

KENYA AND COUNTER- TERRORISM: A TIME FOR CHANGE

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A Kenyan Muslim holds up a sign during protest against terrorism-related extraordinary renditions, Nairobi, Kenya, Friday, 14 Sept. 2007.

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INTRODUCTION

In December 2006 and January and February 2007, at least 150 people, including children¹, of 21 nationalities², were arbitrarily detained in Kenya. Many were fleeing to Kenya from the conflict in Somalia. The individuals were first held in Kenya for several weeks without charge. The majority were denied access to a lawyer, consular assistance, the ability to challenge the legality of their detention or consideration of their potential refugee status. Some former detainees have alleged that they were tortured; that the conditions of their detention amounted to cruel, inhuman or degrading treatment or punishment; and that they were interrogated by the intelligence services of foreign governments. Some of the individuals were released in Kenya or deported to their country of origin. At least 85 and potentially up to 120 individuals were 'rendered' to Somalia outside of any legal process. Four were released from Somalia to their country of origin; the remainder are thought to have been transferred to Ethiopia. To date, approximately 72 individuals are known to have been released from Ethiopia. However, the whereabouts of others remains unknown and they thus remain the victims of enforced disappearance.³

Further reports have emerged that individuals attempting to flee the conflict in Somalia were rejected at the Kenyan border. Also, reports have surfaced that there were further removals from Kenya to Somalia and Ethiopia, without due process, consideration of potential refugee status and assessment as to whether reasonable grounds existed to believe that they were at risk of torture and other cruel, inhuman or degrading treatment or punishment on removal. In addition, a Kenyan citizen, Mohamed Abdulmalik, was detained in Kenya and later surfaced in the United States' (US) detention centre at Guantánamo Bay in Cuba. He is also thought to have been subjected to a similar process of rendition, though his exact trajectory is not yet known as no independent investigation has been undertaken by the Kenyan Government, despite repeated calls for this to be done.⁴ The common thread in these cases is the invocation of national security and the threat of terrorist attack to justify these detentions and removals.

The arbitrary detentions in Kenya and the transfers to Somalia, Ethiopia and Guantánamo Bay violate a range of Kenya's obligations under international law,

¹ According to the official flight manifests of African Express Airways on 27 January 2007 eleven children were rendered from Kenya to Somalia. This manifest is annexed to Muslim Human Rights Forum's report, "Horn of Terror: Report of US-Led Mass Extraordinary Renditions from Kenya to Somalia, Ethiopia and Guantanamo Bay, January – June 2007" (6 July 2007).

² Those detained were of British, Canadian, Comorian, Eritrean, Ethiopian, Jordanian, Kenyan, Moroccan, Omani, Rwandese, Saudi, Somali, South African, Swedish, Sudanese, Syrian, Tanzanian, Tunisian, United Arab Emirates, United States', and Yemeni nationality.

³ See, for example, Muslim Human Rights Forum, *supra* note 1; Muslim Human Rights Forum, "Horn of Terror: Revised Edition" (September 2008); Amnesty International, "Horn of Africa: Unlawful Transfers in the 'War on Terror'" AI Index: AFR 25/006/2007 (June 2007); Cageprisoners, "Inside Africa's War on Terror: War on Terror Detentions in the Horn of Africa" (May 2006); Cageprisoners and Reprieve, "Mass Rendition, Incommunicado Detention, and Possible Torture of Foreign Nationals in Kenya, Somalia and Ethiopia", (22 March 2007); Human Rights Watch, "Why Am I still Here? The 2007 Horn of Africa Renditions and the Fate of those Still Missing" (October 2008).

⁴ See, for example, REDRESS, Muslim Human Rights Forum, Reprieve, Amnesty International, Cageprisoners, Human Rights Watch, ICJ-Kenya, Kenya Human Rights Commission, Kituo Cha Sheria Legal Advice Centre, OMCT, "Letter to the President of Kenya on the Rendition of the Kenyan National, Mohamed Abdulmalik, to Guantanamo Bay", 21 July 2008 at: www.redress.org/documents/Abdulmalik%20letter%20Final%20with%20logos%2021%20July%202008.pdf.

including the absolute prohibition of torture and other cruel, inhuman or degrading treatment, the absolute principle of *non-refoulement*, the absolute prohibition of enforced disappearance, the right to liberty and security of the person, the right to consular access and the right to due process. Kenya also continues to fail to meet its obligation to conduct a full, independent and impartial investigation capable of identifying and punishing those responsible for the detentions and renditions, to provide an effective remedy and full and adequate reparation to those released, and to reform its law and practice to ensure that similar detentions and removals do not take place in the future. Draft anti-terrorism legislation has been rejected by parliamentarians on the grounds that it did not comply with Kenya's international and constitutional obligations, leading some commentators to suggest that the mass arbitrary detentions and transfers out of Kenya are examples of the implementation of Kenya's counterterrorism strategies "through the backdoor".

This Report argues that one of the central reasons for the multiple violations of international law is Kenya's failure to abide by its pre-existing international human rights obligations when countering terrorism. Three central factors have contributed to this: the failure of United Nations (UN) Security Council and African Union requirements that member states adopt specific counterterrorism measures to clearly specify that states must comply with pre-existing human rights obligations; the perception that the terrorist threat faced by Kenya is actual and immediate; and its bilateral partnerships with states such as the US in the fight against terrorism which have led states such as Kenya into notoriously murky waters.

The Report is released shortly after President Barack Obama took office in the US. Already in the first days of his Presidency, President Obama ordered the halt of military commissions at Guantánamo Bay as well as calling for the closure of Guantánamo Bay and other known and secret CIA detention facilities throughout the world. He has also created a review process of the detention, transfer, trial and release of individuals held under the auspices of 'counterterrorism'. The US President's 'time for change' brings much needed hope that a shift in US policy and practice will result in states worldwide employing strategies to fight international terrorism which comply with international human rights law. But for this to occur in practice, not only the US but states such as Kenya must also reflect on their role in cooperating with the US and carrying out 'extraordinary renditions' and take urgent and positive steps to remedy and repair their involvement in such practices.

The Report concludes with key recommendations aimed at ensuring that Kenya complies with its obligations under international law, particularly in relation to the absolute prohibition of torture and cruel, inhuman or degrading treatment or punishment, in all contexts including while developing and implementing strategies to counter terrorism. It also makes a series of recommendations to the UN Security Council and Counter-Terrorism Committee, the African Union and the US as these actors have heavily influenced Kenya's approach to counterterrorism and can potentially play an influential role in working with Kenya to improve compliance with international obligations.

This Report was researched by Lorna McGregor, International Legal Advisor of REDRESS and Clara Gutteridge, Investigator of Reprieve, written by Lorna McGregor and edited by Carla Ferstman, Director of REDRESS. We are especially

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PART I: THE 2006 AND 2007 MASS ARBITRARY DETENTIONS AND DEPORTATIONS TO SOMALIA AND ETHIOPIA

The purpose of this section is to consider the detentions and removals from Kenya in 2006 and 2007 from the perspective of Kenya's international human rights obligations, particularly in relation to:

- The International Covenant on Civil and Political Rights to which Kenya acceded in 23 March 1976 (ICCPR);
- The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment which Kenya ratified on 23 March 1997 (CAT);
- The African Charter on Human and Peoples' Rights which Kenya ratified on 23 January 1992 (African Charter);
- The Convention on the Rights of the Child which Kenya ratified on 2 September 1990;
- The Convention Governing the Specific Aspects of Refugee Problems in Africa which Kenya ratified on 23 June 1992;
- The Convention relating to the Status of Refugees to which Kenya acceded on 16 May 1966.

A. MASS DETENTIONS IN KENYA

In 2006 and early 2007, reports emerged that approximately 150 individuals had been rounded up and detained in Kenya on suspicion of involvement in terrorist acts. The majority of these individuals were picked up at the Kenya/Somali border. As there has been no official investigation into the detentions, these numbers are approximate. They are the result of non-governmental organisations and lawyers accessing some of the detainees at police stations in Kenya; researching the detentions; and bringing *habeas corpus* actions in the Kenyan courts. These organisations have only been able to produce a partial account of what happened as they were denied access to other police stations where they believed other detainees may have been held and/or to view the Occurrence Books (in which all detentions should be registered). Similarly, they do not have the power to access to official documents or to require officials to testify as to the detentions.

Moreover, even though the Kenya National Human Rights Commission (KNHRC) has the right under the Kenya National Human Rights Commission Act "to investigate, on its own initiative or upon a complaint made by any person or group of persons, the violation of any human rights"⁵ and to "visit any prison or places of detention or related facilities with a view to assessing and inspecting the conditions under which the inmates are held and to make appropriate recommendations thereof,"⁶ it was also denied access to certain police stations where it was alleged that detainees were being held. In an official press release, the KNHRC noted that

⁵ Section 16(1)(a) of Act No. 9 of 2002.

⁶ Section 16(b).

in attempting to access police stations, it was “met by recalcitrant and obstructionist police officers who have denied [the KNHCR] access citing ‘orders from above’”.⁷

(1) Detention without Charge

At the time of detention, some of the individuals reported being greeted in the same manner: “Welcome Al-Qaeda”.⁸ With the exception of four individuals the charges against whom were later dropped⁹, none of the individuals detained was ever charged with any offence, in contravention of Article 9(2) of the ICCPR which requires that anyone who is arrested must be informed, at the time of arrest, of the reasons for the arrest and be promptly informed of any charges against him or her.

(2) Lack of Judicial Oversight of Detentions, Denial of Right to Habeas Corpus and Access to a Lawyer

No detainee was ever brought before a judge ‘promptly’ as required by Article 9(3) of the ICCPR.¹⁰ The obligation to bring a person arrested or detained before an independent judicial authority promptly is particularly strict because of the potential for abuse of state power and the overriding importance of the right to liberty and security of person and the presumption of innocence. While courts and international human rights bodies have determined the meaning of ‘promptness’ based on the facts and circumstances of the individual case, they have set clear upper time limits. As General Comment No. 8 of the UN Human Rights Committee sets out, “[m]ore precise time-limits are fixed by law in most States parties and, in the view of the Committee, delays must not exceed a few days”.¹¹

Even when faced with an emergency or security threats where more time might be required to collect evidence and proof or in the case of complex investigations, the very essence of the right to liberty and security cannot be undermined and therefore the strict nature of the ‘promptness’ requirement still applies. In cases in which the period of detention before being brought before a judge is expanded marginally, the individual detained must still have the right to make a *habeas corpus* application to challenge the detention and access to a lawyer.¹²

⁷ Kenya National Human Rights Commission, “Press Statement: Arbitrary Arrest and Illegal Detention by the Police of Alleged Terror Suspects” (31 January 2007).

⁸ Reprieve and Cageprisoners Interview with Mohammed Ezzouek, London (14 and 15 February 2007); *See also*, Awad Mustafa and Mohammed N Al Khan, “A Nightmare in Africa” *XPRESS* (8 April 2007) (citing the case of United Arab Emirates citizen, Kamilya Tuweni, who reported that she was received in Nairobi in the same manner).

⁹ *See*, Muslim Human Rights Forum (2008) *supra* note 3 at 22.

¹⁰ *See also*, Article 2(c) of the African Commission on Human and People’s Rights’ “Resolution on the Right to Recourse and Fair Trial” ACHPR /Res.4(XI)92 (1992).

¹¹ UN Human Rights Committee, “General Comment No. 8: Right to Liberty and Security of Persons” (30 June 1982) at para. 2. *See also*, Article 9(3) of the ICCPR and Article 2(c) of the African Commission’s Resolution on the Right to Recourse and Fair Trial *id.*; The UN Human Rights Committee, “Consideration of Reports Submitted by State Parties under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: Kenya” UN Doc. CCPR/CO/83/KEN (29 April 2005) at para. 17 (“the Committee notes with concern the differential between the time in which those accused of having committed an offence must be brought before a judge (24 hours) and the time limit that applies for a person accused of a capital offence (14 days); the latter is incompatible with Article 9(3) of the Covenant”).

¹² *Brogan and others v. United Kingdom*, European Court of Human Rights (1988).

