



**A REVIEW OF THE LEGAL FRAMEWORK
RELATING TO THE PROPOSED CLOSURE
OF THE DADAAB REFUGEE CAMP AND
REPATRIATION OF SOMALI REFUGEES**

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EXECUTIVE SUMMARY

The Dadaab refugee camp complex in north-eastern Kenya has been in operation for over 25 years and remains home to almost 250,000 Somali refugees. The Kenyan Government has sought the closure of the camp for some time. In May 2016, it intensified these efforts, issuing a directive disbanding the Department of Refugee Affairs (“**DRA**”) and requiring the closure of the camps “*within the shortest possible period*”. In February 2017, the High Court of Kenya held that the proposed closure of Dadaab was unconstitutional, noting that it would be a violation of Kenya’s national, regional and international refugee law obligations. Notwithstanding such temporary reprieve, the Kenyan Government continues to press for the voluntary repatriation of refugees to Somalia. There are significant questions, however, regarding the circumstances in which such returns occur, whether it is truly voluntary, and whether the repatriation process is conducted in accordance with international, regional and domestic laws.

The Norwegian Refugee Council (“**NRC**”) commissioned, through the Thomson Reuters Foundation’s TrustLaw programme, a team of international and national researchers to study the legality of the Dadaab camp closure and voluntary repatriation process. TrustLaw is the Thomson Reuters Foundation’s global pro bono legal programme that connects leading law firms and corporate legal teams around the world with high-impact Non-Governmental Organisations (“**NGOs**”) and social enterprises working to create social and environmental change.

This Report is a product of those efforts. It addresses the legal issues arising from the Kenyan Government’s decision to, and efforts to, close Dadaab, and its commitment to the on-going repatriation process. It does this through an examination of the relevant factual background to the closure of Dadaab, the applicable domestic, regional and international law, and a series of comparative case-studies drawing on other examples of refugee camp closures and repatriations. This Report highlights that, notwithstanding the Kenyan High Court having found the closure of Dadaab to be unconstitutional, there remain significant potentially intractable issues to be addressed if

lasting solutions for Dadaab’s inhabitants are to be identified and implemented.

The issues identified in this Report serve to underscore the importance of the recent movements in international and regional refugee law and policy. On the international level, the New York Declaration provides for the Global Compact and Comprehensive Refugee Response Framework (“**CRRF**”). This is intended to counter the piecemeal approach to responding to refugee crises across the world by seeking to share responsibility for refugee protection beyond neighbouring states. There are also further signs of states sharing responsibility and coordinating responses in regards to Somali refugees at a regional level following a new regional declaration on the situation of Somali refugees under the auspices of the Intergovernmental Authority (“**IGAD**”), known as the Nairobi Declaration. The Nairobi declaration is an important statement of principles on refugee policies in the region including the implementation of durable solutions. The declaration reaffirms the principles of voluntary repatriation and sustainable reintegration but also commits to providing refugees with a range of durable solutions through mentioning resettlement and integration.

FACTUAL BACKGROUND

PLANS TO CLOSE THE DADAAB REFUGEE CAMPS

The Dadaab refugee camp complex in north-eastern Kenya has been in operation for over 25 years and is among the world’s largest. It was originally built in 1991 to accommodate up to 90,000 refugees fleeing violence in Somalia. However, continued conflict, later compounded by drought, caused large numbers of Somalis to continue to cross into Kenya in search of international protection. In 2012, at its peak, Dadaab hosted more than 460,000 registered refugees across five camps.

Although Kenya tolerated the presence of the camp for many years, the Kenyan Government’s approach

to the camp began to harden from 2012 onwards. The change in approach was said to be justified by security concerns, particularly in the wake of high profile attacks by Al-Shabaab militants in Kenya, as well as the cost of maintaining the camps. From December 2012 the Kenyan Government implemented a programme of “structural encampment”, requiring all refugees to relocate to designated refugee camps.

In November 2013, the Kenyan Government, the Somali Government and the United Nations High Commissioner for Refugees (the “**UNHCR**”) entered into a Tripartite Agreement outlining a framework for the voluntary repatriation of Somali refugees.

In 2016 the Kenyan Government became more assertive. First, it issued a directive revoking Kenya’s long-standing approach of granting *prima facie* refugee status to all Somali asylum seekers (thereby requiring individual assessments for each asylum seeker, which it is reported may take three or more years). Second, it issued a directive disbanding the DRA and requiring the closure of Dadaab “*within the shortest possible period*”. The Kenyan Government subsequently fixed the closure deadline of November 2016, and then extended it to May 2017.

In February 2017, the High Court of Kenya ruled that the closure of Dadaab was unconstitutional, noting that the closure would be a violation of Kenya’s national, regional and international refugee law obligations and would be tantamount to an act of “group persecution” against Dadaab’s refugees. The Court ruled that the Kenyan Government’s actions violated the cornerstone principle of refugee law of non-refoulement as well as individual refugees’ right to fair administrative action and the human rights of refugees guaranteed by the national constitution. The Court noted that the situation in Somalia had not fundamentally changed so as to warrant repatriation of refugees and also ordered the reinstatement of the DRA so as to allow asylum seekers to register as refugees. While the Kenyan Government noted an intention to appeal the decision, to date, an actual appeal has not materialised. In Dadaab, the situation for new Somali asylum seekers is even more uncertain as the Kenyan Government through DRA and then subsequently the Refugee Affairs Secretariat (“**RAS**”), has largely suspended refugee registration since July 2015, leaving a growing number of predominately Somali asylum seekers unable to access protection and assistance.

THE SITUATION IN SOMALIA

In 2017, Somalia is struggling with ongoing conflict and its worst drought in 20 years, following three consecutive seasons of poor rainfall. More than half of the population of Somalia (an estimated 6.7 million people) are facing acute food shortages, and more than 3.2 million are deemed to be in “emergency” and “crisis” situations. In 2017 there has been a spike in internal displacement caused by conflict and drought in the south central area of Somalia (the primary return area of Somali refugees in Kenya). The food security and nutrition situation in Somalia is not expected to get better until at least December 2017 and improvements to this situation is dependent on the outcome of the next rainy season which starts in October 2017.

The refugees in Dadaab appear to be acutely aware of the potential for insecurity if they return to Somalia. In a population fixing exercise carried out by the UNHCR between July and August 2016 in Dadaab, only 26 per cent of Somalis indicated a willingness to return to Somalia. For those who were not willing to return, the majority (66 per cent) stated that they wanted to remain in Kenya due to concerns about security. More recently, NRC together with the Refugee Consortium of Kenya (“**RCK**”) and REACH, conducted household assessments monitoring movement and return intentions. The surveys, though not representative, are indicative. They found that 42 per cent of households indicated that they have no intention of returning to Somalia in the next six months and a further 23 per cent stated they are unlikely to return. The main reported reasons for not considering return were conflict (72 per cent), followed by drought (41 per cent) and lack of livelihoods in Somalia (40 per cent).

In 2017, the Kenyan Government continues to pursue a policy of voluntary repatriation for Somali refugees in Dadaab, with the pace of voluntary repatriation picking up since the initial camp closure announcement. Since 2014, 68,000 voluntary repatriation departures from Dadaab have been recorded with the vast majority (91 per cent) occurring since 2016. The voluntary repatriation process involves a number of stages, supported by the UNHCR, RAS, and international and national partners including NRC. NRC provides refugees with information on areas of return, with measures taken to confirm the voluntary nature of return by the UNHCR, along with protection assessments and medical screening conducted by operational partners of the UNHCR. Refugees who are supported to return through the voluntary repatriation process are provided with core relief items and

cash grants to facilitate movement, which is by air or road depending on the area of return. On the Somalia side, refugees are provided with support at way stations and return and reintegration assistance by the UNHCR together with a number of international and national partners in 12 designated return areas.

LEGAL ANALYSIS

The legal framework relating to refugees comprises various international treaties and customary norms of international law, African regional treaties and related jurisprudence and domestic Kenyan law, which includes laws specifically relating to refugees, laws of more general application (including human rights laws and laws concerning the prevention of torture), the constitution of Kenya and related jurisprudence. International, regional and domestic refugee laws govern when individuals should be recognised as refugees, the rights and protections provided to refugees and those seeking refugee status and the circumstances in which a refugee may lose refugee status and may permissibly be removed from a host country. International, regional and domestic human rights laws are also relevant to the treatment of asylum seekers and refugees.

REFUGEE STATUS AND RIGHTS

It appears clear that the vast majority of the Somalis housed in the Dadaab camp are entitled to protection as refugees under Kenyan and international law. While the majority of Somali residents of Dadaab currently enjoy recognised refugee status in Kenya, the refugee status of those arriving after 2016 (who are subject to individual determination processes) is in some cases uncertain. More broadly, if Kenya's refugee policy (including revisions to its legal framework) changes again to an even tougher line, there is a risk that the status of those currently enjoying refugee status may be challenged. Where a person does not fall within the definition of refugee as provided by the international and regional legal framework, the complementary protections offered by applicable human rights law may assist.

A refugee may not be subject to refoulement, apart from in certain limited cases where, based on the individual's conduct, an exception to the non-refoulement principle may apply. The security and humanitarian situation prevailing in Somalia appears to be sufficiently grave to suggest that refugees returned to

Somalia at the present time are likely to be put in danger. In principle, therefore, the Somali refugees in Dadaab may not be compulsorily returned to Somalia unless an exception applies in an individual case.

Exceptions to the principle of non-refoulement are available where an individual refugee poses a danger to the security of the host country, or has been convicted of a particularly serious crime. Alternatively, non-refoulement protection may end if a person falls within the limited circumstances in which refugee status may cease, which includes where the refugee has committed a serious non-political crime outside the country of refuge before admission. The other circumstances in which refugee status could cease, including where a refugee has committed a serious crime, do not apply to the population of Dadaab as a whole, so they cannot be used to justify revoking refugee status and associated protections so as to enable Dadaab to be closed.

The complementary protections given by Article 12 of the African Charter, Article 14 of the Universal Declaration of Human Rights, Article 3 of the 1984 Convention Against Torture and Article 7 of the 1966 International Covenant on Civil and Political Rights provide additional support for the position that the Somali refugees at Dadaab may not be repatriated against their will in the current security and humanitarian context prevailing in Somalia, and may offer limited additional protection to individuals whose refugee status has ceased, or who are subject to an exception from the non-refoulement principle.

VOLUNTARY REPATRIATION

The Kenyan Government is proceeding with its voluntary repatriation process on the basis that the Somali refugees in Dadaab are returning voluntarily to Somalia. Voluntary repatriation is permitted under international refugee law and protection frameworks but there are onerous responsibilities on the countries of asylum and origin, and on the UNHCR, to ensure that return is voluntary, safe and dignified and within a framework of sustainable reintegration.

Article V of the OAU Convention, the Tripartite Agreement and the UNHCR doctrinal positions provide that the voluntary nature of return is underpinned by two important concepts: (a) return must be a free choice and absent of push factors including physical, psychological and material pressure; and (b) return must be based on complete, unbiased and accurate information regarding the situation in their

country of origin. The UNHCR's Handbook titled "*Voluntary repatriation: International Protections*" (the "**UNHCR Handbook**") notes that "*as a general rule, positive pull factors should be the overriding elements in the refugee's decision to return, as opposed to push factors*".

The process established under the Tripartite Agreement has been structured to provide multiple opportunities to provide information and to confirm the voluntary nature of the return. Nevertheless, significant concerns remain as to whether the return of refugees under the process is free from the influence of push factors, fully informed, and, in light of the current situation in Somalia, safe and sustainable.

More broadly, efforts to ensure that returns are truly voluntary and meet international standards are easily undermined where the situation on the ground leaves refugees believing there is no other realistic option but to return. The camp closure deadline imposed by the Kenyan Government has created a situation of uncertainty where Somali refugees may see no alternative but to leave.

Returnees must be provided with complete, unbiased, accurate and politically neutral objective information and there has been criticism of the level and type of return information being provided to refugees at return help desks. There has been significant work done by the UNHCR, together with NRC and other partners, throughout 2016 and 2017 to improve the provision of information on the voluntary repatriation process and areas of return in Somalia. In particular, these organisations have focused on additional efforts to strengthen cross-border coordination and information sharing, adjusting mechanisms for the delivery of information, including refresher country of origin information sessions closer to the time of departure, the use of radio talk shows and radio spot messages and the regular gathering of frequently asked questions from refugees to ensure that information provided addresses the needs of refugees. Nevertheless the situation in Somalia has remained very dynamic and it remains difficult to ensure that all refugees have accurate and updated information in order to enable them to make an informed decision to return.

Voluntary repatriation may also only be conducted when the safety and dignity of returning refugees can be ensured, and is to a country of origin that can support their sustainable return and reintegration.

Population displacement as a result of on-going conflicts, particularly in south central Somalia which has until now been where the majority of Somali refugees from Dadaab have returned, may be seen as a key indicator that the safety and dignity of returnees cannot be assured. This is coupled with reports on the severity of drought and likelihood that any improvement will not be seen until December 2017 at the earliest, the scale of drought-driven displacement, outbreaks of disease and unmet needs in Somalia. In light of these factors, there are considerable questions whether safe and sustainable returns to Somalia are possible at present. Given the security and humanitarian situation in Somalia, there appears to be a real risk that returning refugees will be unable to reintegrate in Somalia and many will be forced into internal displacement or to again seek refuge across international borders.

In this context, even though the process implemented under the Tripartite Agreement provides some comfort that refugees appear to be returning to Somalia willingly, there remain doubts as to whether the requirements for voluntary, fully informed repatriation carried out under conditions of safe, dignified and sustainable return conditions are being, or can be, met. These conclusions are supported by the February 2017 judgment of the High Court of Kenya in the *KNCHR v Attorney General* case, considered at Part C, regarding the closure of Dadaab.

PRECEDENTS FOR THE VOLUNTARY RETURN OF REFUGEES

This Report also provides detailed case studies of previous refugee camp closures and refugee repatriations in: Ethiopia, Yemen, Tanzania, Uganda, Bangladesh, Pakistan and Greece. The case studies set out in this Report illustrate the three different approaches typically employed by the governments of host countries seeking to close refugee camps: (a) repatriation (forced and voluntary); (b) resettlement; and (c) integration. The case studies further show the differing approaches taken by governments to granting *prima facie* refugee status. It appears that a number of governments of host countries may not be fulfilling their international obligations with respect to refugees.

Generally, the treatment of Somali refugees by the Ethiopian and Yemeni Governments can be usefully distinguished from the approach taken to date by the Kenyan Government, as Somali refugees continue to

be granted *prima facie* refugee status in both Ethiopia and Yemen, and neither Government has sought to impose a deadline for repatriation or camp closures (at least as regards Somali refugees). While the Ethiopian Government has been encouraging the voluntary repatriation of Somali refugees back to Somalia, there is currently no fixed deadline on their repatriation.

In the case of the refugee camp closures in Tanzania, the Tanzanian Government imposed a deadline for Burundian refugees to repatriate. The Tanzanian approach is comparable to that of Kenya to the extent that the deadline of May 2017 was set for the closure of Dadaab (although this deadline has not been enforced) and since mid-2015, refugee registration and RSD procedures have been suspended in Dadaab leaving many Somali refugees undocumented and without legal status.

Further, some countries have gone one step further and forcibly repatriated refugees. For example, when Bangladeshi authorities encouraged the return of Rohingya refugees from Bangladesh to Myanmar in 1997 and no refugees volunteered, violence ensued, before refugees were detained and forced to repatriate. Similarly, the Government of Pakistan forcibly returned over 7,000 Afghan refugees in the early 2000s.

Uganda presents an example of better practice and a useful precedent for the approach that could be adopted by Kenya in Dadaab. The Ugandan Government has granted *prima facie* refugee status to refugees from Burundi and DRC, and rights of free movement, property ownership, employment and education. The Ugandan example is also notable for its meaningful integration of refugees into existing communities and for the successful welcoming and development of amicable relations between refugee and local populations.

Uganda, however, appears to represent the exception in relation to positive integration of refugee populations, and large scale integration of refugee communities may often be unrealistic in light of the economic burden on host countries, strain on local communities, and potential security concerns.

The resettlement of refugees may represent a more attractive response. In this regard, despite the controversial nature of the European Commission's EU-Turkey Statement of March 2016, the related acceleration of the European Commission's Resettlement Scheme (first agreed in July 2015) has been a relative success. In particular, countries such as Germany and Sweden (which are comparatively wealthy but whose borders are not directly exposed to refugee influx), have taken a larger share of the resettlement burden associated with the mass migration to Europe (following the Arab Spring and subsequent conflict in Syria and the Middle East).

It is this redistribution of pressure experienced by host countries, particularly developing countries, that the Global Compact also seeks to address; and this approach may form part of the solution for the current situation facing the refugees in Dadaab.

DEFINITIONS, REFERENCES AND ACRONYMS

1951 Convention – The Convention Relating to the Status of Refugees

1967 Protocol – The Protocol Relating to the Status of Refugees

1998 Act – The Tanzanian Refugee Act of 1998

ACHPR – African Commission on Human and Peoples' Rights

Action Plan – Integrated Action Plan for the Sustainable Return and Reintegration of Somali refugees from Kenya to Somalia

African Charter – The African Charter on Human and Peoples' Rights

African Commission – African Commission on Human and Peoples' Rights

AMISOM – African Union Mission in Somalia

ARRA – Administration for Refugee and Returnee Affairs

AVRR – Assisted Voluntary Return and Reintegration Programme

Board – Refugee Status Appeal Board

Cabinet Secretary – The Cabinet Secretary for Interior and Coordination of National Government

CEDAW – the Convention on the Elimination of all Forms of Discrimination against Women

CERD – the Convention on the Elimination of Racial Discrimination

Cessation Clauses – as described in C.1.1.6

Commissioner – Commissioner for Refugees Affairs

Constitution – The Constitution of Kenya (enacted in 2010)

Convention Against Torture – The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Convention and Protocol – the 1967 Protocol together with the 1951 Convention

CRC – the Convention on the Rights of the Child

CRRF – Comprehensive Refugee Response Framework

Dadaab – Dadaab Refugee Camp

Dadaab Judgment – The Kenyan High Court's ruling on 9 February 2017 that the Kenyan Government's directive regarding the closure of Dadaab was unlawful

DRA – Department of Refugee Affairs, Kenya

DRC – Democratic Republic of the Congo

EASO – European Asylum Support Office

EU – European Union

FDP – Food Distribution Points

Foreigners Act – The 1946 Pakistan Foreigners Act

Foreigners Order – The 1951 Pakistan Foreigners Order

GBV – Gender-Based Violence

GFD – General Food Distributions

Global Compact – the Global Compact on Refugees to be adopted in 2018, as described in C.3

HRW – Human Rights Watch

ICC – International Criminal Court

ICCPR – 1966 International Covenant on Civil and Political Rights

ICJ – International Court of Justice

ICJ-Kenya – International Commission of Jurists, Kenya Chapter, as described in B.4.3

IDP – Internally Displaced People

IGAD – Intergovernmental Authority on Development

IOM – International Organisation for Migration

IPC – Integrated Food Security Phase Classification

ISIL – Islamic State of Iraq and the Levant

Joint Strategy and Operational Plan – The Tripartite Commission adopts an Operations Strategy and Operations Plan for 2015-2019

KCIA – Kenya Citizenship and Immigration Act

Kenyan Government – Government of the Republic of Kenya

Kituo Cha Sheria Case – Petition Number 19 of 2013 consolidated with Petition Number 115 of 2013, *Kituo Cha Sheria & 8 others v. Attorney General* [2013] eKLR, Judgment dated 26 July 2013

KNCHR – Kenya National Commission on Human Rights

MEB – Minimum Expenditure Basket

MFDM – Ministry of Food and Disaster Management

MSF – *Médecins Sans Frontières*

MRRR – The Somaliland Ministry of Rehabilitation, Reintegration and Reconstruction

Nairobi Declaration – The Nairobi Declaration on Durable Solutions for Somali Refugees and Reintegration of Returnees under the auspices of the Intergovernmental Authority on Development

New York Declaration – The New York Declaration for Refugees and Migrants

NGOs – Non-Governmental Organisations

NRC – Norwegian Refugee Council

OAU – Organisation of African Unity

OAU Convention – Convention Governing the Specific Aspects of Refugee Problems in Africa

OCP – Out-of-Camp Policy

P&RMN – Protection and Return Monitoring Network

PSN – Persons with Special Needs

Procedures Directive – Directive 2013/32/EU

QIPs – Quick Impact Projects

RAHA – Refugees Affected Hosting Areas

RAS – Refugee Affairs Secretariat

RCK – Refugee Consortium of Kenya

Refugees Act – the Refugees Act, 2006 (Kenya)

Refugees Bill the Refugees Bill, 2016 (Kenya)

Refugee Proclamation – Refugee Proclamation of 2004

Regulations – The 2009 Refugee (Reception, Registration and Adjudication) Regulations

Relevant Legal Framework – the relevant international, national, regional and domestic laws relating to refugees and human rights, as set out in Part C of this Report

Report – this report, titled ‘A Review of the Legal Framework Relating to the Proposed Closure of the Dadaab Refugee Camp and Repatriation of Somali Refugees’

Resettlement Scheme – the EU’s emergency relocation and resettlement scheme, as described in E.21.5

Rome Statute – The Rome Statute of the International Court of Justice

RRRC – Refugee Relief and Repatriation Commissioner

RSD – Refugee Status Determination

Secretariat – Secretariat for Refugee Affairs

SLAA – Security Laws (Amendment) Act of 2014

Somali Government – Government of the Federal Republic of Somalia

SOPs – Standard Operating Procedures

SPLA – Sudan People’s Liberation Army

SSAR – Solutions Strategy for Afghan Refugees

The Statement – the EU-Turkey Statement

TANCOSS – The Tanzania Comprehensive Solutions Strategy

Taskforce Report – as described in Appendix A

The African Charter – as described in C.4.2

Tripartite Agreement – Tripartite Agreement between the Kenyan Government, the Somali Government, and the UNHCR Governing the voluntary repatriation of Somali Refugees Living in Kenya

Uganda Refugees Act – The Uganda Refugees Act 2006

UN – United Nations

UNHCR – The Office of the United Nations High Commissioner for Refugees

UNHCR Handbook – UNHCR’s handbook titled “*Voluntary repatriation: International Protections*”

UNSC – United Nations Security Council

UPR – Universal Periodic Review

WASH – Water, Sanitation and Hygiene

WFP – World Food Programme

A

INTRODUCTION



Somali refugees in Dadaab return to Mogadishu. ©NRC/Fredrik Lerneryd, 2016

A.1 SCOPE OF THIS REPORT

Kenya is home to one of the world's largest refugee camps, the Dadaab Refugee Camp ("**Dadaab**"). The camp is situated in north-eastern Kenya near to the Somali border. Its population peaked at approximately 463,000 in 2012.¹ Since 2013, the Government of the Republic of Kenya (the "**Kenyan Government**") has sought to facilitate the sustainable repatriation and reintegration of Somali refugees under the terms of a Tripartite Agreement, defined below in Part C.5, between Kenya, Somalia and the UNHCR.

In October 2015, the UNHCR and the European Union ("**EU**"), in partnership with the Kenyan Government and the Government of the Federal Republic of Somalia (the "**Somali Government**"), hosted a Ministerial Pledging Conference on Somali Refugees in Brussels. Financial pledges of \$105 million were made by donors towards an action plan for sustainable voluntary repatriation and reintegration of Somali refugees, within the framework of the Tripartite Agreement. However, by October 2016, only \$7.2 million of the \$105 million pledged had been received, and the pace of voluntary repatriations remains slow: fewer than 6,000 Somali refugees returned to Somalia in 2015 with support through the pledged funds.²

¹ Center for Strategic and International Studies, *The Dadaab Refugee Complex: A Powder Keg and It's Giving Off Sparks*, 1 March 2012, available at <https://goo.gl/MF1yrX>

² UNHCR, *Weekly Update - Voluntary repatriation of Somali Refugees From Kenya*, 19 May 2017, available at <http://goo.gl/RU7BcW>; UNHCR, Ministerial Pledging Conference on Somali Refugees; available at <http://goo.gl/gRuKkZ>

In May 2016, the Kenyan Government announced its intention to close Dadaab “*within the shortest time possible*”.³ The Kenyan Government’s directive regarding the closure of Dadaab was subsequently ruled unlawful by the Kenyan High Court on 9 February 2017 (the “**Dadaab Judgment**”) and the Kenyan Government’s revised deadline of May 2017 for the closure of Dadaab has now passed. However, the Kenyan Government remains committed to the closure of Dadaab through an ongoing repatriation process. As of 30 June 2017, Dadaab remained home to 244,459 registered refugees and asylum seekers.⁴

This Report addresses the legal issues arising from the Kenyan Government’s decision to, and efforts to, close Dadaab, and its commitment to the ongoing repatriation process. It does this through an examination of the relevant factual background to the closure of Dadaab against the relevant domestic, regional, and international law which governs the closure. This Report then considers a series of comparative case studies, drawing on other examples of refugee camp closures and refugee repatriations. This Report highlights that notwithstanding the Kenyan High Court having found the closure of Dadaab to be illegal, there remain significant issues to be addressed if durable solutions for Dadaab’s inhabitants are to be identified and implemented.

The issues identified in this Report serve to underscore the importance of the recent movements in international and regional refugee law and policy. On the international level, the New York Declaration provides for the Global Compact and the Comprehensive Refugee Response Framework (“CRRF”). This is intended to counter the piecemeal approach to responding to refugee crises across the world by seeking to share responsibility for refugee protection beyond neighbouring states. This is a fundamental change to the approach taken to date and will “*require political commitment at the highest level, leadership, and a clearer longer-term vision than that evident in some current restrictive and inward-looking national responses today*”.⁵ There are also further signs of states sharing responsibility and coordinating responses at a regional level through the Intergovernmental Authority on Development (“IGAD”) March 2017 Nairobi Declaration (defined in Part C.3 below)

A.2 REPORT STRUCTURE

This Report is comprised of the following parts:

PART B: DADAAB – FACTUAL BACKGROUND AND CONTEXT

Part B sets out background information on Dadaab, addressing the key factual issues that need to be considered in the context of the relevant legal framework. These issues include: the reasons Somalis seek refuge in Kenya; the current security and humanitarian situation in Somalia; the treatment of Somali refugees in Kenya; and the process of repatriating Somali refugees from Dadaab to Somalia.

PART C: RELEVANT LEGAL FRAMEWORK

Part C is comprised of: the relevant international legal instruments and customary norms (“soft law”); the recent developments in international refugee law and policy; African regional treaties and related jurisprudence; domestic Kenyan law, which includes laws specifically relating to refugees, laws of more general application (including human rights laws and laws concerning the prevention of torture), the constitution of Kenya and related jurisprudence; and an analysis of the Dadaab Judgment (together, the “**Relevant Legal Framework**”).

PART D: APPLICATION OF LEGAL FRAMEWORK

Part D considers whether the Kenyan Government’s directive to close Dadaab and its commitment to the voluntary repatriation process, as set out in Part B, comply with the Relevant Legal Framework, as set out in Part C.

PART E: EXAMPLES OF PAST REFUGEE CAMP CLOSURES AND REFUGEE REPATRIATIONS

Part E sets out examples of previous refugee camp closures and refugee repatriations in order to identify legal precedents and state practice for the closure of Dadaab. The case studies address refugee camp closures and the approach to repatriating refugees in Ethiopia; Yemen; Tanzania; Uganda; Bangladesh; Pakistan; and Greece.

³ Statement by the Ministry of the Interior, Kenyan Government, 6 May 2016, p.2, available at <https://minbane.wordpress.com/2016/05/06/httpwp-mep1xtjq-2ed/>

⁴ UNHCR, *Statistical Summary – Refugees and Asylum Seekers in Kenya*, 30 June 2017, p.3, available at <http://goo.gl/VDDn6R>.

⁵ Türk, V. and Garlick, M., *International Journal of Refugee Law* 656, From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees, 2016.

APPENDICES

- **Appendix A:** Timeline of key events relating to the proposed closure of Dadaab.
- **Appendix B:** Dadaab's dependence on international aid.
- **Appendix C:** Consequences of breaching international and regional law.
- **Appendix D:** Submissions of the Kenya National Commission on Human Rights ("**KNCHR**") and the Kenyan Government in the *KNCHR vs Attorney General* case (an overview of the judgment is set out in Part C).

A.3 CONTRIBUTORS

This Report was commissioned by NRC through the Thomson Reuters TrustLaw programme. TrustLaw is the Thomson Reuters Foundation's global pro bono legal programme. It connects leading law firms and corporate legal teams around the world with high-impact non-governmental organisations ("**NGO**"s) and social enterprises working to create social and environmental change. NRC was provided with assistance, through the TrustLaw programme, by an international law firm and a Kenyan law firm.

This Report was prepared under the guidance of James Munn, Suzanna Nelson-Pollard, Brooke Lauten, Neil Turner and Catherine Osborn of NRC.

NRC also received assistance from the following international academics and experts in the area of refugee law who provided their comments on the draft report, including: Ed Schenkenberg van Mierop, Executive Director of HERE-Geneva; Maya Brehm, Graduate Institute; Jennifer Hyndman, Director of the Centre for Refugee Studies at York University (Canada); Anna Lindley, Senior Lecturer at SOAS (on an early draft of the report); and Marina Sharpe, McGill University.

Neither the law firms, nor the independent academics and experts who assisted with this Report have conducted any independent fact-finding exercises, but rather have relied on secondary published data and additional information provided by NRC.

B

DADAAB FACTUAL BACKGROUND AND CONTEXT



Somali refugees in Dadaab return to Mogadishu. ©NRC/Fredrik Lerneryd, 2016

This Part B sets out the factual background and context to the proposed closure of Dadaab and the repatriation process which is relevant to the legal analysis set out in Part D. It is comprised of the following parts:

- **B1** Overview of Dadaab
- **B2** Reasons for Arrival: seeking refuge
- **B3** Current Security and Humanitarian Situation in Somalia
- **B4** Overview of Refugee Treatment
- **B5** Process of Repatriating Somali Refugees From Dadaab to Somalia

Further factual background is provided in the timeline of key events relating to the proposed closure of Dadaab, set out in Appendix A.

B.1 OVERVIEW OF DADAAB

Dadaab is situated in north-eastern Kenya near to the Somali border. The first camp in Dadaab was established in 1991 to provide refuge to Somalis fleeing civil war and was originally designed to host up to 90,000 people. At its peak in 2012, Dadaab was a conglomerate of five camps – the Hagadera, Dagahaley, Ifo, Ifo 2 and Kambioos refugee camps – and was home to more than 463,000 registered

asylum seekers and refugees.⁶ Along with the estimate of the number of unregistered refugees on the outskirts of the camps, the total population of Dadaab at that time was estimated to be close to half a million.⁷

As of 30 June 2017, according to the UNHCR, there were 244,459 registered refugees and asylum seekers in Dadaab's remaining four camps.⁸ One of the causes for the significant reduction in numbers in the last few years has been the repatriation process, which as of early August 2017 has involved more than 68,000 departures from Dadaab since 2014 (more than 62,000 of which have occurred since 2016).⁹ A further cause has been the population fixing / verification exercise conducted by the UNHCR in July and August 2017, which resulted in over 24,000 individuals being identified as Kenyan nationals.¹⁰ As a result of the significant decline in Dadaab's population in recent years, the Kambioos camp was closed in February 2017 with the population either having been: (a) repatriated to Somalia; (b) relocated to the Kakuma camp, which was established in 1992 for non-Somali refugees and Somali refugees waiting for resettlement; or (c) moved to the remaining Dadaab camps.

In June 2017, 96 per cent of registered refugees in Dadaab were of Somali origin. Fifty-one per cent of the population were female and 58 per cent were children.¹¹ The length of time refugees live in Dadaab varies considerably, but refugees often stay for years with some having spent most of their lives there.¹² By 2012, approximately 10,000 third-generation refugees had been born in Dadaab to refugee parents who were also born there.¹³

B.2 REASONS FOR ARRIVAL: SEEKING REFUGE

Somalia has been in a constant state of civil war and conflict for over two decades, which has had profound effects on the overall sense of safety and security in the region. A significant consequence of this has been acute food insecurity for many households in Somalia, as explored below. Not only is farming difficult in war-torn regions, but security restrictions generated by Al-Shabaab (a Somalia-based Islamist militant group) have had a significant impact on the ability of aid agencies to deliver humanitarian assistance.¹⁴ This issue of security was emphasised by the UNHCR's declaration in 2011 that conflict and insecurity in Somalia were to blame for the severity of the famine that affected over 13 million people and displaced one in three Somalis.¹⁵ In the same year, Kenya saw the largest-ever influx of refugees from Somalia, with most estimates ranging between 150,000 and 160,000. Official arrival rates frequently exceeded 1,000 people a day during the summer months, with 30,000 arriving in June, 40,000 in July, and 38,000 in August of 2011.¹⁶

In 2017, NRC and the Refugee Consortium of Kenya ("RCK") carried out household level assessments in Dadaab to establish reasons for refugee displacement and whether refugees intend to return home in the future.¹⁷ The surveys found that 54 per cent of respondents had fled to Dadaab because of conflict in their community and 39 per cent because of drought.

⁶ The Guardian, *Life in Dadaab: three generations of refugees isolated from Kenyan society*, 27 January 2016, available at <https://goo.gl/ARRj6c>; Center for Strategic and International Studies, *The Dadaab Refugee Complex: A Powder Keg and It's Giving Off Sparks*, 1 March 2012, available at <https://goo.gl/Gv4AKe>

⁷ Médecins Sans Frontières, *Humanitarian crisis on outskirts of overcrowded Dadaab camp*, available at <http://goo.gl/JLHS6P>.

⁸ UNHCR, *Statistical Summary – Refugees and Asylum Seekers in Kenya*, 30 June 2017, p.3, available at <http://goo.gl/H9ogUJ>.

⁹ UNHCR, *Weekly Update – Voluntary repatriation of Somali Refugees From Kenya*, 4 August 2017, available at <http://www.unhcr.org/ke/wp-content/uploads/sites/2/2017/08/Voluntary-Repatriation-Analysis-4-August-2017.pdf>.

¹⁰ UNHCR, *Final Report – Refugee Population Fixing Exercise, Dadaab Refugee Camps*, August 2017. NRC has on file.

¹¹ UNHCR, *Statistical Summary – Refugees and Asylum Seekers in Kenya*, 30 June 2017, p.3, available at <https://goo.gl/R7EjBu>.

¹² The Guardian, *Life in Dadaab: three generations of refugees isolated from Kenyan society*, 27 January 2016, available at <https://goo.gl/kWznys>.

¹³ UNHCR, *Dadaab – World's biggest refugee camp 20 years old*, 21 February 2012, available at <http://goo.gl/A3RTsZ>.

¹⁴ UNHCR, *UNHCR concerned about new restrictions on humanitarian work in Somalia*, 1 November 2011, available at <http://www.unhcr.org/4ed4fdb6.html>.

¹⁵ BBC, *Somalia famine killed 260,000 people*, 2 May 2013, available at <http://www.bbc.co.uk/news/world-africa-22380352>.

¹⁶ UNHCR, *Dadaab – World's biggest refugee camp 20 years old*, 21 February 2012, available at <http://goo.gl/r8i7iA>; DRC, *The Dadaab Dilemma A Study on Livelihood Activities and Opportunities for Dadaab Refugees*, August 2013, available at https://drc.dk/media/1654297/dadaab_livelihood_study_final_report.pdf.

¹⁷ REACH/NRC/RCK, *Dadaab Movement and Intentions Monitoring (May – June 2017)*, available at <http://goo.gl/qehQ7w>.

B.3 CURRENT SECURITY AND HUMANITARIAN SITUATION IN SOMALIA

B.3.1 CIVIL WAR AND CONFLICT IN SOMALIA

Refugees returning to Somalia face a volatile security situation dominated by violence from Al-Shabaab, clan militias and inter-clan disputes.¹⁸ Analysis in 2016 found Somalia to be the most conflict-affected country in Africa.¹⁹ Of the large-scale crises in Africa, Somalia had almost three times the number of violent events compared with the next three most conflict-affected states (Libya, South Sudan and Nigeria).²⁰ Civilians continue to be severely affected by conflict-related violence resulting in civilian deaths and injuries, in addition to widespread sexual and gender-based violence, forced recruitment of children by armed forces, and large-scale displacement.²¹

Conflict and related protection risks continue in Somalia. In 2017 there was a spike in conflict-induced displacement in the south central area of Somalia, which has been the primary destination for Somali refugees returning from Kenya. In May and June 2017 alone, the Protection and Return Monitoring Network operated by NRC on behalf of the UNHCR recorded approximately 50,000 new people displaced due to conflict and heightened insecurity in this region, which was mostly caused by Al-Shabaab activities, the African Union Mission in Somalia and Somali National Army operations.²² While the two regions have agreed to promote peace- and state-building processes, this volatile security situation is likely to continue.²³ In its 2017 Country Risk Profile, the Index

For Risk Management – a collaboration of the Inter-Agency Standing Committee Task Team for Preparedness and Resilience and the European Commission – gave Somalia the highest possible rating for “Projected Conflict Risk” and “Current Highly Violent Conflict Intensity”.²⁴

Competition between the Somali Government (established in 2012 following the end of the interim mandate of the Transitional Federal Government) and Al-Shabaab has been a long running source of violence as Al-Shabaab “attempts to dismantle any sign of functioning central or regional governance”.²⁵ Illegal checkpoints and roadblocks established by Al-Shabaab and other armed groups restrict the movement of persons, commercial goods, and humanitarian assistance.²⁶ Al-Shabaab was also reported to be responsible for a wide range of grave human rights abuses, including extrajudicial killings, abductions and disappearances, rape and other forms of sexual violence, forced recruitment of children by armed forces, forced marriages to Al-Shabaab members, restrictions on civil liberties and freedom of movement, and restrictions on NGOs and humanitarian assistance.²⁷

Humanitarian organisations and personnel are frequently affected by violent incidents, to the extent that in 2017 “the threats posed by Al-Shabaab were considered to be too high for the UN to deploy a peace-keeping mission to Somalia”.²⁸ The number of attacks in Mogadishu against humanitarian aid workers increased significantly in 2015, with 120 violent incidents recorded compared with 75 in 2014.²⁹ Between January and June 2017 there were over 90 violent incidents on aid workers in Somalia, leading to four deaths.³⁰

¹⁸ UNHCR, *Position on Returns to Southern and Central Somalia (Update I)*, May 2016, p.2, available at <http://www.refworld.org/docid/573de9fe4.html>.

¹⁹ ACLED, *Conflict Trends (No. 52) Real-Time Analysis of African Political Violence*, October 2016, p.8, available at <http://goo.gl/dwpCWS>; ACLED, *Conflict Trends (No. 55) Real-Time Analysis of African Political Violence*, February 2017, p.3, available at <http://goo.gl/nDXZKA>.

²⁰ ACLED, *Conflict Trends (No. 55) Real-Time Analysis of African Political Violence*, February 2017, p.3, available at <http://goo.gl/thREs8>.

²¹ UNHCR, *Position on Returns to Southern and Central Somalia (Update I)*, May 2016, p.3, available at <http://www.refworld.org/docid/573de9fe4.html>.

²² OCHA, *Somalia: Drought Response (Situation Report No. 15)*, 24 July 2017, available at <http://goo.gl/W5JmvS>.

²³ Press Release, UNSOM, *SRSO Keating Welcomes the Peace Discussions in Adaado*, 31 May 2017, available at <http://goo.gl/t11v5d>.

²⁴ Index For Risk Management, *INFORM Country Risk Profile Version 2017 (Somalia)*, p.1, available at <http://goo.gl/bzwK5d>.

²⁵ ACLED, *Conflict Trends (No. 55) Real-Time Analysis of African Political Violence*, February 2017, p.3, available at <http://goo.gl/oTzc7H>.

²⁶ OCHA, *2017 Somalia Humanitarian Needs Overview*, 28 November 2016, p.9, available at <https://goo.gl/cZg2gm>.

²⁷ UNSC, *Report of the Secretary-General on Somalia (S/2016/27)*, 8 January 2016, available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2016/27.

²⁸ UNHCR, *Position on Returns to Southern and Central Somalia (Update I)*, May 2016, p.6, available at <http://www.refworld.org/docid/573de9fe4.html>; OCHA, *2017 Somalia Humanitarian Needs Overview*, 28 November 2016, p.9, available at <https://goo.gl/jzrQ5M>.

²⁹ UNSC, *Report of the Secretary-General on Somalia (S/2016/27)*, 8 January 2016, available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2016/27.

³⁰ New China, *Four Aid Workers killed in Somalia in past half year*, 6 July 2017, available at http://news.xinhuanet.com/english/2017-07/06/c_136422993.htm.

Al-Shabaab's activity increased in late 2016 with the apparent aim of disrupting the 2017 elections.³¹ Additionally, the federal and regional political processes increased localised clan conflicts.³² While Somalia's presidential elections had previously been postponed three times due to security concerns,³³ Somalia successfully concluded its presidential elections on 8 February 2017 with the election of President Mohamed Abdullahi Mohamed "Farmajo".³⁴ Although the United Nations Security Council ("UNSC") welcomed the election of President Farmajo, it stressed the need for the new President to strengthen Somalia's security capabilities, address the consequences of drought, and prevent famine.³⁵

The refugees in Dadaab appear to be acutely aware of the potential for insecurity if they return to Somalia. In a population fixing exercise carried out by the UNHCR between July and August 2016 in Dadaab, only 26 per cent of Somalis indicated a willingness to return to Somalia. For those who were not willing to return, the majority (66 per cent) stated that they wanted to remain in Kenya due to concerns about security.³⁶ A survey undertaken in Dadaab's Dagahaley camp in July and August 2016 by MSF showed similar findings with regard to the fear of the security situation in Somalia, with 83 per cent of respondents rating Somalia as "very unsafe", 97.5 per cent rating the risk of forced recruitment into armed groups in Somalia as high, and 97 per cent rating the risk of sexual violence in Somalia as high.³⁷ More recently, in assessments by NRC and RCK in May and June 2017, 42 per cent of households indicated that they have no intention of returning to Somalia in the next six months and 23 per cent stated they are unlikely to return.³⁸ The main

reported reasons for not considering return were conflict (72 per cent), followed by drought (41 per cent) and lack of livelihoods (40 per cent).

