

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 115 OF 2013

IN THE MATTER OF THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS
UNDER ARTICLES 2, 3, 10, 20, 21, 27, 28, 29, 36, 39 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 AND IN THE MATTER OF THE INTENTION OF THE
GOVERNMENT OF KENYA TO MOVE ALL REFUGEES RESIDING IN URBAN AREAS TO THE
DADAAB AND KAKUMA REFUGEE CAMPS WITH EFFECT FROM 21.01.2013

BETWEEN

ABEBE DADI TULLU	1 ST PETITIONER
AHMED BASHIR MOHAMED	2 ND PETITIONER
EUGENE BWIMANA	3 RD PETITIONER
DACHASSA GALDI NURE.....	4 TH PETITIONER
MUHIMA SEBIHENDO JOHN.....	5 TH PETITIONER
MBUZUKONGIRA NZABONA.....	6 TH PETITIONER
SAID ABDULLAHI ABUKARIN	7 TH PETITIONER
KITUO CHA SHERIA (PETITIONERS IN PT.NO.19/13).....	8 TH PETITIONER

-VERSUS-

THE HONORABLE ATTORNEY GENERAL.....	RESPONDENT
THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES.....	1 ST AMICUS CURIAE
KATIBA INSTITUTE.....	2 ND AMICUS CURIAE

BRIEF OF 1ST AMICUS CURIAE

THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

Introduction;

1.1 The United Nations High Commissioner for Refugees (“UNHCR”)¹ is grateful for the leave it has been granted by the High Court of Kenya at Nairobi (“the Court”) to be enjoined in these proceedings as an amicus curiae or “friend of the court”.

1.2 UNHCR has been entrusted with a global mandate for the protection of refugees and asylum-seekers, and also has the responsibility to ensure the consistent and coherent interpretation of international refugee law. UNHCR thus has a direct interest in the outcome of this petition which raises a number of important legal issues relating to the right to asylum and the realization of protection and peaceful settlement in society by refugees and asylum-seekers in Kenya, including the principle of non-refoulement, the rights of residence and freedom of movement and associated due process safeguards. In keeping with the “friend of the court” procedures, UNHCR will not delve directly into factual or evidentiary matters and will also take a neutral stance vis-à-vis the positions of the Petitioner and the Respondent or other amici or interested parties. UNHCR’s brief is concerned – as a matter of law – with the interpretation and application of the 1951 Convention relating to the Status of Refugees (“the 1951 Convention”)², its 1967 Protocol³, and the 1969 OAU Convention governing specific aspects of refugee problems in Africa (“1969 OAU Convention”)⁴.

1.3 UNHCR is a global humanitarian and non-political organization. As a subsidiary organ of the United Nations, it has been entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, to seek solutions for their problems.⁵ Paragraph 8(a) of its Statute confers responsibility upon UNHCR to supervise the application of international conventions for the protection of refugees,⁶ which is reiterated in the Preamble of the 1951 Convention. In turn, Article 35(1) of the 1951 Convention obliges States Parties to

¹ This amicus does not constitute a waiver, express or implied, of any privilege or immunity which UNHCR and its staff enjoys under applicable international legal instruments and recognized principles of international law.

² The 1951 Convention relating to the Status of Refugees, 189 U.N.T.S. 137, (“1951 Convention”), <http://www.unhcr.org/refworld/docid/3be01b964.html>.

³ The 1967 Protocol Relating to the status of Refugees, 606 U.N.T.S. 267, (“1967 Protocol”), <http://www.unhcr.org/refworld/docid/3ae6b3ae4.html>.

⁴ The 1969 OAU Convention governing specific aspects of refugee problems in Africa, 1001 U.N.T.S. 45, (“1969 OAU Convention”), <http://www.unhcr.org/refworld/docid/3ae6b36018.html>.

⁵ UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees* (“the Statute”), 14 December 1950, A/RES/428(V), <http://www.unhcr.org/refworld/docid/3b00f0715c.html>.

⁶ According to Article 8(a) of the Statute, ‘The High Commissioner shall provide for the protection of refugees falling under the competence of his Office by: (a) Promoting the conclusion and ratification of international conventions for the protection of refugees, *supervising their application* and proposing amendments thereto’ [emphasis added].

cooperate with UNHCR in the exercise of its functions.⁷ A similar obligation for State Parties is set out in Article II(1) of the 1967 Protocol and Article VIII of the 1969 OAU Convention. UNHCR's supervisory responsibility is exercised in part by the issuance of interpretative guidelines on the meaning of provisions and terms contained in international refugee instruments and through amicus interventions in national and international courts. Some of these guidelines are referred to in this brief.

1.4 The views UNHCR presents to the Court in these proceedings are informed by more than 60 years of experience supervising international refugee law instruments in Africa and elsewhere. UNHCR provides international protection and direct assistance to refugees throughout the world and has staff in some 120 countries. It has operated in Kenya since 1969, enjoys good relations with the Government of Kenya in the protection of refugees and is committed to working with it and other stakeholders in furthering the protection of refugees and asylum-seekers in accordance with international law and the applicable laws of Kenya itself.

1.5 Since 1991, UNHCR has been providing direct assistance to Somali, Sudanese and other refugees in Dadaab and Kakuma refugee camps, Nairobi and various other urban areas in the country. The decision of the Government of Kenya at the heart of these proceedings as communicated to UNHCR and otherwise disseminated publicly in different forms (see "II. Background" below) raises serious concerns that correspond with the key legal and other questions at stake in the petition. The outcome of the petition will thus have far-reaching implications for the protection of refugees and asylum-seekers in Kenya as well as more globally and directly for the work of UNHCR in the country.