In these cases, however, many detainees were denied access to a lawyer completely¹³ and many were denied the opportunity to challenge the legality of their detention.¹⁴ The only ones who did have access to a lawyer or the ability to challenge their detention were afforded this right because of the efforts made by the Kenyan organisation, Muslim Human Rights Forum, to access them in detention rather than because of any proactive step on the part of the Kenyan authorities. Moreover, even in the cases in which Muslim Human Rights Forum filed *habeas corpus* applications, the detainees were never produced in court. Rather, as discussed below, they were either released or transferred out of Kenya after several weeks of detention. As such, no detention was ever subject to the required periodic judicial review.¹⁵ In this respect, the detentions were both unlawful and arbitrary¹⁶ and contravened the fundamental right to liberty and security of persons under international law.¹⁷

(3) Denial of Access to Family or Consular Officials

The majority of detainees were also denied contact with family members. The African Commission on Human and Peoples' Rights has found that, "detaining individuals without allowing them contact with their families and refusing to inform their families of the fact and place of the detention of these individuals amount to inhuman treatment both of the detainee and their families".¹⁸

The foreign nationals detained in Kenya were also denied access to their consulates in violation of international law. Under Article 36(1) of the Vienna Convention on Consular Relations 1963:

- (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
- (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any

¹³ See, *International Pen and Others v. Nigeria*, African Commission on Human and People's Rights, ACHRP (1988) at para. 83 (setting out that access to a lawyer must be provided within a few days of detention).

¹⁴ As required by Article 9(4) of the ICCPR.

¹⁵ *A. v. Australia*, UN Human Rights Committee, UN Doc. CCPR/C/59/D/560/1993 (1997) at para. 9.3 (noting that, "[t]he Committee observes however, that every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed. In any event, detention should not continue beyond the period for which the State can provide appropriate justification.")

¹⁶ *Hugo van Alphen v. The Netherlands*, UN Human Rights Committee UN Doc. CCPR/C/39/D/305/1988 (1990) at para. 5.8 (noting that, "[t]he drafting history of article 9, paragraph 1, confirms that "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances.")

¹⁷ Articles 3 and 9 of the Universal Declaration of Human Rights; Article 9 of the ICCPR and Article 6 of the African Charter.

¹⁸ *Law Office of Ghazi Sulaiman v. Sudan*, African Commission on Human and People's Rights ACHPR (1994) at para. 44.

communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement.

Article 36(I) has been interpreted to confer rights on both the national to access his or her consulate and the state to access his or her national.¹⁹

In the cases in Kenya, the Canadian²⁰ and Swedish Embassies²¹ initially managed to meet with their nationals but were later denied access.²² The British Foreign and Commonwealth Office was also denied access to its nationals, despite attempts to do so.²³ Eritrea equally attempted to access three of its citizens but was unsuccessful.²⁴

However, the US Federal Bureau of Intelligence (FBI) confirmed that it had interviewed its own citizen, Amir Mohammed Meshal, in Nairobi and according to the New York Times, “concluded that he had no terrorist connections”.²⁵ Another US citizen, Daniel Maldonado – who was detained under parallel circumstances to Amir Mohammed Meshal – was interviewed by the FBI in Nairobi and was transferred to the US not long after.²⁶

¹⁹ After the execution of two Mexican citizens in the US who were not notified of their rights under Article 36, Mexico sought an advisory ruling from the Inter-American Court of Human Rights on the nature of Article 36 obligations. It was held that the right to consular notification and access is a fundamental human right essential to the protection of due process, and its denial renders any subsequent execution arbitrary and illegal under international law. See, “The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law”, Inter-American Court of Human Rights, Advisory Opinion No. OC- 16/99 (1 October 1999) at para. 79 (noting that, “the consular officer and the national of the sending State both have the right to communicate with each other, at any time, in order that the former may properly discharge his functions”) and para. 80 (noting that, “the provision recognizing consular communication serves a dual purpose: that of recognizing a State’s right to assist its nationals through the consular officer’s actions and, correspondingly, that of recognizing the correlative right of the national of the sending State to contact the consular officer to obtain that assistance.”) See also, *La Grand (Germany v. United States of America)*, International Court of Justice (27 June 2001) at para. 77 (finding that, “the Court concludes that article 36 paragraph 1, creates individual rights, which, by virtue of article 1 of the Optional Protocol, may be invoked in this court by the State of the detained person”). See also, *Avena (Mexico v. United States of America)* International Court of Justice (31 March 2004) at para. 40.

²⁰ See “Canada ‘Strong Protests’ Man’s Deportation to Somalia” *CBC News* (22 January 2007) (noting that the Canadian national, Bashir Maktal, “was denied Canadian consular access five times before a Canadian High Commission official was able to meet him in the week of Jan. 15.”)

²¹ Sveriges Radio: “Konflikt” (26 May 2007) (reporting that Ambassador Jens Odlander visited Osman Ahmed Yassin) Original Swedish transcript on file with Reprieve; See also, *Cageprisoners supra* note 3 at 13.

²² “Ethiopia Secret Prisons Under Scrutiny” *Associated Press* (5 April 2007).

²³ Reprieve telephone conversation with official of the Foreign and Commonwealth Office (2 February 2007).

²⁴ Ethiopia Secret Prisons Under Scrutiny” *supra* note 23.

²⁵ Raymond Bonner, “New Jersey Man who Fled Somalia Ends up in an Ethiopian Jail” *New York Times* (23 March 2007). See also, Jonathon S. Landey and Shashank Bengali, “America’s Jailing in Ethiopia Raises Questions about US Role” *McClatchy Newspapers* (16 March 2007).

²⁶ “US citizen held in Ethiopia: Lawyer” *Yahoo News Online* (4 April 2007). See also Reprieve and Cageprisoners Interview with Mohammed Ezzouek, London (14 and 15 February 2007) and “US Presses for Release of American Held in Ethiopia” *Washington Post* (23 March 2007).

The testimonies of other detainees who have now been released suggest that they were either interviewed by the security agencies of their state of nationality or witnessed the removal of other detainees by foreign security agencies for interview. For example, the four British detainees allege that they were interrogated by two MI5 agents in a hotel suite in Nairobi on three occasions as well as having their photographs and fingerprints taken by FBI agents.²⁷

(4) Detention of Children

At least eleven children were detained in Kenya²⁸, some as young as six months,²⁹ 4 years,³⁰ 6 years³¹ and 9 years old.³² Such detention contravenes Article 37 of the Convention on the Rights of the Child which provides that:

- (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
- (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
- (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

(5) Alleged Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Other Ill-Treatment)

During detention in Kenya, some former detainees reported subjection to torture and other ill-treatment in violation of Article I of CAT and Article 7 of the ICCPR.³³ For example, the four British nationals reported being beaten and having their lives threatened when they were picked up at the Kenyan border.³⁴

²⁷ Reprieve and Cageprisoners, Interview with Mohammed Ezzouek, 14 and 15 February 2007.

²⁸ See Muslim Human Rights Forum (2007) *supra* note 1 (annex of flight manifest of 27 January 2007).

²⁹ Samia Josephs was six months old when detained.

³⁰ Such as Sumaiya Fazul Hassan.

³¹ Such as Rahma Josephs.

³² Such as Mohammed Josephs.

³³ Amnesty International *supra* note 3 at 1.

³⁴ Reprieve and Cageprisoners, Interview with Mohammed Ezzouek (14 and 15 February 2007).

The reported conditions of detention also violated the absolute prohibition of torture and other ill-treatment. For example, one of the British detainees described the conditions of detention as:

Dimensions less than 4x3 ft, no lights; only ventilation was a hole in the wall with bars and next to the ceiling; liquid all over the floor, particularly around the bucket in the corner of the cell that was meant to be a toilet; it smelt like a very dirty toilet ... There were no lights in the cells, and only two lights in the corridors. There was a squat hole and sink at the end of the corridor, to the left of the cell ... Although some of the people in our group had severe diarrhoea, for the first two days in that police station we were not allowed to use the toilet at all. The cell had shit all over the floor. We were not allowed to clean our cell nor did anyone clean it for us ... We only had shorts and t-shirt, and no blanket. It got very cold at night in the cell. A Christian woman prisoner called Annie helped us a lot. She was allowed to go out of her cell sometimes and she gave us a blanket. We all six shared that one blanket as a pillow.³⁵

Those released reported that medical treatment was denied to the detainees, including children and pregnant women.³⁶ A former detainee described the situation as:

Because we were sleeping on cement in the cell, it was so cold. We were grown-ups, but the children looked horrible in the mornings. They were so cold, their noses were running and were sneezing. We were afraid they would get pneumonia. The baby had bad nappy rash. She was bleedings with big blisters. They all had bad diarrhoea. We were begging the interrogators to give them medical attention. They did not care at all.³⁷

Muslim Human Rights Forum, which was able to access some of the detainees while in custody, also reported the denial of medical assistance to a pregnant woman with a bullet lodged in her back; a man with a serious case of malaria; and detainees with broken bones and infected wounds.³⁸

As such, the detentions in Kenya violated a range of Kenya's obligations under international law.

³⁵ Reprieve and Cageprisoners, Interview with Mohammed Ezzouek (14 and 15 February 2007). *See also*, Amnesty International *supra* note 3 at 1 (noting that "[s]ome detainees were allegedly beaten by the Kenyan police and were made to undress before being photographed. Women, some of them pregnant, reported being held in the same cell as men. All were made to sleep on a cement floor with no mattress or covering".) *See also*, Muslim Human Rights Forum (2007) *supra* note 1 at 7 – 13.

³⁶ *See* UN Human Rights Committee, "General Comment No. 28: Equality of Rights Between Men and Women" UN Doc. CCPR/C/21/Rev.1/Add.10 (29 March 2000) at para. 15 (stating that "[p]regnant women who are deprived of their liberty should receive humane treatment and respect for their inherent dignity at all times surrounding the birth and while caring for their newly-born children; States parties should report on facilities to ensure this and on medical and health care for such mothers and their babies.")

³⁷ Cageprisoners, *supra* note 3 at 4 (quoting former detainee, Safia Benaouda).

³⁸ Muslim Human Rights Forum (2007) *supra* note 1 at 8.

B. RELEASES IN KENYA AND DEPORTATIONS TO COUNTRIES OF ORIGIN

Twenty-seven detainees were later released in Kenya without charge including, as discussed below, some of those with pending *habeas corpus* applications. Four were initially charged but these charges were later dropped and seven individuals were deported to their country of origin.

The seven individuals who were deported from Kenya to their countries of origin appeared to have been removed without any due process. The US citizen, Daniel Maldonado, was transferred to the US on 12 February 2007 together with his three children. He has since been convicted of receiving training from a foreign terrorist organisation.³⁹ Ahmed Musallam Alma'ashaani and Hassan Salim Kashub were deported to Oman on 27 January 2007 after the Minister for Immigration issued deportation orders while their *habeas corpus* applications were pending. Rimal Azmi was deported to Jordan.

While a state enjoys the right to determine whether aliens may enter its territory and may expel an alien who does not conform to its laws, Article 13 of the ICCPR sets out the procedural rights of such aliens when the state reaches a decision on expulsion. These rights apply both to deportation and extradition proceedings.⁴⁰ Article 13 provides that,

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

A similar right is set out in Articles 12(4) and (5) of the African Charter.⁴¹

It is important to note that the procedural guarantees set out in Article 13 only apply to aliens who are lawfully within the territory of the expelling state. In terms of the Omani nationals, they were in Kenya in order to explore the possibility of starting a tea and coffee company in Oman and according to their Kenyan host, had obtained the necessary business visas.

Daniel Maldonado and his three children and other individuals who, as discussed below, were detained at the border were not lawfully in Kenya. However, none had had the opportunity to apply for asylum or entry visas. In effect, they had not had the opportunity to make their status lawful in Kenya and should therefore have been accorded the protection of Article 13. Indeed, as the UN Human Rights Committee

³⁹ US Department of Justice, US Attorney's Office, Southern District of Texas, "US Citizen Sentenced to Prison for Receiving Military Training from a Terrorist Organization" (20 July 2007).

⁴⁰ UN Human Rights Committee, "General Comment No. 15: The Position of Aliens under the Covenant" (11 April 1986) at para. 9.

