solutions to the challenges faced in Bulgaria', 2.

32 Haddad E, 'Who is (not) a refugee?' European University Institute, EUI Working Paper SPS No. 2004/6, 7 -<https://cadmus.eui.eu/bitstream/id/1769/sps2004-06.pdf/> on 12 February 2022. See also, Nicholson F and Kumin J, *A guide to international refugee protection and building state asylum systems: Handbook for Parliamentarians No. 27*, Inter-Parliamentary Union and UNHCR, 2017, 104.

33 Article 14, *UDHR*. See also, Strange C, 'Asylum-seekers and national histories of detention', 514.

34 UNHCR, *Guidelines on the applicable criteria and standard relating to the detention of asylum-seekers and alternatives to detention*, 2012, 12, para. 11.

35 Haddad E, 'Who is (not) a refugee?', 7-8.

36 Amnesty International, *Asylum-seekers detained in the USA: A disproportionate and harsh measure*, 1999.

37 Strange C, 'Asylum-seekers and national histories of detention', 514.

38 ICJ, *Migration and international human rights law: A practitioners' guide*, 2014, 180.

ii. The Refugee/Asylum Seeker as a Vulnerable Person

Vulnerability refers to the 'state of high exposure to certain risks combined with a reduced ability to protect or defend oneself against those risks and cope with their negative consequences'.[39] Asylum seekers and refugees are generally recognised as a vulnerable population.[40] The European Court of Human Rights, for example, has recognised the vulnerability of asylum seekers as a group in the *M.S.S v Belgium and Greece* case, stating that an asylum seeker is particularly vulnerable due to the traumatic experiences they are likely to endure during their migration,[41] as well as because of the uncertainty about their future.[42] International law, also recognising this vulnerability, entitles asylum seekers and refugees to special protection.[43]

Asylum seekers and refugees are generally susceptible to vulnerability because being a refugee implies a breakdown of the normal social, economic and cultural relations.[44] They may experience vulnerability in both the country of origin and the destination country as well as while on route or in transit.[45] There are different kinds of vulnerability which asylum seekers and refugees may be susceptible to such as economic, psychological and social vulnerability. Bernhard Riederer identifies economic vulnerability as referring to financial aspects, that is, poverty and economic hardships. He explains that asylum seekers, for example, enjoy no or very restricted rights to work and are usually not covered by social services and welfare benefits hence end up in difficult financial situations.[46] Psychological vulnerability, on the other hand, includes stress, anxiety and depression,[47] and is mostly experienced by groups who flee from danger hence

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39 Mendola D, Parroco A and Li Donni P, 'Accounting for interdependent risks in vulnerability assessment of refugees', in *Book of short papers SIS*, 2020, 3.

40 See for example, Kaplan C, 'Migration, vulnerability and xenophobia: Central African refugee and asylum seeker's access to health services in Durban, South Africa', Independent Study Project (ISP) Collection 1112, 2011, 6 -<https://digitalcollections.sit.edu/cgi/viewcontent.cgi?article=2125&context=isp_collection> on 12 February 2022; Clayton C, 'Asylum seekers in Europe: M.S.S v Belgium and Greece' 11(4) *Human Rights Law Review*, 2011, 770.

41 *M.S.S v Belgium and Greece,* ECtHR Judgment of 21 January 2011, 47, para. 233.

42 *M.S.S v Belgium and Greece,* 105.

43 Grant S, 'Immigration detention', 69.

44 Riederer B, 'Experts' expectation of future vulnerability at the peak of the 'refugee crisis", Vienna Institute of Demography Working Papers, Working Paper No. 09/2018, 4 -<https://www.econstor.eu/bitstream/10419/207052/1/1031402810.pdf> on 13 February 2022.

45 Mendola D and Pera A, 'Vulnerability of refugees: Some reflections on definitions and measurement practices' 60(5) *International Migration*, 2021, 2. See also, Mendola D *et al*, 'Accounting for interdependent risks in vulnerability assessment of refugees', 5.

46 Riederer B, 'Experts' expectation of future vulnerability at the peak of the 'refugee crisis", 3 - 4.

47 Riederer B, 'Experts' expectation of future vulnerability at the peak of the 'refugee crisis", 4.

suffering traumatic experiences both in the country of origin and during their journey which may be risky.[48] Lastly, Riederer defines social vulnerability as consisting of aspects such as stigmatisation, discrimination and lack of social support.[49] Daria Mendola and Alessandra Pera add to these kinds of vulnerability, the vulnerability to diseases which may be because of lack of healthcare in the country of origin and while in transit, as well as due to experiencing poor living conditions in the destination country.[50] Beyond this, certain groups of asylum seekers and refugees may be more vulnerable due to factors such as their age (such as children), gender (such as pregnant girls and women), sexual orientation, and health and welfare concerns.[51]

Importantly, vulnerability of asylum seekers and refugees is often multi-dimensional, with the asylum seekers and refugees experiencing various kinds of vulnerability simultaneously.[52] This has also been referred to as the 'intersectionality of risks'.[53] Originating from feminist and gender studies, the idea of intersectionality refers to the existence of a cumulative effect of disadvantages due to certain inherent characteristics such as gender, religion and ethnicity which exceeds the sum of the detrimental effects arising from each characteristic individually'.[54] For example, asylum seekers and refugees may be susceptible to economic deprivation and discrimination at the same time hence being both economically and socially vulnerable.[55]

Laws, policies and practices of a host country may impact the vulnerability of migrants, including asylum seekers and refugees.[56] Therefore, state and non-state measures should be assessed with the potential vulnerability in mind, including intersectional vulnerability.[57] Detention is one such state measure that should be assessed to ensure that it does not exacerbate the vulnerability of asylum seekers.

The concept of a refugee as a non-criminal and vulnerable person offers a lens through which Kenya's approach to the detention of asylum seekers and

48 Riederer B, 'Experts' expectation of future vulnerability at the peak of the 'refugee crisis", 5.

49 Riederer B, 'Experts' expectation of future vulnerability at the peak of the 'refugee crisis", 3.

50 Mendola D et al, 'Accounting for interdependent risks in vulnerability assessment of refugees', 3. See also, Riederer B, 'Experts' expectation of future vulnerability at the peak of the 'refugee crisis", 4.

51 UNHCR and International Detention Coalition, *Vulnerability screening tool,* 2016, 3.

52 Riederer B, 'Experts' expectation of future vulnerability at the peak of the 'refugee crisis", 4.

53 Mendola D and Pera A, 'Vulnerability of refugees', 2.

54 Mendola D and Pera A, 'Vulnerability of refugees', 8.

55 Mendola D and Pera A, 'Vulnerability of refugees', 2.

56 Da Lomba S, 'Vulnerability and the right to respect for private life as an autonomous source of protection against expulsion under Article 8 ECHR' 6(4) *Laws*, 2017, 15.

57 Mendola D and Pera A, 'Vulnerability of refugees', 9.

refugees can be analysed. The next section looks at Kenya's detention approach as a form of criminalisation of asylum seekers and refugees in Kenya, and uses this concept to critique this criminalisation.

III. Criminalisation of Asylum Seekers and Refugees in Kenya

Immigration law and criminal law scholars have recently turned their attention to the growing convergence of immigration law and criminal justice, which has been termed as 'crimmigration' or criminalisation.[58] The criminalisation of immigrants, asylum seekers and refugees has taken three main forms: *rhetorical or symbolic criminalisation* which involves the characterisation of these persons as criminals; *literal or direct criminalisation* which is where they are actually charged with criminal offences; and *quasi or procedural criminalisation* which is where they are treated as if they were criminals.[59] Detention of asylum seekers and refugees usually falls in the last category of procedural criminalisation. It is especially criminalising when its use results in the treatment of asylum seekers and refugees as criminals, such as when carried out in prisons or prison-like conditions or where this detention adopts the objectives of criminal justice. This section demonstrates that Kenya has been part of this trend of criminalisation, and that by providing for detention in carceral institutions, it has entrenched procedural criminalisation.

i. Rhetorical or Symbolic Criminalisation

Rhetorical criminalisation involves the representation of asylum seekers and refugees, and immigrants generally in criminal light. Through political and media discourses, they are repeatedly painted as threats to security – dangerous outsiders, criminals and terrorists.[60] Through rhetorical criminalisation, asylum has been reconceptualised as a security issue rather than a humanitarian one.[61]

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58 Majcher I, 'Crimmigration' in the European Union through the lens of immigration detention', 3 and Stumpf J, 'The crimmigration crisis: Immigrants, crime, and sovereign power' 56(2) *American University Law Review*, 2006, 376.

59 Weber L, 'The detention of asylum seekers', 14 and Majcher I, 'Crimmigration' in the European Union through the lens of immigration detention', 3. This characterisation is advanced by Weber with regards to asylum seekers only, but it is visible in the cases of refugees and other immigrants as well. Hence this is the characterisation adopted.

