

DIGNITY DENIED:

Somali Refugees Expelled from Kenya in 2014

**JUSTICE
FORUM** 

 **icj** International
Commission
of Jurists

**SHADOW REPORT ON VIOLATIONS UNDER THE AFRICAN CHARTER
ON HUMAN AND PEOPLES' RIGHTS AGAINST SOMALI REFUGEES AND
ASYLUM SEEKERS IN THE REPUBLIC OF KENYA
DURING "OPERATION USALAMA WATCH"**

Submitted in response to The Combined 8th Periodic Report
(2008-2014) of the Government of Kenya
presented at The 57th Ordinary Session of the Commission
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prepared by

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Reporting Organisations



Justice Forum is a UK based not-for-profit with a focus on investigating human rights violations committed by powerful governments and corporations around the world.



The Kenyan Section of the International Commission of Jurists (ICJ Kenya) is a nongovernmental, nonpartisan, not for profit making, membership organisation registered in Kenya. Its mission is to protect human rights, and promote the rule of law and democracy in Kenya and across Africa through the application of legal expertise and international best practices.

Introduction

This report has been prepared for the African Commission (“the Commission”) in its Universal Periodic Review of the Republic of Kenya (“Kenya”). We present new research alongside a summary of credible, publicly available evidence, demonstrating systemic violations by Kenya of its obligations under the African Charter on Human and Peoples’ Rights (“the Charter”). These violations have been carried out in the context of unlawful internal security operations targeting Somali refugees and asylum seekers, involving the refoulement of Somali refugees and asylum seekers from Kenya to the Republic of Somalia (“Somalia”). In particular we focus on refoulements occurring between March and May 2014 in the context of an internal security operation called “Operation Usalama Watch.”¹

¹ Article 62 of the African Charter on Human and Peoples’ Rights (“African Charter”) requires Member States to submit, every two years, a report to the African Commission on Human and Peoples’ Rights (“Commission”) on the legislative or other measures taken to give effect to the rights and freedoms recognised and guaranteed by the Charter. Djibouti’s recently submitted Combined Initial and Periodic Report details its stated commitment to uphold various rights guaranteed by the African Charter, including, among others: the right to non-discrimination and equality before the law (Article 2), the right to be equal before the law and to enjoy equal protection of the law (Article 3), the right to life and to physical and moral integrity (Article 4), the prohibition of torture and other cruel, inhuman or degrading treatment (Article 5), the right to security of the person and freedom from arbitrary arrest or detention (Article 6), and the right to a fair trial (Article 7). See Republic of Djibouti, Combined Initial and Periodic Report under the African Charter on Human and Peoples’ Rights, Paragraphs 58-112, available at http://www.achpr.org/files/sessions/15th-ec/state-reports/1-1993-2013/periodic_report_1993_2013_eng.pdf

Suggested Questions For Kenya

In light of the submissions in this report, the Government of Kenya must urgently clarify:

1. Who has been transferred from Kenya to Somalia under the Tripartite Agreement, in the context of counterterrorism/internal security operations since 2012?
2. Who has been transferred, deported, expelled or encouraged to return from Kenya to Somalia by Kenyan police or other agents of the Kenyan state, outside of the arrangements provided for by the Tripartite Agreement, in the context of counterterrorism/internal security operations since 2012?
3. What steps have been taken to ensure that returnees purportedly giving consent to a transfer of themselves and/or family members are in fact making informed decisions free from coercion? What system is in place and what records are kept in relation to individual returns and the consent process?
4. How does the government of Kenya justify its policies of returns of Somali refugees and asylum seekers under domestic, regional and international law?
5. What steps has the Government of Kenya taken to monitor the plight of Somali returnees post-return? What system is in place, and what records are kept in this respect? Are monitoring efforts on-going?
6. What procedures, policies and practical steps has the government of Kenya developed and implemented to ensure that Somali refugees are not unlawfully separated from their family members during security operations?
7. What procedures, policies and practical steps has the government of Kenya developed and implemented to ensure that Somali refugees are not unlawfully deprived of their property, business and livelihood during security operations?
8. What procedures, policies and practical steps has the government of Kenya developed and implemented to ensure that Somali refugees are not unlawfully deprived of urgent access to medical care during security operations?
9. What procedures, policies and practical steps has the government of Kenya developed and implemented to ensure that women and child refugees are afforded special protection in line with their increased vulnerability as recognised under international and regional human rights treaties?

10. How does the Government of Kenya continue to justify carrying out national security operations targeting large numbers of Somali refugees, given the fact that despite operations of such nature having been carried out for almost three years, the security situation in Kenya continues to deteriorate (and no domestic terrorist attacks are yet understood to be credibly attributable to Somali refugees)?
11. What steps has the government of Kenya taken to investigate claims of ill-treatment of Somali refugees during arrest, detention and transfer operations?
12. What steps has the government of Kenya taken to assess and provide reparations to Somali refugees unlawfully mistreated during security operations?

Executive Summary

This shadow report documents violations occurring during the refoulement of Somali refugees and asylum seekers from Kenya to Somalia, occurring between March and May 2014 in the context of an internal security operation called “Operation Usalama Watch.” The Operation was carried out around Eastleigh Estate and other predominantly Somali areas of Nairobi. During this operation, thousands of Somali refugees and asylum seekers were apprehended and detained in the Kasarani Sports Stadium Complex in Nairobi. Detainees were subsequently either released without charge, charged with unlawful presence, made to relocate to refugee camps, deported, or released after payment and on the condition that they would return to Somalia as soon as possible. Over five thousand such individuals were subsequently forcibly relocated to refugee camps in northern Kenya and at least 359 others were formally expelled back to Somalia, with an unknown number of individuals informally expelled.²

Conditions of confinement and ill-treatment experienced by the Somali refugees whilst still in Kenya has been well documented by international human rights organisations and other bodies including the Independent Police Oversight Authority (IPOA), who sent a team of monitors and investigators to various police stations including the Kasarani Sport Complex and Jomo Kenyatta International Airport detention centers. The IPOA indicated that the police operations may “engender a feeling of ethnic profiling,”³ and reported violations of human rights including: discriminatory policing practices with Somali refugees being overrepresented amongst those who were detained and expelled during the operation; unconstitutional detention conditions with detainees being placed in overcrowded, unsanitary conditions and being denied basic rights; and that children were routinely being held with adults.⁴

Building on research already conducted relating to events in Kenya during Operation Usalama Watch, this Shadow Report presents new evidence relating to the enforced transfers of Somali refugees and asylum seekers from Kenya to Somalia, following their detention in Nairobi. Our findings are primarily based on interviews with returnees who were forcibly returned to Somalia, together with other supporting research.

² Amnesty International Country Report, Kenya available at <https://www.amnesty.org/en/countries/africa/kenya/report-kenya/>

³ IPOA Report, 2014. Available at <http://www.ipoa.go.ke/ipoa-media/press-releases/209-press-statement-ipoa-regarding-alleged-%E2%80%9Cethnic-profiling,-unlawful-detention-and-deportation%E2%80%9D-of-members-of-certain-communities-by-the-national-police-service-when-carrying-out-security-operations>

⁴ IPOA (2014) “Monitoring report on Operation Sanitization Eastleigh publically known as “Usalama Watch”” available at <http://www.ipoa.go.ke/images/press/MONITORING%20REPORT%20ON%20OPERATION%20%28USALAMA%20WATCH%29%2017%207%202014.pdf>

All of our interviewees held refugee certification documents, and none of them described what could credibly be described as a voluntary, non-coerced return. Their enforced transfers to Somalia with no judicial oversight breached the principle of non-refoulement, a cornerstone principle of both the 1951 Refugee Convention and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.”⁵ Regarding the involuntary nature of the returns, Kenya is in breach of domestic, regional and international legal obligation, as well as the tripartite agreement that was entered into with Somalia and the UNHCR whereby Kenya agreed to continue providing protection and assistance to all refugees: expulsions or forced repatriation of Somali refugees is in direct contradiction of the agreement to facilitate the repatriation of Somali refugees on a “mutually agreed upon and voluntary basis.”⁶

Two of our interviewees now reside in Somalia with their families as “Internally Displaced Persons” (IDPs), whilst the rest are living precariously supported by distant relatives or in one case the relative of a friend. Additionally, interviewees have described a range of connected violations including unlawful ethnic profiling and discrimination, arbitrary arrest and detention, physical and psychological ill-treatment, separation from family members, loss of property and business, and denial of access to medical care. These violations invoke a range of protections required under the African Charter on Human and Peoples’ Rights, including in particular Articles 2, 3, 5, 6, 7, 12, 14, 16, 17 and 18.

In light of the material in this report, we suggest that as part of its review of Kenya, the Commission should engage the Republic of Kenya in an urgent, constructive dialogue with a view to the Republic of Kenya:

- Reaffirming its commitment to a genuine protection of the rights of all refugees on its territory or unlawfully expelled;
- Ceasing all forced or coerced returns of Somali refugees from Kenya to Somalia;
- Upholding its obligations under the Refugee Convention and taking positive steps to integrate Somali refugees into Kenyan society, in particular by ceasing the practise of resettlement of urban Somali refugees in refugee camps, and by recommencing programmes of registering urban refugees in Kenya;

⁵ Kenya Human Rights Commission (2015) “Country Brief at the 56th ordinary session of the African Commission on Human and People’s Rights.” Available at http://www.khrc.or.ke/resources/publications/doc_details/99-country-brief-at-the-56th-ordinary-session-of-the-african-commission-on-human-and-peoples-rights.html

⁶ The Tripartite Agreement Governing the Voluntary Repatriation of Somali Refugees Living in Kenya, available at <http://www.refworld.org/pdfid/5285e0294.pdf>

- Conducting human rights compliant inquiries into abuses committed against Somali refugees by police, military and security forces over the past several years, and holding to account individual officers found to have committed offences;
- Developing and implementing effective policies for the protection of particularly vulnerable Somali refugees, including women and children;
- Providing reparations and an apology to all refugees wrongfully arrested, detained, and/or expelled from Kenya;
- Welcoming wrongfully expelled Somali refugees back into Kenya and assisting with their return;
- Ceasing conflating Somali refugees with terror suspects;
- Ceasing discriminatory treatment towards Somali refugees.

Research Methods

The findings of this report are based on extensive legal research alongside interviews with returnees who were repatriated to Somalia. The interviews took place in Garowe and Mogadishu in 2014 and 2015, and were carried out by a team including experienced Somali speaking researchers. This original research has been contextualised with credible secondary source research by other human rights organisations and bodies including Human Rights Watch and Amnesty International. Legal research included a comprehensive review of Kenya's national level documentation – the Constitution, legislation, policies and government documents; African Union documentation – the comprehensive framework of regional treaties and resolutions concerning the plights of refugees in Africa; and, review of the established international norms relating to refugees – in particular the provisions and developments flowing from the 1951 United Nations Convention on the Status of Refugees.

Due to the ongoing precarious situation for all of our interviewees and their fears of reprisals, we are unable to name them in this report and our descriptions below have been anonymized.

Kenya's Failure To Uphold Its Human Rights Obligations

The following 2 sections detail violations of African Charter obligations by Kenya carried out during Operation Usalama Watch. In the first section, "Thematic Violations", we identify and make submissions on thematic forms of violation that pervade all or many of the individual refoulement cases that we have documented in this report. In the "Case Studies" section, we provide anonymised factual backgrounds of individual cases, and individual analyses of Charter violations as they pertain to these cases.

Thematic Violations

In this report, specific groupings of refugee rights and associated treaty violations are addressed: the prohibition of and duty to protect against torture and cruel, inhuman and degrading treatment, discriminatory State conflation of refugees with terrorism, arbitrary arrest and detention, physical and psychological ill-treatment, separation from family members, expulsions, and the gendered dimensions of enforced transfers.

