



## POLICY BRIEF ON FREEDOM OF MOVEMENT AND NATIONAL SECURITY IN KENYA



## 1. Introduction

Freedom of movement of people refers to the ability to enter a foreign country without a visa, the right to live and work in that country, and the right to establish and to set up a business there without discrimination.<sup>1</sup> There are benefits to freedom of movement of people, and it can be a potential aid to development as various studies have shown. Irrespective of the African Union's encouraging position on freedom of movement of people across the continent, and its commitment evidenced by its launch of the AU passport, many African countries persist in subjecting foreigners who are African, to severe restrictions to entry into their territories. It is not uncommon for Europeans and Americans to be granted visas upon entry and African colleagues travelling with them to be denied entry.<sup>2</sup> Africans face many challenges in not only entry, but also with the possibility of residence and working in other African countries.

Regional organisations such as COMESA and the EAC have in place treaties that move us closer towards seamless borders as a way to enhance economic development. According to these legal documents on visas and free movement, citizens of the countries in COMESA should be able to move freely between the 19 countries and also live and work without undue restraint.

*Just as removing barriers to the free movement of goods enhances trade and economic integration, removing barriers to the free movement of people enhances deeper levels of socio-economic cohesion and integration amongst nations and regions.*<sup>3</sup>

In Kenya, freedom of movement and residence is one of the fundamental rights recognised in the Constitution. However, while the right to leave Kenya is extended to all, the right to enter, remain in and reside anywhere in Kenya is restricted to Kenyan citizens only. In this regard, the right to freedom of movement apart from the right to leave Kenya remains a privilege in Kenya for non-citizens for now. This situation may change should Kenya decide to ratify and then fully implement the provisions of the COMESA free movement protocol.<sup>4</sup>

An important element of freedom of movement is the visa requirement and the free movement protocol provides the framework for dealing with this issue in a progressive manner.<sup>5</sup> Article 3 requires the relaxation of Visa requirement which includes, as a first step, the issuance of visa at the point of entry as opposed to obtaining visas before travelling to another COMESA Country. Secondly, Article 4 requires that within two (2) years of the entry into force of the free movement protocol, citizens of COMESA Member States should be allowed entry into any Member State for up to ninety (90) days at a time. Article 4 also allows Member States the prerogative to extend this period while Article 5 requires the elimination of the Visa requirements within six (6) years from the entry into force of the Protocol.

The above framework has not been implemented as expected and one of the issues that has hindered full implementation is national security concerns. Indeed, the drafters of the COMESA Free Movement Protocol were aware of this challenge and included Article 7 which allows for the

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<sup>1</sup> See; Mandla Lionel Isaacs (26 August 2016) Free movement in Africa is desirable, but how to realize it?, Africa Development Bank Blog, <https://www.afdb.org/en/blogs/integrating-africa/post/free-movement-in-africa-is-desirable-but-how-to-realize-it-16033/> (last accessed 20 January 2017)

<sup>2</sup> Omanga (2015) Restrictive visa requirements make a big mockery of Africa's stated bid for unity, Daily Nation, <http://www.nation.co.ke/oped/Opinion/Restrictive-visa-rules-make-a-big-mockery-of-Africa/440808-3005234-yk5rqbz/index.html> (Visited 14 November 2016)

<sup>3</sup> CCPAU (2013) Continental Report: Freedom of Movement of People Study

<sup>4</sup> COMESA Protocol on the Free Movement of Persons, Labour, Services, Right of Establishment and Residence, 1998 (COMESA Free Movement Protocol)

<sup>5</sup> Article 3, 4 and 5, Ibid.

temporary suspension of the above provisions on grounds of national security or influx of persons as refugees, arising from disturbances in the territory of another Member State. The issue of refugees and public security thus appears to be closely associated particularly in the context of the freedom of movement as envisaged by the COMESA Protocol. In the recent past, and particularly in Kenya, another concern that has emerged and is also a major issue of concern in the context of freedom of movement is terrorism. Thus, the fear of refugees and terror are the two main considerations in the context of public security or national security.

In contrast, Article 4 of the Visa Protocol,<sup>6</sup> only allows for temporary suspension in the public interest or on the grounds of national security. This may be explained by the fact that the refugee problem has become more pronounced in the recent past and is therefore more pronounced in the later Protocol.

The main argument presented in this policy brief is that the fear of a refugee influx into COMESA Member States, driven by conflict in the region has undermined the implementation of the COMESA Protocols, the achievement of the vision of free movement and the harnessing of the dividends of regional integration, particularly of freedom of movement in remote areas, due to immigration barriers.