II. Background

2.1 In a letter dated **10 December 2012** (attached as **Appendix "A"** to the brief), the Department of Refugee Affairs in the Ministry of Immigration and Registration of Persons communicated to UNHCR and other addressees of the letter, mainly branches

⁷ According to Article 35(1) of the 1951 Convention, 'The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees ... in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention'.

of the Department in other Kenyan cities, towns and in the refugee camps, a decision of the Government of Kenya according to which:

- i. the registration of asylum-seekers in urban areas to cease with immediate effect;
- ii. all asylum-seekers are required to be relocated to Dadaab and Kakuma refugee camps for reception, registration and refugee status determination;
- iii. the issuance of movement passes for non-resettlement cases to cease immediately; and
- iv. the government shall put in place necessary preparation to repatriate Somali refugees living in the camps and urban areas.

2.2 A press statement issued on behalf of the Government on **13 December 2012** (attached as **Appendix "B"** to this brief) made reference to a Government decision to 'put in place a structure encampment policy' involving the relocation of refugees and asylum-seekers to the refugee camps and said that UNHCR and other agencies serving asylum-seekers and refugees in urban areas should cease this support with immediate effect.

2.3 In a letter dated **10 January 2013** from the Department of Refugee Affairs (attached as **Appendix "C"** to this brief), the UNHCR Representative was informed that a high level inter-ministerial committee had been established to oversee and guide the relocation process. According to this letter, the committee had held a meeting on 9 January 2013 and recommended the following:

- i. 'The process of relocation will be coordinated by the Department of Refugee Affairs (DRA) in liaison with UNHCR and other stakeholders. DRA and UNHCR were asked to come up with a program of action.
- ii. The program of relocation will be a quick impact project carried out through a "Rapid Results Initiative" (RRI) in 100 days.
- iii. The committee has approved opening of Kambios at Dadaab Refugee Camp and Kaiobei at Kakuma Refugee Camp to host refugees relocated from urban areas.

- iv. UNHCR is requested to mobilize resources and work closely with the DRA on this matter. There is need to set a technical team to oversee the mobilization.
- v. UNHCR to stop funding of urban refugee programs but limit funding of urban refugee programs to process of relocation, e.g. sensitization, transportation, transit assistance and reception at the camps. This is to ensure urban refugee programs do not undermine the government directive.
- vi. DRA's urban offices to remain open to coordinate relocation from different parts of the country.
- vii. Provincial Administration and the police to conduct continuous operations to support the relocation process.
- viii. That the relocation program to officially start on 21 January 2013.'

2.4 Over the weekend of 19 and 20 January 2013, a letter dated 16 January 2013 from the Ministry of Internal Security in the Office of the President to the Permanent Secretary of the Ministry of Special Programmes(attached as Appendix "D" to this brief)on the relocation of urban refugees to officially designated campsbecame public in the local media. The letter informed the Permanent Secretary in the Ministry of Special Programmes that the Government intended 'to move all refugees residing in urban areas to the Dadaab and Kakuma refugee camps and ultimately, to their home countries after the necessary arrangements are put in place'. It called for the support of the Ministry'to extend humanitarian assistance both at the holding ground and during the transportation', during the 'first phase which is targeting 18,000 persons'. The first phase, which would commence according to the letter on 21 January 2013, will 'start by rounding the refugees and transporting them to Thika Municipal Stadium which will act as the holding ground as arrangement for moving them to the Camps are finalized'. The letter indicated that the Government 'do[es]not intend to hold any of the refugee for more than two days at the stadium'.

III. UNHCR concerns and responses

3.1 UNHCR is concerned by the significant adverse impacts of the directive relating to the protection and rights of refugees and asylum-seekers residing in Kenya, both

those in urban areas targeted for relocation and those in the camps subject to the indicated eventual repatriation back to their countries of origin.

3.2 In particular, UNHCR is concerned that:

- i. The directive will interfere with the ability of persons to seek, and refugees to enjoy, asylum and refugee protection in urban settings in Kenya lawfully, peaceably and without harassment, all of which are established in international refugee law and practice as essential requirements of a functional system of asylum.
- ii. Even without yet being implemented formally, the directive has led already to an escalation in the harassment, intimidation and other forms of arbitrary interference with the rights and safety of refugees and asylum-seekers in Nairobi and other Kenyan cities and towns and is otherwise causing among them a considerable amount of suffering, anxiety and uncertainty.
- iii. Enforcement of the directive through a security “round-up” in which there is potential for force and violence to be employed and without essential procedural safeguards is likely to cause serious human rights and humanitarian consequences.
- iv. If implemented or sustained as an absolute form of encampment prohibiting refugees and asylum-seekers from lawfully moving out of the camps to or residing or engaging in cultural, economic or social activities in the urban centres, the relocation would also be a severe curtailing of the essential rights of asylum and refugee protection. Many refugees in Kenya have lived and settled for years in urban areas. Uprooting and relocating them by force means they will lose their jobs, livelihoods or other means of fending for themselves and in turn they will have to depend on relief hand-outs. Families may become separated, and property destroyed or lost. Interruption of their children's schooling would also be particularly harsh and would not be in their best interests.
- v. Forcible return of the refugees to Somalia would put at great risk their safety and security, the very situation they are protected from by the cardinal international law principle of non-refoulement.