REFOULEMENT TO GENERALISED CONDITIONS OF VIOLENCE IN SOUTHERN AND CENTRAL SOMALIA

Credible objective evidence supports the position that throughout 2014 and continuing, much of south and central Somalia is gripped by a humanitarian and human rights crisis, with a high level of generalized violence whereby civilians remain at high risk of killing, wounding and displacement. While it is unclear who is responsible for attacks on civilians in all circumstances, it is believed all parties to the conflict carry out such attacks. Amnesty international has stated that, “in Mogadishu and other areas of south and central Somalia, people continue to be killed and wounded in crossfire during armed clashes and by suicide attacks, grenade attacks and by improvised explosive devices (IEDs). On-going military operations throughout 2014 have led to an increase in violence against civilians.” “Al-Shabaab factions continued to torture and unlawfully kill people they accused of spying or not conforming to their strict interpretation of Islamic law. They killed people in public, including by stoning, and carried out amputations and floggings.”⁷ Amnesty further contends that “The Government of Somalia does not have effective control over many parts of south and central Somalia. Generalised violence and insecurity persists and residents have frequently been subject to both indiscriminate and targeted attacks”.⁸

Kenya’s commitments to protect and promote refugee rights derive from a comprehensive framework of international, regional, and domestic legal documents.⁹ The founding principle of these rights is

⁷ Amnesty International (2014) available at <https://www.amnesty.org/en/latest/news/2014/10/netherlands-forced-returns-somalis-al-shabaab-areas-can-among-death-sentences/> see also Amnesty International Report: Somalia available at <https://www.amnesty.org/en/countries/africa/somalia/report-somalia/>

⁸ Amnesty International (2014) available at <https://www.amnesty.org/en/latest/news/2014/10/netherlands-forced-returns-somalis-al-shabaab-areas-can-among-death-sentences/> see also Amnesty International Report: Somalia available at <https://www.amnesty.org/en/countries/africa/somalia/report-somalia/>

⁹ Kenya’s international treaty obligations derive from various instruments including, but not limited to, the following: The African Charter on Human and Peoples’ Rights; The Organization of African Unity’s Convention Governing the Specific Aspects of Refugee Problems in Africa; Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa; African Charter on the Rights and Welfare of the Child; Convention relating to the Status of Refugees; Protocol relating to the Status of Refugees; Convention on

that of non-refoulement, a principle that is deeply enshrined in Kenya's legal obligations, meaning that refugees and asylum seekers may not be forcibly returned to conditions amounting to cruel, inhuman and degrading treatment or where their lives or freedoms may be threatened. Where refugees are sent back to conditions of generalized violence like those described above, they face a high risk humanitarian and human rights abuses, including death, rape, killings and extortions. Additionally, the African Charter, the protocol on the Rights of Women, the Children's Charter, the Kenyan Constitution and other international treaties to which Kenya is a state party, all emphasise that Kenya has additional obligations towards refugee women and children, as particularly vulnerable and marginalized members of the population.

Further, for any refugee returns to be lawful, they must be genuinely voluntary, meaning without undue pressure and with returnees' safety and dignity guaranteed. Where expulsion has been carried out, the State is obliged to ensure that such repatriation (decisions and measures) are carried out in pursuance of a decision reached in accordance with "due process of law". None of our interviewees described their return to widely accepted conditions of extreme generalised violence in a way that could possibly be construed as genuinely voluntary or under "due process of law". Kenya is therefore in breach of its non-refoulement obligations.

DISCRIMINATORY CONFLATION OF REFUGEES AND TERRORISTS

Somalis, Kenyans of Somali ethnicity and Somali refugees, were specifically targeted in the 2014 Operation Usalama Watch. Furthermore, Somalis in Kenya have been and continue to be scapegoated for the acts of terror carried out by Al Shabaab. This conflation between refugees and terrorists is discriminatory and violates founding human rights obligations of non-discrimination, equality before the law and equal protection of the laws as provided for under Articles 2 and 3 of the African Charter, and Article 27 of the Constitution of Kenya.¹⁰

the Elimination of All Forms of Racial Discrimination; Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment; International Covenant on Civil and Political Rights; Convention on the Elimination of All Forms of Discrimination against Women; Convention on the Rights of the Child; Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict; and the Convention on the Rights of Persons with Disabilities.

10 In *Association Mauritanienne des droits de l'homme v Mauritania* (Malawi African Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l'Homme and RADDHO, Collectif des veuves et ayants-Droit, Association mauritanienne des droits de l'Homme v Mauritania, African Commission on Human and Peoples' Rights Comm. No. 54/91-61/91-96/93-98/93-164/97_196/97-210/98 (2000)) the African Commission emphasized that "Article 2 of the African Charter lays down principles that is essential to the spirit of this Convention, one of whose goals is the elimination of all forms of discrimination and to ensure equality among all human beings." With specific respect to the treatment of refugees, in the case of *Institute for Human Rights and Development*

UNLAWFUL MASS EXPULSIONS

The harassment and ill-treatment of the Somali refugees interviewed for this report caused them to nominally agree to return to Somalia. Amnesty International has stated that similar harassment of Somali refugees by the Kenyan security services has led many others to return to Somalia.¹¹ When people feel they have no option other than to return, this is not a voluntary choice, and amounts to a forced return.

The African Commission has pointed out that “those who drafted the [African] Charter considered large scale expulsion as a special threat to human rights”. In consequence, the action of a State targeting specific national, racial, ethnic or religious groups is generally qualified as discriminatory in this sense as it has no legal basis. (*Amnesty International v. Zambia*, African Commission on Human and Peoples’ Rights, Comm. No. 212/98 (1999), *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v Guinea*, African Commission on Human and Peoples’ Rights, Comm. No 249/02 (2004)). Whilst it is the right of any State to take legal action against illegal immigrants and deport them to their countries of origin (if a competent court so decided), it is unacceptable to deport individuals without giving them the possibility to plead their case before the competent national courts as this is contrary to the spirit and letter of the Charter and international law (*Union interafricaine des droits de l’Homme (et al) v Angola* 159/96 (1997)).

Domestic and international violations relating to mass expulsions include: Due process rights under Article 7 of the Charter, also; Article 9(1) of the Charter which protects the right to receive information;

in Africa (on behalf of Sierra Leonean refugees in Guinea) v Guinea, African Commission on Human and Peoples’ Rights, Comm. No 249/02 (2004)) the complainants alleged that President Conté incited soldiers and civilians to engage in large scale discriminatory acts against Sierra Leonean refugees, the consequences of which had been that these persons were the direct victims of harassment, deportations, looting, stealing, beatings, rapes, arbitrary arrests and assassinations. The African Commission upheld the complainants’ allegation that by failing to distinguish between refugees and rebels, the President and the Government were therefore directly responsible for the violation of this fundamental precept of international law: non-discrimination. The African Commission has stated that the most fundamental meaning of equality before the law under Article 3(1) of the Charter is the right by all to equal treatment under similar conditions. The right to equality before the law means that individuals legally within the jurisdiction of a State should expect to be treated fairly and justly within the legal system and be assured of equal treatment before the law and equal enjoyment of the rights available to all other citizens. Its meaning is the right to have the same procedures and principles applied under the same conditions. The principle that all persons are equal before the law means that existing laws must be applied in the same manner to those subject to them. The right to equality before the law does not refer to the content of legislation, but rather exclusively to its enforcement. It means that judges and administration officials may not act arbitrarily in enforcing laws. (*Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa (on behalf of Andrew Barclay Meldrum) v Zimbabwe* 294/04 (2009)). The Commission further asserts that equality before the law also entails equality in the administration of justice. In this regard, all individuals should be subject to the same criminal and investigative procedures in the same manner by law enforcement and the courts. (see *Egyptian Initiative for Personal Rights & INTERIGHTS v Egypt*).

¹¹ Amnesty International 2015, available at <https://www.amnesty.org/en/latest/news/2015/04/crisis-looms-for-somali-refugees-as-kenya-orders-closure-of-dadaab-refugee-camp-1/>

Article 12(4) of the Charter – which stipulates that expulsion can only be “by virtue of a decision taken in accordance with the law” and in particular the strict prohibitions of mass expulsion under Article 12(5) of the Charter. Article 10(2) of the Constitution of Kenya which enshrines principles of good governance; also Article 47 of the Constitution of Kenya which protects the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair; and with regards to liberty and security of the person; Article 29 protections; Article 32 of the 1951 United Nations Convention on the Status of Refugees; Article II (3) of the OAU Refugee Convention (1969) ¹²; Article 33(1) No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion; Articles 12(3), (4) and (5) African Charter; ¹³ Sections 18 and 21(2) of the Kenyan Refugee Act of 2006 ¹⁴.

UNLAWFUL PRE-REMOVAL DETENTION MEASURES AND CONDITIONS

All of our interviewees were detained without being given a meaningful opportunity to challenge their detention. The African Commission has held that the State’s responsibility in the event of detention is even more evident to the extent that detention centres are its exclusive preserve, hence the physical integrity and welfare of detainees is the responsibility of the competent public authorities. (*Malawi Association v Mauritania*). Furthermore, where the victims did not have the opportunity to challenge the matter before the competent jurisdictions which should have ruled on their detention, as well as on the regularity and legality of the decision to expel them by the government, the African Commission held that Article 7 paragraph 1 (a) of the Charter has been violated. Further domestic and international violations include: freedom of movement - Article 39 of the Constitution of Kenya; Article 28 of the Constitution of Kenya; also the provisions of Article 29 of the Constitution of Kenya, which states that every person has the right to freedom and security of the person, which includes the right not to be deprived of

¹² http://www.au.int/en/sites/default/files/Convention_En_Refugee_Problems_in_Africa_AddisAbaba_10September1969_0.pdf

¹³ In *Institute for Human Rights and Development in Africa (on behalf of Sierra Leone refugees in Guinea)/Guinea* (Communication No. 249/2002) the African Commission recognised that certain acts of a host state can lead to indirect *refoulement* of refugees. In the case, a radio announcement by the President of Guinea that Sierra Leonean refugees in Guinea should be arrested, searched and confined to refugee camps led to widespread discriminatory acts targeting Sierra Leonean refugees. As a result, many refugees were forced to flee back to Sierra Leone. The Commission held that such a situation created in the host state that makes the dangerous option of returning/fleeing to their country as the only option was a violation of the principle of *non-refoulement*.

¹⁴ <http://www.rckkenya.org/rokdownloads/Resources/Conventions,%20policies%20and%20legislation/The%20Refugee%20Act%202006.pdf>

freedom arbitrarily or without just cause; detained without trial, except during a state of emergency, in which case the detention is subject to Article 58; subjected to any form of violence from either public or private sources; subjected to torture in any manner, whether physical or psychological; subjected to corporal punishment; or treated or punished in a cruel, inhuman or degrading manner; Article 5 of the African Charter which protects dignity and freedom from torture and cruel, inhuman and degrading treatment; Article 6 of the African Charter which protects freedom from arbitrary detention.

DISCRIMINATION AND VIOLENCE AGAINST WOMEN

Three of the eight returnees featured in this report were women: Naeema, 22, was detained on her way to seek medical attention for mental and physical health problems; Farah, 38, left her two daughters and young nieces behind in Kenya when she returned to Somalia; and Rahma, 38, has seven children under the age of twelve. Additionally, Hassan was detained and returned with his wife, Khaled with his aunt, who suffered from health problems, and Mahmoud was separated from his sister and aunt.

Kenya has not extended appropriate protection to these refugee women, who are particularly marginalized and vulnerable members of the refugee population, requiring additional protection. Conditions of generalized violence in central and southern Somalia, especially in IDP camps, include high levels of sexual violence against women.¹⁵ The African Commission has held that where a type of violence used was perpetrated based solely on the sex of the persons, the violence was gender-specific and discriminatory by extension.

