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KENYA

Denied Refuge

The effect of the closure of the Kenya/Somalia border on thousands of Somali asylum-seekers and refugees

AI Index: AFR 32.002.2007

INTERNATIONAL SECRETARIAT, 1 EASTON STREET, LONDON WC1X 0DW, UNITED KINGDOM

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May 2007 Summary AI Index: AFR 32.002.2007

The Government of Kenya announced the closure of the Kenya/Somalia border on 3 January 2007 following the resurgence of armed conflict between the Ethiopia-backed Transitional Federal Government of Somalia (TFG) and the Council of Somali Islamic Courts (COSIC) fighters in the beginning of December 2006. The Kenyan government justified the decision to close the border on the basis of security concerns, as it said it was concerned that fleeing COSIC fighters and possibly also Al-Qaeda operatives collaborating with them might enter Kenya and endanger Kenya's national security. Amnesty International is concerned that the border remains closed to date in breach of Kenya's international legal obligations to protect refugees and asylum seekers.

Amnesty International conducted a fact finding research mission to Kenya in March 2007. The organisation found that hundreds of asylum-seekers were forcibly returned to Somalia after the border closure. Thousands of asylum-seekers were, and continue to be, stranded at the Kenya/Somalia border. In addition, individuals fleeing the conflict are unable to cross into Kenya, and are highly vulnerable to human rights abuses by parties to the Somali conflict. Others have managed to cross into Kenya after facing additional grave risks of human rights abuse, and subsequently face possible denial of their right to seek asylum and access humanitarian assistance on account of unofficially crossing into Kenya. The border closure has also restricted humanitarian access to internally displaced persons (IDPs) on the Somali side of the border.

Amnesty International is deeply concerned that the Kenyan government's decision to close its border with Somalia violates its own Refugee Act of 2006, the UN Refugee Convention, the

OAU Refugee Convention and other international human rights law treaties to which Kenya is party, and has contributed to increased abuses of the human rights of those fleeing Somalia.

Amnesty International makes the following recommendations, among others, to the Kenyan government:

- Re-open its border with Somalia in order to allow entry to individuals fleeing from the conflict inside Somalia and seeking refuge in Kenya, in line with its obligations under international and national law;

- Ensure that all individuals seeking refuge in Kenya have access to effective protection through either a group determination process, or if there are concerns regarding exclusion, to a fair and satisfactory individualised asylum procedure, with due observance of procedural safeguards, including a personal interview with the right of appeal against a rejection;

- Instruct and train all relevant border officials including security personnel on their duty to respect the principle of *non-refoulement* and the duty not to reject an asylum claim without reference to the relevant authorities;

- Allow the UNHCR and other humanitarian agencies to deliver aid and other humanitarian assistance to all asylum-seekers regardless of their date of arrival into Kenya;

- Allow humanitarian assistance across the border to IDPs on a regular, predictable and safe basis;

- Ensure that no asylum-seeker is returned to Somalia where his or her life or freedom would be threatened or where he or she might be at risk of serious human rights violations.

This report summarizes a 16-page document (6,158 words), Kenya: Denied refuge: The effect of the closure of the Kenya/Somalia border on thousands of Somali asylum-seekers and refugees (AI Index: 52.002.007) issued by Amnesty International in May 2007. Anyone wishing further details or to take action on this issue should consult the full document. An extensive range of our materials on this and other subjects is available at http://www.amnesty.org and Amnesty International news releases can be received by email: http://www.amnesty.org/email/email_updates.html

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1 Introduction

The Government of Kenya announced the closure of the Kenya/Somalia border on 3 January 2007 following the resurgence of armed conflict between the Ethiopia-backed Transitional Federal Government of Somalia (TFG) and the Council of Somali Islamic Courts (COSIC) fighters in the beginning of December 2006. The Kenyan government justified the decision to close the border on the basis of security concerns. It said it was concerned that fleeing COSIC fighters and possibly also Al-Qaeda operatives collaborating with them might enter Kenya and endanger Kenya's national security.