3.3 UNHCR has thus, since the directive was issued, worked closely with the Government of Kenya and other actors, first, for the preservation as far as feasible of

urban areas as spaces in which refugees and asylum-seekers can safely and lawfully reside or be present⁸; secondly, to stem the protection abuses already occurring as a result of the directive; thirdly, to avoid the harm or suffering likely to be caused by the implementation of the directive; and, fourthly, to avoid the forcible return (refoulement) of the refugees to Somalia. In a letter to the Minister of Immigration and Registration of Persons dated 21 December 2012, the High Commissioner for Refugees urged that any measures relating to the relocation should be carried out in full respect of national and international laws. The interest of UNHCR in speaking, through this amicus curiae brief, to the legal questions before the Court in this petition, and to assist the Court in properly deciding those questions, is informed by this overall objective.

IV. Applicable law

4.1 The 1951 Convention and its 1967 Protocol are the key international instruments governing the protection of refugees. They address who is a refugee, his or her rights and responsibilities and the legal obligations of States Parties. In acceding to the 1951 Convention⁹ and the 1967 Protocol,¹⁰ Kenya entered no reservations to either instrument, thus they apply without exception. In addition, Kenya is also a party to the 1969 OAU Convention,¹¹ to which it also has no reservations, and other major international human rights instruments having a bearing on this case, in particular the 1966 International Covenant on Civil and Political Rights,¹² and the 1981 African Charter on Human and Peoples' Rights ("Banjul Charter").¹³ According to the Constitution of the Republic of Kenya, general rules of international law as well as any treaty or convention ratified by Kenya shall form part of the law of the country (Article 2(5) and (6)),¹⁴ making the above-mentioned international treaties directly applicable in Kenyan law.

4.2 Underscoring this relationship between international and municipal law, Section 2 of the Refugees Act of 2006 provides that "asylum" means shelter and protection granted by the Government to persons qualifying for refugee status in

⁸ UNHCR, *UNHCR Policy on Refugee Protection and Solutions in Urban Areas*, September 2009, available at: <http://www.unhcr.org/refworld/docid/4ab8e7f72.html>.

⁹ Kenya acceded to the 1951 Convention on 16 May 1966. See, <http://treaties.un.org/Pages/UNTSONline.aspx?id=1>.

¹⁰ Kenya acceded to the 1967 Protocol on 13 November 1981. See, <http://treaties.un.org/Pages/UNTSONline.aspx?id=1>.

¹¹ Kenya signed the 1969 OAU Convention on 10 September 1969 and ratified it on 23 June 1992. See, <http://www.au.int/en/treaties>.

¹² The 1966 International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (ICCPR). Kenya acceded to the ICCPR on 1 May 1972. See, <http://treaties.un.org/Pages/UNTSONline.aspx?id=1>.

¹³ The 1981 African Charter on Human and Peoples' Rights (Banjul Charter), 1520 U.N.T.S. 245. Kenya acceded to the African Charter on Human and Peoples' Rights on 23 January 1992. See, <http://www.au.int/en/treaties>.

¹⁴ *The Constitution of Kenya* [Kenya], 27 August 2010, available at: <http://www.unhcr.org/refworld/docid/4c8508822.html>.

accordance with the provisions of the Act and in accordance with International Conventions relating to refugee matters referred to in Section 16'.¹⁵Section 16(1)(a) provides that 'every recognized refugee and every member of his family in Kenya shall be entitled to the rights and be subject to the obligations contained in international conventions to which Kenya is a party'.¹⁶

4.3 Importantly, other provisions of the Constitution of Kenya are also relevant to this case, but which are not elaborated in detail in this submission, including: Articles 20 (the bill of rights to be enforced in favour of all persons and thus no distinction is made between nationals and non-nationals in the Constitution); 21 (duty of every organ of the State to observe, respect, protect, promote and fulfill the bill of rights); 24 (limitations on rights); 27 (equality before the law and non-discrimination); 28 (right to dignity); 39 (freedom of movement); and 47 (lawful, reasonable and procedurally fair administrative action).

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

5.1 Every person has the right to seek and enjoy in other countries asylum from persecution, serious human rights violations and other serious harm. The institution of asylum is implicit in the 1951 Convention, while being explicitly recognized in the Universal Declaration of Human Rights of 1948 (Article 14)¹⁷, the OAU Convention (Article II (2)) and the Banjul Convention (Article 12(3)). Refugees have the right to enjoy asylum peacefully and without harassment, intimidation or arbitrary interference with their rights as established in Articles 3 to 34 of the 1951 Convention and, as applicable, under international human rights law. They are in turn required to abide by the laws and regulations applicable in their host country (Article 2) but should otherwise be free from arbitrary changes in policies that impact on their lives.

5.2 Seeking asylum is, therefore, not an unlawful act¹⁸ and refugees and asylum-seekers, even those who have entered or remained in the territory without

¹⁵*The Refugees Act, 2006* [Kenya], No. 13 of 2006, 30 December 2006, available at: <http://www.unhcr.org/refworld/docid/467654c52.html>.

¹⁶ *Ibid.*

¹⁷UN General Assembly, *Universal Declaration of Human Rights* (UDHR), 10 December 1948, 217 A (III), available at: <http://www.unhcr.org/refworld/docid/3ae6b3712c.html>.