Furthermore, if the Respondent State failed to protect the victims from the violations that they incurred, and did not show any evidence of whether the differential treatment was legitimate, it goes without saying that the State has fallen short of its obligations under 18(3) of the Charter. Refouling girls and women to conditions of generalised violence invokes both general and additional concerns. The UNHCR Guidelines on the Protection of Refugee Women state that “women share the protection problems experienced by all refugees. Along

¹⁵ Two of our interviewees, Hassan and Rahma, are now living with their families as IDPs in Somalia. The UN Secretary General has stated: “Sexual violence remains widespread across Somalia, notably in the south central regions, with increases in frequency consistently observed during military offensives, particularly at checkpoints. According to the Gender-Based Violence Information Management System, 2,891 incidents of gender-based violence were reported between January and August 2014 in Mogadishu alone. Of these, 28 per cent were cases of rape and 9 per cent were sexual assaults. These numbers are regarded as a gross underestimation, as fear of stigma and reprisals inhibits reporting. Most reported cases (81 per cent) involved internally displaced persons, who number more than 1 million across the country, with members of minority clans exposed to greatest risk.” (*Report of the Secretary-General to the Security Council (S/2015/203) issued on 23 March 2015*), summary at <http://www.un.org/sexualviolenceinconflict/countries/somalia/>.

with all other refugees, women need protection against forced return to their countries of origin; security against armed attacks and other forms of violence; protection from unjustified and unduly prolonged detention; a legal status that accords adequate social and economic rights; and access to such basic items as food, shelter, clothing and medical care... Many of the protection problems facing refugee women and girls in flight and in countries of asylum follow them home. Much of the return to home countries is spontaneous, occurring without the assistance of international organizations. Often, the return is to a still-unsettled political and military situation. The physical safety problems encountered in crossing from country of origin to country of asylum may be repeated on the return trip. Moreover, once the refugee woman has returned to her home town or village, she may be subject to abuse or exploitation by military forces in control of the area. The victims may find it difficult to report such abuse to UNHCR staff who are monitoring the safety of returnees unless there are female protection officers among the monitors.”¹⁶

Further domestic and International Violations include Article 21(3) of the Kenyan Constitution, which highlights the need for the State to be particularly attuned to the needs of vulnerable groups within society – including women; section 23 of the Refugees Act calls upon the Commissioner to “take specific measures to ensure the safety of refugee women and children in designated areas”; Articles 4(2)(k), 10(2)(c) & (d) and 11(3) of the African Women’s Protocol: “provides for: equality of access in respect of the refugee status determination process; the provision to refugee women of their own identity as well as other documentation; the inclusion of women in decision-making structures at all levels; and the protection of asylum-seeking, refugee, returnee and displaced women from ‘all forms of violence, rape and other forms of sexual exploitation’.”¹⁷

UNLAWFUL SEPARATION OF FAMILIES

The forced repatriation of these Somali refugees has in almost every case involved the traumatic and tragic separation of families. The African Charter places specific emphasis upon the family unit and the need to protect families – the forced repatriation process as it has been carried out has been particularly injurious for families. International human rights instruments, including those concerned with the rights of the child and of refugees, explicitly recognize

¹⁶ Available at <http://www.unhcr.org/3d4f915e4.html>

¹⁷ Gina Bekker (2013) “The protection of asylum seekers and refugees within the African regional human rights system” 13(1) African Human Rights Law Journal 1-29 available at <http://www.ahrhj.up.ac.za/bekker-g-1#pgfid-1099682>

the importance of family. In the case of *Amnesty International v. Zambia*, African Commission on Human and Peoples' Rights, Comm. No. 212/98 (1999), the African Commission held that the forcible expulsion of the complainants Banda and Chinula by the Zambian government forcibly broke up the family unit which is the core of society thereby failing in its duties to protect and assist the family as stipulated in Articles 18(1) and 18(2) of the Charter. Further domestic and international violations include: Article 45 of the Constitution of Kenya, which establishes the family as the natural and fundamental unit of society enjoying the recognition and protection of the State; Article 23 of the Children's Charter contains specific protections for refugee children.¹⁸

¹⁸ http://www.au.int/en/sites/default/files/Charter_En_African_Charter_on_the_Rights_and_Welfare_of_the_Child_AddisAbaba_July1990.pdf

Case Studies

Between September 2014 and February 2015 we traced and interviewed individuals who had been forcibly returned to Somalia between March and May 2014, under Operation Usalama Watch. All of the interviewees whose cases are described below held documentation showing that they were registered refugees. All of the interviewees described being in continuing precarious states fearing mistreatment following return. They have in our report therefore all been given a pseudonym, and identifying biographical details have been removed. Where refugee documents are cited in the report, our researchers have been shown originals and we have retained copies for our file. In order to protect the identity of our interviewees, these documents have not been reproduced in this report.

We provide summaries of eight case-studies below alongside an analysis of related Charter violations.

ABDULLAHI

Abdullahi (22) is the holder of a UNHCR letter to certify the bearer is a refugee, and a Republic of Kenya Refugee Certificate. Abdullahi was the oldest of 7 siblings, and before fleeing Mogadishu in December 2010, at the age of 17, Abdullahi was a student. Abdullahi described his reasons for fleeing Mogadishu: “In December 2010, I was living in Mogadishu. It had become very dangerous especially for boys my age. There was fighting between Ethiopian troops and local militias and Al Shabaab recruits. After a lot of my friends died in this fighting and some had joined the militias, my family decided to send me out of the country. [I was] by myself because my parents could not afford to take the whole family. They gave me their savings to pay the transportation to Kenya”. Abdullahi was granted asylum in Kenya in 2011 and settled in Eastleigh, living with relatives.

Abdullahi has described how in May 2014, Kenyan soldiers entered the home where he lived with his relatives and arrested him along with 4 family members who were in the house at the time.



In May 2013, around 11.30pm, Kenyan soldiers entered our house with force. I recognized their dress, they were members of KDS, wearing red hats. They arrested me with another 4 of my relatives who were in the house. When they entered our home they grabbed me and put me on the floor and took me to the back of the military truck. They did not ask us anything. I tried to show my refugee papers but they refused to listen. They were doing the same thing with other Somali neighbours. After they filled the truck with Somalis, they transported us to the Kasarani stadium. In the stadium there were a lot of Somali families. There was no food, water or sanitation, it was a very cold night and very scary.

After two days of detention in Kasarani stadium – held in overcrowded conditions with no food, water or adequate sanitation, and no access to a lawyer or opportunity to formally challenge his detention - Abdullahi reports that relatives managed to pay 15,000 Ksh per person in bribes for him and his 4 relatives to be released from custody. The releases were made on condition that they left Kenya for Somalia.

Following release, Abdullahi and his relatives had no choice but to attend the Somali embassy in Nairobi to obtain transfer documents and a flight date for a transfer to Mogadishu. Several days later Abdullahi returned to Mogadishu where he remains, living his life in fear of mistreatment both at the hands of militias or government forces. Abdullahi is particularly fearful of being wrongly profiled as a member of Al Shabaab by government forces. Abdullahi would like to return to Kenya.

- Throughout his unlawful detention in Kenya and his forcible transfer out of the country, Abdullahi, a non-national, did not receive equal treatment before the law in that he was denied the legal rights and remedies available to Kenyan nationals. Abdullahi's status as a non-national rendered him vulnerable to this treatment in violation of Article 2's prohibition on discrimination on the basis of national origin.
- In addition, the incommunicado nature of Abdullahi's detention and the threats made to him by law-enforcement officials immediately prior to release deprived him of any opportunity to seek the protection of the law. Abdullahi's standing before the law, and his ability to seek its protection, was completely negated by the acts of agents of the Kenyan government, in violation of Article 3.
- The abusive treatment inflicted on Abdullahi during his arrest and detention in Nairobi was deliberately designed to humiliate, terrify, and cause pain to Abdullahi, and was carried out in clear violation of Article 5. In addition, Abdullahi's enforced transfer to Somalia carried with it a clear and ongoing risk of mistreatment amounting to torture and/or cruel inhuman and degrading treatment as defined in Article 5 of the Charter.
- Abdullahi was held without charge and incommunicado at Kasarani Stadium in Nairobi. During this detention, he was not permitted to speak with a lawyer. He was not at any point presented before a court or given the opportunity to challenge the basis or circumstances of his detention before a competent jurisdiction. His subsequent transfer from Kenya to Somalia may have given the appearance of a voluntary process involving consent, but in reality it was coerced, abrupt, highly irregular, and involuntary. It did not involve valid, informed consent and was completely devoid of any opportunity for Abdullahi to engage a lawyer or to seize a court or other competent jurisdiction to challenge the legality of his transfer. Abdullahi was therefore deprived of his right to have his cause heard in respect of both his detention in, and transfer from, Kenya in violation of Articles 6 and 7(1).

- Abdullahi was accepted into Kenya by the authorities of Kenya. Once he had been accepted into Kenya, Kenya had an obligation under Article 12 (4) to ensure that he was not removed from the territory except in accordance with the law. Nevertheless, Abdullahi was unlawfully coerced into returning from Kenya to Somalia (namely, as a result of his mistreatment and threats made against him by Kenyan agents, he feared further mistreatment in Kenya more than he feared returning to a warzone), in violation of non-refoulement obligations.
- Prior to his transfer out of Kenya, Abdullahi was not informed of the basis of his rights, nor was he afforded a meaningful opportunity to engage a lawyer or to challenge the decision concerning his transfer before a competent authority. Abdullahi's forcible transfer out of Kenya was therefore fundamentally inconsistent with due process of law, in violation of Article 12(4).
- Abdullahi's incommunicado detention in Kenya prevented him from communicating with other family members, and deprived him of family support. This failure violated Article 18 of the Charter. Moreover, Abdullahi's forcible transfer from Kenya in violation of the non-refoulement principle facilitated their separation from family members remaining in Kenya, breaking up the family unit and further violating Article 18.

FARAH

Farah (38) is the holder of a UNCHR letter to certify the bearer is a refugee, and a Republic of Kenya Refugee Certificate, for her and her household. In 2008 Farah fled from Mogadishu to Kenya by car with her husband, their 7 children and several nieces. Farah and her family spent time in refugee camps in northern Kenya, and in 2011 moved to in Eastleigh, Nairobi, to escape the extreme chaos and high levels of gender-based violence in the Dadaab refugee camps in northern Kenya (this has been well documented by international human rights organisations. For example: Medecin Sans Frontieres states, "With a population of 460,000, Dadaab refugee camp in Kenya is recognized as the largest in the world, and one of the most dangerous. Today, Dadaab is no longer a refuge. As more people arrive from war-torn Somalia, the overcrowded camps are becoming permanent homes where people face rolling nutritional crises and outbreaks of diseases such as measles and cholera."¹⁹



In Nairobi, the family were given UNHCR refugee documents and ID cards by the UNHCR office in Nairobi. The family received support from relatives, and the children began to attend school in Nairobi. On 28 May 2014, members of the Kenyan Administrative Police forcibly entered Farah's house and arrested Farah alongside 10 members of her family.

On the 28th of May, 2014, I was in Nairobi when Kenyan Administrative Police arrested me. I knew their uniform. First they asked me for money and took everything we had. I told them I have an asylum card and I showed them but they did not consider it at all. They took me to a stadium. My children and I were detained in the blank field of the stadium. Hundreds of Somalis, mainly women and children, were collected from Eastleigh village and driven by force into police lorries... There was no food, water or medical care in the camp, people were just treated like animals... Those who had a lot of money were getting the chance to be released.

¹⁹ <http://www.doctorswithoutborders.org/our-work/humanitarian-issues/refugees-and-idps> (last accessed 28 August 2015).

Farah and her family were detained at Kasarani Sports Stadium until relatives paid Kenyan police a total of 350,000 Kenyan Shillings for their release. Upon release, Farah and her family were “advised” by the police to leave Kenya for Somalia in order to avoid the risk being arrested again. Farah left Kenya with some of her family. She is now living in the Waberi IDP camp with some family members. Farah left two of her daughters and her nieces behind in Kenya.

