

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NUMBER 227 OF 2016

IN THE MATTER OF ARTICLES 2, 3, 10, 20, 21, 22, 24, 27, 47 AND 259 OF THE
CONSTITUTION OF THE REPUBLIC OF KENYA, 2010

AND

IN THE MATTER OF ARTICLES 22, 23 AND 258 OF THE CONSTITUTION OF THE REPUBLIC
OF KENYA, 2010

AND

IN THE MATTER OF THE REFUGEES ACT NO. 3 OF 2006

AND

IN THE MATTER OF THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES
AND ITS 1967 PROTOCOL

AND

IN THE MATTER OF THE 1969 ORGANISATION OF AFRICAN UNITY CONVENTION
GOVERNING THE SPECIFIC ASPECTS OF REFUGEE PROBLEMS IN AFRICA

AND

IN THE MATTER OF THE UNITED NATIONS CONVENTION AGAINST TORTURE OF 1987

AND

IN THE MATTER OF THE DISBANDMENT OF THE DEPARTMENT OF REFUGEE AFFAIRS BY
THE GOVERNMENT OF KENYA

AND

IN THE MATTER OF THE INTENDED CLOSURE OF DADAAB REFUGEE CAMP BY THE
GOVERNMENT OF KENYA BY NOVEMBER 2016

AND

IN THE MATTER OF THREATENED AND IMMINENT *REFOULEMENT* OF REFUGEES AND
ASYLUM SEEKERS OF SOMALI ORIGIN BY THE GOVERNMENT OF KENYA

BETWEEN

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS.....1ST PETITIONER

KITUO CHA SHERIA 2NDPETITIONER

VERSUS

THE ATTORNEY GENERAL1STRESPONDENT

THE MINISTRY OF INTERIOR AND

COORDINATION OF NATIONAL GOVERNMENT.....2ND RESPONDENT

MAJOR GENERAL (RTD.) JOSEPH NKAISSERY.....3RD RESPONDENT

DR. (ENG.) KARANJA KIBICHO.....4TH RESPONDENT

AND

AMNESTY INTERNATIONAL..... INTERESTED PARTY

INTERESTED PARTY'S SUBMISSIONS

A. OVERVIEW

My Lord

In this petition, Amnesty International (AI) files its submissions based on its status as interested party, explaining the ways in which the issues involved in the petition engage both Kenya's obligations under international law and the rights of Somali asylum seekers and refugees in Kenya.

In a nutshell, AI discusses whether the directives by the 3rd and 4th Respondents (hereinafter referred to as “directives”) dated May 10, 2016 and May 6, 2016 respectively *inter alia* disbanding the Department of Refugee Affairs (DRA), working towards the closure of Dadaab refugee complex and repatriation of Somali refugees back to Somalia violate Kenya’s obligations under international law and the rights of Somali refugees and asylum seekers in Kenya under international law, specifically, the 1951 Convention relating to the Status of Refugees (hereinafter “1951 Convention”).

B. INTRODUCTION

AI is an international, non-governmental organization (NGO), registered as a company limited by guarantee in England and Wales (company no. 01606776). It operates as the headquarters and international secretariat of the global organization commonly known as the AI movement. AI campaigns for the promotion and respect of international human rights and humanitarian law, including matters relating to the rights of asylum seekers and refugees. Through its regional office for East Africa, the Horn and Great Lakes, based in Nairobi, AI undertakes research, advocacy and campaigns on asylum seekers and refugees.

AI is concerned about the adverse impacts of the directives by the 3rd and 4th Respondents relating to the protection and rights of Somali refugees and asylum seekers residing in Kenya, targeted for repatriation back to Somalia.

AI sought to be enjoined in this suit from the outset as an interested party. In its submissions, AI wishes to specifically address Kenya’s obligations under international law and violations of said obligations by the directives. AI has an interest in the outcome of this case because of: (a) the global work it has undertaken over two decades on asylum seekers and refugee rights, including those in East Africa, the Horn and the Great Lakes; (b) the research, expert opinions, advocacy and campaigns on asylum seekers and refugees it has undertaken; (c) its expertise on international refugee law and human rights law, including the international law principle of *non-refoulement*, its application in practice and states’ international obligations under the 1951 Convention.

AI has conducted research and published several reports and related outputs on human rights issues pertaining to refugees and asylum seekers in Kenya and Somali refugees in particular. Two of the organization’s recent reports have documented the negative human rights impacts of

Kenya's refugee policies on Somali refugees and asylum seekers in recent years. *No Place Like Home: returns and relocations of Somalia's displaced (2014)* documented the impact of the Tripartite Agreement, a repatriation agreement for voluntary returns on Somali refugees. AI's research found that many cases of return to Somalia did not meet the criteria for voluntary return. Many Somali refugees were returning because they felt they had no option but to leave as a result of push factors in Kenya, including: (a) human rights violations; (b) pressure, including that generated by statements from government officials that implied forced returns would be carried out; and (c) increased restrictions on their freedom of movement.¹ *Somalis are Scapegoats in Kenya's Counter-Terror Crackdown (2014)* documented how thousands of Somalis were subjected to arbitrary detention, arrest, harassment, extortion and ill-treatment during Operation Usalama Watch, which began in early April 2014. Over a thousand individuals were forcibly relocated to overcrowded, insecure refugee camps. Hundreds were deported back to Somalia in contravention of Kenya's international obligations.²

AI has also conducted research on the human rights situation in Somalia. AI's 2013 public statement, *Returns to South and Central Somalia: a violation of international law*³ and 2014 briefing, *Forced Returns To South And Central Somalia, Including To Al-Shabaab Areas: a blatant violation of international law*⁴ advised states not to return individuals to south and central Somalia, as fragile security conditions there had not led to fundamental and durable change. Our 2015 report, *Somalia: prioritise protection for people with disabilities*⁵ exposed how lack of institutional mechanisms for protection, underpinned by discrimination by families, the public and the state, renders people with disabilities particularly vulnerable to human rights abuses. The organizations' assessment of the state of human rights in Somalia in 2015 was also published in the AI Annual Report 2015/16.⁶

¹ Amnesty International (AI) (2014) *Somalia: No Place Like Home: returns and relocations of Somalia's displaced* (report on the Tripartite Agreement): <https://www.amnesty.org/en/documents/AFR52/001/2014/en/>.