⁴¹ See also, Article 7 of the General Assembly "Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they Live", Adopted by General Assembly Resolution 40/144 (13 December 1985).

sets out in its General Comment No. 15, “if the legality of an alien’s entry or stay is in dispute, any decision on this point leading to his expulsion or deportation ought to be taken in accordance with article 13”.⁴²

As set out in Article 13, any decision to deport must first be set out in a “decision reached in accordance with the law”. This provision necessarily requires that an expulsion order exists and that it conforms to that state’s national law on expulsion which must have a statutory basis.⁴³

Second, the individuals to be expelled must “be allowed to submit the reasons against [the] expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority”. In this respect, although the procedural guarantees under Article 13 are more limited than Article 14 of the ICCPR in that they do not explicitly require review by the judiciary, they still guarantee the alien the right to have the deportation decision reviewed by an administrative or judicial authority.⁴⁴

The only circumstance in which the procedural guarantees under Article 13 may not apply is where the state has “compelling reasons of national security”. Although the state is afforded a wide margin of discretion in this regard, this exception is to be narrowly construed⁴⁵, must be set out in the deportation decision itself and must be determined on an individual case-by-case basis. In *Alzery v. Sweden*, the UN Human Rights Committee found no violation of Article 13 on the basis that, “the State party had at least plausible grounds for considering, at the time, the case in question to present national security concerns. In consequence, the Committee does not find a violation of Article 13 of the Covenant for the author’s failure to be allowed to submit reasons against his expulsion and have his case reviewed by a competent authority”.⁴⁶ However, in *Giry v. Dominican Republic*, the UN Human Rights Committee found a violation of Article 13, emphasising in particular the failure of the state to furnish:

the text of the decision to remove the author from Dominican territory or shown that the decision to do so was reached ‘in accordance with the law’ ... While finding the violation of the provision of article 13 in the specific circumstances of Mr Giry’s case, the Committee stresses that States are fully entitled vigorously to protect their territory against the menace of drug dealing by entering into extradition treaties with other States. But practice under such treaties must comply with article 13 of the Covenant, as indeed would have been the case, had the relevant Dominican law been applied in the present case.⁴⁷

⁴² UN Human Rights Committee, “General Comment 15” *supra* note 41 at para. 9.

⁴³ *See, Maroufidou v. Sweden*, UN Human Rights Committee, UN Doc. CCPR/C/OP/1 (1985).

⁴⁴ *Id.*

⁴⁵ Manfred Nowak, “UN Covenant on Civil and Political Rights: CCPR Commentary” (Engel Publishers, 1993) at 232.

⁴⁶ *Alzery v. Sweden*, United Nations’ Human Rights Committee, UN Doc. CCPR/C/88/D/1416/2005 (10 November 2006) at para. 11.10

⁴⁷ *Giry v. Dominican Republic*, United Nations’ Human Rights Committee, UN Doc. CCPR/C/39/D/193/1985 (1990) at para. 5.5.

As such, the deportation of the seven individuals from Kenya without due process may have been in violation of Kenya's international obligations under the ICCPR as deportation orders only appear to have been issued in relation to the two Omani citizens and none of the seven individuals appear to have had the opportunity to challenge the deportation.

Moreover, as discussed below, even where Article 13 would not be violated, the procedural obligations under Article 33 of the Convention Relating to the Status of Refugees, Article 2(3) of the Convention Governing Specific Aspects of Refugee Problems and the absolute principle of *non-refoulement* under Article 3 of the CAT and Article 7 of the ICCPR may still have been applicable to these individuals, thus requiring the ability to challenge the removal.

C. TRANSFERS TO SOMALIA, ETHIOPIA AND GUANTANAMO BAY

(I) The Transfers of at least 117 Individuals to Somalia

As a result of the mass arbitrary detentions in Kenya, a total of forty *habeas corpus* applications were filed in the High Courts of Mombasa and Nairobi in an attempt to challenge the legality of the detention of the individuals about whose detention human rights organisations were aware. As noted above, these *habeas* actions resulted in the release of some of the detainees before they were ever produced in court. However, the government contested the *habeas* petitions of others by producing flight manifests to show that these individuals were no longer in Kenyan custody. Rather, they had been transferred to Somalia.

For example, families of Kenyan detainees filed six *habeas corpus* applications in the High Court in Mombasa. The High Court ordered the production of the six individuals.⁴⁸ None were ever produced in Court. Rather, three of the six Kenyans were released as a result of these applications;⁴⁹ the other three were transferred from Kenya to Somalia before the High Court had the opportunity to hear their case.⁵⁰

A similar pattern of removals to Somalia on flights leaving Kenya on 20 January 2007, 27 January 2007 and 10 February 2007⁵¹ was uncovered as a result of thirty-four *habeas corpus* applications filed by Muslim Human Rights Forum in the High Court of Nairobi.⁵² As a result of these applications, the Kenyan government first produced two flight manifests demonstrating that along with others previously unknown to Muslim Human Rights Forum, the thirty-four individuals had been transferred from Kenya to Somalia.

⁴⁸ REDRESS Interview with Muslim Human Rights Forum (August 2008).

⁴⁹ The three released were Salmin Mohamed Khamis and Fatuma Ahmed Abdurahman and her four-year old daughter, Hafsa Swaleh Ali. See Muslim Human Rights Forum (2007) *supra* note 1 at 9.

⁵⁰ See, Muslim Human Rights Forum (2007) *supra* note 1 at 9.

⁵¹ The three flight manifests are annexed to Muslim Human Rights Forum's 2007 report, *supra* note 1.

⁵² Muslim Human Rights Forum (2007) *supra* note 1 at 6. Muslim Human Rights Forum (2008) *supra* note 3 at 22.

However, Muslim Human Rights Forum contested the transfer of three individuals listed on the flight manifests on the basis that its representatives had met with them in police stations in Nairobi after the date on which the state claimed to have transferred them to Somalia. In response, the Assistant Commissioner of Police and Deputy Director of Operations at CID Headquarters, testified in an affidavit that these three individuals, “namely; Kassim Musa Mwarusi, Ali Musa Mwarusi and Abdallah Khalifan Tonde, were left behind due to breakdown of communication”.⁵³ He attached a third flight manifest to his affidavit, which demonstrated that the three individuals as well as a Tunisian national, Ines Chine, had been deported to Somalia on 10 February 2007.

Finally, five constitutional petitions were filed on behalf of the Canadian citizen, Bashir Maktal, and four Kenyan nationals. The petitions addressed the right not to be detained beyond twenty-four hours for bailable offences and not beyond fourteen days for non-bailable offences, and the right to counsel and consular access.⁵⁴ The Court requested counsel to serve the Attorney General and return to the Court the following Monday.⁵⁵ However, over the weekend, the four Kenyan nationals were released and the Canadian national, Bashir Maktal, was removed to Somalia.

On the basis of the production of the flight manifests, it was possible to establish that at least 85 individuals had been removed from Kenya to Somalia.

The Department of Immigration later submitted that it had “processed 96 deportation orders of persons who had fled from the Somali conflict of January – February 2007 on the recommendation of the Police.”⁵⁶ However, at the time of the removals, only the deportation orders for Kamilya Tuweni Mohammedi, Ahmed Musallam Al-Ma’ashaani and Hassan Salim Kashub were produced in court with the flight manifests attached. The deportation order for Kamilya Tuweni Mohammedi, a citizen of the United Arab Emirates, sanctioned her deportation under section 8 of the Immigration Act.⁵⁷ However, the order identified her as a man, her surname was presented as her first name and stated that she as “is not a citizen of Kenya and whose presence in Kenya is contrary to the national interest, be removed from Kenya to his country of origin **SOMALI immediately**,” despite the fact that she is a citizen of United Arab Emirates (emphasis in the original). No other deportation order was provided to the legal counsel for those on whose behalf *habeas corpus* applications had been made and only the flight manifests were produced in court.⁵⁸

⁵³ “Replying Affidavit” in *Swaleh Ali Tunza & Ors v. Commandant Anti Terrorism Police Unit & Ors* (27 February 2007) at para. 4.

⁵⁴ Article 72(2) of the Kenyan Constitution.

⁵⁵ REDRESS Interview with MHRF (August 2008).

⁵⁶ Report of the Presidential Special Action Committee to Address Specific Concerns of the Muslim Community in Regard to Alleged Harassment and/or Discrimination in the Application/Enforcement of the Law” (31 March 2008) at Chapter 3.4 (unpublished).

⁵⁷ Ministry of State for Immigration and Registration of Persons, “Declaration under Section 8 of the Immigration Act, Cap 172 Laws of Kenya” (re: Tuwein Kamilya Mohamed”) (26 January 2007).

⁵⁸ REDRESS interview with Muslim Human Rights Forum (August 2008).

Based on credible information obtained by Muslim Human Rights Forum, however, non-governmental organisations now believe that the number of individuals rendered may be closer to 120.

Again, the discrepancy in figures serves to emphasise that the numbers presented are approximations. They were only revealed as a result of the *habeas corpus* actions brought in the High Courts of Mombasa and Nairobi; the true figure can only be known once an independent investigation takes place.

(2) Subsequent Transfers to Ethiopia

Of those transferred to Somalia, four British nationals were returned to the United Kingdom (UK) from Baidoa via Kenya on 12 February 2007. The remaining detainees are thought to have been transferred to Ethiopia. Indeed, in April 2007, the Ethiopian government confirmed that it was holding forty-one individuals, releasing an official statement that:

Pursuant to a common understanding between Ethiopia and the TFG authorities some of those who have been captured have indeed been brought over to Ethiopia. Their number is 41.

Almost all the states whose citizens are involved were notified in good time after the transfer to Ethiopia of the suspected terrorists. The only exceptions are few individuals whose dual and multiple citizenship is under investigation. Nothing has been done in secret. All legal procedures are being followed, and the suspected terrorists have been allowed to appear before the relevant court of law, in this instance before the competent Military Court. Twenty-nine of them have been slated to be released following the order of the Military Court to the military prosecutor for reasons of the detainees being non-essential or for having played only marginal role. From among these, five have already been released. These are from Tanzania, Sudan, Denmark, UAE and Sweden. The rest of the remaining are also at the final stage of their release. This would mean that there will be only 12 detainees left in Ethiopia. These are awaiting their next appearance before the Court which will take place on April 13, 2007.⁵⁹

(3) Further Transfers to Somalia and Ethiopia and Returns at the Border

Beyond the mass transfers to Somalia and Ethiopia, reports of a number of other incidents in which groups of individuals were sent to Somalia in 2007 have emerged.

On 3 January 2007, Kenya closed its border with Somalia on national security grounds. It argued that the fighting between the Transitional Federal Government of Somalia (TFG) and the Council of Somali Islamic Courts (COSIC) might result in COSIC fighters and/or members of Al-Qaeda thought to be operating in Somalia,

⁵⁹ Federal Democratic Republic of Ethiopia, Ministry of Foreign Affairs, "Ethiopian Government Press Statement" (9 April 2007). *See also*, "Ethiopia Admits Terror Detentions" *BBC* (10 April 2007).

entering Kenya and posing a terrorist threat.⁶⁰ However, the closing of the border also meant that those fleeing the conflict in Somalia could not enter Kenya. Of those who managed to cross the border, reports emerged of the Kenyan military transporting truckloads of individuals back into Somalia.⁶¹

Moreover, in July 2007, two Dutch nationals; two Eritrean nationals, Burhan Adam Abdallah and Ismail Noor Hassan; and a Kenyan national, Abdikadir Mohamed, were detained in Nairobi.⁶² Muslim Human Rights Forum filed *habeas corpus* applications to challenge the legality of their detentions. Ultimately, the Dutch nationals were deported back to the Netherlands “on the strength of deportation orders declaring them undesirable aliens in Kenya”.⁶³

When the chief of the Anti-Terrorism Police Unit, Nicholas Kamwende, appeared in the High Court of Nairobi following a summons to explain the whereabouts of the other three men, it was reported that he testified that the individuals had been detained and then released after four days in custody. The media reported that “he said, he did not follow their movement and did not know their whereabouts”.⁶⁴ However, as with the mass renditions to Somalia in January and February 2007, the Muslim Human Rights Forum submitted that it had visited the men in custody after the date upon which Mr. Kamwende testified to their release, and therefore suspected that the men had been removed to Somalia and/or Ethiopia. Human Rights Watch reported that, “Kenyan officials also secretly expelled [these] three men overland into Somalia, all of whom were ultimately taken into Ethiopian custody.”⁶⁵ Two of the individuals, Burhan Adam Abdallah and Ismail Noor Hassan, have since been released from Addis Ababa.⁶⁶ Abdikadir Mohamed Aden is thought to still be in detention in Addis Ababa.

(4) The Case of Mohamed Abdulmalik

Finally, on 13 February 2007, Mohamed Abdulmalik⁶⁷, a Kenyan citizen born in Kisumu in 1973, was picked up by the Anti-Terrorism Police Unit in a café in Mombasa.⁶⁸ He was detained and held incommunicado in the Kilindini Port and

⁶⁰ Amnesty International, “Denied Refuge: The Effect of the Closure of the Kenya/Somalia Border on Thousands of Somali Asylum Seekers and Refugees” AI Index: AFR.32.002.2007(2 May 2007) at 1.

⁶¹ “Kenya Closes Somalia Border” *The Times Online* (4 January 2007); (reporting that Kenya forcibly returned 700 people to Somalia); “Kenyans Close Border with Somalia” *BBC News* (3 January 2007) (reporting that Kenya returned “more than 420 refugees”); Amnesty International, “Denied Refuge” *id.* at 3 (reporting the return of 400 individuals to Somalia).

⁶² “Kenyan Police Official Says Missing Terror Suspects were Released, not Sent to Ethiopia” *International Herald Tribune* (8 October 2007).

