

LEGAL MEMO ON THE REPATRIATION OF REFUGEES BY THE KENYAN GOVERNMENT

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BACKGROUND

There are currently about 662,850 refugees and asylum seekers in Kenya out of which refugees account for **444,330(Somalia)**, **125,120 (South Sudan)**, **19,510 (Ethiopia)** and **13,950** from other countries. (2015 UNHCR Country Operations Profile – Kenya, UNHCR (last visited May 11, 2016). All of the refugees and asylum seekers in Dadaab are Somali citizens. (Kenya: Dadaab, UNHCR (last updated Feb. 28, 2015).

Following a number of deadly terrorist attacks carried out by members of the Somalia-based terrorist organization known as Al-Shabaab, the Kenya Government initiated calls to have refugee camps within the country closed. In November 2013, several weeks after the al-Shabaab attack on Westgate shopping centre in Nairobi, the then Interior Minister Joseph Ole Lenku issued an order citing "emergency security challenges", that all Somali refugees living in urban areas to return to their camps. In addition, the directive ordered an immediate halt to all refugee registrations and service provision.

Subsequently, in March 2014 a security operation dubbed 'Usalama Watch' was initiated by Government targeting Somalis living in the Eastleigh neighbourhood of Nairobi. Both refugees and ethnic Somalis were detained in police cells and temporary holding camps at Kasarani Stadium where some were later deported after processes of screening. Several of those without identity cards were charged with 'unlawful presence' and others with 'residing outside designated areas without authority.

In December 2014, Kenya enacted a law aimed at forcing out of Kenya tens of thousands of Somali refugees and asylum seekers. It sought to accomplish this by amending the Refugees Act and putting a ceiling on the number of refugees that may be present in the country at a time. The law stated that "... [t]he number of refugees and asylum seekers permitted to stay in Kenya shall not exceed [150,000] persons." However, in response to multiple legal challenges to the constitutionality of the law, on

February 23, 2015, the Constitutional and Human Rights Division of the High Court of Kenya at Nairobi found the provision unconstitutional.

Again, following the April 2, 2015, deadly attacks at Garissa University, Kenya announced that it wants the Dadaab refugee complex closed immediately and its residents, who are all Somalis, moved to Somalia. On April 11, 2015, Kenya's Deputy President William Ruto declared that the United Nations High Commissioner for Refugees (UNHCR) must close the Dadaab refugee complex within three months or "we shall relocate them ourselves."

The most recent pronouncements on the same have been issued by the Ministry of Interior directing that, newly-arrived asylum seekers will not automatically receive refugee status, and the government will step up efforts to have those already living in the country removed. Consequently also, the Department of Refugee Affairs (DRA) responsible for refugee registration and management had been "disbanded" under the said regulations which have not yet been publicised.

NATIONAL AND INTERNATIONAL OBLIGATIONS ON REFUGEES

The laws relating to refugee status and protection in Kenya include:

- a) The Constitution of Kenya 2010 - Article 2(5) and 2(6) of the Constitution of Kenya 2010, all International Conventions that have been ratified by Kenya now form part of Kenyan law. The Constitution also offers a number of protections to refugees vide Chapter Five which guarantees the fundamental rights and freedoms of the individual.
- b) The Refugee Act No 3 of 2006 - an Act of Parliament to make provision for the recognition, protection and management of refugees and connected purposes. The Act lays down the institutional and legal framework for the recognition, protection and management of refugees. It establishes various offices and institutions which include a Department of Refugee Affairs (DRA) and the office of Commissioner for Refugee Affairs, the Refugee Appeal Board and the Refugees Affairs Committee. The Act further lays down provisions relating to recognition of refugees, asserts the principle of non refoulement⁸ and codifies the rights and duties of refugees in Kenya.