60 Bhatia M, 'Turning asylum seekers into 'dangerous criminals': Experiences of the criminal justice system of those seeking sanctuary', 98.

61 Bank J, 'The criminalisation of asylum seekers and asylum policy', 46.

Asylum seekers and refugees in Kenya have not been spared from rhetorical criminalisation.[62] The government and the media often advance the rhetoric that links asylum seekers and refugees with crime and insecurity,[63] with Kenyans picking up on this rhetoric.[64] Hanno Brankamp notes, for example, that the rhetoric which follows refugees in the Kakuma camp is that they are 'crooks whose presumed dishonesty and proclivity to crime have to be constantly monitored and contained'.[65] Rhetoric about links to terrorism has been advanced from as early as President Moi's era, especially following the 1998 bombings of the American embassies in Kenya and Tanzania.[66] The same rhetoric has continued following the terrorist attacks on the Westgate Mall in 2013, Garissa University in 2015 and the Dusit Hotel in 2019 with the Kenyan government often claiming that the attacks were planned from the Kakuma and Dadaab camps despite offering no evidence.[67] Finally, and perhaps most starkly, this criminalisation was evidenced by the transfer of refugee matters from the 'humanitarian-minded' Department of Refugee Affairs (DRA) to the highly securitised Refugee Affairs Secretariat (RAS) whose officers consisted of military officers and other security officers, due to among other reasons, the security concerns about terrorism among refugees.[68]

ii. Literal or Direct Criminalisation

Literal criminalisation refers to where asylum seekers and refugees are actually charged with criminal offences.[69] This occurs in two main ways: criminalisation of immigration violations which have ordinarily been civil violations and through

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62 'Kenyan government sweep of foreigners puts refugees at risk', Human Rights Watch, 7 June 2002 -<https://www.hrw.org/news/2002/06/07/kenyan-government-sweep-foreigners-puts-refugees-risk> on 28 October 2022. See also, Mwangi N, 'Refugees influx and national security: A case study of Kenya', MA Thesis, University of Nairobi, Nairobi, 2016, 74.

63 'Reverse move to close refugee camp: No forced returns of refugees', Human Rights Watch, 27 March 2019 -<https://www.hrw.org/news/2019/03/27/kenya-reverse-move-close-refugee-camp> on 28 October 2022 and 'Kenya: Civil society calls on government', International Rescue Committee, 22 January 2013 -<https://www.rescue.org/press-release/kenya-civil-society-calls-government-end-abuse-refugees> on 28 October 2022. See also, Jaji R, 'Religious and ethnic politics in refugee hosting: Somalis in Nairobi, Kenya' 14(5) *Ethnicities*, 2014, 638.

64 Brankamp H, 'Madmen, womanizers, and thieves: Moral disorder and the cultural text of refugee encampment in Kenya' 91(1) *Africa*, 2021, 156.

65 Brankamp H, 'Madmen, womanizers, and thieves', 153-154.

66 Brankamp H, 'Madmen, womanizers, and thieves', 156. See also, Mogire E, 'Refugee realities', 17-18.

67 Brankamp H and Glück Z, 'Camps and counterterrorism: Security and the remaking of refuge in Kenya' 40(3) *EPD: Society and Space*, 2022, 529.

68 Brankamp H and Glück Z, 'Camps and counterterrorism', 535-537.

69 Weber L, 'The detention of asylum seekers', 14.

enhanced criminal penalties for the existing immigration-related crimes.[70] As this study is limited by the conceptual framework of the refugee as a non-criminal person, this section focuses on the criminalisation of civil immigration violations and excludes criminalisation in the cases where asylum seekers and refugees have committed crimes.

There is a growing trend in many states to make irregular entry or presence in a state a criminal offence.[71] These migration-related violations which have ordinarily been administrative are constructed as criminal acts through legislation, and result in management of migration through crime.[72] Importantly, despite that Article 31 of the Convention Relating to the Status of Refugees provides that asylum seekers should not be penalised merely for unlawful entry or remaining illegally in a country due to being in need of refuge and protection, countries have criminalised the irregular entry and presence of asylum seekers.[73]

Kenya has criminalised various immigration violations which traditionally are civil violations.[74] The repealed Refugees Act of 2006, for example, criminalised acts such as unlawful presence in Kenya,[75] making false declarations or statements to an appointed officer in the public service as well as residing outside the designated areas (refugee camps).[76] While the Refugees Act of 2021, repealed the offence of unlawful presence,[77] it introduced the offence of failing to report to a refugee officer within a specified period for application for asylum or recognition as a refugee.[78] While there may be legitimate reasons to guard

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70 Stumpf J, 'Crimmigration: Encountering the leviathan' in Pickering S and Ham J (eds), *The Routledge Handbook on Crime and International Migration*, Routledge, London and New York, 2015, 241. See also, Legomsky S, 'The new path of immigration law', 476.

71 Grant S, 'Immigration detention', 69. In the European Union, for example, in 2006 at least 17 members had criminalised unlawful border crossing as well as unlawful presence, with fines or detention accruing as the consequence. See, Stumpf J, 'Crimmigration', 241. And in the US, immigration violations which historically were civil violations have also been increasingly prosecuted as federal crimes since the 1980's. See, Miller T, 'Citizenship and severity: Recent immigration reforms and the new penology' 17 *Georgetown Immigration Law* Journal, 2003, 639 - 640. See also, Morris H, 'Zero tolerance'.

72 Stumpf J, Crimmigration, 241.

73 Article 31, *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137. See also, Weber L, 'The detention of asylum seekers', 19.

74 Kenya National Commission on Human Rights, *Survey report on the status of migrants in places of detention in Kenya,* October 2020, 29. These violations are very similar to what Teresa Miller discusses in the context of literal criminalisation in the US. See, Miller T, 'Citizenship and severity', 640.

75 Section 25 (a), *Refugees Act* (Act No. 13 of 2006).

76 Section 25 (b) and (e), *Refugees Act* (Act No. 13 of 2006).

77 Section 15, *Refugees Act* (Act No. 10 of 2021).

78 Section 41 (c), *Refugees Act* (Act No. 10 of 2021). This is within 30 days according to Section 24 of the same Act.

against these actions, treating them as criminal violations rather than civil or administrative violations (literal criminalisation) is problematic. Given that the purpose of criminal sanctions is to punish those who cause the most harm to society, then treating low-level migration violations as criminal violations is inappropriate.[79]

iii. Procedural or Quasi-Criminalisation

The depiction of migrants, asylum seekers and refugees as criminal (rhetorical criminalisation) and criminalisation of asylum (literal criminalisation) results in stringent measures and harsh penal sanctions by states such as the detention of asylum seekers and refugees.[80] The characterisation of asylum seekers and migrants as criminals, for example, is used by states as a justification for restrictive and punitive legislation and policy,[81] which entrenches practices such as detention, imprisonment and forceful removals.[82] When these practices such as detention are used to treat asylum seekers as if they were criminals, they result in procedural criminalisation.[83]

Detention is especially criminalising when it is carried out in prisons. However, even in instances where detention is not carried out in prisons, such as in specialised detention centres instead, it can still be criminalising.[84] This is where detention is carried out in a prison-like environment.[85] Worryingly, there has been an increased cross-over between immigration detention and imprisonment in several countries, with places of detention being either current or former carceral institutions, and where they are not, the detention centres built specifically for the detention of immigrants are based on prison design.[86] Furthermore, immigration detention centres tend to use day-to-day operations and security mechanisms which are similar to those of carceral institutions such as fencing, security cameras, locking doors, segregation cells and razor wire, among others.[87] In some countries even the staffing in the prisons is the same

79 Stumpf J, Crimmigration, 242.

80 Grant S, 'Immigration detention', 69 and Welch M and Schuster L, 'Detention of asylum seekers in the US, UK, France, Germany and Italy', 333 – 334.