² AI (2014) *Kenya: Somalis are scapegoats in Kenya's counter-terror crackdown* (briefing on Usalama Watch): <https://www.amnesty.org/en/documents/AFR52/003/2014/en/>.

³ AI (2013) *Returns to South and Central Somalia: a violation of international law*, May 15, 2013, AFR 52/008/2013: <http://www.refworld.org/docid/519492934.html> (accessed October 29, 2016).

⁴ AI (2014) *Forced Returns To South And Central Somalia, Including To Al-Shabaab Areas: a blatant violation of international law*: AFR 52/005/2014, October 2014.

⁵ AI (2015) *Somalia: prioritise protection for people with disabilities*: <https://www.amnesty.org/en/documents/af52/1166/2015/en/>.

⁶ AI (2016) *Report 2015/16 for Somalia*: <https://www.amnesty.org/en/countries/africa/somalia/report-somalia/> (accessed October 3, 2016).

C. BACKGROUND

My Lord

The sequence of events leading to the filing of this Petition are as follows:

On May 6, 2016, the 4th Respondent issued a press statement on behalf of the government entitled “Government statement on refugees and closure of camps” whose details are, *inter alia*, as follows:

- a) That owing to national security interests, hosting of refugees has to come to an end;
- b) That the DRA has been disbanded;
- c) That the government is working on a mechanism for the closure of the Dadaab and Kakuma camps within the shortest time possible.

On May 10, 2016, the 3rd Respondent addressed the nation by way of a press statement in which he confirmed the DRA’s disbandment as well as the gazetting of a Task Force to implement repatriation of refugees to Somalia. He affirmed that the Dadaab refugee complex would be closed by November 2016 and indicated that repatriation would be expedited. He also stated that the Taskforce on Repatriation had until the end of May to furnish him with a plan of action. On the April 29, 2016, the 3rd Respondent revoked the *prima facie* status of refugees of Somali origin vide Gazette Notice No. 46. This action came after the African Union (AU) Peace and Security Council (PSC) had declared, on April 14, 2016,⁷ that the Dadaab camps were a “legitimate security concern” and had been “deprived of their humanitarian nature and function by the Al-Shabaab terrorist group.”⁸

D. ISSUES

⁷ This followed a 2014 request made by Kenya of an African Union (AU) Heads of State Summit in South Africa that it should consider Dadaab refugee camp a security risk. This matter was then referred to the AU Peace and Security Council (PSC).

⁸ AU Commission (AUC), *590th PSC meeting decision on the situation of refugees in the Dadaab Refugee camps in Kenya*, April 22, 2016: <http://www.african-union.africa-newsroom.com/press/590th-psc-meeting-decision-on-the-situation-of-refugees-in-the-dadaab-refugee-camps-in-kenya?lang=en> (accessed October 3, 2016).

My Lord

While several issues have been raised in this petition, due to the nature of its work, AI wishes to address only the three issues listed below. In this regard, we propose to structure our submissions as follows:

- a) Do the directives interfere with the ability of persons to seek and enjoy asylum from persecution and war in Kenya lawfully, peaceably and without harassment?
- b) Does the repatriation of Somali refugees to Somalia violate the international law principle of *non-refoulement*?
- c) Do the directives meet the threshold and/or standards set out under Article 1c of the 1951 Convention with respect to a declaration of cessation?
- d) Do the directives violate the doctrine of legitimate expectation?

E. THE LAW AND ARGUMENTS

My Lord

It is critical from the outset to consider the legal sources of obligations of the Respondents to Somali refugees and asylum seekers, as well as the legal sources of the rights of Somali refugees and asylum seekers in Kenya.

The Constitution of Kenya is the most important safeguard of the fundamental rights and freedoms of refugees and asylum seekers. The Constitution also recognizes there are other safeguards of fundamental rights and freedoms beyond itself.

Article 19(3)(c) of the Constitution provides that:

“The rights and fundamental freedoms in the Bill of Rights do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognized or conferred by law, except to the extent that they are inconsistent with this Chapter.”

My Lord

Article 2(5) and (6) of the Constitution recognize both general rules of international law, as well as treaties/conventions ratified by Kenya, as part and parcel of the laws of Kenya.

Refugee law derives largely from international law.

Kenya is signatory to a number of international conventions and treaties that deal with the protection of the rights of refugees and asylums-seekers. In particular, Kenya acceded to 1951 Convention Relating to the Status of Refugees and its 1967 Protocol.⁹ Kenya also signed the 1969 Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa.¹⁰ Other international instruments for the protection of refugees and asylum seekers to which Kenya is a party include the Convention against Torture and Other Cruel, Inhuman Degrading Treatment or Punishment (CAT),¹¹ the 1966 International Covenant on Civil and Political Rights (ICCPR)¹² and the 1981 African Charter on Human and Peoples' Rights ("Banjul Charter").¹³

In 2006, Kenya passed the Refugee Act¹⁴ which domesticated the 1951 Convention and 1969 OAU Convention.

Article 27 of the Vienna Convention on the Law of Treaties provides that "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

It follows that, in light of provisions of Article 2(5) and 2(6) of the Constitution of Kenya as well as Article 27 of the Vienna Convention on the Law of Treaties, the government of Kenya cannot employ any of the provisions of law that it has referred to in its response as a basis/justification

⁹ The 1951 Convention relating to the Status of Refugees, 189 UNTS 137, entered into force April 22, 1954 ("1951 Convention"): <http://www.refworld.org/docid/3be01b964.htm> (accessed October 28, 2016).