- c) The Geneva Convention Relative to the Protection of civilian persons in time of war 1949 - Article 44 protects refugees during war and provides that refugees cannot be treated as enemy aliens.
- d) Protocol Additional to the Geneva Conventions of 12th August 1949 and Relating to the Protection of Victims of International Conflicts (Protocol I) 1977 - Article 73 “persons who before the beginning of hostilities were considered stateless persons or refugees ...shall be protected persons ...in all circumstances and without any adverse distinction.”
- e) Convention Relating to the Status of Refugees 1951 (the Refugee Convention) - This was the first international agreement covering the most fundamental aspects of a refugee s life. It spelt out a set of human rights that should be at least equivalent to freedoms enjoyed by foreign nationals living legally in a given country and in many cases those citizens of that state. It sought to assure refugees of the widest possible exercise of fundamental rights and freedoms. The Convention notes (in its preamble) that the United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of refugees.
- f) Convention Relating to the Status of Refugees (1967) – The 1967 Protocol removed the geographical and the time limitations written into the original Refugee Convention under which mainly Europeans involved in events occurring before 1st January 1951 could apply for refugee status.
- g) Organisation of African unity (Now African Union) Convention Concerning Specific Aspects of Refugee problems in Africa 1969 (OAU Convention) - The OAU Convention accepted the 1957 Convention and expanded the definition of a refugee to include people who are compelled to leave the country not only as a result of persecution but also owing to external aggression, occupation, foreign domination and events seriously disturbing public order. (Article 8 & 2)
- h) International Covenant on Civil and Political Rights 1966 (ICCPR) - Articles 2, 12, 13: This is the main international treaty on civil and political rights and it stipulates that a state should ensure the civil and political rights of all individuals within its territory and subject to its jurisdiction (Article 2). The Covenant also guarantees freedom of movement and prohibits forced expulsion Article 12
- i) The Cartagena Declaration on Refugees (1984) – The refugee definition of the Cartagena Declaration builds upon the OAU Convention and adding to it the

threat of generalized violence, internal aggression, and massive violation of human rights. Although not formally binding the Cartagena Declaration has become the basis of Refugee policy in the region covered by the Organisation of American States (OAS) and has become incorporated into the national legislation of a number of states.

- j) Statute of the Office of the United Nations High Commissioner for Refugees - Pursuant to a decision of the General Assembly the office of the United Nations High Commissioner for Refugees (UNHCR) was established as of 1st January 1951. The statute of the office is annexed to resolution 428 (v) adopted by the UN General Assembly on 14th December 1950. According to the statute the Commissioner is called upon inter alia to provide international protection under the auspices of the United Nations to refugees falling within the competence of his office.
- k) In 2013, Kenya signed an agreement with the government of Somalia and UNHCR on voluntary repatriation of Somali refugees in Kenya. Tripartite Agreement Between the Government of the Republic of Kenya, the Government of the Federal Republic of Somalia and the United Nations High Commissioner for Refugees Governing the Voluntary Repatriation of Somali Refugees in Kenya, 2013. Under the agreement, return can only be carried out in specific circumstances, and does not entail the cessation of refugee status. The principle of voluntary return and the right to return in safety and dignity form the backbone of the Tripartite Agreement. The Preamble of the Agreement also reaffirms the prohibition of refoulement, which protects refugees from being sent to places where their lives or freedoms are in danger. Kenya and Somalia are bound by this principle as States Parties to the 1951 Convention Relating to the Status of Refugees and Kenya is a State Party to the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, which also prohibits refoulement.

SPECIFIC STATUTORY PROVISIONS

The principle of non- refoulement is captured by section 18 of the Refugee Act 2006. The section provides:

“18. No person shall be refused entry into Kenya, expelled, extradited from Kenya or returned to any other country or to subjected any similar measure if, as a result of such refusing, expulsion, return or other measure, such person is compelled to return to or remain in a country where-

(a) the person may be subject to persecution on account of race, religion, nationality membership of a particular social group or political opinion; or

(b) the person’s life, physical integrity or liberty would be threatened on account of external aggression, occupation, foreign domination or events seriously disturbing public order in part or the whole of that country.”

Prohibition of forced return of a refugee is one of the most fundamental principles in international law. This principle is laid out in Article 33 of the Convention relating to the Status of Refugees (Refugee Convention). It is to the effect that no state shall expel or 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 or membership of a particular social group or political opinion.