Amnesty International is concerned that to this day the border remains closed in breach of Kenya's international legal obligations to protect refugees and asylum seekers. Amnesty International has on several occasions publicly called on the Kenyan government to re-open its border in compliance with Kenya's obligations under International law. In addition, Amnesty International has written to the Kenyan government expressing concerns at the closure of the border and the impact of this decision on the human rights of asylum-seekers. The organisation has not received any replies from the Kenyan government.

In March 2007, Amnesty International conducted a research mission to Kenya in order to gather information about the impact of the border closure on the human and refugee rights of asylum-seekers and refugees from Somalia. Amnesty International delegates did not enter into Somalia. The delegation met a number of United Nations (UN) humanitarian agencies and international non-governmental organisations in Nairobi who were working on Somalia. The delegation also visited Dadaab refugee camp on the Kenya side of the border, which hosts most of the long-

term and recently arrived Somali refugees and asylum seekers in Kenya. The delegates interviewed a number of asylum-seekers and refugees who had fled Somalia as a result of the ongoing conflict, including those who had arrived on the day of or after the border closure.

Amnesty International has documented human rights violations resulting from and related to the border closure, and calls on the Kenyan authorities to re-open the border and ensure respect for international refugee protection law, to which Kenya is a party.

Amnesty International is gravely concerned that the border closure has caused violations of human and refugee rights of asylum-seekers and that the Kenyan authorities have failed to act in compliance with both international law and standards, and Kenyan law. Reports and testimonies to Amnesty International delegates indicate that individuals were, and continue to be, stranded at the Kenya/Somalia border. Individuals fleeing the conflict are unable to cross into Kenya, and are highly vulnerable to human rights abuses by parties to the Somali conflict. Some were forcibly returned to Somalia after the border closure. Others have managed to cross into Kenya after facing additional grave risks of human rights abuse, and subsequently face possible denial of their right to seek asylum and access humanitarian assistance on account of unofficially crossing into Kenya. The border closure has also restricted humanitarian access to internally displaced persons (IDPs) on the Somali side of the border.

2 Kenya's violations of the principle of *non-refoulement*

The right to seek sanctuary from persecution is enshrined in international law. The right to seek asylum is contained in the founding international human rights document, the Universal Declaration of Human Rights. Article 14(1) states that "Everyone has the right to seek and to enjoy in other countries asylum from persecution". The fundamental principle of *non-refoulement* also inherently requires access to the territory to seek protection. Article 33(1) of the 1951 UN Convention relating to the Status of Refugees (the UN Refugee Convention) to which Kenya is party provides for this:

> "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".

Refoulement is prohibited under Article 3 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The article provides that no one should be sent back to a country where they would be at risk of torture.

The principle of *non-refoulement* is further reflected in regional international law. The 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention on Refugees) which Kenya has ratified, affirms the principle of refugee protection in Africa.[1] The African Charter on Human and Peoples' Rights, to which Kenya is also a party, specifically includes "the right, when persecuted, to seek and obtain asylum".[2] Kenya's own recently enacted refugee law, The Refugees Act, 2006,[3] also makes provision for "the non-return of refugees, their families or other persons". Section 18 of this Act provides that:

> "No person shall be refused entry into Kenya, or expelled, extradited from Kenya or returned to any other country or to be subjected to any similar measure if, as a result of such refusal, expulsion, return or other measure, such person is compelled to return to or remain in a country where the person may be subject to persecution…"

The principle of *non-refoulement* is the cornerstone of the protection of refugees and asylum-seekers under international law. It is so widely accepted as a principle of customary international law that it is generally regarded as binding on all states, whether or not they have signed the international refugee treaties. The right to *non-refoulement* applies to all refugees, including asylum-seekers whose status has not yet been determined and those seeking entry to a country.[4] The Executive Committee of the United Nations High Commissioner for Refugees (UNHCR) has repeatedly stated that in all cases, the "fundamental principle of *non-refoulement* including non-rejection at the frontier" must be ensured.[5]

According to estimates, there were between 5,000 and 7,000 asylum–seekers waiting on the Kenya/Somali border in dire need of humanitarian assistance at the time of the border closure in January 2007.[6] At that time, there was also a complete suspension of activities at the refugee reception centres on the Kenya side where asylum-seekers would normally have been registered and screened before being taken to refugee camps in Kenya, such as nearby Dadaab.

