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HIGH COMMISSIONER FOR HUMAN RIGHTS

SPECIAL PROCEDURES OF THE
HUMAN RIGHTS COUNCIL

Mandates of the Special Rapporteur on the human rights of migrants; the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

REFERENCE: AL G/SO 214 (106-10) G/SO 214 (78-15) Terrorism (2005-4)
KEN 5/2014

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Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the human rights of migrants; Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; and Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism pursuant to Human Rights Council resolutions 17/12, 25/32, and 22/8.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning **the recent arrests and detention by the police of Somali migrants, refugees and asylum seekers living in Nairobi as part of operation "Rudisha Usalama" aimed at addressing the rising insecurity in the country.**

According to the information received:

Several bombings and attacks by the Somali terrorist group Al-Shabaab have been allegedly committed in Kenya since 2011, among these the attack at the Westgate on 21 September 2013 and, more recently, attacks on 23 March 2014, where six persons were reportedly killed in an unidentified bombing of a Christian church near Mombasa, and on 31 March 2014, where another six persons were also killed in a similar unidentified bombing in the neighborhood of Eastleigh, Nairobi.

Following the latest terrorist attacks, the Minister of Interior Joseph Ole Lenku, on 25 March 2014, is said to have claimed that refugees crossing over from Somalia were a security threat to Kenya, and ordered all Somali refugees and asylum-seekers living in cities to report to the Dadaab or Kakuma refugee camps in eastern and north-western Kenya, respectively. More specifically, the Interior Minister is claimed to have called on "all Kenyans to report to the police any

refugee and/or illegal immigrants found outside the designated refugee camps" as part of an operation called "Rudisha Usalama".

It is reported that such measures would affect 50,000 registered refugees and asylum seekers currently living in cities other than Nairobi. Reports also indicate that the refugee camp of Dadaab is overcrowded, having a current population of 400,000 refugees, whereas it was meant to hold 170,000 persons at most.

It is also reported that on 5 April 2014, the President of Kenya affirmed that this operation was to continue. The President is said to have further stated that any refugee in breach of the directive would face corresponding sanctions.

It is further reported that on 6 April 2014, the Police Inspector General, David Kimaiyo, used his account on Twitter to categorize the mass arrest of migrants as a nationwide policy of "war against terrorism".

It is further alleged that just hours following the last terrorist attack on 31 March 2014, Kenyan police reportedly arrested and took into custody 657 Somali persons living in Nairobi. The police raids in Nairobi have been concentrated in neighborhoods known for hosting Somali migrants, particularly in the neighborhood of Eastleigh. It is reported that the detainees are being kept in the Kasarani Stadium and local police stations in Nairobi, and that the media and human rights groups have been denied access to all sections of the detention sites. It is further reported that the number of arrested persons since the start of the operation on 31 March have risen to 2000, among them several women and children.

It is also alleged that an unidentified number of persons have been deported to Somalia in unclear circumstances, despite the current human rights situation there, which would be in breach of the principle of non-refoulement, protecting asylum seekers and refugees from being returned to places where their lives or security could be threatened.

Concerns have been expressed over this operation and Mr. Lenku's statement to relocate refugees as being in violation of the Kenyan High Court ruling of 26 July 2013, which ruled on a similar policy dating from 2012, and confirmed that forced refugee relocation was in breach of international law. We also express concern about the apparent targeting of Somali migrants, refugees and asylum-seekers based on anti-terrorist policies, and the reported xenophobic discourse against Somali refugees and migrants by Kenyan public officials and the general public due to the perception, also fuelled by certain public discourse, that the increasing insecurity situation in Kenya is the result of the continued presence of Somali refugees and migrants in urban areas. In addition we express concern about the reported use of force against women and children, and the inadequate detention facilities being used. We are also concerned about the restriction on freedom of movement of refugees, which is secured by the 1951 Convention on the

Status of Refugees to which Kenya is a party, and which was recently confirmed by the High Court of Kenya.

While we do not wish to prejudge the accuracy of these allegations and being conscious of the fact that States' obligation to protect and promote human rights requires them to take effective measures to combat terrorism, we would like to draw the attention of your Excellency's Government to General Assembly Resolution 68/178 and Human Rights Council Resolution 19/19, whose paragraphs 1 reaffirms "that States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law." With regard to the principle of non-refoulement, paragraph 12 of this Resolution notes with concern measures that can undermine human rights and the rule of law, such as "the return of suspects to countries without individual assessment of the risk of there being substantial grounds for believing that they would be in danger of subjection to torture, and limitations to effective scrutiny of counter-terrorism measures."