I was one of the lucky ones, some of my relatives in Nairobi paid 50,000 Kenyan shillings per person for ransom to a police officer, then after two days they allowed me to leave and I was advised to leave the country otherwise they will catch me again.

Following release from Kasarani Sports Stadium, Farah attended the Somali Embassy in Nairobi for assistance in returning to Mogadishu. She was given papers and plane tickets to Somalia were arranged. Farah was extremely scared whilst she was waiting in Nairobi for her flight back to Somalia.

Back in Mogadishu, Farah and her family live in the Wadajir district of Mogadishu. Life is extremely difficult. Alongside the conditions of generalised violence, there is insufficient food and water, overcrowded living conditions and no schools for the children.

Throughout her unlawful detention in Kenya and forcible transfer out of the country, Farah, her husband and five children, non-nationals, did not receive equal treatment before the law in that he was denied the legal rights and remedies available to Kenyan nationals. Farah and her family’s status as non-nationals rendered them vulnerable to this treatment in violation of Article 2’s prohibition on discrimination on the basis of national origin.

In addition, the incommunicado nature of Farah’s detention and the threats made to her and her family by law-enforcement officials immediately prior to release deprived them of any opportunity to seek the protection of the law. Farah’s standing before the law, and her ability to seek its protection, was completely negated by the acts of agents of the Kenyan government, in violation of Article 3.

The abusive treatment and conditions of confinement inflicted on Farah and her family during their arrest and detention in Nairobi was deliberately designed to humiliate, terrify, and cause pain to them, and was carried out in clear violation of Article 5. In addition, Farah and her family’s enforced transfer to Somalia carried with it a clear and ongoing risk of mistreatment amounting to torture and/or cruel inhuman and degrading treatment as defined in Article 5 of the Charter.

Farah and her family were held without charge and incommunicado at Kasarani Stadium in Nairobi. During this detention, they were not permitted to speak with a lawyer. They were not at any point presented before a court or given the opportunity to challenge the basis or circumstances of their detention before a competent jurisdiction. Their subsequent transfer from Kenya to Somalia may have given the appearance of a voluntary process involving consent, but in reality it was coerced, abrupt, highly irregular, and involuntary. It did not involve valid, informed consent and was completely devoid of any opportunity for them to engage a lawyer or to seize a court or other competent jurisdiction to challenge the legality of his transfer. Farah and her family were therefore deprived of their right to have their cause heard in respect of both their detention in, and transfer from, Kenya in violation of Articles 6 and 7(1).

Farah and her family were accepted into Kenya by the authorities of Kenya. Once they had been accepted into Kenya, Kenya had an obligation under Article 12 (4) to ensure that they were not removed from the territory except in accordance with the law. Nevertheless, Farah and her family were unlawfully coerced into returning from Kenya to Somalia (namely, as a result of his mistreatment and threats made against him by Kenyan agents, they were more terrified of further mistreatment in Kenya more than of returning to a warzone), in violation of non-refoulement obligations.

Prior to their transfer out of Kenya, Farah and her family were not informed of their rights, nor were they afforded a meaningful opportunity to engage a lawyer or to challenge the decision concerning their transfer before a competent authority. Their forcible transfer out of Kenya was therefore fundamentally inconsistent with due process of law, in violation of Article 12(4).

Farah's children have been deprived of the opportunity to continue their education following transfer to Somalia, in violation of Article 17.

Farah and her family members' incommunicado detention in Kenya prevented them from communicating with other family members, and deprived them of family support. This failure violated Article 18 of the Charter. Moreover, Farah and her family members' forcible transfer from Kenya in violation of the non-refoulement principal facilitated their separation from family members remaining in Kenya, breaking up the family unit and further violating Article 18.

HASSAN

Hassan (47) is the holder of a UNHCR letter to certify the bearer and his household are refugees. Hassan fled Mogadishu for Kenya in 1998. He lived in refugee camps in northern Kenya until 2011 when he and his family fled chaos and high levels of violence in the Dadaab refugee camps. They arrived in Nairobi and settled in Eastleigh where the children enrolled in schools and the family were given refugee documents by the UNHCR.



In 2011, my children and I moved to Nairobi because of the growing chaos against refugees and the small amount of support given to refugees was declining. Life had become very hard, and I went to look for a better life. I went to Nairobi with my children by getting some help from some relatives in Nairobi. Then we sent the children to schools in Nairobi...a chance for education. We...got UNHCR asylum refugee card from Nairobi UNCHR branch. UNHCR told us the ID cards will help us and we should be shown respect and given assistance, but we didn't get all these mentioned respects as refugees.

Hassan was detained by Kenyan Administrative Police in May 2014, along with his wife and 6 children.

In May, 2014, I was in Nairobi when Kenyan Administrative Police arrested me. I knew their uniform. They were 5 policemen and 2 police women. First they asked me for money, and I gave whatever we had. I told them we have asylum cards and I showed them but they did not consider these at all. They took us to the Kasarani Stadium. I was beaten and hit on my head, neck and backbone and forcibly thrown to the ground. I still feel the pain of kicking by their boots.

Hassan reports that there was no food, water or medical care in Kasarani Stadium. The family were denied access to lawyers. Eventually, family members in Nairobi paid the police bribes of 50,000 Kenyan shillings per person in order to affect the release of Hassan and his family. After four days of detention and the payment of these bribes, Hassan and his family members were released and “advised” by police

to leave the country in order to avoid re-arrest. Hassan and his family attended the Somali Embassy in Nairobi after their release in order to obtain transfer documents and assistance with flights back to Somalia. Hassan and his family are now internally displaced persons struggling to survive in Mogadishu.

- Throughout his unlawful detention in Kenya and forcible transfer out of the country, Hassan and his family, non-nationals, did not receive equal treatment before the law in that they were denied the legal rights and remedies available to Kenyan nationals. Hassan and his family's status as non-nationals rendered them vulnerable to this treatment in violation of Article 2's prohibition on discrimination on the basis of national origin.
- In addition, the incommunicado nature of Hassan's detention and the threats made to him and his family by law-enforcement officials immediately prior to release deprived them of any opportunity to seek the protection of the law. Hassan's standing before the law, and his ability to seek its protection, was completely negated by the acts of agents of the Kenyan government, in violation of Article 3.
- The abusive treatment and conditions of confinement inflicted on Hassan and his family during their arrest and detention in Nairobi was deliberately designed to humiliate, terrify, and cause pain to them, and was carried out in clear violation of Article 5. In addition, Hassan and his family's enforced transfer to Somalia carried with it a clear and ongoing risk of mistreatment amounting to torture and/or cruel inhuman and degrading treatment as defined in Article 5 of the Charter.
- Hassan and his family were held without charge and incommunicado at Kasarani Stadium in Nairobi. During this detention, they were not permitted to speak with a lawyer. They were not at any point presented before a court or given the opportunity to challenge the basis or circumstances of their detention before a competent jurisdiction. Their subsequent transfer from Kenya to Somalia may have given the appearance of a voluntary process involving consent, but in reality it was coerced, abrupt, highly irregular, and involuntary. It did not involve valid, informed consent and was completely devoid of any opportunity for them to engage a lawyer or to seize a court or other competent jurisdiction to challenge the legality of his transfer. Hassan and his family were therefore deprived of their right to have their cause heard in respect of both their detention in, and transfer from, Kenya in violation of Articles 6 and 7(1).
- Hassan and his family were accepted into Kenya by the

authorities of Kenya. Once they had been accepted into Kenya, Kenya had an obligation under Article 12 (4) to ensure that they were not removed from the territory except in accordance with the law. Nevertheless, Hassan and his family were unlawfully coerced into returning from Kenya to Somalia (namely, as a result of his mistreatment and threats made against him by Kenyan agents, they were more terrified of further mistreatment in Kenya more than of returning to a warzone), in violation of non-refoulement obligations.

- Prior to their transfer out of Kenya, Hassan and his family were not informed of their rights, nor were they afforded a meaningful opportunity to engage a lawyer or to challenge the decision concerning their transfer before a competent authority. Their forcible transfer out of Kenya was therefore fundamentally inconsistent with due process of law, in violation of Article 12(4).
- Hassan's children have been deprived of the opportunity to continue their education following transfer to Somalia, in violation of Article 17
- Hassan and his family members' incommunicado detention in Kenya prevented them from communicating with other family members, and deprived them of family support. This failure violated Article 18 of the Charter. Moreover, Hassan and his family members' forcible transfer from Kenya in violation of the non-refoulement principle facilitated their separation from family members remaining in Kenya, breaking up the family unit and further violating Article 18.

KHALED

Khaled (23) is the holder of UNHCR refugee documents and a Republic of Kenya Refugee Certificate. Khaled fled the Somali warzone at the age of 17, leaving Mogadishu with his three sisters and a niece. They initially resided in refugee camps in northern Kenya before arriving in Eastleigh, Nairobi where they lived with an aunt and registered as refugees. Khaled was detained in early April 2014 when soldiers forcibly entered his family's Eastleigh apartment at 2am. Khaled and family members were taken to the Kasarani Sports Stadium.



Police and military soldiers were deployed to Eastleigh. They forcibly entered our apartment around 2am. I was sleeping, the soldiers were yelling at us, we tried to show our refugee documents but unfortunately they were not listening or interested to see the refugee cards. I told them that we are refugees and this is my card, you need to respect my human rights as a refugee. Then they pointed their guns on us and took us to the police truck - it was me, my cousin and three sisters and my aunt. They transported us to the Kasarani stadium, in the stadium there was a lot of Somali families, no food, water or sanitation, it was a very difficult time, I was very cold at night and very scared.

The family did not have any money to bribe officials for their release and were detained in overcrowded and unsanitary conditions in the stadium for one week, with no access to a lawyer or opportunity to formally challenge their detention. Khaled's aunt was extremely ill whilst in detention and was denied access to urgent medical care by Kenyan authorities.

My aunt was very ill - she had diabetes and high blood pressure. I asked for medical help but they denied it. We tried to comfort her. The next morning a Somali Kenyan saw her and he went to the town and brought her some medication.

After one week of detention, a Somali Embassy representative arranged for Khaled and his family members to return to Somalia. Khaled and his family were forcibly returned to Mogadishu on April 12, 2013. In Mogadishu, Khaled and his relatives have no immediate family to rely on, and are staying with distant relatives. The future is unknown.

- Throughout his unlawful detention in Kenya and forcible transfer out of the country, Khaled and his family, non-nationals, did not receive equal treatment before the law in that they were denied the legal rights and remedies available to Kenyan nationals. Khaled and his family's status as non-nationals rendered them vulnerable to this treatment in violation of Article 2's prohibition on discrimination on the basis of national origin.
- In addition, the incommunicado nature of Khaled's detention and the threats made to him and his family by law-enforcement officials immediately prior to release deprived them of any opportunity to seek the protection of the law. Khaled's standing before the law, and his ability to seek its protection, was completely negated by the acts of agents of the Kenyan government, in violation of Article 3.
- The abusive treatment and conditions of confinement inflicted on Khaled and his family during their arrest and detention in Nairobi was deliberately designed to humiliate, terrify, and cause pain to them, and was carried out in clear violation of Article 5. In addition, Khaled and his family's enforced transfer to Somalia carried with it a clear and ongoing risk of mistreatment amounting to torture and/or cruel inhuman and degrading treatment as defined in Article 5 of the Charter.
- Khaled and his family were held without charge and incommunicado at Kasarani Stadium in Nairobi. During this detention, they were not permitted to speak with a lawyer. They were not at any point presented before a court or given the opportunity to challenge the basis or circumstances of their detention before a competent jurisdiction. Their subsequent transfer from Kenya to Somalia may have given the appearance of a voluntary process involving consent, but in reality it was coerced, abrupt, highly irregular, and involuntary. It did not involve valid, informed consent and was completely devoid of any opportunity for them to engage a lawyer or to seize a court or other competent jurisdiction to challenge the legality of his transfer. Khaled and his family were therefore deprived of their right to have their cause heard in respect of both their detention in, and transfer from, Kenya in violation of Articles 6 or 7(1).
- Khaled and his family were accepted into Kenya by the authorities of Kenya. Once they had been accepted into Kenya, Kenya had

an obligation under Article 12 (4) to ensure that they were not removed from the territory except in accordance with the law. Nevertheless, Khaled and his family were unlawfully coerced into returning from Kenya to Somalia (namely, as a result of his mistreatment and threats made against him by Kenyan agents, they were more terrified of further mistreatment in Kenya more than of returning to a warzone), in violation of non-refoulement obligations.