B.3.2 SOMALIA UNDER STRAIN

The combination of armed conflict, clan violence, forced evictions and natural hazards has led to more than 1.1 million people becoming internally displaced in Somalia,³⁹ of which up to 60 per cent are facing secondary displacement from their first place of refuge.⁴⁰ The humanitarian assistance and basic local services in Somalia appear to be already under stress, and refugees returning from camps in Kenya may add to the strain.⁴¹

There are serious concerns about whether Somalia can absorb the large numbers of returning refugees. In August 2016, the Jubaland administration (an autonomous region in southern Somalia) temporarily halted the return of over 1,100 Somali refugees entering the region, citing the following concerns: (a) the UNHCR provided insufficient return packages, exposing refugees to further risks; (b) the returns were unplanned, contributing to the already volatile security situation; and (c) most returnees were likely to end up in already overstretched internally displaced persons ("IDP") camps in the region.⁴² This region is of particular concern due to current movement patterns. Between 1 January 2017 and 17 March 2017, 89 per cent of returning refugees headed to Kismayo.⁴³ As a result of limited absorption capacities, returnees may be forced to join IDP camps, or make

³¹ UNSC, *Report of the Secretary-General on Somalia (S/2017/21)*, 9 January 2017, pp.2-3, available at <http://goo.gl/9HHNFY>.

³² OCHA, *2017 Somalia Humanitarian Needs Overview*, 28 November 2016, p.7, available at <https://goo.gl/QCK5yK>.

³³ Reuters, *Somalia's election postponed again - lawmaker*, 25 September 2016, available at <http://af.reuters.com/article/topNews/idAFKCN11V080>; The East African, *Facing many hurdles, Somalia presidential election postponed again*, 29 November 2016, <http://goo.gl/3v5o54>.

³⁴ BBC, *Somalia's Mohamed Abdullahi Farmajo chosen as president*, 8 February 2017, available at <http://www.bbc.com/news/world-africa-38904663>.

³⁵ UN Press Release, Security Council Statement, *Welcoming Election of New President in Somalia, Stresses Urgent Need to Prevent Famine, Address Drought's Consequences*, 10 February 2017, available at <https://www.un.org/press/en/2017/sc12712.doc.htm>.

³⁶ UNHCR, *Final Report - Population Fixing Exercise, Dadaab Refugee Camps*, August 2016. On file with NRC.

³⁷ Médecins Sans Frontières, *Dadaab to Somalia: Pushed Back Into Peril*, October 2016, pp.2-3, available at <http://goo.gl/7Yh2Ev>.

³⁸ REACH/NRC/RCK, *Dadaab Movement and Intentions Monitoring (May - June 2017)*, available at <http://goo.gl/h819Kh>.

³⁹ UNHCR, *Position on Returns to Southern and Central Somalia (Update I)*, May 2016, p.8, available at <http://www.refworld.org/docid/573de9fe4.html>. OCHA, *2017 Somalia Humanitarian Needs Overview*, 28 November 2016, p.4, available at <https://goo.gl/WN4dNG>.

⁴⁰ OCHA, *2017 Somalia Humanitarian Needs Overview*, 28 November 2016, p.7, available at <https://goo.gl/xyzJxm>.

⁴¹ NRC, *Dadaab's broken promise: A call to reinstate voluntary, safe and dignified returns for Dadaab refugee community*, 10 October 2016, pp.6-7, available at <https://www.nrc.no/globalassets/dadaabs-broken-promise-an-nrc-report-10.10.16.pdf>.

⁴² NRC, *Dadaab's broken promise: A call to reinstate voluntary, safe and dignified returns for Dadaab refugee community*, 10 October 2016, p.7, available at <https://www.nrc.no/globalassets/dadaabs-broken-promise-an-nrc-report-10.10.16.pdf>; Amnesty International, *Nowhere Else To Go: Forced Returns of Somali Refugees From Dadaab Refugee Camp, Kenya*, 14 November 2016, p.5, available at <https://www.amnesty.org/en/documents/afr32/5118/2016/en/>.

⁴³ Foreign Policy, *The UN is sending thousands of refugees back into a war zone*, 26 September 2016, available at <http://goo.gl/xdpXm>.

the return journey to Dadaab or other refugee camps.⁴⁴

As returning refugees are likely to become IDPs, those returning (along with the existing estimated 1.1 million IDPs in Somalia) may be left more vulnerable due to insecurity and inadequate protection upon a return to Somalia. IDPs are at particular risk of forced evictions, gender based violence, and child rights violations.⁴⁵ Certain groups may be at a higher risk, including returnees with disabilities and those belonging to minority groups, such as the Somali Bantu. The Somali Bantu in particular may be excluded from accessing land and other services on the basis of their identity as an ethnic minority.⁴⁶ Such discrimination also increases the susceptibility of Somali Bantu youth and children to recruitment by Al-Shabaab.⁴⁷

B.3.3 DETERIORATING HUMANITARIAN SITUATION

Somali refugees are returning from Dadaab to a country struggling not only with ongoing conflict and civil war, but also its worst drought in 20 years following two consecutive seasons of poor rainfall. This year, it is estimated that more than half of the population of Somalia (approximately 6.7 million people) are facing acute food shortages, and more than 3.2 million are deemed to be in “emergency” and “crisis” food insecurity situations, according to the Integrated Food Security Phase Classification (“IPC”).⁴⁸ Areas affected by the drought include the 12 areas in Somalia designated by the UNHCR as areas of return for refugees (see Part B.5.1 below).⁴⁹

The humanitarian situation is not expected to improve until at least December 2017 as a consequence of below average 2017 *Gu* rains (or “Long Rains”, the rainy season that runs from February to May), and related problems of food production and pest infestation.⁵⁰ The likely results of the continued drought are: (a) food access remaining a challenge among most poor households; and (b) increased risks of acute malnutrition and mortality caused by disease outbreaks such as cholera and measles.⁵¹ The malnutrition rate has worsened in 2017 with an estimated 363,000 children acutely malnourished.⁵² Food assessments have revealed that levels of acute malnutrition remain highest in most IDP settlements.⁵³

Since November 2016, displacement caused by drought and related factors has led more than 776,000 people inside Somalia to abandon their homes in search of water and food in other parts of the country.⁵⁴ Drought conditions are spreading to the southern regions of Somalia where ongoing armed conflict creates access constraints that hinder the provision of humanitarian assistance to vulnerable communities. This is of particular concern because the access constraints in the southern regions of Somalia were a “principal contributor to the catastrophic 2011-12 famine”.⁵⁵

Drought conditions are also a significant driver of conflict. For example, increased movement among Somalia’s pastoral farmers in search of improved water availability and pasture is likely to lead to further conflict as farmers fight for limited resources.⁵⁶ Additionally, upon return from displacement, housing may be occupied by other IDPs, leading to further conflict. Refugee returnees and IDPs remain particularly vulnerable to the effects of drought as food

⁴⁴ NRC, *Dadaab's broken promise: A call to reinstate voluntary, safe and dignified returns for Dadaab refugee community*, 10 October 2016, pp.6-7, available at <https://www.nrc.no/globalassets/dadaabs-broken-promise-an-nrc-report-10.10.16.pdf>; Amnesty International, *Nowhere Else To Go: Forced Returns of Somali Refugees From Dadaab Refugee Camp, Kenya*, 14 November 2016, pp.21-22, available at <https://www.amnesty.org/en/documents/afr32/5118/2016/en/>.

⁴⁵ OCHA, *Somalia Humanitarian Response Plan January-December 2017*, 30 November 2016, p.36, available at <http://goo.gl/savfEL>.

⁴⁶ NRC, *Dadaab's broken promise: A call to reinstate voluntary, safe and dignified returns for Dadaab refugee community*, 10 October 2016, p.5, available at <https://www.nrc.no/globalassets/dadaabs-broken-promise-an-nrc-report-10.10.16.pdf>; Amnesty International, *Nowhere Else To Go: Forced Returns of Somali Refugees From Dadaab Refugee Camp, Kenya*, 14 November 2016, p.5, available at <https://www.amnesty.org/en/documents/afr32/5118/2016/en/>.

⁴⁷ *Ibid.*, p.5

⁴⁸ The Food Security and Nutrition Analysis Unit (FSNAU) and the Famine Early Warning Systems Network (FEWSNET), *FSNAU-FEWSNET Food Security Quarterly Brief - Focus on Gu 2017 Season Early Warning, April 2017*, 29 May 2017, p.1, available at <http://goo.gl/hGrfi1>.

⁴⁹ FSNAU and FEWSNET, *FSNAU-FEWSNET Technical Release, February 2017*, 2 February 2017, pp.1-2, available at <http://goo.gl/ydnnc9>.

⁵⁰ OCHA, *Humanitarian Bulletin Somalia May 2017*, 2 June 2017, pp.1, 2, available at <http://goo.gl/R5GuWw>.

⁵¹ *Ibid.*

⁵² *Ibid.*, p.1.

⁵³ FSNAU-Fews NET 2017 Post Gu Technical, 31 August 2017, available at <http://www.fao.org/somalia/news/detail-events/en/c/1036170/>.

⁵⁴ OCHA, *Somalia: Drought Response (Situation Report No. 15)*, 24 July 2017, available at <http://goo.gl/uMa1s2>.

⁵⁵ OCHA, *Somalia Humanitarian Response Plan January-December 2017*, 30 November 2016, pp.4, 8, available at <http://goo.gl/5XT9Dv>.

⁵⁶ OCHA, *2017 Somalia Humanitarian Needs Overview*, 28 November 2016, p.6, available at <https://goo.gl/yjWsq1>.

prices rise and increased migration to urban areas results in competition for employment.⁵⁷ Any increased drought-related conflict is likely to exacerbate an already complex humanitarian situation in Somalia and may consequently affect returns and reintegration in Somalia.

The deteriorating humanitarian situation in Somalia must be addressed if voluntary repatriations are to be a durable solution for Somali refugees. This was identified most recently through the Nairobi Declaration, which is explored in Part C.3 below.

B.4 OVERVIEW OF REFUGEE TREATMENT

B.4.1 REGISTRATION AND REFUGEE STATUS DETERMINATION (“RSD”)

The Kenyan 2006 Refugees Act (the “**Refugees Act**”), along with the 2009 Refugee (Reception, Registration and Adjudication) Regulations (the “**Regulations**”), set out the entitlement of refugees to reside in Kenya and the principle of non-refoulement within domestic law. The Refugees Act affirms Kenya’s commitment to providing refugees with the rights contained in the international agreements to which Kenya is a party, and sets out a structured set of powers and functions for dealing with refugee-related issues.

The Regulations set out the process for Refugee Status Determination (“**RSD**”). Asylum seekers are to make applications at a “reception centre” to a RSD Officer using a specified form that requires applicants

to list biographical information and provide a written statement about why they believe they need protection as a refugee.⁵⁸ Asylum seekers are then required to attend an in-person interview with a RSD Officer. Further hearings and investigations may be conducted during this period,⁵⁹ and the asylum seeker bears the burden of proof to establish that s/he is a refugee as defined in the Refugees Act.⁶⁰ After the completion of an interview, a RSD Officer submits a recommendation to the Commissioner for Refugees Affairs (the “**Commissioner**”),⁶¹ who then has 90 days to make a decision.⁶²

The Regulations also specify the rules around refugee documentation. Upon making their application, an asylum seeker (and his or her family) is to be issued with an Asylum Seeker Pass⁶³ (the form of which is specified in the Regulations)⁶⁴ which functions as proof of legal status in Kenya⁶⁵ and specifies the time and date at which the asylum seeker is to return to a Refugee Reception Office,⁶⁶ and the expiry date of the pass.⁶⁷ Following the grant of refugee status, a refugee is to be issued with a Refugee Identity Card (or, if aged under 18, a Refugee Identification Pass)⁶⁸ by a Refugee Camp Officer, an officer appointed by the Commissioner to manage refugee camps and various administrative issues.⁶⁹ Such documentation is issued free of charge⁷⁰ and contains a photograph of the holder along with the holder’s name, date of birth, gender, country of origin, and an identification number.⁷¹ The card (or pass) is proof of the bearer’s legal presence in Kenya.⁷² This legal status protects the bearer against deportation for being unlawfully present in the country under the Kenya Citizenship and Immigration Act 2011.⁷³

⁵⁷ FSNAU and FEWSNET, *FSNAU-FEWSNET Technical Release, February 2017*, 2 February 2017, pp.1-2, available at <http://goo.gl/VCn50T>.

⁵⁸ Form 1, Schedule to the Regulations.

⁵⁹ See Part III.

⁶⁰ Regulation 22(1).

⁶¹ Regulation 29(1).

⁶² Regulation 18(1).

⁶³ Regulations 10(e) and 24(4).

⁶⁴ Form 2, Schedule to the 2009 Regulations.

⁶⁵ Regulation 13(2).

⁶⁶ Regulation 13(1)(b).

⁶⁷ Regulation 32(3)(i).

⁶⁸ Regulation 31.

⁶⁹ See Refugees Act 2006, § 17.

⁷⁰ Regulation 32(1)(b).

⁷¹ Regulation 32(3).

⁷² Regulation 33(3). The Regulations also set specific registration mechanisms for any child who enters the country unaccompanied or separated from both parents though not necessarily other relatives: Refugees (Reception, Registration and Adjudication) Regulations of 2009 § 15.

⁷³ Kenya Immigration and Citizenship Act 2011, §§ 33, 34, 43.

According to the law and the general practice in Dadaab, the procedure for refugee registration historically involved the following:

- (1) An asylum seeker registers with the DRA to get an Asylum Seeker Pass and an RSD appointment slip from the UNHCR for access to refugee camps.
- (2) An asylum seeker is then issued with a Ration Card by the UNHCR in the camps.
- (3) The RSD process is carried out jointly by the UNHCR and the DRA.
- (4) Once recognised, refugees receive a Refugee Recognition Letter from the Kenyan Government, which allows them to apply for a Refugee ID Card from the Kenyan Government and a Mandate Certificate from the UNHCR, which allows them full access to humanitarian assistance and services.

Under the Refugees Act, Kenya recognises two types of refugees: *prima facie* and statutory refugees.⁷⁴ *Prima facie* status applies to groups of refugees, often based on nationality. Previously, Somali asylum seekers were considered to be *prima facie* refugees and the RSD process for Somali asylum seekers was automatic, which meant that the RSD process was accelerated, and asylum seekers would not be required to undergo additional interviews, an assessment, decision-making, review process, further research, legal analysis or any other further steps regarding an assessment of the asylum seeker's claim.⁷⁵ However, on 29 April 2016 the Kenyan Government revoked the *prima facie* status for Somali refugees and, with effect from 1 April 2016, Somali asylum seekers were required to undergo the full RSD process on an individual basis. As statutory refugees the period between registration and RSD is currently around three years.⁷⁶

There are also a growing number of asylum seekers in Dadaab who have not been able to access international protection because, since July 2015⁷⁷, the Kenyan Government has largely suspended

registration of asylum seekers in Dadaab, most acutely affecting asylum seekers of Somali origin. Ongoing data gathered by NRC, and the RCK and supported by REACH/Impact Initiatives in Dadaab, revealed that 20 per cent of households in contact with Dadaab staff in May and June 2017 had no member of the household registered, and 4 per cent had only some members of the household registered.⁷⁸ While this sample may not be indicative of wider camp trends (given that NRC and RCK teams interviewed refugees who had sought assistance with protection concerns and therefore may have included a disproportionate number of undocumented persons), it does reveal that the scale of undocumented persons in the camp may be larger than the current published numbers, and is likely to be growing.

The consequences for undocumented persons in Dadaab are complex and, in most cases, result in serious protection risks. Basic humanitarian support given to registered refugees and asylum seekers such as food, non-food items and shelter is denied (with limited exceptions) to undocumented persons. They can only access basic healthcare within the camp, and an absence of medical screening for them has directly led to outbreaks of cholera and measles. Undocumented children have limited access to education services without the right to sit for Kenyan state exams. Full child protection and GBV services are often not available. Fear of contact with officials is also preventing many undocumented persons from reporting crimes against them.

B.4.2 STRUCTURAL ENCAMPMENT POLICY

On 13 December 2012, the DRA announced the implementation of a structural encampment policy that required all refugees and asylum seekers in urban areas to relocate to refugee camps or return to their country of origin.⁷⁹ The designation of refugee areas appears to be dictated by several factors, including the administrative challenge of processing refugees, difficulties regarding local integration and political and security concerns. Additionally, registration of

⁷⁴ Refugees Act 2006, § 3.

⁷⁵ GSMA, Refugees and Identity: Considerations for mobile-enabled registration and aid delivery, 2017.

⁷⁶ Amnesty International, *Nowhere Else To Go: Forced Returns of Somali Refugees From Dadaab Refugee Camp, Kenya*, 14 November 2016, p.11, available at <https://www.amnesty.org/en/documents/af32/5118/2016/en/>.

⁷⁷ Human Rights Watch, *Kenya: Protect Somalis Facing Conflict, Abuses, Drought*, 23 March 2017, available at <https://goo.gl/DdEMyK>.

⁷⁸ REACH/NRC/RCK, Dadaab Movement and Intentions Monitoring (May - June 2017), available at <http://goo.gl/PBQEqw>.

⁷⁹ HRW, *Human Rights Watch: Kenya: Don't Force 55,000 Refugees Into Camps*, 21 January 2013, available at <https://goo.gl/cVhJXu>.

new arrivals in urban areas was suspended, and refugees with expired documents were not permitted to renew their status. Kenyan police adopted a practice of stopping refugees and asking for their papers, and if refugees did not have the required documents they were at risk of arrest and, in some cases, deportation. It is worth noting, however, between 2012 to 2013 and 2014 to 2015, there were periods of urban registration that contributed to the ongoing urban verification programme. Small-scale and one-off urban registrations continue to occur occasionally, but this process has been largely scaled back since December 2012, when the DRA announced that the registration of asylum-seekers and refugees in urban areas would be suspended.⁸⁰

B.4.3 OPERATION USALAMA

One of the most prominent incidents cited to justify the encampment approach towards Somali refugees was the Westgate Shopping Centre attack on 21 September 2013. At least 67 people died when suspected Al-Shabaab militants stormed the shopping centre, leading to a four-day siege.⁸¹ In this context, the Kenyan Government began a concerted effort to neutralise Al-Shabaab, beginning with Operation Usalama which commenced on 5 April 2014. Thousands of Somali refugees in Nairobi were apprehended and detained in the Kasarani Sport Stadium Complex in Nairobi. Some Somali detainees were charged with unlawful presence and were either made to relocate to refugee camps, deported or released after payment and on the condition that they would return to Somalia as soon as possible.

On 4 September 2014, the International Commission of Jurists, Kenya Chapter (“**ICJ-Kenya**”) and Justice Forum published a report documenting the human rights violations that occurred during the forced

repatriation of refugees and asylum seekers from Kenya to Somalia (or “refoulement”) between April and May 2014 during Operation Usalama.⁸² Additionally, Amnesty International published a report on 23 October 2014, which concluded that deporting refugees and asylum seekers to south and central Somalia amounted to a violation of international law.⁸³

B.4.4 FIRST STEPS TOWARDS THE CLOSURE OF DADAAB

On 2 April 2015 Al-Shabaab militants attacked the University College of Garissa in Kenya, killing 148 people and injuring 79 more. Following the attack, the Kenyan Government once again took measures against Somali refugees including attempting to implement the structural encampment policy, freezing of funds, suspension of various civil society organisations, and the threat of closure of refugee camps suspected of having links with terrorism.⁸⁴ In response to these measures, at its 56th session in April and May 2015, the African Commission called upon the Kenyan Government to “[t]ake all necessary measures to protect refugees in conformity with regional and international commitments that Kenya has entered into”.⁸⁵

The Kenyan Government’s attitude towards refugees in Kenya culminated in a directive of the Ministry of the Interior, issued on 6 May 2016, which disbanded the DRA and declared that two refugee camps – Dadaab and Kakuma⁸⁶ – would be closed “*within the shortest time possible*”.⁸⁷ The Kenyan Government subsequently extended the deadline for the closure of Dadaab from 30 November 2016 to May 2017. Since May 2017, the camp has continued to operate despite the deadline having expired.⁸⁸

⁸⁰ Amnesty International, *Nowhere Else To Go: Forced Returns of Somali Refugees From Dadaab Refugee Camp, Kenya*, 14 November 2016, available at <https://www.amnesty.org/en/documents/afr32/5118/2016/en/>.

⁸¹ Independent, *Nairobi Westgate mall attack: Shopping centre re-opens two years after terror siege where al-Shabaab killed 67 people*, 14 July 2015, available at <http://goo.gl/49MQW5>.

⁸² Justice Forum, *Executive summary*, available at <http://goo.gl/8Ywx3N>.

⁸³ Amnesty International, *Kenya: Somalis scapegoated in counter-terror crackdown*, available at <https://goo.gl/oA2CkN>.

⁸⁴ Justice Forum, *Dignity Denied: Somali Refugees Expelled from Kenya in 2014*, 4 September 2015, available at <http://goo.gl/CqjEcc>.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ Statement by the Ministry of the Interior, Kenyan Government, 6 May 2016, p.2, available at <https://goo.gl/Ywzdqd>.

⁸⁸ Reuters, *Kenya delays closure of Somali refugee camp*, 16 November 2016, available at <http://goo.gl/od4BWZ>.

B.4.5 CAMP DEPENDENCIES AND IMPACT ON KENYA

Dadaab is reliant on external agencies for the provision, distribution and management of many basic services and provisions. Appendix B details the services and provisions provided by national and international agencies to refugees in Dadaab. Dadaab has, over time, grown to resemble a city with its own informal economy.⁸⁹ Because of this, some have argued that the presence of Dadaab has benefits for Kenya: a 2010 study commissioned by the Kenyan, Danish and Norwegian governments concluded that Dadaab provides about \$14 million of economic benefits to the surrounding community each year.⁹⁰ Similarly, a study commissioned by the World Bank in 2016 showed the positive effects of the Kakuma camp on Kenya. These included a boost to the overall economic activity and greater physical well-being of Kenya as a result of improved access to: (a) food or cash in exchange for goods, services, and labour; and (b) other services, which were intended for refugees but are also available or easily accessible to the host community.⁹¹

Living conditions are difficult in Dadaab; due to recurring population influxes and the protracted nature of the displacement, humanitarian assistance has often not kept pace with needs. Refugees typically live in makeshift shelters, with only a limited number of refugees receiving formal shelter. Due to limited freedom of movement and livelihood opportunities, refugees in Dadaab remain reliant on the UNHCR and other humanitarian providers, including the World Food Programme (“WFP”) and national and international NGOs, for basic assistance and services such as food, health and education. Funding levels in Dadaab have also not kept pace with needs. The UNHCR has noted that its appeal for its Kenya refugee response in July 2017 was just 21 per cent funded.⁹² WFP, responsible for food assistance in Dadaab, had to cut its food rations by 50 per cent between December 2016 and April 2017 due to shortfalls in funding.⁹³

Any reduction in humanitarian assistance and basic services provided by humanitarian agencies in Dadaab could serve as a ‘push’ factor due to the decrease in quality of life offered to refugees in Dadaab, calling into question the voluntary nature of refugees’ decision to return to Somalia.⁹⁴ Indeed, in household assessments conducted by NRC and RCK between May and June 2017, one of the main reported reasons for considering a return among Somali refugee households was the lack of services in Dadaab (24 per cent of households cited this as one of the main reasons they are considering return).⁹⁵

B.5 PROCESS OF REPATRIATING THE SOMALI REFUGEES FROM DADAAB TO SOMALIA

B.5.1 THE PROCESS FOR REPATRIATION

The process for the voluntary repatriation of Somali refugees within the framework of the Tripartite Agreement, which became fully operational in 2015, consists of a number of stages. The process has no fixed time scale, as the time it takes is dependent upon factors such as the movement capacities of the UNHCR and the International Organisation on Migration (“IOM”) which vary depending upon a number of factors, including the place of return and overall weather and security conditions.⁹⁶ Under the Tripartite Agreement, the UNHCR is largely responsible for ensuring that the refugees’ decision to repatriate is truly voluntary, with a positive obligation on the UNHCR to “*verify and assure the free and voluntary nature of the decisions... to repatriate*” (Article 26 (i)).

The UNHCR currently supports the return to 12 designated areas in South Central Somalia, Somaliland and Puntland: Afgooye, Baidoa, Balad, Beletweyne, Jowhar, Kismayo, Luuq, Mogadishu, Wanla-weyn, Diinsoor, Afmadow and Balad-Hawo. Refugees who wish to return outside of these areas

⁸⁹ The Economist, *From here to eternity*, 28 May 2016, available at <http://goo.gl/qgVyXU>.

⁹⁰ Enghoff, M. et al., *Socio-economic and Environmental Impacts of Dadaab Refugee Camps on Host Communities*, September 2010, available at <http://www.alnap.org/resource/6334>.

⁹¹ World Bank Group, *In My Backyard? Yes*, 2016, p.41, available at <http://goo.gl/kCRu3S>.

⁹² UNHCR, *Kenya Funding Update as of 3 July*, 3 July 2017, available at <http://goo.gl/UiP5jr>.

⁹³ Human Rights Watch, *Kenya: Protect Somalis Facing Conflict, Abuses, Drought*, 23 March 2017, available at <https://goo.gl/Dt5uF7>.

⁹⁴ The Guardian, *Somalis torn between hunger in Dadaab and uncertainty at home*, 19 January 2015, available at <https://goo.gl/yC8gBa>.

⁹⁵ REACH/NRC/RCK, *Dadaab Movement and Intentions Monitoring (May - June 2017)*, available at <http://goo.gl/HtkrLc>.

⁹⁶ UNHCR, *Voluntary repatriation of Somali Refugees from Kenya, Operations Plan July 2015-December 2019*, p.7, available at <http://www.unhcr.org/561627e39.pdf>.

are free to do so but will not be provided with return and reintegration assistance.

First, refugees who wish to return to Somalia must visit one of the Return Help Desks situated in each of the camps in Dadaab. The integrated Return Help Desks were initially set up in mid-2014 by the UNHCR and DRA. Since 2015 these have been run by the UNHCR with a number of NGO partners, including NRC⁹⁷ and specialised health and child protection partners.⁹⁸ The voluntary repatriation process is governed by inter-agency Standard Operating Procedures (“**SOPs**”) that are regularly reviewed at the field level. Refugees at any step of the process have the option of deciding against return.

All members of the household are required to go to a Return Help Desk if they are considering a return. After verification of each member’s registered refugee status, household members are provided with information and counselling on conditions in Somalia, in particular on their planned area of return. Such information will include: (a) issues of security and prevailing humanitarian conditions such as drought and internal displacement; (b) the availability of essential services and assistance in their return areas; (c) livelihood opportunities; (d) the ability to reclaim housing, land and other assets left behind, and (e) protection threats and services including with respect to the risks of mines, unexploded ordnances and improvised explosive devices.

After refugees have received information on return areas, they undergo protection counselling by the UNHCR staff including confirmation of the voluntariness of the decision and completion of a counselling questionnaire. Refugees are then required to have a seven day ‘reflection period’ during which the refugees wishing to return are encouraged to reflect upon their impending return in light of the information and counselling they have received. Refugees must then re-approach a Return Help Desk and

confirm their decision to return.⁹⁹ Refugees will then receive additional practical information on the repatriation process and the next steps from the Refugee Affairs Secretariat (“**RAS**”). Refugees with specific needs will have additional assessments undertaken, and unaccompanied and separated children will be subjected to the “*best interest determination*” processes by the UNHCR together with child protection partners.¹⁰⁰

The refugees in question are then referred for a health screening. To ensure the safety of returning refugees, only those who pass the health screening and are deemed to be fit to travel will be supported through the return process. For those found unfit to travel, medical attention will be provided and departure will be supported once they are deemed fit to travel.¹⁰¹ The refugees regarded as fit to travel will then register for a SCOPE card from the WFP. The SCOPE card provides a cash grant to those returning to Somalia, which allows them to pick up food items upon return to Somalia for six months.¹⁰² A voluntary repatriation form is then issued by the UNHCR Kenya.

The next step, led by the RAS and the UNHCR, is to undergo exit procedures and be issued movement passes. Depending on movement convoys, it can take months to set a repatriation date. Once set, the refugee is moved on to a transit centre in either the Dagahaley or Hagadera camps in Dadaab where they are given a hot meal, their SCOPE card and a final medical check with the UNHCR. Refugees at the transit centres are also provided by NRC with: (a) more information on the threat of mines, unexploded ordnances and improvised explosive devices and how to protect themselves; (b) the latest information on security conditions and updates on the situation in their planned areas of return; (c) core relief items and hygiene kits, which are provided on behalf of the UNHCR.¹⁰³ The UNHCR also provides the returning refugees with a cash grant. Originally, each individual was given \$80 (plus 20 per cent for vulnerable

⁹⁷ UNHCR, *Voluntary repatriation of Somali Refugees From Kenya, Operations Strategy 2015-2019*, 29 July 2015, p.13, available at <http://www.unhcr.org/5616280b9.pdf>.

⁹⁸ *Ibid.*, p.14.

⁹⁹ UNHCR, *Voluntary repatriation of Somali Refugees From Kenya, Operations Plan July 2015-December 2019*, pp.13-14, available at <http://www.unhcr.org/561627e39.pdf>.

¹⁰⁰ Save the Children, *Ensuring protection and adequate care for children in Dadaab Refugee Camps, Kenya*, available at <https://goo.gl/99GqzS>.

¹⁰¹ UNHCR, *Voluntary repatriation of Somali Refugees From Kenya, Operations Plan July 2015-December 2019*, available at <http://www.unhcr.org/561627e39.pdf>.

¹⁰² Amnesty International, *Nowhere Else To Go: Forced Returns of Somali Refugees From Dadaab Refugee Camp, Kenya*, November 2016, p.13, available at https://www.aivl.be/sites/default/files/bijlagen/dadaab_report_0.pdf.

¹⁰³ Amnesty International, *Nowhere Else To Go: Forced Returns of Somali Refugees From Dadaab Refugee Camp, Kenya*, November 2016, available at https://www.aivl.be/sites/default/files/bijlagen/dadaab_report_0.pdf.

individuals)¹⁰⁴ but following the cross-border coordination meeting in April 2015,¹⁰⁵ the UNHCR Somalia reported that the cash grant was not sufficient as returning refugees were struggling to afford the transportation costs needed to reach their final destination. As a result, the grant was increased in 2015 and again in 2016, to \$200 per person travelling by road, and \$150 per person travelling by air (with an extra \$30 provided to persons with specific needs).¹⁰⁶

On the day of departure, returning refugees will proceed through immigration and customs control. Those travelling by road will be escorted by the Kenya Police Service to the border crossing point, whereas for those travelling by air – currently available for Mogadishu and Kismayo-bound passengers – exit formalities will differ depending on whether regular commercial or charter flights have been organised. Once the returning refugees reach an officially designated border crossing point, they will be provided with access to: (a) hot meals, (b) water, sanitation and hygiene facilities, (c) emergency healthcare, (d) protection screening, and (e) additional information on transit routes, areas of return and protection screening at way stations along the borders or at airports. Those travelling by air will be met at the airports and taken to the nearest transit centre or supported to return home directly.¹⁰⁷

B.5.2 ASSISTANCE PROVIDED UPON RETURN TO SOMALIA

The UNHCR and partners also provide for initial return and reintegration assistance in Somalia, with the levels of assistance and modalities for delivery dependent on funding, security and access. In 2017, assistance has included a one-off reinstallation grant of \$200 per person (in addition to the initial cash grant provided when the refugee registers for a SCOPE card, as discussed above at B.5.1), monthly unconditional cash assistance of \$200 per household for six months, food assistance (food rations or vouchers depending on area of return) for six months provided by the WFP, one-off provision of core relief item kits, and an education grant for primary school-aged children attending schools for one school year.¹⁰⁸

Additionally, the UNHCR with partners and in coordination with the Somalia 2016 Humanitarian Response Plan (which is devised to inform strategic decisions and coordinate humanitarian responses) has been focused on developing access to basic services in key return areas through community-based projects and livelihood opportunities.

¹⁰⁴ UNHCR, Voluntary return and reintegration of Somalia refugees from Kenya, Pilot phase, Evaluation Report, available at <http://www.unhcr.org/560b962f9.pdf>.

¹⁰⁵ UNHCR, Voluntary repatriation of Somali Refugees from Kenya, Operations Strategy 2015-2019, p.15, available at <http://www.unhcr.org/5616280b9.pdf>.

¹⁰⁶ UNHCR, *Somalia Situation, Supplementary appeal, July-December 2016*, July 2016, available at <http://goo.gl/32uAJ4>.

¹⁰⁷ UNHCR, Voluntary repatriation of Somali Refugees from Kenya, Operations Strategy 2015-2019, available at <http://www.unhcr.org/5616280b9.pdf>.

¹⁰⁸ UNHCR, *Somalia Situation, Supplementary appeal, July-December 2016*, July 2016, available at <http://goo.gl/VhPR4i>; UNHCR, *UNHCR appeals for additional 115 million for voluntary return, reintegration of Somali refugees from Dadaab camp*, 26 July 2016, available at <http://goo.gl/qqrnE>.



RELEVANT LEGAL FRAMEWORK



Somali refugee at the NRC helpdesk in Dadaab. ©NRC/Fredrik Lerneryd, 2016

The legal framework relating to refugees comprises various international treaties, and customary norms of international law; African regional treaties and related jurisprudence; and domestic Kenyan law, which includes laws specifically relating to refugees, laws of more general application (including human rights laws and laws concerning the prevention of torture), the constitution of Kenya and related jurisprudence. International, regional and domestic refugee laws govern when individuals should be recognised as refugees, the rights and protections that accord to refugees and those seeking refugee status and the circumstances in which a refugee may lose refugee status and may permissibly be removed from a host country. International and regional human rights laws are also relevant to the treatment of asylum seekers and refugees.

This Part C sets out the legal framework pertaining to refugees in Kenya and is comprised of the following sections:

- ➔ **C1** International legal instruments to which Kenya has acceded as a State Party
- ➔ **C2** International soft law, including doctrinal positions of the UNHCR
- ➔ **C3** Recent Developments in International Refugee Law and Policy
- ➔ **C4** African regional legal instruments to which Kenya has acceded as a State Party
- ➔ **C5** Tripartite Agreement between Kenya, Somalia and the UNHCR
- ➔ **C6** Domestic Kenyan laws and case law
- ➔ **C7** Dadaab Judgment and the *Kituo Cha Sheria* Court of Appeal Judgment regarding the 2012 encampment policy

C.1 INTERNATIONAL LEGAL INSTRUMENTS TO WHICH KENYA HAS ACCEDED AS A STATE PARTY

C.1.1 THE 1951 CONVENTION AND 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES

The 1951 Convention Relating to the Status of Refugees (the “**1951 Convention**”) is the centrepiece of international refugee law and sets out the standard international definition of a “*refugee*”, the rights and responsibilities of refugees and the obligations of State Parties. Kenya is a State Party to the 1951 Convention, having acceded to it in 1966 without reservation.

In 1967, the Protocol Relating to the Status of Refugees (the “**1967 Protocol**”) entered into force. Whereas the 1951 Convention restricted refugee status to those whose circumstances had come about “*as a result of events occurring before 1 January 1951*”, and giving State Parties the option of interpreting this as “*events occurring in Europe*” or “*events occurring in Europe or elsewhere*”, the 1967 Protocol removed these temporal and geographic restrictions. The 1967 Protocol did not itself amend the 1951 Convention, but rather it adopted Articles 2 to 34 from the 1951 Convention and added further provisions (including refinements to the definition of “*refugee*”). The 1967 Protocol is independent of, yet integrally related to, the 1951 Convention and can be (and has been) ratified by State Parties independently of the 1951 Convention. Kenya acceded to the 1967 Protocol in 1981 without reservation.

C.1.1.1 Definition of Refugee

Article 1A(2) of the 1951 Convention, when read together with Article I of the 1967 Protocol, defines a refugee as:

“ any person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it”.¹⁰⁹

There is therefore a four-part test to determine whether an individual is a refugee under the 1951 Convention, as supplemented by the 1967 Protocol:

- a) He or she must be outside his or her country of nationality or habitual residence.
- b) He or she must have a well-founded fear of being persecuted.
- c) That fear must be based on his or her race, religion, nationality, membership of a particular social group or political opinion.
- d) He or she must be unable or unwilling to avail himself or herself of the protection of that country, or return there, for fear of being persecuted.

This definition of refugee is not limited as to time and makes no allowance for the conditions in the state where the individual is seeking refuge. Article 1A(2) makes clear that a refugee remains a refugee indefinitely unless there are grounds for a cessation of refugee status.

Jurisprudence relating to the 1951 Convention and the 1967 Protocol (the 1967 Protocol together with the 1951 Convention, the “**Convention and Protocol**”) often comes from national courts of State Parties (or regional courts such as the European Court of Human Rights) that seek to interpret the international obligations that apply in that national jurisdiction. The applicant must have a well-founded fear of persecution, which is not remote, insubstantial or

¹⁰⁹ *Ibid.*, at Art. 1(A).

far-fetched.¹¹⁰ It is also notable that the definition gives considerable weight to the refugee's subjective perception, because a refugee's status under the 1951 Convention arises from an individual's fear of persecution, only subject to the requirement that such fear is "well-founded". In contrast, the OAU Convention (defined below in Part C.4.1) provides an alternative definition of "refugee", as discussed below, which includes a further objective element.

If an individual does not meet the definition of refugee given in the 1951 Convention or in another legal instrument such as the OAU Convention, the Refugees Act, or the Regulations, then the non-refoulement provision of the 1951 Convention (discussed below) will not apply and the individual may in principle be returned to his country of origin. However, in these circumstances, complementary protections may compel the host state to protect the individual on other grounds. An example of such complementary protection includes Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "**Convention Against Torture**"), which stipulates that no State Party shall expel, return ("refouler") or extradite a person to another state where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.¹¹¹ In addition, Article 7 of the 1966 International Covenant on Civil and Political Rights (the "**ICCPR**") has been interpreted by the Human Rights Committee as prohibiting the return of persons to places where torture or persecution is feared.¹¹² Where refugee protection and complementary human rights protection do not apply, in many cases the presence of asylum seekers is tolerated in the host country, sometimes on extra-legal compassionate grounds, but such individuals do not have legal status.

C.1.1.2 Exclusion

Where an asylum seeker has been involved in particular acts of grave moral culpability, the individual may be excluded from eligibility for refugee status at the point of refugee status determination, pursuant to Article 1F of the 1951 Convention, which provides that the protection of refugee status does not apply to:

“ any person with respect to whom there are serious reasons for considering that:

a) he or she 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 crimes;

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

c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations”.¹¹³

Given the strict requirements of Article 1F, it will only be relevant in a small number of individual cases. Given that it requires "serious reasons" with respect to a particular "person", the Article cannot be used to justify an indiscriminate exclusion of large numbers of asylum seekers from the protections of the 1951 Convention. As noted above in Part B, the threat of terrorism appears to be a significant factor in the Kenyan Government's approach to the refugee population at Dadaab. While in cases of particular gravity, an individual may be refouled in reliance on the national security or serious crime exceptions in Article 33 discussed below or excluded from refugee status pursuant to Article 1F, these provisions do not permit the mass refoulement or exclusion of refugees as they require individual case determination and impose criteria that are unlikely to be met in many cases.

¹¹⁰ Goodwin-Gill, G. & McAdam, J., *The Refugee in International Law*, Oxford Univ. Press (3d ed.) 2011, p.92.

¹¹¹ Convention Against Torture, Art. 3.

¹¹² See *GT v Australia*, Comm. No. 706/1996 (CCPR/C/61/0/706/1996), 4 November 1997, para. 8.1.

¹¹³ 1951 Convention, Art. 1F.

C.1.1.3 Non-Refoulement

States that are party to the 1951 Convention and/or the 1967 Protocol accept specific obligations relating to the protection of persons who have been granted refugee status, and the principle of non-refoulement is at the core of this protection. The principle of non-refoulement is an obligation on states not to return refugees to the frontiers of any territory where their life or freedom would be threatened. The non-refoulement protection applies also to asylum seekers who are undergoing status determination.

Article 33(1) of the 1951 Convention provides that “[n]o 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”.¹¹⁴

C.1.1.4 Exceptions to Non-Refoulement

There are two very limited exceptions to the principle of non-refoulement where an individual meets the definition of refugee under the 1951 Convention. Article 33(2) of the 1951 Convention states that protection against refoulement may not 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 judgment of a particularly serious crime, constitutes a danger to the community of that country”. These limited exceptions are discussed below and are distinguished from Article 1C of the 1951 Convention (discussed Part C.1.1.6) which describes circumstances in which a refugee’s status will cease.

- **“National Security” Exception:** The inherent nature of national security as a matter concerning each sovereign state means that the concept of national security remains undefined in international law. Examples of acts qualifying as endangering national security can include activities aimed at facilitating the conquest of the host state by another state, working to overthrow the government of the host state by force or other illegal means, or engaging in activities that are

directed against a foreign government, which as a result threaten repercussions of a serious nature for the government of the host state. Activities typically identified as threats to national security of a country include terrorism, espionage and sabotage of military installations. The European Court of Justice ruled in 1977 that there must be a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society.¹¹⁵ Criminal offences without any specific national security implications are not to be deemed threats to national security and the national security exception is not implicated by local or isolated threats to law and order.¹¹⁶ The needs of national security will be interpreted with respect for the rule of law, democracy, human rights and fundamental freedoms; and¹¹⁷

- **“Particularly Serious Crime” Exception:** This exception is to be interpreted and implemented in a restrictive manner.¹¹⁸ The seriousness of the consequences of expulsion for the refugee requires that the analysis and decision involve a careful examination of the question of proportionality between the danger to the security of the community and the gravity of the crime.