About 400 people were *refouled* back into Somalia on the day of the border closure. These people, mostly women and children, were loaded into trucks at the Liboi reception centre and driven to the Somalia side of the border and left at an

[1] Article 2
[2] Article 12(3)
[3] Act No. 13 of 2006, assented to into law by the Kenyan President on 30 December 2006.
[4] Amnesty International (1997) *Refugees: Human Rights Have No Borders* pp 7, 31.
[5] Excom Conclusion Nos. 6, 22, 81, 82, 85.
[6] Amnesty International interviews with UN agencies and non-governmental organisations working on Somalia, 14-16 March 2007.

unknown place without regard to any kind of humanitarian assistance they may have been able to access.[7] Further information obtained by Amnesty International indicates that some of those forcibly returned into Somalia had in fact already been pre-registered with UNHCR in Kenya a few days before the *refoulement.*[8]

Khadija, a 24-year-old mother of four children was one of those who had been forcibly returned to Somalia on the day of the border closure.[9] She subsequently made her way back into Kenya with much difficulty and risk. She told Amnesty International what happened on the day they were *refouled,* and narrated the subsequent ordeal that asylum-seekers underwent:

> "We were about 30 families who had fled to Dhoblei town [on the Somalia side of the border] from the heavy fighting between Ethiopian-backed TFG fighters and COSIC fighters in Kismayu. We managed to cross into Kenya at Liboi town on the Kenyan side of the border and were registered by UNHCR officials there. After registration we were transferred to a UNHCR refugee transit centre, only to be arrested by Kenyan police officers. We were ordered into a waiting truck and driven back to the Somalia side of the border under the guard of Kenyan police officers. We were dropped and left in the middle of nowhere…We had to go on foot for some days from where we had been left, back to Dhoblei town. Some people decided to stay in Dhoblei, others decided to walk heading back to Kismayu and some like me decided to come back into Kenya illegally. In the process of trekking back into Kenya, we decided to come through the bush. While walking in the bush, we would encounter helicopters hovering over the bush. On one such occasion a helicopter was flying low and we thought it was the Kenyan security personnel looking for persons who would have been attempting to cross into Kenya through the bush. There was so much confusion and panic and everybody started running in order to hide. As a result I lost all my children and did not manage to trace any of them. I feel that because of the decision to return us to Somalia I lost my children. My husband was left with no option but to return to the bush and possibly back into Somalia in order to look for our children…To this day, I have neither heard from my husband nor seen or heard about my children…I don't know whether they are safe, especially with the fighting back in Somalia… "[10]

Returning people to Somalia who would be at obvious risk of serious human rights violations inherent in the conflict constitutes a clear violation of the principle of *non-refoulement*, regardless of whether these people have been allowed access to asylum-seeking procedures and even if their claim might eventually be refused.[11]

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[7] See Amnesty International "Kenya: Government must respect the rights of refugees under international Law" AI Index: AFR 32/001/2007, 15 January 2007, available at http://web.amnesty.org/library/Index/ENGAFR320012007?open&of=ENG-KEN.
[8] Amnesty International interviews with refugees in the Dadaab refugee camp.
[9] All the names of the persons interviewed have been changed.
[10] Amnesty International interview with Khadija, 20 March 2007.
[11] Amnesty International (1997) *Refugees: Human Rights Have No Borders* p31.

Amnesty International asked all the refugees interviewed during the mission what they felt about returning to Somalia. They were all unequivocal that given the choice, they would not return to Somalia in the present circumstances, mainly because of the fighting between different forces and militias and the grave threats this would pose to their lives and security.[12] This fear is vindicated by the ongoing heavy fighting in Somalia, particularly in the capital Mogadishu, where estimates indicate that nearly 100,000 people are believed to have fled fighting (most of them from the capital to the adjacent Shabelle region to the south-west of Somalia) since the beginning of February, including 47,000 in just two weeks in April.[13]