- Prior to their transfer out of Kenya, Khaled and his family were not informed of their rights, nor were they afforded a meaningful opportunity to engage a lawyer or to challenge the decision concerning their transfer before a competent authority. Their forcible transfer out of Kenya was therefore fundamentally inconsistent with due process of law, in violation of Article 12(4).
- Khaled's aunt was deprived of the right to health when medical treatment was withheld during her detention in Kenya, in violation of Article 16.
- Khaled and his family members' incommunicado detention in Kenya prevented them from communicating with other family members, and deprived them of family support. This failure violated Article 18 of the Charter. Moreover, Khaled and his family members' forcible transfer from Kenya in violation of the non-refoulement principle facilitated their separation from family members remaining in Kenya, breaking up the family unit and further violating Article 18.

MAHMOUD

Mahmoud (39) is the holder of a Republic of Kenya Refugee Certificate. Mahmoud's parents died when he was young, and he was raised by his aunt in Kismayo, Somalia. In 1993, Mahmoud, his sister and his aunt fled Kismayo by boat to Kenya in 1993. They initially arrived in Mombasa, and lived at Utanga and Kakuma refugee camps. Mahmoud and his aunt lived in Nairobi from 1997 until 2006, when they returned to Kakuma refugee camp and rejoined Mahmoud's sister. The entire family then applied for refugee status. Mahmoud was granted refugee status and received his refugee identity card in 2011.

Mahmoud was arrested in Eastleigh, Nairobi on May 14, 2014 by the Kenyan Administrative Police, and detained in Kasarani Sports Complex.



On May 14th, 2014, I was in Nairobi when Kenyan Administrative Police arrested me. I knew their uniform. First they asked me for money and I did not have anything. I told them I have an asylum card and I showed them it but they did not consider it at all. They took me to the station called SHURA-MOU. I and another 17 Somali men were detained in a small room. The room had no furniture and we had to sit on the ground shoulder to shoulder with no food or water at all. On the second day they transferred us to Kasarani Stadium.

Mahmoud was released following the payment of a 35000 Kenyan shilling bribe, with strong "advice" by police that he leave the country in order to avoid re-arrest. He therefore attended the Somali Embassy in Nairobi to obtain transfer papers and to arrange a flight home. Mahmoud was transferred far from his region of origin, to Garowe, Somalia, in June 2014, where he is staying with the distant relatives of one of his friends from Nairobi. Mahmoud's aunt and sister remain in the Kakuma refugee camp. Mahmoud finds life as a non-local in Garowe extremely difficult. As he originally comes from southern Somalia, he is frightened of being profiled as an al-Shabaab member. He is also distraught at the separation with his aunt and sister, who remain at Kakuma refugee camp.

- Throughout his unlawful detention in Kenya and his forcible transfer out of the country, Mahmoud, a non-national, did not receive equal treatment before the law in that he was denied the legal rights and remedies available to Kenyan nationals. Mahmoud's status as a non-national rendered him vulnerable to this treatment in violation of Article 2's prohibition on discrimination on the basis of national origin.
- In addition, the incommunicado nature of Mahmoud's detention and the threats made to him by law-enforcement officials immediately prior to release deprived him of any opportunity to seek the protection of the law. Mahmoud's standing before the law, and his ability to seek its protection, was completely negated by the acts of agents of the Kenyan government, in violation of Article 3.
- The abusive treatment inflicted on Mahmoud during his arrest and detention in Nairobi was deliberately designed to humiliate, terrify, and cause pain to Mahmoud, and was carried out in clear violation of Article 5. In addition, Mahmoud's enforced transfer to Somalia carried with it a clear and ongoing risk of mistreatment amounting to torture and/or cruel inhuman and degrading treatment as defined in Article 5 of the Charter.
- Mahmoud was held without charge and incommunicado at Kasarani Stadium in Nairobi. During this detention, he was not permitted to speak with a lawyer. He was not at any point presented before a court or given the opportunity to challenge the basis or circumstances of his detention before a competent jurisdiction. His subsequent transfer from Kenya to Somalia may have given the appearance of a voluntary process involving consent, but in reality it was coerced, abrupt, highly irregular, and involuntary. It did not involve valid, informed consent and was completely devoid of any opportunity for Mahmoud to engage a lawyer or to seize a court or other competent jurisdiction to challenge the legality of his transfer. Mahmoud was therefore deprived of his right to have his cause heard in respect of both his detention in, and transfer from, Kenya in violation of Articles 6 or 7(1).
- Mahmoud was accepted into Kenya by the authorities of Kenya. Once he had been accepted into Kenya, Kenya had an obligation under Article 12 (4) to ensure that he was not removed from the territory except in accordance with the law. Nevertheless, Mahmoud was unlawfully coerced into returning from Kenya to Somalia (namely, as a result of his mistreatment and threats made against him by Kenyan agents, he feared further mistreatment in Kenya more than he feared returning to a

warzone), in violation of non-refoulement obligations.

- Prior to his transfer out of Kenya, Mahmoud was not informed of the basis of his rights, nor was he afforded a meaningful opportunity to engage a lawyer or to challenge the decision concerning his transfer before a competent authority. Mahmoud's forcible transfer out of Kenya was therefore fundamentally inconsistent with due process of law, in violation of Article 12(4).
- Mahmoud and his family members' incommunicado detention in Kenya prevented them from communicating with other family members, and deprived them of family support. This failure violated Article 18 of the Charter. Moreover, Hassan and his family members' forcible transfer from Kenya in violation of the non-refoulement principle facilitated their separation from family members remaining in Kenya, breaking up the family unit and further violating Article 18.

NAEEMA

Naeema (22) is the holder of a Republic of Kenya Refugee Certificate. Naeema and her family lived in IDP camps in Mogadishu before fleeing Somalia for Kenya in 2009. Before being forcibly transferred back to Somalia, Naeema lived at the Ifo refugee camp in northern Kenya.

At the end of 2009 we fled from Mogadishu to Kenya by car with our parents. We fled because wars were engulfing the country and Al-Shabab was emerging. Assassinations, rape and killing became common. We left because my parents decided to look for a better place for our safety and well being, they paid whatever money they had to save us. After a week of travelling we reached the Ifo camp. I was very young and my parents were struggling to feed us.



In early March 2014, Naeema travelled from the Ifo camp to Nairobi for medical treatment. She was suffering from chronic mental and physical health problems. Naeema obtained a medical treatment referral letter for Kenyatta Hospital, Nairobi, from the UNHCR Ifo office. Naeema's plan was to return to her family in Ifo camp after her treatment. Naeema was arrested in March 2014 at Kenyatta Hospital, Nairobi whilst having her blood checked.

I was at Kenyatta Hospital, in Nairobi for blood checking and blood pressure measurement when four Kenyan Administrative Policemen entered the hospital and searched for Somalis in the hospital. First they asked me for money and I did not have anything, I told them I have an asylum card and medical letter and I showed them but they did not consider these at all. They arrested me and took me to a police station where I was detained with 12 other Somali women in a small room. We were not given access to lawyers, food or water and had to lie on the dirty floor, shoulder to shoulder, for 2 nights.

After detention at the police station, Naeema was taken to Kasarani Sports Stadium where she was detained for several further nights, where she was held in similar conditions. After approximately 4 days of detention, Naeema was transferred to an airport in Nairobi where she was given some transfer papers and a plane ticket to Nairobi was arranged.

Naeema is now living with distant relatives in Mogadishu, separated from her mother, father and brothers who remain in Ifo camp.

- Throughout her unlawful detention in Kenya and forcible transfer out of the country, Naeema, a non-national, did not receive equal treatment before the law in that he was denied the legal rights and remedies available to Kenyan nationals. Naeema's status as a non-national rendered her vulnerable to this treatment in violation of Article 2's prohibition on discrimination on the basis of national origin.
- In addition, the incommunicado nature of Naeema's detention and the threats made to her by law-enforcement officials immediately prior to release deprived her of any opportunity to seek the protection of the law. Naeema's standing before the law, and her ability to seek its protection, was completely negated by the acts of agents of the Kenyan government, in violation of Article 3.
- The abusive treatment inflicted on Naeema during her arrest and detention in Nairobi was deliberately designed to humiliate, terrify, and cause pain to Naeema, and was carried out in clear violation of Article 5. In addition, Naeema's enforced transfer to Somalia carried with it a clear and ongoing risk of mistreatment amounting to torture and/or cruel inhuman and degrading treatment as defined in Article 5 of the Charter.
- Naeema was held without charge and incommunicado at Kasarani Stadium in Nairobi. During this detention, she was not permitted to speak with a lawyer. She was not at any point presented before a court or given the opportunity to challenge the basis or circumstances of her detention before a competent jurisdiction. Her subsequent transfer from Kenya to Somalia may have given the appearance of a voluntary process involving consent, but in reality it was coerced, abrupt, highly irregular, and involuntary. It did not involve valid, informed consent and was completely devoid of any opportunity for Naeema to engage a lawyer or to seize a court or other competent jurisdiction to challenge the legality of her transfer. Naeema was therefore deprived of her right to have her cause heard in respect of both his detention in, and transfer from, Kenya in violation of Articles 6 or 7(1).
- Naeema was accepted into Kenya by the authorities of Kenya. Once she had been accepted into Kenya, Kenya had an obligation under Article 12 (4) to ensure that she was not removed from the territory except in accordance with the law. Nevertheless, Naeema was unlawfully coerced into returning from Kenya to Somalia (namely, as a result of her mistreatment and

threats made against her by Kenyan agents, she feared further mistreatment in Kenya more than she feared returning to a warzone, and felt she had no choice but to leave), in violation of non-refoulement obligations.

- Prior to her transfer out of Kenya, Naeema was not informed of the basis of her rights, nor was she afforded a meaningful opportunity to engage a lawyer or to challenge the decision concerning her transfer before a competent authority. Naeema's forcible transfer out of Kenya was therefore fundamentally inconsistent with due process of law, in violation of Article 12(4).
- Naeema's unlawful arrest whilst attending Kenyatta Hospital whilst receiving treatment for mental and physical health problems, and the manner of her treatment in detention and subsequent transfer have deprived her of the right to health, violating Article 16.
- Naeema's incommunicado detention in Kenya prevented her from communicating with other family members, and deprived them of family support. This failure violated Article 18 of the Charter. Moreover, Naeema's forcible transfer from Kenya in violation of the non-refoulement principle facilitated her separation from family members remaining in Kenya, breaking up the family unit and further violating Article 18.

RAHMA

Rahma (38) is the holder of a UNCHR letter to certify the bearer is a refugee. She fled Mogadishu for Kenya in 2008, fleeing the Somali warzone. Rahma and her husband, who worked as a construction labourer in Mogadishu, have seven children ranging in age from newborn to 12 years old. Rahma and her family lived in Ifo refugee camp in northern Kenya until conditions in the camp became too dangerous, with high levels of general and gender-based violence. Fearing in particular for their daughters' safety, in 2010, Rahma, her husband and their children moved from a refugee camp in northern Kenya to Eastleigh, Nairobi. They started building a stable life with the help of relatives who were well off financially, and the children started going to schools.



On 28th May 2014, Rahma and family members were arrested in Eastleigh by Kenyan Administrative Police. Rahma and her family were released after relatives paid bribes to the police, on strong "advice" from police that they leave Kenya in order to avoid re-arrest. Rahma therefore fled Kenya following release.