¹⁰ Organization of African Unity (OAU), Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention"), September 10, 1969, 1001 UNTS 45: <http://www.refworld.org/docid/3ae6b36018.html> (accessed October 28, 2016).

¹¹ Convention against Torture and Other Cruel, Inhuman Degrading Treatment or Punishment (CAT): <http://www.ohchr.org/Documents/ProfessionalInterest/cat.pdf>. (accessed October 28, 2016).

¹² UN General Assembly (GA), International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, Volume 999, page 171: <http://www.refworld.org/docid/3ae6b3aa0.html> (accessed October 29, 2016).

¹³ The 1981 African Charter on Human and Peoples' Rights (Banjul Charter), 1520 UNTS 245. Kenya acceded to the African Charter on Human and Peoples' Rights on January 23, 1992: <http://www.au.int/en/treaties/african-charter-human-and-peoples-rights> (accessed October 29, 2016).

¹⁴ 2006 Kenya Refugee Act http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/RefugeeAct_No13of2006.pdf. (accessed October 29, 2016).

for failure to perform any of its obligations under the 1951 Convention, the ICCPR or any other international legal instrument providing for the protection of refugees and asylum seekers.

The question is then what precisely are the rights and obligations in both the Constitution's Bill of Rights and other legal instruments that have been violated by the directives? As stated above, while the directives violate several rights and Kenya's obligations under international law, AI wishes to restrict its submissions only to Kenya's international obligations and submits that:

- a) The directives interfere with people's ability to seek and enjoy asylum from persecution and war in Kenya, peaceably and without harassment;
- b) The directives to repatriate Somali refugees to Somalia violate the international law principle of *non-refoulement*;
- c) The directives do not meet the threshold and/or standards set out under Article 1c of the 1951 Convention with respect to a declaration of cessation.

Further, it is our submission that, through these directives, Kenya is effectively repudiating its obligations under the 1951 Convention. The directives negate the entire purpose of the 1951 Convention, which is to protect the right to seek and enjoy asylum from persecution.

The right to seek and enjoy asylum peacefully and without harassment, intimidation or arbitrary interference

Under Article 14 of the Universal Declaration of Human Rights (UDHR), those seeking protection have the right "to seek and to enjoy in other countries asylum from persecution." The 1951 Convention defines the obligations of state parties towards refugees, as well as the human rights of refugees.¹⁵ The OAU Convention (Article 11(2)) and the Banjul Convention (Article 12(3)) also state that refugees have the right to enjoy asylum peacefully and without harassment, intimidation or arbitrary interference.

This position has been endorsed by the United Nations General Assembly (UNGA) Resolution 52/103 of February 9, 1998, through which the UNGA *inter alia* reaffirmed:

¹⁵ Articles 3 to 34 of the 1951 Convention.

“That everyone is entitled to the right to seek and enjoy in other countries asylum from persecution, and, as asylum is an indispensable instrument for the international protection of refugees, calls upon all states to refrain from taking measures that jeopardize the institution of asylum, in particular, by returning or expelling refugees or asylum-seekers contrary to international human rights and to humanitarian and refugee law.”¹⁶

Submission

My Lord

The DRA’s disbandment has made it impossible for any person seeking asylum in Kenya to lodge and have his/her asylum claim adjudicated. The Refugees Act 2006 and the regulations thereunder provide both the normative and institutional framework for the lodging and adjudication of asylum claims in Kenya. With the DRA’s disbandment, asylum seekers are left in limbo as there is no avenue to lodge their asylum claim for assessment and determination by the bodies created under the Refugees Act such as the Refugees Affairs Committee, the Commissioner for Refugee Affairs and the Refugees Appeal Board for those aggrieved by the formers’ decisions. Since May 2016, no determination has been made with respect to application for asylum by any asylum seeker in Kenya, irrespective of their nationality.

Secondly, since the DRA’s disbandment, refugees with expired identity documents have been unable to renew their documents.

The foregoing circumstances have not only deprived people of an effective right to seek asylum in Kenya, but have also left refugees and asylum seekers at risk of arbitrary arrest and detention by law enforcement agencies under immigration (not refugee) law which, in some cases, may result to *refoulement* further to arraignment in court on immigration-related offences. The aforementioned actions by the Respondents also amount to a violation of Article 47 of the Constitution of Kenya which guarantees everyone the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

The government has also suspended registration of asylum seekers from Somalia in Dadaab refugee complex since May 2016. Consequently, all new asylum seekers from Somalia are unable

¹⁶ United Nations High Commissioner for Refugees (UNHCR): Resolution/adopted by the General Assembly, February 9, 1998, A/RES/52/103, paragraph 5: <http://www.refworld.org/docid/3b00f32b17.html> (accessed October 29, 2016).

to access humanitarian assistance at Dadaab refugee complex. Those pursuing education in institutions of higher learning away from the camp were compelled to defer the semester that commenced in May and ended in September due to their lack of movement passes, which could only be issued by the DRA, to facilitate their movement outside the camp.

My Lord

We submit that the acts above are calculated measures by the Respondents to make asylum in Kenya untenable, thereby negating the protections of the 1951 Convention. Indeed, the Respondent has abdicated its obligations under the 1951 Convention.

The international legal principle of *non-refoulement*

Under international law, individuals being transferred from the jurisdiction of one state to that of another have the right to both substantive and procedural safeguards. Substantively, the principle of *non-refoulement* prohibits states from transferring anyone, whether directly or indirectly, to a place where they would have a well-founded fear of persecution or would face a real risk of other serious human rights violations or abuses. Procedurally, the principle of *non-refoulement* obliges states to give individuals concerned an effective opportunity to challenge the transfer.