Given the serious consequences for the applicant refugee if an exception to the principle of non-refoulement is established, like any limitation on fundamental human rights, the threshold for establishing the exception should be very high, with the exception being interpreted restrictively and in accordance with the principle of proportionality. Article 33(2) should be assessed and applied on an individual-by-individual basis following legal due process.

Most international human rights laws contain absolute prohibitions on refoulement; for example, Article 3 of the Convention Against Torture provides that no person within the jurisdiction of a State Party shall be returned to a place where his right to be free from torture will not be respected.¹¹⁹ Thus, even if the exceptions to the non-refoulement principle described in Article 33(2) apply, complementary

¹¹⁴ 1951 Convention, Art. 33(1). A similar formulation is also found in Article 3(i) of the UN Declaration on Territorial Asylum adopted by the United Nations General Assembly in 1967.

¹¹⁵ *Regina v Pierre Bouchereau*, No. C-30/77, [1977] ECR 1999, 27 October 1977, para. 35.

¹¹⁶ Goodwin-Gill, G. & McAdam, J., *The Refugee in International Law*, Oxford Univ. Press (3d ed.) 2011, p.238.

¹¹⁷ *Ibid.*, p.237.

¹¹⁸ *Ibid.*, p.237.

¹¹⁹ Convention Against Torture, Art. 3.

protections may be available to the individual (as discussed above in Part C.1.1.1) and so the host state may in fact be prohibited from refouling the individual on other grounds.

C.1.1.5 Prohibition on Expulsion

In addition to Article 33 of the 1951 Convention (which embodies the principle of non-refoulement), Article 32 of the 1951 Convention provides for a prohibition on the expulsion of refugees generally, together with limited exceptions to that prohibition.

Article 32(1) of the 1951 Convention provides that “[t]he Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order”.¹²⁰ The concepts of national security and public order are not defined in the 1951 Convention and there was no extensive discussion of these concepts during the drafting of the 1951 Convention, but subsequent case law has shown that the grounds of expulsion are restrictive, as seen in *Rehman*¹²¹, in which the House of Lords stated that “*there must be material on which proportionately and reasonably he [the Secretary of State] can conclude that there is a real possibility of activities harmful to national security*” and in *Nolan*¹²², the European Court of Human Rights stressed that an assessment of whether ‘national security’ is threatened should be judged by the reasonable person standard, i.e., the decision a person in society who exercises average care, skill and judgment would make.

Article 32 also provides that the decision to expel a refugee must be reached in accordance with legal due process and further provides that, except where compelling reasons of national security otherwise require, the host state is required to give the refugee the opportunity to challenge the expulsion.¹²³ Accordingly, refugees are entitled to substantive and procedural due process safeguards. The application of Article 32 to expel a refugee therefore requires individual examination. Further, before a refugee is expelled, Article 32(3) requires that a reasonable period must be allowed for the refugee to seek admission into another country.

C.1.1.6 Cessation of Refugee Status

The 1951 Convention recognises that refugee status may cease under certain clearly defined circumstances set out in Article 1C of the 1951 Convention. This means that once an individual is determined to be a refugee, that status is maintained unless changed circumstances are determined to fall within the terms of the cessation clauses in Article 1C (the “**Cessation Clauses**”).

The circumstances in which refugee status, once established, may cease are as follows:

- **Protection of nationality:** the refugee: (1) voluntarily re-avails himself of the protection of his country of nationality, (2) voluntarily re-acquires lost nationality or (3) voluntarily acquires a new nationality and avails himself of the protection of the country of his new nationality (Articles 1C(1), (2) and (3))
- **Voluntary re-establishment:** the refugee voluntarily re-establishes himself in the country that he left or outside which he remained owing to fear of persecution (requiring voluntary re-establishment with a view to remaining there, not just return to the country) (Article 1C(4))
- **Fundamental change of circumstances in the country of nationality or, for stateless persons, former habitual residence (which are commonly referred to as the “ceased circumstances” or “general cessation” clauses):** Article 1C(5) provides that the 1951 Convention shall cease to apply to any person falling within the definition of “refugee” in Article 1A if “[he] can no longer, because the circumstances in connection with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality” or “habitual residence” (Article 1C(6)). Each provision is subject to an exception that prevents the loss of refugee status under these provisions if the refugee can show compelling reasons arising out of previous persecution for failing to avail himself of the protection of his country of nationality or former habitual residence

The Cessation Clauses are negative in character and are exhaustively enumerated; that is, no additional

¹²⁰ See 1951 Convention, Art. 32.

¹²¹ *Rehman v Secretary of State for the Home Department*, [2001] UKHL 47, 11 October 2001, para. 22.

¹²² *Nolan v Russia*, No. 2512/04, 12 February 2009, para. 71.

¹²³ See 1951 Convention, Art. 32.

grounds may justify a conclusion that protection is no longer required.¹²⁴

As noted above, Articles 1C(5) and (6) of the 1951 Convention provide that refugee status can be terminated independently of the will of the refugee if there is a change of circumstances in the country of nationality or habitual residence. Such a determination of changed circumstances entitles the host state to repatriate the former refugee. If the “changed circumstances” clause applies based on the objective situation in the country of origin, the refugee ceases to hold refugee status, thereby ordinarily resulting in a need to return to their country of origin.

The UNHCR has stated that states should not resort to the Cessation Clauses in haste and must bear in mind the consequences of a cessation of an individual’s refugee status for that individual’s family, social network and employment, which may result from a long period of establishment in the host country.¹²⁵ States must ensure that the need for international protection has in fact ended and must be satisfied of the fundamental and enduring nature of the change in circumstances, so that a temporary change in circumstances is not sufficient to allow states to rely on Article 1C.¹²⁶ States should make use of appropriate information available in this respect from relevant specialised bodies, particularly the UNHCR.¹²⁷ Changes that qualify as fundamental may often involve an end to hostilities, a complete political change and a return to peace and stability. As the Cessation Clauses note, the burden of proof is on the host state to show that circumstances have changed sufficiently for the Cessation Clauses to be invoked.¹²⁸ The UNHCR Handbook provides “*Circumstances’ refer to fundamental changes in the country of origin, which can remove the basis of the fear of persecution. A mere – possibly transitory – change in the facts surrounding*

the individual refugee’s fear of persecution, which does not amount to a fundamental change of circumstances, is not sufficient to make this clause applicable.”¹²⁹

Further, the UNHCR Executive Committee recommends that appropriate arrangements, such as alternative residence status, be put in place for persons “*who cannot be expected to leave the country of asylum, due to a long stay in that country resulting in strong family, social and economic links*”.¹³⁰

In practice, the procedures outlined for applying the Cessation Clauses are not well developed and it is notable that the European Court of Human Rights appears to have taken a more liberal approach to the Cessation Clauses than has been advanced by the UNHCR as described above.¹³¹ The European Court of Human Rights has held that, when deciding whether a refugee should continue receiving protection, the host country must determine whether the country of origin has a functioning legal system, whether the individual in question will have access to that system and the basic human rights situation in the country of origin.¹³² Finally, Cessation Clauses cannot be applied if there are “*compelling reasons arising out of previous persecution*” requiring the individual to continue to receive international protection.¹³³

¹²⁴ UNHCR, Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention (HCR/GIP/03/03), 10 February 2003, para. 25(ii).

¹²⁵ *Ibid.*, para.4 and para. 7.

¹²⁶ See 1951 Convention, Art. 1C.

¹²⁷ UNHCR, *Executive Committee Conclusion on Cessation of Status*, No. 69 (XLIII), 9 October 1992, para. (b), available at <http://goo.gl/hVxqPy>.

¹²⁸ See 1951 Convention, Art. 1C.

¹²⁹ *Ibid.*, § 2.2.

¹³⁰ UNHCR, *Executive Committee Conclusion on Cessation of Status*, No. 69 (XLIII) 9 October 1992, para. (d) (as cited in UNHCR, Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention (HCR/GIP/03/03), 10 February 2003, para. 22), available at <http://www.unhcr.org/en-us/excom/exconc/3ae68c431c/cessation-status.html>.

¹³¹ Mowbray, A. *Cases and Materials on the European Convention on Human Rights*, Oxford Univ. Press, 2001, p.62; Mowbray, A., *Duties of Investigation Under the European Convention on Human Rights*, 51 ICLQ 437, April 2002.

¹³² *Ibid.*

¹³³ 1951 Convention, Arts. 1C(5), (6); UNHCR, Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention (HCR/GIP/03/03), 10 February 2003, para. 20 and para. 21.

C.2 SOFT INTERNATIONAL LAW

C.2.1 OFFICE OF THE UNHCR

The United Nations General Assembly established the UNHCR in 1950 by resolution.¹³⁴ The UNHCR is the UN refugee agency, with the High Commissioner being appointed by the UN General Assembly, and the constitution and operations of the UNHCR governed by the Statute of the UNHCR.¹³⁵ The UNHCR has an ongoing role in the development of “soft law” norms through official Conclusions issued by its Executive Committee, and through the publication of policies and guidelines. These actions by the UNHCR seek to promulgate developments and clarifications on treaty obligations, although these actions do not have the force of law and are not legally binding.

The UNHCR has an express mandate to be involved in the protection of refugees by the Contracting States to the Convention and Protocol. Article 35 of the 1951 Convention provides: “[t]he Contracting States undertake to cooperate 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”.¹³⁶ In addition to monitoring and supervision, the UNHCR will often also be involved, formally or informally, with the process for refugee status determinations and with refugee repatriation processes.

In addition to the UNHCR’s “soft law” development, the UNHCR has used tripartite agreements between a country of origin, a country of refuge and the UNHCR to advance key concepts of voluntariness and legal safety. In this regard, the Kenya/Somalia tripartite agreement is discussed below.

C.2.1.1 Voluntary Repatriation

Voluntary repatriation is a key concept in international refugee law, although it is not found in the 1951 Convention or the 1967 Protocol. The concept is derived from the Statute of the UNHCR and doctrinal positions it has taken which are non-binding but nonetheless authoritative guidance.¹³⁷ The Statute of the UNHCR provides that part of the UNHCR’s international protection function is to “assist governmental and private efforts to promote voluntary repatriation”.¹³⁸

The UNHCR has promoted concepts of safety and dignity in the repatriation of refugees and has emphasised that repatriation must be voluntary. In a Conclusion issued in 1985, the UNHCR stated that “the repatriation of refugees should only take place at their freely expressed wish; the voluntary and individual character of repatriation of refugees and the need for it to be carried out under conditions of absolute safety, preferably to the place of residence of the refugee in his country of origin, should always be respected”.¹³⁹ In 1992, the UNHCR reiterated this concept, emphasising that repatriations must be voluntary and must be “carried out under conditions of safety and dignity, preferably to the refugee’s place of residence in the country of origin”.¹⁴⁰

In 1996, the UNHCR Handbook was published, which sought to further elaborate on the concepts of voluntariness, safety and dignity, which are linked to the concept of sustainable returns:

- “**voluntariness**” was described as the absence of any physical, psychological or material pressure to push the refugee to repatriate, and noted that this is often clouded by the fact that for many refugees a decision to return is dictated by a combination of pressures due to political factors, security problems or economic needs. As a general rule, positive-pull factors should be the overriding elements in the refugee’s decision to return, as opposed to push-factors;

¹³⁴ UN General Assembly Resolution 428(V) of 14 December 1950.

¹³⁵ UNHCR, Statute of the Office of the UNHCR, General Assembly Resolution 428(V), 14 December 1950, available at <http://www.unhcr.org/4d944e589.pdf>.

¹³⁶ 1951 Convention, Art. 35.

¹³⁷ UNHCR, Statute of the Office of the UNHCR, General Assembly Resolution 428(V), 14 December 1950, available at <http://www.unhcr.org/4d944e589.pdf>.

¹³⁸ UNHCR, Statute of the Office of the UNHCR, General Assembly Resolution 428(V), 14 December 1950, p. 11, available at <http://www.unhcr.org/4d944e589.pdf>. (emphasis added).

¹³⁹ UNHCR, Executive Committee Conclusion on Voluntary repatriation, No. 40 (XXXIV), 18 October 1985, available at <http://goo.gl/T3MzuB>.

¹⁴⁰ UNHCR, Discussion Note on Protection Aspects of Voluntary repatriation (EC/1992/SCP/CRP.3), 1 April 1992.

- the requirement of “**safety**” was described as being satisfied when a return takes place under conditions of legal safety (such as amnesties or public assurances of personal safety, integrity, non-discrimination and freedom from fear of persecution or punishment upon return), physical security (including protection from armed attacks, and use of mine-free routes and if not mine-free, then at least demarcated settlement sites), and material security (access to land or means of livelihood);
- the requirement of “**dignity**”, while being less self-evident than safety, requires that refugees are not manhandled; that they can return unconditionally and that if they are returning spontaneously, they can do so at their own pace; that they are not arbitrarily separated from family members; and that they are treated with respect and full acceptance by their national authorities, including the full restoration of their rights; and
- to achieve **lasting solutions**, the country of origin should seek “*lasting solutions to refugee problems, inter alia by assuming responsibility for the elimination of root causes of refugee flows and the creation of conditions conducive to voluntary return and reintegration*”.¹⁴¹

The most recent UNHCR Conclusion on voluntary repatriation was issued in 2004, which reaffirmed the importance of the “*voluntary character of refugee repatriation, which involves the individual making a free and informed choice through, inter alia, the availability of complete, unbiased, accurate and politically neutral objective information on the situation in the country of origin*” and stressed the “*need for voluntary repatriation to occur in and to conditions of safety and dignity*”.¹⁴²

C.3 RECENT DEVELOPMENTS IN INTERNATIONAL REFUGEE LAW AND POLICY

On 19 September 2016 at the UN General Assembly High Level Summit, 193 member states endorsed the New York Declaration for Refugees and Migrants (the “**New York Declaration**”). The New York Declaration reaffirms the existing rights, international legal instruments and principles relating to refugee protection, and provides that states commit to working towards a Global Compact on Refugees to be adopted in 2018 (the “**Global Compact**”).¹⁴³

The New York Declaration provides for the CRRF, which specifies the key elements for an effective response to any large movement of refugees, namely: (a) enhancing the conditions of refugee reception and admission, (b) supporting the immediate and ongoing needs of refugees (such as protection, health and education), (c) providing support for host countries and communities, and (d) increasing commitment to facilitating durable solutions to displacement. The CRRF will form the basis of the Global Compact, which is currently being developed and finalised with the input of the NGO community, including NRC.¹⁴⁴

The aim of the Global Compact, once endorsed, is two-fold. First, it should place moral responsibility onto developed states to encourage and support the voluntary and informed repatriation, integration, and relocation of refugees, which in effect should reduce the current pressure on host developing countries to respond to large movements of refugees into their country. Second, it should contribute towards ending the current piecemeal approach to refugee protection that currently operates in host countries.

Further signs of a move towards responsibility-sharing by states can be seen following the signing in March 2017 of the Nairobi Declaration on Durable Solutions for Somali Refugees and Reintegration of Returnees under the auspices of the IGAD (the “**Nairobi Declaration**”). The IGAD was constituted by the four Horn of Africa states (Djibouti, Ethiopia, Somalia and Eritrea) plus Sudan, South Sudan, Kenya and Uganda. The Nairobi Declaration shows support

¹⁴¹ UNHCR Handbook, *Voluntary repatriations: International Protections*, 1996, available at <http://www.unhcr.org/3bfe68d32.pdf>.

¹⁴² UNHCR, *Executive Committee Conclusion on Legal Safety Issues in the Context of Voluntary repatriation of Refugees*, No. 101 (LV), 8 October 2004, available at <http://goo.gl/tA5b22>.

¹⁴³ UNHCR, *Comprehensive Refugee Response Framework: from the New York Declaration to a global compact on refugees*, 5 December 2016, available at <http://www.unhcr.org/584687b57.pdf>.

¹⁴⁴ *Ibid.*

for providing Somali refugees with economic opportunities in hosting states and calls on IGAD member states to enhance the education, training and skills development for refugees; align domestic laws and policies with the 1951 Convention; and advance alternative arrangements to refugee camps, facilitating the free movement of refugees.¹⁴⁵

The Nairobi Declaration is an important statement of principle on refugee policies in the region including the implementation of durable solutions. The declaration reaffirms the principles of voluntary repatriation and the need to “*facilitate the voluntary return of Somali refugees in safety and dignity by addressing the root causes of displacement, violence and armed conflict in order to achieve the necessary political solutions and the peaceful settlement of disputes*”.¹⁴⁶ Notably the declaration does not highlight voluntary repatriation to Somalia as the only option presented to Somali refugees but also mentions resettlement and integration – committing to providing refugees with a range of durable solutions.

C.4 AFRICAN REGIONAL LEGAL INSTRUMENTS TO WHICH KENYA HAS ACCEDED AS A STATE PARTY

C.4.1 THE OAU CONVENTION¹⁴⁷

In 1969, the Organisation of African Unity (which became the African Union in 2002) adopted the Convention Governing the Specific Aspects of Refugee Problems in Africa (the “**OAU Convention**”), which Kenya signed in September 1969 and ratified without reservations in June 1992.¹⁴⁸ The OAU Convention does not establish a free-standing refugee protection framework but rather complements, and does not duplicate, the 1951 Convention by addressing refugee problems that are particular to Africa. In this regard, the OAU Convention should not be seen as reducing the protections afforded by the 1951 Convention, but as an “*effective regional complement in Africa*”¹⁴⁹ of the 1951 Convention. The OAU

Convention acknowledges that the 1951 Convention is “*the basic and universal instrument relating to the status of refugees*”.¹⁵⁰ In contrast to the UNHCR’s “soft law” role in relation to the Convention and Protocol, there is no equivalent body that serves to interpret or supervise the implementation of the OAU Convention. Accordingly, the OAU Convention does not create any formal oversight function.

C.4.1.1 Definition of Refugee

The OAU Convention adopts the basic definition of “refugee” from the 1951 Convention read together with the 1967 Protocol and expands the definition to also apply to:

“*every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality*”.¹⁵¹

This additional definition focuses on people who are fleeing events causing generalised danger or instability in their country of origin and does not require persecution as does the original 1951 Convention. This definition can be seen as an example of how the OAU Convention sought to enhance the Convention and Protocol. The additional OAU Convention definition should be viewed in the historical context of the issues relating to colonialism, racism, and apartheid prevalent in Africa at the time, and which required a more expansive and general definition not hinging on persecution. The OAU Convention’s definition is therefore helpful to those refugees who flee general danger as opposed to individualised oppression.

In contrast with the Convention and Protocol, which do not express an obligation on states to provide asylum, Article II(1) of the OAU Convention states that “*Member States of the OAU shall use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those*

¹⁴⁵ Forced Migration Forum, *Nairobi Declaration on Somali Refugees*, 30 March 2017, available at <https://goo.gl/z7Mnac>.

¹⁴⁶ IGAD, *Nairobi Declaration on Durable Solutions for Somali Refugees and Reintegration of Returnees in Somalia*, 25 March 2017, available at <https://goo.gl/sXDKJH>.

¹⁴⁷ Marina Sharpe, *McGill Law Journal* (2012) 56:1 *McGill LJ* 95, *The 1969 African Refugee Convention: Innovations, Misconceptions, and Omissions*.

¹⁴⁸ UNHCR, *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa*, 20 June 1974, available at <http://www.unhcr.org/45dc1a682.pdf>.

¹⁴⁹ Article VIII(2) of the OAU Convention.

¹⁵⁰ Article VIII(2) of the OAU Convention.

¹⁵¹ OAU Convention, Art. I(2).

refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality".¹⁵²

C.4.1.2 Exclusion

Similar to the Convention and Protocol, the OAU Convention sets out exclusion clauses. These are broadly the same as those in the 1951 Convention, except that Article I(5)(c) of the OAU Convention further provides that a person is not entitled to its protections if that individual has committed acts contrary to the purposes and principles of the African Union.¹⁵³ Although at first appearance, this provision may appear to restrict the protections afforded by the 1951 Convention, the purposes and principles of the OAU Convention are designed to protect those living in Africa, including refugees.

C.4.1.3 Non-Refoulement

Article II(3) of the OAU Convention states the principle of non-refoulement as follows: "[n]o person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2".¹⁵⁴ The wording of Article II(3) of the OAU Convention is almost identical to the principle of non-refoulement contained in Article 33(1) of the 1951 Convention.

The OAU Convention sets forth a responsibility-sharing objective between Member States of the OAU Convention. Article II(4) provides that "[w]here a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the OAU, and such other Member States shall in the spirit of African solidarity and international co-operation take appropriate measures to lighten the burden of the Member State granting asylum".¹⁵⁵

C.4.1.4 Voluntary repatriation

For African states, the OAU Convention (which was the first significant international or regional refugee

treaty to elaborate on the principles of voluntary repatriation) provides for voluntary repatriation at Article V, which states:

- “ 1. The essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will.
2. The country of asylum, in collaboration with the country of origin, shall make adequate arrangements for the safe return of refugees who request repatriation.
3. The country of origin, on receiving back refugees, shall facilitate their re-settlement and grant them the full rights and privileges of nationals of the country, and subject them to the same obligations.
4. Refugees who voluntarily return to their country shall in no way be penalised for having left it for any of the reasons giving rise to refugee situations. Whenever necessary, an appeal shall be made through national information media and through the Administrative Secretary-General of the OAU, inviting refugees to return home and giving assurance that the new circumstances prevailing in their country of origin will enable them to return without risk and to take up a normal and peaceful life without fear of being disturbed or punished, and that the text of such appeal should be given to refugees and clearly explained to them by their country of asylum.
5. Refugees who freely decide to return to their homeland, as a result of such assurances or on their own initiative, shall be given every possible assistance by the country of asylum, the country of origin, voluntary agencies and international and intergovernmental organisations, to facilitate their return".¹⁵⁶

¹⁵² OAU Convention, Art. II(1).

¹⁵³ The purposes and principles of the Organisation of African Unity are set out in the OAU Charter adopted in 1963, available at www.chr.up.ac.za/chr_old/hr_docs/african/docs/oau/oau5.doc.

¹⁵⁴ OAU Convention, Art. II(3).

¹⁵⁵ *Ibid.*

¹⁵⁶ OAU Convention, Art. V.

C.4.1.5 Cessation of Refugee Status

The OAU Convention provides similar grounds for the cessation of refugee status to the 1951 Convention, with slight variations.¹⁵⁷ In addition to the grounds for cessation of refugee status in the 1951 Convention, the OAU Convention also provides for cessation of refugee status if the refugee has committed a serious non-political crime outside his country of refuge after admission to that country as a refugee or if the refugee has seriously infringed the purposes and objectives of the OAU Convention.¹⁵⁸ In both cases the requirement is not for suspicion of the acts in question, but for the acts themselves to have been committed.

The OAU Convention, unlike the 1951 Convention, does not contain any provisions allowing for the effect of the cessation of refugee status provisions to be mitigated in cases where a refugee can invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of his nationality.

C.4.2 THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS ("THE AFRICAN CHARTER")

The African Charter was adopted under the auspices of the OAU in 1981 and was ratified by Kenya in 1992. The African Charter covers a range of human rights issues, including the right to seek and obtain asylum, the right to be free from ill treatment and protection from refoulement.

The right of asylum is set forth at Article 12(3), "*[e]very individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions*". The wording of Article 12(3) is potentially far-reaching, but offers no definition of "persecution", rendering it difficult to fully determine the scope of the provision.

Article 5 of the African Charter provides a distinct set of protections from ill treatment, as follows: "*[e]very individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited*". This provision could be invoked to protect a refugee from being returned to a state where the refugee is likely to face torture or cruel, inhuman or degrading treatment.

The African Charter supports the 1951 Convention's requirement that expulsions be performed in accordance with legal due process in that Article 12(4) of the African Charter states that "*[a] non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law*". Article 12(5) also prohibits a general expulsion of refugees from a particular country: "*the mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups*".¹⁵⁹

Finally, Article 23 of the African Charter imposes a duty on State Parties to ensure that: (a) any individual enjoying the right of asylum [...] shall not engage in subversive activities against his country of origin or any other State Party to the present Charter; (b) their territories shall not be used as bases for subversive or terrorist activities against the people of any other State Party to the present Charter.¹⁶⁰ Therefore, the African Charter strikes a balance between providing asylum to individuals in need of such protection, whilst protecting national security through the implementation of Article 23 of the African Charter.

Within the large body of case law interpreting the African Charter created by the African Commission on Human and Peoples' Rights ("ACHPR") are many cases relating to the treatment of refugees as it relates to human rights laws and the requirement to first seek a domestic remedy. Some of the more significant are summarised here.¹⁶¹

¹⁵⁷ OAU Convention, Art. I(4).

¹⁵⁸ OAU Convention, Art. I(4)(f)-(g).

¹⁵⁹ ACHPR, African Charter on Human and Peoples' Rights, Art. 12(5), available at <http://www.achpr.org/instruments/achpr/>.

¹⁶⁰ *Ibid.*, Art. 23(2).

¹⁶¹ These cases are cited in: Bekker G., *The protection of asylum seekers and refugees within the African regional human rights system*, 13 AHRLJ 1, 2013, available at <http://www.ahrlj.up.ac.za/bekker-g-1>.

- *Mouvement des Réfugiés Mauritanien au Sénégal v Senegal (1)*.¹⁶² In this case, the petitioner alleged a series of violations by the Senegalese authorities against Mauritanian refugees, including arrest and humiliating treatment by the security forces, and, threats from the Mauritanian authorities when they attempted to return to their country of origin. The complaint was held inadmissible by the ACHPR for, among other reasons, a failure to exhaust domestic remedies.
- *Doebbler v Sudan*.¹⁶³ In this case, the ACHPR stated that “where the violations involve many victims, it becomes neither practical nor desirable for the complainants or the victims to pursue such internal remedies in every case of violation of human rights”. Addressing the specific facts of the case in which it was alleged that as a result of a tripartite agreement between the Sudanese and Ethiopian Governments and the UNHCR approximately 14,000 Ethiopian refugees would lose their refugee status, the ACHPR noted that even if certain domestic remedies were available, it was not reasonable to expect refugees to complain to the Sudanese courts, given their extreme vulnerability and state of deprivation, their fear of being deported and their lack of adequate means to seek legal representation.
- *African Institute for Human Rights and Development (on behalf of Sierra Leonean refugees in Guinea) v Guinea*.¹⁶⁴ In this case, the ACHPR noted three reasons why it considered the exhaustion of domestic remedies to be futile where large numbers of refugees had been refouled. In the first instance, the ACHPR held that it would dispense with the exhaustion of domestic remedies requirement where the complainant is in a “life-threatening situation that makes domestic remedies unavailable”. It further noted in this regard that the availability of domestic remedies is compromised in circumstances where “the authorities tasked with providing protection are the same individuals persecuting victims”. On the impracticability of large numbers of Sierra Leonean refugees in Guinea (put at nearly 300,000 at the time of the alleged violations) approaching the domestic courts, and, the scale of crimes

committed against the refugees, the ACHPR found that “the domestic courts would be severely overburdened if even a slight majority of victims chose to pursue legal redress in Guinea”.

The above decisions suggest that, where individual refugees are concerned, the ACHPR will tend to refuse jurisdiction to hear a complaint until all domestic remedies have been exhausted, but where large numbers of refugees allege ill treatment by their host country contrary to the African Charter, the ACHPR is more likely to hear a complaint, having regard to the practical difficulties of large numbers of potentially disadvantaged refugees seeking legal redress in their host state.

C.5 TRIPARTITE AGREEMENT

The Tripartite Agreement concluded in November 2013 between the governments of Kenya, Somalia and the UNHCR for a period of three years, extended for a further six months by agreement in November 2016, provides an important recent statement of policy agreed at a multilateral level.

Generally, the tripartite model is based on agreements between the UNHCR, the refugees’ country of origin, and country of asylum, which state the parties’ respective roles and responsibilities in a voluntary repatriation process. Tripartite agreements are treaties that are considered “special agreements” under the 1950 Statute of the UNHCR and are governed by international law, and this special status makes them binding on all signing parties.¹⁶⁵ At the time of writing, the status of the Tripartite Agreement is unclear following its six-month extension. There have been no public statements related to the formal extension of the Tripartite Agreement and the last communiqué was issued in July 2016.¹⁶⁶ Nevertheless the Tripartite Agreement is an important recent statement of policy agreed at a multilateral level.

The Tripartite Agreement provides a framework for the safe and dignified voluntary repatriation of Somali refugees from Kenya and their reintegration in Somalia under the auspices of a Tripartite Commission

¹⁶² (2000) AHRLR 287 (ACHPR 1997), available at <http://www.achpr.org/communications/decision/162.97/>.

¹⁶³ (2009) AHRLR 208 (ACHPR 2009), available at <http://www.chr.up.ac.za/images/files/documents/africancases/country/sudan/Doebbler%20v%20Sudan.pdf>.

¹⁶⁴ (2004) AHRLR 57 (ACHPR 2004), available at <http://www.achpr.org/communications/decision/249.02/>.

¹⁶⁵ C. d’Orsi, *Asylum-Seeker and Refugee Protection in Sub-Saharan Africa*, p. 252.

¹⁶⁶ UNHCR, *Somalia Situation 2017: Supplementary Appeal, January – December 2017*, May 2017, available at <http://www.unhcr.org/591ae0e17.pdf>; Ministerial Tripartite Commission for the Voluntary repatriation of Somali Refugees from Kenya to Somalia, *Joint Communiqué*, 26 July 2016, available at <http://goo.gl/3VPsv8>.

made up of representatives from each of the parties to the Tripartite Agreement. The Tripartite Commission has adopted a Joint Strategy and Operational Plan which envisaged a phased voluntary repatriation of 435,000 Somali refugees between 2015 and 2019.¹⁶⁷

C.5.1 SAFETY

The Tripartite Agreement places significant emphasis on the safety of refugees, recognising in both the preamble and the operative clauses the need for the voluntary repatriation to be in “*safety and dignity*”, and provides for the safety and protection of the refugees while in Kenya, while in transit, and while reintegrating in Somalia.¹⁶⁸ This emphasis on the safety of the refugees is extended to vulnerable groups, requiring the parties to take special measures to ensure that vulnerable groups, including women, children, disabled, sick, and older persons, are adequately protected throughout the repatriation and reintegration process.¹⁶⁹

Both the Kenyan and Somali Governments are responsible for the safety of refugees and ensuring refugees are treated with dignity.¹⁷⁰

Kenya is responsible for continuing to “*provide protection and assistance to all refugees until durable solutions are attained in accordance with national and international law*”.¹⁷¹ At a minimum, this requires Kenya to provide protection and assistance to refugees while they remain in Dadaab. Additionally, Kenya is required to provide security escorts for the repatriation convoys while in Kenya.¹⁷²

Somalia has a general obligation to put in place measures to ensure that the return and reintegration of refugees takes place in safety and dignity and is subject to specific duties to protect the safety of refugees within Somalia and, if returning to Somalia, while in transit and while proceeding to their final

destinations.¹⁷³ Somalia must also ensure that the returnees are free from harassment, intimidation, persecution, discrimination or prosecution on account of having left or having remained outside of Somalia.¹⁷⁴

Finally, all parties have the right to “advocate” for the strengthening and expansions of Somalia’s development, security and humanitarian assistance programmes to facilitate reintegration of the returnees.¹⁷⁵

C.5.2 VOLUNTARINESS

The Tripartite Agreement’s focus on the voluntary nature of repatriation is evident in the explicit operative clause on voluntariness, the consistent references to the voluntary character of the repatriation, and the specific duties of the parties to facilitate the voluntariness of the decision to repatriate.¹⁷⁶ The Tripartite Agreement explicitly recognises that the repatriation of Somali refugees from Kenya shall take place in conformity with international law pertaining to voluntary repatriation and provides guidance on how voluntariness will be determined, indicating that “*the decision of the refugees to repatriate shall be based on their freely expressed wish and their relevant knowledge of the conditions within the country of origin and the areas of return*”.¹⁷⁷ The refugees’ ability to make an informed decision is facilitated by an obligation by the parties to provide the refugees with “*objective, accurate and timely information on current conditions in Somalia*”, and the obligation to facilitate “go and see” and “come and tell” visits by refugees, returnees, local authorities from Somalia, and other relevant partners.¹⁷⁸ While the Tripartite Agreement does contain these express provisions on voluntariness, it is lacking provisions concerning those refugees who do not wish to return voluntarily to their country of origin that are common in other Sub-Saharan Africa (such as those with Angola/Zambia, Angola/Namibia, and

¹⁶⁷ Tripartite Agreement, Art. 5; see also Amnesty International, *Nowhere Else To Go: Forced Returns of Somali Refugees From Dadaab Refugee Camp, Kenya*, 14 November 2016, available at <https://www.amnesty.org/en/documents/afr32/5118/2016/en/>; Tripartite Commission for the Voluntary repatriation of Somali Refugees from Kenya, *Joint Communiqué*, 30 July 2015, available at <http://www.refworld.org/docid/5608e2234.html>.

¹⁶⁸ Tripartite Agreement, Arts. 12, 18.

¹⁶⁹ *Ibid.*, Arts. 12-18.

¹⁷⁰ *Ibid.*, Preamble, Arts. 12, 18, 24, 25.

¹⁷¹ *Ibid.*, Art. 24(x).

¹⁷² *Ibid.*, Art. 24(viii).

¹⁷³ *Ibid.*, Art. 25.

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*, Art. 12.

¹⁷⁶ See, e.g., *ibid.*, Art. 10.

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*, Art. 15.

Zambia/Rwanda), leaving the treatment of these individuals somewhat unclear.¹⁷⁹

The UNHCR is largely responsible for ensuring that the refugees' decision to repatriate is truly voluntary. The UNHCR has an obligation to "verify and assure the free and voluntary nature of the decisions... to repatriate".¹⁸⁰ To achieve this, the UNHCR is responsible for the dissemination of relevant information and awareness raising activities regarding the voluntary repatriation to Somalia. However, arguably the most powerful attempt to guarantee the voluntary nature of the decision to repatriate is the obligation on Kenya to continue to protect and support the refugees until "durable solutions" are attained.¹⁸¹ This is because such guarantee of the refugees' rights would provide the refugees with a genuine alternative to repatriation.

C.5.3 REINTEGRATION

Successful reintegration is key to ensuring that the returnees are not left in situations that subsequently lead to secondary displacement. In addition to Somalia's general duty to "create conditions conducive to sustainable return and reintegration of returnees", the Tripartite Agreement contains specific duties of the Kenyan and Somali Governments that support the successful reintegration of Somali refugees.¹⁸² The two Governments have agreed to several mechanisms aimed at easing the process of returning to, and reintegrating into, Somalia. Immigration, customs and health formalities have all been streamlined, and the Kenyan and Somali Governments have agreed, respectively, to issue and recognise documentation in respect of certain life events such as births, deaths,

adoptions, marriages and divorces that occurred while the returnees were residing as refugees in Kenya.¹⁸³ Kenya has also agreed to issue, and Somalia has agreed to recognise or provide the equivalent of, certificates, diplomas and degrees reflecting academic or vocational skills obtained by the refugees in Kenya.¹⁸⁴ The Tripartite Agreement also provides for the freedom of choice of destination within Somalia, freedom of movement within Somalia, and for the parties to make every effort to ensure the preservation of family unity, which is likely to facilitate the long-term success of reintegration in a clan-based society.¹⁸⁵

Once the returnees have reached their final destinations, Somalia must facilitate the returnees' enjoyment of "all the social, economic, civil, cultural and political rights provided for in the laws of the country, including fair and equal access to public services".¹⁸⁶ For those refugees who owned land or property prior to being displaced, Somalia has specific duties to establish fair and accessible procedures to settle the returnees' claims for the restitution of lands or property left behind when they were forced to flee.¹⁸⁷ Additionally, Somalia must ensure the returnees' enjoyment of property ownership and protection in accordance with national laws.¹⁸⁸

C.5.4 ACCESS AND MONITORING

The UNHCR is responsible for assisting and coordinating reintegration activities in Somalia, and verifying and assuring the progress of the reintegration process.¹⁸⁹ In addition to the refugees' and returnees' access rights in respect of the "go and see" and "come and tell" visits, the Tripartite Agreement provides for

¹⁷⁹ A typical clause would provide that "The status of those refugees who decide not to avail themselves of the voluntary repatriation programme under this Agreement shall continue to be governed by the relevant international protection principles and standards". See, e.g., UN High Commissioner for Refugees (UNHCR), Agreement on the Establishment of a Tripartite Commission for the Voluntary repatriation of Angolan Refugees between the Government of the Republic of Angola, the Government of the Republic of Zambia and the United Nations High Commissioner for Refugees, 28 November 2002, available at: <http://www.refworld.org/docid/447d6a4c4.html> [accessed 22 August 2017] and UN High Commissioner for Refugees (UNHCR), *Tripartite Agreement on the Establishment of a Commission for the Promotion of Voluntary repatriation of Angolan Refugees between the Government of the Republic of Angola, the Government of the Republic of Namibia and the United Nations High Commissioner for Refugees*, 7 November 1995, available at: <http://www.refworld.org/docid/447d5d2d4.html> [accessed 22 August 2017].

¹⁸⁰ Tripartite Agreement, Art. 26(i).

¹⁸¹ *Ibid.*, Art. 24.

¹⁸² *Ibid.*, Art. 25.

¹⁸³ *Ibid.*, Arts. 14, 20.

¹⁸⁴ *Ibid.*, Art. 14.

¹⁸⁵ *Ibid.*, Arts. 11, 13, 25.

¹⁸⁶ *Ibid.*, Art. 25.

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.*, Art. 26.

¹⁸⁹ *Ibid.*

certain rights of the UNHCR to access the refugees and returnees while in Kenya and Somalia. Kenya must facilitate access by the UNHCR to Somali refugees in Kenya for the purposes of implementing the voluntary repatriation programme.¹⁹⁰ The UNHCR has corresponding duties to verify the free and voluntary nature of the refugees' decisions to repatriate and to monitor the situation of the ongoing enjoyment of the refugees' continued asylum in Kenya in compliance with applicable international and national legal standards.¹⁹¹

Somalia must also grant to the UNHCR free and unhindered access to the returnees in Somalia in order to allow the UNHCR to monitor the legal, physical and material situation of the returnees and to intervene where appropriate.¹⁹² The UNHCR also has the explicit right to access the returnees during the reintegration process.¹⁹³ These access rights allow the UNHCR to carry out its general obligation to verify that the voluntary repatriation of Somali refugees is carried out in conditions of safety and dignity.

C.6 DOMESTIC KENYAN LAWS AND CASE LAW

Kenyan refugee law can be found in constitutional laws, statutory law and case law. The Constitution of Kenya (enacted in 2010) (the "**Constitution**") is the supreme law of Kenya and contains several provisions governing the treatment of refugees in Kenya.¹⁹⁴ The Refugees Act, supplemented by the Regulations, establishes the domestic legal regime for the treatment of refugees.¹⁹⁵ The Kenya Citizenship and Immigration Act 2011 also addresses the lawful presence of refugees among other persons in Kenya.¹⁹⁶ These laws and recent court cases interpreting these laws are discussed below.

C.6.1 THE CONSTITUTION

Under Articles 2(5) and (6) of the Constitution, general rules of international law, treaties and conventions ratified by Kenya, form part of the law of Kenya. Kenya is a signatory to a number of conventions and treaties dealing with refugees and their protection, including the 1951 Convention, the 1967 Protocol, the OAU Convention and the African Charter, as discussed above. Kenya is also a signatory to a number of other international legal instruments covering international human rights, including the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the ICCPR.¹⁹⁷

Article 10 of the Constitution sets out the national values and principles of governance, which include "*human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised*". Such national values and principles bind all state organs, state officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law; or makes or implements public policy decisions.¹⁹⁸

Chapter 4 of the Constitution contains Kenya's Bill of Rights. The Bill of Rights is an integral part of Kenya's democratic state and is the framework for its social, economic and cultural policies.¹⁹⁹

The Bill of Rights sets out the rights and fundamental freedoms to which every person in Kenya is entitled. Importantly, these rights and fundamental freedoms are not limited to Kenyan citizens, but apply to all persons within Kenya's borders irrespective of how they came into the country. Thus, Kenya places itself under an obligation to ensure that the basic human

¹⁹⁰ *Ibid.* Art. 24.

¹⁹¹ *Ibid.*, Art. 26.

¹⁹² *Ibid.*, Art. 25.

¹⁹³ *Ibid.*, Art. 26.

¹⁹⁴ Constitution of Kenya, Art. 2(1).

¹⁹⁵ Refugees (Reception, Registration and Adjudication) Regulations, 2009 (Kenya) (the "Refugees Act").

¹⁹⁶ Kenya Citizenship and Immigration Act 2011.

¹⁹⁷ UN, Universal Declaration of Human Rights, available at <http://www.un.org/en/universal-declaration-human-rights/>; UNHCR, International Covenant on Economic, Social and Cultural Rights, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ICESCR.aspx>; UNHCR, ICCPR, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>; ACHPR, African Charter on Human and Peoples' Rights, available at <http://www.achpr.org/instruments/achpr/>.

¹⁹⁸ Constitution of Kenya, Art. 10.

¹⁹⁹ *Ibid.*, Chapter 4.

rights of every person in its territory, including refugees, are respected.²⁰⁰

Rights and freedoms enshrined in the Bill of Rights include:

- the right to equal protection and equal benefit of the law;
- inherent dignity and the right to have that dignity respected and protected;
- the right to freedom of movement; and
- the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.²⁰¹

Limitations on the rights and fundamental freedoms in the Bill of Rights may be justified in certain circumstances where:

“ [a] right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including–

- (a) the nature of the right or fundamental freedom;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
- (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose”.²⁰²

The burden of establishing that the limitation satisfies the above requirements is borne by the state.²⁰³

In addition to bearing the burden of proof, the Constitution imposes specific obligations on the Kenyan Government in relation to vulnerable persons, stipulating that “[a]ll State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities”.²⁰⁴ Again, the Kenyan Government owes this duty to all vulnerable people, not just Kenyan citizens. The Kenyan Courts have confirmed that refugees, by virtue of their situation, are a special category of persons who are considered vulnerable.²⁰⁵

Finally, the Constitution provides that the national security of Kenya is to be promoted and guaranteed in accordance with a number of principles, including that national security shall be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms.²⁰⁶ As such, when the Kenyan Government takes steps to protect national security, human rights (including refugees’ human rights) must continue to be given the utmost respect.