In May, 2014, I was in Nairobi when Kenyan Admin Police forcibly entered our house. They arrested the whole family, 10 people in total. First they asked me for money, and I gave them everything I had. I told the police that we had refugee cards, but they would not look at them. They took us to a police station called Pangania. My children and I were detained in a small room. My husband, who was sick, was detained with other men. There was nothing in our cell to sleep on, and we were given no food or water.

Rahma, her children and husband were detained at Pangania for 2 days until relatives paid a bribe of 35000 Kenyan Shillings per person. Following the payment of the bribe, Rahma and her children were released and advised to leave Kenya in order to avoid re-arrest. Rahma raised the money for plane tickets for her and her family through donations from neighbours, selling furniture and even some of her children's clothes.

Rahma and her family now live in the Waberi IDP camp in Somalia. Life is very challenging. There is not enough food and water, and the children cannot go to school anymore. Rahma and her husband struggle to meet the basic needs of their family.

- Throughout her unlawful detention in Kenya and forcible transfer out of the country, Rahma, her husband and children, non-nationals, did not receive equal treatment before the law in that he was denied the legal rights and remedies available to Kenyan nationals. Rahma and her family's status as non-nationals rendered them vulnerable to this treatment in violation of Article 2's prohibition on discrimination on the basis of national origin.
- In addition, the incommunicado nature of Rahma's detention and the threats made to her and her family by law-enforcement officials immediately prior to release deprived them of any opportunity to seek the protection of the law. Rahma's standing before the law, and her ability to seek its protection, was completely negated by the acts of agents of the Kenyan government, in violation of Article 3.
- The abusive treatment and conditions of confinement inflicted on Rahma and her family during their arrest and detention in Nairobi was deliberately designed to humiliate, terrify, and cause pain to them, and was carried out in clear violation of Article 5. In addition, Rahma and her family's enforced transfer to Somalia carried with it a clear and ongoing risk of mistreatment amounting to torture and/or cruel inhuman and degrading treatment as defined in Article 5 of the Charter.
- Rahma and her family were held without charge and incommunicado at Paganja Police station in Nairobi. During this detention, they were not permitted to speak with a lawyer. They were not at any point presented before a court or given the opportunity to challenge the basis or circumstances of their detention before a competent jurisdiction. Their subsequent transfer from Kenya to Somalia may have given the appearance of a voluntary process involving consent, but in reality it was coerced, abrupt, highly irregular, and involuntary. It did not involve valid, informed consent and was completely devoid of any opportunity for them to engage a lawyer or to seize a court or other competent jurisdiction to challenge the legality of his transfer. Rahma and her family were therefore deprived of their right to have their cause heard in respect of both their detention in, and transfer from, Kenya in violation of Articles 6 and 7(1).
- Rahma and her family were accepted into Kenya by the authorities of Kenya. Once they had been accepted into Kenya, Kenya had an obligation under Article 12 (4) to ensure that they

were not removed from the territory except in accordance with the law. Nevertheless, Rahma and her family were unlawfully coerced into returning from Kenya to Somalia (namely, as a result of his mistreatment and threats made against him by Kenyan agents, they were more terrified of further mistreatment in Kenya more than of returning to a warzone), in violation of non-refoulement obligations.

- Prior to their transfer out of Kenya, Rahma and her family were not informed of their rights, nor were they afforded a meaningful opportunity to engage a lawyer or to challenge the decision concerning their transfer before a competent authority. Their forcible transfer out of Kenya was therefore fundamentally inconsistent with due process of law, in violation of Article 12(4).
- Rahma gave Kenyan police all the money she had when they entered her home in Nairobi to arrest her and her family. This amounts to unlawful deprivation of property in violation of Article 14.
- Rahma's children are now unable to continue their education following transfer to Somalia, in violation of Article 17.
- Rahma and her family members' incommunicado detention in Kenya prevented them from communicating with other family members, and deprived them of family support. This failure violated Article 18 of the Charter. Moreover, Rahma and her family members' forcible transfer from Kenya in violation of the non-refoulement principal facilitated their separation from family members remaining in Kenya, breaking up the family unit and further violating Article 18.

ZAHEER

Zaheer (20) is the holder of a UNCHR letter to certify the bearer is a refugee, and a Republic of Kenya Refugee Certificate. Zaheer lived in Mogadishu with his mother and two sisters until he was 13, when in 2008 the family fled the Somali warzone for Kenya. They left behind a small food-store in Mogadishu that had been the family business. Upon arrival in Kenya, the family registered as refugees at the Kakuma refugee camp. The family resided at Kakuma until September 2012 when they moved to Nairobi, as Zaheer's mother had many health problems living in the camp. In Nairobi, Zaheer was enrolled in college.

One night in May 2014, around 11.30pm, Kenyan soldiers wearing red hats stormed the family home in Eastleigh, Nairobi.

They arrested us without out asking any questions or documents. They threw us into the back of the army truck, and took us to the Kasarani stadium. In the stadium there were a lot of Somali families, no food, water or sanitation and it was a very cold night and very scary.



After two days in the stadium, relatives managed to pay police 15,000 Kenyan Shillings (each) for the release of Zaheer, his mother and his two sisters. The release was made on condition that they had to leave Kenya as soon as possible. They obtained transfer documents from the Somali Embassy in Nairobi and a few days later, took a flight back to Mogadishu.

In Mogadishu, Zaheer and his family are staying with distant relative from his mother's side. They are struggling financially and Zaheer lives in fear of arrest.

I really don't know what the future is. I don't know the city very well since I left when I was very young. In addition to that, I am afraid of being arrested here since I am a young man and therefore fit the Al-Shabaab members profile, so I try to stay home most of the time. I hope one day I can get back to Nairobi.

Throughout his unlawful detention in Kenya and forcible transfer out of the country, Zaheer and his family, non-nationals, did not receive equal treatment before the law in that they were denied the legal rights and remedies available to Kenyan nationals. Zaheer and his family's status as non-nationals rendered them vulnerable to this treatment in violation of Article 2's prohibition on discrimination on the basis of national origin.

- In addition, the incommunicado nature of Zaheer's detention and the threats made to him and his family by law-enforcement officials immediately prior to release deprived them of any opportunity to seek the protection of the law. Zaheer's standing before the law, and his ability to seek its protection, was completely negated by the acts of agents of the Kenyan government, in violation of Article 3.
- The abusive treatment and conditions of confinement inflicted on Zaheer and his family during their arrest and detention in Nairobi was deliberately designed to humiliate, terrify, and cause pain to them, and was carried out in clear violation of Article 5. In addition, Zaheer and his family's enforced transfer to Somalia carried with it a clear and ongoing risk of mistreatment amounting to torture and/or cruel inhuman and degrading treatment as defined in Article 5 of the Charter.
- Zaheer and his family were held without charge and incommunicado at Kasarani Stadium in Nairobi. During this detention, they were not permitted to speak with a lawyer. They were not at any point presented before a court or given the opportunity to challenge the basis or circumstances of their detention before a competent jurisdiction. Their subsequent transfer from Kenya to Somalia may have given the appearance of a voluntary process involving consent, but in reality it was coerced, abrupt, highly irregular, and involuntary. It did not involve valid, informed consent and was completely devoid of any opportunity for them to engage a lawyer or to seize a court or other competent jurisdiction to challenge the legality of his transfer. Zaheer and his family were therefore deprived of their right to have their cause heard in respect of both their detention in, and transfer from, Kenya in violation of Articles 6 and 7(1).
- Zaheer and his family were accepted into Kenya by the authorities of Kenya. Once they had been accepted into Kenya, Kenya had an obligation under Article 12 (4) to ensure that they were not removed from the territory except in accordance with the law. Nevertheless, Zaheer and his family were unlawfully coerced into returning from Kenya to Somalia (namely, as a result of his mistreatment and threats made against him by Kenyan agents, they were more terrified of further mistreatment in Kenya more

than of returning to a warzone), in violation of non-refoulement obligations.

- Prior to their transfer out of Kenya, Zaheer and his family were not informed of their rights, nor were they afforded a meaningful opportunity to engage a lawyer or to challenge the decision concerning their transfer before a competent authority. Their forcible transfer out of Kenya was therefore fundamentally inconsistent with due process of law, in violation of Article 12(4).
- Zaheer was enrolled in college in Nairobi and has been unable to continue his education following transfer to Somalia, in violation of Article 17.
- Zaheer and his family members' incommunicado detention in Kenya prevented them from communicating with other family members, and deprived them of family support. This failure violated Article 18 of the Charter. Moreover, Zaheer and his family members' forcible transfer from Kenya in violation of the non-refoulement principle facilitated their separation from family members remaining in Kenya, breaking up the family unit and further violating Article 18.

Suggested Recommendations

In light of the material in this report, we suggest that as part of its review of Kenya, the Commission should engage the Republic of Kenya in an urgent, constructive dialogue with a view to the Republic of Kenya

- Reaffirming its commitment to a genuine protection of the rights of all refugees on its territory or unlawfully expelled;
- Ceasing all forced or coerced returns of Somali refugees from Kenya to Somalia;
- Upholding its obligations under the Refugee Convention and taking positive steps to integrate Somali refugees into Kenyan society, in particular by ceasing the practise of resettlement of urban Somali refugees in refugee camps, and by recommencing programmes of registering urban refugees in Kenya;
- Conducting human rights compliant inquiries into abuses committed against Somali refugees by police, military and security forces over the past several years, and holding to account individual officers found to have committed offences;
- Developing and implementing effective policies for the protection of particularly vulnerable Somali refugees, including women and children;
- Providing reparations and an apology to all refugees wrongfully arrested, detained, and/or expelled from Kenya; and
- Welcoming wrongfully expelled Somali refugees back into Kenya and assisting with their return;
- Ceasing conflating Somali refugees with terror suspects;
- Ceasing discriminatory treatment towards Somali refugees.

Appendix 1: Chronology Of Key Events And Procedural History

2012

- **13 December 2012**

In a December 13 news release, the Kenyan authorities said that planned transfers of urban Somali refugees to camps in northern Kenya was being carried out in response to a series of attacks in which unidentified people threw hand-grenades into crowds in various locations, killing and injuring a number of people, including police officers and soldiers.²⁰ At a December 13 news conference, Kenya's acting commissioner for refugee affairs, Badu Katelo, said that urban refugees' and asylum seekers' "documentation has ceased to function in the urban areas and if they will continue staying in the urban areas they will be staying illegally – and that [arresting and removing them from the cities] is a function of another department of government, probably police and immigration." Commissioner Katelo said that the refugees' relocation to the camps would "closely be followed by repatriation of Somali refugees back to Somalia."

According to the United Nations High Commissioner for Refugees (UNHCR), at the end of 2012, 46,540 registered urban refugees were living in Kenya, including 33,246 Somalis. In addition, 6,832 registered urban asylum seekers from a variety of nationalities, including 447 Somalis, were living in Kenya.

- **21 December 2012**

On 21 December 2012, President Mwai Kibaki said that, "There is no dignity in living in refugee camps" and that Somalia and Kenya would "work together to enable the hundreds of thousands of Somalis who are living in refugee camps to return to their homes."

- **28 December 2012**

Human Rights Watch said the situation in south-central Somalia remains insecure and that any steps by Kenyan authorities to force or otherwise encourage Somalis to return to their country would breach Kenyan and

²⁰ Government of Kenya, Department of Refugee Affairs, Press Statement, December 2012, https://admin.hrw.org/sites/default/files/related_material/Department%20of%20Refugee%20Affairs%20press%20statement%2013%20December%202012.pdf.

international law, which forbids the forcible return of refugees to persecution, torture, or situations of generalized violence.

Doctors Without Borders, which runs numerous health care programs in the Dadaab camps, said that in light of “completely overstretched assistance” in the camps, the “medical and humanitarian situation” of the refugees in Dadaab was already “disastrous,” “dire,” and “precarious” and that the organization was “concerned about the medical consequences [of] a new influx of refugees” on the camp population.