¹⁸Article 12(3), Banjul Charter, *Supra* 12. Also, Article 14, UDHR. UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, Guideline 1, available at:

authorization, are protected from penalization, including detention or other restrictions on movement for having sought asylum.¹⁹ Article 31 requires States to amend – and to implement – their laws to ensure that no person who is entitled to benefit from Article 31 is subject to such penalties.²⁰ Penalties imposed on refugees and asylum-seekers who are legally in the territory – such as those regulated by the Refugees Act – would likewise be in breach of international law.²¹

5.3. A directive subjecting all asylum-seekers and refugees – en masse – to forced relocation from urban centres to camps from which they may not be able easily or at all to leave may be viewed as being punitive and amount to a breach of a State's obligations in international law, in particular Article 31 of the 1951 Convention.²² Article 31(2) provides, additionally, that only necessary restrictions can be placed on their movement and only until their status is regularized.²³ In that it imposes this mandatory relocation to the camps without the relevant due administrative procedures, the Government's decision is not in conformity with these principles (see paragraph 7.7 below).

5.4 As noted above, the directive is causing widespread fear and anxiety among refugees, asylum-seekers and Somalis generally, many of whom have been living peacefully in the urban areas in harmony with their local hosts while making positive contributions for both themselves and their communities. The directive, if implemented, is likely to affect the institution of asylum in Kenya and interfere with rights recognized under the 1951 Convention, the OAU Convention and other human rights, including

<http://www.unhcr.org/refworld/docid/503489533b8.html>. UN General Assembly, *Office of the United Nations High Commissioner for Refugees : resolution / adopted by the General Assembly*, 12 February 1999, A/RES/53/125, available at: <http://www.unhcr.org/refworld/docid/3b00f52c0.html> and Conclusions of the Executive Committee of the High Commissioner's Programme ("EXCOM Conclusion"): No. 82, para. (b) in UNHCR, *Safeguarding Asylum*, 17 October 1997, No. 82 (XLVIII) - 1997, available at: <http://www.unhcr.org/refworld/docid/3ae68c958.html>.

¹⁹ UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, Guideline 2, para. 14, available at: <http://www.unhcr.org/refworld/docid/503489533b8.html>.

²⁰ *R v. Uxbridge Magistrates Court and Another, Ex parte Adimi*, [1999] EWHC Admin 765; [2001] Q.B. 667, United Kingdom: High Court (England and Wales), 29 July 1999, per Simon Brown LJ, referring in part to A. Grahl-Madsen, *The Status of Refugees in International Law* (Vol. II, 1972), 211.

²¹ Article 31(1) of the 1951 Convention provides that, '[t]he Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence'.

²² UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, Guideline 4.1.4 (para. 32), available at: <http://www.unhcr.org/refworld/docid/503489533b8.html>.

²³ Article 31(2) of the 1951 Convention provides: 'The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country'.

variously family and private life, employment and livelihoods, education for their children, property rights and prospects for solutions.

VI. The obligation of non-refoulement

6.1 The obligation of non-refoulement is the cornerstone of international refugee protection and has crystallized into a norm of customary international law, binding on all States.²⁴ This obligation is codified, inter alia, in Article 33(1) of the 1951 Convention and Article II (3) of the 1969 OAU Convention. The obligation extends to any conduct leading to the 'return in any manner whatsoever'²⁵ – whether repatriation, removal, expulsion, deportation, extradition, rejection at the frontier or non-admission, or induced return²⁶ – to a territory in which a refugee is at risk of threats to his/her life or freedom. The directive indicates that its aim is “to repatriate” Somali refugees living in both urban areas and camps. Such repatriation would be unlawful under international law as a form of refoulement, as explained below. The obligation of non-refoulement applies in favour of all refugees, including those who have been recognized as such – whether through individual procedures or on a prima facie basis – and to asylum-seekers whose status has not yet been determined.²⁷

6.2 Although Article 33(2) of the 1951 Convention allows for lawful refoulement in two limited circumstances in respect of a refugee ‘whom there are reasonable grounds for regarding as a danger to the security of the country ... or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country’, the provision must be applied only on an individual and exceptional basis. Specifically, it is submitted that Article 33(2) has been overridden by Article II(3) of the OAU Convention, as well as having in large measure

²⁴ UNHCR, *Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of Refugees*, 16 January 2002, HCR/MMSP/2001/09, para. 4, available at: <http://www.unhcr.org/refworld/docid/3d60f5557.html>; and UNHCR, *The Scope and Content of the Principle of Non-Refoulement (Opinion)* [Global Consultations on International Protection/Second Track], 20 June 2001, 87 at 163-164, available at: <http://www.unhcr.org/refworld/docid/3b3702b15.html>; UNHCR, *UNHCR Note on the Principle of Non-Refoulement*, November 1997, available at: <http://www.unhcr.org/refworld/docid/438c6d972.html>.

²⁵ Art. 33(1) 1951 Refugee Convention.

²⁶ On the latter, see *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012, available at: <http://www.unhcr.org/refworld/docid/4f4507942.html> (“*Hirsi v Italy*”), where the court interpreted the term ‘expulsion’ to mean ‘to drive away from the place’ (para. 174).