C.6.2 THE REFUGEES ACT

In 2006, Kenya put in place a national legal framework governing refugee matters and assumed partial responsibility for the refugee status determination process. The framework includes the Refugees Act, which came into force in 2007, and its subsidiary legislation, the Regulations, in 2009.²⁰⁷

According to the Refugees Act, a person does not automatically become a refugee upon entry into Kenya. He or she must apply for registration to be recognised as such.²⁰⁸ Sections 3(1) and (2) of the Refugees Act provide for two categories of refugee: ‘statutory refugees’ and ‘prima facie refugees’. The ‘statutory’ definition is adopted from the 1951 Convention while the ‘prima facie’ definition adopts the broader additional definition of refugee in Article I(2) of the OAU Convention.

²⁰⁰ *Ibid.*; see also *Kituo Cha Sheria & 8 others v Attorney General*, Pet. Nos. 19 & 115 of 2013, [2013] eKLR, 26 July 2013 (the “*Kituo Cha Sheria Case*”), para. 29, available at <http://kenyalaw.org/caselaw/cases/view/84157>.

²⁰¹ *Constitution of Kenya*, Arts. 27, 28, 39, 47.

²⁰² *Ibid.*, Art. 24(1).

²⁰³ *Ibid.*, Art. 24(3); *Kituo Cha Sheria Case*, [2013] eKLR.

²⁰⁴ *Constitution of Kenya*, Art. 21(3).

²⁰⁵ *Kituo Cha Sheria Case*, [2013] eKLR.

²⁰⁶ *Constitution of Kenya*, Art. 238(2).

²⁰⁷ *Refugees Act*; the *Regulations*.

²⁰⁸ *Regulation 11(1)*.

The Cabinet Secretary for Interior and Coordination of National Government (the “**Cabinet Secretary**”), who is responsible for Refugee Affairs, is responsible for declaring that a class of persons comprises *prima facie* refugees, and is also permitted to amend or revoke such declaration (and hence the refugee status of the *prima facie* refugees) at any time.²⁰⁹ If the Cabinet Secretary seeks to rely on Section 3(3) to revoke the refugee status of *prima facie* Somali refugees, such revocation of refugee status and these provisions might be at risk of constitutional challenge in court.²¹⁰

In addition to provisions permitting voluntary renunciation of refugee status,²¹¹ and termination of refugee status due to a change of circumstances,²¹² the Refugees Act allows disqualification of statutory refugees on the grounds given in the 1951 Convention and the OAU Convention, including serious non-political crimes outside the host country before admission,²¹³ and acts contrary to the purposes and principles of the United Nations or the African Union.²¹⁴ The Refugees Act goes on to add a further ground for disqualification based on the commission of a serious non-political crime inside Kenya after admission as a refugee.²¹⁵ The characterisation of terrorism as a political or non-political crime remains disputed, but in certain individual cases this provision might assist the Kenyan Government in compiling a case for the revocation of refugee status.

The Commissioner also has the right to withdraw the refugee status “*of any person where there are reasonable grounds for regarding that person as a danger to national security or to any community of that country*”.²¹⁶ Further, the Commissioner may order the expulsion of refugees on grounds of national security or public order subject to: (a) the principle of non-refoulement set out in Section 18 (described below); and (b) the Cabinet Secretary acting in accordance with due process of law.²¹⁷

Once recognised as a refugee, that refugee and every member of his or her family living in Kenya are

entitled to the rights and subject to the obligations contained in the international conventions to which Kenya is a party and are also subject to all the laws in force in Kenya.

The Refugees Act also adopts the non-refoulement principle enshrined in the 1951 Convention and OAU Convention, which provides that:

“ No person shall be refused entry into Kenya, expelled, extradited from Kenya or returned to any other country or 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 –

- (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”.²¹⁸

Subsection (b) in the excerpt above also appears to preserve the broader definition of refugee given by Article 1(2) of the OAU Convention as a protection against expulsion to a home country where the refugee would be imperilled.

The Refugees Act thus provides a regime for the withdrawal of refugee status, and the expulsion of refugees that broadly reflects the position under applicable international law. As a result, it is possible for the Kenyan Government to pursue a policy of withdrawing refugee status (and, if the security situation in the receiving country permits, expelling refugees who have had their refugee status withdrawn) in cases of terrorist activity by refugees, for example. There is nothing in the Refugees Act to permit mass expulsions, however, and so an individual assessment of refugees would need to be made and reasonable grounds for suspecting terrorist activity would need to be provided.

²⁰⁹ Refugees Act § 3(3); Regulation 42(1).

²¹⁰ See, e.g., *Kituo Cha Sheria Case*.

²¹¹ Refugees Act; Regulations 5(a)-(d).

²¹² Regulation 5(e).

²¹³ *Ibid.*, §§ 4(b), 5(f).

²¹⁴ *Ibid.*, § 4(d).

²¹⁵ *Ibid.*, § 4(c).

²¹⁶ *Ibid.*, Art. 19.

²¹⁷ Section 21 of the Refugees Act which reflects the language of Article 32(1) of the 1951 Convention; see also regulation 47 of the Regulations.

²¹⁸ *Ibid.*, at § 18.

A new Refugees Bill 2016 (the “**Refugees Bill**”) was debated and passed in its final parliamentary stage in June 2017 and at the time of writing is awaiting presidential assent. If presidential assent is granted, the Bill will repeal the Refugees Act, and create a new regime for the administration of refugee affairs.

C.6.3 THE KENYA CITIZENSHIP AND IMMIGRATION ACT

The Kenya Citizenship and Immigration Act (“**KCIA**”) provides under Section 32 that an inadmissible person shall not enter or remain in Kenya.²¹⁹ The presence of an inadmissible person in Kenya is unlawful unless such presence is authorised under the provisions of KCIA or, with regards to asylum seekers, the Refugees Act and Regulations. An inadmissible person is defined to include an asylum seeker whose application for grant of refugee status has been rejected under the Refugees Act.²²⁰ If this is the case, the Cabinet Secretary may make a directive that the person unlawfully in Kenya be removed and returned to their country of origin.²²¹

C.7 KENYAN JURISPRUDENCE

C.7.1 RECENT KENYAN COURT JUDGMENT ON THE KENYAN GOVERNMENT’S PROPOSED CAMP CLOSURE POLICY

On 9 February 2017, in the Dadaab Decision, the High Court of Kenya ruled that the directive issued on 6 May 2016 disbanding the DRA was an ultra vires act, and the directive issued on 10 May 2016 regarding the closing of Dadaab and repatriation of Somali refugees was unconstitutional. Therefore, both directives were null and void.²²² A summary of the submissions of the KNCHR and the Kenyan Government is set out in Appendix D.

In its decision, the High Court considered representations by the KNCHR and Kituo Cha Sheria Legal Advice Centre (as petitioners) and Amnesty International (as an interested party), and briefs by the respondents, in relation to the following decisions and directives of the Kenyan Government:

- the revocation of the *prima facie* refugee status of refugees of Somali origin
- the closing of Dadaab and Kakuma refugee camps within the shortest time possible
- the appointment of a task force to implement repatriation of refugees to Somalia
- the disbanding of the DRA²²³

Before addressing the issues, the Court explained the current state of modern refugee law and listed international and regional instruments relating to refugees upon which its decision relies.²²⁴ The Court also looked to regional and domestic court opinions interpreting the right to life and freedom from torture when opining on the prohibition against refoulement, noting that the principle of non-refoulement prohibits not only the removal of individuals but also the mass expulsion of refugees.²²⁵

The Court considered: (a) whether or not the Kenyan Government’s decision violated the principle of non-refoulement, the refugees’ rights to a fair administrative action and the constitutional rights of the refugees; (b) whether the circumstances in Somalia have fundamentally changed to warrant repatriation of the refugees; and (c) whether the decision to disband the DRA was valid. On each of these issues and as discussed in more detail below, the Court ruled in favour of the petitioners.²²⁶ The Court concluded by ordering the Kenyan Government, with immediate effect, to restore the status quo ante predating the invalidated Kenyan Government directive with regard to administration of refugee affairs in Kenya and to reinstate and operationalise the DRA.²²⁷

²¹⁹ Kenya Citizenship and Immigration Act 2011, § 32.

²²⁰ Refugees Act.

²²¹ Refugees Act, Art. 43.

²²² *Kenya National Commission on Human Rights & another v Attorney General & 3 others*, Pet. No. 227 of 2016 [2017] eKLR, 9 February 2017, available at <http://kenyalaw.org/caselaw/view/131173>.

²²³ Please see Appendix E for a detailed summary of the submissions of KNCHR and the Kenyan Government.

²²⁴ Kenya National Commission on Human Rights, [2017] eKLR, p.7.

²²⁵ *Ibid.*, p. 8.

²²⁶ *Ibid.*, pp. 21-22.

²²⁷ *Ibid.*, p.22.

1. The Court held the Kenyan Government's decision violated the principle of non-refoulement

The Court noted that the principle of non-refoulement was the cornerstone of asylum and international refugee law and universally acknowledged as a human right.²²⁸ The Court found that non-refoulement was defined in a number of international refugee instruments, and was expressly prohibited in a number of human rights treaties and “had become a norm of customary international law”.²²⁹

The Court noted that respect for the principle of non-refoulement requires that asylum applicants be protected against “return to a place where their life or freedom might be threatened until it has been reliably ascertained that such threats would not exist and that, therefore, they are no longer refugees”.²³⁰ The Court also recognised that the principle applies to all refugees and asylum-seekers, regardless of whether they have been formally recognised as refugees, including where no decision has been made as to the individual's refugee status.²³¹

The Court explained that “whenever refugees – or asylum seekers who may be refugees – are subjected, either directly or indirectly, to such measures of return, be it in the form of rejection, expulsion or otherwise, to territories where their life or freedom are threatened, the principle of non-refoulement has been violated”.

The Court also noted that there may be certain legitimate exceptions to the principle of non-refoulement, found in Article 33(2) of the 1951 Convention, where there are reasonable grounds for regarding a refugee 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.²³² However, the Court held that these exceptions require an individualised determination by the refugee's host country that the

individual comes within one of these exceptions and rules out group or generalised application or collective condemnation and noted that “international human rights law and most regional refugee instruments contained an absolute prohibition on refoulement, without exceptions of any sort”.²³³ In respect of the Kenyan Government's claims that the refugees are a threat to public security and that the refugee camps have become breeding grounds for criminal activities, the Court found:

“ there is no clear evidence of involvement of crime and conviction. . . No single arrest or conviction has been cited nor has it been established why a blanket condemnation should be applied to all refugees nor is it clear why the government with its capable and mighty state machinery has not been able to identify any refugees involved in crime and prosecute them instead of mounting a blanket condemnation at this risk of punishing minor children, women and innocent persons”.²³⁴

Thus, the Court held that no exceptions could apply in this situation.

The Court concluded that it had “no difficulty” in finding that the Kenyan Government's decision to collectively repatriate all refugees in Dadaab to the frontiers of their country of origin against their will violated the principle of non-refoulement and held that the directive to forcefully repatriate refugees based at Dadaab or anywhere else in Kenya was a violation of Kenya's international legal obligations under the 1951 Convention, the OAU Convention, and Articles 2(5) and (6) of the Constitution and therefore, was null and void.²³⁵

2. The Court held the Kenyan Government's decisions/directives violated the refugees' right to fair administrative action

The Court looked to Article 47 of the Constitution and the Fair Administrative Action Act of 2015, both of which provide that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and held that the Kenyan Government's decisions “were made in

²²⁸ *Ibid.*, p. 9.

²²⁹ *Ibid.*, pp. 9-10 (citing 1951 Convention, Art. 33 (1); 1967 Protocol, Art. I (1); Article 3 (1) of the UN Declaration on Territorial Asylum; OAU Convention, Art. II (3); American Human Rights Convention, Art. 22 (8); Resolution on Asylum to Persons in Danger of Persecution (adopted by the Committee of Ministers of the Council of Europe); Principles concerning the Treatment of Refugees, Art. III (3) (adopted by the Asian-African Legal Consultative Committee); Convention Against Torture, Art. 3; ICCPR, Art. 7; European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 3.)

²³⁰ *Ibid.*, p. 11.

²³¹ *Ibid.*.

²³² *Ibid.*.

²³³ *Ibid.*.

²³⁴ *Ibid.*, p. 12.

²³⁵ *Ibid.*, pp. 12 & 21-22.

total disregard of the provisions of the act".²³⁶ The Court reasoned that a decision that fails to examine individual circumstances and anticipated exceptions is not fair and reasonable because it does not allow due process for persons with refugee status.²³⁷ As a result, the Court once again found that it had "no difficulty" in concluding that the Kenyan Government's decisions/directives complained of in the petition violated the clear provisions of Article 47 of the Constitution and the Fair Administrative Action Act of 2015 and, consequently, to the extent that the decisions in question affected or purported to affect the rights of refugees of Somali origin or any other refugees, they could not be allowed to stand.²³⁸

3. The Court held the Kenyan Government's decision violated the human rights of the refugees guaranteed by the Constitution

The Court declared the Kenyan Government's directive on the intended repatriation of refugees of Somali origin to be "*arbitrary, discriminatory and indignifying [sic]*" and therefore a violation of Articles 27 (right to equality and freedom from discrimination) and 28 (right to dignity) of the Constitution and consequently the Court quashed the directive.²³⁹ The Court noted that the right to dignity is underpinned by other international human rights instruments, including the Universal Declaration of Human Rights and the African Charter.²⁴⁰ In reaching this conclusion, the Court held that these constitutional rights were guaranteed (with limited exceptions) to all persons within Kenya's borders, including refugees and accepted the petitioners' submission that the directive's targeting of refugees of Somali origin amounted to racial profiling and discrimination.²⁴¹ The Court noted in this regard that "*racial profiling results in group condemnation and is discrimination of the worst kind and has no place in modern democracy*".²⁴²

The Court then examined whether the Kenyan Government's violations of the refugees' constitutional rights fell within the permitted exceptions of the Constitution. In doing so, the Court held that the appropriate test for determining whether a restriction on a constitutional right is appropriate should be one

of proportionality, as used in international, regional and comparative human rights jurisprudence.²⁴³ The Court found that the Kenyan Government's decision did not meet the proportionality test, describing it as arbitrary and offending the constitutionally guaranteed rights of the petitioners, international law and international and regional instruments on the treatment of refugees. In any event, the Court held that the reasons offered by the Kenyan Government had not been shown to fall within the exceptions to the principle of non-refoulement.²⁴⁴ The Court therefore declared the Kenyan Government's decisions specifically targeting Somali refugees to be "*an act of group persecution, illegal, discriminatory and unconstitutional*".²⁴⁵

4. The Court held circumstances in Somalia have not fundamentally changed so as to warrant repatriation of the refugees

The Court examined whether the circumstances in Somalia had fundamentally changed such that the Somali refugees' status as refugees could be said to have ceased, pursuant to Articles 1C(5) and 1C(6) of the 1951 Convention (referred to as the 'general cessation exception' and discussed above in section C.1.1.6), and noted in this regard that the 1951 Convention and principles of refugee protection look to durable solutions for refugees.²⁴⁶ The Court found that to meet the requirements for cessation of refugee status, the state must make a careful assessment into the "*fundamental character of the changes*", the "*general human rights situation*" and the "*particular cause for the fear of persecution*", among other things, in an objective and verifiable nature.²⁴⁷ The Court identified an "*end to hostilities, a complete political change and return to a situation of peace and stability*" as the most typical situation in which the 'general cessation' exception applies.²⁴⁸ Therefore, the state was required to show a durable solution to the circumstances that led to the refugees' status in order to comply with international law and practices. The mere assertion by the Kenyan Government that there was now a Somali Government did not meet this requirement.²⁴⁹

²³⁶ *Ibid.*, pp. 14-15.

²³⁷ *Ibid.*, p. 14.

²³⁸ *Ibid.*

²³⁹ *Ibid.*, p. 21.

²⁴⁰ *Ibid.*, p. 14.

²⁴¹ *Ibid.*, p. 15.

²⁴² *Ibid.*

²⁴³ *Ibid.*, p. 17.

²⁴⁴ *Ibid.*, p. 18.

²⁴⁵ *Ibid.*, p. 22.

²⁴⁶ *Ibid.*, p. 18.

²⁴⁷ *Ibid.*, p. 19.

²⁴⁸ *Ibid.*

²⁴⁹ *Ibid.*

When looking to the factual evidence before the Court, the Court noted the Kenyan Government's decision did not appear to have been backed by a report from any relevant specialised bodies and a report prepared by Amnesty International, regarded by the Court as the only credible report, had identified "areas of serious concern" raising doubts as to whether the changes that may have taken place in Somalia were permanent and enduring.²⁵⁰ In the circumstances, the Court held that, applying the standard laid down by the international conventions governing the issue, the Kenyan Government had not satisfied the standard required to demonstrate the changed circumstances, which was a prerequisite for repatriation. Perhaps significantly, however, the Court noted that "a report by the relevant specialized bodies on the subject would have sufficed" for the Kenyan Government to satisfy this condition and this may be something the Kenyan Government looks to address in any renewed attempt to close Dadaab.²⁵¹

5. The decision by the Attorney General to disband the DRA was invalid

The DRA was established pursuant to Section 6 of the Refugees Act. As a result of its being a creation of statute, the Court held that the DRA could only be disbanded by amending the law, not by executive action. Consequently, the decision-maker had acted outside his powers and the Court declared the decision to disband the DRA null and void.

Status of Appeal

On 16 February 2017, the Kenyan Attorney General filed a notice of appeal on behalf of the Kenyan Government. However the Kenyan Government is also required to file a memorandum and record of appeal no later than 60 days from the date the notice of appeal is filed, which it has not done. Despite the lack of an official appeal, there has been no formal change to the deadline for camp closure, nor has the Kenyan Government taken the specific steps ordered by the Court. This has created significant uncertainty over what will happen to Dadaab.

²⁵⁰ *Ibid.*, p. 19.

²⁵¹ *Ibid.*, p. 20.

C.7.2 RECENT KENYAN COURT OF APPEAL JUDGMENT KITUO CHA SHERIA

The 2017 Kenyan Court of Appeal judgment upholding the July 2013 High Court judgment in the case of *Kituo Cha Sheria & 8 others v Attorney General*, which found the Kenyan Government's 2012 directive compelling urban refugees to relocate into refugee camps to be unlawful, is important because it is an appellate court case opinion that came out a day after the Dadaab Decision and focused on many of the same issues, including: (a) whether international refugee law should be recognised as Kenyan law, (b) whether refugees were entitled to rights granted under the Bill of Rights in the Kenyan Constitution, (c) whether actions taken by the Kenyan Government to round up and repatriate Somali refugees were prohibited by principles of non-refoulement, (d) whether national security and criminal behaviour exceptions to the principle of non-refoulement were applicable in the mass expulsion of refugees, and (e) whether the courts had authority to review executive directives.²⁵²

1. The Court of Appeal upheld the High Court's decision that the principle of non-refoulement forms a part of customary international law

The Court examined a variety of human rights laws (including the United Nations Convention Relating to the ICCPR, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the Convention against Torture) and affirmed the first instance decision that the principle of non-refoulement is a norm of customary international law that is incorporated into Kenyan Law through express provisions in the Constitution.²⁵³ The Court rejected the Attorney General's argument that the High Court erred in applying non-refoulement as a peremptory customary law norm from which no derogation is permitted.²⁵⁴

2. The Court of Appeal upheld the freedom of movement for citizens and refugees

Broadly, the Court held that freedom of movement, as guaranteed by the Constitution, is reserved for both citizens and non-citizens.²⁵⁵ The Court further held that in interpreting the provisions of the Constitution,

²⁵² *Kituo Cha Sheria Case*, [2017] eKLR.

²⁵³ *Ibid.*, pp. 22-26.

²⁵⁴ *Ibid.*

²⁵⁵ *Ibid.*, p. 21.

the Court must do so in a manner that promotes human dignity, equity, social justice, inclusiveness, human rights, non-discrimination and protection of the marginalised.²⁵⁶ The Court of Appeal affirmed the decision of the High Court that the Bill of Rights is not an exhaustive list of rights and held that aliens are entitled to reside anywhere in Kenya under Article 2(6), which gives effect to the provisions of the 1951 Convention that recognise a refugee's right to reside anywhere in the receiving country, subject to any regulations applicable to aliens.²⁵⁷ The state may therefore impose reasonable conditions or restrictions to non-citizens but cannot deny the refugees the right to reside in urban centres.²⁵⁸

3. The Court of Appeal held that the relocation and encampment policy in relation to refugees failed to meet substantive requirements necessary to limit the rights of refugees under the Constitution

The Court held that refugees' rights may only be limited or restricted if provided for by law, and are necessary for the protection of national security, public order, public health or morals or the rights and freedoms of others.²⁵⁹ The Court placed the burden of proof on the person defending this limitation to provide a justification for the restriction.²⁶⁰

The Court found that the justification given by the Commissioner, which was that the structural encampment policy was intended effectively to undertake its statutory mandate and to offer humanitarian assistance in a safe environment which could not be guaranteed in urban centres, had not been demonstrated.²⁶¹ It further held that, in any case, there existed less restrictive means of achieving this policy.²⁶² The Court further concurred with the High Court that the real reason for the policy was to secure or improve national security, but did not find any evidence to link the refugees as a group to a national security threat.²⁶³ The Court therefore affirmed the High Court's ruling that a real connection must be established between the affected persons and the danger to national security and found that this had not been proved in

²⁵⁶ *Ibid.*, pp. 14-15.

²⁵⁷ *Ibid.*, p. 21.

²⁵⁸ *Ibid.*

²⁵⁹ *Ibid.*, p. 27.

²⁶⁰ *Ibid.*, p. 30.

²⁶¹ *Ibid.*, pp. 30-31.

²⁶² *Ibid.*, p. 31.

²⁶³ *Ibid.*, pp. 31-32.

this case.²⁶⁴ As such, the Court found that the Kenyan Government failed to justify its limitations on national security grounds based on grenade attacks in urban areas throughout the country.²⁶⁵ Additionally, the Court affirmed the High Court's position that the Kenyan Government had not provided a sufficiently rational connection between the relocation policy and the limitation of refugee rights, and found no evidence that a sweeping relocation policy would promote the welfare of refugees.²⁶⁶

4. The Court of Appeal concluded that it was not unconstitutional to quash the state relocation directive

The Court criticised the Kenyan Government for its haphazard policy based on a tenuous connection between the refugee population and the previously mentioned grenade attacks.²⁶⁷ The Court of Appeal reaffirmed the principle of non-refoulement and held that quashing was lawful because of procedural constitutional violations.²⁶⁸ The Court noted that the Kenyan Government's directive failed to respect the constitutional provision that all persons have the right to expeditious, efficient, lawful, reasonable, and procedurally fair administrative action.²⁶⁹

The Court definitively stated that the Kenyan Government failed to involve or consult the groups and individuals affected by its actions.²⁷⁰ As an example, it discussed a situation in which 18,000 persons had been rounded up and transported for holding at Thika Municipal Stadium without any criminal charges.²⁷¹ The Court described this scenario as a violation of human dignity and affirmed the High Court's position on the directive and further recognised the substantive and procedural rights of refugees.²⁷²

²⁶⁴ *Ibid.*

²⁶⁵ *Ibid.*

²⁶⁶ *Ibid.*, pp. 33-34.

²⁶⁷ *Ibid.*, p. 35.

²⁶⁸ *Ibid.*, pp. 34-35.

²⁶⁹ *Ibid.*, p. 35.

²⁷⁰ *Ibid.*

²⁷¹ *Ibid.*

²⁷² *Ibid.*, pp. 37-38.

C.7.3 FURTHER KEY KENYAN JURISPRUDENCE: HIGH COURT DECISION ON PROPOSED AMENDMENTS TO KENYAN REFUGEE LAW LIMITING THE NUMBER OF REFUGEES IN KENYA TO 150,000²⁷³

In the wake of a number of terrorist attacks in Kenya in 2015, the Kenyan Government enacted the Security Laws (Amendment) Act of 2014 (the “SLAA”).²⁷⁴ The SLAA amended the provisions of 22 other acts of Parliament which it claimed were concerned with national security, including the Refugees Act. Section 58 of the SLAA amended Section 16 of the Refugees Act by inserting a new Section 16A which, *inter alia*, provided that the number of refugees permitted to stay in Kenya should not exceed 150,000.²⁷⁵

A number of petitioners, including the Kenyan National Commission on Human Rights and the Coalition for Reforms and Democracy, challenged this amendment to the Refugees Act in the Kenyan Courts. The petitioners contended that, as the number of refugees in Kenya at that time was approximately 583,000, implementing a limit on the number of refugees in Kenya to 150,000 would inevitably breach international human rights and refugee laws and, more particularly, give rise to unlawful refoulement and prevent any new refugee arrivals.²⁷⁶

In their judgment of 23 February 2015, a panel of five Kenyan High Court judges agreed with the petitioners’ submissions that this amendment was unconstitutional as it violated the principle of non-refoulement as recognised under the 1951 Convention, which is part of the laws of Kenya pursuant to Articles 2(5) and (6) of the Constitution.²⁷⁷

In reaching this conclusion, the Court affirmed that “*both domestically and internationally, the cornerstone of refugee protection is the principle of non-refoulement*” and rejected the Kenyan Government’s argument that there was “*a direct relationship between the presence of refugee populations and the number of terrorist attacks*” and that therefore the cap was justified on the basis of national security concerns.²⁷⁸ On the latter issue, the Court held that the Kenyan

Government already had alternative legal options in the Refugees Act for dealing with refugees who it deemed to be engaged in criminal behaviour.²⁷⁹ In particular, as noted above, Section 19 of the Refugees Act allows the Commissioner to withdraw the refugee status of any person “*where there are reasonable grounds for regarding that person as a danger to national security or to any community of that country*”, while Section 21(1) allows the expulsion of a refugee, after consultation with the Minister (now Cabinet Secretary) responsible for matters relating to immigration and internal security, if the Minister considers that the expulsion of the refugee or a member of his family is necessary on the grounds of national security or public order.²⁸⁰

In light of the foregoing, the Court held that it was clear that: (a) the Kenyan Government had legal options available to it for dealing with refugees who it deemed to have engaged in conduct that is not in conformity with their status as refugees; and (b) setting a cap on the number of refugees permitted to remain in the country would lead to a violation of the Constitution.²⁸¹

²⁷³ Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others, Pet. Nos. 628 and 629 of 2014 and Pet. No. 12 of 2015, [2015] eKLR, para. 464(g).

²⁷⁴ Security Laws (Amendment) Act of 2014.

²⁷⁵ *Ibid.*

²⁷⁶ *Ibid.*

²⁷⁷ *Ibid.*

²⁷⁸ *Ibid.*, para. 408 and para. 421.

²⁷⁹ *Ibid.*, para. 428-29.

²⁸⁰ *Ibid.*

²⁸¹ *Ibid.*, para. 430.

D APPLICATION OF LEGAL FRAMEWORK



Somali refugees in Dadaab return to Mogadishu. ©NRC/Fredrik Lerneryd, 2016

This section will consider the extent to which, given the facts relating to Dadaab and its refugee population described in Part B, the Kenyan Government's proposed plan to close Dadaab and repatriate Somali refugees is in compliance with the international, regional and Kenyan domestic refugee and human rights laws described in Part C.

This analysis follows five areas of inquiry that emerge from the description of the applicable legal framework in Part C:

- **D1** The definition of "refugee"
- **D2** The cessation of refugee status
- **D3** The principle of non-refoulement protection
- **D4** The voluntary repatriation process
- **D5** Complementary protection

D.1 DEFINITION OF REFUGEE

There is a four-part test to determine whether an individual is a refugee under the Convention and Protocol:

- He or she must be outside his or her country of nationality or habitual residence.
- He or she must have a well-founded fear of being persecuted.
- That fear must be based on his or her race, religion, nationality, membership of a particular social group or political opinion.
- He or she must be unable or unwilling to avail himself or herself of the protection of that country, or return there, for fear of being persecuted.

This four-part test also serves as the definition of “statutory refugee” for the purposes of the Refugees Act.²⁸² This test is extended under the OAU Convention to provide for refugee status to every person who has been compelled to seek refuge in another country due to events seriously disturbing public order in any part, or the whole of the person’s country or origin or nationality. This extended definition of refugee under the OAU Convention is also the definition of “*prima facie* refugee” for the purposes of the Refugees Act.²⁸³

Until April 2016, Somali asylum seekers were designated by the Kenyan Government as *prima facie* refugees, within the meaning of the Refugees Act. Since that time, however, Somalis seeking asylum in Kenya are classified as statutory refugees rather than *prima facie* refugees, and are therefore required to undergo individual RSD to establish that they fall within the scope of the statutory definition of refugee under the Refugees Act.

During the RSD process, where an asylum seeker has been involved in particularly egregious acts (described above in Part C), the individual may be excluded from eligibility for refugee status, pursuant to the Refugees Act, which incorporates Article 1F of the 1951 Convention or Article I(5) of the OAU Convention. Nevertheless, as described in Part C, due to the nature of the criteria, exclusion will only be relevant in a small number of individual cases.

D.2 CESSATION OF REFUGEE STATUS

As described in Part C, there are only limited circumstances in which refugee status can cease. The only circumstances that could potentially result in the cessation of refugee status for a large refugee population would be if the circumstances in the home country were to have fundamentally improved or if refugee status is voluntarily disclaimed. There has been no broad voluntary disclaimer, and the circumstances in Somalia, as described in Part B, have not improved for cessation to apply.

The other circumstances in which refugee status could cease, including where a refugee has committed a serious crime, cannot apply to the population of Dadaab as a whole, and so do not provide justification for revoking the refugee status of all the refugee population of Dadaab in order to close Dadaab.

D.3 NON-REFOULEMENT PROTECTION

Pursuant to the Relevant Legal Framework, a refugee may not be subject to refoulement, apart from in certain limited cases where, based on the individual’s conduct, an exception to the non-refoulement principle may apply. The security and humanitarian situation prevailing in Somalia is discussed in Part B above appears to be sufficiently grave to suggest that refugees returning to Somalia at the present time are likely to be put in danger. In principle, therefore, the Somali refugees in Dadaab should be protected from refoulement until the security and humanitarian situation in Somalia shows considerable improvement, save where an exception applies in an individual case.

As noted in Part C, individual exceptions arise where a specific refugee poses a danger to the security of the host country, or has been convicted of a particularly serious crime. The exceptions require careful consideration of individual cases, and in the case of the particularly serious crime exception, a final judgment. Neither instance will assist Kenya in the pursuit of a mass repatriation policy.²⁸⁴ Reports indicate that, in some cases, individual residents of Dadaab who are suspected of involvement in terrorism or serious criminality have been arrested by the Kenyan police.²⁸⁵ If the requirements of the Relevant Legal Framework are met, an exception to the non-refoulement principle may apply in such cases, allowing Kenya to repatriate those individuals.

²⁸² Refugees Act, Art.3(1).

²⁸³ Refugees Act, Art 3(2).

²⁸⁴ See *Kituo Cha Sheria Case*, [2013] eKLR, at para. 43.

²⁸⁵ Daily Nation, *Police hold four terror suspects after operations in Dadaab*, 6 April 2017, available at <http://goo.gl/NKdCnj>.

D.4 VOLUNTARY REPATRIATION PROCESS

Kenya is proceeding with its repatriation policy on the basis that Somali refugees at Dadaab are returning voluntarily to Somalia. Voluntary repatriation is permitted under international refugee law and protection frameworks but, as described in Part C, those frameworks place onerous responsibilities on the countries of asylum and origin, and on the UNHCR to ensure that return is voluntary, safe and dignified, and within a framework of sustainable reintegration.

Under Article V of the OAU Convention, Tripartite Agreement and the UNHCR doctrinal positions, the voluntary nature of return is underpinned by two important concepts: (a) return must be a free choice and absent of push factors including physical, psychological and material pressure; and (b) return must be based on complete, unbiased and accurate information regarding the situation in their country of origin.

As described in Part C, the process established under the Tripartite Agreement has been structured so as to provide multiple opportunities to provide information and to confirm the voluntary nature of the return. The Tripartite Agreement should be formally extended, and its principles should continue to be adhered to and all parties should respect their obligations under the Tripartite Agreement to ensure that return is voluntary, safe and dignified. The Tripartite Commission and Technical Committees should meet as originally intended and the framework of the Tripartite Agreement should be utilised to ensure refugee protection in accordance with international law.

Significant concerns remain as to whether the return of refugees under the process is free from the influence of push-factors, fully informed, and, in light of the current situation in Somalia, safe and sustainable.

D.4.1 PUSH FACTORS

Many operational agencies and human rights organisations on the ground in Dadaab have questioned: (a) whether the current return process is truly voluntary; (b) whether it is representative of the effect of positive pull factors, as opposed to push factors, in each case in light of the Kenyan Government's statements of its intention regarding camp closure.²⁸⁶

There have been reports in 2016 of both direct and indirect push factors in Dadaab, encouraging refugees to return to Somalia. Such push factors include radio and print media claiming that Somalia is safe and warning that the Kenyan Government would take "stern action" against any people who harbour refugees escaping the camps.²⁸⁷ There is also a perception among some refugees that the current assistance package may not be available to them in future if they do not register to return to Somalia now.

More broadly, efforts to ensure that returns are truly voluntary and meet international standards are undermined where the situation on the ground leaves refugees believing there is no other realistic option but to return. The camp closure deadline imposed by the Kenyan Government, which remains in place, means many Somali refugees may see no alternative but to leave Dadaab. Any efforts to ensure that refugee returns meet international standards of voluntariness are questionable where the situation of refugees in Dadaab leaves them no option but to return to Somalia or exposes them to pressure to return.

The impact of such push factors are borne out in the results of NRC and RCK household assessments conducted in May and June 2017, described above in Part B, which revealed that significant push factors lay behind the decisions of many refugees to return.²⁸⁸

²⁸⁶ See for example, NRC, Dadaab's Broken Promise, October 2016. Available at <https://goo.gl/xLJk8X>. Also: Médecins Sans Frontières, Dadaab to Somalia: Pushed Back in Peril, October 2016. Available at <http://goo.gl/CGk1Zp>; and Save the Children International, 'Thousands of Vulnerable Children at Risk as Closure of World's Largest Refugee Camp Looms', October 2016. Available at <https://goo.gl/naasFv>.

²⁸⁷ Human Rights Watch, Kenya: Involuntary Refugee Returns to Somalia, 14 September 2016; available at <https://goo.gl/bpL9Xn>.

²⁸⁸ REACH/NRC/RCK, Dadaab Movement and Intentions Monitoring (May – June 2017), available at <http://goo.gl/8ZJaUu>.

D.4.2 PROVISION OF INFORMATION

There has been criticism of the level and type of return information being provided to refugees who are considering a return to Somalia.²⁸⁹ Human Rights Watch (“**HRW**”) stated in 2016 that the information at help desks within Dadaab is “*mostly superficial, out of date and sometimes misleading*” which has the consequence of affecting their ability to make a voluntary, informed choice to return to Somalia.²⁹⁰

There has been significant work by the UNHCR, together with NRC and other partners throughout 2016 and 2017, to improve the provision of information on the voluntary repatriation process and areas of return in Somalia. The two agencies have focused on ensuring refugees are provided with the accurate, detailed and updated information on return areas and that refugees throughout the voluntary repatriation process receive updates to ensure that, right up to the point of departure, they have the most up-to-date information to make an informed decision. The UNHCR and its partners have also focused on additional efforts to strengthen cross-border coordination and information sharing, adjusting mechanisms for the delivery of information including refresher country of origin information sessions closer to the time of departure, the use of radio talk shows and radio spot messages and the regular gathering of frequently asked questions from refugees to ensure that information provided addresses the needs of refugees.

Nevertheless, the situation in Somalia has remained very dynamic and it continues to be difficult to ensure that all refugees have, in particular, accurate and updated information in order to enable them to make an informed decision to return. In this regard, it is critical that the UNHCR and its operational partners continue to dedicate significant resources to the collection, verification and sharing of information to allow international standards to be met for ensuring that decisions to return are fully informed.

D.4.3 SAFE, DIGNIFIED AND SUSTAINABLE RETURNS

The OAU Convention, Tripartite Agreement and the UNHCR Executive Committee conclusions and handbooks all provide that repatriation may only be conducted in circumstances where the safety and dignity of returning refugees can be ensured and to a country of origin that can support their sustainable return and reintegration. Refugees from Dadaab are returning to a country now not only struggling with ongoing conflict, but also experiencing its worst drought in 20 years. It should also be noted that, in 2017, the UNHCR temporarily suspended returns to Baidoa, a return area that has been particularly affected by drought and displacement.

Population displacement as a result of ongoing conflict, particularly in south central Somalia which has until now been where the majority of Somali refugees from Dadaab have returned, may be seen as a key indicator that the safety and dignity of returnees cannot be assured. Further, reports indicate that the severe drought in the region, which has led to further population displacement and outbreaks of disease, will not improve until December 2017 at the earliest. In light of these factors, there are few grounds for believing that safe and sustainable returns to Somalia are possible at present. Given the security and humanitarian situation in Somalia, there appears to be a real risk that returning refugees will be unable to reintegrate in Somalia, and many will be forced into internal displacement or to again seek refuge across international borders.

In this context, even though the process implemented under the Tripartite Agreement provides some comfort that refugees appear to be returning to Somalia willingly, there remain doubts as to whether the requirements for voluntary, fully informed repatriation carried out under conditions of safety, dignified and sustainable return conditions are being, or can be, met. The Kenyan and Somali Governments, and the UNHCR, must closely monitor the ability of refugees to make safe, dignified and sustainable returns. The UNHCR and its partners must increase information management between Somalia and Kenya to continuously monitor the safety, dignity and sustainability of return. Further, the Tripartite Commission should consider suspending returns, whether generally or to specified areas, for periods of time to avoid harm being caused to returning refugees.

²⁸⁹ UNHCR, Handbook: Voluntary repatriations: International Protections, 1996, section 2.5; available at <http://goo.gl/M77odH>.

²⁹⁰ Article 15, Tripartite Agreement.

D.5 COMPLEMENTARY PROTECTIONS

The complementary protections provided by Article 12 of the African Charter (right to freedom of movement), Article 14 of the Universal Declaration of Human Rights (right to seek and enjoy in other countries' asylum from persecution), Article 3 of the 1984 Convention Against Torture (right to not be expelled, returned, or extradited to another state where there are substantial grounds for believing the individual would be in danger of being subjected to torture) and Article 7 of the 1966 Covenant on Civil and Political Rights (right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment) should be noted. The effect of these provisions give further support to the position that the Somali refugees in Dadaab may not be repatriated against their will in the current security and humanitarian context prevailing in Somalia, and they may offer further protection to individuals whose refugee status has ceased, or who are subject to an exception from the non-refoulement principle.

D.6 CONCLUSION

The Somali residents of Dadaab benefit from considerable protection against involuntary repatriation as a result of their refugee status. It is possible that certain refugees may be legally repatriated against their will under an exception to the non-refoulement principle or may see their refugee status cease, but such cases must be individually considered and the evidential burden on the Kenyan Government is onerous. In any case, given the nature of the individual actions required for their application, these provisions are of very limited assistance to the Kenyan Government in the context of closing Dadaab generally. Where an individual is subject to cessation of refugee status or an exception to the non-refoulement principle, complementary protections may apply to prevent their refoulement. In any event, the Kenyan Government does not appear to have made a convincing case that the refugee population at Dadaab poses a security risk to Kenya.

Therefore, in the case of the large majority of Somali refugees currently residing in Dadaab, the only permissible means for the Kenyan Government to return refugees to Somalia in compliance with the Relevant Legal Framework will be for the Kenyan Government to seek their voluntary repatriation. This in fact appears to be the approach espoused by the

Kenyan Government. However, the Relevant Legal Framework, and in particular Article V of the OAU Convention and the Tripartite Agreement, imposes significant obligations on the Kenyan Government to ensure that returning refugees are really making a free and fully informed choice. It is of course possible that, the dangers presented by the drought and ongoing civil war in Somalia notwithstanding, certain refugees are making fully informed, voluntary decisions to return to Somalia. However, given the overall context in Dadaab and the large numbers of refugees being processed for return, there is considerable doubt as to whether the Kenyan Government is at present meeting its obligations to ensure that those Somali refugees returning to Somalia are in fact doing so voluntarily and that returns to Somalia are occurring in a safe, dignified and sustainable manner. These conclusions are supported by the judgment of the High Court of Kenya in the *KNCHR v Attorney General* case, discussed in Part C.

More broadly, pursuant to international refugee law, if the only choice available to refugees is to return to their country of origin, this is not a choice at all. Local integration and resettlement in the host country must remain options for refugees. Practical means of ensuring that alternatives to return are in place should now be discussed as part of the IGAD Plan of Action and the CRRF pilot, the regional and international frameworks relating to the situation of Somali refugees.

E

EXAMPLES OF PAST REFUGEE CAMP CLOSURES AND REFUGEE REPATRIATIONS



Kobe Camp in Dolo Ado, Ethiopia. ©NRC/Ingrid Prestetun, 2014

E.1 INTRODUCTION

E.1.1 This Part E sets out examples of other refugee camp closures, in order to identify potentially instructive similarities and points of difference with the situation at, and proposed closure of, Dadaab (both in terms of legal issues and practical responses). In particular, this Part seeks to highlight best practice and provide possible alternative approaches to the closure of Dadaab within the framework of durable solutions for refugees.