Amnesty International has received first-hand accounts of civilian casualties in the course of the armed conflict, where there has hardly been any civilian protection.[14] The fact that most of those interviewed were not even able to identify who their attackers were demonstrates the myriad of armed forces or groups in the Somalia conflict. **Hassan**, a 17-year old male originally from Gedo region in Somalia narrated to Amnesty International how he had lost sight his right eye as a result of an aerial attack:

> "It was one afternoon in early January 2007. I was herding cattle in a place called Kulbiu in Gedo region. I saw a helicopter fly over the grazing field and did not think there was any danger. I don't remember what happened well. However, I can only recall that all over sudden there was an aerial attack -I don't know whether it was an aerial bomb or a bullet. All I remember is that I was in acute pain especially in my right eye and I could not see anything. I don't know the identity of the attackers. I cannot even exactly remember what the helicopter looked like...I keep asking myself why the attackers targeted me when I was an innocent person herding cattle alone in the grazing field and not a member of any of the armed groups…"

All the interviewees narrated to Amnesty International the human rights violations they experienced or that they witnessed being inflicted on other civilians detained by different armed forces or groups during the armed conflict in the past year. These human rights violations include extrajudicial executions, torture, arbitrary detentions and rapes. The violations were reportedly perpetrated by all the parties to the Somalia conflict, including the Ethiopian, TFG, COSIC forces/security personnel and Somalia clan-based armed groups.[15]

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[12] Amnesty International interviews with refugees in Dadaab refugee camp, 17-23 March 2007.

[13]The recent fighting between the Ethiopian backed interim government forces on the one hand and on the other, fighters linked with the Hawiye clan (the dominant clan in Mogadishu) and militant Islamists has been described by the International Committee of the Red Cross as the worst fighting for 15 years in Mogadishu. See, "Somalia: Fears of resumption of conflict in Mogadishu; 400 civilians killed and thousands fleeing", AI Index: AFR 52/007/2007,).

[14]Amnesty International interviews with refugees in Dadaab refugee camp, 17 – 20 March 2007.

[15]Amnesty International interviews with refugees in Dadaab refugee camp, 17 – 20 March 2007.

Most of the asylum-seekers who were at the Somalia side of the border in Dhoblei town at the time of the border closure appear to have dispersed, some possibly returning to their place of origin and many going to town centres such as Kismayu. There are very strong concerns that the IDPs who have moved to the town centres such as Kismayu are at high risk of violence as they often lack clan and family protection.[16] Amnesty International talked to a number of refugees from the Somali minority groups, who have no clan protection. Most of them asserted that they had been specifically targeted for persecution by the different armed groups such as COSIC fighters or clan-based armed or militia groups, solely on the basis of being minorities and not members of a clan. According to the refugees, this often resulted in targeted attacks on them and their families resulting in deaths and injuries, the looting of their belongings and property, and their forced conscription into armed groups.[17] Narrating why she fled Somalia to seek refuge in Kenya in December 2006, **Safia**, a 24-year old mother of two from the Ashraf religious minority, had the following to say regarding systematic attacks on minorities and a pattern of lack of protection for members of different minority groups:

> "Before coming to Kenya in December 2006, I lived with my husband in Baidoa town in Somalia and I used to be a vendor of groceries in one of the local markets. We fled Somalia because of persecution related to the fighting around Baidoa between TFG and COSIC forces. There were also other clan-based armed militia operating in Baidoa involved on either side of the fighting. The main clan-based militia was from the Rahenwein, one of the majority clans in Baidoa. When coming from the market after my day's work, the armed fighters from this clan-based militia would stop us on our way home and loot all we had, leaving us with nothing to take home. They would also come to our homes and beat us up. In one such attack my husband and I were beaten for several hours. We decided to flee Somalia on one particular day in October/November 2006 when fighters from this clan-based militia attacked our home while I was in the market. I reached home only to realize that they had looted property in the house and that my husband and kids had fled the house. I later managed to trace them and we decided to leave Somalia by hiding and walking through the bushes surrounding Baidoa. These attacks happened to other Ashraf families and I believe we were targeted for no reason other than that we were members of this minority."[18]