## **2. Legal Framework for National Security in Kenya**

### *Constitutional framework*

The starting point to this discussion is the Constitution of Kenya, 2010. Article 238 of the Constitution of Kenya defines national security as follows:

*National security is the protection against internal and external threats to Kenya's territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity, and other national interests.*

From the above definition, the scope of national security definition is very wide and almost indefinite because of the phrase 'other national interests'. In order to ensure that this definition is not abused, the Constitution also provides for the guiding principles under the same article, which states that,

*[t]he national security of Kenya shall be promoted and guaranteed in accordance with the following principles: national security is subject to the authority of this Constitution and Parliament; and national security shall be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms...*

These guiding principles are important because they subject national security to the authority of the Constitution and Parliament. What this means is that first, national security cannot be used as a premise to overthrow the Constitution or the Bill of Rights. In 2014, the Security Laws (Amendments) Bill, which amended fourteen (14) different security laws, received a lot of opposition from various stakeholders on grounds that it potentially violated the authority of the Constitution. Secondly, it means that Parliament has a central role to play in terms of legislation

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<sup>6</sup> Protocol Relating to the Gradual Relaxation and Eventual Elimination of Visa Requirements within the COMESA, 1984.

and oversight. For instance, Article 240(7) requires that “[t]he [National Security] Council shall report annually to Parliament on the state of the security of Kenya”. It is anticipated that the constitutional framework provides enough safeguards to avoid the abuse of the powers of national security organs that has been seen in the recent past.

#### *Preservation of Public Security Act, 1960*

The main national security legislation is the Preservation of Public Security Act, 1960. The Act provides for special regulation for the preservation of public security including the “restriction of movement (into, out of or within Kenya)”.<sup>7</sup> The Public Security (Control of Movement) Regulations, 1967 however, deals mainly with movement controls and order within Kenyan territory. Its focus is thus national rather than international.

#### *The Kenyan Citizenship and immigration Act, 2011*

Of particular interest is the Border Control and Operations Co-ordination Committee (the Committee), which is responsible for, among other things, the formulation of policies and programmes for the management and control of designated entry and exit points.<sup>8</sup> The Director of Immigration and the Permanent Secretary to the Ministry responsible for national security are members of the Committee, and it is required to report to the National Security Council at the end of every year.<sup>9</sup>

This Act requires that “[a] person who is not a citizen of Kenya or an asylum seeker shall not enter or remain in Kenya unless she or he has a valid permit”.<sup>10</sup> It also provides that the Cabinet Secretary shall from time to time make regulations, prescribing the types of visas and specifying persons or groups of persons and countries whose citizens shall be required to obtain or be exempted from obtaining visas before entering Kenya.<sup>11</sup>

#### *The Refugees Act, 2006*

The Refugee Act establishes a Refugees Affairs Committee.<sup>12</sup> A representative from the Ministry responsible for provincial administration and internal security and a representative from the National Security Intelligence Service sit on the Committee. The Act restricts movement of refugees and requires that every refugee and asylum seeker shall not leave the designated refugee camp without the permission of the Refugee Camp Officer.<sup>13</sup> This means that refugees do not enjoy the right to freedom of movement in Kenya. The Commissioner for Refugee Affairs may withdraw the refugee status of any person where there are reasonable grounds for regarding that person as a danger to national security or to any community of that country.<sup>14</sup> The Act also allows for the expulsion of refugees and members of their families on grounds of national security of public order.<sup>15</sup>

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<sup>7</sup> Section 4(2)(b), Preservation of Public Security Act, 1960.

<sup>8</sup> Section 5A(1), Kenyan Citizenship and immigration Act, 2011.

<sup>9</sup> Section 5D, *ibid.*

<sup>10</sup> Article 34(1), *ibid.*

<sup>11</sup> Article 35, *ibid.*

<sup>12</sup> Section 8(1), Refugees Act, 2006.

<sup>13</sup> Section 14(c), *ibid.*

<sup>14</sup> Section 19, *ibid.*

<sup>15</sup> Section 21(1), *ibid.*

### *The Prevention of Terrorism Act, 2012*

Apart from Section 35 which provides for the limitation of certain fundamental rights, section 30C provides for the presumption of travel to a country for purposes of being trained as a terrorist. Specifically, it provides that,

*[a] person who travels to a country designated by the Cabinet Secretary to be a terrorist training country without passing through designated immigration entry or exit points shall be presumed to have travelled to that country to receive training in terrorism.*

This provision is significant especially in terms of free movements of persons in remote areas where immigration services are not available.

### *Other relevant laws*

First, the National Intelligence Services Act, 2012 limits the freedom of movement and residence for members of the National Intelligence Services.<sup>16</sup> Second, the Kenya Defence Forces, 2012 Article 47 also limits the freedom of movement and residence for members of the defence forces.<sup>17</sup>

### **3. Enforcement of National Security Laws: the Somali Refugee, War on Terror and Freedom of Movement in Kenya**

Kenya is one of the countries that has hosted a large number of refugees within its borders for many years. However, after several Al-shabaab terrorist attacks in various parts of the country, the treatment of refugees in Kenya has come under sharp focus. There have been reports that Kenya's new strategy to fight terrorism is "screening Somali communities in Nairobi and uncovering Al-Shabaab militants who hide amongst the large refugee community". In essence, Kenya's new strategy on combating terrorism has been linked to the Somali refugee influx in Kenya and their alleged hosting of Al-Shabaab militants. Immediately following the attacks in Mombasa and Eastleigh in March 2014, Kenya launched an operation dubbed the 'Usalama Watch' in 2014, which has drawn a wide range of criticism from various stakeholders because of its supposedly indiscriminate targeting of Somali refugees and allegations of human rights violations especially in the context of the detention camps and deportation of hundreds of Somalis.