E.1.2 This Part is comprised as follows:

- (a) Case studies concerning Somali refugees: Ethiopia, Yemen
- (b) Case studies concerning other African states: Tanzania, Uganda
- (c) Case studies concerning South Asian states: Bangladesh, Pakistan
- (d) Case studies concerning EU states: Greece

ETHIOPIA CASE STUDY (2014 – PRESENT)

E.2 THE REFUGEES

E.2.1 CAUSE OF THE REFUGEE FLOW

At the time of writing, there were over 251,000 Somali refugees in Ethiopia seeking asylum in Somali regions of Ethiopia as a result of the drought and civil war which has been ongoing in Somalia since 1991, and which is detailed in Part B of this Report.²⁹¹

In December 2013, following the outbreak of civil war in South Sudan (when President Salva Kiir accused his ousted deputy, Riek Machar, of planning a coup), thousands sought refuge in neighbouring countries, including Ethiopia.²⁹² Since 2016, an average of 600 South Sudanese refugees per day continue to enter Ethiopia citing fear over renewed fighting and food insecurity as the reason for seeking refuge.

Further, in the last few years there has been an influx of Eritrean refugees and approximately 155,000 Eritrean refugees currently reside in Ethiopia (fleeing from the human rights abuses and a strictly enforced national service that requires all adults to spend most of their lives working for the Eritrean Government).²⁹³

E.2.2 SAFETY AND TREATMENT

Somali refugees reside in camps in Dollo Ado and Jijiga, which have, in recent years, been reported to be suffering from a lack of shelter, acute malnutrition and poor hygiene practices²⁹⁴ largely owing to the adverse weather conditions in the area. However, there were a number of notable achievements in 2016 in relation to the refugee camps in Ethiopia, such as an increase in water provisions to the camps, improved road maintenance and assistance including WASH, education, health, nutrition, shelter, and

additional services to support those with specific needs.²⁹⁵

Similarly, South Sudanese refugees reside in seven different camps across Ethiopia, the most recent camp, Nguenyiel, opening in 2016 to accommodate the increasing number of South Sudanese refugees seeking refuge in Ethiopia. The conditions in these camps are also sub-standard, with the main concerns of the refugees relating to food ration cuts, and water and sanitation gaps.²⁹⁶

The situation of Eritrean refugees residing in Ethiopia has historically been more favourable than of other refugees, as demonstrated by the establishment of the Out-of-Camp Policy (“**OCP**”) in 2010 offering opportunities for Eritrean refugees to live outside of camps, and the fact that Eritrean refugees in the camps have access to the national justice system. This favourable treatment of Eritrean refugees has led to a steady influx of approximately 2,500 Eritrean arrivals each month.²⁹⁷ However, even Eritrean refugees are largely prohibited from working, which restricts their ability to become self-sufficient and fully integrate within the Ethiopian community. As a result, the majority of jobs available to them are “informal,” offer no legal protection, and often entail poor conditions of employment.²⁹⁸

E.3 THE LEGAL FRAMEWORK

E.3.1 STATUS AND LEGAL POSITION

The Government of Ethiopia ratified both the 1951 Convention and the 1967 Protocol on 10 November 1969, and is party to the OAU Convention. Domestic policy is guided by the Refugee Proclamation of 2004 (“**Refugee Proclamation**”), which outlines Ethiopia’s legal framework for refugees, and aims to ensure that Ethiopia stays in line with its international obligations.

²⁹¹ UNHCR, *Global Focus, Refugees and Asylum Seekers from Somalia in Ethiopia*, 2017, available at <http://reporting.UNHCR.org/node/15849>.

²⁹² Financial Times, *Heavy fighting in South Sudan spark fears of return to civil war*, 10 July 2016, available at <https://goo.gl/8SYQz4>.

²⁹³ UNHCR, *Do not risk your lives, Grandi tells Eritrean refugees*, 2 February 2016, available at <http://goo.gl/VTKUkN>.

²⁹⁴ UNHCR, *As starving Somalis flood into Ethiopia, UN sends in emergency aid team*, 23 August 2011, available at <http://goo.gl/wwFyD3>.

²⁹⁵ UNHCR, *Global Focus, Refugees and Asylum Seekers from Somalia in Ethiopia*, 2017, available at <http://reporting.UNHCR.org/node/15849>.

²⁹⁶ UNHCR, *Global Focus, South Sudanese Refugees and Asylum-Seekers (in West)*, 2017, available at <http://reporting.unhcr.org/node/15847>.

²⁹⁷ UNHCR, *Global Focus, Refugees and Asylum Seekers from South Sudan in Ethiopia*, 2017, available at <http://reporting.unhcr.org/node/15848>.

²⁹⁸ NRC and Samuel Hall, *Living out of camp, Alternative to camp-based assistance for Eritrean refugees in Ethiopia*, 2014, available at <http://goo.gl/5dtBbk>.

The Government of Ethiopia's relatively open policy towards refugees has made it the largest refugee-hosting nation in Africa, and the fifth largest in the world.²⁹⁹ However, it maintains reservations to the 1951 Convention regarding the right to work and freedom of movement for refugees living in Ethiopia.

Recent pledges at the Leaders' Summit on Refugees, co-hosted by Ethiopia in September 2016 serve to demonstrate the country's increasing commitment to establishing a comprehensive response to refugee protections, including pledges to expand the OCP beyond only Eritrean refugees, provide work permits to refugees, increase enrolment of refugees in schools and to allow for local integration for refugees who have lived in Ethiopia for over 20 years³⁰⁰. It is expected that the majority of the pledges will be passed into law in October 2017, and so it is not yet possible to evaluate the efficacy of these policies. However, some changes are already being implemented, for example, legislative changes to the Vital Events Registration and National Identification Card Proclamation came into force in August 2017, permitting refugees to obtain legal identity documents from the Vital Events Registration Authority in the same way as local residents, aiding integration efforts.

E.3.2 VOLUNTARY REPATRIATION

Since 1997, programmes in the eastern Somali camps have mainly focused on repatriation, resulting in six Somali refugee camps being closed down with the successful voluntary repatriation of 222,033 people. For example, in 1997, the UNHCR launched a programme to support the repatriation of Somali refugees from Ethiopia, through providing transportation and a return package worth approximately \$ 130 per person (containing food for nine months, 200 Ethiopian birr (\$ 90), blankets, jerry cans, and plastic sheeting for shelter). Moreover, Quick Impact Projects ("QIPs") were undertaken in areas of return from 1994 to 2005, which focused on providing water, health-care, livelihood and education, in an attempt to

reconstruct and rehabilitate communities for the return of the refugees.

By mid-2005, most camps had been successfully closed. Of those who remained in the Ethiopian camps, some explained that this was due to fear that their clan affiliation could put them at risk if they were repatriated. In response, officials working on the repatriation for the Somaliland Ministry of Rehabilitation, Reintegration and Reconstruction ("MRRR") emphasised that go-and-see visits to areas of return for refugee elders was crucial to mobilising refugees, as elders were able to testify to their clan constituents that the areas were safe.³⁰¹ However, determining whether the returns to Somalia are truly "voluntary" is difficult to assess. First, some returnees claim that a reduction of rations and services in eastern Ethiopian camps drove them to return.³⁰² Second, doubts over the safety and quality of life in the Ethiopian camps have led many to return to Somalia.³⁰³

Whilst the Ethiopian Government is encouraging the voluntary return of Somali refugees back to Somalia, there is currently no fixed deadline on their repatriation. Under the Refugee Proclamation of 2004, there is a focus on the "voluntary" nature of repatriation of refugees. The preamble emphasises that Ethiopia will promote the refugees' "voluntary repatriation in safety and dignity whenever conditions permit." Article 7 of the Refugee Proclamation further states that a person shall only cease to be considered a refugee in Ethiopia when he "voluntarily" re-avails himself of the protection of the country of his nationality, and "voluntarily" re-establishes himself in the country which he left or outside of which he remained due to fear of persecution. Article 23 then explains that "every recognised refugee has the right to seek to repatriate from Ethiopia to his country of nationality or former habitual residence in safety and dignity."³⁰⁴

Support continues to be provided for voluntary repatriation of Somali refugees. As part of the UNHCR's 2017 operation, it plans to target 5,000

²⁹⁹ The Guardian, *Ethiopia hosts largest number of refugees in Africa*, 20 August 2014, available at <https://goo.gl/E5Eim3>.

³⁰⁰ UNHCR, *Ethiopia- Applying the Comprehensive Refugee Response Framework*, 20 available at <http://www.unhcr.org/ethiopia-592fd4854.html>.

³⁰¹ DRC and NRC, *Durable solutions: Perspectives of Somali refugees living in Kenyan and Ethiopian camps and selected communities of return*, 8 July 2013, available at <http://goo.gl/8JosbW>.

³⁰² DRC and NRC, *Durable solutions: Perspectives of Somali refugees living in Kenyan and Ethiopian camps and selected communities of return*, 8 July 2013, available at <http://goo.gl/LXEme>.

³⁰³ *Ibid.*

³⁰⁴ National Legislative Bodies / National Authorities, *Ethiopia: Proclamation No. 409/2004 of 2004, Refugee Proclamation*, 19 July 2004, available at <http://www.refworld.org/docid/44e04ed14.html/>.

Somali refugees for repatriation. However, the ability to repatriate is limited by the current drought, famine and humanitarian problems faced in Somalia. For South Sudanese refugees in Ethiopia, no official voluntary repatriation scheme currently exists due to unrest in South Sudan. Instead, the UNHCR will continue to monitor the South Sudan Peace Agreement and explore possible future opportunities for return to South Sudan.

E.3.3 INTEGRATION

Historically, the Ethiopian Government has sought to limit integration of refugees through restricting refugees' right to work and to move and settle freely. However, policies such as OCP, and in particular its recent reforms demonstrate a commitment by the Ethiopian Government to aid integration efforts and enable refugees to live beyond the camp boundaries. Under the current policy, to qualify for OCP status, a refugee must:

- be of Eritrean nationality;
- if less than forty-five years old, the refugee must have spent at least three to six months in one of the refugee camps;
- if more than forty-five years old, the refugee can be immediately eligible;
- the refugee must have a sponsor, who guarantees they can cover the living expenses of the refugee in the city he chooses to live in. The sponsor must:
 - ▶ be a relative of the refugee;
 - ▶ be an Ethiopian citizen;
 - ▶ sign an agreement with the Administration for Refugee and Returnee Affairs (“ARRA”); and
 - ▶ pass checks by ARRA relating to whether they will be able to provide for the refugee.

In short, under the OCP, Eritrean refugees are allowed to live, study, and access higher education outside of the camps if they are able to support themselves independently (usually through the help of relatives or remittances). Approximately 3,000 Eritrean refugees have benefited from the scheme so far and with the recent expansion of the OCP, it is likely that this number will increase, and entail refugees of many more nationalities.

Separately, the government allows refugees to reside in urban areas if they qualify under the urban programme. At the time of writing, there were 20,398 refugees officially registered as urban refugees in Ethiopia and there are three main grounds upon which a refugee can be accepted into the programme: (i) for security reasons, (ii) for medical reasons, and (iii) for humanitarian reasons. Beneficiaries of the urban programme are supported by the UNHCR and receive a subsistence allowance.³⁰⁵

Major policy pledges with regards to refugees were announced by the Ethiopian government in 2016 – including expanding the OCP policy and providing refugees with work permits. Enactment of these pledges is expected in late 2017.

E.3.4 RESETTLEMENT

Due to the lack of suitable conditions for voluntary repatriation or local integration, further efforts were made to increase the resettlement quota. Resettlement requests stood at approximately 50,200 persons in 2016. By mid-2016, a total of 1,036 cases (3,802 individuals) had been submitted for resettlement, while 640 cases (1,989 individuals) had achieved resettlement in other countries by the end of July 2016.³⁰⁶

E.4 APPLICATION TO DADAAB

There are a number of similarities between the situation in the camps in Ethiopia and in Dadaab. Whilst the UNHCR and its partners are working to improve the livelihood, safety, and health of those living in the refugee camps, both face economic limitations, due in part to government policies, such as restricting refugees' ability to work (resulting in a poorer quality of life for many), that in turn leads to many refugees repatriating to their country of origin. This situation raises doubts as to whether repatriation is truly “voluntary.”

Secondly, both the Government of Kenya and the Government of Ethiopia distinguish between particular groups of refugees: Kenya has applied different approaches to refugees based on camp location, (for example, it has ordered the closure of Dadaab rather

³⁰⁵ NRC and Samuel Hall, *Living out of camp, Alternative to camp-based assistance for Eritrean refugees in Ethiopia*, 2014, available at <http://goo.gl/jm7BvB>.

³⁰⁶ UNHCR, Ethiopia: Fact sheet, July 2016.

than the other major camp complex of Kakuma). Similarly, the Ethiopian Government, until recently, can be argued to have applied favourable treatment to Eritrean refugees, who are entitled to apply for the OCP. However, as highlighted above, Ethiopia's pledges at the Leaders' Summit, and the opening of the OCP scheme to all nationalities are indicative of a less discriminatory refugee policy emerging in the country.

There are also a number of differences between the camps in Ethiopia and those that make up Dadaab. Firstly, the Government of Ethiopia has an "open door" policy for refugees, granting *prima facie* refugee status to South Sudanese, Eritrean, and Somalia refugees originating from South and Central Somalia. In contrast, the Government of Kenya revoked the *prima facie* refugee status for Somalia refugees.³⁰⁷ Secondly, the Government of Ethiopia has no strict voluntary repatriation system with deadlines or targets for return – in part because the unstable situation in many of the countries of return, particularly in South Sudan, make it too difficult to predict which destinations would or will be safe. Therefore, there is more of a focus on integration and resettlement of refugees. By contrast, the Government of Kenya has focused its attention on repatriation of refugees, as shown by the current absence of any integration or resettlement schemes, and the high numbers of voluntary repatriation noted in the context of the Tripartite Agreement and operational plans.

YEMEN CASE STUDY (2009)³⁰⁸

E.5 THE REFUGEES

E.5.1 CAUSE OF THE REFUGEE FLOW

In 2009, over 100,000 people arrived in Yemen, over ninety-nine per cent of whom were from Somalia and Ethiopia.³⁰⁹ For both the Somali and Ethiopian refugees, the underlying reason for fleeing was persecution at home. In particular, there have been reports that Ethiopia's Government grew increasingly repressive in the early 2000s³¹⁰ and in a 2010 survey, "insecurity from conflict" was the overall most frequent reason for travel (for eighty-seven per cent of Somali respondents and sixty-seven per cent of Ethiopian respondents); based on this, the vast majority of such individuals would normally have been eligible for refugee status.³¹¹

E.5.2 SAFETY AND TREATMENT

Yemeni authorities treat Somali refugees differently from Ethiopian refugees. Somali refugees are recognised as having fled due to the Somali civil war and thus, have a "well-founded fear of being persecuted". Consequently, Somali refugees receive government issued identification documents once registered with the UNHCR, which grants the holder the right to live and work in Yemen.

In contrast, Ethiopian refugees (and all non-Somali refugees) must apply for asylum in order to be able to remain legally in Yemen; and there appears to be a widespread perception that Ethiopian refugees do not have a "well-founded fear" but are illegal migrants looking for work.

³⁰⁷ The Kenya Gazette, published by the Authority of the Republic of Kenya, Vol.CXVIII-No. 46, Nairobi, 29 April 2016, available at <http://goo.gl/qr219K>.

³⁰⁸ This case study covers only the time period leading up to 2009.

³⁰⁹ *Hostile Shores; Abuse and Refoulement of Asylum Seekers and Refugees in Yemen*, Human Rights Watch, December 2009; available at: <https://goo.gl/qsmLXS>

³¹⁰ See Human Rights Watch, *Suppressing dissent: Human rights abuses and political repression in ethiopia's oromia region*, vol. 17, no. 7(A), May 2005, available at <http://goo.gl/Ss8YbW>; *Collective punishment: War crimes and crimes against humanity in the ogaden area of ethiopia's somali regional state*, June 2008, available at <http://goo.gl/xKhfC4>; Human Rights Watch, *Ethiopia: New law ratchets up repression*, 8 January 2009, available at <http://goo.gl/WKCdmd>; International Crisis Group, *Ethiopia: Ethnic Federalism and Its Discontents*, Africa Report no. 153, 4 September 2009, available at <https://goo.gl/tg6shk>.

³¹¹ Jureidini, R., *Mixed Migration Flows: Somali and Ethiopian Migration to Yemen and Turkey, final report*, p.8, May 2010, available at <https://goo.gl/w2jgts>.

E.6 THE LEGAL FRAMEWORK

E.6.1 STATUS AND LEGAL POSITION

The Yemeni authorities accept that Somali individuals have fled Somalia because of a “well-founded fear of being persecuted” according to Article 1 of the 1951 Convention.³¹² On this basis, Somali refugees have been granted prima facie refugee status since the Somali civil war,³¹³ meaning they are not individually required to prove they are eligible for refugee status but they must register with the UNHCR. As such, they are free to remain in Yemen.

Non-Somali refugees must apply for refugee status with the UNHCR office but, even after registration, non-Somali nationals are not recognised as legitimate asylum seekers by the Yemeni authorities and may be discriminated against.³¹⁴ This distinction is not founded on any local legislation or regulation but, rather, is the result of the Yemeni Government’s interpretation of the refugee definition in the 1951 Convention and 1967 Protocol and other international conventions.

E.6.2 VOLUNTARY REPATRIATION

The Yemeni Government did not issue any order in relation to, and has not pursued a policy of repatriation with respect to Somali refugees. In light of their prima facie refugee status and their access to certain services within Yemen, in addition to the worsening situation back home in Somalia, there was little incentive for Somali refugees to return home.

With respect to Ethiopian refugees, deportation estimates relate only to the minority who were granted refugee status by the UNHCR; there was an unknown, and potentially much larger, number of Ethiopians who were deported before reaching the UNHCR reception centres or central offices. In pursuing a policy of non-recognition of Ethiopian refugee

claims, the deportation of Ethiopian nationals was, as far as the Yemeni authorities were concerned, legitimate on the basis that the deportations did not fall within the scope of the 1951 Convention and 1967 Protocol (together the “**Convention and Protocol**”).

In 2006 (and again in 2008), the Yemeni Government issued an order to deport all non-Somali migrants and asylum seekers.³¹⁵ The UNHCR estimates that approximately 1,000 Ethiopians were deported in 2006 and 500 in 2008.³¹⁶ It has been suggested that these figures may be gross under-estimates as the exact repatriation figures are not known (the Yemeni Government does not share such information).³¹⁷ For the minority of non-Somali refugees who (i) made it to the UNHCR reception centres, (ii) officially registered with the UNHCR, and (iii) received official refugee status from the UNHCR in Yemen, there was some protection from refoulement but not much more than those who remained unregistered.

E.6.3 INTEGRATION

Despite the Yemeni Government stressing its opposition to local integration, many Somali and Ethiopian nationals avoided registration and hoped to blend in among the local Yemeni population.³¹⁸ However, this was risky because only the Somali inhabitants (approximately 10,000 – 11,000) of the al-Kharaz refugee camp regularly received food, education and health care. Those outside the camp faced poor employment prospects and chronic inflation.³¹⁹

E.6.4 RESETTLEMENT

Resettlement was a rare occurrence and was only available to Somali refugees; during 2006, only 350 people of the tens of thousands living in Yemen were resettled to third countries.³²⁰ The UNHCR identification card issued by the UNHCR to non-Somali

³¹² 1951 Convention, Art. 1; Optional Protocol, Art. I.

³¹³ U.S. Committee for Refugees and Immigrants, *World refugee survey 2009 – Yemen*, 17 June 2009, available at <http://www.refworld.org/docid/4a40d2b65d.html>.

³¹⁴ Human Rights Watch, *Hostile shores: Abuse and refoulement of asylum seekers and refugees in Yemen*, December 2009, available at <https://goo.gl/A6CJyc>.

³¹⁵ This policy is pursued with particular strictness with respect to political dissidents (The Guardian, *Yemen’s forgotten refugee crisis*, 11 October 2009, available at <https://www.theguardian.com/commentisfree/2009/oct/11/yemen-refugee-crisis-somali>).

³¹⁶ Government statistics indicate that there were 1,300 asylum seekers during 2008 (*World refugee survey 2009 – Yemen*, Refworld, 17 June 2009, available at <http://www.refworld.org/docid/4a40d2b65d.html>).

³¹⁷ Jureidini, R., *Mixed migration flows: Somali and Ethiopian migration to Yemen and Turkey, final report*, May 2010, p.77, available at <https://goo.gl/w2jgts>.

³¹⁸ Forced Migration Review, *Urban Somali refugees in Yemen*, Forced Migration Review, February 2010, available at <http://goo.gl/wFzxYc>.

³¹⁹ The Guardian, *Yemen’s forgotten refugee crisis*, 11 October 2009, available at <https://goo.gl/sGpY5M>.

³²⁰ Jureidini, R., *Mixed migration flows: Somali and Ethiopian migration to Yemen and Turkey, final report*, May 2010, p. 77, available at <http://goo.gl/X7j37Q>.

refugees stated that the holder was not eligible for resettlement.³²¹

E.7 APPLICATION TO DADAAB

There are a number of apparent similarities between the situation in Yemen and that in Dadaab. Arguably, both governments appear to discriminate between certain groups: Yemen, as illustrated above, freely distinguishes between Somalis and Ethiopians; Kenya also distinguishes on the basis of nationality as the Kenyan Government plans to close Dadaab (which hosts Somali refugees) but has, to date, allowed Kakuma, (which hosts mostly Sudanese refugees), to remain.³²² Further, both countries have placed less weight on integration of refugees within their countries: the Yemeni Government ordered the deportation of all non-Somali migrants and asylum seekers and the Kenyan Government is pursuing the repatriation of Somali nationals residing in Dadaab. What is more, it appears that the vulnerability of refugees is similar in both countries. As explored above, in Ethiopia, refugees live in fear of being deported because, even after registration, non-Somali nationals are not recognised as legitimate asylum seekers by the Yemeni authorities,³²³ and for those refugees living outside of camps in Yemen, basic assistance such as food, education and healthcare is not provided by Yemeni authorities. Some similarities exist with Kenya in terms of the current treatment of Somali refugees and attempts to enforce a structural encampment policy. Finally, the approach of both governments is similar with regards to opposing integration.

However, a fundamental difference exists, in that the Yemeni Government ‘recognises’ the situation of Somalis by granting them prima facie refugee status; while the Kenyan Government has now revoked the prima facie refugee status for Somali refugees.³²⁴

TANZANIA CASE STUDY (1972-2009)

E.8 THE REFUGEES

From the time of its independence in 1961, up until the 2000s, Tanzania had an “open door” policy for refugees,³²⁵ and it has hosted one of the largest refugee populations in Africa.³²⁶ In 1972, refugees fled to Tanzania after a two-month long genocide campaign against the Hutu population by the Tutsi-controlled army in Burundi.³²⁷ While some of these refugees voluntarily repatriated when Melchior Ndadaye, a Hutu, became the first democratically elected president in Burundi in 1993,³²⁸ they almost immediately fled and sought refuge again when a Tutsi military coup killed Ndadaye within his first three months of office.³²⁹ This served as a catalyst for the Burundi civil war which ignited the 1993 wave of Burundian refugees to Tanzania.³³⁰ The number of registered refugees in Tanzania went from 292,100 in 1992 to 883,300 in 1994.³³¹

The Mtabila Refugee Camp, before it was shut down, was populated mostly by Burundian refugees who arrived and settled in the camp in the 1990s.³³² This group of Burundians represented one of three distinct

³²¹ Jureidini, R., *Mixed migration flows: Somali and Ethiopian Migration to Yemen and Turkey, final report*, May 2010, p.36, available at <http://goo.gl/BE8MGz>.

³²² Mutiga, M. and Graham-Harri, E., *Kenya says it will shut world's biggest refugee camp at Dadaab*, 11 May 2016, available at <https://goo.gl/jmESJ6>.

³²³ Human Rights Watch, *Hostile Shores: Abuse and Refoulement of Asylum Seekers and Refugees in Yemen*, December 2009, available at <https://goo.gl/BL74Py>.

³²⁴ UNHCR Yemen Operation Refugee Response in 2016, March 2016, available at: <https://reliefweb.int/report/yemen/unhcr-yemen-operation-refugee-response-2016>; *The Kenya Gazette, published by the Authority of the Republic of Kenya, Nairobi*, 29 April 2016, available at http://kenyalaw.org/kenya_gazette/gazette/volume/MTMxNA--/Vol.CXVIII-No.46.

³²⁵ International Refugee Rights Initiative, *The State of Freedom of Movement for Refugees in Tanzania: An Overview*, 1 September 2015, available at <http://goo.gl/iuuitE>.

³²⁶ Case Studies Journal, *The Effects of Closure of Refugee Camps on Livelihood Activities to the Surrounding Villages: A Case of Mtabila Camp in Tanzania*, November 2015, p.1, available at <http://goo.gl/fh1YcM>.

³²⁷ Centre for the Study of Forced Migration, International Refugee Rights Initiative, Social Science Research Council, *Going Home or Staying Home? Ending Displacement for Burundian Refugees in Tanzania*, November 2008, p.8, available at <http://goo.gl/RZVUY2>.

³²⁸ Reuters, *Challenger Wins Burundi Election*, 3 June 1993, available at <http://goo.gl/mkHbYi>.

³²⁹ International Refugee Rights Initiative, *Repatriation or Else: Closing the Mtabila Refugee Camp in Tanzania*, June 2009, available at <http://goo.gl/kfQ4cb>.

³³⁰ *Ibid.*

³³¹ Case Studies Journal, *The Effects of Closure of Refugee Camps on Livelihood Activities to the Surrounding Villages: A Case of Mtabila Camp in Tanzania*, November 2015, p.1, available at <http://goo.gl/MkAmaj>.

³³² International Refugee Rights Initiative and Rema Ministries, *An urgent briefing on the situation of Burundian refugees in Mtabila camp in Tanzania*, 10 August 2012, p.2, available at <http://www.refugee-rights.org/Assets/PDFs/2012/Mtabila%20FINAL.pdf>.

types of Burundian refugees within the country.³³³ The other two groups were those who fled Burundi in 1972 and consisted of those who lived in settlements in Tanzania and a smaller group who lived outside formal assistance structures upon arrival into the country.³³⁴

E.9 THE LEGAL FRAMEWORK

E.9.1 STATUS AND LEGAL POSITION

The granting of refugee status and the initial treatment of incoming Burundians depended on which refugee category they fell into. Burundian refugees who arrived in 1972, while they remained “legally and socially marginalised from mainstream Tanzanian society,” were given access to land, basic services, physical security and education for their children.³³⁵

Self-settlement refugees, who did not receive help from the UNHCR,³³⁶ received refugee permits in 1988.³³⁷ Those born thereafter to self-settled refugee families lacked refugee identity cards but were presumed to be citizens.³³⁸

Refugees in the 1990s received access to land and provisions of security and safety from the

government.³³⁹ International resources provided to these refugees also included health, schools, piped water supply, food and sanitation, and non-food items like sheets and blankets, stoves, cooking materials, and fuel wood.³⁴⁰

Uncertainty as to refugee status grew when the Tanzanian Government later shifted its previous openness toward hosting refugees.³⁴¹

The Tanzanian Refugee Act of 1998³⁴² incorporated into national law the refugee definitions from the 1951 Convention and the OAU Convention.³⁴³ The legislation additionally placed restrictions on the freedom of movement of refugees, disallowed them from working without a permit,³⁴⁴ and sought to make Tanzania less attractive for asylum seekers and incoming refugees.³⁴⁵ A few years later, the 2003 Refugee Policy emphasised repatriations as the best solution for refugees.³⁴⁶

The Tanzanian Government can lawfully withdraw refugee status but must do so in accordance with basic human rights and Tanzanian administrative law.³⁴⁷ Specifically, group cessation of refugee status can be declared, but individuals must be afforded the opportunity to explain why they have a continued need for protection and their refugee status should be maintained.³⁴⁸

³³³ *Ibid.*

³³⁴ *Ibid.*

³³⁵ *Ibid.*, p.14.

³³⁶ *Ibid.*, p.8.

³³⁷ *Ibid.*, p.8.

³³⁸ *Ibid.*, p.25.

³³⁹ Case Studies Journal, The Effects of Closure of Refugee Camps on Livelihood Activities to the Surrounding Villages: A Case of Mtabila Camp in Tanzania, November 2015, p.4, available at <http://goo.gl/Xftc8P>.

³⁴⁰ *Ibid.*, p.4.

³⁴¹ *Ibid.*, p.25.

³⁴² Government of United Republic of Tanzania, *The Refugees Act* (1998), No. 9, Tanzania Gazette Supplement No. 107; International Refugee Rights Initiative, *The State of Freedom of Movement for Refugees in Tanzania: An Overview*, 1 September 2015, available at <http://goo.gl/n8ytP3>.

³⁴³ Centre for the Study of Forced Migration, International Refugee Rights Initiative, Social Science Research Council, *Going Home or Staying Home? Ending Displacement for Burundian Refugees in Tanzania*, November 2008, p.11, available at <http://goo.gl/i4LkKG>.

³⁴⁴ *Ibid.*, p.11.

³⁴⁵ International Refugee Rights Initiative, *The State of Freedom of Movement for Refugees in Tanzania: An Overview*, 1 September 2015, available at <http://reliefweb.int/report/united-republic-tanzania/state-freedom-movement-refugees-tanzania-overview>.

³⁴⁶ Tanzanian Ministry of Home Affairs, *National Refugee Policy*, 2003; Centre for the Study of Forced Migration, International Refugee Rights Initiative, Social Science Research Council, *Going Home or Staying Home? Ending Displacement for Burundian Refugees in Tanzania*, November 2008, p.11, available at <https://goo.gl/kJxkbn>.

³⁴⁷ Tanzania Refugees Act, 1998, available at <http://www.refworld.org/docid/3ae6b50bf.html>; See also International Refugee Rights Initiative and Rema Ministries, *An urgent briefing on the situation of Burundian refugees in Mtabila camp in Tanzania*, 10 August 2012, p.2, available at <http://www.refugee-rights.org/Assets/PDFs/2012/Mtabila%20FINAL.pdf>.

³⁴⁸ According to international law set out in Article 32 of the 1951 Refugee Convention; Centre for the Study of Forced Migration, International Refugee Rights Initiative, Social Science Research Council, *Going Home or Staying Home? Ending Displacement for Burundian Refugees in Tanzania*, November 2008, p.23, available at <http://goo.gl/n2U4Gh>.

E.9.2 VOLUNTARY REPATRIATION

By the late 2000s, the majority of Burundian refugees were under considerable pressure by the Tanzanian Government to repatriate. In 2009, the Tanzanian Government took the position that peace had been re-established in Burundi and thus, under article 4(3) (e) of the 1998 Refugees Act,³⁴⁹ the Mtabila refugee camp would close.³⁵⁰ Refugees at the Mtabila camp were told they had to voluntarily repatriate by December 2011 or be stripped of their refugee status.³⁵¹ With this announcement, camp resources and services were steadily withdrawn,³⁵² formal (and eventually also informal) education programmes were halted, and the various parts of the Mtabila camps were consolidated until only one “zone” remained.³⁵³

In addition to camp consolidation, the Tanzanian Government “prohibit[ed] all income generating activities, and crop cultivation and animal slaughter” and medical provisions were reduced.³⁵⁴ There were also allegations that the police and military moved into the camp, to incite fear in the refugees including beatings if refugees were caught going outside the camp for food.³⁵⁵ While the government did not call for direct forced return, it appeared to create an

environment that gave refugees little choice but to leave Tanzania.³⁵⁶

To comply with Tanzania’s legal and humanitarian commitment, the Mtabila camp closing involved individual screening to assess which refugees qualified for continued international protection and which would be “obliged to go back.”³⁵⁷ In the first phase of screening, 2,000 people qualified for additional protection while approximately 34,000 were to be stripped of their refugee status.³⁵⁸

There was also an appeals process in place.³⁵⁹ While ostensibly there was “due process” in light of the appeal system, it was reported that many refugees did not seek to appeal due to rumours that a failed appeal would lead to expedited repatriation.³⁶⁰

Refugees were informed by the Tanzanian authorities that they would be assisted in returning to Burundi if they cooperated with the return procedure.³⁶¹ They were also afforded 100 kg of return weight and travelled by bus.³⁶² A system was also put in place to identify elderly, disabled and pregnant individuals, and Persons with Special Needs or (“PSNs”). These PSNs as of November 2012, were provided with separate buses for themselves and their dependents,³⁶³ and nearly twenty-five per cent of returnees were

³⁴⁹ “A person shall cease to be considered to be a refugee for the purposes of this Act if . . . he can no longer because the circumstances in connection with which he was recognised as a refugee having ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality, or if he has no nationality the country of his former habitual residence” United Republic of Tanzania, The Refugees Act, 4(3)(e), 1998, available at <https://goo.gl/a6Ncpz>.

³⁵⁰ International Refugee Rights Initiative and Rema Ministries, *An urgent briefing on the situation of Burundian refugees in Mtabila camp in Tanzania*, 10 August 2012, p.2, available at <http://www.refugee-rights.org/Assets/PDFs/2012/Mtabila%20FINAL.pdf>.

³⁵¹ International Refugee Rights Initiative and Rema Ministries, *Resisting Repatriation: Burundian Refugees Struggling to Stay in Tanzania*, September 2011, pp.5-6, available at <http://www.refugee-rights.org/Assets/PDFs/2011/ResistingRepatriation-FINAL2.pdf>.

³⁵² Allegedly, the slowing of resources was due more to shortages of food programmes and the UN later assured that there would be food and medical resources until the camp’s official closing in 2012. *Ibid*; International Refugee Rights Initiative and Rema Ministries, *An urgent briefing on the situation of Burundian refugees in Mtabila camp in Tanzania*, 10 August 2012, available at <http://www.refugee-rights.org/Assets/PDFs/2012/Mtabila%20FINAL.pdf>.

³⁵³ International Refugee Rights Initiative, *Repatriation or Else: Closing the Mtabila Refugee Camp in Tanzania*, June 2009, available at <http://www.refugee-rights.org/Publications/RRN/2009/June/V5.I4.Repatriation%20or%20Else.html>.

³⁵⁴ *Ibid*; International Refugee Rights Initiative and Rema Ministries, *An urgent briefing on the situation of Burundian refugees in Mtabila camp in Tanzania*, 10 August 2012, p.7, available at <http://www.refugee-rights.org/Assets/PDFs/2012/Mtabila%20FINAL.pdf>.

³⁵⁵ International Refugee Rights Initiative and Rema Ministries, *An urgent briefing on the situation of Burundian refugees in Mtabila camp in Tanzania*, 10 August 2012, p.8, available at <http://www.refugee-rights.org/Assets/PDFs/2012/Mtabila%20FINAL.pdf>.

³⁵⁶ International Refugee Rights Initiative, *Repatriation or Else: Closing the Mtabila Refugee Camp in Tanzania*, June 2009, available at <http://goo.gl/AXqrp4>.

³⁵⁷ International Refugee Rights Initiative and Rema Ministries, *Resisting Repatriation: Burundian Refugees Struggling to Stay in Tanzania*, September 2011, p.2, available at <http://goo.gl/YSSMwD>; International Refugee Rights Initiative and Rema Ministries, *An urgent briefing on the situation of Burundian refugees in Mtabila camp in Tanzania*, 10 August 2012, p.3, available at <http://goo.gl/ra83nG>.

³⁵⁸ *Ibid*, p.3.

³⁵⁹ *Ibid*, p.3.

³⁶⁰ *Ibid*, p.3.

³⁶¹ UNHCR Representational Office, *Tanzania – Situation Report Mtabila Camp closure November 26 – December 02, 2012*, December 2012, p.3, available at <http://data.unhcr.org/drc/download.php?id=1010>.

³⁶² Centre for the Study of Forced Migration, International Refugee Rights Initiative, Social Science Research Council, *Going Home or Staying Home? Ending Displacement for Burundian Refugees in Tanzania*, November 2008, p.19, available at <http://goo.gl/429kqE>.

³⁶³ UNHCR Representational Office, *Tanzania – Situation Report Mtabila Camp closure November 26 – December 02, 2012*, December 2012, p.3, available at <http://data.unhcr.org/drc/download.php?id=1010>.

PSNs.³⁶⁴ In December 2012, with the camp's official closure, seventy per cent of the initial camp population (approximately 34,000 individuals) had returned to Burundi "in safety and dignity" in accordance with international law.³⁶⁵

E.9.3 INTEGRATION

Only the 1972 group of refugees was offered both the options of naturalisation or repatriation.³⁶⁶ While some reported undue pressure to repatriate, nearly eighty per cent opted for Tanzanian citizenship.³⁶⁷ In October 2014, refugees who requested citizenship received their certificates of naturalisation, but as of May 2016, there were 40,000 applications for citizenship still pending.³⁶⁸

Having land to farm and live on in western Tanzania from the time of arrival afforded the 1972 refugees the opportunity to realise "historical affinity and acquire familiar[ity] with Tanzania" which influenced many of them to opt for naturalisation when given the choice.³⁶⁹ Similar cultural ground with locals helped integrate them into the society and make them self-sufficient contributors to the local economy.³⁷⁰ Nevertheless, post-naturalisation, some of the 1972 refugees did not easily integrate due to tensions surrounding their relocation from certain settlements into other parts of the country.³⁷¹

The Tanzanian Prime Minister in 2008 said naturalised refugees should be integrated in a way to ensure they mix with Tanzanian communities.³⁷² The Tanzania

Comprehensive Solutions Strategy ("TANCOSS") outlined a plan for the 1972 refugees' integration after naturalisation.³⁷³ The plan was ultimately suspended, but naturalised refugees were permitted to choose if they wished to be relocated within Tanzania.³⁷⁴

E.9.4 RESETTLEMENT

Aside from the 1972 refugees, nearly 3,000 refugees from Mtabila were transferred to Nyarugusu Camp because they were found to be in need of continued international protection.³⁷⁵ Additionally, several thousand Burundians resettled in third countries from the period 2002 to 2010.³⁷⁶ There were otherwise no resettlement schemes in Tanzania, as the vast majority of refugees were encouraged to repatriate.

E.10 APPLICATION TO DADAAB

An analysis of the proposed closure of Dadaab in Kenya and Mtabila in Tanzania presents several similarities. For one, in both cases the decision to close the refugee camp has brought into question the voluntary nature of repatriations.³⁷⁷

Another similarity is that both refugee camps had/ have become large centres of trade, business and services to surrounding villages. Thus, due to the reduction of unskilled labour and various operating services and facilities like nurseries and hospitals, the camp closure in Tanzania and the proposed closure of

³⁶⁴ *Ibid*, p.4.

³⁶⁵ *Ibid*, p.5.

³⁶⁶ Kuch, A., Forced Migration Review, *Naturalisation of Burundian Refugees In Tanzania*, Oxford 52, May 2016, p.63, available at <https://goo.gl/zLJ8Rh>; International Refugee Rights Initiative, *Repatriation or Else: Closing the Mtabila Refugee Camp in Tanzania*, June 2009, available at <http://goo.gl/GbRrPW>.

³⁶⁷ Kuch, A., Forced Migration Review, *Naturalisation of Burundian Refugees In Tanzania*, Oxford 52, May 2016, p.63, available at <https://goo.gl/F86uMX>.

³⁶⁸ *Ibid*, p.64.

³⁶⁹ *Ibid*, p.63.

³⁷⁰ *Ibid*.

³⁷¹ International Refugee Rights Initiative and Rema Ministries, *An urgent briefing on the situation of Burundian refugees in Mtabila camp in Tanzania*, 10 August 2012, p.2, available at <http://www.refugee-rights.org/Assets/PDFs/2012/Mtabila%20FINAL.pdf>.

³⁷² UNHCR and DANIDA, *Evaluation of the Protracted Refugee Situation (PRS) for Burundians in Tanzania*, 31 October 2010, p.27, available at <http://goo.gl/494kzX>.

³⁷³ *Ibid*, p.52.

³⁷⁴ Kuch, A., Forced Migration Review, *Naturalisation of Burundian Refugees In Tanzania*, Oxford 52, May 2016, p.63, available at <https://goo.gl/cFOHxE>.

³⁷⁵ Case Studies Journal, *The Effects of Closure of Refugee Camps on Livelihood Activities to the Surrounding Villages: A Case of Mtabila Camp in Tanzania*, November 2015, p.4, available at <http://goo.gl/ym6yCA>.

³⁷⁶ UNHCR and DANIDA, *Evaluation of the Protracted Refugee Situation (PRS) for Burundians in Tanzania*, 31 October 2010, p.27, available at <http://goo.gl/Ludhmq>.

³⁷⁷ The Guardian, *Dadaab Closure: How 600,000 Refugees Got Caught Up in Kenya's Electioneering*, 11 May 2016, available at <https://goo.gl/Pkm4pg>; International Refugee Rights Initiative and Rema Ministries, *An urgent briefing on the situation of Burundian refugees in Mtabila camp in Tanzania*, 10 August 2012, p.3, available at <http://goo.gl/zwzkmJ>.

Dadaab have/would similarly impact the livelihood of locals.³⁷⁸

The cases of Mtabila and Dadaab however, do differ in significant respects, such as the cited government purpose behind the camp closures. In Kenya, the government claimed the closure was necessary given the threats to national security.³⁷⁹ By contrast, the government in Tanzania did not present national security arguments, instead maintaining that there was “no reason for the Burundians to stay” in Tanzania any longer.³⁸⁰

Another distinction can be made regarding the political status of the returnee’s native country: Somalia is arguably still war torn and suffering from civil war, drought and violence, whereas Burundi from 2008 had technically established peace and, therefore, the Tanzanian Government felt it was suitable for the Burundian refugees to return.³⁸¹

UGANDA CASE STUDY (1991 – PRESENT)

E.11 THE REFUGEES

E.11.1 CAUSE OF THE REFUGEE FLOW

Uganda is home to more than 1 million refugees from thirteen countries, including the DRC, Somalia, South Sudan, Rwanda, Eritrea and Burundi, who have fled their countries due to political insecurity and persecution.³⁸² For example, Somalia has been undergoing a civil war since 1991; South Sudan has faced civil war since December 2013; Eritrea has a national service policy for all adults which causes a continual exodus

of its citizens;³⁸³ Rwanda was subject to the 1994 genocide;³⁸⁴ and Burundi has been facing civil unrest violence since 2015 following president Nkurunziza’s proposed third term in office.³⁸⁵

E.11.2 SAFETY AND TREATMENT

Refugees in Uganda are not required to reside in camps within the country. Uganda’s refugee laws, namely the Uganda Refugees Act 2006 (the “**Uganda Refugees Act**”), allow refugees to integrate within the community to a greater degree than many other countries, including those which are the subject of the case studies in this report. The Uganda Refugees Act therefore brings Uganda’s domestic legal framework in line with its regional and international obligations.³⁸⁶

³⁷⁸ Case Studies Journal, *The Effects of Closure of Refugee Camps on Livelihood Activities to the Surrounding Villages: A Case of Mtabila Camp in Tanzania*, November 2015, p.1; Intermedia Development Consultants, *The Dadaab Dilemma, A study on Livelihood Activities and Opportunities for Dadaab Refugees*, August 2013, available at <https://goo.gl/EXJ3ft>.