²⁷ UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, supra note 3, para. 28.

been succeeded by international human rights law protections, which are absolute (both are addressed below).²⁸

6.3 Article II(3) of the OAU Convention permits no exceptions to the prohibition of refoulement, and is thus more closely aligned with the general position at international law than Article 33 of the 1951 Convention. It is submitted here that as a matter of treaty interpretation, Article II (3) of the OAU Convention is the applicable provision in the event of a conflict of laws. First, Article II (3) would be *lex specialis vis-à-vis* the 1951 Convention, as it was developed to address the particular refugee problems in Africa. Second, Article 5 of the 1951 Convention, which calls on States parties to provide more generous rights and benefits to refugees and asylum-seekers where they apply, would necessitate such an interpretation.²⁹ This interpretation is also in conformity with the Vienna Convention on the Law of Treaties, in which subsequently assumed treaty obligations are intended to replace earlier provisions.³⁰

6.4 Even if Article 33(2) is held to continue to apply, in view of the serious consequences for a refugee of being returned to a country where he or she faces danger to her or his freedom, the exception provided for in Article 33(2) must be applied with the greatest caution in the individual case. In particular, Article 33(2) requires that it be applied on an individual, not collective, basis, and that a proper accounting of the reasons for that refoulement be carried out, including the right to challenge such a decision before a court. Like any exception to human rights guarantees, the exceptions to the principle of non-refoulement must be interpreted restrictively and with full respect for the principle of proportionality. The danger posed by the particular refugee must be to the country of refuge itself; should be very serious;³¹ and the finding of dangerousness must be based on an individual assessment and reasonable grounds, and therefore supported by credible and reliable evidence.

²⁸UNHCR, *UNHCR Note on the Principle of Non-Refoulement*, November 1997, available at: <http://www.unhcr.org/refworld/docid/438c6d972.html>.

²⁹Art. 5 1951 Convention provides: 'Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention'.

³⁰See the concept of *lex posterior derogate legi priori* in Article 30(3) United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations Treaty Series, vol. 1155, p. 331, available at: <http://www.unhcr.org/refworld/docid/3ae6b3a10.html>.

³¹UNHCR, *Guidance Note on Extradition and International Refugee Protection*, April 2008, para. 14, available at: <http://www.unhcr.org/refworld/docid/481ec7d92.html>; UNHCR, *UNHCR Note on Diplomatic Assurances and International Refugee Protection*, August 2006, para. 12, available at: <http://www.unhcr.org/refworld/docid/44dc81164.html>; UNHCR, *Manickavasagam Suresh (Appellant) and the Minister of Citizenship and Immigration, the Attorney General of Canada (Respondents). Factum of the Intervenor, United Nations High Commissioner for Refugees ("UNHCR")*, 8 March 2001, paras. 66 and 70, available at: <http://www.unhcr.org/refworld/docid/3e71bbe24.html>; G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, third edition, (Oxford: OUP, 2007), p. 237; J.C. Hathaway, *The Rights of Refugees Under International Law*, (Cambridge: CUP, 2005), p. 345-346.

Refoulement needs also to be a proportionate response to the perceived danger, that is, there must be a rational connection between the removal of the refugee and the elimination of the danger; refoulement must be the last possible resort to eliminate or alleviate the danger and other methods of minimizing the danger considered; and the danger to the country of refuge must outweigh the risk to the refugee upon refoulement.³²

6.5 In addition to Article 33 of the 1951 Convention, Article 32 of the 1951 Convention contains a number of procedural safeguards in case of expulsion on public order or national security grounds. It requires that the expulsion 'of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law'. Furthermore, except where there are compelling reasons of national security, the refugee shall be allowed to submit evidence to clear herself or himself, and to appeal to and be represented for the purpose before the competent authority. The Contracting State shall also allow the refugee to have a reasonable period within which to seek legal admission to another country.³³ Article 13 of the ICCPR provides for similar guarantees.³⁴ These procedural safeguards therefore apply to recognized refugees and asylum-seekers residing in Kenya.

6.6 Finally, refugees and asylum-seekers are protected equally by international human rights law which prohibits *inter alia* the removal of a person to a real risk of torture or other cruel, inhuman or degrading treatment or punishment and threats to life or other forms of serious harm.³⁵ The prohibition on such removal is absolute,

³²UNHCR, *Advisory Opinion from the Office of the United Nations High Commissioner for Refugees (UNHCR) on the Scope of the National Security Exception Under Article 33(2) of the 1951 Convention Relating to the Status of Refugees*, 6 January 2006, available at: <http://www.unhcr.org/refworld/docid/43de2da94.html>. Also, Lauterpacht and Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, June 2003, in: Feller, Türk and Nicholson (eds.), *Refugee Protection in International Law. UNHCR's Global Consultations on International Protection*, Cambridge University Press, paras. 159-179, available at: <http://www.unhcr.org/refworld/docid/470a33af0.html>.

³³UNHCR, *Issasi v. Rosenzweig - Memorandum of Fact and Law of the Intervener, the United Nations High Commissioner for Refugees*, 21 March 2011, Court File No. C52822, paras. 11-15, available at: <http://www.unhcr.org/refworld/docid/4d889b392.html>.

³⁴ Art. 13 ICCPR provides: 'An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority'.