⁶³ Muslim Human Rights Forum (2008) *supra* note 3 at 33.

⁶⁴ “Anti-Terror Boss in Court” *The Nation* (9 October 2007).

⁶⁵ Human Rights Watch, *supra* note 3 at 13.

⁶⁶ *See*, Muslim Human Rights Forum (2008) *supra* note 3 at 31 (noting in footnote 50 the release of the two men on 21 June 2008 from Addis Ababa).

⁶⁷ He has variously been referred to as Malik; Abdulmalik Mohamed; Mohamed Abdulmalik Abdujabber; Abduljabar Ibrahim and Abdulmalik Rajab Mohamed by the Anti-Terrorism Police Unit and in the media.

⁶⁸ *Mariam Mohamed & another v. Commissioner of Police & another* [2007] eKLR, Replying Affidavit (29 October 2007) at para 3.

Urban Police Stations in Mombasa before being transferred to the Hardy, Ongata Rongai and Spring Valley Police Stations in Nairobi. While detained in Kenya, Mr. Abdulmalik was not charged with any offence; was denied the right to challenge his detention by way of a *habeas corpus* application; was denied access to a lawyer and contact with family members.

Nothing was heard of Mr. Abdulmalik until 26 March 2007, when the US Department of Defense issued a press statement announcing Mr. Abdulmalik's detention at Guantánamo Bay.⁶⁹ The US Ambassador to Kenya, Michael Ranneberger, reportedly confirmed that Mr. Abdulmalik was "moved to the Cuban camp with the full consent of the Kenyan government ... [as] part of collaboration between the two governments to fight Global terrorism".⁷⁰

Although Mr. Abdulmalik had been held at Guantánamo Bay for more than one year, his US lawyer was allowed to meet with him for the first time only in April 2008. Almost two years later, due to US government delays, Mr. Abdulmalik has not been able to exercise his right to challenge the lawfulness of his detention in a US court⁷¹ nor has there been any decision issued by the less than adequate combatant status review⁷² process.⁷³ While Mr. Abdulmalik's family brought a *habeas corpus* application on his behalf in Kenya, the High Court dismissed the action on the basis that Mr. Abdulmalik was no longer under the control of the Kenyan authorities and the Kenyan Commissioner for Police could not therefore comply with a *habeas corpus* writ requiring his production in court.⁷⁴

The High Court found that:

It is evident that, voluntarily or involuntarily, the respondents have placed themselves in a position in which it is *no longer within their power to produce* the Subject before this Court. This Court, within the concept of *Habeas corpus*, will be unable to make orders for the *production* of the Subject, because such an order would be *in vain*. It is a fundamental principle applicable in the judicial settlement of disputes, that a Court of law is not to make an order in vain. Courts' orders are focussed, clear, enforceable and capable of being secured by applying the law of contempt, against those who disobey. From the facts placed before this Court, the respondents are, at this moment, *not in control* of the physical custody of the subject, and so they would not be in a factual *position to comply* with a writ of *Habeas corpus* ...

⁶⁹ United States Department of Defence, Office of the Assistant Secretary of Defense (Public Affairs) "Terror Suspect Transferred to Guantanamo," Press Release No. 343-04 (26 March 2007) available at: <http://www.defenselink.mil/releases/release.aspx?releaseid=10662>

⁷⁰ George Munyori, "US Defends Transfer of Terror Suspect to Guantanamo Bay," CapitalFM.co.ke (29 March 2007).

⁷¹ See, Article 9(4) of the ICCPR.

⁷² The administrative proceedings held at Guantánamo Bay which set out the charges against detainees.

⁷³ See, s 7 of the Military Commissions Act 2006. While the United States Supreme Court held in *Boumediene et al. v. Bush* 553 U.S. _ (12 June 2008) that detainees at Guantánamo Bay have the right to bring *habeas corpus* applications, it indicated that courts may nevertheless delay hearing such claims until after there has been time for a combatant status review, and left open many questions about possible restrictions on such proceedings. It thus remains unclear when Mr. Abdulmalik will effectively be able to have an application heard, and whether its form will meet the requirements of international law.

⁷⁴ *Mariam Mohamed & another v. Commissioner of Police & another* [2007] eKLR.

Clearly, by taking the Subject out of the jurisdiction of the Kenyan Courts, the foundation for his enjoyment of constitutional rights had, in a formal sense, been taken away; for those rights are enforced by the Courts which only have jurisdiction in *Kenyan territory*.

That the Subject should always have access to the safeguards of the Constitution of Kenya, is a *right*; and so the person who *made it impossible* for the Subject to enjoy those rights, committed a *constitutional and legal wrong* against him. Legal wrongs are always actionable, in any *common law* system such as that which applies in this country ...

This, however, is *not* the question which has been placed before this Court, by the *Habeas corpus* application of 18th October, 2007; and it is for that reason, that a *different* application would have to be made before the High Court. Even if the Court were to be moved in a different way, though, the High Court's possible redress orders would probably fall short of *restoring* the Subject to the Kenyan jurisdiction, as there are no unfailing instruments for retrieving him from those now having his physical custody. To deal more effectively with a plight such as that now facing the Subject, it will be essential to complement the principles regulating *extradition in international law*, with the enactment of legislation to regulate the exercise of executive discretion to take Kenyan subjects away from the jurisdiction of local Courts.⁷⁵

To date, no official investigation into how Mr. Abdulmalik ended up at Guantánamo Bay has been conducted. To the knowledge of Reprieve and REDRESS, the Kenyan government has not made diplomatic representations on his behalf to the US government for his release and return to Kenya or fair trial before ordinary civilian courts in the US and compliant with international fair trial standards. Rather, the Kenyan government continues to deny that Mr. Abdulmalik is a Kenyan national, claiming that “[h]e does not have any kin or relatives in Kenya who can prove that he is Kenyan.”⁷⁶ This is inconsistent with all known facts regarding Mr. Abdulmalik's situation; Mr. Abdulmalik's Kenyan father and siblings can all attest to Mr. Abdulmalik's Kenyan citizenship. The Kenyan government also denies that Mr. Abdulmalik was handed over by the Kenyan authorities to the US, action which would result in Kenya incurring responsibility regardless of his nationality. However, the Assistant Minister of the Office of the President, has conceded that, “Kenya deported him to Somalia from where he originated ... Where the Americans got him from, is their business.”⁷⁷

In declassified notes from Mr. Abdulmalik's meetings with his lawyers at Reprieve at Guantánamo Bay, he alleges that ten policemen picked him up in a café in Mombasa and shackled and hooded him.⁷⁸ He alleges that he was shouted at and threatened with death at the Port police station in Mombasa and interrogated until the evening.⁷⁹

⁷⁵ *Mariam Mohamed & another v Commissioner of Police & another* [2007] eKLR at 7 – 9.

⁷⁶ See for example, National Assembly, Official Report: Parliamentary Debates, “Handing over of Kenyans to USA Security Forces” 285 (3 April 2007) at 286.

⁷⁷ National Assembly, Official Report: Parliamentary Debates, “Handing over of Kenyans to USA Security Forces” 285 (3 April 2007) at 286.

⁷⁸ Reprieve, declassified notes from interview with Mohamed Abdulmalik at Guantanamo Bay on 16 April 2008.

⁷⁹ *Id.*

He says that he was then taken from Mombasa to Nairobi and held in Ongata police station for five days; Hardy police station for five days and then Spring Valley police station for three to four days.⁸⁰ He says that he was sometimes held in isolation and sometimes shared a cell and that on occasion was denied access to toilet facilities and to food.⁸¹ From Spring Valley police station he says that Kenyan intelligence officers took him to Nairobi airport where he was handed over to US officials and put on a “huge American cargo plane [which was] as big as a football field”.⁸² His eyes were covered and once he was on the plane, his clothes were cut off and the door to the plane was opened as if he would be thrown out.⁸³ He says he was “treated like a dog”.⁸⁴ He thinks he was first taken to Djibouti as he saw a sign reading “Horn of Africa” and the water he was given bore a Djibouti brand.⁸⁵ He then believes that he was taken to Bagram Airbase in Afghanistan as the water he was given had a Kabul label on it.⁸⁶ He thinks he was held there for between one and two months before being flown to Guantánamo Bay where he remains.⁸⁷

D. THE VIOLATIONS OF INTERNATIONAL LAW RESULTING FROM THE TRANSFERS TO SOMALIA, ETHIOPIA AND GUANTANAMO BAY

In so far as any of the individuals were lawfully in Kenya or were denied the opportunity to make their presence in Kenya lawful, Kenya violated Article 13 of the ICCPR and Article 12(4) of the African Charter by failing to provide due process to those to be deported as set out above. Moreover, as provided in Article 12(5) of the African Charter and the UN Human Rights Committee in its General Comment No. 15, Kenya further violated its international obligations by carrying out mass expulsions as both Article 13 of the ICCPR and Article 12(4) of the African Charter require each expulsion decision to be reached on an individual basis.⁸⁸

Beyond these violations of international law, Kenya may have also violated two further fundamental principles of international law. First, the prohibition on deporting nationals, particularly if they would be rendered stateless as a result; and second, the principle of *non-refoulement* under international refugee law and international human rights law.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Reprieve, declassified notes from interview with Mohamed Abdulmalik at Guantanamo Bay on 27 June 2008.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Reprieve, declassified notes from interview with Mohamed Abdulmalik at Guantanamo Bay on 16 April 2008.

⁸⁶ *Id.*

⁸⁷ Reprieve, declassified notes from interview with Mohamed Abdulmalik at Guantanamo Bay on 27 June 2008.

⁸⁸ UN Human Rights Committee, General Comment 15 *supra* note 41 at para. 10, provides that “[Article 13] entitles each alien to a decision in his own case and, hence, article 13 would not be satisfied with laws or decisions providing for collective or mass expulsions. This understanding, in the opinion of the Committee, is confirmed by further provisions concerning the right to submit reasons against expulsion and to have the decision reviewed by and to be represented before the competent authority or someone designated by it.”

(I) Deportation of Nationals

As noted above, some of the individuals removed may have been Kenyan citizens. For its part, the Kenya government has denied that any of the individuals removed were Kenyan. According to media reports, “[t]he Kenyan government routinely denies any wrongdoing in the case. Last month, Internal Security Minister John Michuki took out a notice in the national dailies. ‘It is incorrect to claim that some Kenyans have been deported from the country,’ he wrote. ‘Fool proof evidence (must be presented). Until this is done, the issue of deportation will continue to remain hollow and unconvincing.’”⁸⁹

However, according to Muslim Human Rights Forum, it has been able to confirm that at least twenty of the individuals rendered to Somalia and then Ethiopia are Kenyan.⁹⁰ More individuals may be Kenyan; however, determining the nationality of some of the detainees has proved difficult in part because the identification documents they held were apparently confiscated during interrogations in Nairobi. Again, because of the lack of opportunity to challenge their detention in Kenya and to further advance reasons as to why they should not be removed from Kenyan territory, these individuals were unable to assert their Kenyan nationality.

In contrast to Article 13 of the ICCPR and Article 12(4) of the African Charter, nationals do not only have a procedural right to challenge a decision to remove them from their country of nationality but also a substantive right not to be removed.⁹¹ Article 13(1) of the Universal Declaration of Human Rights provides that “[e]veryone has the right to freedom of movement and residence within the borders of each state” and Article 13(2) provides that “[e]veryone has the right to leave any country, including his own, and to return to his own country”. Article 13(2) is echoed by Article 12(2) of the African Charter. As the UN Human Rights Committee sets out in General Comment 27:

The right of a person to enter his or her own country recognizes the special relationship of a person to that country. The right has various facets. It implies the right to remain in one's own country. It includes not only the right to return after having left one's own country; it may also entitle a person to come to the country for the first time if he or she was born outside the country (for example, if that country is the person's State of nationality). The right to return is of the utmost importance for refugees seeking voluntary repatriation. It also implies prohibition of enforced population transfers or mass expulsions to other countries.⁹²

The Committee further sets out that:

In no case may a person be arbitrarily deprived of the right to enter his or her own country. The reference to the concept of arbitrariness in this

⁸⁹ “Kenya: Muslim Lobbies talk about deportation Kenya: Muslim Lobbies talk about deportation” *Islamic Broadcasting Network*, (24 October 2007).

⁹⁰ Muslim Human Rights Forum (2008) *supra* note 3 at 14.

⁹¹ Jean-Marie Henckaerts, “Mass Expulsion in Modern International Law and Practice” (1995) at 78 – 79.