2013

- **16 Jan 2013 Presidential Letter: relocation of urban refugees to designated camps**

On January 16, 2013 the Ministry of Provincial Administration and Internal Security wrote to the Ministry of Special Programs saying the first phase of “rounding” up refugees would “target” 18,000 people and would start on January 21. The letter said they would be taken to Nairobi’s Thika Municipal Stadium, which would act as a “holding ground” pending transfer to the camps.²¹ Citing a series of grenade attacks in 2012, the authorities contended the move would improve Kenyan national security and lead to the return of Somali refugees to Somalia.²²

- **21 January 2013 Human Rights Watch reports on serious violations against Somali refugees in Kenya**

Since the plan [to relocate urban Somali refugees] was announced, non-governmental organizations and refugee lawyers in Nairobi say the police in Nairobi have arbitrarily arrested hundreds of Somali nationals, most of whom have been released after paying hefty bribes. Reports from the Somali Embassy in Kenya, airline companies and aid workers on the Kenya-Somali border near the Dadaab camps say that since December over a thousand Somalis have returned to their country every week, either by air or overland. Some told aid workers in Somalia they left because they feared a crackdown against Somali refugees in Kenya.

²¹ Presidential Letter, Relocation of Urban Refugees to Officially Designated Camps, 16 January 2013, https://admin.hrw.org/sites/default/files/related_material/16%20January%202013%20letter%20from%20Ministry%20of%20Public%20Administration%20and%20Internal%20Security.pdf.

²² Human Rights Watch: Kenya: Don’t Force 55,000 Refugees Into Camps, <https://www.hrw.org/news/2013/01/21/kenya-dont-force-55000-refugees-camps>.

Human Rights Watch has also received reports of a significant increase since late December in sexual violence against refugee women and girls in one of the Dadaab camps, "Ifo 2." A reliable source told Human Rights Watch that the police have failed to respond adequately to the attacks, which refugees say has led to a general fear of insecurity that has caused hundreds of refugees to leave the camps and cross into Somalia. Others have relocated to the edge of other camps near Dadaab. In 2010, Human Rights Watch reported on [longstanding Kenyan police failures to investigate sexual violence](#) in the Dadaab camps.²³

Human Rights organizations and lawyers working with refugees in Nairobi say that since December, police in Nairobi have arrested dozens of Somalis on spurious charges of belonging to terrorist organizations. All of those taken to court have ultimately been released for lack of evidence.²⁴

- **26 July 2013 Conclusion of the Kituo cha Sheria Case**

In January, 2013 the Kenyan nongovernmental organization Kituo Cha Sheria (Center for Law) filed a petition challenging the lawfulness of the December 2012 refugee relocation plan, under which all urban refugees and asylum seekers were supposed to leave Kenya's cities and move to squalid, overcrowded, and closed refugee camps. In the case Kituo (and 7 others) petitioned the Court to block the government directive to have all refugees decamped to Kakuma and Daadab camps. The Court declared the expulsions unconstitutional: "the Government Directive is a threat to the petitioners' fundamental rights and freedoms including the freedom of movement, right to dignity and infringes on the right to fair and administrative action and is a threat to the non-refoulement principle incorporated by section 18 of the Refugees Act, 2006. It is also violates the State responsibility to persons in a vulnerable situations. I have also concluded that the policy intended to be implemented by the Government Directive cannot be justified under Article 24."²⁵

23 Human Rights Watch: Kenya: Don't Force 55,000 Refugees Into Camps, <https://www.hrw.org/news/2013/01/21/kenya-dont-force-55000-refugees-camps>.

24 Human Rights Watch: Kenya: Don't Force 55,000 Refugees Into Camps, <https://www.hrw.org/news/2013/01/21/kenya-dont-force-55000-refugees-camps>.

25 Paragraph 94, Kituo Cha Sheria & 8 others v Attorney General [2013] eKLR full case available at <http://kituochasheria.or.ke/wp-content/uploads/2014/02/PETITION-115-AND-19-OF-2013>

- **21 Sept 2013 Westgate Shopping Centre attack**
- **10 Nov 2013 Somalia, Kenya and UNHCR sign tripartite agreement**

Almost every Somali refugee and asylum seeker Human Rights Watch interviewed about police abuses they faced in Eastleigh in the months following the Westgate Shopping Centre Attack (between November 19 and late January 2013), said the police repeatedly accused them of being “terrorists”²⁶

Two months after the Westgate attacks, the Government entered into a tripartite agreement with Somalia and the United Nations High Commissioner for Refugees (UNHCR) to facilitate the voluntary repatriation of refugees to Somalia. According to the UNHCR, the agreement led to the initiation of a six month Pilot Project (launched in December 2014) during which UNHCR offered assistance to “return and reintegrate” in three areas identified for the Pilot Phase.

²⁷

2014

- **25 March 2014 Directive restricting all urban refugees to designated camps**

In March of 2014 the government issued a directive restricting all urban refugees to designated camps.

- **March-May 2014 Operation Usalama Watch: forced relocation, detention & expulsions**

This Operation was carried out by Kenyan police around Eastleigh Estate and other predominantly Somali areas of Nairobi, with the declared purpose of flushing out Al Shabaab adherents/aliens, and to search for weapons, IEDs and terrorists. During this operation, thousands of Somali refugees and asylum seekers were apprehended and detained in the Kasarani Sport Stadium Complex in Nairobi. Detainees were subsequently either released without charge, charged with unlawful presence, made to relocate to refugee camps, deported, or released after payment and on the condition that they would return to Somalia

²⁶ Human Rights Watch (2013) “You are all terrorists” available at <http://www.hrw.org/report/2013/05/29/you-are-all-terrorists/kenyan-police-abuse-refugees-nairobi>

²⁷ See more at <http://unhcr-regional.or.ke/news/somalia-unhcr-high-commissioner-voluntary-and-sustainable-return-somali-refugees-top-priority#sthash.7Q1Z1VSl.dpuf>

as soon as possible. Over five thousand such individuals were subsequently forcibly relocated to refugee camps in northern Kenya and at least 359 others were expelled back to Somalia.²⁸

- **20 May 2014 Reports that 359 Somalis have been “repatriated”**

The Kenyan government demanded and eventually received the support of the UN Refugee Agency (UNHCR) in returning Somali refugees to Somalia.²⁹ Almost 2,600 Somali refugees reportedly left Kenya and returned to Somalia in the course of a seven-month “Pilot Phase” from December 2014 during which UNHCR reportedly provided “repatriation and reintegration support”.³⁰

- **18 Dec 2014 President passes new national security law**

The Security Laws (Amendment) Act 2014 (hereafter SLAA) was hurriedly passed.³¹ SLAA came into force on 22nd December 2014 and amended the provisions of twenty two other Acts of Parliament concerned with matters of national security. The new amendments changed Kenya’s 2006 Refugee Act in two vital ways: it sought to limit the number of refugees and asylum seekers in the country to 150,000, and it introduced an encampment policy, limiting refugees to the country’s two camps in Dadaab and Kakuma.³² The Bill was published on 8th December, 2014, and digital versions were made available to the public on 9th December, 2014.³³

2015

28 Amnesty International Country Report, Kenya available at <https://www.amnesty.org/en/countries/africa/kenya/report-kenya/>

29 116 Somali refugees from Kenya land in Mogadishu, spearheading new phase of voluntary repatriation. Press Releases, 5 August 2015 available at <http://www.unhcr.org/55c1fadd9.html>

30 Return to Somalia: No longer a refugee, News Stories, 7 August 2015 available at <http://www.unhcr.org/55c517346.html>

31 This new law was contested in the Kenyan courts: the court ruled that Section 48 of the security laws that dealt with limiting the number of refugees in Kenya violated the principle of non refoulement and that limiting the numbers of refugees was unconstitutional. However the judgment upheld part of the act which restricted the movement of refugees. (*Coalition for Reform and Democracy (CORD) & another v Republic of Kenya & another* [2015] eKLR)

32 The Conversation (2014 n) “Kenya’s Harsh new Security Laws put hundreds of thousands of refugees at risk” available at <http://theconversation.com/kenyas-harsh-new-security-laws-put-hundreds-of-thousands-of-refugees-at-risk-35789>.

33 The tight timeline given by the Departmental committee on Administration and National Security for making submissions, the sheer volume of the Bill and the difficulty in accessing the Bill seriously limited public participation and made it impossible for any meaningful public participation and engagement with the Bill. (see paragraph 154 of the CORD Case).

- **22 Jan 2015 Kenya begins the process of Universal Periodic Review (OHCHR)**

In January 2015 the Government of Kenya underwent the Universal Periodic Review (UPR) process and presented a national report within which it discussed its position on refugees and asylum seekers. The government reiterated its commitment to upholding its obligations and the terms of the tripartite agreement regarding the safe and dignified voluntary repatriation of refugees to Somalia in line with international law.³⁴ UPR recommendations made to the Government of Kenya included a call to ensure that human rights and fundamental freedoms enshrined in its Constitution are protected in the fight against terrorism and the national security plan and actions, and to pay particular attention to safeguarding the rights and safety of minorities and marginalized groups.³⁵

During the UPR process, UNHCR stated that following a series of security incidents, the Government of Kenya had issued in December 2012 a directive outlining the encampment policy and requesting refugees and asylum seekers to relocate from urban centres to the refugee camps in Dadaab and Kakuma. In March 2014 a renewed directive had been released; subsequently the Government had stipulated that those camps were the only areas in which refugees and asylum seekers could reside in Kenya. According to UNHCR, the two directives and security measures had had a significant impact on refugees and asylum seekers in Nairobi and other urban centres, including as a result of the closure of reception, documentation and registration services and the arrest and detention of refugees and asylum seekers.

UNHCR reported that in conjunction with those arrests and detentions, several cases of abuse by law enforcement officials, including physical violence, sexual and gender-based violence, degrading treatment and extortion, had been recorded, as well as growing xenophobic attitudes in the public and the media. Women, children and persons with specific needs had been reported to be among detainees, and UNHCR had been granted limited access to detention facilities. UNHCR also stated that in April 2014, the

34 Human Rights Council (March 2015) "Report of the Working Group on the Universal Periodic Review: Kenya" (Paragraph 92) available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G15/064/59/PDF/G1506459.pdf?OpenElement>

35 Paragraph 142.17 of the Report of the Working Group on the Universal Periodic Review: Kenya.

Government had started to relocate refugees and asylum seekers from urban areas, including by forced relocations, to the Dadaab and Kakuma camps. Approximately 300 children had been separated from their parents due to the involuntary relocation of the parents or caretakers to the camps.³⁶

- **23 Feb 2015 Certain security law amendments struck down by domestic courts**

The constitutionality of the SLAA was challenged in the 2015 case of Coalition for Reform and Democracy (CORD) & another v Republic of Kenya & another [2015] eKLR (hereafter referred to as the CORD Case): It was contended that Kenya's compliance with International Instruments is under threat as a result of the Act particularly in light of the capping of the number of refugees that can be accommodated in the country at 150,000 since there is a possibility of the Government claiming it has the stipulated number allowed by the law in contravention of the International Instruments dealing with refugees which are part of our law under Articles 2(5) and (6) of the Constitution. The amendments, it was submitted are likely to leave refugees with no protection against persecution. Further the amendments are likely to restrict the freedom of movement of lawful refugees as it would restrict lawful refugees and their residences. (Paragraph 52). In its defence, the Government argued that it "is entitled to have its own policies on the refugee issue hence the issue is a policy issue as opposed to a constitutional issue. In any case the provisions relating thereto allows Parliament to increase the number of refugees." (Paragraph 84) Justice Odunga suspended the relevant clause of the SLAA.³⁷

³⁶ Available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/208/10/PDF/G1420810.pdf?OpenElement>

³⁷ "Clause 48 introduces a ceiling on the number of refugees and asylum seekers permitted to be in the country and places it at 150,000 though the same can be varied for a maximum of 12 months by Parliament. It is contended that this provisions flies in the face of International Instruments which are part of our law by virtue of Article 2(5) and 2(6) of the Constitution in particular Convention and Protocol Relating to Status of Refugees, 1951, International Covenant on Civil and Political Rights, 1966 and United Nations Universal Declaration of Human Rights, 1948 as well as the African Charter on Human and Peoples Rights. The effect of the implementation of this amendment would be the immediate reduction of the number of refugees which may lead to evacuation of some of them from the refugee camps and deportation of not a small number of refugees from the country if the 2nd petitioner's contention that there were 583,278 as at 30th November, 2014 is to be believed. If this was to happen before the petitions are heard, nobody including the learned Solicitor General was able to enlighten the Court how the situation would be restored. Clause 56 introduced new Part V dealing with "special operations" which are operations meant to neutralise threats against national security. The provisions thereunder then proceed to deal with what are called "covert operations". It is contended that this provision is likely to take the Country back to the pre-2010 Constitution dark days. By enacting unto themselves the current Constitution by way of a referendum, no doubt Kenyans intended to have a break from the past. It is therefore necessary that this part be investigated by the Court in order to determine whether it is susceptible to abuse considering the current Constitutional dispensation." (paragraph 181)

- **11 March 2015 Kenya submitted 8th-11th Periodic Report to African Commission**

In 2007 the African Commission recommended that Kenya review its decision to close the border with Somalia and more specifically, observe the principle of non-refoulement. In Kenya's combined 8-11 Report on the African Charter, the Government of Kenya pointed out that the country hosts "about 600,000 refugees and every year a large number of Somali refugees are admitted into refugee camps in Kenya."³⁸ This is the only reference that the State makes concerning its policies, legislation and actions towards the significant refugee community that the country hosts.