81 Bank J, 'The criminalisation of asylum seekers and asylum policy', 46, 49.

82 Bhatia M, Turning asylum seekers into 'dangerous criminals', 98 - 99, 101.

83 Weber L, 'The detention of asylum seekers', 14.

84 Weber L, 'The detention of asylum seekers', 14.

85 Barker V and Smith P, 'This is Denmark', 1547.

86 Bosworth M and Turnbull S, 'Immigration detention, punishment and the criminalisation of migration', 92-93.

87 Bosworth M and Turnbull S, 'Immigration detention, punishment and the criminalisation of migration', 92-93.

as the staffing in the detention centres,[88] and detained immigrants are subjected in prison-like conditions such as not being allowed to use mobile phones and if found with one, are subjected to solitary confinement as happens in prisons.[89]

Detention also ends up as criminalisation when it takes up the objectives of criminal justice: deterrence, retribution and punishment.[90] Deterrence, as a criminal justice principle, aims at instilling fear of the penalties for committing a crime, and in doing so, discouraging the public from engaging in criminal activity. Deterrence has become a key consideration in immigration policy and as such, detention is increasingly being used with the intention to deter future asylum seekers.[91] Detention is also used as a punitive and retributive measure.[92] Retribution in criminal justice aims at imposing a punishment commensurate to the crime committed, and this has been seen where governments use detention as punishment for illegal entry and presence in a country as well as the supposed burden that immigrants pose on the social structure and state resources. [93] Governments such as the UK especially, use indefinite detention as a retribution for what they deem as illegality of arrival.[94] Barker and Smith have noted that the US similarly uses detention centres to further the punitive purpose of prisons.[95]

The conceptualisation of asylum seekers and refugees as threats to national security has enabled the Kenyan government to take extraordinary measures to control refugee populations such as enforcing a mandatory encampment policy,[96] as well as mass arrests, detention and deportation of asylum seekers and refugees.[97] This includes the routine detention of asylum seekers and refugees in prisons. In 2014, the UNHCR noted that 153 asylum seekers and refugees were

88 Bosworth M and Turnbull S, 'Immigration detention, punishment and the criminalisation of migration', 92-93.

89 Barker V and Smith P, 'This is Denmark', 1548.

90 Albin T, 'The criminalisation of unauthorised immigrants', Abstract.

91 Detention is used to deter asylum seekers in various ways including offshore processing in Australia, detention in prisons or prison-like facilities in Denmark and the detention of the heads of households in the UK to encourage whole families of Eastern European Roma asylum seekers to abandon their asylum claims. See respectively, Welch M, 'The sonics of crimmigration in Australia', 325; Barker V and Smith P, 'This is Denmark', 1548, 1552 and Weber L, 'The detention of asylum seekers', 12.

92 Bank J, 'The criminalisation of asylum seekers and asylum policy', 44.

93 Albin T, 'The criminalisation of unauthorised immigrants', 24.

94 Albin T, 'The criminalisation of unauthorised immigrants', 30.

95 Barker V and Smith P, 'This is Denmark', 1547.

96 Hulbert E, 'Kenya and the securitisation of refugees', The Security Distillery, 14 February 2020 -<https://thesecuritydistillery.org/all-articles/kenya-and-the-securitization-of-refugees> on 31 October 2022 and Amnesty International, *Somali are scapegoats in Kenya's counter-terror crackdown*, 2014, 4.

97 Mwangi N, 'Refugees influx and national security: A case study of Kenya', MA Thesis, University of Nairobi, Nairobi, 2016, 39.

being held in Garissa Prison Centre.[98] Furthermore, asylum seekers are often detained together with, and subjected to the same standards of confinement as, persons charged with crimes or those imprisoned for crimes. In this manner, they end up being treated as criminals.[99] Detention of asylum seekers and refugees in Kenyan prisons thus constitutes procedural criminalisation.

The Operation Usalama Watch also demonstrated procedural criminalisation in Kenya. The operation which followed an attack in Mombasa and explosions in Eastleigh,[100] was in effort to address the increasing insecurity in Kenya.[101] The operation saw asylum seekers and refugees arrested and held without charge for days at a time, beyond the twenty-four-hour limit mandated by law.[102] Refugees during the operation were detained in several police stations such as the Pangani, Shauri Moyo, Kamukunji, Kasarani and Gigiri stations.[103] Human Rights Watch and Amnesty International noted that it appeared the Kenyan government was collectively punishing asylum seekers and refugees through this operation.[104] This detention was criminalising as firstly, it was carried out in police stations, which are carceral institutions like prisons. Secondly, it was often indefinite and pursued a punitive objective which is ordinarily a criminal objective. In this manner, this detention constituted procedural criminalisation of asylum seekers and refugees.

iv. The Detention Approach under the Refugees Act and Persons Deprived of Liberty Act

The Refugee Act and the Persons Deprived of Liberty Act provide that carceral facilities such as prisons and police stations can be used in the detention of asylum seekers and refugees. By providing for the detention of asylum seekers and refugees in carceral institutions, especially prisons, the two Acts entrench procedural criminalisation of asylum seekers and refugees.

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98 UNHCR, *Dadaab refugee camps: Bi-weekly update*, 1-15 October 2014, 2.

99 Kiama L and Likule D, 'Detention in Kenya', 34.

100 Amnesty International, *Somali are scapegoats in Kenya's counter-terror crackdown*, 2014, 4.

101 Kenya National Commission on Human Rights, *Return of the Gulag: Report of KNCHR investigations on Operation Usalama Watch (Draft)*, July 2014, 3.

102 Amnesty International, *Somali are scapegoats in Kenya's counter-terror crackdown*, 2014, 6.

103 'End abusive round-ups: Detainees describe mistreatment, lack of access to UN Agency', Human Rights Watch, 12 May 2014 -<https://www.hrw.org/news/2014/05/12/kenya-end-abusive-round-ups> on 31 October 2022.

104 Amnesty International, *Somali are scapegoats in Kenya's counter-terror crackdown*, 2014, 13 and 'End abusive round-ups: Detainees describe mistreatment, lack of access to UN Agency', Human Rights Watch, 12 May 2014 -< https://www.hrw.org/news/2014/05/12/kenya-end-abusive-round-ups> on 31 October 2022.

This approach becomes concerning when gauged against the understanding of the refugee as a non-criminal and vulnerable person. By treating asylum seekers and refugees as criminals through their detention in prisons and police stations (procedural criminalisation), this approach contradicts the view of the refugee as a non-criminal person or legal person. Furthermore, this approach fails to consider that asylum seekers and refugees are susceptible to psychological vulnerability such as stress, anxiety and depression which they may have undergone in either their country of origin or during their journey,[105] and which may be exacerbated by detention in prisons.[106] Such detention also exacerbates their vulnerability by exposing them to ill-health.[107] As such, the detention approach adopted by Kenya fails to consider both the non-criminal and vulnerable nature of the refugee.

The next section uses this shortcoming to highlight the disproportionate nature of the approach, and in particular, that this approach may not be the least restrictive means to achieve the administrative aims of immigration detention, and that its detrimental effects may far outweigh the beneficial effects.

IV. The Proportionality of Kenya's Approach to the Detention of Asylum Seekers and Refugees

i. The Proportionality Test

The proportionality test is used to assess the reach and effect of measures taken by states and individuals.[108] It is often used to reconcile conflicting rights, interests and values.[109] Though the principle is applied with slight variations in different jurisdictions and tribunals, an underlying structure is visible. This structure entails a four-part test of a legitimate aim, suitability, necessity and proportionality in the narrow sense.[110]

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105 Riederer B, 'Experts' expectation of future vulnerability at the peak of the 'refugee crisis", 4.

106 Albin T, 'The criminalisation of unauthorised immigrants', 24 - 25; UNHCR and International Detention Coalition, *Vulnerability screening tool,* 2016, 2.

107 Mendola D, Parroco A and Li Donni P, 'Accounting for interdependent risks in vulnerability assessment of refugees', 3 and Regional Mixed Migration Secretariat, *Behind bars: The detention of migrants in and from the East & Horn of Africa*, February 2015, 58.

108 Krommendijk J and Morijn J, "Proportional' by What Measure(s): Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle in Investor-State Arbitration, Case Studies on Protection Standards and Specific Human Rights' in Dupuy P, Petersmann E, Francioni F (eds), 1st ed, *Human rights in international investment law and arbitration*, Oxford University Press, Oxford, 2009, 438.

109 Klatt M and Meister M, *The constitutional structure of proportionality,* 1st ed, Oxford University Press, 2012, 1.

110 Klatt M and Meister M, *The constitutional structure of proportionality*, 7. This has been adopted by Kenyan courts as well. See for example*, Kenya Human Rights Commission v Communications Authority of Kenya & 4 others* (2018) eKLR.

The first sub-test requires that a measure or act is only taken in pursuit of a legitimate aim.[111] Suitability, which has also been termed as adequacy,[112] requires that the measure or act is appropriate to achieve the intended objective.[113] That is, that the act or measure is capable of achieving the aim it sets out to accomplish.[114] The necessity sub-test requires that the chosen act or measure restricts the right(s) as little as possible[115] – that the measure does not limit the rights any more than is necessary.[116] This requires that if there are two or more measures which are capable of promoting the same interest or objective, the one which interferes with the right(s) less intensively is chosen.[117] However, this less restrictive measure must also be suitable or equally effective to achieve the objective.[118]

The last subtest is proportionality in the narrow sense, also known as proportionality stricto sensu or the balancing stage.[119] This stage entails an assessment of whether the measure will result in a net gain when the interference of the right is weighed against the objective sought.[120] In essence, it is an analysis of the costs incurred by the limitation of the right against the benefits of the measure or act.[121] This analysis entails three steps: establishing the degree of non-satisfaction of or detriment to the first principle; establishing the importance of satisfying the competing principle and lastly, establishing whether the importance of satisfying the competing principle justifies the non-satisfaction of or detriment to the first principle.[122] Generally, when weighing these considerations, rights weigh more than other considerations or interests.[123]

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111 Klatt M and Meister M, *The constitutional structure of proportionality,* 8.