⁹² UN Human Rights Committee, “General Comment No. 27: Freedom of Movement” UN Doc. CCPR/C/21/Rev.1/Add.9 (2 November 1999) at para. 19.

context is intended to emphasize that it applies to all State action, legislative, administrative and judicial; it guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable. A State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country.⁹³

By forcibly deporting and denying the nationality of the Kenyan nationals, Kenya violated these international obligations by effectively preventing the Kenyan nationals from returning to their country. Moreover, Article 1(1) of the Convention Relating to the Status of Stateless Persons sets out that, "the term 'stateless person' means a person who is not considered as a national by any State under the operation of its law". In this respect, the denial by the Kenyan government that any of the individuals removed to Somalia were Kenyan nationals would render them stateless, unless any of them enjoyed dual nationality.

While the consulates of other states quickly made efforts to access their nationals⁹⁴, reports only emerged in August 2008 of Kenyan authorities visiting eight of the Kenyan nationals in Ethiopia, i.e. one and a half years after they were deported.⁹⁵

(2) The Violation of International Refugee Law

When the Kenyan border was closed in January 2007, the UN High Commissioner for Refugees was reported to have "reminded Nairobi that it had an obligation under international law to protect civilians. 'Kenya also has a humanitarian obligation to allow civilians at risk to seek asylum on its territory.'"⁹⁶ Under international law, individuals enjoy the "right to seek and to enjoy in other countries asylum from persecution".⁹⁷ This right necessarily entails the right to enter a state for the purposes of making an asylum application and thus does not permit rejection at the border before the application has been processed and considered. Article 2(3) of the Convention Governing Specific Aspects of Refugee Problems in Africa sets out that, "[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 or

⁹³ *Id.* At para. 21.

⁹⁴ See, Antony Mitchell, "Ethiopia Secret Prisons under Scrutiny" *Associated Press* (5 April 2007) (quoting a spokesperson for the Canadian Foreign Affairs Office confirming that representations to the Ethiopian government on behalf of Bashir Maktal had been made in Ottawa and Ethiopia); Jonathon S Landey, "U.S. Diplomat Visits American Detainee in Ethiopia" *McClatchy Newspapers* (30 March 2007) (confirming that US State Department Officials had visited US citizen, Amir Meshal twice).

⁹⁵ Human Rights Watch, *supra* note 3 at 20 (discussing the detention of the Kenyan nationals, Said Khamis Mohammed, Kassim Mwarusi, Ali Musa Mwarusi, Swaleh Ali Tunza, Hassan Shaaban Mwazume, Bashir Chirag Hussein, Abdallah Khalfan Tondwe, and Salim Awadh Salim in Ethiopia.)

⁹⁶ "Kenya Closes Somalia Border" *The Times Online* (4 January 2007).

⁹⁷ Article 14(1) of the Universal Declaration of Human Rights states that, "Everyone has the right to seek and to enjoy in other countries asylum from persecution". See also, Article 12(3) of African Charter (providing that, "Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions.")

to remain in a territory, where his life, physical integrity or liberty would be threatened”. Similarly, Article 33(1) of the Convention Relating to the Status of Refugees prohibits the expulsion or return of an individual, “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”. These provisions are particularly relevant in the context of the border closure, given that the individuals seeking to enter Kenya were fleeing conflict.

Article 33(2) provides an exception to Article 33(1) where the state has “reasonable grounds for regarding [the individual] as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country”. Article 1F also provides that, “[t]he provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that (a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) He has been guilty of acts contrary to the purposes and principles of the United Nations”.

While these exceptions may have applied to some of the individuals attempting to cross the border, Kenya was still under an obligation to conduct an assessment of the applicability of Articles 33(2) and 1F in relation to each individual; these exceptions could not provide a basis for the mass return of hundreds of individuals fleeing from conflict without individual assessment. As such, the mass returns at the border violated Kenya’s obligations under international refugee law.

(3) The Violation of the Absolute Principle of *Non-Refoulement* under International Human Rights Law

Beyond the violations of the principle of *non-refoulement* under international refugee law, at least some of the returns to Somalia as well as Mohamed Abdulmalik’s transfer to Guantánamo Bay may have violated the absolute principle of *non-refoulement* under Articles 3 of the CAT, 7 of the ICCPR and 5 of the African Charter. The absolute principle of *non-refoulement* prohibits the expulsion, return (“refoulement”), extradition, deportation, return or other transfer of an individual to a place where there are substantial grounds to believe that he or she would be at a risk of torture or other ill-treatment.

In contrast to international refugee law, the principle of *non-refoulement* under international human rights law is absolute.⁹⁸ It applies regardless of whether the individual is seeking asylum; allows no limitations, derogations or exceptions, even in

⁹⁸ This is confirmed in regional and international treaties including, for example, Article 2(2) of the CAT; UN Human Rights Committee “General Comment No. 20: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment” UN Doc. HRI/GEN/1/Rev.1. (10 March 1992) at para. 30 and “General Comment No. 29: Derogations during a State of Emergency” UN Doc. CCPR/C/21/Rev.1/Add.11 (31 August 2001) at para. 7; *Chahal v. United Kingdom*, European Court of Human Rights App. No. 22414/93 (1996) at para. 79; and *Aemei v. Switzerland*, UN Committee against Torture UN Doc. CAT/C/18/D/34/1995 (1997) at para. 9.8.

the context of national security concerns;⁹⁹ and applies to all persons, however, “undesirable or dangerous” their alleged conduct.¹⁰⁰ Accordingly, an exception akin to Article 33(2) or Article 1F of the Convention Relating to the Status of Refugees does not arise.

(a) *The Failure of Kenyan Law to Provide Procedural Guarantees of Non-Refoulement*

The principle of *non-refoulement* contains both a procedural and substantive dimension. The procedural element to *non-refoulement* requires that individuals to be removed have the opportunity to challenge the removal by judicial or administrative review. As the risk of torture and other ill-treatment will only be determined at the point of review, the procedural dimension to *non-refoulement* necessarily requires that all individuals to be removed have access to judicial or administrative review procedures.

In the case of Kenya, the law does not appear to provide for the opportunity for individuals to challenge the removal on the basis of *non-refoulement*. Under Section 8(1) of the Immigration Act 1967,

The Minister may, by order in writing, direct that any person whose presence in Kenya was, immediately before the making of that order, unlawful under this Act, or in respect of whom a recommendation has been made to him under section 26A of the Penal Code, shall be removed from and remain out of Kenya either indefinitely or for such period as may be specified in the order.

Under Section 4(1) a person will be deemed to be in Kenya unlawfully if he or she does not hold a valid entry permit or pass. No process to have the expulsion decision judicially or administratively reviewed is set out under the Act, although in its State Party Report to the Committee against Torture, Kenya submitted that, “[t]he decisions of the Principal Immigration Officer can initially be forwarded on appeal to the Minister. A second appeal lies from the Minister’s decision to the High Court. The lodging of an appeal with the High Court stays the order from the Minister until the matter is heard and determined by the court.”¹⁰¹ However, as acknowledged by Kenya in its State Party Report, the Act makes no express mention of the principle of *non-refoulement* under Article 33(1) of the Refugee Convention or Articles 3 of the CAT and 7 of the ICCPR¹⁰².

Similarly, while section 10 of the Extradition (Contiguous and Foreign Countries) Act and section 16 of the Extradition (Commonwealth Countries) Act allow the individual to be extradited to challenge the extradition by way of *habeas corpus*, neither Act makes reference to the principle of *non-refoulement* as a ground for denying the extradition.

⁹⁹ See, *Agiza v. Sweden*, Committee against Torture, UN Doc. CAT/C/34/D/233/2003 (2005) at para. 13.8 and *Alzery v. Sweden*, *supra* note 47.

¹⁰⁰ See, *M.B.B. v. Sweden*, Committee against Torture, UN Doc. CAT/C/22/D/104/1998 (1999) at para. 6.4.

¹⁰¹ UN Committee against Torture, “Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Initial Reports of States Parties Due in 1998: Kenya” UN Doc. CAT/C/KEN/1 (6 June 2007) at para. 56.

¹⁰² *Id.* at para. 54.

Section 18 of the Refugee Act 2006, which is not yet in force,¹⁰³ provides that:

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

- (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 whole of that country.

However, it does not reference the absolute principle of *non-refoulement* where substantial grounds exist to believe the individual to be returned would be at a risk of torture or other ill-treatment. Moreover, section 21(1) enables the Minister to expel a refugee on the grounds of national security, again without reference to the absolute nature of the principle of *non-refoulement* where a risk of torture or other ill-treatment exists.

Despite the shortcomings in the law, in its State Party Report, Kenya noted that “[i]n practice it does not extradite persons where there is reasonable belief that they will suffer torture and other cruel, inhuman or degrading treatment or punishment”.¹⁰⁴ Such a statement, however, fails to provide legal certainty and indeed, in the cases of the individuals transferred to Somalia, no opportunity was provided in law or in practice to challenge the removals. Similarly, Mohamed Abdulmalik was not given the opportunity to challenge his removal from Kenya. Consequently, in these cases Kenya violated the procedural dimension of the absolute principle of *non-refoulement*.¹⁰⁵

As a result of these shortcomings, the UN Committee against Torture has recently recommended that Kenya:

should adopt the necessary measures to bring current expulsion and refoulement procedures and practices fully in line with article 3 of the Convention. In particular, expulsion and refoulement of individuals should be decided after careful assessment of the risk of being tortured in each case and should be subject to appeal with suspensive effect. The Committee urges the State Party to fulfil all its obligations under article 3 of the Convention thereby guaranteeing the absolute principle of non-refoulement.¹⁰⁶

¹⁰³ See IMLU *et al*, “Torture and Related Violations in Kenya: Alternative Report to the United Nations Committee against Torture” (15 October 2008) at para. 81.

¹⁰⁴ *Id.* at para. 53.

¹⁰⁵ *Alzery v. Sweden*, *supra* note 47 at para. 11.8 (finding that, “[t]he absence of any opportunity for effective, independent review of the decision to expel in the author’s case accordingly amounted to a breach of article 7, read in conjunction with article 2 of the Covenant”).

¹⁰⁶ Committee against Torture, “Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Concluding Observations of the Committee against Torture: Kenya” UN Doc. CAT/C/KEN/CO/1 (21 November 2008) at para. 16.

(b) *Potential Violations of the Substantive Dimension of the Absolute Principle of Non-Refoulement*

In order to substantiate a claim of *non-refoulement*, a 'present and personal' risk must be shown.¹⁰⁷ Article 3(2) of the CAT sets out that the circumstances in the receiving state or territory constitute a weighty but not determinative factor¹⁰⁸:

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 rights.

Since the overthrow of President Barre in 1991, conflict has persisted in Somalia between groups competing for power. Between June and December 2006, a union of Sharia courts - the Islamic Courts Union - emerged as a political force in Mogadishu and vied for power with the Transitional Federal Government. In late 2006, the Islamic Courts Union was driven out of Mogadishu by a coalition of Transitional Federal Government and Ethiopian forces.¹⁰⁹

However, in 2007, the International Crisis Group noted that:

[p]olitically, Somalia has now been returned roughly to where it was when the TFG was formed in October 2004. The government is weak, unpopular and faction ridden, and the power vacuum in southern Somalia is rapidly being filled by the same faction leaders and warlords the Courts overthrew less than a year ago. Many Mogadishu residents resent the Courts' defeat, feel threatened by the TFG and are dismayed by the presence of Ethiopian troops in the capital. Mogadishu is awash with weapons, and there have already been hit-and-run attacks on TFG and Ethiopian troops. The potential for serious violence is just below the surface.¹¹⁰

Such political instability in Somalia as well as the presence and control exercised by Ethiopian troops may have given rise to claims under Article 3 of the CAT, 7 of the ICCPR and 5 of the African Charter in individual cases. This is particularly so given the practice of torture and other ill-treatment by Ethiopia as noted in the US State Department's last Country Reports on Human Rights Practices:

[a]lthough the constitution and law [in Ethiopia] prohibit the use of torture and mistreatment, there were numerous credible reports that security officials tortured, beat, or mistreated detainees. Opposition political parties reported frequent and systematic abuse of their supporters by police and regional militias. In Makelawi, the central police investigation headquarters in Addis Ababa, police investigators reportedly commonly used illegal

¹⁰⁷ On the requirement of a 'personal and present risk', see, UN Committee against Torture, "General Comment No. 1: Refoulement and Communications (Implementation of Article 3 in the Context of Article 22)" UN Doc. A/53/44 (21 November 1997) at para. 6.

¹⁰⁸ See also, *Z.Z. v. Canada*, Committee against Torture, UN Doc. CAT/C/26/D/123/1998 (16 May 2001) at para. 8.4 setting out that it is insufficient just to show that the receiving state has a bad human rights record.