We would further like to draw the attention of your Excellency's Government to paragraph 6 (j) and (k) of the General Assembly resolution 68/178, which urges States, while countering terrorism, "to fully respect non-refoulement obligations under international refugee and human rights law" and "to refrain from returning persons, including in cases related to terrorism, to their countries of origin or to a third State whenever such transfer would be contrary to their obligations under international law, in particular international human rights, humanitarian and refugee law, including in cases where there are substantial grounds for believing that they would be in danger of subjection to torture, or where their life or freedom would be threatened, in violation of international refugee law, on account of their race, religion, nationality, membership of a particular social group or political opinion, bearing in mind obligations that States may have to prosecute individuals not returned, and in that case to adhere to the principle of extradite or prosecute".

In addition we would like to recall your Government's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination ratified by Kenya on 23 September 1997.

In particular, we would like to recall General Recommendation No. 30 of the Committee on the Elimination of Racial Discrimination which recommends the State party "19. To ensure the security of non-citizens, in particular with regard to arbitrary detention [...]" and "18. To ensure that non-citizens enjoy equal protection and recognition before the law [...]". In its General Recommendation the Committee further recommends:

- "21. To combat ill-treatment of and discrimination against non-citizens by police and other law enforcement agencies and civil servants by strictly applying relevant legislation and regulations providing for sanctions and by ensuring that all officials dealing with non-citizens receive special training, including training in human rights";

- “25. To ensure that laws concerning deportation or other forms of removal of non-citizens from the jurisdiction of the State party do not discriminate in purpose or effect among non-citizens on the basis of race, colour or ethnic or national origin, and that non-citizens have equal access to effective remedies, including the right to challenge expulsion orders, and are allowed effectively to pursue such remedies”;

- “26. To ensure that non-citizens are not subject to collective expulsion, in particular in situations where there are insufficient guarantees that the personal circumstances of each of the persons concerned have been taken into account”;

- “28. To avoid expulsions of non-citizens, especially of long-term residents, that would result in disproportionate interference with the right to family life”.

With regard to the alleged arbitrary detention of Somali migrants and asylum seekers, we would like to draw your attention to Article 9.1 of the International Covenant on Civil and Political Rights (ICCPR), which your Excellency’s Government acceded to on 1 May 1972, which provides that everyone has the right to liberty and security of person. The enjoyment of the rights guaranteed in the ICCPR is not limited to citizens of States parties but “must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party” (CCPR/C/21/Rev.1/Add. 13 (2004), para. 10). The detention of migrants and asylum seekers should thus be a measure of last resort. The ICCPR further stipulates that all persons deprived of their liberty be ensured the right without delay to control by a court of the lawfulness of the detention (art. 9 (4)). For a more detailed overview of the international human rights standards governing the detention of migrants, including the obligation of States to always resort to alternatives to detention first, we would like to draw your attention to the Special Rapporteur on the human rights of migrants’ 2012 report to the Human Rights Council (A/HRC/20/24).

In this regard, we would also like to draw the attention of your Excellency’s Government to paragraph 6 (c) of the General Assembly resolution 68/178, which urges States, while countering terrorism, “to ensure that no form of deprivation of liberty places a detained person outside the protection of the law, and to respect the safeguards concerning the liberty, security and dignity of the person, in accordance with international law, including international human rights and humanitarian law.”

Moreover, as it is our responsibility under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your cooperation and your observations on the following matters:

1. Are the facts alleged in the summary of the case accurate?
2. Have any complaints been lodged?

3. Please provide the details, and where available the results, of any investigation, judicial or other inquiries which may have been carried out in relation to this case. If no inquiries have taken place, or if they have been inconclusive, please explain why.
4. Please indicate how Your Excellency's Government is fulfilling its international obligations, in particular the 1951 Convention on the Status of Refugees and the Convention on the Elimination of All Forms of Racial Discrimination, to which Kenya is a party.

We would appreciate a response within sixty days. Your Excellency's Government's response will be made available in a report to the Human Rights Council for its consideration.

While waiting for your response, we call on the Government to ensure that, as they endeavour to bolster security within the country, law enforcement officers will uphold the rule of law. We also remind the Kenyan Government of the need not to tolerate any acts of discourse of xenophobia or discrimination against migrants or refugees of Somali origin, and to ensure compliance with the principle of non-refoulement, protecting asylum seekers and refugees from being returned to places where their lives or freedoms could be threatened.

We also call upon the Government to ensure unconditional and unfettered access to all places where the detainees are being held, to ensure that the rights of those arrested and detained are respected, fulfilled and protected as provided by the Kenyan Constitution and statutory laws, in particular the right to be provided adequate food, social amenities, water, reasonable accommodation, separation by gender and age and access to legal counsel.

Please accept, Excellency, the assurances of our highest consideration.

François Crépeau
Special Rapporteur on the human rights of migrants

Mutuma Ruteere
Special Rapporteur on contemporary forms of racism, racial
discrimination, xenophobia and related intolerance

Ben Emmerson
Special Rapporteur on the promotion and protection of human rights
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