In addition, refugees were particularly concerned about sexual and gender based violence against women and girls. These concerns are reflected in reports from NGOs working with IDPs in Somalia.[19] **Mariam,** a 40-year old mother of four who fled from the fighting in Kismayu town, told Amnesty International about the painful

[16]Most of those interviewed by the Amnesty International testified on the general vulnerability of civilians in the armed conflict in Somalia. Interviewees however said that for the fortunate, especially the majority clans, clan and family protection would serve as some form of protection from the conflict.
[17]Amnesty International interviews with refugees in Dadaab refugee camp, 17 – 20 March 2007.
[18] Amnesty International interview with Safia in Dadaab refugee camp, 17 March 2007.
[19] Amnesty International interviews with refugees in Dadaab refugee camp, 17 – 20 March 2007.

ordeal of witnessing the rape of her two teenage daughters (now with her in Dadaab) by members of an armed group who were manning a road block that they encountered while fleeing. She also explained that rape by members of armed groups (mainly clan-based) manning road blocks was common.[20] She concluded that:

> "Both my daughters, especially the 21-year old who is the younger of the two, remain sick and badly traumatised by the rape ordeal…I don't know whether they will ever recover from the incident".[21]

Amnesty International is deeply concerned that by closing the border to any person fleeing from possible persecution mainly from and as a result of the armed conflict in Somalia, Kenya is in serious breach of its obligation under international and national human rights and refugee law to respect the principle of *non-refoulement* and not to forcibly return or deny access at the border to people at risk of serious human rights abuses, including rape.

3 The rationale for the closing of the Kenya/ Somalia border

As stated above, the Kenyan government has cited security risks as the primary reason for its decision to close the border.

Under the UN Refugee Convention, it is permissible for the Kenyan government to ensure its security concerns are properly addressed. However, this should only be done after granting a person access to the territory and a fair and satisfactory process of individualised assessment in the case of those thought not to be covered by refugee protection. Article 1(F) of the UN Refugee Convention states that the provisions of the Refugee Convention, "shall not apply to any person with respect to whom there are serious reasons for considering that…

(a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

[20] Amnesty International interview with Mariam in Dadaab refugee camp, 18 March 2007.
[21] Amnesty International interviews with Mariam in Dadaab refugee camp, 18 March 2007.

(c) He has been guilty of acts contrary to the purposes and principles of the United Nations."[22]

In addition, to ensure the fundamental civilian nature of the refugee protection regime, active combatants are excluded.[23]

Further, Article 33 of the UN Refugee Convention states that the principle of *non-refoulement* "may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country". A state considering invoking this provision must, however, ensure that an individual asylum-seeker poses a clear danger to the public or to national security. It should take into account the proportionality of the sentence faced relative to the crime; the circumstances of the crime and other relevant factors.[24] As with the exclusion factors cited in Article 1(F) of the UN Refugee Convention, this determination requires access to a fair and satisfactory asylum procedure.

Amnesty International believes that even if an individual is not considered to be a refugee, international human rights law and the principle of *non-refoulement* provide absolute protection if there is a risk of serious human rights violations. In addition, all asylum-seekers from Somalia are considered as "*prima-facie* or *de facto*" refugees because they cannot safely return to their country of origin where most of them have been targeted and forced to flee as a result of persecution, massive human rights violations, armed conflict and other circumstances that have seriously disturbed public order, threatening their lives, safety and freedom.[25] Amnesty International believes that this recognition does not preclude the ability to provide a fair and satisfactory process of determination and identification of individuals thought not to be covered by refugee protection.

[22]See also, UNHCR, "Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees", HCR/GIP/03/05, 4 September 2003 (hereafter "Guidelines on Exclusion"), at paragraph 7, and the accompanying "Background Note on the Application of the Exclusion Clauses" (hereafter "Background Note on Exclusion"), at paragraphs 18–20.

[23]According to the Guidelines on Exclusion Clauses: "The presumption of refugee status does not apply to active combatants. Armed or military activities are by nature incompatible with the civilian character of asylum. As a consequence, those who continue to take an active part in armed conflict – whether international or non-international – are not eligible for refugee protection and assistance. Individuals who have taken part in armed or military activities but who have given these up (that is, former combatants) should also be kept outside the scope of *prima facie* recognition, but may apply for asylum and may be admitted into asylum procedures under certain conditions."