112 Cianciardo J, 'The principle of proportionality', 179.

113 Klatt M and Meister M, *The constitutional structure of proportionality,* 8

114 Klatt M and Meister M, *The constitutional structure of proportionality*, 8. See also, Cianciardo J, 'The principle of proportionality', 179.

115 Klatt M and Meister M, *The constitutional structure of proportionality,* 9.

116 Sweet A and Mathews J, 'Proportionality balancing and global constitutionalism', 75.

117 Klatt M and Meister M, *The constitutional structure of proportionality*, 9.

118 Klatt M and Meister M, *The constitutional structure of proportionality*, 10.

119 Klatt M and Meister M, *The constitutional structure of proportionality*, 8-9 and Cianciardo J, 'The principle of proportionality', 183.

120 Klatt M and Meister M, *The constitutional structure of proportionality*, 8.

121 Sweet A and Mathews J, 'Proportionality balancing and global constitutionalism', 75-76.

122 Klatt M and Meister M, *The constitutional structure of proportionality,* 10.

123 Klatt M and Meister M, 'Proportionality: A benefit to human rights?' 10(3) *International Journal of Constitutional Law*, 2012, 690. See also, Schauer F, 'A comment on the structure of rights' 27 *Georgia Law Review*, 1993 and Barak A, *Proportionality: Constitutional rights and their limitations*, 1st ed, Cambridge University Press, Cambridge, 2012, 344. See also, *Kenya Human Rights Commission v Communications Authority of Kenya & 4 others* (2018) eKLR, para. 68.

ii. Proportionality of Immigration Detention Practices

Though the principle of proportionality is usually used in individual cases to assess the necessity or arbitrariness of detention measures, the principle can also be useful in assessing immigration detention practices wholly.[124] That is, we can assess whether a specific detention practice is proportionate to the aims it seeks to achieve, which are the limited administrative aims set in law.[125]

Flynn, in setting out the guiding framework for assessing the proportionality of detention practices, relies on the United Nations' rule of thumb as regards the treatment of civil prisoners, that 'persons so imprisoned shall not be subjected to any greater restriction or severity than is necessary to ensure safe custody and good order'.[126] According to Flynn, therefore, an assessment of the proportionality of a detention practice entails analysing: (a) whether detention is used to the limited extent necessary to facilitate these administrative aims (or instead, it resembles criminal detention and criminalises migrants) and (b) whether the state has struck a balance between serving public interests and ensuring respect for detainees.[127] These two questions align with the necessity and balancing sub-tests of the proportionality test. To answer these two questions, Flynn sets out further guiding questions. These questions include what kind of facilities are used, how detainees are segregated and what security regime is in place at these facilities.[128]

On the type of facilities, Flynn argues that the types of facilities used to confine migrants can tell us if the state has taken steps to differentiate administrative and criminal detention (and thus limited the detention to the extent necessary).[129] Flynn divides detention centres into three groups: criminal, administrative and ad-hoc. Criminal facilities are those used to confine criminal suspects and convicts, such as prisons and police stations. Administrative facilities are those which are used to detain people who have not been charged with criminal violations such as migrant detention centres, immigration offices, transit areas and reception centres. Lastly, ad hoc are those which are used to fulfil a role which they are not structurally or administratively intended to do such as hotels and military bases, among others.[130] Flynn posits that detention in criminal

124 Flynn M, 'Who must be detained', 2.

125 Flynn M, 'Who must be detained', 12.

126 Rule 121, *The United Nations Standard Minimum Rules for the Treatment of Prisons*, A/RES/70/175, 17 December 2015. Flynn M, 'Who must be detained', 15.

127 Flynn M, 'Who must be detained', 12 and 2.

128 Flynn M, 'Who must be detained', 13.

129 Flynn M, 'Who must be detained', 16.

130 Flynn M, 'Who must be detained', 16.

facilities criminalises migrants and because migrants are likely held alongside criminal suspects, it is not the least restrictive.[131] Quite similar to Flynn, Nakache posits that detention of asylum seekers in carceral institutions is inappropriate to their non-criminal nature and ends up in disproportionate restrictions on their liberty.[132]

On the issue of segregation, he asserts that confining administrative detainees (such as asylum seekers and refugees) together with criminal detainees denotes criminalisation and would appear to be a violation of the principle of proportionality.[133] The question on segregation imputes the idea of imposing more restrictions than are required, though Flynn does not expound on this as such. This is because without segregation, asylum seekers and refugees are likely to be treated in the same manner as persons charged or convicted of offences. As such, restrictions which should not apply to them such as excessive limitation of their freedom of movement, or certain disciplinary measures such as solitary confinement may be imposed on them.

On the security regime used in detention centres, he asserts that the detention of asylum seekers and migrants is to enable the limited aims of adjudication of their cases or to enable removal and that therefore, the security regime used should match these aims.[134] According to Flynn, the use of high-security facilities as opposed to medium and low-security facilities raises questions as to the proportionality of the detention as they appear unnecessary considering the non-criminal aims of immigration detention and that immigration detainees are usually detained for non-violent offences.[135] Nakache furthers this argument that holding asylum seekers, who usually pose a very low security risk in high-security prisons rather than minimum or medium-security prisons fails the proportionality test.[136]

Flynn and Nakache's questions and discussions are used to complement this paper's analysis of whether Kenya's detention approach meets the necessity and balancing subtests.

131 Flynn M, 'Who must be detained', 17.

132 Nakache D, 'The human and financial cost of detention of asylum-seekers in Canada', 8.

133 Flynn M, 'Who must be detained', 24.

134 Flynn M, 'Who must be detained', 22.

135 Flynn M, 'Who must be detained', 22.

136 Nakache D, 'The human and financial cost of detention of asylum-seekers in Canada', 8.

iii. Kenya's Detention Approach: Proportionate or Disproportionate?

a. Legitimate aim

The first sub-test of proportionality requires that the measure taken must be in pursuit of a legitimate aim.

Section 2 of the Refugees Act and Sections 4 and 12(3)(g) of the Persons Deprived of Liberty Act provides for the detention of asylum seekers and refugees for various reasons such as while in transit areas before they are transferred to designated areas, reception areas and settlement areas, pending repatriation and resettlement or pending health and security screening, and where there is need for humanitarian assistance.[137] However, while the general practice of detention of asylum seekers and refugees is in pursuit of these administrative aims, the specific approach of detaining them *in prisons and police stations* was motivated by the desire to exempt the government from the obligation to build parallel facilities for housing asylum seekers and refugees when it could just improve the capacity of existing facilities such as prisons and police stations.[138] This desire can be attributed to cost saving through avoiding extra costs associated with building other facilities to house asylum seekers and refugees during their detention. As such, the aim of Kenya's detention practice can be said to be two-fold: to undertake administrative objectives such as health and security screening of asylum seekers and refugees, among others and secondly, cost saving by eliminating the financial burden of building parallel facilities.

On the primary objective of undertaking certain administrative aims, the UNHCR identifies three general legitimate reasons for detention of asylum seekers: public order, public health, and national security.[139] Under public order, the state may detain asylum seekers in order to prevent absconding, to carry out initial identity and/or security verification or to carry out a preliminary interview to establish the elements of their claim to international protection.[140] Under public health, detention may be used to carry out health checks,[141] while

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137 Section 2, *Refugees Act* (Act No. 10 of 2021); and Sections 4 and 12(3)(g), *Persons Deprived of Liberty Act* (Act No. 23 of 2014).

138 Departmental Committee on Administration and National Security, *Report on the consideration of the President's memorandum on the Refugee Bill (National Assembly Bill No. 62 of 2019)*, October 2021, 8.