³⁵UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, Art. 3(1), available at: <http://www.unhcr.org/refworld/docid/3ae6b3a94.html>; ICCPR, Art. 7, *Supra* 12, see: Human Rights Committee, General Comment No. 20 (1992), at para. 9; and Human Rights Committee, General Comment No. 31 (2004), at para. 12.; Organization of American States, *American Convention on Human Rights, "Pact of San Jose"*, Costa Rica, 22 November 1969, available at: <http://www.unhcr.org/refworld/docid/3ae6b36510.html>, Article 5(2) and Art. 22.8; Organization of American States, *Inter-American Convention to Prevent and Punish Torture*, Art. 13, available at: <http://www.unhcr.org/refworld/docid/3ae6b3620.html>. Convention for the Protection of Human Rights and Fundamental Freedoms, Europ.T.S. No. 5; 213 U.N.T.S. 221, Nov. 4, 1950, see for example, *Soering v. The United Kingdom*, 1/1989/161/217, Council of Europe: European Court of Human Rights, 7 July 1989, available at: <http://www.unhcr.org/refworld/docid/3ae6b6fec.html>; *Chahal v. The United Kingdom*, 70/1995/576/662, Council of Europe: European Court of Human Rights, 15 November 1996, available at:

without exceptions including in emergency situations. Thus, even though the 1951 Convention permits lawful refoulement in the very limited circumstances described above, refoulement protection under international human rights law would still apply and would need to be respected.³⁶ Overall, therefore, for the purposes of Kenyan law, the prohibition on refoulement of refugees or asylum-seekers to threats to their life or freedom is absolute and does not permit exceptions even for persons posing a threat to national security.

6.7 The directive further raises concerns around collective expulsion, also a violation of international human rights law.³⁷ Article 12(5) of the Banjul Charter prohibits the mass expulsion of non-nationals. International jurisprudence clarifies that States are to be prevented from removing non-nationals without examining their personal circumstances and, consequently, without enabling them to put forward their arguments against such a measure taken by the authorities.³⁸

6.8 Finally, repatriation of refugees to their countries of origin can only be carried out either voluntarily, a principle closely safeguarded in Article V of the OAU Convention, or pursuant to the cessation of refugee status under Article 1C(5) or (6) of the 1951 Convention. In respect of the former, Article V of the OAU Convention provides that the essentially voluntary character of repatriation shall be respected; that necessary arrangements shall be made for safe return; that, upon return, the refugee is to receive the full rights and privileges of a national that he or she shall not be penalized for having left their country of origin; and that assurances shall be given that the new circumstances prevailing in the country of origin will enable return without risk and to take up a normal and peaceful life. In respect of cessation, this is only applicable once it has been judged that the circumstances in the country of origin are such as to have fundamentally and durably changed so as to permit the cessation

<http://www.unhcr.org/refworld/docid/3ae6b69920.html>; and more recently *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, available at: <http://www.unhcr.org/refworld/docid/4d39bc7f2.html>, and *Hirsi v. Italy*, Supra 27.

³⁶Non-refoulement obligations complementing the obligations under the 1951 Convention, which preceded the major human rights treaties, have also been established under international human rights law. More specifically, States are bound not to transfer any individual to another country if this would result in exposing him or her to serious human rights violations, notably arbitrary deprivation of life, or torture or other cruel, inhuman or degrading treatment or punishment. See UN High Commissioner for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, paragraph 17 and successive, available at: <http://www.unhcr.org/refworld/docid/45f17a1a4.html>.

³⁷*Hirsi v. Italy*, Supra 27. See, also, UN Office of the High Commissioner for Human Rights, *Hirsi et al. v. Italy: Intervener Brief filed on behalf of the United Nations High Commissioner for Human Rights*, 5 May 2011, Application No 27765/09, available at: <http://www.unhcr.org/refworld/docid/4f5f11a52.html>.

³⁸*Hirsi v. Italy*, Supra 27.

of refugee status.³⁹ Neither voluntary repatriation nor cessation of refugee status are at issue in this case. They are presented here only to highlight the fundamental character of the prohibition of refoulement, which must be scrupulously observed.⁴⁰ If the relocation of refugees and asylum-seekers to Kakuma and Dadaab and their subsequent forced return is one of the purposes of the directive, it would be at variance with Kenya's obligation of non-refoulement.

VII. The rightsofchoice of residence and of free movement

7.1 Pursuant to Article 26 of the 1951 Convention, States parties shall accord to refugees and asylum-seekers lawfully in their territories the rights to choose their place of residence and to move freely within that territory subject only to any regulations applicable to aliens generally in the same circumstances.⁴¹ Article 26 of the 1951 Convention establishes only two possible limitations to the rights of choice of residence and freedom of movement: first, that they apply only to individuals lawfully present in the territory and, second, are subject only to such regulations applicable to aliens in general under the same circumstances. As previously noted, Kenya has no reservations to the 1951 Convention and has made no particular reservation to this article which is thus applicable in full.

7.2 Under international refugee law, both refugees and asylum-seekers, in respect of the latter this includes those who are registered as asylum-seekers as well as those who have announced their intention to seek asylum but who have yet to be registered officially because of, for example, administrative delays, are considered "lawfully in"

³⁹ 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)*, 10 February 2003, HCR/GIP/03/03, available at: <http://www.unhcr.org/refworld/docid/3e50de6b4.html>.