[24]Amnesty International (1997): *Refugees: Human Rights Have No Borders*, pp 32-33.

[25]Amnesty International (1997): *Refugees: Human Rights Have No Borders*, p 27. There is general recognition that people who do not fit within the UN Refugee Convention's criteria or who have not been formally recognized as refugees but cannot safely return to their country of origin are considered "*de-facto*" refugees.

Amnesty International is deeply concerned that the closure of the border, with the result of prohibiting access to the Kenyan territory is in and of itself a breach of international law, as it automatically precludes access to a fair and satisfactory asylum procedure which would assess the protection needs of those seeking refuge, and identify individuals who were thought not to be in need of refugee protection in line with international law.

Amnesty International understands that before the border was closed, the Kenyan government had received offers for the provision of additional capacity in receiving and screening individual asylum-seekers coming into Kenya from Somalia, in an effort to address the security concerns raised by the Kenyan authorities.[26] Apparently, these offers were, however, ignored by the Kenyan government.[27]

Amnesty International is particularly concerned that the majority of those now unofficially crossing the border are vulnerable asylum-seekers fleeing out of fear of persecution and who are at grave risk of human rights violations in Somalia.

4 The impact of the border closure on asylum seekers

Amnesty International established that up to 2,000 asylum seekers may have unofficially crossed the border since it was closed in January,[28] exacerbating the risk of human rights violations to the thousands of individuals who may have wished or tried to cross the border since the closure.

All the individual testimonies obtained by Amnesty International delegates during their visit revealed harrowing experiences of human rights abuses in the process of reaching the border.[29] The abuses suffered by the asylum-seekers ranged

[26]Amnesty International interview with non-governmental organizations working on Somalia, 11-17 March 2007.
[27]Amnesty International interview with non-governmental organizations working on Somalia, 11-17 March 2007.
[28]Amnesty International's interviews with UN aid agencies and non-governmental organizations working in Somalia, 11-17 March 2007. Amnesty International was told that the great majority of those identified as having arrived since the border closure are new arrivals from Somalia although it cannot be ruled out that included in this number are refugees who have been in the Kenyan refugee camps and are seeking to register in order to obtain additional food tokens. Regarding new arrivals from Somalia, Article 31(1) of the UN Refugee Convention provides that: "The 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 authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence".
[29]Amnesty International interviews refugees in Dadaab refugee camp, 17 – 20 March 2007.

from killings by armed groups, looting and theft of personal property, to torture and rapes in the hands of different armed groups for instance the story of **Mariam** and the rape ordeal suffered by her two daughters.[30] These accounts also highlighted the multiple grave risks faced by internally displaced persons in Somalia as they flee the conflict, often meeting road blocks and armed groups on their way. The threat of starvation and disease is constant, as they often walked hundreds of kilometres for many days or weeks, with minimal water, food or shelter.

Furthermore, for those who did manage to cross into Kenya, many said that other relatives; family and friends (particularly the weak, elderly and the sick) were not able to complete the journey and remained internally displaced in Somalia and at grave risk of further human rights violations.[31]

Faiza, one of the asylum-seekers who arrived in the Kenyan Dadaab refugee camp in February 2007, more than a month after the border closure, narrated some of the grave risks of human rights abuses faced by individuals seeking to unofficially cross into Kenya:

> "… It was a nightmare entering Kenya when the border was closed. We had to try and enter at night because of security personnel and helicopters patrolling the areas and bush near the Kenyan border. During the day we had to hide under trees. This was very difficult. I know of about seven families who did not manage to cross the border because of the risks and difficulties. I presume that they had to go back all the way, risking harm, attacks and insecurity from armed groups on their way back to their towns or villages. I have not heard of them and their fate but I think they must have been forced to go back to seek refuge wherever they could in Somalia with all the risks to their lives and security with the armed conflict there…"[32]

