



**UNHCR's Oral Submissions as 1<sup>st</sup> Amicus Curiae in the High Court of Kenya at  
Nairobi, Constitutional and Human Rights Division, Petition No. 115 of 2013**

**9 May 2013**

*(abridged version)*

My lord, the 1st Amicus Curiae's submissions address the following three fundamental issues:

- 1. The right to seek and enjoy asylum peacefully and without harassment, intimidation or arbitrary interference;**
- 2. The obligation of the principle of *non-refoulement*;**
- 3. The rights of choice of residence and freedom of movement.**

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

- 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), 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 under international human rights law. They are 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 in the country of asylum.<sup>1</sup>
- Seeking asylum is thus not an unlawful act and refugees and asylum-seekers, even those who have entered or remained in the territory without authorization, are protected from penalization, including detention or other restrictions on movement for having sought asylum pursuant to article 31 of the 1951 Convention. Article 31(2) provides that only necessary

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<sup>1</sup> See page 7 of the submissions; paragraph 5.1 for details. The international instruments cited are also attached to the submission and relevant sections are highlighted for ease of reference .

restrictions can be placed on their movement and only until their status is regularized.<sup>2</sup>

- A directive subjecting all asylum-seekers and refugees to forced relocation from urban centres to camps where their freedom of movement will be severely restricted, may be viewed as being punitive and amount to a breach of Article 31 of the 1951 Convention.

## **2. The obligation of *non-refoulement***

- The obligation of non-refoulement is the cornerstone of international refugee protection and is considered a norm of customary international law, binding on all States. 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'— whether repatriation, removal, expulsion, deportation, extradition, rejection at the frontier or non-admission, or induced return— to a territory in which a refugee is at risk of threats to his/her life or freedom.
- Article II(3) of the OAU Convention permits no exceptions to the prohibition of *refoulement*, and is thus closely aligned with the general position at international law. Article II(3) is considered to be *lex specialis* as the OAU Convention was developed to address the *particular* refugee problems in Africa..<sup>3</sup>

## **3. The rights of choice of residence and of free movement**

- 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. 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<sup>4</sup>.
- 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

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<sup>2</sup> Ibid Page .8 at paragraph 5.2

<sup>3</sup> See page 9 of the submissions for a detailed explanation of the application of the 1969 OAU Convention.

<sup>4</sup> See page 12, and 13 of the submissions, paragraph 7.1 and 7.1 of the submissions

example, administrative delays, are considered “lawfully” in the territory for the purposes of benefiting from this provision. The 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 ICCPR 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<sup>5</sup>.

These are the highlights of the 1st Amicus Curiae. The full text is available for ease of reference.

Dated at Nairobi the 9th of May 2013.

Chigiti and Chigiti Advocates

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<sup>5</sup> Ibid at page 13; paragraph 7.2