The principle of *non-refoulement* is the cornerstone of the international refugee protection system and is codified in Article 33(1) of the 1951 Convention:

“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.”

In addition, international human rights law instruments – including the CAT, as well as the ICCPR – contain specific protections against *refoulement*. The principle of *non-refoulement* is also codified in regional refugee law instruments and has attained the status of customary international law. Kenya has domesticated provisions relating to *non-refoulement* in Section 18 of the Refugees Act 2006, which specifically provides that fulfilment of Kenya’s international obligations is an objective of the statute. The directives to close Dadaab refugee camps and repatriate Somali

refugees back to Somalia constitute *refoulement* on the grounds that Kenya will be returning them to territories where their lives or freedom would be threatened.

Somalia is a country within which there is ongoing conflict, instability and limited access to basic services. Fighting between government forces supported by the African Union Mission in Somalia (AMISOM) and various armed (clan-based) groups, including Al-Shabaab, has resulted in gross and systemic human rights violations and abuses of the civilian population. Consequently, Somalia continues to be a place from which people flee from violence and persecution.¹⁷ There are an estimated 1.1 million internally displaced people (IDPS) in Somalia.¹⁸ Many parts of the country lack basic services, including healthcare and education, due to prolonged conflict and lack of adequate infrastructure.¹⁹ According to the UN's early warning famine system, as of August 2016, more than 40 per cent of the population (or five million people) is food insecure and more than 1.1 million people are unable to meet their daily food requirements.²⁰ Somalia has experienced intensified political instability in 2016 as parliamentary and presidential elections, due to be held in August and September, were delayed. Parliamentary elections are expected to end on November 10, 2016 and a federal president to be chosen on November 30, 2016. According to Inform, an index for risk management, Somalia is ranked as high-risk for vulnerability, hazard and coping capacity.²¹

We submit that Somali refugees in Dadaab camp are at risk of serious human rights violations and abuses if *refouled* to Somalia. Further, vulnerable individuals and groups in need of additional or specialised assistance and support would face additional risks upon return to Somalia.

Persons with disabilities face additional challenges and risks upon return to Somalia. AI's 2015 report "*Somalia: prioritise protection for people with disabilities*" documents human rights violations and abuses faced by people with disabilities living in Mogadishu and other areas of

¹⁷ UNHCR, *UNHCR Position on Returns to Southern and Central Somalia (Update 1)*, May 2016: <http://www.refworld.org/docid/573de9fe4.html> (accessed October 29, 2016).

¹⁸ UNHCR, *Somalia: overview situation report (as of April 30, 2016)*, May 29, 2016: <http://data.unhcr.org/horn-of-africa/country.php?id=197> (accessed October 29, 2016).

¹⁹ UN Office for the Coordination of Humanitarian Affairs (OCHA), *Somalia: humanitarian dashboard – August 2016*, September 29, 2016: <http://reliefweb.int/sites/reliefweb.int/files/resources/Somalia%20Humanitarian%20Dashboard%20-%20August2016.pdf> (accessed October 29, 2016).

²⁰ *Ibid.*

²¹ Inform Index for Risk Management, *Country Profile: Somalia*: <http://www.inform-index.org/Countries/Country-Profile-Map> (accessed October 29, 2016).

south and central Somalia. These violations include forced evictions, gender-based and sexual violence (GBSV), some of which amounts to torture and other cruel, inhuman and degrading treatment, as well as lack of access to adequate healthcare, housing, water and sanitation, education and other forms of assistance.²² The report also documents the social stigma people with disabilities in Somalia face, including, in some cases, rejection and abandonment by their families.²³ The UN Independent Expert on Somalia raised concerns in his latest report, published in September 2016, about persons with disabilities being marginalized in Somalia and the lack of support provided to them by the government and international community.²⁴ Somalia has not ratified the Convention on Rights of Persons with Disabilities.²⁵

Somalia is also home to a number of ethnic minority groups including the Bantu, Rerhamar and Baravnese, Bajuni and Gaboye, Tumul, Yibir and Galagala.²⁶ These groups face discrimination in Somalia and are often excluded from accessing land and other essential services due to their identity as ethnic minorities in a society with a dominant ethnicity organised according to clans.²⁷ The UN Independent Expert on Somalia stated that many Somali Bantu, the largest minority group, have fled areas they are from due to drought, inter-clan fighting and attacks by Al-Shabaab.²⁸ The UN Independent Expert on Somalia's report also states that child recruitment by "Al-Shabaab targets Somali Bantu youth and children as young as 10 years of age" and is still ongoing.²⁹

In August 2016, authorities in Somalia's Lower Juba State halted the return of 1,100 Somalis due to the lack of humanitarian assistance.³⁰ Among concerns raised by regional authorities in Somalia

²² <https://www.amnesty.org/en/documents/afr/52/1166/2015/en/>.

²³ *Ibid.*

²⁴ UN Human Rights Council (HRC) Thirty-third session, *Report of the Independent Expert on the situation of human rights in Somalia*, September 15, 2016: <http://www.refworld.org/country,,,SOM,,57e13f654,0.html> (accessed October 10, 2016).

²⁵ *Ibid.*

²⁶ OCHA, *A study on minorities in Somalia*, August 1, 2002: <http://reliefweb.int/report/somalia/study-minorities-somalia> (accessed October 10, 2016).

²⁷ *Ibid.*

²⁸ UN HRC Thirty-third session, *Report of the Independent Expert on the situation of human rights in Somalia*, September 15, 2016: <http://www.refworld.org/country,,,SOM,,57e13f654,0.html>.