139 Guideline 4.1, *Guidelines on the applicable criteria and standard relating to the detention of asylum-seekers and alternatives to detention*, 2012, 16, para. 21

140 Guideline 4.1.1, *Guidelines on the applicable criteria and standard relating to the detention of asylum-seekers and alternatives to detention*, 2012, 16-18, para. 22 – 28. See also, *Bakhtiyari v Australia*, CCPR Comm No. 1069/2002 (29 October 2003), paras. 9.2– 9.3

141 Guideline 4.1.1, *Guidelines on the applicable criteria and standard relating to the detention of asylum-seekers and alternatives to detention*, 2012, 18, para. 29.

under national security, the state may detain individuals who threaten national security.[142] The Executive Committee also lists these as the legitimate reasons for the detention of asylum seekers and refugees, in addition to situations where the state needs to 'deal with cases where asylum seekers and refugees have destroyed their travel and/or identity documents or have used fraudulent documents with the aim of misleading the authorities of the state'.[143]

The security and health screening objectives evidently fall within the UNHCR list of objectives – under the public order objective of carrying out security verification and the public health objective of health checks – and are thus legitimate aims. The aims of detaining them where there is need for humanitarian assistance, pending transfer to designated areas, reception areas or settlement areas or pending repatriation and resettlement can also be said to be legitimate aims as they are processes in the reception, [144] and hosting of asylum seekers and refugees,[145] which Kenya as a state is entitled to undertake.[146]

Concerning the secondary purpose, there have been different approaches as to whether cost saving is a legitimate purpose for limiting a right. While some courts do not accept fiscal considerations such as cost saving as a legitimate purpose for limiting a right,[147] various other courts have held that cost saving can be a legitimate aim in some circumstances.[148] The German Federal Constitutional Court, for example, accepts cost saving as a legitimate aim as long as it is not the only purpose or the predominant purpose being pursued. Hence cost saving can be a legitimate aim if it complements other substantive legitimate aims.[149] The South African Constitutional Court has also held that cost saving can be a legitimate purpose especially in a developing country where decisions regarding

142 Guideline 4.1.1, *Guidelines on the applicable criteria and standard relating to the detention of asylum-seekers and alternatives to detention*, 2012, 29, para. 30.

143 UNHCR, *Detention of Refugees and Asylum Seekers*, Executive Committee Conclusion No. 44, 13 October 1986.

144 Section 24-26, *Refugees Act* (Act No. 10 of 2021).

145 Section 37-38, *Refugees Act* (Act No. 10 of 2021).

146 Boed R, 'The state of the right of asylum in international law' 5(1) *Duke Journal of Comparative & International Law*, 1994, 3-4.

147 Hardcastle L, 'Proportionality analysis by the Canadian Supreme Court' in Kremnitzer M, Steiner T and Lang A (eds), 1st ed, *Proportionality in action: Comparative and empirical perspectives on the judicial practice,* Cambridge University Press, 2020, 170.

148 Lang A, 'Proportionality analysis by the German Federal Constitutional Court' in Kremnitzer M, Steiner T and Lang A (eds), 1st ed, *Proportionality in action: Comparative and empirical perspectives on the judicial practice,* Cambridge University Press, 2020, 74-75, 77; Hardcastle L, 'Proportionality analysis by the Canadian Supreme Court', 170 and Stacey R, 'Proportionality analysis by the South African Constitutional Court' in Kremnitzer M, Steiner T and Lang A (eds), 1st ed, *Proportionality in action: Comparative and empirical perspectives on the judicial practice,* Cambridge University Press, 2020, 250.

149 Lang A, 'Proportionality analysis by the German Federal Constitutional Court', 74-75, 77.

resource allocation involve difficult choices.[150] The Canadian Supreme Court in a similar vein has held that cost saving can be a legitimate purpose such as in the instance that a state is undergoing a financial crisis.[151] Thus, Kenya's second purpose can be argued to be a legitimate aim, especially as it complements other legitimate administrative purposes such as health and security screening, and because Kenya is a developing country with limited resources that have to be spread across many demands.

b. Suitability

This subtest inquires as to whether there is a rational connection between the objective being pursued and the measure taken.

Generally, detention has been recognised as a capable measure in the regulation of immigration.[152] However, the suitability of prisons and police stations for purposes of immigration detention has been disputed numerously as the detainees in such cases are usually not suspected or convicted of a criminal offence.[153] This is also because such institutions are ideally not designed for such purposes and the managers and staff of such institutions are usually not properly trained to handle immigration detainees.[154] Instead, centres specifically designed for the purpose of immigration detention are advocated for.[155]

The unsuitability of Kenyan prisons and police stations as places of detention of asylum seekers and refugees has already been demonstrated. Their effectiveness is curtailed by the particular problem of officers having limited

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150 Stacey R, 'Proportionality analysis by the South African Constitutional Court', 250.

151 Hardcastle L, 'Proportionality analysis by the Canadian Supreme Court', 170.

152 *Faurisson v France*, CCPR Comm No. 550/1993 (8 November 1996) and *Vélez Loor v Panama* (2010), Inter-American Court of Human Rights, para. 169.

153 Acer A and Goodman J, 'Reaffirming rights: Human rights protections of migrants, asylum seekers, and refugees in immigration detention' 24 *Georgetown Immigration Law Journal*, 2010, 526-531. See also, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Immigration Detention Factsheet*, 10 March 2017, 4. See also, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Safeguards for irregular migrants deprived of their liberty: Extract from the 19th General Report of the CPT*, 2009, 2, para. 77. Human Rights Committee, *Consideration of reports submitted by States Parties under Article 40 of the Covenant: Concluding observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland and Overseas Territories of the United Kingdom of Great Britain and Northern Ireland*, 2001, 16.
See also, Guideline 8, *Guidelines on the applicable criteria and standard relating to the detention of asylum-seekers and alternatives to detention*, 2012, 29, para. 48.

154 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Safeguards for irregular migrants deprived of their liberty: Extract from the 19th General Report of the CPT*, 2009, 2, para. 79.

155 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Immigration Detention Factsheet*, March 2017, 4.

knowledge on asylum and refugee law,[156] and generally, prison personnel lacking specialised training on how to deal with foreign detainees.[157] Law enforcement cannot, for example, distinguish between criminals, irregular migrants and asylum seekers and are unable to conduct interviews with migrants (due to, for example, language barriers) to assess whether they are actually asylum seekers.[158] Thus, the approach taken to use prisons and police stations to detain can be said to be unsuitable if gauged on the basis of effectiveness.

However, at the most elemental level, prisons and police stations can be said to be capable of being used for the detention of asylum seekers and refugees as they have been used in various jurisdictions to undertake the administrative aims of immigration detention.[159] Furthermore, their use in Kenya could also be capable of saving costs as the Kenyan government would not incur costs involved in the building of new facilities. As such, this detention approach can be argued to be suitable.

c. Necessity

This sub-test requires that there is no alternative measure that is equally effective and less restrictive than the chosen measure.

Where there is need for detention of asylum seekers and refugees, the most evident alternative to criminal justice facilities is specialised facilities such as immigration detention centres.[160] The choice to use criminal justice facilities such as prisons and police stations therefore has to be backed by evidence that it is the least restrictive measure – that it does not restrict the right to liberty of the asylum seekers and refugees any more than is necessary.[161] Flynn's test becomes particularly useful here as it sets out questions that indicate whether detention has been limited to the extent necessary or has become excessive through criminalisation of asylum seekers and refugees.[162] The questions are what kind

156 Kiama L and Likule D, 'Detention in Kenya', 35 and Regional Mixed Migration Secretariat, *Behind bars: The detention of migrants in and from the East & Horn of Africa*, February 2015, 57.

157 Kenya National Commission on Human Rights, *Survey report on the status of migrants in places of detention in Kenya,* October 2020, 35.

158 Regional Mixed Migration Secretariat, *Behind bars: The detention of migrants in and from the East & Horn of Africa*, February 2015, 57.

159 Association for the Prevention of Torture and United Nations High Commissioner for Refugees, *Monitoring immigration detention: Practical Manual*, 2014, 29.

160 United Nations Commission on Human Rights, *Report of the Working Group on Arbitrary Detention: Addendum: Report on the visit of the Working Group to the United Kingdom on the issue of immigrants and asylum seekers,* E/CN.4/1999/63/Add.3, 18 December 1998, 30.

161 Sweet A and Mathews J, 'Proportionality balancing and global constitutionalism', 75.

162 Flynn M, 'Who must be detained', 12.

of facilities are used, what security regime is in place at these facilities and how detainees are segregated.

On the questions of the kind of facilities and segregation, Kenya's approach provides for detention of asylum seekers and refugees in prisons and police stations, which are criminal facilities.[163] The Refugees (General) Regulations of 2024 (the 2024 Regulations) provide that where asylum seekers and refugees are detained in prisons and detention centres, they should be separated from persons in conflict with the law, those imprisoned or in remand.[164] However, in practice, in prisons, asylum seekers are actually treated as criminals, detained together with the convicted prisoners and subjected to the same standards of confinement as convicted prisoners.[165] They are subjected to restrictions such as limited access to phone calls and visits from their families and contacts outside of the prisons, limited access to recreational activities such as physical exercise as well as limited freedom of movement.[166] This is despite the requirement that they should be subjected to lesser restrictions as they are administrative detainees.[167] This detention approach thus criminalises asylum seekers and refugees and ends up being excessive.