¹⁰⁹ For a background to the conflict in Somalia, see Human Rights Watch, "Shell-Shocked: Civilians under Siege in Somalia" (August 2007) at 10 – 27.

¹¹⁰ International Crisis Group, "Policy Briefing: Somalia: the Tough Part is Ahead" Africa Briefing No. 45 (26 January 2007) at 1.

interrogation methods to extract confessions ... Impunity also remained a serious problem. The government rarely publicly disclosed the results of investigations into such types of abuses.¹¹¹

A determination of whether the principle of *non-refoulement* has been violated focuses on what the state ought to have known at the time of removal. Thus, it is irrelevant for the purposes of establishing liability under the absolute principle of *non-refoulement* whether or not the individual is ultimately tortured or ill-treated. However, any information, including allegations of torture or other ill-treatment, which emerges subsequent to removal, “are relevant to the assessment of the State party’s knowledge, actual or constructive, at the time of removal”.¹¹² In this respect, as set out below, the testimonies of former detainees that some detainees were subject to torture and other ill-treatment in Somalia supports the contention that the substantive dimension to the absolute principle of *non-refoulement* was violated in relation to some of those removed from Kenya.

Moreover, both the UN Human Rights Committee and the Committee against Torture have interpreted the absolute principle of *non-refoulement* to also prohibit the return of individuals to states where they would be in danger of being expelled to a third country or territory where there would be substantial grounds to believe that they would be at risk of torture or other ill-treatment.¹¹³ Given the presence of Ethiopian troops in Somalia and their support of the TGF, the principle of *non-refoulement* would therefore apply both in relation to the risk of torture and other ill-treatment on return to Somalia and in relation to the risk of transfer to Ethiopia. Again, as set out below, the testimonies of some former detainees held in Ethiopia who allege that they were tortured and ill-treated support the conclusion that such a risk did exist.

In relation to the case of Mohamed Abdulmalik, by the time he was arbitrarily detained in Kenya in February 2007, information and documentation widely available in the public domain underscored the real risk that foreign “terror suspects” handed over to the US could be subjected to the practice of “extraordinary rendition” to third countries where they would be at risk of torture or other ill treatment, and/or transferred to detention sites such as Guantánamo Bay, Bagram Airbase in Afghanistan and/or “black sites” located outside of US territory.¹¹⁴ Indeed, a 2007 report of the UK Intelligence and Security Committee emphasised that by 2002, “the U.S. was willing to

¹¹¹ US State Department, “Country Reports on Human Rights Practices: 2007” Released by the Bureau of Democracy, Human Rights and Labor (11 March 2008).

¹¹² *Agiza v Sweden*, *supra* note 100 at para. 13.2.

¹¹³ UN Committee against Torture “General Comment 1” *supra* note 108 at para. 2; UN Committee against Torture *Korban v. Sweden*, UN Doc. CAT/C/21/D/88/1997 (1998); and UN Human Rights Committee, “General Comment No. 31: The Nature of the General Legal Obligations Imposed on States Parties” UN Doc. CCPR/C/21/Rev.1/Add.13 (26 May 2004).

¹¹⁴ See for example, UN Human Rights Committee “Concluding Observations of the Human Rights Committee on the Second and Third U.S. Reports to the Committee” UN Doc. CCPR/C/USA/CO/3 (2006); Council of Europe, Parliamentary Assembly Reports, “Alleged Secret Detentions and Unlawful Inter-State Transfers Involving Council of Europe Member States,” (12 June 2006) and “Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe member states: second report,” (11 June 2007); European Parliament, “Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners,” (26 January 2007).

exercise these powers [of rendition] on individuals unconnected with the conflict in Afghanistan.”¹¹⁵ It continued that, “[b]y mid-2003, following the case of Khaled Sheikh Mohamed and suspicions that the U.S. authorities were operating “black sites”, the Agencies appreciated the potential risk of renditions and possible mistreatment of detainees ...[a]fter April 2004 – following the revelations of mistreatment at the U.S. military-operated prison at Abu Ghraib – the UK intelligence and security Agencies and the Government were fully aware of the risk of mistreatment associated with any operations that may result in U.S. custody of detainees ...”¹¹⁶ Given this context, any irregular transfer of a suspected terrorist to US custody would have involved a real, foreseeable and personal risk of torture or other ill-treatment in contravention of the absolute principle of *non-refoulement*.¹¹⁷

In the *habeas corpus* action brought in the Kenyan High Court after Mr. Abdulmalik’s detention at Guantánamo Bay was announced, Acent Kaloki, the Chief Inspector of Police for the Anti-Terrorism Police Unit, stated that Mr. Abdulmalik was released from police custody on 28 February 2007 and the “police did not follow up on his whereabouts”.¹¹⁸ No independent evidence is available, however, to confirm the Chief Inspector’s claim that Mr. Abdulmalik was released rather than transferred to US custody. Rather, the last time Mr. Abdulmalik was seen prior to the official announcement of his detention at Guantánamo Bay, he was under the full custody and control of the Kenyan police. Moreover, as noted above, the US Ambassador to Kenya, Mr. Ranneberger has reportedly confirmed that Mr. Abdulmalik was moved to Guantánamo Bay with the full consent of the Kenyan Government and Mr. Abdulmalik has claimed that he was handed over into US custody at Nairobi airport. As such, a *prima facie* case appears to have been established to support the contention that Mr. Abdulmalik was removed from Kenyan territory in contravention of the principle of *non-refoulement*.

As such, beyond the procedural violation of the absolute principle of *non-refoulement*, Kenya may have also violated the substantive dimension to the principle in individual cases.

(4) The Violation of the Absolute Prohibition of Torture and Other Ill-Treatment

Where an individual is tortured or subjected to other ill-treatment on removal, the removing state may both violate the absolute principle of *non-refoulement* and the absolute prohibition of torture and other ill-treatment itself. This is the case even if the state carrying out the removal has no involvement in the eventual detention and treatment at the detention centre as the responsibility is based on the exposure of

¹¹⁵ Intelligence and Security Committee, “Special Report on Rendition” (2007) available at: <
http://www.cabinetoffice.gov.uk/intelligence/special_reports.aspx> at para. 65.

¹¹⁶ *Id.* At paras. I – J.

¹¹⁷ See, for example, Committee against Torture, *Motumbo v. Switzerland*, UN Doc. A/49/44 at 45 (1994).

¹¹⁸ *Mariam Mohamed & another v. Commissioner of Police & another* [2007] eKLR., Replying Affidavit (29 October 2007) at paras. 5 – 6.

the individual to torture and other ill-treatment in violation of the absolute principle of *non-refoulement*; if torture or ill-treatment is actually committed as a result of the transfer, further responsibility will ensue. As the UN Human Rights Committee found in *Mansour Ahani v. Canada*:

In the light of the circumstances of the case, the State party, having failed to determine appropriately whether a substantial risk of torture existed such as to foreclose the author's deportation, is under an obligation (a) to make reparation to the author if it comes to light that torture was in fact suffered subsequent to deportation, and (b) to take such steps as may be appropriate to ensure that the author is not, in the future, subjected to torture as a result of the events of his presence in, and removal from, the State party.¹¹⁹

In this respect, the testimonies of some of the former detainees transferred from Kenya to Somalia in January and February 2007 support the contention that some detainees were tortured and subjected to other ill-treatment in Somalia. As one former detainee describes: “[w]e all filed down into an underground cell. It was pitch black. There were water bottles down there to pee into. The floor was dusty and dirty. There were rats and cockroaches ... The only time we saw light was when the door was opened for them to go in or out.”¹²⁰

In Ethiopia, one former detainee estimated that the size of the cells in which at least four people were initially held was 8 foot by 8 foot.¹²¹ Thereafter, the men were allegedly held in metal cages.¹²² Former detainees also report instances of denial of access to medical treatment.¹²³ For example, one former detainee claimed that two women gave birth while in custody, the babies had “boils under the rash and they were losing their hair” and one of the women was very ill as she “had not been sewn up properly, she was bleeding constantly and she didn’t get any help”.¹²⁴ Another described being forced to stand in stressful positions, with his hands cuffed behind his back for up to five hours; while another recounts being yelled at so loudly during interrogations that he was certain he would lose his hearing.¹²⁵

Some former detainees held in Ethiopia also reported being taken, sometimes on a daily basis, to a villa outside of Addis Ababa for interrogation by the Ethiopian security services and agents of foreign security services. One former detainee described being taken to the villa every day at 4 or 5a.m., being hit, strangled, made to stand up until 10p.m., threatened with death and with the rape of his wife.¹²⁶ Amnesty International reported that, “[w]hile in custody in Ethiopia, the detainees

¹¹⁹ *Mansour Ahani v. Canada*, UN Human Rights Committee UN Doc. CCPR/C/80/D/1051/2002 (2004) at para 12.

¹²⁰ Cageprisoners, *supra* note 3 at 5 (quoting former detainee, Mohammed Ezzouek). See also, Muslim Human Rights Forum (2008) *supra* note 3; Human Rights Watch, *supra* note 3 at 22 - 27.

¹²¹ Cageprisoners, *supra* note 3 at 7; Sveriges Radio: “Konflikt” (26 May 2007) *supra* note 22.

¹²² Cageprisoners, *supra* note 3 at 7; Sveriges Radio: “Konflikt” (26 May 2007) *supra* note 22.

¹²³ Cageprisoners, *supra* note 3 at 7.

¹²⁴ Sveriges Radio: “Konflikt” (26 May 2007) *supra* note 22.

¹²⁵ Human Rights Watch, *supra* note 3 at 14. See also, Muslim Human Rights Forum (2008) *supra* note 3 at 24 – 27.

¹²⁶ Sveriges Radio: “Konflikt” (26 May 2007) *supra* note 22.

were questioned by US agents. Most had their fingerprints, DNA and photographs taken.”¹²⁷

As such, Kenya may have also violated the absolute prohibition of torture and other ill-treatment in addition to the absolute principle of *non-refoulement*.

(5) The Violation of the Absolute Prohibition of Enforced Disappearance

Since the three flights to Somalia and subsequent transfers to Ethiopia, at least 72 detainees are known to have been released accordingly to Muslim Human Rights Forum’s most recent figures.¹²⁸

However, as the Ethiopian authorities have never confirmed holding more than forty-one individuals and do not officially announce any releases, the number, identity and whereabouts of the remaining detainees is unknown.¹²⁹ In September 2008, Human Rights Watch noted that the “whereabouts of 22 Somalis, Ethiopian Ogadenis, Eritreans, and Kenyans rendered to Somalia in early 2007 remain unknown”.¹³⁰ Most recently, the media reported the release of eight Kenyans from Ethiopia, although the Ethiopian government claimed that they had been picked up in Somalia and were not rendered from Kenya.¹³¹

Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance sets out the elements of enforced disappearance as, “the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which places such a person outside the protection of the law”. As such, the individuals whose whereabouts remain unknown would be victims of enforced disappearance.

The multiple violations of international law involved in the mass detentions and removals from Kenya – including the right to liberty and security of the person; the absolute principle of *non-refoulement*; the absolute prohibition of torture and other ill-treatment and the prohibition on enforced disappearance – can be characterised as instances of ‘extraordinary rendition’. As one commentator notes, “[e]xtraordinary rendition is a hybrid human rights violation, combining elements of arbitrary arrest, enforced disappearance, forcible transfer, torture, denial of access

¹²⁷ Amnesty International, *supra* note 3 at 2. See also, Human Rights Watch, *supra* note 3 at 14 – 15.

¹²⁸ See also, Amnesty International *supra* note 3; Muslim Human Rights Forum (2008) *supra* note 3; Timothy Williams, “New Jersey Man Back Home After Three-Nation African Ordeal” *New York Times* (27 May 2007); Jeffrey Gettleman and Will Connors, “New Jersey Man Appears before Tribunal in Ethiopia” *New York Times* (14 April 2007).

¹²⁹ See, Muslim Human Rights Forum (2008) *supra* note 3 at 13.

¹³⁰ Human Rights Watch, *supra* note 3 at 18.