Amnesty International is particularly concerned that the decision to close the border is putting individuals at further risk of human rights abuses as they seek alternative ways of crossing into Kenya in order to avoid Kenyan security personnel manning the border. From the testimonies received by Amnesty International, it was clear that most of the asylum-seekers crossing into Kenya after the border closure go through additional hardship, over and above the risks to human rights abuses faced by all individuals fleeing from Somalia, and are placed at a higher risk of suffering human rights abuses as a direct result of the border closure.[33]

[30]Amnesty International interview with **Mariam** (n 20 above).
[31]Amnesty International interviews with asylum seekers in Dadaab refugee camp, 17 – 20 March 2007. See also, "Somalia: Fears of resumption of conflict in Mogadishu; 400 civilians killed and thousands fleeing", AI Index: AFR 52/007/2007, 4 April 2007, available at http://web.amnesty.org/library/Index/ENGAFR520072007 (last accessed 5 April 2007).
[32]Amnesty International interview with Faiza in Dadaab refugee camp, 20 March 2007.
[33]Amnesty International interviews with refugees in Dadaab refugee camp, 17 – 20 March 2007.

5 Violation of the rights of refugees once in Kenya

Amnesty International is deeply concerned that for the thousands of asylum-seekers who have crossed into Kenya after the border closure, the fact that they crossed unofficially might lead to further human rights violations. Many interviewees were reluctant to openly admit crossing into Kenya after the border closure.[34]

Amnesty International delegates found out that the border closure has affected asylum-seekers' capacity to register for the purpose of accessing humanitarian aid such as food and medical care once in the refugee camps. Amongst those interviewed, the first to arrive after the border closure reported being able to register with the UNHCR. Amnesty International was informed by the interviewees that the process of registering new arrivals was subsequently halted.[35]

Faced with this predicament, a significant number of asylum seekers are not yet pre-registered with the UNHCR with the consequence that they have inadequate access to humanitarian aid from the UNHCR and other humanitarian agencies. Many of those interviewed by Amnesty International complained that they did not have ration cards which would enable access to food rations for them and their families. They had to rely on the goodwill of registered asylum seekers or refugees (mostly their friends and relatives) in order to survive.[36]Given the strong clan structures of Somali social relations, the current situation further disadvantages members of minority groups, who are outside the clan system and subject to systematic discrimination as a result.

Amnesty International believes that by virtue of its obligations under international refugee and human rights law, the Kenyan government has an obligation to ensure effective protection and assistance to all refugees and asylum-seekers and should ensure that the UNHCR and other humanitarian agencies continue to provide such assistance and protection to individual asylum-seekers who arrive, irrespective of the border closure.

[34]Amnesty International's delegates encountered many instances where interviewees only admitted this fact the day after the interview. Moreover, this was only after they were reassured that the information they volunteered to the delegates would not be used to their detriment by being passed on to the Kenyan authorities.
[35]Amnesty International interviews with refugees in Dadaab refugee camp, 17 – 20 March 2007.
[36]Amnesty International interviews with refugees in Dadaab refugee camp, 17 – 20 March 2007.

6 Restrictions to the provision of humanitarian assistance to IDPs in Somalia

Kenya has an obligation under international human rights law to ensure that it does not impose undue and unreasonable restriction to the delivery of aid and other humanitarian assistance to displaced persons on the Somalia side of the border. The International Covenant on Economic, Social and Cultural Rights (ICESCR), to which Kenya is party, provides in Article 2 that:

> "Each State Party to the present Covenant undertakes to take steps, individually and *through international assistance and co-operation*, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures." (*Emphasis added*)

The UN Committee on Economic, Social and Cultural Rights, the body in charge of interpreting the obligations of States under the ICESCR, has in its General Comment on the Right to Adequate Food clarified that the right to adequate food under Article 11 of the ICESCR includes the obligation that:

> "States parties should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required…States have a joint and individual responsibility, in accordance with the Charter of the United Nations, to cooperate in providing disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and internally displaced persons…"[37] (*Emphasis added*)

Amnesty International established that the humanitarian needs of the fleeing Somali IDPs are huge. These humanitarian needs range from acute malnutrition and dire need for healthcare, to a total lack of adequate shelter and access to food, water or sanitation for IDPs, many of whom are living under trees, on the roadside or out in the open. Further south of Mogadishu in the Shabelle regions, people are reported to queue for more than 12 hours for water as available boreholes are unable to meet demands.