⁴⁰ See EXCOM Conclusion: No. 1 (XXVI) (1975), para. (b); No. 19 (XXXI) (1980), para. (a); No. 22 (XXXII) (1981), para. 2; No. 71 (XLIV) (1993), para. (g); No. 74 (XLV) (1994), para. (g); No. 108 (LIX) (2008), para. (a), available at, UNHCR, *A Thematic Compilation of Executive Committee Conclusions, 6th edition, June 2011*, June 2011, available at: <http://www.unhcr.org/refworld/docid/4f50cfbb2.html>. The United Nations General Assembly has also repeatedly underlined the importance of full respect for the principle of *non-refoulement*, in, for example, the following resolutions: 32/67 (1977); 33/26 (1978); 34/60 (1979); 35/41 (1980); 36/125 (1981); 37/195 (1982); 38/121 (1983); 39/140 (1984); 40/118 (1985); 41/124 (1986); 42/109 (1985); 43/117 (1988); 44/137 (1989); 46/106 (1991); 47/105 (1992); 48/116 (1993); 49/169 (1994); 50/152 (1995); 51/75 (1996); 52/103 (1997); 52/132 (1999); 53/125 (1998); 54/146 (1999); 55/74 (2000); 56/137 (2001); 57/187 (2001); 58/151 (2003); 59/170 (2004); 60/129 (2005); 61/137 (2006); 62/124 (2007); 63/148 (2008); 63/127 (2009); 65/194 (2010)). For a thematic overview of relevant UNGA and ECOSOC Resolutions see: UNHCR, *Thematic Compilation of General Assembly & Economic and Social Council Resolutions*, September 2011, available at: <http://www.unhcr.org/refworld/docid/4e9683242.html>.

⁴¹ Article 26 of the 1951 Convention provides: 'Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory subject to any regulations applicable to aliens generally in the same circumstances'. According to UNHCR's urban refugee policy urban areas are legitimate places for refugees and asylum-seekers to enjoy their rights, UNHCR, *UNHCR Policy on Refugee Protection and Solutions in Urban Areas*, September 2009, available at: <http://www.unhcr.org/refworld/docid/4ab8e7f72.html>.

the territory for the purposes of benefiting from this provision.⁴²The lawful presence of non-nationals has also been interpreted broadly by the United Nations' Human Rights Committee in its General Comment No. 27 on Article 12 of the ICCPR⁴³ to encompass any aliens irrespective of the way in which they entered the country (regularly or irregularly) whose status has been regularized under relevant national laws.⁴⁴

7.3 The second condition under Article 26 of the 1951 Convention is that any restrictions on choice of residence or freedom of movement must be judged according to the "aliens generally" standard, and in turn any such limitation would need to conform with international law. At a minimum, Article 26 guarantees that a Contracting State may not impose restrictions that are applicable only to refugees or stateless persons (see, also, Articles 3 and 8 on non-discrimination). In other words, special restrictions vis-à-vis refugees and stateless persons are not permitted.⁴⁵

7.4 The only possible exception to the right of choice of residence and free movement in Article 26 of the 1951 Convention would be via Article 9 of the 1951 Convention which recognizes that States Parties may, in time of war or other grave and exceptional circumstances, take provisional measures essential to national security in the case of a particular person, pending a determination by the State that that person is in fact a refugee and that the continuance of such measures is necessary in the individual case in the interest of national security. In effect, Article 9 of the 1951 Convention allows States to derogate in very exceptional circumstances and for reasons of national security from rights listed in the 1951 Convention, including Article 26, in respect of particular refugees or asylum-seekers. Emphasizing that it applies only to "particular persons", any measures pursued under Article 9 must be directed against specific individuals – not collectively – on account of the particular

⁴² UNHCR, "Lawfully Staying" – A Note on Interpretation, 1988, available at: <http://www.unhcr.org/refworld/pdfid/42ad93304.pdf>; UNHCR Global Consultations: Reception of Asylum-Seekers, above note 25, para. 3, available at: <http://www.unhcr.org/refworld/docid/3bfa81864.html>.

⁴³ Human Rights Committee in its General Comment N° 27: Article 12 (Freedom of Movement): '4. Everyone lawfully within the territory of a State enjoys, within that territory, the right to move freely and to choose his or her place of residence. In principle, citizens of a State are always lawfully within the territory of that State. The question whether an alien is "lawfully" within the territory of a State is a matter governed by domestic law, which may subject the entry of an alien to the territory of a State to restrictions, provided they are in compliance with the State's international obligations. In that connection, the Committee has held that an alien who entered the State illegally, but whose status has been regularized, must be considered to be lawfully within the territory for the purposes of article 12. Once a person is lawfully within a State, any restrictions on his or her rights guaranteed by article 12, paragraphs 1 and 2, as well as any treatment different from that accorded to nationals, have to be justified under the rules provided for by article 12, paragraph 3'.

⁴⁴ HRC, General Comment No. 27: Freedom of Movement, UN Doc. CCPR/C/21/Rev.1/Add.9, 2 Nov. 1999, para. 4, available at <http://www.unhcr.org/refworld/docid/45139c394.html>.

⁴⁵ A. Edwards, *Back to Basics: The Right to Liberty and Security of Person and "Alternatives to Detention" of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, UNHCR Legal and Protection Policy Research Series, PPLA/2011/01.Rev.1, April 2011, page 16, available at: <http://www.unhcr.org/refworld/docid/4dc935fd2.html>.

threat they pose themselves and may only be applied pending the determination that that person is a refugee, continuing after this only if the threat persists.⁴⁶ Most pertinent in the context of applying Article 9 of the 1951 Convention is the principle of proportionality and non-discrimination (Articles 3 and 8, 1951 Convention), in which any measures adopted would need to be clearly proportionate to the objective and must not target particular persons because of their nationality. As noted above, expulsion is not available as a measure to be taken (see “VI. The obligation of non-refoulement” above).