So, what is the link between the war on terror and the issue of visa free movement as advocated by the COMESA Protocol? The first link is that Kenya is now proposing to fence-off the Kenya-Somali border to keep off terrorists. Many other countries have proposed similar measures and therefore the practice is not isolated to Kenya alone. However, its impact on free movement for local communities will be significant because it will limit the physical movement of people between these two countries. This problem is exacerbated by the fact that official border points in Kenya are very few and far apart and that there are Somalis on both sides of the border and it becomes difficult to differentiate between Kenyan and Somali nationals. The effect of this is that the free movement which is already happening in remote border areas will be stifled instead of being

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<sup>16</sup> Article 35, National Intelligence Service Act, 2012.

<sup>17</sup> Article 47, Kenya Defence Forces, 2012.

encouraged on a wider scale. Cross border communities will also be disrupted by any such move. The second link is that there are enhanced security assessments at places of crossing for people who are or appear to be of Somali origin, leading to specialised processes that are often opaque and uncertain, leading to the requirement of a bribe, even for Kenyans who have genuine identity documents.

## **Conclusion**

The challenge of terrorism cannot be taken lightly. However, efforts to combat terrorism should not undermine other initiatives aimed at promoting free movement of people especially in Kenya. While Somalia is not a COMESA country, its relationship with Kenya has shaped the free movement of persons and policies in Kenya, as it stands now. Kenya has restricted rather than promoted free movement judging by the national security laws discussed above, and the enforcement measures being undertaken currently. Of particular concern is the restriction of free movement in remote areas because of the presumption of terrorist activities provision.

## *Policy Recommendations*

Kenya as a member of the AU, COMESA and the EAC, has had to review its immigration policies in the past years according to its obligations to these sub-regional bodies. It has also reviewed its policies for countries that it has strong ties with that may not be members of any of the abovementioned bodies. Kenya has the opportunity within COMESA to be the standard bearer, with the benefits of free movement that will ensue, she has the potential to become an economic power house within the region and such an opportunity should not be bypassed. The security laws already in place, described above, will provide the requisite security protections, and address many of the related concerns around visa free borders. It is therefore recommended that Kenya:

- i. Expands the right to freedom of movement to all COMESA citizens immediately or gradually in line with the recommendations in the COMESA treaties and removes any barriers to African and COMESA visitors' movement into and within the country;
- ii. Provides for a legal framework for the movement of persons from the COMESA region under the Kenya Citizenship and Immigration Act, 2011;
- iii. Ensures that the enforcement of the national security laws and treatment of refugees in Kenya in particular, respects international and national law. The power of the Commissioner for Refugees to withdraw refugee status and expel refugees should be subjected to judicial review;
- iv. Reviews the Prevention of Terrorism Act (Article 30C), on the presumption of terrorist activities, in order to recognise the free movement of persons in remote border communities;
- v. Implements the provisions of the COMESA Visa Protocol which it has ratified to ensure a more visa-free policy that will enable Africans to enter the country easily;
- vi. Ratifies the COMESA free movement protocol which it has already signed;
- vii. Aligns its immigration laws with the COMESA model law to ensure uniformity in law and practice across the COMESA Region;
- viii. Dialogues honestly and openly with various national and multilateral stakeholders regarding its security concerns, and implements only necessary measures drawing from best practice examples.

### ***About the Pan African Citizens Network (PACIN)***

*PACIN (formerly CCPAU) has established itself as a critical Pan-Africanist initiative which facilitates a deeper engagement of African civil society organisations and citizens with regional and continental policies and programmes. PACIN's mandate is to ensure that the continent has its people at its centre and not governments, and that decision-making is driven by, and accountable and accessible to African citizens. PACIN is a network of national, regional and continental African civil society organisations and citizens. We utilise invited and claimed spaces to foster substantive and procedural changes within regional and continental mechanisms, and to amplify African citizen voices. Our theory of change recognises citizen-led accountability as the bedrock of democratic governance and development on the continent. Citizens are the legitimate rights holders and need to be more involved in claiming the promise of a "peaceful, prosperous and integrated Africa". PACIN undertook research on freedom of movement of Africans across Africa in 2013. The report which is available on request, was carried out at two levels, at the sub-regional level (with some country analysis) and at the continental level.*



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