²⁹ *Ibid.*

³⁰ Somalia Newsroom, *Analysis: Dadaab refugees stopped on return to Somalia, raising repatriation questions*, August 30, 2016: <https://somalianewsroom.com/2016/08/30/analysis-dadaab-refugees-stopped-on-return-to-somalia-raising-repatriation-questions/> (accessed October 10, 2016).

were: (a) the unplanned nature of the returns, threatening to exacerbate an already volatile security situation; and (b) the likelihood of most returnees ending up in IDP camps.³¹

In 2016, Al-Shabaab continued to carry out lethal attacks in most parts of Somalia, killing or injuring hundreds of civilians. A truck explosion outside SYL hotel near the presidential palace in the capital on August 31, 2016 killed at least 15 people and injured 45.³² An Al-Shabaab attack on Banadir beach restaurant at Lido beach in Mogadishu on August 2, 2016 killed at least ten civilians.³³ On July 26, 2016, two car explosions outside a UN office in Mogadishu killed at least ten people. On January 21, 2016, an Al-Shabaab attack on Beach View Hotel and Lido Seafood Restaurant at Lido beach in Mogadishu killed at least 20 people.

Civilians have also been directly targeted by Al-Shabaab. On June 15, 2016, Al-Shabaab fighters fired mortars into densely populated areas of Mogadishu. Al-Shabaab also continued to torture and extra-judicially execute people it accused of spying on it or not conforming to its interpretation of Islamic law. The group killed people in public, including by stoning, and carried out amputations and floggings, especially in areas where AMISOM had withdrawn.

Beyond the human rights abuses committed by Al-Shabaab, extrajudicial executions (EJEs), extortion, arbitrary detentions and arrests and GBSV, including rape, continued to be carried out by clan or government-aligned armed groups, in part as a result of poor discipline and lack of command control. On August 7, 2016, a clan-based armed group in Qansax Dheere district fired mortar shells at civilians killing three people. In August 2016, several civilians were killed during clan clashes in Bay region.

Article 33(2) of the 1951 Convention allows for an exception to *non-refoulement* in two limited circumstances, one of which is related to refugees who pose “a danger to the security of the country in which [they are],” that is, the country of refuge, while the other relates to refugees who, having been convicted by a final judgment of a particularly serious crime, constitute a danger to the community of that country. Article 33(2), like any limitation on fundamental human rights, must be interpreted restrictively and with full respect for the principle of proportionality. Moreover, the application of this provision requires an individualized, case-by-case

³¹ *Ibid.*

³² Cable News Network (CNN): <http://edition.cnn.com/2016/08/30/africa/somalia-truck-bomb/>.

³³ CNN: <http://edition.cnn.com/2016/08/26/africa/somalia-restaurant-attack/>.

determination.³⁴ The UN High Commission for Refugees (UNHCR), acknowledged as the guardian of the 1951 Convention, has expressed concern that:

“States may be inclined to expel groups or individuals based on religious, ethnic or national origin or political affiliation, on the mere assumption that they may be involved in terrorism. International law, in particular Article 33(2) of the 1951 Refugee Convention, does not prohibit the expulsion of recognized refugees, provided, however, that it is established in the individual case that the person constitutes a danger to the security or the community of the country of refuge. As this danger should outweigh the danger of return to persecution, UNHCR wishes to emphasize that such expulsion decisions must be reached in accordance with due process of law which substantiates the security threat and allows the individual to provide any evidence which might counter the allegations.”³⁵ (emphasis added)

On April 14, 2016, the AU PSC declared that Dadaab camps were a “legitimate security concern” and had been “deprived of their humanitarian nature and function by the Al-Shabaab terrorist group.”³⁶ The directives have linked national security challenges, such as the threat of Al-Shabaab, directly to the hosting of refugees.

However, the directives and the process set up to implement the closure of Dadaab and the repatriation of Somali refugees have not met the criteria as laid out in Article 33(2) of the 1951 Convention. The directives implicitly link all refugees to security risks, but do so without presenting any evidence further to the AU PSC declaration. The first directive stated that: “owing to national security interests, hosting of refugees has to come to an end.” It is false to say all refugees are linked to security risks. Having made this a basis of directives to both close Dadaab and repatriate refugees, the government has not put in place any mechanism to meet the requirements of Article 33(2). Moreover, any attempt to put each and every refugee through a

³⁴ UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, paragraph 10, January 26, 2007: <http://www.refworld.org/docid/45fi7a1a4.html>.

³⁵ UNHCR, *Addressing Security Concerns without Undermining Refugee Protection: UNHCR's perspective*: <http://www.un.org/en/sc/ctc/specialmeetings/2011/docs/unhcr-security-refugee-protection.pdf> (accessed October 28, 2016).

³⁶ AUC, *590th PSC meeting decision on the situation of refugees in the Dadaab Refugee camps in Kenya*, April 22, 2016: <http://www.african-union.africa-newsroom.com/press/590th-psc-meeting-decision-on-the-situation-of-refugees-in-the-dadaab-refugee-camps-in-kenya?lang=en> (accessed October 3, 2016).

process to assess whether they are a risk to security would be unwarranted in the absence of a reasonable basis to believe each refugee constituted such a threat.

Even if individualized decisions *had* been made in accordance with the requirements under Article 33(2) of the 1951 Convention, individuals concerned would still benefit from *non-refoulement* protections under other branches of international law, including international human rights law. Therefore, even if a person was found to fall within the exceptions provided in Article 33(2), if s/he would still be at real risk of treatment prohibited by the CAT if s/he was returned to Somalia, Article 3 of the CAT would prohibit Kenya from expelling them from its territory.³⁷ The ban on torture is absolute and permits no exceptions whatsoever.