With regards to the security level of detention centres, Kenya has been noted to employ immigration detention, including of asylum seekers and refugees, in prisons such as Kamiti Maximum Prison, Lang'ata Women's Prison and Manyani Maximum Prisons,[168] which are the highest security level prisons in Kenya.[169] This is despite the fact that asylum seekers and refugees are generally considered low risk detainees and thus should be detained in low to medium security level facilities.[170] Detention carried out in such facilities can therefore be said to be excessive.

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163 Flynn M, 'Who must be detained', 16, 34.

164 Section 3(3), The Refugees (General) Regulations (2024).

165 Kiama L and Likule D, 'Detention in Kenya', 34.

166 International Juvenile Justice Observatory, *Human rights and deprivation of liberty in Kenya: An analysis of the human rights' situation and guidelines for an internal monitoring system*, December 2016, 63, 65. See also, Kenya National Commission on Human Rights, *Survey report on the status of migrants in places of detention in Kenya,* October 2020, 35.

167 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Safeguards for irregular migrants deprived of their liberty: Extract from the 19th General Report of the CPT*, 2009, 2, para. 77.

168 Kenya National Commission on Human Rights, *Survey report on the status of migrants in places of detention in Kenya,* October 2020, 26-27. See also, Regional Mixed Migration Secretariat, *Behind bars: The detention of migrants in and from the East & Horn of Africa*, February 2015, 58.

169 Kenya National Commission on Human Rights, *Survey report on the status of migrants in places of detention in Kenya,* October 2020, 26-27. See also, Regional Mixed Migration Secretariat, *Behind bars: The detention of migrants in and from the East & Horn of Africa*, February 2015, 58.

170 Nakache D, 'The human and financial cost of detention of asylum-seekers in Canada', 8.

In comparison to this, specialised facilities would be administrative in nature,[171] and as these facilities would not house convicted persons,[172] they would also meet the test of segregation. If their administrative nature is maintained,[173] specialised detention facilities would be, at face value, less restrictive means than criminal justice facilities. The present detention approach could therefore be said to be excessive and unnecessary as there is a less restrictive measure that can be used – specialised detention facilities.

Where there is a less restrictive measure, the said measure must be suitable as well. That is, the measure must also be capable of achieving the legitimate purpose being pursued. Remembering that Kenya's detention approach is also in pursuit of cost saving, the use of specialised detention facilities could be argued to be unsuitable. This is because it would require building new facilities as Kenya does not have specialised immigration detention centres,[174] hence, *on face value*, imposing more costs to the Kenyan government. As such, this detention practice may be considered to meet the necessity test as well.

d. Proportionality in the narrow sense

Establishing the degree of non-satisfaction of or detriment to the first principle

This step looks at how much the first principle, the right to liberty of asylum seekers and refugees, is impacted negatively. This impact of detention can be assessed by looking at the conditions of detention and the length of detention, among others.[175]

The conditions of detention are useful in gauging the severity of the limitation of the right to liberty through detention.[176] This is because detention can turn into excessive deprivation of liberty where the conditions

171 Flynn M, 'Who must be detained', 16.

172 Flynn M, 'Who must be detained', 18.

173 Scholars have noted that specialised detention facilities can also become criminalising, such as if asylum seekers and refugees are held in prison-like conditions. Hence this disclaimer is necessary, since if the specialised facilities become criminalising, they might not be really less restrictive than criminal justice facilities. Weber L, 'The detention of asylum seekers', 14 and Barker V and Smith P, 'This is Denmark', 1547.

174 Personal communication with Likule D on 30 January 2023. Likule D has conducted and published research on the detention of asylum seekers and refugees in Kenya in his previous post at the Refugee Consortium of Kenya (RCK).

175 Nakache D, 'The human and financial cost of detention of asylum-seekers in Canada', 15.

176 *Secretary of State for the Home Department ex parte Saadi (FC) and Others (FC)* (2002), The United Kingdom House of Lords. See also, Kalhan A, 'Rethinking immigration detention' 110 *Columbia Law Review*, 2010, 47.

of confinement are poor,[177] or where asylum seekers and refugees are detained under the same restrictive conditions as convicted prisoners.[178] The UNHCR details what the conditions of detention of asylum seekers and refugees ought to be. This includes that they should be allowed to make regular contact and receive visits from their families, friends and different organisations; the chance to carry out physical exercise and access to suitable outside space including fresh air and natural light; access to basic necessities such as beds, shower facilities and clean clothing including the right to wear their own clothing; and food of nutritional value, among others.[179]

In Kenya, these conditions are hardly met. Asylum seekers and refugees are detained in police stations and prisons whose conditions are characterised by overcrowding, poor diet, lack of clean water and poor sanitation.[180] They are further exposed to a myriad of issues such as sexual assault, ill-health, limited legal assistance and other human rights violations such as inhumane and undignified treatment.[181] In addition to this, asylum seekers and refugees in prisons are usually held in the same standards of confinement as convicted prisoners.[182] As such, they are subjected to restrictions such as limited access to phone calls and visits from their families and contacts outside of the prisons, limited access to recreational activities such as physical exercise as well as limited freedom of movement.[183] These are severe restrictions which should not be the case in light of the administrative nature of their detention, and which contravene the UNHCR Guidelines on the detention conditions for asylum seekers and refugees.[184]

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177 Kalhan A, 'Rethinking immigration detention', 47.

178 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Safeguards for irregular migrants deprived of their liberty: Extract from the 19th General Report of the CPT*, 2009, 2, para. 79. See also, Nakache D, 'The human and financial cost of detention of asylum-seekers in Canada', 76.

179 Guideline 8, *Guidelines on the applicable criteria and standard relating to the detention of asylum-seekers and alternatives to detention*, 2012, 29-32, para. 48

180 United States Department of State, *Country reports on human rights practices for 2019*, 2019, 6.

181 Regional Mixed Migration Secretariat, *Behind bars: The detention of migrants in and from the East & Horn of Africa*, February 2015, 58-59.

182 Kiama L and Likule D, 'Detention in Kenya', 34.

183 International Juvenile Justice Observatory, *Human rights and deprivation of liberty in Kenya: An analysis of the human rights' situation and guidelines for an internal monitoring system*, December 2016, 63, 65. Kenya National Commission on Human Rights, *Survey report on the status of migrants in places of detention in Kenya,* October 2020, 35.

184 Nakache D, 'The human and financial cost of detention of asylum-seekers in Canada', 76. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Safeguards for irregular migrants deprived of their liberty: Extract from the 19th General Report of the CPT*, 2009, 2, para. 79.

The severity of the limitation of the right to liberty of asylum seekers and refugees is also denoted by the length of detention. If it is carried out for protracted periods, it is among the gravest acts that can be taken by a state.[185] Ideally then, their detention ought to be for the shortest time possible.[186] While the Refugees Act provides that asylum seekers held at transit centres (such as the prisons and police stations) are only to be held for a reasonable time,[187] and the 2024 Regulations provide that this detention should be for the shortest time possible, in practice the time restrictions set in law have not been adhered to leading to, at times, indefinite detention.[188] Detention in such prisons and police stations is thus likely to become disproportionate, as asylum seekers and refugees are held indefinitely under more severe restrictions than they should.

Lastly, the gravity of detention is also clear when the persons are not detained on criminal charges,[189] and more so, when they are criminalised through such detention.[190] As illustrated above, asylum seekers and refugees in Kenya are subjected to excessive restrictions by being held in prisons and police stations which are criminal justice facilities, and sometimes these facilities are high security level facilities despite the low security risk that asylum seekers and refugees pose generally. This restriction to the right to liberty is further exacerbated by the failure to segregate them from persons charged or convicted with offences. As such, their detention becomes criminalising and excessive.[191] The detriment of this approach is made more stark by the nature of asylum seekers and refugees as non-criminal and vulnerable persons, as discussed in Section 2.

Establishing the importance of satisfying the competing principle

Detention of asylum seekers and refugees enables the state to undertake various administrative aims such as health and security screening, resettlement and repatriation, among others. These are important in the protection of public

185 Welch M and Schuster L, 'Detention of asylum seekers in the US, UK, France, Germany and Italy', 332.

186 Majcher I, 'Crimmigration' in the European Union through the lens of immigration detention', 9. See also, International Detention Coalition, *Alternatives to immigration detention in Africa: A summary of member findings from six countries, 2015-2016,* March 2017, *6*.

187 Section 25 (4), *Refugees Act* (Act No. 10 of 2021).

188 International Detention Coalition, *Alternatives to immigration detention in Africa: A summary of member findings from six countries, 2015-2016,* March 2017, 6.