³⁷⁹ Oxford Pro Bono Publico, *International Refugee Law in Tanzania*, 21 August 2013, p.54, available at <http://ohrh.law.ox.ac.uk/international-refugee-law-in-tanzania/>.

³⁸⁰ International Refugee Rights Initiative and Rema Ministries, *An urgent briefing on the situation of Burundian refugees in Mtabila camp in Tanzania*, 10 August 2012, p.1, available at <http://www.refugee-rights.org/Assets/PDFs/2012/Mtabila%20FINAL.pdf>.

³⁸¹ Centre for the Study of Forced Migration, International Refugee Rights Initiative, Social Science Research Council, *Going Home or Staying Home? Ending Displacement for Burundian Refugees in Tanzania*, November 2008, p.8, available at <http://goo.gl/Pqfxbx>.

³⁸² The Economist, *Why Uganda is a model for dealing with refugees*, 26 October 2016, available at <http://goo.gl/zzX9C6>.

³⁸³ UNHCR, *Do not risk your lives, Grandi tells Eritrean refugees*, 2 February 2016, available at <http://goo.gl/Mma2eg>.

³⁸⁴ The Borgen Project, *Ten Facts About Rwanda Refugees*, February 2017, available at <https://borgenproject.org/10-facts-about-rwanda-refugees/>.

³⁸⁵ European Commission, *Burundi regional crisis*, March 2017, available at http://ec.europa.eu/echo/files/aid/countries/factsheets/burundi_en.pdf.

³⁸⁶ International Journal of Refugee Law, *Refugee Status Determination and the Rights of recognised refugees under Uganda’s Refugee Act 2006*, 2012, available at <http://goo.gl/u7ZqSZ>.

First, section 30(1) of the Uganda Refugees Act provides that all refugees in Uganda are entitled to freedom of movement, although section 30(2) provides that this right may be restricted in line with the laws of Uganda or on grounds, such as national security, public order, public health, public morals or the protection of the rights and freedoms of others. Second, section 29(1)(e) of the Uganda Refugees Act guarantees that recognised refugees shall receive the same treatment as ‘aliens generally in similar circumstances’ regarding the right to moveable and immovable property, education, and engagement in gainful employment, among other interests.

Refugees in Uganda are integrated into the community in one of two main ways:

(i) self-settlement; or (ii) by living in organised settlements that cover approximately 350 square miles of land set aside by the Government of Uganda.³⁸⁷ Refugees who are self-settled live in close proximity to Ugandan nationals – and most are able to support themselves. The Ugandan Government also provides assistance to those refugees who live in settlements, by equipping them with a plot of land and tools in order to aid their goal of self-sufficiency.

Overall, the relationship between refugees and the host communities is reportedly very amicable. The populations peacefully co-exist, and with the emergence of intermarriage between groups, relationships are likely to improve further.

E.12 THE LEGAL FRAMEWORK

E.12.1 STATUS AND LEGAL POSITION

Uganda’s refugee laws are among the most progressive in the world. Under Uganda’s domestic Uganda Refugees Act³⁸⁸ and Refugee Regulations 2010, a person qualifies to be granted refugee status under the act if that person has a well-founded fear of persecution making that person unwilling or unable to return to the country of his or her former habitual residence.

³⁸⁷ *Ibid.*

³⁸⁸ Uganda: The Refugees Act 2006, available at <http://www.refworld.org/docid/4b7baba52.html>.

³⁸⁹ Uganda: The Refugees Regulations, 2010, available at <http://www.refworld.org/docid/544e4f154.html>.

³⁹⁰ UNHCR and The World Bank Group, *An Assessment of Uganda’s Progressive Approach to Refugee Management*, 2016, available at <http://goo.gl/CT5Bg8>.

³⁹¹ *Ibid.*

³⁹² Africa, DW, *Uganda moves to expel Burundian refugees*, 15 February 2017, available at <http://goo.gl/qZd7zI>.

Asylum seekers from the eastern DRC³⁸⁹ and Burundi are recognised as prima facie refugees, whereas asylum seekers from other countries have their refugee status determined by Uganda’s Refugee Eligibility Committee.

E.12.2 VOLUNTARY REPATRIATION

Following the restoration of peace in Rwanda after the 1994 genocide, and the 2005 Comprehensive Peace Agreement in Sudan, large-scale repatriation movements facilitated the voluntary return of Rwandan and South-Sudanese refugees to their countries of origin.

However, for many South-Sudanese refugees, repatriation is still not a realistic option due to continued instability in their home country.³⁹⁰ In fact, although there was a large scale voluntary repatriation of South-Sudanese refugees following the Comprehensive Peace Agreement, many returned to Uganda following the outbreak of further conflict in December 2013.³⁹¹

There have also been attempts by the Ugandan Government to voluntarily repatriate refugees from the DRC and Burundi to their home countries. First, in 2014, the Ugandan Government began the process of repatriating 18,400 refugees to the DRC. Second, the Ugandan Government recently initiated plans to voluntarily repatriate approximately 46,000 Burundian refugees in 2017.³⁹²

E.12.3 INTEGRATION

As discussed above, refugees in Uganda are integrated into the community through self-settlement or by living in organised settlements set aside by the Ugandan Government.

Whilst the process has proved generally amicable, one limitation of the Ugandan integration policy is that refugees who cannot return to their countries of origin and continue to live in a settlement in Uganda will remain refugees indefinitely as it is not possible to

obtain Ugandan citizenship. Also, the Ugandan constitution prohibits the naturalisation of an offspring of a refugee, even if he or she is born in Uganda, and even if one parent is Ugandan.³⁹³

E.12.4 RESETTLEMENT

There is no official application process for resettlement in a third country. Instead, the UNHCR identifies refugees for resettlement consideration on an ongoing basis by monitoring specific protection needs and vulnerabilities. Resettlement is not a common process, and is generally only available to the most vulnerable of refugees in Uganda.³⁹⁴

E.13 APPLICATION TO DADAAB

The refugee response in Uganda appears to provide an example of best practice. In contrast to the response of the Kenyan Government to Dadaab, the Ugandan Government has focused its attention on integrating refugees into its existing communities, rather than isolating refugees in camps away from the host communities, or pushing for repatriation – as can be seen in Kenya. Moreover, it seems the Ugandan Government has applied its definition of refugee more generously than the Kenyan Government, resulting in an “open door” policy to all asylum seekers, regardless of nationality or ethnicity.

BANGLADESH CASE STUDY (ROHINGYAS, 1991-2016)

E.14 THE REFUGEES

E.14.1 CAUSE OF THE REFUGEE FLOW

Since the 1970s, an estimated 500,000 Rohingya refugees have fled from Myanmar to Bangladesh.³⁹⁵ Notable influxes of migration occurred in 1978, 1991-1992, and 2016. The immigration and military authorities in Myanmar catalysed the 1978 influx to Bangladesh when they claimed Rohingyas had illegal status in Myanmar and forcibly evicted them from the country.³⁹⁶ The Government of Myanmar revoked Rohingya citizenship in 1982.³⁹⁷ In the early 1990s, more than 250,000 Rohingyas in Myanmar’s Arakan State fled to Bangladesh reportedly to escape forced labour, rape, limited access to education and public services, and other forms of abuse and discrimination faced by this ethnic and religious minority.³⁹⁸

In 2016, to escape reported attacks, unlawful killings, sexual violence and village destructions by security forces in Myanmar, approximately 70,000 Rohingyas from Rakhine State in Myanmar entered Bangladesh, adding to the growing number of unregistered refugees in the country.³⁹⁹

E.14.2 SAFETY AND TREATMENT

Prior to 1992, the Government of Bangladesh recognised those who fled from Myanmar to Bangladesh as refugees and established thirteen refugee camps in the Cox’s Bazar district to accommodate them.⁴⁰⁰ Although supervised by the UNHCR, the camps remained under the control of the Government of Bangladesh.⁴⁰¹ The only two remaining official camps are Kutupalong and Nayapara, which host approximately 34,000⁴⁰² recognised refugees— only around

³⁹³ *Ibid.*

³⁹⁴ Rory Peck Trust, *The Refugee Process in Uganda*, available at <https://rorypecktrust.org/resources/exile/refugee-process/uganda>.

³⁹⁵ Note that in keeping with the practice of the UN and Norway, “Myanmar” will be used instead of “Burma.” The Burmese Government renamed Burma “the Union of Myanmar” in 1989. National Public Radio, *Long-Persecuted Rohingya Find Refuge, But Not Acceptance, In Bangladesh*, 14 April 2017, available at <http://goo.gl/cXRHbj>.

³⁹⁶ Human Rights Watch, *Burmese Refugees in Bangladesh: Still no Durable Solution*, 1 May 2000, p.1, available at <https://goo.gl/QvuVu2>.

³⁹⁷ Al Jazeera, *A Fight to Survive For Rohingya Refugees in Bangladesh*, 16 March 2017, available at <http://goo.gl/DJuNsd>.

³⁹⁸ Human Rights Watch, *Burmese Refugees in Bangladesh: Still no Durable Solution*, 1 May 2000, p.1, available at <https://goo.gl/rWs8Mj>.

³⁹⁹ Human Rights Watch, *Bangladesh: Reject Rohingya Refugee Relocation Plan*, 8 February 2017, available at <https://goo.gl/AedG98>.

⁴⁰⁰ Human Rights Watch, *Burmese Refugees in Bangladesh: Still no Durable Solution*, 1 May 2000, p.1, available at <https://goo.gl/cveQTi>.

⁴⁰¹ *Ibid.*

⁴⁰² Reuters, *Stateless Rohingya refugees sucked into booming bangladesh drug trade*, 27 February 2017, available at <http://goo.gl/AXL3tB>.

ten to fifteen per cent of the total refugee population.⁴⁰³

Refugees registered in the two government-run camps near Cox's Bazar are provided with regular distributions of food rations, water, and relief items, such as clothing and shelter.⁴⁰⁴ Additionally, sanitation and health services are provided by the Bangladeshi Government, the UNHCR and its partners.⁴⁰⁵

Nevertheless, access to services and assistance in the camps is considered substandard and a number of alleged abuses within the camps have been reported.⁴⁰⁶ Refugees in the Kutupalong and Nayapara camps are not legally permitted to work, study beyond Grade 5 or go outside the camps.⁴⁰⁷ "Family books" (books which identify all members of a family as refugees) are the only legal form of identification for Rohingyas in the camps, and are essential for obtaining support, such as food and medical care.⁴⁰⁸ Furthermore, refugees who fail to abide by camp regulations have reportedly been subjected to beatings and other forms of physical abuse (although camp administrators have begun in some cases to take disciplinary action against the responsible camp staff).⁴⁰⁹

In the past, administrators at the Nayapara and Kutupalong camps reportedly used coercive measures to induce refugees' return to Myanmar.⁴¹⁰ Moreover, in May 1999, in an effort to complete a census registration of all families in the two camps, authorities reportedly confiscated the "family books"

of a number of refugee families who refused to cooperate.⁴¹¹

Refugees living in Bangladesh outside the camps also struggle to achieve self-reliance as they are not legally entitled to work. Though many seek employment illegally, doing so exposes them to risks, such as unsafe and unfair work conditions, harassment, exploitation, and extortion.⁴¹²

E.15 THE LEGAL FRAMEWORK

E.15.1 STATUS AND LEGAL POSITION

The Bangladeshi Government has not signed the Convention and Protocol.⁴¹³ There is no national legislation governing the administration of refugee affairs in Bangladesh,⁴¹⁴ and the legislation applicable to foreigners (the Foreigners Act 1946) and admission (the Control of Entry Act 1952) make no explicit reference to refugees.⁴¹⁵

However, Bangladesh is party to the International Covenant on Civil and Political Rights ("**ICCPR**");⁴¹⁶ the International Covenant on Economic, Social and Cultural Rights;⁴¹⁷ the Convention on the Rights of the Child ("**CRC**") with reservations to articles 14(1) and 21;⁴¹⁸ the Convention on the Elimination of Racial Discrimination ("**CERD**");⁴¹⁹ and the Convention on the Elimination of all Forms of Discrimination against Women ("**CEDAW**") with reservations to Articles 2 and 13(a).⁴²⁰ It has also signed the Convention on the

⁴⁰³ UNHCR, *Two camps of thought on helping Rohingya in Bangladesh*, 28 January 2013, available at <http://goo.gl/ajitMc>.

⁴⁰⁴ *Ibid.*

⁴⁰⁵ *Ibid.*

⁴⁰⁶ Human Rights Watch, *Burmese refugees in Bangladesh: Still no durable solution*, 1 May 2000, p.4, available at <https://goo.gl/9BkcmD>.

⁴⁰⁷ *Ibid.*

⁴⁰⁸ *Ibid.*

⁴⁰⁹ *Ibid.*

⁴¹⁰ *Ibid.*, p.1.

⁴¹¹ *Ibid.*

⁴¹² *Ibid.*

⁴¹³ Human Rights Watch, *Universal periodic review: Bangladesh*, April-May 2013, p.1, available at <https://goo.gl/1x8Uv9>.

⁴¹⁴ UNHCR, *Global Appeal: Bangladesh*, 2008-2009, p.229, available at <http://goo.gl/BYFk7>.

⁴¹⁵ Zimmermann, A. (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, Oxford University Press, 2011, p.174.

⁴¹⁶ UNHCR, *Bangladesh's Human Rights Record to be Reviewed by UN Committee*, 2 March 2017, available at <http://goo.gl/wGzwYn>.

⁴¹⁷ United Nations Treaty Collection (UNTC), *Chapter 4: Human rights: 3. International covenant on economic, social, and cultural rights*, 16 December 1966, available at <https://goo.gl/7tHR4z>.

⁴¹⁸ CRC, *Concluding Observations of the Committee on the Rights of the Child: Bangladesh*, 12 June 2009, available at <http://goo.gl/uVDx1S>.

⁴¹⁹ CERD, 15 January 1992, p.2, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>.

⁴²⁰ CEDAW, *Bangladesh*, 1 April 1997, p.1, available at <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>.

Political Rights of Women⁴²¹ and the Optional Protocol to the Convention on Elimination of Discrimination against Women.⁴²²

Other general provisions of Bangladeshi law would apply to refugees in principle. For example, several articles in the Constitution of the People's Republic of Bangladesh arguably have a bearing on refugee affairs including: the obligation "to support oppressed people throughout the world waging a just struggle against imperialism, colonialism and racism" (article 24(1)(c)); the obligation to "base its international relations on the principles enunciated in the UN Charter" (article 25); the obligation "to protect every citizen and every other people within Bangladesh for the time being" (article 31); and the obligation that "no person shall be deprived of life and liberty save in accordance with the law" (article 32).⁴²³

Administratively, the Ministry of Food and Disaster Management ("MFDM") is responsible for refugee related issues and coordinating activities in relation to camp based refugees.⁴²⁴ It, in turn, has designated responsibility for a range of camp administrative matters (management, delivery of assistance, health care, water and sanitation, and camp maintenance) to the Office of the Refugee Relief and Repatriation Commissioner ("RRRC").⁴²⁵

The Bangladeshi Government's refusal to register any new refugees since 1992 has left more than 150,000 Rohingyas unrecognised by the state.⁴²⁶ Unregistered refugees live illegally outside the official camps and are ineligible for international humanitarian aid.⁴²⁷ These "self-settled" Rohingyas are a mix of former

repatriated refugees who returned to Bangladesh, family members of Rohingyas in Bangladesh, and economic migrants.⁴²⁸ Nearly all are believed to have left Myanmar for the same reason: repressive state practices and policies against Rohingyas.⁴²⁹ But as they are afforded no formal refugee documentation in Bangladesh, they are particularly vulnerable to being forcibly returned to Myanmar.

Further, in November 2002, the Government of Bangladesh carried out "Operation Clean Heart" in which many (semi)-integrated Rohingyas were removed from their homes and lost their livelihoods.⁴³⁰ Consequently, approximately 4,500 people ended up in a makeshift camp on a piece of privately owned land in Teknaf town – often referred to as "Tal Camp."⁴³¹

E.15.2 VOLUNTARY REPATRIATION

Repatriations in 1992 were carried out under a bilateral agreement between Myanmar and Bangladesh whereby the UNHCR only had very restricted access to the refugees.⁴³² In 1992 and 1993, clashes between refugees and Bangladeshi security forces over allegedly involuntary repatriations resulted in deaths and injuries on both sides.⁴³³ In December 1992, the UNHCR announced its withdrawal from involvement in the repatriations, due to incomplete UNHCR access to the refugees and reports of forced returns and of abuse of refugees by camp officials.⁴³⁴ In May 1993, the UNHCR signed a memorandum of understanding with Bangladesh for cooperation to ensure the "safe and voluntary repatriation" of those Rohingyas who opted to return to

⁴²¹ UNTC, *Convention on the Political Rights of Women*, available at <https://goo.gl/ycUjaH>.

⁴²² UNTC, *Chapter 4: Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, 6 October 1999, available at <http://goo.gl/8THcDs>.

⁴²³ The Constitution of the People's Republic of Bangladesh: *Part III, Fundamental Rights*, November 1972; Message from the Hon'ble Prime Minister on the Occasion of the International Day of Solidarity with the Palestinian People, 29 November 2016, available at <http://goo.gl/afWu4H>; UNHCR, *Bangladesh: Analysis of Gaps in the Protection of Rohingya Refugees*, May 2007, p.13, available at <http://goo.gl/HtvFNG>.

⁴²⁴ UNHCR, *Bangladesh: Analysis of Gaps in the Protection of Rohingya Refugees*, May 2007, p.13, available at <http://www.unhcr.org/protect/PROTECTION/46fa1af32.pdf>.

⁴²⁵ *Ibid.*

⁴²⁶ U.S. News, *Stateless Rohingya refugees sucked into booming Bangladesh drug trade*, 27 February 2017, available at <http://goo.gl/2Lzmxm>.

⁴²⁷ *Ibid.*

⁴²⁸ UNHCR, *Bangladesh: Analysis of Gaps in the Protection of Rohingya Refugees*, May 2007, p.12, available at <http://goo.gl/CSrD2t>.

⁴²⁹ *Ibid.*, p.18.

⁴³⁰ South Asia Analysis Group (SAAG), *Bangladesh: Operation Clean Heart*, 1 May 2003, pp.1-5, available at <http://www.southasiaanalysis.org/paper674>.

⁴³¹ Kaladan Press Network, *Tal Makeshift Camp: No One Should Have To Live Life This: MSF*, 20 August 2007, available at <http://goo.gl/9FDpdU>.

⁴³² United States Bureau of Citizenship and Immigration Services, *Bangladesh: Information on the situation of Rohingya refugees*, 28 March 2001, p.3, available at <http://www.refworld.org/docid/3deccb113.html>.

⁴³³ *Ibid.*

⁴³⁴ Human Rights Watch, *Burmese Refugees in Bangladesh: Still no Durable Solution*, 1 May 2000, p.1, available at <https://goo.gl/Cwr4ic>.

Myanmar.⁴³⁵ Six months later, the UNHCR and the Government of Myanmar agreed that the UNHCR would assist in resettlement of the returnees.⁴³⁶

In July 1997, Bangladeshi authorities entered the Nayapara camp and requested that the refugees return to Myanmar.⁴³⁷ When no one volunteered, violence ensued and over one hundred refugees were detained overnight. The following day, 76 refugees were forced onto boats back to Myanmar.⁴³⁸ A second repatriation of 212 Rohingyas took place in the Kutupalong camp in July 1997.⁴³⁹ There have been scattered repatriations to Myanmar since 1997, but the process has largely been stalled due to refugee unwillingness and the lengthy verification process in Myanmar.⁴⁴⁰

E.15.3 INTEGRATION

The Government of Bangladesh has reportedly rejected integration recommendations, citing local sensitivities surrounding land allocation and population pressure⁴⁴¹ as Bangladesh is the most densely populated country on earth, with a population of approximately 162 million people as of August 2017.⁴⁴² The government also rejects integration on the ground that it would serve as an additional “pull” factor and attract more Rohingya to Bangladesh.⁴⁴³

However, while the Bangladeshi Government has not promoted integration, due to ethnic affinities, a porous border between Bangladesh and Myanmar, and a common Bangladeshi history, Rohingyas have been integrated into the Chittagonian society within Bangladesh.⁴⁴⁴ Further, some Rohingyas have married into the local community (although this has been

reportedly discouraged by the Bangladeshi authorities who fear it could have the effect of compromising repatriation efforts.)⁴⁴⁵

E.15.4 RESETTLEMENT

In 1997, there were 21,800 Rohingya refugees remaining in the two camps (Nayapara and Kutupalong).⁴⁴⁶ The Government of Myanmar accepted repatriation of 7,500 of these refugees, and the UNHCR requested that Bangladesh assist in resettling the remaining 14,300.⁴⁴⁷ The Bangladeshi Government refused to assist on grounds that local hostility towards the refugees was increasing and, further, because there were alleged concerns that Islamic fundamentalists were working within the refugee camps.⁴⁴⁸ More recently, however, there has been some resettlement to Western countries, such as Canada and the United States. In the former, 300 Rohingya refugees were resettled between 2006 and 2010,⁴⁴⁹ and in the latter, nearly 5,000 resettled between January 2015 and September 2016.⁴⁵⁰

E.16 APPLICATION TO DADAAB

There are a number of similarities and differences between the camp closures in Kenya and Bangladesh. In both cases, the host countries have made it more difficult for certain refugees to access refugee registration and legal rights to stay. In Kenya, this came after 1 April 2016, with the revocation of *prima facie* refugee status for Somalis; in Bangladesh, refugees have not been granted refugee status since 1992,

⁴³⁵ United States Bureau of Citizenship and Immigration Services, *RIC Query – Burma [Myanmar]*, 28 March 2001, p.3, available at <https://goo.gl/tWxp8i>.

⁴³⁶ *Ibid.*

⁴³⁷ National Coalition Government of the Union of Burma (NCGUB), *Human Rights Yearbook 1998-99: Burma*, July 1999, p.251, available at <http://goo.gl/KuojoM>.

⁴³⁸ *Ibid.*

⁴³⁹ *Ibid.*

⁴⁴⁰ United States Bureau of Citizenship and Immigration Services, *Bangladesh: Information on the situation of Rohingya refugees*, 28 March 2001, p.4, available at <http://www.refworld.org/docid/3deccb113.html>.

⁴⁴¹ Human Rights Watch, *Burmese Refugees in Bangladesh: Still no Durable Solution*, 1 May 2000, p.6, available at <https://goo.gl/NZFywg>.

⁴⁴² BBC, *Bangladesh Country Profile*, 13 August 2017, available at <http://www.bbc.com/news/world-south-asia-12650940>.

⁴⁴³ Human Rights Watch, *Burmese Refugees in Bangladesh: Still no Durable Solution*, 1 May 2000, p.6, available at <https://goo.gl/CGXYfo>.

⁴⁴⁴ *Ibid.*

⁴⁴⁵ UNHCR, *Myanmar: Rohingya refugees living in tough conditions in Bangladesh camps*, 21 September 2005, available at <http://goo.gl/f9YD9e>.

⁴⁴⁶ *Ibid.*

⁴⁴⁷ *Ibid.*

⁴⁴⁸ *Ibid.*

⁴⁴⁹ The Star.Com, *Persecuted Rohingyas who fled to Canada remember harsh life in native Burma*, 22 August 2012, available at <https://goo.gl/BS19PD>.

⁴⁵⁰ Reuters, *Myanmar refugees, including Muslim Rohingya, outpaced Syrian arrivals in the U.S.*, 20 September 2016, available at <http://goo.gl/6JuFnA>.

leading to a majority being unregistered in Bangladesh.

Both countries also used camp closures (which raises the question whether encouraging refugees to “voluntarily” repatriate can be genuinely voluntary where refugees were left with no real alternatives). Further, the decisions to implement camp closures were taken by both governments despite ongoing violence and instability in the refugees’ home countries.

While both Kenya and Bangladesh sought to send refugees back home, in the case of the former there was a call from the state for camps to close and refugees to repatriate within the period of one year, whereas the Bangladeshi Government took a different approach to encourage repatriation by proposing relocation of Rohingya refugees to the island of Thengar Char in the Bay of Bengal.⁴⁵¹ However, the island is apparently not yet suitable for human settlement, as it is underwater for a quarter of the year due to torrential rain and monsoons⁴⁵² (which has attracted criticism of the Bangladeshi Government by the international human rights community).

Finally, there were ostensibly different motivations for the Kenyan and Bangladesh Governments’ seeking to remove refugees from their countries. In the case of Dadaab, the Kenyan Government cited security concerns as a key reason for the camp closure. In the case of Bangladesh,⁴⁵³ the refugee camps are in an area of the country that attracts a significant amount of tourism, and the Bangladeshi Government stated that the concern was to rid the area of refugees in order to protect and maintain this source of state revenue.

PAKISTAN CASE STUDY (2000-2013)

E.17 THE REFUGEES

E.17.1 CAUSE OF THE REFUGEE FLOW

Afghanistan is sometimes referred to as a “quasi-state,” because of its struggle to protect citizens’ rights, and provide social and economic welfare.⁴⁵⁴ By the end of the Soviet invasion of Afghanistan in 1989, an estimated one third of the Afghan population had been forced to flee, with over 1.5 million IDPs.⁴⁵⁵ Thereafter, the majority of Afghan refugees chose to remain in Pakistan rather than facing factional fighting among various Afghan militia groups, persecution of ethnic groups and the rise of the Taliban in Afghanistan. The US-led military operation in 2001 prompted more Afghans to seek asylum in Pakistan. By February 2002, there were approximately two million Afghans in Pakistan, displaced by 22 years of civil and political repression.⁴⁵⁶

E.17.2 SAFETY AND TREATMENT

In 2002, there were more than 150 refugee camps in Pakistan, mostly located around Peshawar and along the Afghanistan border in the North-West Frontier Province with others situated around Quetta in Baluchistan province. Such camps included Shamshatoo and Nasirbagh on the outskirts of Peshawar which housed tens of thousands of refugees. There were also several pockets of Afghan urban refugees living outside of these official camps in settlements in urban centres, such as Peshawar, Quetta, Islamabad and Karachi.⁴⁵⁷

The UNHCR and NGOs faced an enormous challenge in providing assistance and protection to undocumented Afghans who had recently arrived, because the international agencies were not authorised to be in Pakistan and the Pakistani Government was restrictive with the allocation of land for camps. Accordingly, refugees lived in makeshift shelters in already-existing refugee camps with very difficult

⁴⁵¹ CNN, *The ‘silent crisis’ of the Rohingya refugees in Bangladesh*, 19 April 2017, available at <http://goo.gl/as6ooh>.

⁴⁵² *Ibid.*

⁴⁵³ New York Times, *Rohingya Refugees in Bangladesh to Be Relocated to Remote Island*, 31 January 2017, available at <https://goo.gl/LwP3bB>.

⁴⁵⁴ Jackson, R., *Quasi-States, Sovereignty, International Relations and the Third World*, Cambridge University Press, 1993.

⁴⁵⁵ International Crisis Group, *Afghanistan: What Now for Refugees?*, 31 August 2009, p.3, available at <https://goo.gl/uNWIK9>.

⁴⁵⁶ Human Rights Watch, *Closed Door Policy: Afghan Refugees in Pakistan and Iran*, 27 February 2002, available at <http://goo.gl/7sw5Wc>.

⁴⁵⁷ *Ibid.*

sanitary and humanitarian conditions. For example, the Tajarabat refugee camp is perched on top of a garbage dump with an open sewage system.⁴⁵⁸ The refugee camps were often highly impoverished, with inhabitants having minimal access to basic services⁴⁵⁹; insufficient shelter, space and hazardous living conditions resulted in very high death rates.⁴⁶⁰ Refugees also faced brutality from the Pakistani authorities⁴⁶¹ and the distribution of assistance within camps was often open to abuse and corruption.

E.18 THE LEGAL FRAMEWORK

E.18.1 STATUS AND LEGAL POSITION

The 1951 Pakistan Foreigners Order (the “**Foreigners Order**”) and the 1946 Pakistan Foreigners Act (the “**Foreigners Act**”) granted the power to the Pakistan civil authorities to grant or refuse entry at the Pakistan border.⁴⁶² Further, the Pakistan Procedure Code allows for the arrest without a warrant of any person reasonably suspected of being involved in an offence; accordingly, a foreign national in Pakistan without valid documentation would be defined as an illegal immigrant, and could be arrested.⁴⁶³

Gradually, Pakistan has made it more difficult for Afghan asylum seekers to enter the country. From 1 January 2000, Pakistan stopped recognising newly arriving Afghans as *prima facie* refugees which meant they no longer could claim an exemption from the Foreigners’ Act.⁴⁶⁴ In November 2000, Pakistan closed its border with Afghanistan, citing an inability to absorb the 30,000 Afghans who had already arrived in the previous two months, with thousands more expected to arrive.⁴⁶⁵ From 11 September 2001 onwards, the Pakistani authorities were able to impose fines on people who were stopped while crossing the border, which would often be beyond

the means of fleeing Afghans with little or no money at all. As such, the increasingly strict border closure policy, fines and reported extortions made the entry into Pakistan after 9/11 more dangerous and costly for Afghans. A further issue was that women, children and the elderly were allowed to enter but men were often not, resulting in many families being separated whilst crossing the border.

Accordingly, many Afghans have sought safety in Pakistan via unofficial channels, a problem worsened by the refusal of Pakistan to grant permission for the UNHCR to conduct refugee registration. This also caused significant problems with respect to the distribution of aid assistance.⁴⁶⁶

Pakistan started to tackle the issue of Afghan refugees’ legal status in 2007 following criticism for failure to register, grant legal status or issue identification documents to Afghan refugees. With support from the UNHCR, the Pakistani Government pursued an ongoing registration campaign which sought to provide official identification cards to all Afghans possessing documentary evidence of their living in Pakistan at the time of the 2005 census, registering more than three million Afghans living in Pakistan in February and March 2005.⁴⁶⁷ The registration effort provided the Afghans with their first-ever official documentation and helped manage the refugee population in Pakistan.

E.18.2 VOLUNTARY REPATRIATION

Between October 2000 and May 2001, the Pakistani Government forcibly returned approximately 7,633 Afghan refugees on the basis of the refugees’ undocumented status.⁴⁶⁸ In October 2001, the Pakistani Government called for the establishment of IDP camps in order to prevent further arrivals of Afghans. This announcement ignited fears that Pakistan would forcibly return more Afghans from the safety of

⁴⁵⁸ *Ibid.*

⁴⁵⁹ Human Rights Watch, *Closed Door Policy: Afghan Refugees in Pakistan and Iran*, 27 February 2002, available at <http://goo.gl/WZzKBn>.

⁴⁶⁰ *Ibid.*

⁴⁶¹ Human Rights Watch, *Closed Door Policy: Afghan Refugees in Pakistan and Iran*, Human Rights Watch interview, Shamshatoo camp, 17 November 2001 available at <http://goo.gl/NR6JhJ>.

⁴⁶² Foreigners Order of October 1951; Foreigners Act of 1946.

⁴⁶³ Pakistan Criminal Procedure Code, § 15 and 54.

⁴⁶⁴ Turton, D. and Marsden, P., *Taking Refugees for a Ride? The politics of refugee return to Afghanistan*, December 2002, p.3, available at <http://goo.gl/mTNEJ2>.

⁴⁶⁵ *Ibid.*

⁴⁶⁶ *Ibid.*

⁴⁶⁷ IRIN, *Registration open to more Afghan refugees*, 4 January 2007, available at <http://goo.gl/t7m2M7>.

⁴⁶⁸ Human Rights Watch, *Closed Door Policy: Afghan Refugees in Pakistan and Iran*, 27 February 2002, available at <http://goo.gl/zVkiWw>.

Pakistan to Afghanistan. Further, between March and June 2008, more than 120,000 Afghans have been repatriated from Pakistan.⁴⁶⁹

The capacity of Afghanistan to absorb tens of thousands of Afghan refugees, with its existing services, education, health, water and sanitation provisions was limited.⁴⁷⁰ Indeed, of the 120,000 Afghans repatriated since March 2008, 14,000 have become IDPs because they are unable to return to their place of origin because of tribal conflicts and insecurity.⁴⁷¹ A report in early 2007 on the registration of Afghans living in Pakistan, found 82 per cent of Afghans had no intention of returning to their homeland in the near future, with 41 per cent citing insecurity as the primary impediment to their return.⁴⁷²

Relief agencies have reported that Pakistani authorities have increasingly violated the principle of non-refoulement⁴⁷³ and there has been evidence the standards of “voluntariness” under international law have not been met, including reports of limits placed on income generation and work-related activities by Afghans in Pakistan⁴⁷⁴ and limited information about their country of origin being provided before voluntary repatriation was carried out.⁴⁷⁵

Accordingly, in July 2013, the Pakistani Government agreed to a new National Policy on Afghan Refugees, drafted in synergy with the multi-year Solutions Strategy for Afghan Refugees (“SSAR”), which focuses on “voluntary repatriation in safety and dignity, sustainable reintegration inside Afghanistan, and assistance to refugee host communities.”⁴⁷⁶ A proposal for the development of 48 reintegration sites for returnees was put forward in an attempt to ensure that the voluntary repatriation was at the heart of the new

policy, and that Afghan refugees could reintegrate on a sustainable basis.

E.18.3 INTEGRATION

Since their arrival in Pakistan during the late 1970s, Afghan refugees have worked as labourers in development projects throughout Pakistan but, competing against their Pakistani counterparts, they are often forced to accept lower wages.⁴⁷⁷

The prospect of integrating Afghan refugees into Pakistan has been limited as a result of their limited legal status and poor access to services⁴⁷⁸ and the willingness of the Pakistani Government to integrate Afghan refugees has been dampened by certain events, such as the terrorist attack on the Army Public School and College Peshawar in 16 December 2014.⁴⁷⁹ A decline in the flow of international donations for refugees has also been a major concern for Pakistan in its attempts to accommodate Afghan refugees.⁴⁸⁰

E.18.4 RESETTLEMENT

The UNHCR and the Pakistani Government attempted to resettle Afghan refugees to other camps in Pakistan. However, the anticipated resettlement of refugees from camps and urban areas to Bajaur Agency had to be re-assessed in 2001 due to concerns of ethnic violence in light of the ethnic mix of Afghans.⁴⁸¹

Restrictive asylum policies in North America, Europe, Australia and The Persian Gulf may have resulted in the Pakistani Government not engaging in resettlement further afield, and instead focusing on other

⁴⁶⁹ IRIN News, *Jalozai camp closed, returnees face difficulties at home*, 2 June 2008 available at <http://goo.gl/aHJRqG>.

⁴⁷⁰ Turton, D. and Marsden, P., *Taking Refugees for a Ride? The politics of refugee return to Afghanistan*, p.3, available at <http://goo.gl/ULodrF>.

⁴⁷¹ IRIN News, *Jalozai camp closed, returnees face difficulties at home*, 2 June 2008 available at <http://goo.gl/EEpNV1>.

⁴⁷² *Ibid.*

⁴⁷³ Human Rights Watch, *Closed Door Policy: Afghan Refugees in Pakistan and Iran*, 27 February 2002 available at <http://goo.gl/4hvqgh>.

⁴⁷⁴ Human Rights Watch, *Pakistan Coercion, UN Complicity: The Mass Forced Return of Afghan Refugees*, 13 February 2017, available at <https://goo.gl/kGaMr8>.

⁴⁷⁵ *Ibid.*

⁴⁷⁶ Under the Federal Minister for States and Frontier Regions (SAFRON), Lt Gen Abdul Qadir Baloch.

⁴⁷⁷ Cultural Survival, *Resettlement Pattern: The Afghan Refugees in Pakistan*, December 1998, available at <https://goo.gl/8cp3e6>.

⁴⁷⁸ European Resettlement Network, *Afghan Refugees in Iran & Pakistan*, 2013, available at <http://www.resettlement.eu/page/afghan-refugees-iran-pakistan-0>.

⁴⁷⁹ Dawn, *UNHCR in a dilemma over Afghans' repatriation*, 15 April 2015, available at <https://www.dawn.com/news/1176064>.

⁴⁸⁰ *Ibid.*

⁴⁸¹ Khel, D. A., *Where war is way of life: A region that bristles with weapons is home to the fierce Pashtun, a potential U.S. foe*, 26 September 2001, available at <http://goo.gl/wFY2R4>.

local solutions.⁴⁸² One example of effective resettlement of refugees in Pakistan was the peacefully negotiated closure of the Kacha Garhi refugee camp, which contained more than 64,000 Afghans.⁴⁸³

The development of host communities in the context of the 48 integration sites proposed in 2013 pursuant to the SSAR was also important in assisting the estimated 70 per cent of registered Afghans in Pakistan who were living outside refugee camps. Such refugees were provided with access to limited infrastructure and resources in new Refugees Affected Hosting Areas (“**RAHA**”)⁴⁸⁴ and, out of a total of \$ 610 million pledged by the international community to Pakistan under SSAR, the RAHA development initiative received \$ 490 million.⁴⁸⁵

E.19 APPLICATION TO DADAAB

Both Afghans and Somalis have sought protection in their respective host nations for a protracted period of time: in Afghanistan, the Soviet invasion and the rise of the Taliban prompted the exodus of Afghans, whilst Somalia’s civil war in 1991 compelled many Somalis to leave the country. Further, the security situation in both Afghanistan and Somali has been highly unstable and the prospect of voluntary repatriation with refugees returning safely was severely limited. Similarly to Dadaab, refugee camps in Pakistan were also closed and the governmental policies of both countries reflect the increasingly wary attitude towards large refugee populations. However, assistance packages have been offered by both the Kenyan and Pakistani Governments in an attempt to assist the refugees with the repatriation process.

The focus of the Pakistani and Kenyan Governments has differed: in Kenya, the focus has been on repatriating Somalis to their homeland, whereas the Pakistani Government has increasingly offered the choice to Afghan refugees when refugee camps have been closed down to resettle in another Pakistani refugee camp.

GREECE CASE STUDY

E.20 THE REFUGEES

E.20.1 CAUSE OF THE REFUGEE FLOW

In March 2011, the “Arab Spring” revolts drove Tunisian President Zine El Abidine Ben Ali and Egyptian President Hosni Mubarak from power. In Syria in 2012, military defectors formed the Free Syrian Army in an attempt to overthrow President Assad’s government. At the same time sectarian tensions in the Syrian population were exacerbated by economic and social hardship throughout the region, most notably a severe drought between 2007 and 2010, which had driven 1.5 million rural Syrians to the country’s major cities.

Subsequently, the Islamic State of Iraq and the Levant (“**ISIL**”) entered northern and eastern Syria in 2013, in opposition to the Assad government. Kurdish forces, seeking independence in northern Syria also entered the war. Various foreign governments lent support to Syrian factions. From September 2015 Russia, in support of the Assad government, launched controversial bombing campaigns targeting ISIL, the Free Syrian Army and other rebel groups. Led by the US, a collection of Western powers targeted ISIL within Syria and Iraq, whilst providing temporary support to certain rebel groups.⁴⁸⁶

ISIL’s presence in the Middle East continued to grow throughout 2015, with attacks in Jalalabad, Afghanistan, and Karachi, Pakistan spurring further destabilisation in the region.⁴⁸⁷ Between 31 December 2012 and 31 December 2016, the UN estimates that the total number of Syrian refugees increased almost tenfold to 4,850,957 as a result of the ongoing civil war in Syria. A significant number of these refugees have sought asylum in Europe.⁴⁸⁸

In 2014, IOM documented approximately 280,000 migrant arrivals into the EU. In 2014, the EU granted protection status to more than 183,000 migrants.

⁴⁸² Muftah, *Understanding Afghan refugee repatriation in Pakistan*, 29 January 2016, available at <https://goo.gl/PEYLy8>.

⁴⁸³ UNHCR, *Kacha Garhi refugee camp closes in Pakistan after 27 years*, 27 July 2007, available at <http://goo.gl/X5q4ig>.

⁴⁸⁴ Forced Migration Review, *Pakistan’s national refugee policy*, May 2014, available at <http://www.fmreview.org/afghanistan/khan.html>.

⁴⁸⁵ *Ibid.*

⁴⁸⁶ Al Jazeera News, *Syria’s civil war explained from the beginning*, 18 July 2017, available at <http://goo.gl/q8xaF8>.

⁴⁸⁷ Reuters, *Afghan blast kills 33; president blames Islamic State*, 18 April 2015, available at <http://goo.gl/S6ByZB>; BBC News, *Pakistan gunmen kill 45 on Karachi Ismaili Shia bus*, 13 May 2015, available at <http://www.bbc.com/news/world-asia-32717321>.

⁴⁸⁸ UNHCR, *Syrian Regional Refugee Response*, available at <http://data.unhcr.org/syrianrefugees/regional.php>.