My Lord

The Respondents have argued the repatriation of Somali refugees is voluntary and does not violate the principle of *non-refoulement*. The basic principle underlying voluntary repatriation is the right to return to one's own country and the freedom to choose when and whether to return.³⁸ The 1969 OAU Refugee Convention remains the only binding instrument which explicitly covers voluntary repatriation. It recognizes the voluntary character of repatriation and specifies the responsibilities of both the country of asylum and the country of origin.³⁹

Since the filing of this petition, several well-respected NGOs such as Human Rights Watch,⁴⁰ *Médecins Sans Frontiers (MSF)*,⁴¹ Save the Children⁴² and the Norwegian Refugee Council⁴³ have carried out investigations in Dadaab refugee complex. Their findings show that most Somali refugees are unwilling to return to Somalia. During the population verification exercise carried

³⁷ See, for instance, UNHCR, *UNHCR intervention in the case of SA v Section for Asylum, Ministry of Interior of The former Yugoslav Republic of Macedonia*, paragraph 5.3.4, July 2010:

<http://www.refworld.org/docid/4c32dfbcf2.html>.

³⁸ UNHCR, *Handbook - Voluntary Repatriation: international protection*, January 1996:

<http://www.refworld.org/docid/3ae6b3510.html> (accessed October 28, 2016).

³⁹ UNHCR, *Global Consultations on International Protection/Third Track: voluntary repatriation*, April 25, 2002, EC/GC/02/5: <http://www.refworld.org/docid/3d62695d4.html> (accessed October 28, 2016).

⁴⁰ Human Rights Watch (HRW) (2016) *Kenya: Involuntary Refugee Returns to Somalia*:

<https://www.hrw.org/news/2016/09/14/kenya-involuntary-refugee-returns-somalia>.

⁴¹ *Médecins sans frontières (MSF)* (2016) *Dadaab to Somalia: pushed back into peril*:

http://www.msf.org/sites/msf.org/files/dadaab_to_somalia_pushed_back_into_peril-0.pdf.

⁴² Save the Children, (2016) *Thousands of vulnerable children at risk as closure of world's largest refugee camp looms*: <https://www.savethechildren.net/article/thousands-vulnerable-children-risk-closure-world%E2%80%99s-largest-refugee-camp-looms> (accessed October 28, 2016).

⁴³ *Dadaab's Broken Promise: a call to reinstate voluntary, safe and dignified returns for the Dadaab refugee community*: <https://www.nrc.no/globalassets/dadaabs-broken-promise-an-nrc-report-10.10.16.pdf>.

out in July and August 2016, UNHCR found that only 25 per cent of refugees in Dadaab were willing to return.⁴⁴ A survey by the medical NGO, MSF, also found that 86 per cent of refugees interviewed stated that neither they nor their families wanted to return to Somalia due to security fears, including fear of forced recruitment by armed groups, as well as the lack of healthcare and other social services in Somalia.⁴⁵ According to UNHCR, since it launched its Return Help Desk in November 2013, 64,660 individuals, approximately 20 per cent of the Somali refugee population, have expressed an interest in returning to Somalia.⁴⁶ While there is some variability across the data, all information sources (the verification exercise, the MSF survey and the Returns Desk) points to the majority of people not wanting to return.

Some investigations also found the repatriation exercise has been characterized by misinformation and silence over alternative options to return. Since the directives about the closure of the Dadaab camps, information on what will happen to the camp residents has been limited and confusing. No information has been provided on what will happen to Somali refugees in Dadaab who do not wish to leave Kenya. Several statements made by both national and county-level officials to refugees have indicated that all refugees must leave the Dadaab camps and leave Kenya.⁴⁷

Through announcements made to refugees, they have been told by government officials that the cash repatriation grant of USD400 currently available to those who choose to return to Somalia will be forfeit if they do not return to Somalia this year.

In addition, the government has set a deadline for closure of the Dadaab camps and provided no alternatives for refugees living there who do not wish to return to Somalia. Combined with public statements by the government that Somali refugees are viewed, *en masse*, as a security risk, the actions of the government have not been consistent with the concept of voluntary returns.

We submit that this repatriation does not meet international standards for voluntary return. Under international refugee law, repatriation is only considered voluntary if refugees have a genuinely free choice about whether to return and are fully informed about conditions in their country. Any

⁴⁴ UNHCR, (2016) *Dadaab Refugee Camps, Bi-Weekly Update* (01-15 September 2016).

⁴⁵ Supra note 41.

⁴⁶ UNHCR, *Weekly Update: voluntary repatriation of Somali refugees From Kenya*: <http://www.unhcr.org/ke/wp-content/uploads/sites/2/2016/10/Voluntary-Repatriation-Analysis-14102016.pdf> (accessed October 28, 2016).

⁴⁷ See, for example: Qaranimo Online, *House refugees at your risk, says Saleh*, August 18, 2016: <http://www.qaranimo.com/news/2016/08/18/house-refugees-at-your-risk-says-saleh/>; Kenya Television (KTN) News, *Mohamud Saleh has warned Garissa residents against harbouring the refugees*, August 13, 2016: https://www.youtube.com/watch?v=XYG_4nGFXuU.

repatriation exercise that falls short of this, as is the case in Dadaab refugee complex, amounts to *refoulement*.

Cessation of refugee status

My Lord

The Replying Affidavit dated June 26, 2016 filed by the Attorney General on behalf of the Respondents in this petition seems to suggest Somali refugees in Kenya no longer need the protection of the refugee regime as the circumstances that made them flee Somalia no longer apply. The Respondent further alleges that the situation in Somalia has normalized and there is a government in place with a functional executive, legislature and judiciary.