- **2 April 2015 Garissa attack leaving 147 dead; Kenya government announces pending closure of Dadaab refugee camps**

In the wake of the Garissa University College shootings (on 2 April 2015) that left nearly 150 people dead, the Kenyan government threatened to close Dadaab, the world's largest refugee camp, holding that the 350,000 Somali refugees living there returned to their country.³⁹ Member of Parliament for Garissa town, Adan Barre Dualle, who also serves as Majority Leader in the National Assembly, called on the government to relocate Somali refugees in Kenya back to Somalia, saying the camps were a threat to national security.⁴⁰

Asman Kamama, an MP and head of the parliamentary committee on national security, reaffirmed this position: "That camp has become a nursery for terrorists. The UN must now understand the security of Kenyans comes first. Even if it is about human rights, it should not be at our expense."⁴¹ On 11 April 2015, Kenya's Deputy President William Ruto said the government had told the United Nations High Commission for Refugees that it must close Dadaab refugee camp within three months and return its residents to Somalia, otherwise Kenya would 'relocate them ourselves.'⁴²

38 Kenya State Report available at http://www.achpr.org/files/sessions/57th/state-reports/8th-11th-2008-2014/kenya_state_report_eng.pdf

39 UNHCR statement on the future of Kenya's Dadaab Refugee Camps, Briefing Notes, 14 April 2015 available at <http://www.unhcr.org/552d0a8a9.html>;

40 <http://www.irinnews.org/report/101352/somali-refugees-feel-remittance-pain-after-kenya-attack>

41 The Guardian (2015) "World's largest refugee camp scapegoated in wake of Garissa attack" available at <http://www.theguardian.com/world/2015/apr/14/kenya-garissa-dadaab-scapegoat-al-shabaab>

42 Amnesty International (2015) Crisis looms for Somali refugees as Kenya orders closure of Dadaab refugee

- **April/May 2015 The African Commission adopts a resolution on terrorist attacks in Kenya**

At its 56th session, the Commission adopted a resolution on terrorist acts in the Republic of Kenya. The Commission made specific mention of the scapegoating of Somali refugees in the Kenyan war on terror, noting: “the frequent use of retaliatory measures such as collective punishment, expulsion of refugees in the urban areas and members of the Somali community, freezing of funds, suspension of various civil society organizations and the threat of closure of refugee camps suspected of having links with terrorism.”

⁴³ The Commission called upon the Government of Kenya to “[t]ake all necessary measures to protect refugees in conformity with regional and international commitments that Kenya has entered into” (Article 3(iv)).

- **30 April 2015 Kenyan Chair of Refugee Affairs Commission makes statement on returns**

While we are committed to the return of the refugees, you will not see us holding them by the head and tail and throwing them across the border,” said Ali Bunow Korane, who chairs Kenya’s Refugee Affairs Commission. Korane was addressing a gathering organised by the Rift Valley Institute’s Nairobi Forum, where officials from the UN, aid agencies and civil society discussed the implications of closing Dadaab refugee complex, where more than 330,000 Somalis live. He acknowledged that, while it was Kenya’s policy to encourage refugees to go back to Somalia, the country, “does not provide a conducive environment for mass return”. This is also the position of the UNHCR, the UN’s agency for refugees, and most aid agencies working in [Somalia](#).⁴⁴

- **30 July 2015 Joint Communiqué from the Tripartite Commission.**

In July 2015, The Tripartite Commission for the Voluntary Repatriation of Somali Refugees from Kenya, comprising

camp (16 April 2015) available at <https://www.amnesty.org/en/latest/news/2015/04/crisis-looms-for-somali-refugees-as-kenya-orders-closure-of-dadaab-refugee-camp-1/>

⁴³ Resolution on terrorist acts in the Republic of Kenya - ACHPR/Res.302 (LVI) 2015, adopted by the African Commission at its 56th Ordinary Session in Banjul, The Gambia, from 21 April– 7 May 2015. Available at <http://www.achpr.org/sessions/56th/resolutions/302/>

⁴⁴ Kenya Softens its Position on Proposed Closure of Dadaab Refugee Camp, The Guardian, 30 April 2015, <http://www.theguardian.com/global-development/2015/apr/30/kenya-softens-stance-closure-dadaab-refugee-camp-somalis>.

the Government of the Republic of Kenya, the Government of the Federal Republic of Somalia, and UNHCR, met to work on enhanced support for the voluntary repatriation of Somali refugees from Kenya to Somalia. The Commission agreed on concrete operational modalities to scale up the “safe, dignified and voluntary repatriation of Somali refugees from Kenya.” A new Joint Strategy and Operational Plan, effective now, envisages the “voluntary repatriation” of 435,000 Somalia refugees in phases. The phased approach in the Strategy outlines planned support to the voluntary return and reintegration of 10,000 refugees in 2015; 100,000 in 2016; 150,000 in 2017; 130,000 in 2018 and 35,000 in 2019.

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45 Joint Communiqué: Tripartite Commission for the Voluntary Repatriation of Somali Refugees from Kenya. Available at <http://www.regionaldss.org/sites/default/files/Communique%20of%20the%20Tripartite%20Commission%20meeting%2029%20July%202015.pdf>

Appendix 2 - Legislation and Case law

CONSTITUTIONAL PROVISIONS

Relevant provisions from the 2010 Constitution of Kenya

Article 10 (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them-- (a) applies or interprets this Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions.

Article 10(2) The national values and principles of governance include-- (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; (c) good governance, integrity, transparency and accountability; and (d) sustainable development.

Article 19(3)(a) The rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the State;

Article 21(1) It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.

Article 21(2) The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43.

Article 21(3) All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.

Article 21(4) The State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.

Article 24(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-- (a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

Article 27(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

Article 27(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

Article 28 Every person has inherent dignity and the right to have that dignity respected and protected.

Article 29 Every person has the right to freedom and security of the person, which includes the right not to be— (a) deprived of freedom arbitrarily or without just cause; (b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58; (c) subjected to any form of violence from either public or private sources; (d) subjected to torture in any manner, whether physical or psychological; (e) subjected to corporal punishment; or (f) treated or punished in a cruel, inhuman or degrading manner.

Article 31 Every person has the right to privacy, which includes the right not to have— (a) their person, home or property searched; (b) their possessions seized...

Article 39(1) Every person has the right to freedom of movement.

Article 44(1) Every person has the right to use the language, and to participate in the cultural life, of the person's choice.

Article 44(2) A person belonging to a cultural or linguistic community has the right, with other members of that community— (a) to enjoy the person's culture and use the person's language; or (b) to form, join and maintain cultural and linguistic associations and other organs of civil society.

Article 44 (3) A person shall not compel another person to perform, observe or undergo any cultural practice or rite.

Article 45(1) The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State.

Article 47(1) Every person has the right to administrative

action that is expeditious, efficient, lawful, reasonable and procedurally fair.

Article 47(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

Article 49(1) (a)(i) An arrested person has the right - to be informed promptly, in language that the person understands, of the reason for the arrest;

Article 49(1)(c) An arrested person has the right - to communicate with an advocate, and other persons whose assistance is necessary.

Article 53(1) Every child has the right - ... (b) to free and compulsory basic education; (c) to basic nutrition, shelter and health care; (d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour; (e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not; and (f) not to be detained, except as a measure of last resort, and when detained, to be held – (i) for the shortest appropriate period of time; and (ii) separate from adults and in conditions that take account of the child's sex and age. (2) A child's best interests are of paramount importance in every matter concerning the child.

REFUGEES ACT, 2006

Provisions from the Refugees Act, 2006 the legislation that makes provision for the recognition, protection and management of refugees

Section 18. No person shall be refused entry into Kenya, expelled, extradited from Kenya or returned to any other country or be subjected to any similar measure if, as a result of such refusal, expulsion, return or other measure, such person is compelled to return to or remain in a country where: (a) the person may be subject to persecution on account of race, religion, nationality, membership of a particular social group or political opinion; or (b) the person's life, physical integrity or liberty would be threatened on account of external aggression, occupation, foreign domination or events seriously disturbing public order in part or whole of that country.

Section 21 (1) Subject to section 18(1) and subsection (2) of this section, the Minister may, after consultation with the

Minister responsible for matters relating to immigration and internal security, order the expulsion from Kenya of any refugee or member of his family if the Minister considers the expulsion to be necessary on the grounds of national security or public order. (2) Before ordering the expulsion from Kenya of any refugee or member of his family in terms of subsection (1) of this section, the Minister shall act in accordance with the due process of the law.

Section 23 (1) The Commissioner shall ensure that specific measures are taken to ensure the safety of refugee women and children in designated areas.

RELEVANT PROVISIONS OF THE SLAA:

Section 45. Section 11 of the Refugees Act is amended in subsection (1) by deleting the words “or in any case within thirty days after his entry”.

Section 46. Section 12 of the Refugees Act is amended by “inserting the following new subsection immediately after subsection (2) - (3) Every person who has applied for recognition of his status as a refugee and every member of his family shall remain in the designated refugee camp until the processing of their status is concluded.

Section 47. Section 14 of the Refugees Act is amended by inserting the following new paragraph immediately after paragraph (b)- (c) not leave the designated refugee camp without the permission of the Refugee Camp Officer.

Section 48. The Refugees Act is amended by inserting the following new section immediately.

16A (1) The number of refugees and asylum seekers permitted to stay in Kenya shall not exceed one hundred and fifty thousand persons.

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

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

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

Appendix 3 - Literature

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Refugee Consortium of Kenya "Asylum under Threat - Assessing the protection of Somali refugees in Dadaab refugee camps and along the migration corridor" available at <http://www.rckkenya.org/index.php/component/k2/item/1160-asylum-under-threat-assessing-the-protection-of-somali-refugees-in-dadaab-refugee-camps-and-along-the-migration-corridor>

S Pavanello, S Elhawary, and S Pantuliano "Hidden and exposed: Urban refugees in Nairobi, Kenya" (HPG Working Paper. March 2010) available at <http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/5858.pdf>

TG Gebresilassie (2007) "Engendering "Voluntary" Repatriation: The Planned Repatriation of Maban Refugees from Sherkole Refugee Camp, Ethiopia, to South Sudan" available at http://www.etd.ceu.hu/2007/girma_tigist.pdf