Accounting for more than half of the total, were Syrians (68,300 or thirty-seven per cent), Eritreans (14,600 or eight per cent) and Afghans (14,100 or 8 per cent).⁴⁸⁹ According to IOM, the number of documented migrants into the EU in 2015 increased to around 1,050,000. IOM estimates that 1,011,700 of these migrants arrived by sea, and that forty-nine per cent of those migrants were Syrian nationals, twenty-one per cent were Afghan nationals, and eight per cent were Iraqi nationals.⁴⁹⁰

The UNHCR documented 851,319 migrant arrivals in Greece in 2015. The majority had made the journey (at its shortest, four miles by sea) from Turkey to the Greek islands of Kos, Chios, Lesbos, Leros, Kastellorizo, Agathonisi, Farmakonisi, Rhodes, Symi and Samos.⁴⁹¹

E.20.2 SAFETY AND TREATMENT

At the forefront of the UNHCR's continuing work in Greece is the provision of safe accommodation for migrants in informal camps, most notably Idomeni, Greece's largest informal refugee camp. Following the closure of the Macedonian border in February 2016, nearly 10,000 migrants settled in Idomeni. Reports of criminal syndicates, extortion, squalid conditions and people-smuggling characterised the camp.⁴⁹² Working in conjunction with the Greek Government, the UNHCR supported the closure of Idomeni in May 2016, with 8,500 refugees transported to camps operated by the Greek Government.⁴⁹³

The UNHCR and its partners have worked alongside the municipalities of Athens and Thessaloniki to provide accommodation in apartment buildings and hotels for more than 10,300 relocation candidates and vulnerable asylum-seekers. Reports from within the

islands, however, speak of intense suffering, squalor and overcrowding.⁴⁹⁴

E.21 THE LEGAL FRAMEWORK

E.21.1 STATUS AND LEGAL POSITION

On 20 April 2015, the European Commission proposed a ten-point plan to tackle the worsening crisis in Greece and the onwards travel of migrants to other European countries.⁴⁹⁵ Much of the plan focused on patrols, border enforcement and tackling smuggler boats in the Mediterranean. The plan did, however, propose streamlined methods for processing of asylum applications and broad documentation procedures.

On 27 January 2016, the European Commission accused Greece of neglecting its obligations under the Schengen Agreement.⁴⁹⁶ Greek authorities were criticised for a lack of organisation, border protection and insufficient documentation of migrants. The Greek Government sought financial support from the EU, whilst the FYR of Macedonia closed its southern border with Greece, leading to the creation of Greece's largest refugee camp, Idomeni.⁴⁹⁷

On 20 March 2016, the European Commission's "EU-Turkey Statement" (the "**Statement**") came into effect. The Statement implemented the following measures:

- Migrants arriving in Greece are to be sent back to Turkey if they do not apply for asylum or if their claim is rejected.

⁴⁸⁹ Eurostatnewsrelease, *EU Member States granted protection to more than 185,000 asylum seekers in 2014*, 12 May 2015, available at <http://goo.gl/Cu7zf5>.

⁴⁹⁰ BBC News, *Migrant crisis: Migration to Europe explained in seven charts*, 4 March 2016, available at <http://www.bbc.com/news/world-europe-34131911>; ABC News, *More than one million asylum seekers reached Europe by sea this year*: UNHCR, 30 December 2015, available at <http://goo.gl/A6dr1m>.

⁴⁹¹ UNHCR, *Mediterranean Situation*, May 2017, available at <http://goo.gl/jgZRpY>.

⁴⁹² The Guardian, *The refugee children of Idomeni: alone, far from home but clinging to hope*, 7 May 2016, available at <https://goo.gl/CB3k7M>.

⁴⁹³ The Guardian, *Idomeni: Greek riot police move in to clear refugee camp*, 24 May 2016, available at <https://goo.gl/UfBCdQ>.

⁴⁹⁴ *Ibid.*

⁴⁹⁵ European Commission, *Joint Foreign and Home Affairs Council: Ten point action plan on migration*, 20 April 2015, available at <http://goo.gl/18VKHj>.

⁴⁹⁶ The Schengen Agreement took effect in 1995, and serves to abolish borders between signatory EU member states, enabling passport-free movement across the bloc. Greece is within the Schengen zone and is expected to reflect the Schengen Agreement's common rules on asylum.

⁴⁹⁷ The Telegraph, *Idomeni: Greek riot police move in to close refugee camp*, 24 May 2016, available at <https://goo.gl/fg69K>.

- Any “irregular” migrants who cross into Greece from Turkey after 20 March 2016 are to be sent back to Turkey following an individual evaluation.⁴⁹⁸
- Any Syrian national returned to Turkey from Greece (i.e., whose application is rejected) will be replaced by a Syrian in Turkey making a legitimate request for asylum, up to a number not exceeding 72,000.⁴⁹⁹
- The EU agreed to honour the commitments taken in the Representatives of the Governments of Member States meeting on 20 July 2015, and a further commitment of voluntary resettlement for up to 54,000 persons.
- The EU and Turkey agreed to work collectively to improve humanitarian conditions inside Syria, especially near the Turkish border, to improve safety and encourage voluntary repatriation to safe regions.

The Statement identifies that the Greek state (supported by the UNHCR) is responsible for registering migrants and processing asylum applications, and in accordance with the Asylum Procedures Directive. The costs of returning migrants to Turkey are covered by the EU.

In principle, the Statement works in conjunction with the resettlement mechanism emanating from the Representatives of the Governments of Member States meeting with the European Council, 20 July 2015, the EU’s Emergency Relocation Mechanism.

Where the Statement operates to replace an “irregular” migrant within the EU with a Syrian seeking asylum from within Turkey, the Statement refers to the “UN Vulnerability Criteria,”⁵⁰⁰ as a measure by which to assess which refugees should be resettled within the EU.

Clause 1 of the Statement states explicitly that the return of “irregular” migrants to Turkey “will take

place in full accordance with EU and international law, thus excluding any kind of collective expulsion. All migrants will be protected in accordance with the relevant international standards and in respect of the principle of non-refoulement.” The Statement self-identifies as a “temporary and extraordinary measure.”

According to official EU figures, the implementation of the Statement has had a notable impact on the number of “irregular” migrants entering Greece, citing a ninety-seven per cent decrease.⁵⁰¹ Since 4 April 2016, 8,812 Syrian refugees have been resettled to EU countries from within Turkey. Since 21 March 2016, 1,895 people have been deemed “irregular” migrants, and have been returned from Greece to Turkey. A staff of 1,193 people has been provided for FRONTEX and the European Asylum Support Office (“EASO”) – agencies dedicated to the control and management of the EU’s external borders.⁵⁰²

The Statement has been controversial since its inception. In return for accepting returning migrants from Greece, Turkey has received \$ 3.3 billion in aid from the EU. Turkey has also been promised an array of political incentives, largely surrounding accession to the EU. According to the Economist, however, Turkey’s EU membership bid is now “on life support,” after President Erdogan countered EU criticism by threatening to withdraw from the Statement.⁵⁰³ Amnesty International, NRC, the International Rescue Committee, Oxfam, Doctors Without Borders, and various aid agencies have condemned the Statement as a contravention of international law.

In a public statement on 22 March 2016, the UNHCR outlined a “redefined” role for agency staff in Greece. Citing the “mandatory detention” of refugees in Greek Government facilities, the UNHCR stated:

“UNHCR is not a party to the EU-Turkey deal, nor will we be involved in returns or detention. We

⁴⁹⁸ “Irregular migration” is defined by IOM as “movement that takes place outside the regulatory norms of the sending, transit and receiving countries. There is no clear or universally accepted definition of irregular migration. From the perspective of destination countries it is entry, stay or work in a country without the necessary authorization or documents required under immigration regulations. From the perspective of the sending country, the irregularity is for example seen in cases in which a person crosses an international boundary without a valid passport or travel document or does not fulfil the administrative requirements for leaving the country.” IOM, *Key migration terms*, 2017, available at <https://www.iom.int/key-migration-terms#Irregular-migration>.

⁴⁹⁹ Council of the European Union, *EU-Turkey statement*, 18 March 2016, available at <http://goo.gl/m2TkAM>.

⁵⁰⁰ The EU has subsequently revealed that the “UN Vulnerability Criteria” does not refer to a specific document, but that the “UNHCR criteria for resettlement from Turkey” should be considered. Letter from EASO, 15 June 2017, available at <https://goo.gl/DwFphy>.

⁵⁰¹ European Commission, *EU-Turkey Statement one year on*, 18 March 2017, p.2, available at <https://goo.gl/TQuqjx>.

⁵⁰² European Commission, *Operational implementation of the EU-Turkey Statement*, 26 August 2017, available at <https://goo.gl/YhUSSM>.

⁵⁰³ The Economist, *Turkey’s effort to join the EU is on life support*, 1 December 2016, available at <http://goo.gl/KHGLWD>.

*will continue to assist the Greek authorities to develop an adequate reception capacity.*⁵⁰⁴

There has also been significant opposition to the Statement from NGOs working with refugees in Greece. Human Rights Watch, reporting on the first anniversary of the Statement, outlined the reality of the Statement's implementation stating that the Greek Government, in an attempt to streamline the processing and restore public order, has adopted a containment policy for refugees in reception facilities across the country and that what was originally meant to be a temporary solution may become permanent. Human Rights Watch asserts that it is not possible to comply with the model envisaged by the Statement while complying with international standards.⁵⁰⁵

E.21.2 ACCESS / FAIRNESS

A Greek law passed in April 2016, in an attempt to facilitate the implementation of the Statement, has created a fast-track procedure for asylum applications on the Greek islands.⁵⁰⁶ The "admissibility" procedure is conducted by EASO and the Greek Asylum Service. The test applied does not assess an individual's need for international protection, but instead whether an individual can be returned to Turkey (pursuant to Directive 2013/32/EU (the "**Procedures Directive**") identifies a "safe third country" as a country to which asylum seekers can be returned without a full examination of their asylum claims).⁵⁰⁷ In principle, therefore, Greece may reject a person's asylum application if he or she has already been granted protection by Turkey, should Turkey be deemed a "safe third country."

The Procedures Directive requires that a person returned to a "safe third country" retain the right to request refugee status. However, Turkish law excludes non-Europeans from qualifying for refugee status.⁵⁰⁸

Moreover, the Law on Foreigners and International Protection, Turkish legislation passed in April 2014, is regarded by many NGOs as inadequate in granting refugees basic human rights and access to legal counsel.⁵⁰⁹

E.21.3 VOLUNTARY REPATRIATION

Through the Assisted Voluntary Return and Reintegration Programme ("**AVRR**") the Greek Government has actively promoted voluntary repatriation. Headed by IOM, AVRR has been focused on the islands of Lesbos, Chios, Leros, Samos and Kos. Migrants are encouraged to register with the AVRR project, and are granted cash incentives to return to their country of origin. All returnees registering with AVRR receive 500 EUR at the point of registration. They are granted an additional 500 EUR at the airport on the day of departure. The AVRR grants are designed to aid the reintegration of returnees, "contribu[ting] to their sustainability [in their] countries of origin."⁵¹⁰ From June 2016 to June 2017, 1,771 migrants registered with AVRR on the islands of Lesbos, Chios, Leros, Samos and Kos, with 1,333 departing for their country of origin.⁵¹¹

E.21.4 INTEGRATION

Within the context of the current refugee crisis in Europe, integration of migrants into Greek society has been limited. Greece "became a transit country for over 1,000,000 migrants" seeking to "reach a northern European country by the Balkan refugee route."⁵¹² As such, the integration of migrants travelling through Greece is better assessed on a trans-European level, considering the impact of the resettlement of migrants across the Continent (see below).

⁵⁰⁴ UNHCR, *UNHCR redefines role in Greece as EU-Turkey deal comes into effect*, 22 March 2016, available at <http://goo.gl/sNhGn4>.

⁵⁰⁵ *Ibid.*

⁵⁰⁶ Greece: Law No. 4375 of 2016 on the organisation and operation of the Asylum Service, the Appeals Authority, the Reception and Identification Service, the establishment of the General Secretariat for Reception, the transposition into Greek legislation of the provisions of Directive 2013/32/EC, 3 April 2016, available at <http://www.refworld.org/docid/573ad4cb4.html>.

⁵⁰⁷ Council of the European Union, 2013/32/EU, 26 June 2013, Article 38, available at <http://goo.gl/ZhCjJ2>.

⁵⁰⁸ Chicago Policy Review, *Refugee problem in Turkey: evaluating needs and challenges*, 2 January 2017, available at <http://goo.gl/6LQpZE>.

⁵⁰⁹ Amnesty International, *Greece: Court decisions pave way for first forcible returns of asylum-seekers under EU-Turkey deal*, 22 September 2017, available at <https://goo.gl/vUxQSJ>.

⁵¹⁰ International Organisation for Migration, *Assisted voluntary return and reintegration programs (AVRR)*, available at <https://goo.gl/PFyEEA>.

⁵¹¹ International Organisation for Migration, *AVRR Statistics*, available at <https://goo.gl/cvft18>.

⁵¹² Anagnostou, D., *Local government and migrant integration in Europe and in Greece*, 2016, p.35, available at <http://goo.gl/xCoayv>.

E.21.5 RESETTLEMENT

On 12 April 2017, the European Commission adopted its eleventh progress report on the EU's emergency relocation and resettlement schemes (the "**Resettlement Scheme**"). According to the report, 16,340 relocations have been carried out under the Resettlement Scheme, of which 11,339 have been relocations from Greece. With 14,000 registered relocation candidates remaining in Greece, and a further 3,500 in Italy, the Commission has set a target of 1,500 relocations per month, in order to achieve the relocation of all candidates by September 2017.⁵¹³

Member States and Associated Countries have been inconsistent in fulfilling their resettlement obligations. Whilst many Member States (in particular Germany and Sweden) have resettled hundreds of thousands of migrants, nine Member States have yet to start resettling migrants within the ongoing EU-level schemes: Bulgaria, Cyprus, Greece, Croatia, Malta, Poland, Romania, Slovakia and Slovenia.⁵¹⁴

insufficient information about the admissibility process, had a lack of adequate legal support, and were questioned in circumstances and surroundings unsuitable for hosting a fair asylum hearing.⁵¹⁵

E.22 APPLICATION TO DADAAB

The status of refugees in Greece and the implementation of the EU-Turkey Statement have a degree of application to the present situation in Dadaab, predominantly by providing an example of an alternative governmental response to mass migration in the midst of security concerns and political instability. However, the voluntary repatriation process in Dadaab is significantly different from the situation in Greece. Under the Statement, refugees in Greek Government camps on the islands of Lesbos, Chios, Leros, Samos and Kos are effectively detained pending the outcome of their admissibility test. Further, since the Statement came into effect, there have been a combination of voluntary and involuntary returns to Turkey. The European Commission has reported that many returned migrants chose not to apply for asylum, whilst others withdrew their applications after negative decisions in their admissibility hearing. However, Human Rights Watch has widely criticised the voluntary nature of the process, citing various instances in which migrants were provided with

⁵¹³ European Commission, *Relocation and Resettlement: Steady progress made but more efforts needed to meet targets*, 12 April 2017, available at <http://goo.gl/PEBipb>.

⁵¹⁴ Member States agreed on a European Resettlement Scheme on 8 June 2015, confirmed on 20 July 2015 and accelerated on 7 March 2016. On 13 July 2017 the Commission proposed a permanent EU Resettlement Framework, available at http://europa.eu/rapid/press-release_IP-17-218_en.htm.

⁵¹⁵ Human Rights Watch, *Greece: A year of suffering for asylum seekers*, 15 March 2017, available at <https://www.hrw.org/news/2017/03/15/greece-year-suffering-asylum-seekers>.

APPENDIX A:

TIMELINE OF KEY EVENTS

Event	Overview / Comment	Source
23 June 1992		
Kenya ratifies the African Union Convention governing Specific Aspects of Refugee Problems in Africa	The OAU Convention has been ratified by 50 of the 53 Member States of the OAU.	OAU Convention, available at http://goo.gl/Y4g9aT
October 1991		
Dadaab set up	Dadaab's five refugee camps were set up to provide a temporary safe haven to approximately 90,000 Somalis fleeing the civil war in Somalia that in 1991 had culminated in the fall of Mogadishu and overthrow of the central government.	The UNHCR, <i>Dadaab – World's biggest refugee camp 20 years old</i> , 21 February 2012, available at http://goo.gl/NNkSUp Intermedia Development Consultants, <i>The Dadaab Dilemma: A Study on Livelihood Activities and Opportunities for Dadaab Refugees</i> , August 2013, available at https://goo.gl/GXJzXT
2006		
Kenyan 2006 Refugees Act	The Refugees Act provides for the recognition, protection, and management of refugees, the process for which would be managed by the DRA which was established under the Act. The Refugees Act recognises two classes of refugees: <ul style="list-style-type: none"> • Statutory: a person who has “a well-founded fear of being persecuted for reasons of race, religion, sex, nationality, membership of a particular social group or political opinion”. • <i>Prima facie</i>: a person who, “owing to external aggression, occupation, foreign domination or events seriously disturbing public order in any part or whole of his country of origin or nationality is compelled to leave his place of habitual residence”. 	Refugees Act 2006, available at http://goo.gl/TAccJ4 Library of Congress, <i>Refugee Law and Policy: Kenya</i> , March 2016, available at https://goo.gl/UxdWop
2009		
2009 Refugee Regulations	These Regulations act as a subsidiary to the Refugees Act, and also have the aim of providing for the recognition, protection and management of refugees.	Refugee Regulations of 2009, available at https://goo.gl/QLtAjG
2011		
The UNHCR conducts a review of the health and water provision across the five Dadaab camps	The report found that health posts were overcrowded and access to water was inadequate.	Integrated Regional Information Networks (IRIN), <i>Red tape adds to refugee woes in Dadaab</i> , 26 July 2011, available at http://goo.gl/5Qssmub
2011		
Somalis flee the conflict, drought and famine that hit east Africa	The drought affected over 13 million people, and approximately one in three Somalis were displaced due to the drought. Mass influx of over 160,000 refugees poured into Kenya in 2011, and the population of Dadaab rises to approximately 500,000.	International Federation of Red Cross and Red Crescent Societies, <i>Drought in the Horn of Africa, Preventing the next disaster</i> , 2011, available at https://goo.gl/YciQnz

Event	Overview / Comment	Source
9 May 2011		
Registration statistics published	According to the UNHCR, some 43,001 persons have been registered since the start of 2011. Of that total, 42,218 are Somalis.	IRIN, <i>Endless stream of refugees</i> , 17 May 2011, available at http://goo.gl/2ZqSTw
6 June 2011		
Reception centres were established across the three camps	The centres were opened with the purpose of speeding up the delivery of humanitarian assistance to the new arrivals.	IRIN, <i>Red tape adds to refugee woes in Dadaab</i> , 26 July 2011, available at http://goo.gl/bhPx4N
July 2011		
Administrative issues with respect to registering in Dadaab	The issues were due to the vast number of registrations (1,000 refugees a day) at only one registration centre.	IRIN, <i>Red tape adds to refugee woes in Dadaab</i> , 26 July 2011, available at http://goo.gl/Fvzj8d
2011-2012		
Famine forces refugees to cross the Kenyan border	A further famine hits Somalia, which estimates suggest killed up to 260,000 Somalis and forced 150,000 across the Kenyan border.	Intermedia Development Consultants, <i>The Dadaab Dilemma: A Study on Livelihood Activities and Opportunities for Dadaab Refugees</i> , August 2013, available at https://goo.gl/rGG2ym
1 March 2012		
Maximum intended capacity of 90,000 refugees superseded	There were 463,000 registered refugees in Dadaab, largely from neighbouring Somalia, and thousands more unregistered, with estimates of the total number (including registered and unregistered) being close to 500,000.	Center for Strategic and International Studies, <i>The Dadaab Refugee Complex: A Powder Keg and It's Giving Off Sparks</i> , 1 March 2012, available at https://goo.gl/rTNcf1
13 December 2012		
Press statement: implementation of a structural encampment policy in response to a series of violent outbreaks	The press statement announced the following: (a) all refugees from Somalia must move back to Dadaab; (b) registration in urban areas is stopped; and (c) the UNHCR and other aid agencies are to stop providing direct services in urban areas with immediate effect.	Kenyan Government, Department of Refugee Affairs, <i>Press Statement</i> , 2012, available at https://goo.gl/tp262o
18 December 2012		
DRA directive implements a forced structural encampment policy of all refugees	The DRA cited national security concerns as the reason for implementing the forced structural encampment policy.	Kenya Commission on Human Rights, Press Release, <i>Government Statement on Refugees and Closure of Refugee Camps</i> , available at http://goo.gl/GUk3fQ
16 January 2013		
Presidential Letter requiring relocation of urban refugees to designated camps	The Ministry of Provincial Administration and Internal Security wrote to the Ministry of Special Programs saying the first phase of "rounding up" refugees would target 18,000, beginning on 21 January 2013, and these refugees would be taken to Nairobi's Thika Municipal Stadium, pending transfer to the camps.	Kenyan Government, Ministry of Public Administration, <i>Presidential Letter, Relocation of Urban Refugees to Officially Designated Camps</i> , 16 January 2013, available at https://goo.gl/85b1Nhf
21 January 2013		
Human Rights Watch reports on serious violations against Somali refugees in Kenya	Reports suggest that thousands of Somalis have returned to their country amidst significant increases in violations against refugees, including reports of sexual violence against refugee women and girls.	International Commission of Jurists, <i>Dignity Denied: Somali Refugees Expelled From Kenya in 2014</i> , 4 September 2015, available at http://www.refworld.org/docid/565da2fba.html Human Rights Watch, <i>Kenya: Don't Force 55,000 Refugees Into Camps</i> , 21 January 2013, available at https://goo.gl/pqHRnk

Event	Overview / Comment	Source
16 April 2013		
Paper highlighting the protection needs of the refugees	A paper signed by a number of agencies operating in Dadaab highlighted the protection needs of the refugees, where it mentioned that cases of sexual and gender-based violence had increased by 36 per cent between February and May 2013.	IRIN, <i>Briefing: Somalia, federalism and Jubaland</i> , 16 April 2013, available at http://goo.gl/JdXwBe
15 May 2013		
Amnesty International publishes public statement: <i>Returns to South and Central Somalia: A Violation of International Law</i>	The public statement states that Amnesty International opposes attempts to forcibly return people to Somalia, and goes on to assess the security situation in Mogadishu.	Amnesty International, <i>Returns to South and Central Somalia: A Violation of International Law</i> , 15 May 2013, available at http://www.refworld.org/docid/519492934.html
26 July 2013		
Conclusion of the Kituo Cha Sheria Case	Kituo (and seven others) petitioned the court to block the government directive to have all refugees sent to Kakuma and Dadaab camps. The court declared the expulsions unconstitutional on the basis that it is a threat to the non-refoulement principle incorporated by Section 18 of the Refugees Act and violates the state responsibility to persons in vulnerable situations.	International Commission of Jurists, <i>Dignity Denied: Somali Refugees Expelled From Kenya in 2014</i> , 4 September 2015, available at http://www.refworld.org/docid/565da2fba.html Paragraph 94, <i>Kituo Cha Sheria & 8 others v Attorney General</i> [2013] eKLR, available at http://kenyalaw.org/caselaw/cases/view/84157
August 2013		
Population of Dadaab: over 400,000	The population of Dadaab reaches over 400,000, with the number of female refugees standing at 51 per cent and the number of youth and children at over 52 per cent.	Intermedia Development Consultants, <i>The Dadaab Dilemma: A Study on Livelihood Activities and Opportunities for Dadaab Refugees</i> , August 2013, available at https://goo.gl/ojZFHM
21 September 2013		
Westgate Shopping Centre attack	At least 67 people died when suspected Al-Shabaab militants attacked Nairobi's Westgate shopping centre.	Independent, <i>Nairobi Westgate mall attack: Shopping centre re-opens two years after terror siege where al-Shabaab killed 67 people</i> , 14 July 2015, available at http://goo.gl/U1yfyk
10 November 2013		
Signing of the Tripartite Agreement by governments of Kenya and Somalia, and the UNHCR	The objective of the agreement is to provide a legal framework for the safe and dignified voluntary repatriation of Somali refugees from Kenya and their reintegration into Somalia.	Tripartite Agreement, available at http://www.refworld.org/pdfid/5285e0294.pdf NRC, <i>Paving the way for voluntary return</i> , 22 October 2015, available at https://goo.gl/ynas5P
19 February 2014		
Amnesty International publishes report: <i>No place like Home: returns and relocations of Somalia's displaced (2014)</i>	The report provides an overview of key human rights concerns in the context of returns and relocations of displaced persons and it assesses the protection of refugees and internally displaced persons in Kenya and within Somalia.	Amnesty International, <i>Somalia: No Place Like Home: Returns and Relocations of Somalia's Displaced</i> , 2014, available at https://goo.gl/jKnNK8
March 2014		
MSF publishes report: <i>Dadaab refugees: an uncertain tomorrow</i>	During an assessment carried out by MSF, respondents revealed that reasons for fleeing Somalia were almost 100 per cent linked to insecurity within the country, with 60 per cent of respondents citing the drought as a secondary reason for having left their homeland.	MSF, <i>Dadaab refugees: an uncertain tomorrow</i> , March 2014, available at http://goo.gl/xpx2Dt
March 2014		
WFP identifies income generating activities within Dadaab	Activities include trading meat and milk (both within the camp, and within the host community), rearing livestock, providing transport services, and running various businesses such as restaurants and guest houses.	World Food Programme, <i>Dadaab and Kakuma Refugee Camps Market Assessment</i> , June 2014, available at http://goo.gl/q6rnhn

Event	Overview / Comment	Source
26 March 2014		
Second directive seeking to implement a forced structural encampment policy	Ministry of Interior and Coordination of National Government, Joseph Ole Lenku, issued a directive, similar to the one issued by DRA on 18 December 2012, ordering all refugees to the camps, citing "security challenges".	Kenya Commission on Human Rights, Press Release, <i>Government Statement on Refugees and Closure of Refugee Camps</i>
5 April 2014		
Operation Usalama Watch commences	This major security operation was carried out by Kenyan police around Eastleigh estate and other predominantly Somali areas of Nairobi, resulting in over 5,000 individuals being forcibly relocated to refugee camps in northern Kenya and at least 359 others expelled to Somalia.	Kenya Commission on Human Rights, Press Release, <i>Government Statement on Refugees and Closure of Refugee Camps</i> International Commission of Jurists, <i>Dignity Denied: Somali Refugees Expelled From Kenya in 2014</i> , 4 September 2015, available at http://www.refworld.org/docid/565da2fba.html
27 May 2014		
Amnesty International publishes briefing paper: <i>Somalis are scapegoats in Kenya's Counter-Terror Crackdown (2014)</i>	The paper describes the way in which thousands of Somalis in Kenya have been subjected to arbitrary arrest, harassment, extortion and ill-treatment since Operation Usalama Watch began.	Amnesty International, <i>Kenya: Somalis scapegoated in counter-terror crackdown</i> , 27 May 2014, available at https://goo.gl/ATHXyw
30 June 2014		
<i>Samow Mumin Mohamed and Others v Cabinet Secretary, Minister of Interior Security and Coordination and others</i>	The Court held that a revised policy of concentrating urban refugees in designated refugee camps did not breach the petitioners' fundamental rights and permitted the continuance of the policy.	Judgment, available at http://kenyalaw.org/caselaw/cases/view/99326/
20 August 2014		
<i>Addis Ababa Commitment Towards Somali Refugees</i> report adopted	The Commitment (to assure continuing protection for the Somali refugees and to explore all available solutions) was adopted by the governments of Djibouti, Ethiopia, Kenya, Somalia, Uganda and Yemen, together with the United Nations Assistance Mission in Somalia, the United Nations Economic Commission for Africa, the Intergovernmental Authority on Development and the African Union at the Ministerial meeting of the UNHCR Global Initiative for Somali Refugees.	The UNHCR, <i>Addis Ababa Commitment Towards Somali Refugees</i> , 2 August 2014, available at http://www.unhcr.org/540dac2c6.pdf
23 October 2014		
Amnesty International publishes report: <i>Forced Returns to South and Central Somalia, including to Al-Shabaab areas: a blatant violation of International Law</i>	Amnesty International considers that forced returns to south and central Somalia amount to a violation of international law.	Amnesty International, <i>Somalia: Forced Returns to South and Central Somalia, Including to Al-Shabaab Areas: a Blatant Violation of International Law</i> , 23 October 2014, available at https://goo.gl/bw2ifc
18 December 2014		
SLAA passes (and enters into force on 22 December 2014)	The SLAA amended the provisions of twenty two other Acts of Parliament concerned with matters of national security. The new amendments changed the Refugees Act in two vital ways: <ul style="list-style-type: none"> • it sought to limit the number of refugees in the country to 150,000; and • it introduced a structural encampment policy, limiting refugees to the country's two camps in Dadaab and Kakuma. 	International Commission of Jurists, <i>Dignity Denied: Somali Refugees Expelled From Kenya in 2014</i> , 4 September 2015, available at http://www.refworld.org/docid/565da2fba.html

Event	Overview / Comment	Source
End of 2014		
485 refugees return to Somalia	By the end of 2014, the repatriation of Somali refugees from Kenya to Somalia had only seen 485 returns.	NRC, <i>Dadaab's broken promise</i> , October 2016, available at https://goo.gl/9j865y
22 January 2015		
Kenyan Government begins the process of Universal Periodic Review (“UPR”)	The Kenyan Government underwent the UPR process and presented a national report within which it discussed its position on refugees, reiterating its commitment to upholding its obligations and the terms of the Tripartite Agreement.	International Commission of Jurists, <i>Dignity Denied: Somali Refugees Expelled From Kenya in 2014</i> , 4 September 2015, available at http://www.refworld.org/docid/565da2fba.html UN Human Rights Council, Working Group on the Universal Periodic Review, <i>National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Kenya (A/HRC/WG.6/21/KEN/1)</i> , 6 November 2014, available at https://goo.gl/5rN3KM
23 February 2015		
Certain security law amendments struck down by domestic courts	The constitutionality of the SLAA was challenged in the case of <i>Coalition for Reforms and Democracy (CORD) & another v Republic of Kenya & another</i> [2015]. It was contended that Kenya had not complied with international instruments when it capped the number of refugees that can be accommodated in Kenya at 150,000 and passed the SLAA on 18 December 2014. In its defence, the Kenyan Government argued that it is entitled to have its own policies on the refugee issue, hence the issue is a policy issue as opposed to a constitutional issue. The Court declined to suspend the implementation of SLAA, but granted orders suspending several clauses – namely clauses 12, 16, 20, 26, 34, 48 and 64 – on the grounds that they were unconstitutional.	Judgment, available at http://goo.gl/7V3QKr International Commission of Jurists, <i>Dignity Denied: Somali Refugees Expelled From Kenya in 2014</i> , 4 September 2015, available at http://www.refworld.org/docid/565da2fba.html
11 March 2015		
Kenya submits 8th – 11th Periodic Report to African Commission in conformity with Article 62 of the African Charter following consultations between government officials, civil society organisations and independent national human rights institutions	In Kenya’s combined 8th – 11th Report on the African Charter, the Kenyan Government pointed out that the country hosts “about 600,000 refugees and every year a large number of Somali refugees are admitted into refugee camps in Kenya”.	Kenyan Government, <i>Combined 8th-11th Periodic Report on the African Charter on Human & Peoples’ Rights</i> , November 2014, available at http://goo.gl/DGVGhW International Commission of Jurists, <i>Dignity Denied: Somali Refugees Expelled From Kenya in 2014</i> , 4 September 2015, available at http://www.refworld.org/docid/565da2fba.html
12 March 2015		
Amnesty International publishes report: <i>Somalia: Prioritise Protection for People with Disabilities</i>	The report focuses on the fact that over two decades of conflict and a lack of access to health services have left people in Somalia with various forms of disabilities, which subsequently leaves them at risk of discrimination by their families, the public and the state.	Amnesty International, <i>Somalia: Prioritise Protection for People with Disabilities</i> , 12 March 2015, available at https://goo.gl/79S91Q
2 April 2015		
Al-Shabaab militants launch an attack on the University College of Garissa in Kenya	148 Kenyan students were killed in the attack.	The UNHCR, <i>UNHCR statement on the future of Kenya’s Dadaab Refugee Camps</i> , 14 April 2015, available at http://www.unhcr.org/552d0a8a9.html

Event	Overview / Comment	Source
11 April 2015		
Kenyan Deputy President William Ruto tells the UNHCR to close Dadaab in 90 days or Kenya will forcibly relocate it	This statement was made following Al-Shabaab gunmen storming Garissa University College in eastern Kenya.	CNN, <i>Kenyan official to U.N.: Relocate world's largest refugee camp, or we'll do it</i> , 11 April 2015, available at http://goo.gl/wRPSTN
21 April 2015		
Formal launch of the Tripartite Commission	The Tripartite Commission was formally established to oversee the implementation of the Tripartite Agreement.	Amnesty International, <i>Kenya: Nowhere Else To Go: Forced Returns of Somali Refugees from Dadaab Refugee Camp, Kenya</i> , Amnesty International, 14 November 2016, available at https://goo.gl/i7Crms
April / May 2015		
The African Commission adopts a resolution on terrorist attacks in Kenya	At its 56th session, the African Commission adopted a resolution on terrorist acts in Kenya and made specific reference to the scapegoating of Somali refugees in the Kenyan war on terror. The Commission called upon Kenya to "[t]ake all necessary measures to protect refugees in conformity with regional and international commitments that Kenya has entered into".	African Commission resolution no. ACHPR/Res. 302(LVI), 2015, para. 3(iv), available at http://www.achpr.org/sessions/56th/resolutions/302/ International Commission of Jurists, <i>Dignity Denied: Somali Refugees Expelled From Kenya in 2014</i> , 4 September 2015, p.54, available at http://www.refworld.org/docid/565da2fba.html
30 April 2015		
Kenyan Chair of Refugee Affairs Commission makes statement on returns	The chair of Kenya's Refugee Affairs Commission, Ali Bunow Korane, acknowledged the dangerous security situation in Somalia and stated that the Kenyan Government would encourage the safe return of Somali refugees but would not do so without ensuring their safety and wellbeing.	International Commission of Jurists, <i>Dignity Denied: Somali Refugees Expelled From Kenya in 2014</i> , 4 September 2015, p.54, available at http://www.refworld.org/docid/565da2fba.html Guardian, <i>Kenya Softens its Position on Proposed Closure of Dadaab Refugee Camp</i> , 30 April 2015, available at http://goo.gl/weCMt8 .
29 July 2015		
The Tripartite Commission adopts an Operations Strategy and Operations Plan for 2015-2019 (" Joint Strategy and Operational Plan ")	The Tripartite Commission for the Voluntary repatriation of Somali Refugees from Kenya, comprising the Kenyan Government, the Somali Government, and the UNHCR, met to work on enhanced support for the voluntary repatriation of Somali refugees from Kenya to Somalia. The Joint Strategy and Operational Plan envisaged the voluntary repatriation of 435,000 Somalia refugees in phases. The phased approach outlined support to the voluntary return and reintegration of 10,000 refugees in 2015; 100,000 in 2016; 150,000 in 2017; 130,000 in 2018 and 35,000 in 2019.	The UNHCR, <i>Voluntary repatriation of Somali Refugees from Kenya: Operations Strategy 2015-2019</i> , 29 July 2015, available at http://www.unhcr.org/561627e39.pdf The UNHCR, <i>Voluntary repatriation of Somali Refugees from Kenya: Operations Strategy 2015-2019</i> , 29 July 2015, available at http://www.unhcr.org/5616280b9.pdf The UNHCR, <i>Joint Communiqué of the Tripartite Commission for the Voluntary repatriation of Somali Refugees from Kenya</i> , 30 July 2015, available at http://www.refworld.org/docid/5608e2234.html
July 2015		
President Hassan Sheikh Mohamud of Somalia announces that while he is committed to holding elections before the end of his term in August 2015, it will not be possible to organise a popular vote	The lower house of Parliament will be elected based on a power-sharing formula between clans.	UNSC, <i>Report of the Secretary-General on Somalia (S/2017/27)</i> , 8 January 2016, available at http://www.refworld.org/docid/5698a0b64.html

Event	Overview / Comment	Source
August 2015		
Over 116,000 people are forcibly evicted from Somalia during the first eight months of 2015	Forced evictions exacerbate the humanitarian and human rights situation for Somali IDPs.	UNSC, <i>Report of the Secretary-General on Somalia (5/2017/21)</i> , 9 January 2017, available at http://goo.gl/BRpbbl
August 2015		
The UNHCR profiles each Dadaab camp	The following observations were made: <ul style="list-style-type: none"> • food rations are distributed across the camp twice a month, with supplementary feeding programmes in place across Dadaab for children and those with severe malnutrition • in 2015, enrolment at primary schools across Dadaab was approximately 50 per cent, and only 10 per cent for secondary school • Dadaab depends on external providers, such as MSF, to provide healthcare across the camps via health posts. Unfortunately, the ability of external parties to access the camp depends on the security situation therein 	<i>Refugees in the Horn of Africa: Somali Displacement Crisis</i> , 2011, available at http://goo.gl/kJMcfR
4 September 2015		
Shadow Report: <i>Dignity Denied: Somali Refugees Expelled From Kenya in 2014</i> published by International Commission of Jurists, Kenya Chapter (ICJ-Kenya) and Justice Forum	The report documents violations occurring during the refoulement of Somali refugees from Kenya to Somalia, and presents new evidence relating to the enforced transfers of Somali refugees from Kenya to Somalia, following their detention in Nairobi.	International Commission of Jurists, <i>Dignity Denied: Somali Refugees Expelled From Kenya in 2014</i> (Executive Summary), 4 September 2015, available at http://goo.gl/mnEaZg
14 October 2015		
Integrated Action Plan for the Sustainable Return and Reintegration of Somali refugees from Kenya to Somalia (" Action Plan ") published	The Action Plan, which is to be presented at the <i>Ministerial Pledging Conference on Somali Refugees</i> in Brussels on 21 October 2015, is published. The Action Plan was prepared within the framework of the Tripartite Agreement, in collaboration with a range of humanitarian and development partners. The Action Plan is designed to contribute to confirming the voluntariness of the decision by refugees to return, and to ensuring the physical and legal safety of returnees.	Action Plan, available at http://www.unhcr.org/561e54069.pdf
21 October 2015		
The UNHCR and the EU, in partnership with Kenya and Somalia, host a <i>Ministerial Pledging Conference on Somali Refugees</i> in Brussels	The conference was attended by over 50 states and organisations. Financial pledges of EUR 94 million were made by donors towards the Action Plan. In addition, a non-financial donation was made by the American Refugee Committee to offer livelihood training to 10,000 young Somali returnees.	The UNHCR, <i>Ministerial Pledging Conference on Somali Refugees</i> , available at http://goo.gl/2mpDGB
End of 2015		
A further 5,616 refugees return to Somalia from Kenya	The Tripartite Agreement was still proving to be slow to implement: only a further 5,616 returned to three "safe" zones in Somalia by the end of 2015. Returnees received support from the UNHCR and other humanitarian organisations in the first 12 – 18 months of returning, including: construction of permanent shelters, teaching, food assistance and implementation of cash-for-work projects to rebuild community infrastructures such as education, health facilities, and water systems.	NRC, <i>Dadaab's broken promise</i> , October 2016, available at https://goo.gl/M4wzq6 The UNHCR, <i>Voluntary repatriation of Somali Refugees from Kenya, Operations Strategy 2015-2019</i> , 29 July 2015, available at http://www.unhcr.org/5616280b9.pdf

Event	Overview / Comment	Source
2015		
Increase in the number of attacks in Mogadishu against humanitarian aid workers	The number of attacks in Mogadishu against humanitarian aid workers increased significantly in 2015, with 120 violent incidents being recorded, compared with 75 in 2014, and Al-Shabaab is also reported to be responsible for a wide range of grave human rights abuses.	UNSC, <i>Report of the Secretary-General on Somalia (5/2016/27)</i> , 8 January 2016, available at http://www.refworld.org/docid/5698a0664
14 April 2016		
The African Union Peace and Security Council declares that Dadaab is a "legitimate security concern"	The Council stated that it " <i>acknowledges the legitimate security concern of Kenya that the Dadaab Refugee Camps, in existence for more than 25 years, have been infiltrated and have become hideouts of Al Shabaab terrorist group, which exploits the camps to plan and carry out attacks against Kenyan institutions, installations and civilians. Council deplors that the Dadaab Refugee Camps have been deprived of their humanitarian character and function by the Al Shabaab terrorist group</i> ". This was one of the first steps taken at a regional level to discourage Somali refugees from living in Kenya.	African Union Commission, <i>590th PSC meeting decision on the situation of refugees in the Dadaab Refugee Camps in Kenya</i> , available at http://goo.gl/XP2zwh Amnesty International, <i>Nowhere Else To Go: Forced Returns of Somali Refugees from Dadaab Refugee Camp, Kenya</i> , November 14, 2016, available at https://goo.gl/2FH2iQ
29 April 2016		
Kenyan Government revokes <i>prima facie</i> refugee status for Somali refugees	The revocation had effect from 1 April 2016, and from this date all refugees from Somalia were required to undergo the RSD process as prescribed in the Regulations.	Kenya Gazette, Vol. CXVIII-No. 46, <i>Revocation of Prima Facie Refugee Status</i> , 29 April 2016, p.1901, available at http://goo.gl/f8CXm4
April 2016		
Registration process until this date	The DRA and the UNHCR shared responsibility for the RSD process, which would result, if successful, in the issuance of a Refugee Recognition Letter by the Kenyan Government, enabling full access to services. For <i>prima facie</i> refugees the RSD process is automatic and recognition occurs within months of arrival. For <i>non-prima facie</i> refugees the average wait for the RSD process is three years.	Amnesty International, <i>Nowhere Else To Go: Forced Returns of Somali Refugees from Dadaab Refugee Camp, Kenya</i> , November 14, 2016, available at https://goo.gl/9WNNWhi
6 May 2016		
Press release: Dr. Karanja Kibicho, Principal Secretary, issues a directive	The directive states that the Kenyan Government, having taken into consideration its national security interests, has decided that: • the DRA is to be disbanded • two of the Dadaab refugee camps will be closed "within the shortest time possible"	Kenyan Government, <i>Government Statement on Refugees and Closure of Refugee Camps</i> , 6 May 2016, available at https://goo.gl/cNQNau
6 May 2016		
HRW publishes <i>Kenya: Ending Refugee Hosting, Closing Camps</i>	The paper assesses the announcement made on 6 May 2016 that Kenya will no longer host refugees and concludes that the announcement is contrary to principles it has pledged to respect.	HRW, <i>Kenya: Ending Refugee Hosting, Closing Camps</i> , 6 May 2016, available at https://goo.gl/Rdx275
10 May 2016		
Joseph Nkaissery, Interior Cabinet Secretary, issues a press statement confirming the disbandment of the DRA	The directive confirms that the DRA is to be disbanded and Dadaab is to be closed " <i>within the shortest time possible</i> ".	Kenyan Government, <i>Statement by the Ministry of the Interior</i> , 10 May 2016
11 May 2016		
By the beginning of May, only 5,200 refugees have returned to Somalia	Interior Cabinet Secretary Joseph Nkaissery stated that there has been very slow progress on the implementation of the Tripartite Agreement.	Daily Nation, <i>Kenya: How Kenya Sealed the Repatriation of Refugees</i> , 11 May 2016, available at http://allafrica.com/stories/201605120367.html