189 Welch M and Schuster L, 'Detention of asylum seekers in the US, UK, France, Germany and Italy', 332.

190 Flynn M, 'Who must be detained', 12.

191 Flynn M, 'Who must be detained', 12.

health such as in the case of communicable diseases and epidemics as well as to ensure public order and security where there are indications of security risks.[192]

In Kenya, the more specific objective for detaining asylum seekers in prisons and police stations is the government's aim to reduce the costs that would be incurred by building new facilities rather than improving the capacity of the existing facilities. However, the benefits which are to be accrued here are actually limited. Kenyan prisons are already faced with the problem of endemic overcrowding and poor conditions of detention. Arguably then, improving their capacity to hold asylum seekers and refugees separately, and especially in humane and favourable conditions, might entail significant costs as well.[193] In 2023, for example, the Budget and Appropriation Committee was being asked to increase the prisons budget by Ksh.6.5B to improve the conditions in Kenyan prisons.[194] Hence, the benefits of this detention approach might not be as significant as the government intends.

Establishing whether the importance of satisfying the competing principle justifies the non-satisfaction of or detriment to the first principle

While the detention of asylum seekers and refugees, in prisons and police stations, might enable the state to pursue these administrative aims in order to ensure public order and public health, and to a limited extent, save costs, the degree of harm to the right to liberty of asylum seekers and refugees outweighs these benefits.

Firstly, the restrictions imposed on their right to liberty are excessive in light of the fact that their detention is only in pursuit of administrative aims. As demonstrated, asylum seekers and refugees in Kenya are detained firstly, in very poor, degrading and inhumane conditions. Secondly, they are detained together with convicted prisoners and persons charged with offences and are subjected to the same restrictive standards of confinement. This means that they are subjected to more severe restrictions than is acceptable for administrative detainees. This is especially so as the length of their detention is sometimes protracted, as has been shown to be the case in Kenya. Furthermore, in some instances, they are detained

192 Guideline 4.1, *Guidelines on the applicable criteria and standard relating to the detention of asylum-seekers and alternatives to detention*, 2012, 16-20.

193 Opinion of Advocate General Bot, 30 April 2014 -< https://curia.europa.eu/juris/document/document.jsf?text=&docid=151561&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=419121> on 28 January 2023.

194 Edwin Obuya, 'Allocate More Funds To Prisons, Murugara Tells Budget Committee', Citizen, 24 May 2023 - < https://www.citizen.digital/news/allocate-more-funds-to-prisons-murugara-tells-budget-committee-n320289> on 1 June 2024.

in high security level facilities such as maximum-security prisons despite the low security risk that they generally pose. Lastly, by being detained in criminal justice facilities and being treated as criminals, they are subjected to criminalisation which in itself exceeds the legitimate administrative aims,[195] and does not take into account their vulnerable and non-criminal nature. These cumulative factors make their deprivation of liberty excessive in relation to the administrative aims that the detention of asylum seekers and refugees aim to achieve.

This detention approach also becomes excessive in relation to the second objective of cost saving by virtue of the nature of the principles being balanced. On one hand, is the right to liberty and on the other is the desire to save costs. Generally, rights outweigh other considerations, and as such, the impact on the asylum seekers and refugees' right to liberty outweighs the cost-saving benefit. However, this disproportionality is aggravated by the fact that the costs to be saved through detention in prisons and police stations would most likely be minimal due to the endemic problems of overcrowding and poor conditions in Kenyan prisons and police stations.

Therefore, the detriment to the right to liberty of asylum seekers and refugees outweighs the benefits to be accrued through such detention, and in this manner, is disproportionate.

V. Resolving the Conflict Between Kenya's International Obligations under the ICCPR and the Refugees Act and the Persons Deprived of Liberty Act

By being disproportionate, Kenya's approach contravenes Kenya's international obligation under the ICCPR to ensure that any limitation to the right to liberty of asylum seekers and refugees is proportionate.[196] A conflict therefore exists between Kenya's obligations under international law and Kenyan domestic law (the Refugees Act and the Persons Deprived of Liberty Act). This conflict creates a challenge with respect to the enforcement of the right to liberty of asylum seekers and refugees. For example, it raises the question of whether asylum seekers and refugees who are detained in prisons and police stations can appeal to domestic courts against such detention on the basis that the detention contravenes Kenya's international obligations. The question that arises then is how such a conflict between Kenya's international obligation and Kenyan domestic statutes should be diffused.

[195] Flynn M, 'Who must be detained', 12.

[196] See Chapter 3.

i. Monism and Dualism: Kenya's Position

The interplay between international law and domestic law is characterised by the question of direct application of international law and the question of supremacy of either international law or domestic law over the other. The theories of monism and dualism provide different answers to these questions. Monism posits that domestic law and international law are part of a single or unified legal order.[197] Therefore, international law is directly applicable in the domestic context,[198] without any further state action.[199] In the monist view, either system may have supremacy over the other. Where there is a conflict, the domestic law of the specific state should be the reference point as to which system prevails over the other.[200] Dualism, on the other hand, views international law and domestic law as two distinct and autonomous legal systems.[201] International law does not, as such, form part of domestic law unless by virtue of adoption into domestic law.[202] Dualism therefore relies on the methodology of transformation, whereby the legislature must transform treaties into municipal legislations before they can become The courts have also taken varying stances on this question of supremacy. binding on the state.[203] Under the dualist view, as the two systems exist distinctly and independently from each other, each system is supreme in its own sphere and no system can overrule the other.[204] In the event of a conflict therefore, the national courts are expected to apply national law or decide which system they are to abide by.[205]

Articles 2(5) and 2(6) of the 2010 Constitution of Kenya have entrenched international law as a valid source of law in the Kenyan legal system.[206] While in some instances, the courts have endorsed the view that international law

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197 Ambani J and Kabau T, 'The 2010 Constitution and the application of international law in Kenya', 38.

198 Crawford J, *Brownlie's principles of public international law*, 45.

199 Fieldman D, 'Monism, dualism and constitutional legitimacy' 20 *Australian Year Book of International Law*, 1999, 105.

200 Kelsen H, *Principles of international law,* 2nd ed, Hold, Rinehart and Winston, 1967, 580, 566-567. See also, Ambani J and Kabau T, 'The 2010 Constitution and the application of international law in Kenya', 38-39.

201 Crawford J, *Brownlie's principles of public international law*, 45. See also, Ambani J and Kabau T, 'The 2010 Constitution and the application of international law in Kenya', 39.

202 Jennings R and Watts A, *Oppenheim's international law*, 53.

203 Mwagiru M, 'From dualism to monism', 146. See also, Ambani J and Kabau T, 'The 2010 Constitution and the application of international law in Kenya', 39.

204 Jennings R and Watts A, *Oppenheim's international law*, 53. See also, Crawford J, *Brownlie's principles of public international law*, 45.

205 Crawford J, *Brownlie's principles of public international law*, 45.

206 Article 2(5) and 2(6), *Constitution of Kenya* (2010).

supersedes local statutes,[207] in other instances, they have taken the view that the two are at par.[208] The Court of Appeal, for example, in the case of *Karen Njeri Kandie v Alassane Ba & another* ruled that Kenya is now a monist state and that international treaties and conventions are at par with Acts of Parliament.[209] The standing precedent, however, is the Supreme Court case of *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa* where the Supreme Court held that Artiles 2(5) and 2(6) are not related to the monist-dualist categorisation and have not transformed Kenya from a dualist to a monist state. The Supreme Court went ahead to rule that these articles instead require courts to apply international law as long as it is not in conflict with, among others, *local statutes*.[210] In 2024, the Supreme Court reiterated this primacy of domestic law and subsidiarity of international law in the domestic sphere.[211] As such, the ICCPR cannot not supersede the Refugees Act and the Persons Deprived of Liberty Act on the domestic plane (that is, in domestic courts).

ii. Article 27 of the Vienna Convention on the Law of Treaties

While the Supreme Court has ruled that domestic laws supersede international law in the domestic sphere, it has also recognised the principle that 'a state party shall not invoke its domestic law to abdicate from its international obligations'.[212] This principle is enshrined in Article 27 of the Vienna Convention on the Law of Treaties,[213] and ensures that states cannot escape their obligations on the international plane by referencing their domestic laws.[214] Some have interpreted this article as not affecting what states can do on the domestic plane as it does not require national courts to override domestic laws that contravene treaties.[215] They note that the article instead ensures that a state, as against another state in international courts, cannot rely on domestic law to escape responsibility for

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207 *Re The Matter of Zipporah Wambui Mathara* (2010) eKLR, para. 9-10 and *David Njoroge Macharia v Republic* (2011) eKLR, 12.

208 *Diamond Trust Kenya Ltd v Daniel Mwema Mulwa* (2010) eKLR, 4 and *Beatrice Wanjiku & another v Attorney General & another* (2012) eKLR, 20.