In this context, the Respondent is trying to invoke a legal concept known as cessation in refugee law. Under the international refugee regime, once an individual is determined to be a refugee, their status is maintained unless they fall within the terms of the cessation clauses or their status is cancelled or revoked. Cessation refers to the formal process through which refugee status is brought to an end. Cessation provisions are found in article 1c of the 1951 Convention and replicated in Section 5 of the Refugees Act 2006 which provides as follows:⁴⁸

“This Convention shall cease to apply to any person falling under the terms of Section A (which defines a refugee) if:

- (1) He has voluntarily re-availed himself of the protection of the country of his nationality; or*
- (2) Having lost his nationality, he has voluntarily re-acquired it; or*
- (3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or*
- (4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution;*

⁴⁸ Cessation clauses are also contained in Article 1(4) of the OAU Convention.

(5) He can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;

Provided that this paragraph shall not apply to a refugee falling under Section A(1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;

(6) Being a person who has no nationality he is, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence;

Provided that this paragraph shall not apply to a refugee falling under Section A(1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.”

The above clauses can be divided broadly into two categories: those relating to a change in the personal situation of the refugee brought about by his/her own acts (contained in sub-paragraphs 1 to 4); and those relating to a change in the objective circumstances which formed the basis for the recognition of refugee status (contained in sub-paragraphs 5 and 6). The last clause is commonly referred to as the “ceased circumstances” clause.⁴⁹

My Lord

From its pleadings, the government of Kenya seems to be relying on paragraph 5 above to bring the refugee status of Somali refugees in Kenya and Dadaab refugee complex to an end. For the Respondent to rely on paragraph 5 above to bring the status of the Somali refugee in Kenya to an end, the following threshold must be met:⁵⁰

A. The fundamental character of change

⁴⁹ UNHCR, *Guidelines on International Protection No. 3: Cessation of Refugee Status under Article 1c(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses)*, February 10, 2003, HCR/GIP/03/03: <http://www.refworld.org/docid/3e50de6b4.html> (accessed October 29, 2016).

⁵⁰ *Ibid* at paragraph 4 and 5. See also UNHCR, *Excom Conclusion No. 69. (XLIII) ON Cessation of Refugee Status*: <http://www.unhcr.org/excom/exconc/3ae68c431c/cessation-status.html> (accessed October 29, 2016).

For cessation to apply, the changes in the country of origin or nationality (Somalia) need to be of a fundamental nature such that the refugee can no longer continue to refuse to avail himself of the protection of the country of nationality. The changes must be major, profound or substantial.⁵¹

B. The enduring nature of the change

The second ground to be met is that the fundamental changes must also be durable and a strict approach should be maintained in deciding whether or not the changes can be qualified as durable.⁵² Momentary periods of peace and stability do not warrant application of the cessation clause. All developments which would appear to evidence significant and profound changes should be given time to consolidate before any decision on cessation is made. Changes in the refugee's country of origin or nationality affecting only part of the territory should not, in principle, lead to cessation of refugee status. Refugee status can only come to an end if the basis for fear of persecution is removed without the pre-condition that the refugee has to return to specific "safe areas" of the country to be free from persecution.⁵³

C. Restoration of protection

Finally, in determining whether circumstances have changed so as to justify cessation under Article 1c(5) another crucial question is whether the refugee can effectively re-avail him or herself of the protection of his or her own country. Such protection must therefore be effective and available. It requires more than mere physical security or safety. It includes the existence of a functioning government and basic administrative structures as evidenced, for instance, through a functioning system of law and justice as well as the existence of adequate infrastructure.⁵⁴

My Lord

Both Article 1c(5) and (6) contain an exception to the cessation provision, allowing a refugee to invoke "compelling reasons arising out of previous persecution" for refusing to re-avail himself or

⁵¹ *Ibid.*

⁵² *Ibid.*, paragraph 26.

⁵³ *Ibid.*, paragraph 26

⁵⁴ *Ibid.*, paragraph 17: <http://www.refworld.org/docid/3c06138c4.html> (accessed October 29, 2016).

herself of the protection of the country of origin. This exception is intended to cover cases where refugees, or their family members, have suffered persecution and therefore cannot be expected to return to the country of origin or former habitual residence.⁵⁵

This might, for example, include ex-camp or prison detainees, survivors or witnesses of violence against family members, including GBSV, as well as traumatized persons. It is presumed that such persons have suffered persecution, including at the hands of the local population, and cannot reasonably be expected to return.⁵⁶

Submission

The court must be alive to the fact that application of the cessation clauses results in the formal loss of refugee status and that they must thus be interpreted restrictively. The conditions under which international refugee protection may cease are the same whether refugee status was determined as a result of individual refugee status determination (RDS) or on a *prima facie* basis.⁵⁷

The process of arriving at a declaration of general cessation requires coherence, consultation and transparency. Where an asylum state like Kenya applies the ceased circumstances clauses to a recognized refugee, an individualized process is required. Evidence of general political and human rights conditions is relevant, but the focus must be upon the causes of the particular individual's flight, whether post-flight change has eliminated the risk of persecution and whether effective protection from the state of nationality or habitual residence is now available in the individual case. A situation which has changed, but which also continues to show signs of volatility, as in Somalia, is, by definition, not durable. There must be objective and verifiable evidence that human rights are generally respected in that country and, in particular, that the factors which gave rise to the refugee's well-founded fear of being persecuted are durably suppressed or eliminated.

My Lord

In such cases, the burden of proof rests with the asylum state authorities where the cessation clauses are applied to an individually recognized refugee. We submit that no material has been placed before you to confirm a fundamental change which is enduring in nature in Somalia. We further submit that the threshold for cessation has not been met, as already demonstrated in our

⁵⁵ *Ibid*, paragraph 20: <http://www.refworld.org/docid/3c06138c4.html> (accessed October 29, 2016).

⁵⁶ *Ibid*, paragraph 20.