Event	Overview / Comment	Source
31 May 2016		
<i>Report of the National Taskforce on Repatriation of Refugees from Dadaab Refugee Complex</i> (the “ Taskforce Report ”) is published	The Taskforce Report, issued by the Kenyan authorities, sets out a population verification exercise aimed at ensuring refugee figures are accurate and states that the Tripartite Agreement has not achieved its intended purpose and reiterates that Dadaab will subsequently be closed.	<i>Report of the National Taskforce on Repatriation of Refugees from Dadaab Refugee Complex</i> , 31, May 2016, on file with NRC
25 June 2016		
Tripartite Commission announces that the Dadaab population will be reduced by 150,000 people by the end of 2016	The parties noted that these returns would be as a result of <i>voluntary</i> returns to Somalia, relocation of non-Somali refugees, the deregistration of Kenyan citizens who had registered as refugees, and a population verification exercise.	The UNHCR, <i>Joint Communiqué: Ministerial Tripartite Commission for the Voluntary repatriation of Somali Refugees from Kenya to Somalia</i> , 25 June 2016, available at http://goo.gl/gpiazz
4 July – 10 August 2016		
A population verification exercise is undertaken in the Dadaab refugee camps by the UNHCR	The exercise involved cross-checking information provided by refugees registered in Dadaab with the information available to the Kenyan Government and the UNHCR, and deregistering individuals who did not present themselves during the process. The exercise, carried out by the UNHCR, found that only 25 per cent of the refugees in Dadaab were willing to return.	The UNHCR, <i>Dadaab Refugee Camps, Kenya: UNHCR Dadaab Bi-Weekly Update</i> , 01-15 September 2016, available at http://goo.gl/1rJDUUp Amnesty International, <i>Nowhere Else To Go: Forced Returns of Somali Refugees from Dadaab Refugee Camp, Kenya</i> , 14 November 2016, available at https://goo.gl/BGhnWE
July 2016		
The cash grant is increased	In July 2016, the average cash grant provided by the UNHCR and partners was increased to \$200 per person travelling by road, and \$150 per person travelling by air (with an extra \$30 provided to persons with specific needs), with a further \$200 upon arrival in Somalia. In order to assist with initial reintegration, each returning family will also be supported with a \$200 per family monthly payment for six months to help cover basic needs.	HRW, <i>Kenya: Involuntary Refugee Returns to Somalia</i> , 14 September 2016, available at https://goo.gl/CRWmtM The UNHCR, <i>UNHCR appeals for additional \$115 million for voluntary return, reintegration of Somali refugees from Dadaab camp</i> , 26 July 2016, available at http://goo.gl/pgLqZJ
July – August 2016		
MSF survey undertaken in Dadaab’s Dagahaley camp	The survey showed that: <ul style="list-style-type: none"> • Eighty-three per cent of respondents rated Somalia as “very unsafe” • Ninety-seven and a half per cent rated the risk of forced recruitment into armed groups in Somalia as high • Ninety-seven per cent rated the risks of sexual violence in Somalia as high 	MSF, <i>Dadaab to Somalia: Pushed Back Into Peril</i> , October 2016, pp.2-3, available at http://goo.gl/JjQbhE
August 2016		
Authorities in Somalia’s Lower Juba State halt the return of 1,100 Somalis from Kenya due to lack of humanitarian assistance	The authorities based this decision on the following concerns: <ul style="list-style-type: none"> • the security situation in an already volatile area; • whether the return package was sufficient to allow returnees to fully integrate; and • the likelihood of most returnees going to already overstretched and under-resourced IDP camps. 	Amnesty International, <i>Nowhere Else To Go: Forced Returns of Somali Refugees from Dadaab Refugee Camp, Kenya</i> , 14 November 2016, available at https://goo.gl/hCSC9b
August 2016		
Humanitarian appeal just 34 per cent funded as of August 2016	The international humanitarian response in Somalia is limited.	UN Office for the Coordination of Humanitarian Affairs (OCHA), <i>Somalia: Humanitarian Dashboard, August 2016</i> , 29 September 2016, available at http://goo.gl/gwxhkr

Event	Overview / Comment	Source
14 September 2016		
HRW publishes <i>Kenya: Involuntary Refugee Returns to Somalia</i>	Report suggests that Kenya's Repatriation Process does not meet international standards for voluntary refugee return.	HRW, <i>Kenya: Involuntary Refugee Returns to Somalia</i> , 14 September 2016, available at https://goo.gl/dJ8uL4
22 September 2016		
UK announces that it will provide an additional GBP 20 million to help repatriation of refugees from Kenya to Somalia	The new support is to ensure that refugees who wish to return home to Somalia have the support and livelihoods in place to ensure their safe, long-term resettlement in Somalia. Of the GBP 20 million, GBP 4 million will be spent in Kenya to identify and register Somali refugees who want to return, and provide safe routes of transport from Kenya. The remainder of the funds will go into providing shelter, hygiene kits and the essentials for people to return and resume a normal life in Somalia.	British High Commission Nairobi, <i>UK increases support for voluntary returns of Somali refugees from Kenya</i> , 22 September 2016, available at https://goo.gl/41c23Y
3 October 2016		
Amnesty International publishes <i>Report 2015/2016 for Somalia</i>	The report assesses the state of human rights in Somalia in 2015.	Amnesty International, <i>Report 2015/2016 for Somali</i> , 3 October 2016, available at https://goo.gl/ZcV1HF
October 2016		
NRC publishes a position paper: <i>Dadaab's broken promise</i>	The paper argues why the proposed deadline to close the camps should be lifted, to better protect vulnerable Somali refugees who remain in need of international protection.	NRC, <i>Dadaab's broken promise</i> , October 2016, available at https://goo.gl/zy6cwn
October 2016		
Only \$7.2 million of the \$110 million pledged at the pledging conference in Brussels received	At the pledging conference in Brussels in September 2015, \$500 million was requested, but only \$110 million was pledged by countries to fund sustainable returns. As of October 2016, only \$7.2 million had been received.	The UNHCR, <i>In Kenya, UNHCR chief assured refugee return will not contravene international obligations</i> , 12 June 2016, available at http://goo.gl/mSzTPZ
October 2016		
As of mid-October 2016, only 27,000 people have returned to Somalia in 2016	Amnesty International and other organisations have questioned whether these returns are truly "voluntary" in light of the pressure placed upon them in Dadaab.	Amnesty International, <i>Nowhere Else To Go: Forced Returns of Somali Refugees from Dadaab Refugee Camp, Kenya</i> , 14 November 2016, available at https://goo.gl/yEVq8G
October 2016		
MSF publishes <i>Dadaab to Somalia: Pushed Back Into Peril</i> paper	The paper assesses the levels of insecurity and absence of medical care in Somalia. MSF consider that the conditions necessary for a dignified return to Somalia are simply not present.	MSF, <i>Dadaab to Somalia: Pushed Back Into Peril</i> , October 2016, available at http://goo.gl/EFz5U7
7 October 2016		
Fighting breaks out in Gaalkacyo (capital of the north-central Mudug region of Somalia)	The fighting triggered the displacement of more than 75,000 people and left more than 74 people dead and 220 injured.	UNSC, <i>Report of the Secretary-General on Somalia</i> , 9 January 2017, p.3, available at http://goo.gl/S7QX2N
20 October 2016		
Save the Children publishes <i>Thousands of Vulnerable Children at Risk as Closure of World's Largest Refugee Camp Looms</i>	The report provides details on the potential risk to refugee children of violence, forced recruitment and separation from their families by the planned closure of Dadaab.	Save the Children, <i>Thousands of Vulnerable Children at Risk as Closure of World's Largest Refugee Camp Looms</i> , 20 October 2016, available at https://goo.gl/FjRkr9
23 October 2016		
A faction of Al-Shabaab declares allegiance to ISIL	The faction is based in the Galgala hills in Somalia's semi-autonomous Puntland region.	Reuters, <i>Small group of Somali Al-Shabaab swear allegiance to Islamic State</i> , 23 October 2016, available at http://goo.gl/hqCthp3

Event	Overview / Comment	Source
16 November 2016		
HRW publishes <i>Kenya Delays Dadaab Closure Deadline</i>	The report provides details on the Kenyan Government's decision to extend the Dadaab closure deadline.	HRW, <i>Kenya Delays Dadaab Closure Deadline</i> , 16 November 2016, available at https://goo.gl/uo6Z1R
30 November 2016		
First deadline for the proposed closure of Dadaab	An 11-member team has compiled a report on how the repatriation will be carried out. Interior Cabinet Secretary Joseph Nkaissery said the repatriation of the refugees will be done in a humane way.	Kenyan Government, <i>Statement by the Ministry of the Interior</i> , [date], on file with NRC HRW, <i>Kenya: Involuntary Refugee Returns to Somalia</i> , 14 September 2016, available at https://goo.gl/5CaSPX Amnesty International, <i>Nowhere Else To Go: Forced Returns of Somali Refugees from Dadaab Refugee Camp, Kenya</i> , 14 November 2016, available at http://goo.gl/ibYQX7 JURIST, <i>Amnesty urges Kenya to halt closure of refugee camp</i> , 15 November 2016, available at http://goo.gl/cmEYR3
November – December 2016		
Levels of acute malnutrition in Somalia increase	Surveys conducted between November and December 2016 by FSNAU indicate that 363,000 children are acutely malnourished, including 71,000 who are severely malnourished and face increased risk of morbidity and death.	FSNAU and FEWSNET, <i>Nearly 3 million people in Somalia face crisis and emergency acute food insecurity</i> , 2 February 2017, available at http://goo.gl/dwjWbc
December 2016		
FSNAU and the Famine Early Warning Systems Network conduct a countrywide seasonal assessment	More than half of the population of Somalia (an estimated 6.2 million Somalis) are facing acute food shortages, of whom more than 2.9 million are in "emergency" and "crisis" situations.	FSNAU and FEWSNET, <i>Nearly 3 million people in Somalia face crisis and emergency acute food insecurity</i> , 2 February 2017, available at http://goo.gl/Mx2deF
January – December 2016		
Somalia held as most conflict-affected country in Africa	Of the large-scale crises in Africa, Somalia had almost three times the number of violent events compared with the next three most conflict-affected states (Libya, South Sudan and Nigeria).	Armed Conflict Location & Event Data Project (ACLED), <i>Conflict Trends (No. 52): Real-Time Analysis of African Political Violence</i> , October 2016, available at http://goo.gl/Vs5fJx ACLED, <i>Conflict Trends (No. 55): Real-Time Analysis of African Political Violence</i> , February 2017, available at http://goo.gl/7oiy2P
2017		
Index for Risk Management Country Risk Profile published	In its 2017 Country Risk Profile, the Index For Risk Management ranked Somalia as the highest-risk country globally, along with its highest possible rating for "Projected Conflict Risk" and "Current Highly Violent Conflict Intensity".	Index For Risk Management, <i>INFORM Country Risk Profile Version 2017 (Somalia)</i> , p.1, available at http://goo.gl/xdir46
8 February 2017		
Somalia elects President Mohamed Abdullahi Mohamed "Farmajo" concluding the electoral process in Somalia	In a statement on the Somalia election, UNSC welcomed the election of President Farmajo, strongly condemned recent Al-Shabaab attacks that attempted to disrupt the political process in Somalia, and called upon President Farmajo to pay urgent attention to the immediate risk of famine, take active steps to prevent it, and address the consequences of the severe drought in Somalia.	UNSC, <i>Statement, Welcoming Election of New President in Somalia, Stresses Urgent Need to Prevent Famine, Address Drought's Consequences (SC/12712)</i> , 10 February 2017, available at https://goo.gl/DQxHiN BBC, <i>Somalia's Mohamed Abdullahi Farmajo chosen as president</i> , 8 February 2017, available at http://goo.gl/VZS2Fh

Event	Overview / Comment	Source
9 February 2017		
The Dadaab Decision: the High Court of Kenya blocks the Kenyan Government's bid to close Dadaab in judgment of <i>Kenya National Commission on Human Rights v Attorney General</i> [2017] eKLR	The Court ruled that the decision to close Dadaab in May 2017 is tantamount to an act of group persecution, and, consequently, an order of certiorari is issued to quash the directives dated 10 May 2016 and 6 May 2016, respectively, and an order of Mandamus is issued to reinstate and operationalize the DRA.	Judgment, available at http://goo.gl/TCFMdn
March 2017		
Kenya launches an appeal for Europe to take more Somali refugees	In addition to voluntary repatriation, the other internationally recognised durable solutions to camp closure are reintegration in the host nation or resettlement in a third country. Kenya has appealed to Europe to take more Somali refugees, thereby considering resettlement as a possible alternative to repatriation.	EBL News, <i>Kenya urges Europe to 'share burden' in Somali Refugee Crisis</i> , 24 March 2017, available at https://goo.gl/nC7Pbf
25 March 2017		
IGAD, <i>Nairobi Declaration on Somali Refugees</i>	A declaration published following the Special Summit on 25 March 2017 in which the heads of state and governments declared they would pursue a regional approach to deliver durable solutions for Somali refugees, and create an enabling environment for safe, sustainable and voluntary return and reintegration of Somali refugees.	IGAD, <i>Nairobi Declaration on Somali Refugees</i> , 25 March 2017, available at https://goo.gl/18g4on
10 May 2017		
International conference on Somalia held in London	<p>Co-chaired by British Prime Minister Theresa May and the United Nations Secretary-General Antonio Guterres, the conference was also attended by heads of state of East African nations, senior officials from international organisations and other key partners.</p> <p>Participants in round-table discussions during the conference considered how to drive forward durable solutions for refugees in the region while addressing ongoing protection, assistance and other response needs. It was agreed that this can be achieved by demonstrating solidarity and sharing responsibility, including jointly providing resettlement opportunities for refugees in need, with most refugees eventually returning voluntarily, in conditions of safety and dignity, to their homes.</p> <p>As called upon in the New York Declaration, the UNHCR was encouraged to continue to develop, in consultation with states and relevant partners, modalities for the application of the CRRF to a range of specific refugee situations in both the pilot and other countries. In this respect, participants look forward to the High Commissioner's proposals for a Global Compact for Refugees as requested by the New York Declaration.</p>	The UNHCR, <i>The 2017 London Somalia Conference: Supporting Refugees and Their Host Communities in the Horn and East Africa</i> , 15 May 2017, available at http://goo.gl/de9wkE

APPENDIX B:

DADAAB'S DEPENDENCE ON INTERNATIONAL AID

1. Food

- Dadaab is reliant on a number of agencies with respect to the provision and distribution of food rations. Food assistance is mainly provided by CARE International in Kenya, NRC, Save the Children UK and WFP⁵¹⁶ in the form of general Food Distributions (“GFD”), which ensures food is provided to households to make up for the difference between their food consumption requirements and what they are able to provide for themselves. In Dadaab, all refugees receive GFD rations for their daily nutritional and caloric intake.⁵¹⁷ Special nutrition products are also supplied to pregnant women, nursing mothers and young children to prevent malnutrition.
- Food is distributed through the GFD in two cycles that fall during the first and third weeks of each month. Refugees collect food at the Food Distribution Points (“FDP”) situated in each of the camps. The fingerprints of beneficiaries are verified before they collect their food assistance.⁵¹⁸
- Although food rations provided during the GFD are designed to last a whole cycle of approximately 15 days, the food often does not last this long. As a consequence, families employ various coping mechanisms to ensure they survive until the next distribution cycle. Such coping mechanisms include borrowing from one’s neighbours, taking food items on credit, reducing the amount of food cooked or skipping meals.⁵¹⁹ The refugees’ dependence on such rations is an example of one of the ways in which refugees in Dadaab struggle to achieve self-reliance.

2. Water and Sanitation

Several agencies share the responsibility of water management and sanitation, including CARE International in Kenya, Welthungerhilfe, NRC, OXFAM, the UNHCR and the National Council of Churches of Kenya.⁵²⁰ On average, the UNHCR supplied 31.8 litres of water per day per capita from 29 boreholes to the refugee population in Dadaab. Twenty-six of these boreholes operate on a Solar PV – Diesel hybrid system. The water is distributed to refugees through 909 tap stands scattered around the five camps.⁵²¹ Improvements in the availability of water and sanitation have been observed between 2011 and 2015. For example, in 2011 the Ifo camp was only able to provide 12.4 litres of water per person, per day, which increased to 22 litres in 2015.⁵²²

3. Shelter

Most Dadaab inhabitants live in tents or “T-Shelter” structures comprising a timber frame and canvas cover, built and maintained by a number of external agencies.⁵²³ Unfortunately, such structures are temporary, with tents having a 6 to 7 month lifespan. More permanent structures, such as mud block structures, have been prohibited by the Kenyan Government. Therefore, it is the responsibility of external charities to replace and repair these structures periodically, in addition to building more to accommodate new arrivals.⁵²⁴

4. Education

African Development and Emergency Organisation, CARE International in Kenya, Danish Refugee Council, FilmAid International, The Lutheran World Federation,

⁵¹⁶ Operational Portal, Refugee Situations, available at <http://data.unhcr.org/horn-of-africa/region.php?id=3>.

⁵¹⁷ World Food Programme, *Vouchers for food assistance in Kenya's refugee camps*, March 2015, available at <https://data2.unhcr.org/en/documents/download/32031>.

⁵¹⁸ UNHCR, *Dadaab Update 15/13 – Refugee Camps in Garissa County, Kenya*, 15 November 2013, available at <https://data2.unhcr.org/en/documents/download/31873>.

⁵¹⁹ UNHCR, *Joint Assessment Mission – Kenya Refugee Operation*, June-July 2014, available at <http://www.unhcr.org/54d3762d3.pdf>.

⁵²⁰ Operational Portal, Refugee Situations, available at <http://data.unhcr.org/horn-of-africa/region.php?id=3>.

⁵²¹ UNHCR, *Dadaab bi-weekly update*, 16-28 February 2017, available at <http://goo.gl/XbgwLW>.

⁵²² UNHCR, *Refugees in the Horn of Africa: Somali Displacement Crisis, 2011*, available at <http://data.unhcr.org/horn-of-africa/regional.php>.

⁵²³ External agencies include: Norwegian Refugee Council and International Organisation for Migration; available at <http://goo.gl/Jy6hqN>.

⁵²⁴ UNHCR, *Refugees in the Horn of Africa: Somali Displacement Crisis, 2011*, available at <http://data.unhcr.org/horn-of-africa/regional.php>.

NRC, the UNHCR, United Nations Children’s Fund and Windle Trust Kenya share the responsibility of providing education across Dadaab.⁵²⁵ Despite continued efforts, in 2015 fewer than 50 per cent of school-aged children were enrolled in primary school, and only 8 per cent in secondary school.⁵²⁶ In addition to this, the three high schools in Dadaab (which taught Kenyan curriculum) were forced to close due to lack of funding.⁵²⁷

5. Health

Access to healthcare and the availability of treatment are particular causes for concern. Dadaab depends on external providers, such as MSF, African Development and Emergency Organisation, Danish Refugee Council, FilmAid International, the Deutsche Gesellschaft für Internationale Zusammenarbeit, IOM, International Rescue Committee, the UNHCR and the National Council of Churches of Kenya.⁵²⁸ The ability of external parties to access the camp depends on the security situation therein. In 2015, two of the four health posts in the Dagahaley camp had to be closed for security reasons, with antenatal care suspended. There are a number of hospitals within the camps, but they are overcrowded, with one managing 454 appointments a day. There are 28,000 individuals per each clinic in the Hagadera camp.⁵²⁹

⁵²⁵ Operational Portal, Refugee Situations; available at <http://data.unhcr.org/horn-of-africa/region.php?id=3>.

⁵²⁶ UN, Africa Renewal, *How the world's top executives are preparing students in Dadaab for leadership*; available at <http://goo.gl/YoQJcj>

⁵²⁷ Oxford Journal of Refugee Studies, *Refugee Camps or Cities? The Socio-economic Dynamics of the Dadaab and Kakuma Camps in Northern Kenya*; available at <https://goo.gl/EQvAkX>.

⁵²⁸ Operational Portal, Refugee Situations; available at <http://data.unhcr.org/horn-of-africa/region.php?id=3>.

⁵²⁹ UNHCR, Hagadera Camp Profile, Dadaab Refugee Camps, Kenya; available at <https://data2.unhcr.org/en/documents/download/32022>

APPENDIX C:

CONSEQUENCES OF BREACHING INTERNATIONAL AND REGIONAL LAW

TERMS OF THE TREATIES PROVIDING FOR CONSEQUENCES OF BREACH

1951 Convention and 1967 Protocol

There are no provisions in either instrument concerning the consequences of breach of a provision. State Parties may denounce the 1951 Convention and/ or the 1967 Protocol by a written notification to the Secretary-General of the United Nations, the relevant instrument ceasing to apply to the denouncing State Party one year from the date of notification.⁵³⁰

Any dispute about the interpretation or application of the 1951 Convention or the 1967 Protocol that cannot be settled by other means shall be referred to the International Court of Justice, at the request of any State Party to the dispute. Under Article 36 of the Rome Statute, the ICJ would in principle have the jurisdiction to issue a binding ruling in such a case.⁵³¹

OAU Convention

There are no provisions concerning the consequences of breach of a provision. State Parties may denounce the OAU Convention by a written notification to the Administrative Secretary-General, the OAU Convention ceasing to apply to the denouncing State Party one year from the date of notification.⁵³²

Any dispute about the interpretation or application of the OAU Convention that cannot be settled by other means shall be referred to the Commission of Mediation, Conciliation and Arbitration of the OAU, at the request of any State Party to the dispute.⁵³³ This commission does not have the power to make orders that bind parties to a dispute and therefore, questions of enforcement relating to the OAU Convention ultimately fall to be decided in the political sphere.

African Charter

The African Charter established the African Commission, which has a mandate to ensure the protection of human rights under conditions laid down by the African Charter, and to interpret the provisions of the African Charter at the request of a State Party, an institution of the OAU or “an African Organization recognised by the OAU”.⁵³⁴ Ultimately, cases of serious breach will be reported to the Assembly of the African Union for consideration, which may lead to the establishment of an investigatory committee.⁵³⁵ Whether the Assembly of the African Union decides to impose sanctions against a defaulting State Party will be a political decision.

The International Criminal Court

The Rome Statute provides that a crime against humanity, which is subject to the ICC’s jurisdiction, includes deportation or forcible transfer of a population, meaning “forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law”.⁵³⁶

Further, the action must be part of a “widespread or systematic attack directed against any civilian population, with knowledge of the attack”, which means “a course of conduct involving the multiple commission of acts [...] against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack”.⁵³⁷

Kenya is currently a State Party to the Rome Statute. However, the African Union has urged member states to withdraw from the ICC, particularly following the prosecution of Kenyan president Uhuru Kenyatta for crimes against humanity at the ICC relating to political

⁵³⁰ 1951 Convention, Art. 44; 1967 Protocol, Art. IX.

⁵³¹ 1951 Convention, Art. 38; 1967 Protocol, Art. IV.

⁵³² OAU Convention, Art. XIII.

⁵³³ *Ibid.*, Art. IX.

⁵³⁴ African Charter, Arts. 30, 45.

⁵³⁵ *Ibid.*, Art. 58.

⁵³⁶ International Criminal Court, ICJ Statute, 1 July 2002, Arts. 7(1)(d), 2(d), available at <https://goo.gl/CzhUkE>.

⁵³⁷ *Ibid.*, Arts. 7(1), 7(2)(a).

violence during the 2007 elections, though he was cleared of all charges. This resentment towards the ICC culminated in February 2017, when the African Union passed a non-binding resolution encouraging member states to withdraw from the ICC, accusing the ICC of unfairly targeting Africans for prosecution. Whilst Kenya has not yet withdrawn, it has signalled that it may withdraw in the future.⁵³⁸

The current policy of the Kenyan Government would appear to be unlikely to amount to a crime against humanity subject to the jurisdiction of the ICC. On the plain meaning of the words above, the element of a “widespread or systematic attack” is not present. If, however, the Kenyan Government were to adopt measures, such as the forcible expulsion of all Somali asylum seekers from Kenya, the analysis may be different. However, even if the Kenyan Government’s actions were to meet the *prima facie* definition of a crime against humanity in the Rome Statute, a prosecution would not be undertaken unless the crime were “of sufficient gravity to justify further action by the Court”.⁵³⁹

Contravention of the Convention Against Torture

Kenya is a party to the Convention Against Torture. There is the possibility that the Kenyan Government may breach its obligations under the Convention Against Torture if the proposed repatriation policy is pursued, and if Somali refugees are returned to Somalia and face the threat of torture.

The Convention Against Torture provides as follows:

1. No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights⁵⁴⁰

As seen from the above, the Convention Against Torture is drafted specifically to cover the case where

a person is returned to the risk of torture as opposed to, for example, civil unrest or other dangers; so it may not assist many refugees returned to Somalia where they face dangers other than torture.

Any dispute about the interpretation or application of the Convention Against Torture that cannot be settled by other means shall be referred to the ICJ, at the request of any party to the dispute.⁵⁴¹ Under Article 36 of the Rome Statute, the ICJ would in principle have the jurisdiction to issue a binding ruling in such a case.⁵⁴²

Notably, if a State Party considers that another State Party is not giving effect to the provisions of the Convention Against Torture and the matter is not resolved within three months by mutual discussion, it may refer the matter to the Committee against Torture (established by the Convention Against Torture), which may make a report to the United Nations.⁵⁴³ As in the case of the African Charter, the referral of such a report to the United Nations means that the question of any sanctions for non-compliance with the Convention Against Torture would, ultimately, be a political one.

State Parties may denounce the Convention Against Torture to the UN Secretary-General with the denunciation taking effect one year after notification.⁵⁴⁴

⁵³⁸ The Reporter, *ICC’s biggest challenge in reversing African mass withdrawal*, 20 May 2017, available at <http://goo.gl/T2TAFx>

⁵³⁹ *Ibid.*, Art. 17(1)(d).

⁵⁴⁰ Convention Against Torture, Art. 3.

⁵⁴¹ *Ibid.*, Art. 30.

⁵⁴² Rome Statute, Art. 36.

⁵⁴³ Convention Against Torture, Art. 21.

⁵⁴⁴ Convention Against Torture, Art. 31.

APPENDIX D:

SUBMISSIONS OF KNHCR AND THE KENYAN GOVERNMENT IN THE *KNHCR VS ATTORNEY GENERAL* CASE

The petitioners' arguments claimed that the revocation of *prima facie* refugee status of Somali refugees failed to consider information regarding country of origin and lacked stakeholders' input and, therefore, offended the provisions of Article 47 of the Constitution, which requires lawful, reasonable and fair administrative action.

The petitioners also submitted that equating refugees to criminals exposed them to the dangers of persecution and discrimination, and that the threatened closure of the camps and forced repatriation violated various international legal instruments protecting refugees and prohibiting torture, cruelty, and degrading and inhuman treatment.

Before addressing the issues, the Court explained the current state of modern refugee law and listed the following international and regional instruments relating to refugees upon which its decision relies:

- 1951 Convention relating to the Status of Refugees
- 1967 Optional Protocol relating to the Status of Refugees
- Universal Declaration of Human Rights (art. 14)
- American Declaration on the Rights and Duties of Man (art. 27)
- American Convention on Human Rights (art. 22)
- Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama (Cartagena Declaration)
- African [Banjul] Charter on Human and Peoples' Rights (art. 12)
- OAU Convention Governing the Specific Aspects of the Refugee Problem in Africa
- Arab Charter on Human Rights (art. 28)
- Cairo Declaration on Human Rights in Islam (art. 12)
- European Convention on Human Rights (arts. 2, 3, and 5)

- Council Regulation EC No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national
- Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted
- Convention Against Torture (art. 3)
- African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa
- Convention on the Rights of the Child (art. 22)⁵⁴⁵

The Court also looked to regional and domestic Court opinions interpreting the right to life and freedom from torture when opining on the prohibition against refoulement, noting that the principle of non-refoulement prohibits not only the removal of individuals but also the mass expulsion of refugees.⁵⁴⁶

Non-Refoulement and Prevention of Torture

KNCHR submitted that the closure of the Kakuma and Dadaab refugee camps and the subsequent forced return of refugees to their respective countries of origin was completely at variance with Kenya's non-refoulement obligation.

In particular, KNCHR submitted that the proposed repatriation upon closure of the camps would necessarily be forcible and therefore illegal under international law as a form of refoulement. The non-refoulement obligation applied to all refugees, including those who had been recognised as such – whether through individual procedures or on a *prima facie*

⁵⁴⁵ Kenya National Commission on Human Rights, [2017] eKLR, p.7.

⁵⁴⁶ *Ibid.*, p. 8.

basis – and to asylum seekers whose status had not yet been determined.

KNCHR acknowledged that Article 33(2) of the 1951 Convention allowed for lawful refoulement in two limited circumstances in respect of a refugee for “whom there are reasonable grounds for regarding as a danger to the community...or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country”, but argued that the provision must be applied only on an individual and exceptional basis. Furthermore, Article 33(2) of the 1951 Convention had been overridden by Article II(3) of the OAU Convention (which permits no exceptions to the non-refoulement prohibition) and had, in large measure, been succeeded by international human rights law protections, which are absolute.

KNCHR submitted that the exceptions to the principle of non-refoulement should 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, and the finding of dangerousness must be based on an individual assessment and reasonable grounds and, therefore, supported by reliable and credible evidence. With regard to proportionality, refoulement must be a proportionate response to the perceived danger, which means 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 minimising the danger must have been considered. Finally, the danger to the country of refuge must outweigh the risk to the refugee upon refoulement.

Furthermore, Article 32 of the 1951 Convention contained a number of procedural safeguards in case of expulsion on public order or national security grounds, namely that the expulsion “of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law”.

KNCHR also directed the Court’s attention to other protections afforded to refugees under international human rights law, such as those that appear in the Convention Against Torture and the ICCPR, which prohibit (*inter alia*) the deportation of a person that will result in that person facing a real risk of torture or other cruel, inhuman or degrading treatment or

punishment and threats to life or other forms of serious harm.⁵⁴⁷ The prohibitions on removal found in the above instruments are absolute and without exceptions, even in emergency situations. Thus, KNCHR submitted, even though Article 33(2) of the 1951 Convention permits lawful refoulement in the very limited circumstances described above, refoulement protection under international human rights law would still apply and need to be respected. Overall, for the purposes of Kenyan law, the prohibition on refoulement of refugees to threats to their life or freedom was absolute and did not permit exceptions, even for persons posing a threat to national security.

Finally, KNCHR stated that the Kenyan Government’s directive raised concerns about collective expulsion. KNCHR submitted that collective expulsion was also a violation of human rights law, referring to Article 12(5) of the African Charter, which prohibits the mass expulsion of non-nationals. KNCHR also cited international jurisprudence in support of its argument 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.

Voluntary repatriation

KNCHR submitted that repatriation of refugees to their countries of origin could only be carried out voluntarily, a principle safeguarded in Article V of the OAU Convention, or pursuant to the cessation of refugee status under Articles 1C(5) or (6) of the 1951 Convention. In particular, Article V of the OAU Convention provides that: (a) the essentially voluntary character of repatriation should be respected; (b) necessary arrangements should be made for safe return; (c) upon return, the refugee is to receive full rights and privileges of a national; (d) he or she should not be penalised for having left their country of origin; and (e) assurances should be given that the new circumstances prevailing in the country of origin will enable him or her to return without risk and to take up a normal and peaceful life.

It followed, therefore, that repatriation carried out through threats, intimidation and coercion could not be said to be voluntary. The proposed renegotiation of the Tripartite Agreement so as to expedite the process of repatriation would mean assigning specific

⁵⁴⁷ Convention Against Torture, Art. 3(1); ICCPR, Art. 7.

time limits to the return of the refugees back to Somalia, thereby eroding the voluntariness of the process.

In respect of the cessation of refugee status, KNCHR submitted that this was only applicable once it had been judged that the circumstances in the country of origin had fundamentally and durably changed so as to permit the cessation of refugee status.

Violation of the Constitution

The petitioners also alleged that the Kenyan Government's decisions/ directives violated the Constitution, in particular:

- i. Article 10 (requirement for public participation in governance)
- ii. Article 27 (equality and freedom from discrimination)
- iii. Article 28 (right to human dignity)
- iv. Article 47 (right to fair administrative action)

The above constitutional rights and protections found in the Bill of Rights (Articles 27, 28 and 47) could only be limited under Article 24 and the Kenyan Government had failed to demonstrate that the actions concerned fell within the permitted limitations of Article 24. Relying on phrases such as 'insecurity' and 'huge economic burden' could not justify the exposure of thousands of lives to danger. The Kenyan Government had not submitted any evidence that the best way to end terrorism in Kenya was through the closure of the refugee camps.

Disbandment of the DRA

Finally, disbanding the DRA was not preceded by public participation and the decision was *ultra vires* the powers of the Minister because the Department could only be disbanded by way of a legislative process.

The Kenyan Government's Defence

The Kenyan Government submitted that the decisions/ directives were informed by two factors: (a) the cessation of the circumstances giving rise to the refugee status (Articles 1C(5) and (6) of the 1951 Convention); and (b) justifiable emergent challenges (overcrowding in the camps, terrorist attacks, huge

economic costs, human trafficking, proliferation of arms, strained government resources and insecurity) that had rendered Kenya incapable of continued hosting of the refugees. The Kenyan Government submitted that the criteria for refugee status in Section 3 of the Refugees Act (namely persecution for reasons of race, religion, sex, nationality, membership of a particular social group or political opinion, external aggression, occupation, foreign domination or events disturbing public order) no longer existed in Somalia and that the situation in Somalia, Uganda, DRC and Burundi had normalised. The Kenyan Government asked the Court to take judicial notice that Somalia now had a federal government and that the African Union Mission in Somalia ("**AMISOM**") had liberated and stabilised the country.

The Kenyan Government also relied on the exception to the rule of non-refoulement in Article 33(2) of the 1951 Convention, referring to various intelligence reports that several terror attacks in Kenya had been planned in Dadaab. The Kenyan Government did not provide further details on those reports in its written submissions.

With regard to the disbandment of the DRA, the Kenyan Government submitted that it was not within the Court's purview to supervise the administrative arrangement of institutions performing specific executive duties.

The Kenyan Government also justified its proposed actions as reasonable limitations under Article 24 of the Constitution (circumstances in which a right or fundamental freedom may be limited).

KNCHR replied that the measures taken by the Kenyan Government were draconian and would expose the lives of innocent refugees to the dangers of trauma, torture, harm and possible loss of life, and that the Kenyan Government's proposed refoulement did not meet the proportionality test required to justify a limitation under Article 24 of the Constitution. KNCHR also argued that the situation in Somalia remained volatile and that the allegedly improved situation cited by the Kenyan Government was not fundamental, enduring and stable and therefore did not warrant the invocation of the principle of cessation of circumstances. The planned repatriation was also discriminatory as it only targeted refugees of Somali origin.

REFUGEES BILL 2016

The Refugees Bill 2016 (the “**Refugees Bill**”) is awaiting presidential assent. The Refugees Bill repeals the Refugees Act Cap 173 in its entirety and creates a new regime for the administration of refugee affairs.

The Refugees Bill establishes three bodies charged with the management of refugee affairs. These are:

- (a) Kenya Refugee Repatriation and Resettlement Commission (the “**Commission**”)
- (b) the Secretariat for Refugee Affairs (the “**Secretariat**”)
- (c) a Refugee Status Appeal Board (the “**Board**”)

The Commission is established under the Refugees Bill and its functions include:

- (a) formulation of national policy on matters relating to refugees in accordance with international standards
- (b) ensuring that the rights of refugees are upheld in accordance with the international obligations
- (c) making declarations of refugee status in respect of large scale influxes of refugees
- (d) ensuring that adequate and appropriate facilities and services are provided for the reception and care of refugees
- (e) proposing and ensuring the provision of durable solutions for refugees

The Secretariat is empowered to handle all operational aspects of protection and assistance to refugees. It shall comprise the office of the Commissioner whose functions include:

- (a) to assist the Eligibility Committee (the “**Committee**”) to undertake individual refugee status determination of persons who are not part of an influx and therefore do not have *prima facie* refugee status;

- (b) to work with the UNHCR in finding durable solutions for refugees
- (c) to receive applications for refugees status and submit them to the Committee
- (d) to register applications for refugee status and maintain a register of refugees
- (e) to co-ordinate the provision of adequate facilities and services for the reception and care of refugees within Kenya
- (f) to ensure that an applicant for refugee status is not ordered to leave the country before his or her claim for refugee status has been determined
- (g) to implement and communicate with applicants the decisions on their status

The Board shall hear and determine appeals against decisions of the Secretariat with regard to the rejection or cancelation of refugee status.

A person is considered a refugee if:

- (a) because of a well-founded fear of being persecuted for reasons of race; religion; nationality; membership of a particular social group, political opinion or sex the person is:
 - i) outside the country of his or her nationality and unable or unwilling to avail himself or herself of the protection of that country, or
 - ii) without a nationality, outside the country of his or her former habitual residence, and unable or unwilling to return to that country
- (b) because of external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his or her country of origin or nationality, he or she is compelled to leave his or her place of habitual residence in order to seek refuge in another place outside his country of origin or nationality, or

- (c) the person is a member of a class of persons declared to be refugees by the Commission

The Commission is also empowered to declare a class of persons as refugees and may at any time amend or revoke such declaration.

The Refugees Bill sets out the procedure for determination of refugee status. Upon entry into Kenya, an application is made to the Secretariat which shall be forwarded to the Commissioner. The Commissioner shall on review of the application invite the applicant to appear before him and provide evidence. The Commissioner shall then communicate his or her decision to the applicant in writing and, in the event of a refusal, set out reasons for the decision.

An authorised officer shall interview the applicant in language(s) he/she understands and prepare a transcript of the interview, which shall be signed by the applicant. In the event that the applicant declines to sign, the reasons for declining shall be noted. The authorised officer shall, within 30 days of the interview, transmit to the Commissioner the decision on whether to grant refugee status, together with the transcript of the interview and evidence produced.

The Commissioner shall, upon receipt of the above, submit it to the Committee and ensure the Committee convenes and reviews the decision within 60 days from date of application.

Any person aggrieved with the decision of the Committee may, within 30 days of the decision, appeal to the Board. Any person aggrieved with the decision of the Board may appeal to the High Court.

The Commissioner shall have the power to cancel refugee status where:

- (a) a person recognised as a refugee has fraudulently misrepresented or omitted material facts which, if known, would have changed the decision to grant refugee status
- (b) new evidence becomes available that a person should not have been recognised as a refugee

The Commissioner may revoke refugee status where there are reasonable grounds for regarding such a person as a danger to the community provided that the revocation does not result in the revocation of a member of the family of those who derive their status from that person.

The Refugees Bill makes provisions for the special protection of women, children, persons with disabilities and persons who have suffered trauma.

The following are the rights and duties of refugees as provided for in the Refugees Bill:

- (a) a refugee in possession of a valid identity card may engage in gainful employment. Refugees shall be afforded the same rights and restrictions conferred on persons who are not citizens of Kenya
- (b) right to non-refoulement
- (c) a refugee or a member of the refugee's family shall not be rejected at the border, expelled or extradited or returned from Kenya to any country where there are substantial grounds for believing that such a person would be persecuted for reasons of race, religion, nationality, membership of a particular social group, political opinion, or sex, or that life, physical integrity or freedom would be threatened owing to external aggression, occupation, foreign domination or events seriously disturbing public order
- (d) a refugee may be expelled where that the expulsion is necessary for reasons of national security or in pursuance of a decision reached after due process
- (e) a refugee residing in a designated refugee settlement area shall have free access to the use of the land for the purposes of cultivation or pasturing. The refugee shall not have a right to sell, lease or otherwise alienate. A refugee who lives outside of a designated camp may acquire or dispose of a leasehold interest in land in accordance with the applicable law
- (f) every refugee child is entitled to primary education whereas every adult refugee is entitled to adult education in accordance with the law. The cabinet secretary responsible for refugee affairs shall make rules on the post-primary education of refugees
- (g) a refugee may be issued with a work permit in accordance with the Kenya Citizenship and Immigration Act
- (h) a refugee who becomes eligible for Kenyan citizenship in accordance with the Kenya

Citizenship and Immigration Act may apply for citizenship

- (i) a refugee who enters Kenya in contravention to the procedure laid down in the law, in order to apply for recognition as a refugee, shall not be punished for it

The Refugees Bill also provides mechanisms for the following:

- (a) integration of refugees into the communities in which they have settled. This integration shall be done in cooperation with the UNHCR
- (b) voluntary repatriation. An asylum seeker or a refugee shall have a right at any time to return voluntarily to the country of his/her nationality. A refugee who leaves Kenya voluntarily shall surrender all travel documents, identity cards, permits or any other documents
- (c) the resettlement of refugees in a country outside Kenya. A refugee residing outside Kenya may also apply to be resettled in Kenya