7.5 Reinforcing Article 26 of the 1951 Convention is Article 12 of the ICCPR which similarly guarantees the rights of choice of residence and freedom of movement for persons lawfully in the territory, including refugees and asylum-seekers.⁴⁷ Article 12 permits restrictions on such a right in very limited circumstances. Article 12(3) provides that any such restrictions (i) must be provided for by law (that is, it must have a lawful basis in legislation); (ii) only imposed to serve one of the permissible purposes and be necessary to protect them; and (iii) must be consistent with other rights in the Covenant, including that of non-discrimination.⁴⁸The United Nations Human Rights Committee has stressed that in applying restrictions on lawful aliens, ‘it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them’.⁴⁹ It has further noted that ‘States should always be guided by the principle that the restrictions must not impair the essence of the right’.⁵⁰Such safeguards are also reflected in Article 12 of the Banjul Charter.

7.6 From the information that has been made available about the directive its conformity with a number of these safeguards is difficult to establish. In the first instance, the legal basis of the directive has not been adequately articulated in the information available to UNHCR. Secondly, it will apply to refugees and asylum-seekers on a group basis and regardless of their personal circumstances. Thirdly, the objectives

⁴⁶ U. Davy on Article 9, in: Andreas Zimmerman (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford Commentaries on International Law), Oxford University Press Inc. (New York) (2011), pp. 781-803.

⁴⁷ Article 12 of the ICCPR provides: ‘1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. 2. Everyone shall be free to leave any country, including his own. 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant. 4. No one shall be arbitrarily deprived of the right to enter his own country’.

⁴⁸ Art 12(3) of the ICCPR provides an exhaustive list of justifications to limit the right to freedom of movement. Human Rights Committee, General Comment No. 27: Article 12 (Freedom of Movement), paras. 12 and 14.

⁴⁹ *Ibid.*, para. 14.

⁵⁰ *Ibid.*, para. 13.

of the directive are not really elaborated. While reference has been made to national security considerations, without an elaboration of these considerations as they relate to specific refugees and asylum-seekers, the directive, its nature and scope appear to be extreme and disproportionate.

7.7 In addition to the legal standards in respect of choice of residence or freedom of movement outlined above at paragraphs 7.1-7.5, more generally, any restrictions on these rights under international law are subject to a number of due process safeguards. Such safeguards cannot render a decision to restrict one's movement lawful if it otherwise conflicts with the standards at paragraphs 7.1-7.5. However, the failure to implement the following due process safeguards would render an otherwise lawful decision to restrict one's choice of residence or freedom of movement unlawful or arbitrary as a matter of international law. Such due process safeguards include at a minimum the following:

- i. to be informed of the order/measure, their rights in connection with the order, including procedures to challenge that order and its application to him/her, in a language and in terms which they understand, and with reasonable notice;
- ii. to be informed of the right to legal counsel;
- iii. to be brought promptly before a judicial or other independent authority to have the decision reviewed. The reviewing body must be independent of the initial detaining authority, and possess the power to suspend, remove or vary the order in respect of the particular person;
- iv. either personally or through a representative, the right to challenge the lawfulness of the order before a court of law at any time and an effective remedy⁵¹;
- v. to contact and be contacted by UNHCR.⁵²

7.8 Where any measures imposed under the directive are more appropriately considered to be forms of detention, or deprivations of liberty, rather than restrictions

⁵¹ Article 2(3) ICCPR.

⁵² UNHCR EXCOM Conclusion, No. 85 (XLIX) – 1998, available at: <http://www.unhcr.org/refworld/docid/3ae68c6e30.html>. See, also, WGAD, *Report to the Fifty-sixth session to the Commission on Human Rights*, E/CN.4/2000/4, 28 December 1999, Annex II, Deliberation No. 5; WGAD, *Report to the Fifty-fifth Session of the Commission on Human Rights*, E/CN.4/1999/63, 18 December 1998, , paras. 69 and 70, referring to principles 3, 6, 7, 8, 9 and 10.

on movement, the rights and obligations in respect of Article 9 of the ICCPR would apply. These would include:

- (i) the detention must be in accordance with the law;
- (ii) detention must not be arbitrary and as such, any decision to detain must be based on an assessment of the individual's particular circumstances according to the following:
 - detention is an exceptional measure and can only be justified for a legitimate purpose;
 - detention can only be resorted to when it is determined to be necessary, reasonable in all the circumstances and proportionate to a legitimate purpose; and
 - alternatives to detention need to be considered;
- (iii) detention must not be discriminatory;
- (iv) decisions to detain or to extend detention must be subject to minimum procedural safeguards;
- (v) conditions of detention must be humane and dignified; and
- (vi) the special circumstances and needs of particular asylum-seekers must be taken into account.⁵³

VIII. Conclusion

8.1 In light of the above submissions, UNHCR considers that there are critical aspects of the directive, or its consequences, that are not in conformity with international refugee and human rights law, including particularly the 1951 Convention, its 1967 Protocol and the OAU Convention.

8.2 UNHCR respectfully requests this Honourable Court to take account of its submissions, which are a testament of the Organization's preoccupations about the ultimate dire effects and consequences of the directive on ordinary asylum-seekers and refugees and their rights to seek and enjoy asylum in Kenya peacefully and

⁵³ See, for explanations, UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, Guideline 3 to 9, available at: <http://www.unhcr.org/refworld/docid/503489533b8.html>. For any detention or deprivation of liberty to be lawful and not arbitrary, it must be in accordance with and authorized by law, which in turn needs to be compatible with international law, and based on an assessment of the individual's particular circumstances. Further, detention must be an exceptional measure only justified for a legitimate purpose and necessary, reasonable in all circumstances, proportionate to the legitimate purpose and non-discriminatory.

without harassment, intimidation or arbitrary interference; to protection from refoulement; to the right of choice of residence and free movement; and to due process safeguards in respect of any such orders.

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