⁵⁷ UNHCR, *Manual on Mandate RSD: a reference tool for UNHCR Staff*, October 1, 2005.

earlier submissions on the situation in Somalia – a fact which we urge the court to take judicial notice of. Apart from alleging that Kenya has secured parts of Somalia under AMISOM, no evidence has been tabled to show that institutions such as the Somali National Army, the police or the judicial system can offer protection to refugees upon their return. In August 2016, authorities in Somalia’s Lower Juba State halted the return of 1,100 Somalis due to lack of humanitarian assistance.⁵⁸ Among the concerns raised by regional authorities in Somalia were the unplanned nature of the returns threatening to exacerbate an already volatile security situation, the region’s absorption capacity and the likelihood of most returnees ending up in IDP camps.⁵⁹

We further submit that no process of public participation has been carried out with relevant stakeholders, such as the interested party herein, as required by the Constitution, before arriving at the declaration herein.

My Lord

We wish to further submit that despite provisions of paragraph 5 and 6 providing for exceptions from continued international protection needs and compelling reasons where cessation is invoked by an asylum state like Kenya, the directives of the 3rd and 4th Respondents dated May 10, 2016 and May 6, 2016 do not take cognizance of these exceptions. The directives push for the blanket closure of the Dadaab refugee complex without any procedures for those with continued international protection needs and compelling reasons to lodge their claims for consideration. As a matter of fact, the situation is made worse by the fact that the DRA, mandated to consider such claims, has also been disbanded by the 3rd and 4th Respondents through the same directives.

We submit that the situation in Somalia does not meet the threshold for declaration of cessation under Article 1c, paragraph 5. Hence the government of Kenya cannot declare cessation with respect to Somali refugees in Kenya. The situation of human rights in Somalia continues to be volatile, with ongoing conflict and instability. Fighting between government forces and AMISOM on one hand, and armed (clan-based) groups and Al-Shabaab on the other, continues to result in

⁵⁸ Somalia Newsroom, *Analysis: Dadaab refugees stopped on return to Somalia, raising repatriation questions*, August 30, 2016: <https://somalianewsroom.com/2016/08/30/analysis-dadaab-refugees-stopped-on-return-to-somalia-raising-repatriation-questions/> (accessed October 10, 2016).

⁵⁹ *Ibid.*

gross and systemic human rights violations and abuses of the civilian population.⁶⁰ In a September 2016 report, the UN Independent Expert on Somalia noted that, despite some security improvements in the country, “Al-Shabaab has continued to attack major security and civilian facilities, such as its attacks against AMISOM military installations and the killing of AMISOM soldiers, the occasional loss of territory and the capture of weaponry.”⁶¹ The UN Independent Expert also raised concerns “about violations of the right to life in Somalia owing to the ongoing indiscriminate attacks by Al-Shabaab and the use of suicide bombers and improvised explosive devices against civilian targets”⁶² and reported on a data-gathering exercise in 2015 that found that “trends in sexual and gender-based violence continued to be a critical protection concern.”⁶³

D. Legitimate expectation

My Lord

It is the Interested Party’s submission that the law as set out herein above, the principles of international law as enunciated and the conduct of the Respondents for a long time prior to the issuance of these directives created a legitimate expectation.

The fact that Kenya embraced international practice in refugee protection, set up offices including the Commissioner for Refugee Affairs, the DRA, the Refugee Appeals Board and the refugee camps created an expectation that refugees would be treated in a certain way. It created a promise and aroused expectation that, once an asylum seeker set foot on Kenyan soil, s/he would be accorded protection, with systems in place to guarantee this protection.

In *Keroche Breweries Limited & 6 Others v. Attorney General & 10 Others [2016] eKLR*, the doctrine of legitimate expectation was exhaustively discussed by the learned judge who, after citing several authorities on the subject, concluded:

⁶⁰ UNHCR, *UNHCR Position on Returns to Southern and Central Somalia (Update 1)*, May 2016: <http://www.refworld.org/docid/573de9fe4.html> (accessed October 28, 2016).

⁶¹ UN HRC, *Report of the Independent Expert on the situation of human rights in Somalia*, paragraph 9, September 15, 2016, A/HRC/33/64: <http://www.refworld.org/docid/57e13f654.html>. (accessed October 28, 2016).

⁶² *Ibid*, paragraph 29: <http://www.refworld.org/docid/57e13f654.html>. (accessed October 28, 2016).

⁶³ *Ibid*, paragraph 37: <http://www.refworld.org/docid/57e13f654.html> (accessed October 28, 2016).

*“In my view, there is a legitimate expectation that public authorities will comply with the Constitution and the law.”*⁶⁴

F. CONCLUSION

It is therefore the Interested Party’s humble submission that the directives violated and continue to violate Article 14 of the UDHR, Article 11(2) of the OAU Convention and Article 12(3) of the Banjul Convention provisions on the right to seek and enjoy asylum peacefully and without harassment, intimidation or arbitrary interference.

Further, these directives, leading to the repatriation of Somali refugees to Somalia violate the principle of *non-refoulement* as outlined in Article 3(1) of the 1951 Convention. Somali refugees, including those most vulnerable – for example survivors of SGBV and persons with disabilities, in Dadaab refugee complex are at risk of serious human rights violations and abuses if *refouled*.

The directives fail to meet the standards for the declaration of cessation as outlined in Article 1c of the 1951 Convention, Article 1(4) of the OAU Convention and Section 5 of the Refugee Act, 2006.

These directives violate the doctrine of legitimate expectation - the law, international principles and practice - has had become understood and appreciated were not and are not being followed.

G. REMEDIES

My Lord

It is the Interested Party’s submission that the following remedies recommend themselves in light of the foregoing arguments:

- a) A declaration that the decision of the government of Kenya to collectively repatriate all Somali refugees in Dadaab refugee complex to the frontiers of their country of origin against their will violates the principle of *non-refoulement* as expressed – *inter alia* – in

⁶⁴ See, for example, Nairobi Petition 295 of 2015, paragraph 139.

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