¹³¹ “Ethiopia Arrests Terror Suspects” *News 24* (9 October 2008) (reporting that a representative of the Ethiopian government had stated that the eight released Kenyan nationals had been caught in Somalia and not rendered from Kenya).

to consular officials, and denial of impartial tribunals. It involves the state-sponsored abduction of a person in one country, with or without the cooperation of the government in that country, and the subsequent transfer of that person to another country for detention and interrogation".¹³²

E. FAILURE TO INVESTIGATE

Given the multiple alleged violations of international law described above, a number of positive obligations arise, including the duty to conduct a full, independent and impartial investigation into the mass detentions and removals. The investigation must be capable of identifying and punishing those responsible. In its Concluding Observations on the United States, the Human Rights Committee found that:

The State should conduct a thorough and independent investigation into allegations that persons have been sent to third countries where they have undergone torture or cruel, inhuman or degrading treatment or punishment, modify its legislation and policies to ensure that no such situation will recur, and provide appropriate remedy to the victims.¹³³

In a Memorandum of Understanding with the National Muslim Leaders Forum, the then Kenyan Presidential candidate, Raila Odinga, committed to taking:

[s]pecific action [which] will include the setting up of a commission to inquire on deliberate schemes and actions of government, its agencies or officers, to target or interfere with welfare and social well being of Muslims in Kenya as citizens including renditioning of Kenyans to Somalia, Ethiopia and Guantamano (sic) Bay. Such schemes and actions **will be put to an end** and public officers responsible for the same named **and held to account...** (Signed between Hon. Raila Amolo Odinga (29/8/07) and Sheikh Abdullahi Abdi on behalf of National Muslim Leaders Forum).¹³⁴

However, no investigation has been conducted to date into any of the arbitrary detentions in Kenya or the removals to Somalia, Ethiopia and Guantánamo Bay. Thus, Kenya continues to violate its obligations under international law by failing to conduct an investigation into the mass detentions and removals.

¹³² David Weissbrodt and Amy Bergquist, "Extraordinary Rendition: A Human Rights Analysis," 19 *Harv. Hum. Rts. J.* 123 (2006) at 127. *See also, See also* Margaret L. Satterthwaite, "Rendered Meaningless: Extraordinary Rendition and the Rule of Law" 75 *Geo. Wash. L. Rev.* 1333 (2007) at 1336. *Alzery v. Sweden, supra* note 47 at para. 3.11. Council of Europe Parliamentary Assembly, Committee on Legal Affairs and Human Rights, Rapporteur Mr Dick Marty, "Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states" (12 June 2006) at paras. 288 – 291.

¹³³ *See*, UN Human Rights Committee, "Concluding Observations of the Human Rights Committee on the Second and Third U.S. Reports" UN Doc. CCPR/C/USA/CO/3 (2006) at para. 16.

¹³⁴ Clause b(iv) of Memorandum of Understanding between Honourable Raila Amolo Odinga and the National Muslim Leaders Forum on 29 August 2007 (bold in the original).

F. LACK OF PROVISION OF AN EFFECTIVE REMEDY AND FULL AND ADEQUATE REPARATION

The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law adopted by General Assembly resolution 60/147 of 16 December 2005 set out that states are obliged to provide victims with “fair, effective and prompt access to justice”¹³⁵ and make available “adequate, effective, prompt and appropriate remedies, including reparation”.¹³⁶ Principle 11 defines remedies as including “equal and effective access to justice” and “adequate, effective and prompt reparation for harm suffered;” and Principles 18 – 23 define reparation as restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

In *Agiza v. Sweden*, the UN Committee against Torture found that:

[t]he Committee observes that the right to an effective remedy for a breach of the Convention underpins the entire Convention, for otherwise the protections afforded by the Convention would be rendered largely illusory. In some cases, the Convention itself sets out a remedy for particular breaches of the Convention, while in other cases the Committee has interpreted a substantive provision to contain within it a remedy for its breach. In the Committee’s view, in order to reinforce the protection of the norm in question and understanding the Convention consistently, the prohibition on refoulement contained in article 3 should be interpreted the same way to encompass a remedy for its breach, even though it may not contain on its face such a right to remedy for a breach thereof.¹³⁷

In the cases of those arbitrarily detained in Kenya and removed to Somalia, Ethiopia or Guantánamo Bay, Kenya has failed to meet its obligations under international law to provide an effective remedy and full and adequate reparation. As a result, the UN Committee against Torture has called upon Kenya “to investigate these allegations [of renditions] in order to establish responsibilities and ensure compensation to victims.”¹³⁸

¹³⁵ Principle 2(b).

¹³⁶ Principle 2(c).

¹³⁷ At para. 13.6.

¹³⁸ Committee against Torture, “Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Concluding Observations of the Committee against Torture: Kenya” UN Doc. CAT/C/KEN/CO/1 (21 November 2008) at para. 17.

PART II: KENYA'S FAILURE TO ENSURE THAT COUNTERTERRORISM STRATEGIES RESPECT FUNDAMENTAL HUMAN RIGHTS

In the course of REDRESS and Reprieve's research, members of civil society repeatedly expressed their concern that the detentions and renditions were symptomatic of a broader problem that counterterrorism strategies were developed and pursued without regard to their impact upon Kenya's international human rights obligations. This created an enabling environment for the mass detentions and removals set out in Part I.

A. KENYA'S INTERNATIONAL AND REGIONAL OBLIGATIONS ON COUNTERTERRORISM

The development of strong counterterrorism strategies has been a particular priority in Kenya. The key factors contributing to this prioritisation include Kenya's general international counterterrorism obligations pursuant to the relevant UN Security Council resolutions; its geographical proximity to Somalia and previous terrorist attacks on US and Israeli interests in Kenya; and the identification of Kenya as a key strategic partner in the implementation of the US-led 'war on terror'. In this respect, Kenya has established a number of agencies and institutions to counter terrorism.

(I) UN Security Council Obligations

Prior to the events of 11 September 2001, the UN Security Council tended to make targeted and *ad hoc* interventions on counterterrorism following particular 'terrorist' incidents. Following 11 September 2001, however, the Security Council established a general framework on counterterrorism and acting under Chapter VII of the UN Charter¹³⁹, it adopted Resolution 1373 which sets out the specific measures states are required to take to counter terrorism¹⁴⁰ such as the prevention and suppression of "the financing of terrorist acts"¹⁴¹; refraining from supporting "entities or persons involved in terrorists acts"¹⁴² including through the provision of safe havens; ensuring that "terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts"¹⁴³; cooperating with other states on early warning systems and the investigation of terrorist acts¹⁴⁴; and adopting stringent border controls to prevent the movement of individuals or persons involved in terrorist acts.¹⁴⁵

¹³⁹ Acting under Chapter VII of the UN Charter, on 12 September 2001, Security Council determined that 'terrorism' constitutes a threat to international peace and security in Resolution 1368.

¹⁴⁰ Security Council Resolution 1373 UN Doc. S/RES/1373 (2001) adopted (28 September 2001).

¹⁴¹ At para. 1.

¹⁴² At para. 2(a).

¹⁴³ At para. 2(e).

¹⁴⁴ At paras. 2(b) and (e) and 3(a) – (c).

¹⁴⁵ At para. 2(g).

Resolution 1373 also established the Counter-Terrorism Committee¹⁴⁶ to monitor the implementation of the Resolution. The Counter-Terrorism Committee Executive Directorate was later established in 2004 to provide expert assistance to the Committee and technical advice to states in relation to the implementation of Resolution 1373.¹⁴⁷ In common with all member states, Kenya is obliged to comply with the measures set out by the Security Council.

Kenya has acceded to all thirteen conventions set out in Resolution 1373¹⁴⁸:

- Convention on Offences and Certain Other Acts Committed on Board Aircraft 1963;
- Convention for the Suppression of Unlawful Seizure of Aircraft 1970;
- Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971;
- International Convention against the Taking of Hostages, 1979;
- Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (supplementary to the Convention for Suppression of Unlawful Acts against the Safety of Civil Aviation) 1988;
- Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988;
- Convention on the Physical Protection of Nuclear Material 1980;
- Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf 1988;
- Convention on the Marking of Plastic Explosives for the purpose of Detection 1991;
- International Convention for the Suppression of Terrorist Bombings 1997;
- International Convention for the Suppression of the Financing of Terrorism 1999;
- Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Individual Diplomatic Agents 1993;
- Convention for the Suppression of Acts of Nuclear Terrorism 2005.

The Solicitor General of Kenya, Wanjuki Muchemi, has also stated that,

Kenya called on States to move towards the ratification of the Convention for the Suppression of Acts of Nuclear Terrorism, adding that the international legal framework for the suppression and combating of terrorism would not be fully effective until the international community's desire for a comprehensive convention on international terrorism was fully realized. It was disheartening, he said, that the elaboration of the draft comprehensive convention on

¹⁴⁶ At para. 6.

¹⁴⁷ Security Council Resolution 1535 (2004) UN Doc. S/RES/1535 (2004) adopted (26 March 2004).

¹⁴⁸ See, Counter-Terrorism Committee, "International Law and Terrorism" available at: <http://www.un.org/sc/ctc/law.shtml>

international terrorism has not been completed because of a few outstanding issues, including the definition of terrorism.¹⁴⁹

Kenya has submitted three reports to the Counter-Terrorism Committee as required by paragraph 6 of Resolution 1373.¹⁵⁰ The Counter-Terrorism Committee visited Kenya in 2005 and praised it for its honest reporting and its plans to establish a unit to combat the financing of terrorism. During this visit, the Executive Director of the Counter-Terrorism Committee's Executive Directorate "stressed the importance of having in place in Kenya 'legislation for the criminalization of terrorism as well as instruments to control the financing of terrorism.'"¹⁵¹ The fifth special meeting with international, regional and sub-regional organisations of the Counter-Terrorism Committee on "Prevention of Terrorist Movement and Effective Border Security" was also held in Nairobi in October 2007.¹⁵²

In implementing their obligations under Resolution 1373, states can receive technical assistance through the dissemination of "best practices; identifying existing technical, financial, regulatory and legislative assistance programmes; promoting synergies between the assistance programmes of international, regional and subregional organizations; and, through its Executive Directorate (CTED), serving as an intermediary for contacts between potential donors and recipients and maintaining an on-line directory of assistance providers."¹⁵³ Kenya has received assistance through this mechanism on a number of occasions in relation to financial law and practice; police and law enforcement; military counterterrorism training; training and capacity-building for the judiciary; maritime security; civil aviation and customs and border control.¹⁵⁴

UNDP and UNODC also jointly run a \$431,000 one-year project on 'Strengthening counter-terrorism capacity for a safer Kenya' which is funded by the Government of Denmark:

¹⁴⁹ UN Department of Public Information "United States Tells Assembly's Legal Committee Anti-Terrorism Efforts Must Stress Prevention of Global Expansion, Address Legitimate Grievances: Renewing Call for Progress Towards Comprehensive Convention, Delegates Say Bridge-Building Among Different Cultures Still Crucial" (11 October 2007).

¹⁵⁰ Security Council, "Letter dated 4 March 2004 from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) Concerning Counter-Terrorism addressed to the President of the Security Council" UN Doc. S/2004/181 (10 March 2004) (containing Kenya's third report); Security Council, "Letter dated 25 March 2003 from the Chairman of the Security Council Committee established pursuant to Resolution 1373 (2001) Concerning Counter-Terrorism Addressed to the President of the Security Council" UN Doc. S/2003/384 (31 March 2003) (containing Kenya's second report to the Committee); Security Council, "Letter dated 29 July 2002 from the Chairman of the Security Council Committee established pursuant to Resolution 1373 (2001) concerning Counter-Terrorism Addressed to the President of the Security Council" UN Doc. S/2002/856 (31 July 2002) (containing Kenya's first report to the Committee).

¹⁵¹ "UN Counter-terrorism Experts Praise Kenya's Cooperation" (3 May 2005).

¹⁵² "Joint Statement" The Fifth Special Meeting of the Counter-Terrorism Committee with International, Regional and Subregional Organizations on "Prevention of Terrorist Movement and Effective Border Security", Nairobi (29 to 31 October 2007). For documents from the meeting, see <http://www.un.org/sc/ctc/specialmeetings/nairobi/docs.html>

¹⁵³ On 12 November 2001 the Security Council adopted Resolution 1377 (2001) UN Doc. S/RES/1377 (2001), which "recognizes that many States will require assistance in implementing all the requirements of resolution 1373 (2001), and invites States to inform the Counter-Terrorism Committee of areas in which they require such support". See, Counter Terrorism Committee, "Technical Assistance" at <http://www.un.org/sc/ctc/page2.html>

¹⁵⁴ UN Counter-Terrorism Committee Executive Directorate, "Technical Assistance Matrix: Kenya" (25 October 2007), available at: <http://www.un.org/sc/ctc/matrix/reports/KEN.pdf>

This project constitutes the UNODC component of a joint UNDP/UNODC programme aimed at strengthening counter-terrorism in Kenya with the Kenyan National Counter-terrorism Centre (NTCT), Office of the President, as the main government counterpart. The long-term objective of the project is to reduce incidences of terrorism, financing of terrorism, and money laundering in Kenya. The immediate objective is to strengthen national capacity to more effectively and comprehensively prevent, investigate and prosecute terrorism, counter-terrorism financing and money laundering in Kenya.