209 *Karen Njeri Kandie v Alassane Ba & another* (2015) eKLR, 8.

210 *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa* (2021) eKLR, para. 132-133.

211 *Reference Advisory No. E001 of 20*22, para. 56.

212 *Reference Advisory No. E001 of 20*22, para. 56.

213 Article 27, *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331.

214 Dörr O and Schmalenbach K (eds), *Vienna Convention on the Law of Treaties: A Commentary*, 2nd edition, Springer, Berling, 2018, 494.

215 Dörr O and Schmalenbach K (eds), *Vienna Convention on the Law of Treaties,* 494.

failure to perform their obligations.[216] However, the Human Rights Committee has found that by virtue of this article, states should not give priority to their national legislations over their international obligations under the ICCPR,[217] and has often instructed state parties to review their legislations to make them in line with the ICCPR.[218]

As such, on the international plane, Kenya is still bound by its obligations to ensure that the detention of asylum seekers and refugees is proportionate regardless of the provisions in the Refugees Act and the Persons Deprived of Liberty Act, and would bear responsibility for disproportionate detention of asylum seekers and refugees. This then profers a reason for Kenya to review its detention approach and the two statutes.

VI. Recommendations

i. Elimination of Detention of Asylum Seekers and Refugees in Carceral Institutions.

To comply with the principle of proportionality in the detention of asylum seekers and refugees, Kenya should eliminate the use of carceral institutions such as prisons and police stations in detaining asylum seekers and refugees.[219] A review of Section 2 of the Refugees Act and Sections 4 and 12(3(g) of the Persons Deprived of Liberty is thus needed to remove prisons and police stations as transit centres and institutions where asylum seekers and refugees may be held when there is need for humanitarian assistance.

To replace these, Kenya needs to invest in specialised immigration detention centres to accommodate asylum seekers and refugees where it is necessary to detain them. These can be open and semi-open centres which do not limit the right to liberty of asylum seekers and refugees more than is necessary.[220] These specialised immigration detention centres have already been entrenched in law through Section 2 of the Refugees Act which defines a transit area as including immigration detention centres,[221] and hence what remains is progressively instituting them in the country.

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216 Dörr O and Schmalenbach K (eds), *Vienna Convention on the Law of Treaties*, 500.

217 *Tae Hoon Park v Republic of Korea*, Comm No. 628/1995 (20 October 1998), para. 10.4.

218 Seibert-Fohr A, 'Domestic implementation of the International Covenant on Civil and Political Rights pursuant to Article 2 para 2' 5 *Max Planck Yearbook of United Nations Law*, 2001, 439.

219 Nakache D, 'The human and financial cost of detention of asylum-seekers in Canada', 86.

220 UN General Assembly, *Report of the Special Rapporteur on the Human Rights of Migrants,* UN Doc. A/65/222, 3 August 2010, 17, 23, para. 63 and para. 94 respectively.

221 Section 2, *Refugees Act* (Act No. 10 of 2021).

However, even in adopting specialised detention centres, the government must be careful to ensure the administrative nature of these centres as failure to do this may lead to the centres being as criminalising and restrictive as carceral institutions.[222] As such, there is need to make sure certain safeguards are in place. Firstly, the authorities running these facilities should not be security forces. Rather, the officials working in these centres should be trained in human rights and refugee law. This will avoid the current problem of officers handling asylum seekers and refugees in detention lacking sufficient knowledge and training on asylum matters and law.[223] Thirdly, the disciplinary rules used in the detention centres should be different from those in carceral institutions such as prisons in line with the administrative and non-criminal nature of this detention.[224] In addition to this, the government needs to ensure that the conditions of detention are humane and dignified.[225] This will ensure that the detention of asylum seekers and refugees is proportionate to the administrative aims of such detention.

ii. Entrenchment and strict enforcement of maximum time limits for the detention of asylum seekers and refugees in law

For detention to be proportionate, it must not be carried on for longer than is necessary.[226] The Refugees Act provides that asylum seekers held at transit centres (such as the prisons and police stations) are only to be held for a reasonable time.[227] The 2024 Regulations, unlike the 2009 Regulations which provided for a maximum of 30 days,[228] do not provide a maximum time limit for the detention of asylum seekers and refugees and instead provide that the detention should be for the *shortest time possible.*

Such a vague provision might be used to perpetuate the excessive detention of asylum seekers and refugees. There is need therefore to entrench specific time limits in law, given the tendency to detain asylum seekers and refugees for longer than necessary. More importantly, this maximum time limit needs to be enforced

222 Weber L, 'The detention of asylum seekers', 14. See also, Barker V and Smith P, 'This is Denmark', 1547.

223 Kiama L and Likule D, 'Detention in Kenya', 35.

224 UN General Assembly, *Report of the Special Rapporteur on the Human Rights of Migrants,* UN Doc. A/65/222, 3 August 2010, 21, para. 87.

225 Guideline 8, *Guidelines on the applicable criteria and standard relating to the detention of asylum-seekers and alternatives to detention*, 2012, 29-31, para. 48.

226 Majcher I, 'Crimmigration' in the European Union through the lens of immigration detention', 9. International Detention Coalition, *Alternatives to immigration detention in Africa: A summary of member findings from six countries, 2015-2016,* March 2017, *6*.

227 Section 25(4), *Refugees Act* (Act No. 10 of 2021).

228 Section 17(6), Refugees (Reception, Registration and Adjudication) Regulations (2009).

strictly.[229] One way to ensure compliance is to encourage monitoring,[230] by bodies such as the Refugee Consortium of Kenya, the Kenya National Commission on Human Rights and the UNHCR, which are already doing some monitoring on the same.[231]

iii. Tackling Criminalisation of Asylum Seekers and Refugees in Kenya

Kenya also needs to tackle the underlying problem of criminalisation of asylum seekers and refugees, especially rhetorical and procedural criminalisation. Rhetorical criminalisation in Kenya has taken the form of associating asylum seekers and refugees with crime and terrorism as well as the creation of RAS which was mainly comprised of military and security officers to replace the 'humanitarian-minded' Department of Refugee Affairs.[232] As such, one way to prevent criminalisation of asylum seekers and refugees is to ensure that the newly established Department of Refugee Services[233] takes on a humanitarian character in its operations like the former Refugee Affairs Secretariat.

Procedural criminalisation, on the other hand, has been noted to occur when the detention of asylum seekers and refugees pursues criminal objectives such as deterrence and punishment or where it is conducted in carceral institutions and carceral-like conditions. To deal with this, the detention of asylum seekers and refugees in Kenya should only be used to achieve the aims detailed in the Refugees Act and the Persons Deprived of Liberty Act rather than seeking to punish refugees as has been the case in Kenya, for example. Secondly, there should be elimination of the detention of asylum seekers and refugees in prisons and police stations.

VII. Conclusion

This paper has assessed whether Kenya's practice of detaining asylum seekers and refugees in prisons and police stations as endorsed by Section 2 of the Refugees Act and Sections 4 and 12(3)(g) of the Persons Deprived of Liberty

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229 International Detention Coalition, *Alternatives to immigration detention in Africa: A summary of member findings from six countries, 2015-2016,* March 2017, 6.

230 Guideline 108, *Guidelines on the applicable criteria and standard relating to the detention of asylum-seekers and alternatives to detention*, 2012, 60, para. 66-67. See also, Albin T, 'The criminalisation of unauthorised immigrants', 40.

231 See for example, Kenya National Commission on Human Rights, *Survey report on the status of migrants in places of detention in Kenya,* October 2020.

232 Brankamp H and Glück Z, 'Camps and counterterrorism', 535-537.

233 Section 7, *Refugees Act* (Act No. 10 of 2021).

Act contravenes the principle of proportionality and thus violates Kenya's international obligations under the ICCPR. It has argued that this approach is disproportionate because its detriment to the right to liberty of asylum seekers and refugees (given the conditions and length of detention) outweighs the benefits of cost-saving and achieving the administrative aims it seeks to achieve. By providing for a disproportionate detention approach, the two statutes are in conflict with the ICCPR, and this paper has demonstrated that while on the domestic plane the two statutes may override the ICCPR, at the international plane, the ICCPR would override the two statutes. Following this, the paper has highlighted three recommendations, the key one being the elimination of detention of asylum seekers and refugees in prisons and police stations.

In conclusion, this paper calls for entrenching an approach to the detention of asylum seekers and refugees that is suitable to their status and nature as non-criminal and vulnerable persons. Such detention ought to be administrative in nature, less restrictive than criminal detention, carried out in humane and dignified conditions and ultimately, proportionate. Importantly, even in calling for proportionate detention of asylum seekers and refugees, this paper joins in the call for entrenchment of alternatives to detention in Kenyan refugee law and policy, and eventually a shift from detention of asylum seekers and refugees.