According to Section 21(1) subject to 18(1) and subsection (2) of this section, the minister may, after consultation with the minister responsible for matters relating to immigration and internal security, order the expulsion from Kenya of any refugee or member of his family if the minister considers the expulsion to be necessary on the grounds of national security or public order. Before ordering the expulsion from Kenya of any refugee or member of his family in terms of subsection (1) of section 18, the minister shall act in accordance with the due process of law. This means that the minister should adhere to the principles of international law regarding non-refoulement and non-penalization of asylum seekers as they make part of Kenyan law.

CASE LAW IN RELATION TO REFUGEES IN KENYA

Kituo Cha Sheria & 8 others v Attorney General [2013] eKLR

Kituo Cha Sheria challenged a Government Directive made in December 2012, compelling all refugees inhabiting urban areas to relocate to border camps. The directive was also designed to shut down all registration and provision of services to refugees in the urban centres of Nairobi, Isiolo and Mombasa on the basis that it

violated the basic freedoms enshrined within the Kenyan Constitution, the Refugee Act, 1996, and a range of international human rights instruments.

The High Court of Kenya found the policy to be in breach of both domestic and international law, stating:

“...I have concluded that the Government Directive is a threat to the petitioners’ fundamental rights and freedoms including the freedom of movement, right to dignity and infringes on the right to fair and administrative action and is a threat to the non-refoulement principle incorporated by section 18 of the Refugees Act, 2006. It also violates the State responsibility to persons in a vulnerable situations. I have also concluded that the policy intended to be implemented by the Government Directive cannot be justified under Article 24.”(para 94)

The Court also declared:

“...Every person who acquires refugee status under our law is entitled to be treated as such. The Government Directive in this respect, being a blanket directive, is inconsistent with the Act and international law. It amounts to taking away accrued or acquired rights without due process of law...I find and hold that a government directive which has no regard for the urban refugee is arbitrary and discriminative...” (para 62)

Samow Mumin Mohamed & 9 others v Cabinet Secretary, Ministry Of Interior Security and Co-Ordination & 2 others [2014] eKLR

The petitioners were challenging the constitutionality of the Directive issued by the Kenya Government contained in the Gazette Notice No. 1927 in which the Minister then designated the areas specified in the schedule as Refugee Camps which the petitioners felt was a breach of the principle of non-refoulement.

The court however dismissed the petition holding that:

“The petitioners have not established that their rights and fundamental freedoms under Articles 25, 27, 28, 29, 31, 39, 47, 49 and 50 of the Constitution have been violated by the respondents; The Press Statement issued by Cabinet Secretary on 26th March 2014 does not violate the petitioners’ rights and

fundamental freedoms; and the Gazette Notice No. 1927 designating certain areas as Refugee Camps is not unconstitutional.”

Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10; others [2015] eKLR

The petitioners in this case were contesting the constitutionality of the Security Laws (Amendment) Act, No 19 of 2014. In relation to refugees, the petitioners challenged the provisions of Section 48 of SLAA which sought to limit the number of refugees acceptable in Kenya to 150,000. They contended that the provision offends the principle of non-refoulment which prohibits the return or expulsion of refugees and asylum seekers. They also submitted that Section 48 was discriminatory since it did not state what criteria was to be adopted in selecting and identifying the 150,000 refugees. Further, it was submitted that Section 48 of SLAA is “irregular and illegal” as it introduces another ground for cessation of refugee status not provided for by the Refugees Act, 2006. To achieve the 150,000 limit, refugees would have to be repatriated and blanket repatriation is unlawful.

The court subsequently held that:

“Section 48 of SLAA which introduced Section 18A to the Refugee Act, 2006 is unconstitutional for violating principle of non-refoulment as recognized under the 1951 United Nations Convention on the Status of the Refugees which is part of the laws of Kenya by dint of Article 2(5) and (6) of the Constitution.”