Due to the insecurity and extremely difficult logistical situation in Somalia as a consequence of conflict, an earlier flooding emergency in November and December 2006 and extreme under-development of infrastructure in these remote areas, the only effective way to deliver humanitarian emergency aid to Somali IDPs near the Kenyan border is through Kenya. Following the border closure, humanitarian agencies were

[37]UN Committee on Economic, Social and Cultural Rights, "General Comment No. 12: The Right to Adequate Food (Article 11)", E/C.12/1999/5, Adopted 12 May 1999, Paras 36, 38.

unable to cross the border to deliver food and non-food items on the Somalia side for about seven weeks.[38] Information available to Amnesty International indicates that even when the Kenyan government allowed them to cross over, aid and humanitarian agencies were often prevented from so doing by local authorities who claimed not to be aware of the government permission.[39] It appears that the relevant Kenyan government ministry has thus either failed, or is unwilling, to communicate and implement its amended policy to other ministries and relevant Kenyan authorities. The situation subsequently improved and most humanitarian agencies have now been able to deliver emergency aid to the Somalia side of the border. Amnesty International is, however, concerned that the continued border closure means that humanitarian agencies are not guaranteed free access into Somalia.

Already, reports reaching Amnesty indicate that by late March, humanitarian aid agencies were again often unable to reach Somali IDPs stranded in Somalia. The restrictions on access are reportedly because security personnel at the Kenyan border refuse to let the humanitarian aid agencies through.[40] Heavy fighting in Mogadishu in the last weeks of March has resulted in further forced displacements. These reports indicate that there are currently hundreds of Somali refugees who are stranded near the Kenyan border after trekking hundreds of kilometres and in dire need of humanitarian relief. They are without food, medicine or a supply of clean water, and faced with a cholera outbreak in Dhoblei town on the Somalia side of the border.[41]

Without a firm commitment from the Kenyan government to allow humanitarian agencies to freely access those in need across the border in Somalia, the conditions of IDPs in Somalia, including their access to even minimum life-sustaining levels of food, water, sanitation and health care, as required under international human rights law, will continue to be severely affected. Amnesty International therefore calls on the Kenya Government to ensure that no unnecessary restrictions are placed on the delivery of needed humanitarian assistance across its border.

7 Conclusion

The Kenyan government's decision to close its border with Somalia violates its own Refugee Act of 2006, the UN Refugee Convention, the OAU Refugee Convention and other international human rights law treaties to which it is party, and has contributed to increased abuses of the human rights of those fleeing Somalia.

[38] Amnesty International's interviews with international humanitarian and relief agencies working with Somalia refugees and IDPs, 17-23 March 2007

[39] Amnesty International's interviews with international humanitarian and relief agencies working with Somalia refugees and IDPs, 17-23 March 2007.

[40] See BBC, "Fleeing Somali refugees stranded", available at http://news.bbc.co.uk/2/hi/africa/6521313.stm (last accessed 4 April 2007).

[41] BBC Report, ibid.

8 Recommendations

Amnesty International urgently calls on the Kenyan government to:

a) Re-open its border with Somalia in order to allow entry to individuals fleeing from the conflict inside Somalia and seeking refuge in Kenya, in line with its obligations under international and national law;

b) Ensure that all individuals seeking refuge in Kenya have access to effective protection through either a group determination process, or if there are concerns regarding exclusion, to a fair and satisfactory individualised asylum procedure, with due observance of procedural safeguards, including a personal interview with the right of appeal against a rejection;

c) Instruct and train all relevant border officials including security personnel on their duty to respect the principle of *non-refoulement* and the duty not to reject an asylum claim without reference to the relevant authorities;

d) Allow the UNHCR and other humanitarian agencies to deliver aid and other humanitarian assistance to all asylum-seekers regardless of their date of arrival into Kenya;

e) Allow humanitarian assistance across the border to IDPs on a regular, predictable and safe basis;

f) Ensure that no asylum-seeker is returned to Somalia where his or her life or freedom would be threatened or where he or she might be at risk of serious human rights violations;