GOVERNMENT OF KENYA VIOLATIONS

By calling for the forceful repatriation of Somali refugees, Kenya will have breached the Tripartite Agreement which provides for the voluntary return and the right to return in safety and dignity for the refugees. The Agreement also reaffirms the prohibition of refoulement, which protects refugees from being sent to places where their lives or freedoms are in danger. Kenya will also be in violation of international obligations under the Constitution of Kenya, the United Nations Convention on the Status of Refugees; the OAU Refugee Convention (1969) among other international and regional legal instruments.

Among the violations that the actions by the Kenya Government has instigated include: the prohibition of and duty to protect against torture and cruel, inhuman and degrading treatment, discriminatory State conflation of refugees with terrorism, arbitrary arrest and detention, physical and psychological ill-treatment, separation from family members, expulsions, and the gendered dimensions of enforced transfers.

JURISDICTIONAL CONSIDERATIONS

It is clear from the above cited cases that the Kenyan Courts have jurisdiction over the matter and have previously pronounced themselves on the same as discussed hereinabove. Bearing in mind that the cause of action is the infringement of fundamental rights of refugees and the disregard of judicial pronouncements by the Government, the appropriate forum for the instituting such a case will be the High Court of Kenya.

The possible causes of action from the directives of Government for forceful repatriation of refugees include:

- Instituting a Constitutional Petition at the High Court by dint of Article 2(5) and (6) in view of the Government's violation of the principle of non-refoulement as recognized under the 1951 United Nations Convention on the Status of the Refugees which is part of the laws (**this was however already determined in CORD's Petition of 2015 but remains the best option due to the wide spectrum of reliefs that the court can grant and the minimal cost implications**);
- Instituting a Judicial Review - The High Court also has jurisdiction, under Article 23(1), to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights (**the remedies of mandamus, certiorari and prohibition can also be given under a constitutional petition**);

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS (ACHPR)

It is also possible to make reference to the African Commission on Human and Peoples' Rights. An individual complaints mechanism provides for the submission of communications to the African Commission concerning any alleged violations of the

protected rights. Communications alleging violations of rights may be brought to the African Commission for any alleged breaches of the provisions of the African Charter, the African Women's Protocol and other relevant human instruments which may be invoked, based on articles 18(3), 60 and 61 of the African Charter.

The African Court on Human and People's Rights also has jurisdiction over:

- Cases and disputes concerning the interpretation and application of the African Charter, the Court's Protocol and any other human rights treaty ratified by the state concerned.
- The Court may also render advisory opinion on any matter within its jurisdiction. The advisory opinion of the Court may be requested by the AU, member states of the AU, AU organs and any African organisation recognised by the AU.
- The following entities are competent to submit communications to the Court: the African Commission, state parties to the Court's Protocol, African Inter-governmental Organisations, NGOs with observer status before the Commission and individuals.
- In respect of cases brought by NGOs and individuals, articles 6 and 34(6) of the Protocol establishing the Court provides for the following admissibility requirements: In addition to the seven admissibility requirements under article 56 of the African Charter, cases brought directly before the Court by individuals and NGOs are admissible only when the state against which the complaint is brought has made a declaration under article 5(3) of the Court's Protocol accepting the competence of the court to receive such complaints.

This avenue may however not be appropriate due to the urgency of the matters that need to be addressed and the enforcement mechanisms for decisions from the commission may also not be adequate in fully addressing the matter. It may however be important to make a follow-up on the communication to the commission (presented at The 57th Ordinary Session of the Commission (4-18 November 2015)) as a means of escalating the advocacy over the issue rather than making reference to the African Court which may require extensive jurisdictional interrogations.

CONCLUSION

The matter in contention is that of repatriation of Somali refugees. This has previously been handled by the courts and the same has been declared unconstitutional. Further reference to the court may however still be necessary in view of Government's pronouncements over the same. The best route will however be a Constitutional Petition noting that it will give a wider avenue to seek extensive reliefs over the matter.

It is however also important to take note of the agreements by the Kenya Government and other stakeholders most importantly the Tripartite Agreement in determining appropriate cause of action in view of the progress made under the agreement and any considerations for the enforcement and adherence to the said agreement. The 12-member Tripartite Commission established to oversee the gradual and voluntary repatriation process should be allowed to lead in the repatriation process as per the agreement.

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