The project strategy is two-pronged, namely (i) to assist in the development of national counter-terrorism and anti-money-laundering legislation and regulations in line with international standards and norms, and (ii) to strengthen Kenya's capacity to implement the said legislation on counter-terrorism under the broad framework of respect for civil liberties and human rights by training the judiciary, prosecutors and investigators in the application of the legislation. The strategy includes the establishment of a control mechanism to combat counter-terrorism financing and money laundering, i.e. of a Financial Reporting Centre (FRC) or Financial Intelligence Unit (FIU), as well as training of relevant government authorities and private banks on the implementation of the new legislation.¹⁵⁵

(2) African Union Obligations

At the African Union level, Kenya has ratified the Convention on the Prevention and Combating of Terrorism 1999 and its 2002 Protocol. In 2002, a "Plan of Action on the Prevention and Combating of Terrorism in Africa" was developed.¹⁵⁶ The Plan specifically references the obligations set out under UN Security Council Resolution 1373¹⁵⁷; emphasises the common objectives of member states to eradicate terrorism through the "exchange of information among Member States on the activities and movements of terrorist groups in Africa; mutual legal assistance; exchange of research and expertise; and the mobilization of technical assistance and cooperation, both within Africa and internationally, to upgrade the scientific, technical and operational capacity of Member States"¹⁵⁸; and mandates states to take specific action in relation to police and border control¹⁵⁹, legislative and judicial measures¹⁶⁰ and exchange of information.¹⁶¹

¹⁵⁵ UNODC, "Project Portfolio of UNODC Regional Office for Eastern Africa" <http://www.unodc.org/kenya/en/projects.html>

¹⁵⁶ African Union, "Plan of Action of the African Union High-Level Intergovernmental Meeting on the Prevention and Combating of Terrorism in Africa" Mtg/HLIG/Conv.Terror/Plan.(I) (11 – 14 September 2002). *See also*, African Union, Second High-Level Intergovernmental Meeting on the Prevention and Combating of Terrorism in Africa, "Declaration of the Second High-Level Intergovernmental Meeting on the Preventing and Combating of Terrorism in Africa" Mtg/HLIG/Conv.Terror/Decl.(II)Rev.2 (13 – 14 October 2004).

¹⁵⁷ *Id.* at para. 8.

¹⁵⁸ *Id.* at para. 2.

¹⁵⁹ *Id.* at para. 11.

¹⁶⁰ *Id.* at para. 12.

¹⁶¹ *Id.* at para. 14.

The Peace and Security Council of the African Union is the central body responsible for overseeing the implementation of the Convention on the Prevention and Combating of Terrorism¹⁶² and states must submit annual reports to the Council in this respect.¹⁶³ The Commissioner for Peace and Security in the Commission is also vested with the responsibility to:

- b. examine the reports submitted by Member States in relation to paragraph 16.b. of the Plan of Action;
- c. review and make recommendations to update the Plan of Action;
- d. provide advice on matters pertaining to counter-terrorism action including preparation of model legislation and guidelines to assist Member States; and
- e. follow-up with Member States and any other States on decisions taken by the Peace and Security Council and other organs of the Union on terrorism and activities of terrorist groups.¹⁶⁴

The African Centre for the Study and Research on Terrorism has also been established as a “structure of the Commission of the African Union and the Peace and Security Council (PSC), which shall serve to centralize information, studies and analyses on terrorism and terrorist groups and develop training programs by organizing, with the assistance of international partners training schedules, meetings, and symposia.”¹⁶⁵

In 2005, the AU hired a consultant to draft a model law on counterterrorism and has also created a counterterrorism unit in Addis Ababa.

Like all states, therefore, Kenya is obliged to develop and implement counterterrorism strategies as a result of its international and regional commitments.

(3) The Relationship between Counterterrorism and Human Rights Obligations at the International and Regional Level

The African Union makes no reference to the obligation upon states to comply with their pre-existing human rights obligations when implementing the various counterterrorism measures. Similarly, the UN Security Council did not initially emphasise the connection.

Security Council Resolution 1373 made little reference to states’ duties to comply with their pre-existing obligations under international human rights, humanitarian and refugee law when implementing the Resolution.¹⁶⁶ In a briefing to the Security

¹⁶² Article 7(i) of the Protocol relating to the Establishment of the Peace and Security Council of the African Union.

¹⁶³ Plan of Action *supra* note 158 at para. 16(b).

¹⁶⁴ Plan of Action *supra* note 158 at para. 18.

¹⁶⁵ African Union, Second High-Level Intergovernmental Meeting on the Prevention and Combating of Terrorism in Africa, “Declaration of the Second High-Level Intergovernmental Meeting on the Preventing and Combating of Terrorism in Africa” Mtg/HLIG/Conv.Terror/Decl.(II)Rev.2 (13 – 14 October 2004).

¹⁶⁶ Paragraphs 3(f) and (g) set out that states must: “Take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts; Ensure, in conformity with international law, that refugee status is not abused by the

Council, the first Chairperson of the Counter-Terrorism Committee (CTC), Sir Jeremy Greenstock, also submitted that human rights lay outside the mandate of the CTC, stating that:

The Counter-Terrorism Committee is mandated to monitor the implementation of resolution 1373 (2001). Monitoring performance against other international conventions, including human rights law, is outside the scope of the Counter-Terrorism Committee's mandate. But we will remain aware of the interaction with human rights concerns, and we will keep ourselves briefed as appropriate. It is, of course, open to other organizations to study States' reports and take up their content in other forums.¹⁶⁷

The thrust of the CTC's reasoning for not actively requiring states to comply with their human rights obligations while implementing Resolution 1373 derived from the lack of an express requirement in the Resolution itself and from a practical perspective, as submitted by Sir Jeremy Greenstock, that other UN agencies already enjoyed a human rights mandate, therefore, the CTC did not need to overlap with other agencies' work.¹⁶⁸

However, the lack of a strong human rights connection in Resolution 1373 and the policy of the CTC drew criticism from other UN bodies and non-governmental organisations (NGOs).¹⁶⁹ The UN Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism stated that Resolution 1373, "regrettably, contained no comprehensive reference to the duty of States to respect human rights in the design and implementation of such counter-terrorism measures. This omission may have given currency to the notion that the price of winning the global struggle against terrorism might require sacrificing fundamental rights and freedoms".¹⁷⁰ This position was echoed by the successive High Commissioners for Human Rights who recommended the appointment of a human rights advisor within the CTC.¹⁷¹ Mary Robinson also provided the CTC with a set of guidelines to assist in its monitoring of the implementation of Resolution 1373.¹⁷²

perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists."

¹⁶⁷ Briefing of the first Chairman to the Counter-Terrorism Committee to the Security Council (18 January 2002) (noted at: <http://www.un.org/sc/ctc/page6.html>)

¹⁶⁸ E.J. Flynn, "The Security Council's Counter-Terrorism Committee and Human Rights", 7(2) *Human Rights Law Review* 371 (2007) at 377.

¹⁶⁹ See, for example, Amnesty International, "Open Letter to the Members of the Security Council" IOR 50/003/2002 (17 January 2002); Human Rights Watch, "Briefing Paper: Hear No Evil, See No Evil: The UN Security Council's Approach to Human Rights Violations in the Global Counter-Terrorism Effort" (10 April 2004).

¹⁷⁰ Commission on Human Rights, "Promotion and Protection of Human Rights: Protection of Human Rights and Fundamental Freedoms while Countering Terrorism: Note by the United Nations' High Commissioner for Human Rights" UN Doc. E/CN.4/2005/103 (7 February 2005) at para. 6. For a comprehensive overview of the critiques made of the impact of the absence of a human rights framework within the Security Council's approach to counterterrorism, see, Rosemary Foot, "The United Nations, Counter Terrorism, and Human Rights: Institutional Adaptation and Embedded Ideas" 29 *Human Rights Quarterly* 489 (2007).

¹⁷¹ See, for example, "Address by Sergio Vieira de Mello, The High Commissioner for Human Rights to the Counter-Terrorism Committee of the Security Council" (21 October 2002).

¹⁷² Office of the High Commissioner for Human Rights. "Note to the Chair of the Counter-Terrorism Committee: A Human Rights Perspective On Counter-Terrorist Measures" (no date); Office of the High Commissioner for Human Rights, "Proposals for "Further Guidance" for the submission of reports pursuant to paragraph 6 of Security Council Resolution 1373 (2001) (intended to supplement the Guidance of 26 October 2001)" (23 September 2002).

Sir Nigel Rodley, in his capacity of Vice-Chair of the Human Rights Committee also appeared before the CTC and submitted that the CTC should encompass human rights within its work, noting that:¹⁷³

the Council should not leave [human rights] wholly to those parts of the United Nations system that have a specific human rights mandate. Political and legal reasons support this contention. What resolutions 1373 and 1456 represent is a paradigm shift towards depoliticization and a professionalization of what had been a supremely political discourse in our organization, that is, the discourse on terrorism. Like the earlier discourse on terrorism, human rights discourse in the inter-governmental organs of the United Nations dealing with human rights, notably, the Commission on Human Rights, has suffered from the same political manipulation and has not yet begun to transcend it. Accordingly, the Council cannot rely on those bodies to monitor the human rights dimension with the methodology necessary to make their monitoring reliable. Moreover, from the legal perspective, their findings would not, of themselves, have the same binding force that decisions of the Security Council adopted under chapter VII of the Charter evidently have.¹⁷⁴

Since 2003, however, the Security Council and the CTC appear to be taking a stronger approach to human rights. The Security Council first adopted Resolution 1456 of 2003, setting out that:

States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law.¹⁷⁵

In 2004, in a general move to generally ‘revitalise’ the CTC, the Security Council established the Counter-Terrorism Executive Directorate (CTED) to provide support to the CTC.¹⁷⁶ The ‘revitalisation’ of the CTC included the appointment of a senior human rights officer. In 2006, the CTC also adopted “Conclusions for Policy Guidance Regarding Human Rights and the CTC”.¹⁷⁷ The Conclusions set out that when the CTED analyses the implementation of Resolution 1373 and in “preparing draft letters to States [and] organising visits”, the CTED should:

a. provide advice to the CTC, including for its ongoing dialogue with States on their implementation on resolution 1373 (2001), on international human rights, refugee and humanitarian law, in connection with identification and implementation of effective measures to implement resolution 1373 (2001).

¹⁷³ Security Council Counter-Terrorism Committee, “Briefing by Sir Nigel Rodley, Vice-Chairperson Human Rights Committee: Human Rights and Counter-Terrorism Measures” (19 June 2003).

¹⁷⁴ At paras. 5 – 6 (*see also*, para. 11. recommending the appointment of a human rights expert to the CTC).

¹⁷⁵ Security Council, Resolution 1456, UN Doc. S/RES/1456 (2003) at para. 6.

¹⁷⁶ Security Council, Resolution 1535, UN Doc. S/RES/1535 (2004).

¹⁷⁷ Counter-Terrorism Committee, “Conclusions for Policy Guidance Regarding Human Rights and the CTC” UN Doc. S/AC.40/2006/PG.2 (25 May 2006). *See also*, Security Council, “Letter dated 7 February from the Chairman of the Security Council pursuant to resolution 1373 (2001) concerning Counter-Terrorism Addressed to the President of the Security Council” UN Doc. S/2008/80 (8 February 2008).

- b. advise the CTC on how to ensure that any measures States take to implement the provisions of resolution 1624 (2005) comply with their obligations under international law, in particular international human rights law, refugee law, and humanitarian law.
- c. liaise with the Office of the High Commissioner for Human Rights and, as appropriate, with other human rights organizations in matters related to counter-terrorism.

Moreover, at an operational level, the CTC communicates on a more regular basis with the Office of the High Commissioner for Human Rights and the Special Rapporteur on the Protection and Promotion of Human Rights while Countering Terrorism.¹⁷⁸ The CTED is also preparing Preliminary Implementation Assessments with respect to Resolution 1373. The purpose of these assessments is to reduce “the need for continual requests to member states to update reports. The new assessments will seek to match every country’s performance with a set of criteria, make note of human rights abuses, gaps that other UN bodies have identified, and anti-terrorism conventions that the country has ratified. The CTED has prepared a table on its findings of how countries have implemented the resolution, which the Committee is reviewing before submitting an official report to the Council. But this table is not expected to be published at this time so as to avoid any sense that member states are being publicly ‘named and shamed’”.¹⁷⁹

While the Security Council has now more visibly connected states’ counterterrorism obligations to their human rights duties under international law, it is not clear whether this shift has impacted state practice. Some organisations, like the Commonwealth Human Rights Initiative, have questioned whether the damage to human rights had already been done:

But by 2003 many Commonwealth governments had already used 1373 to justify the revival of outdated draconian security laws and enact new, repressive anti-terrorism legislation undermining the rule of law and allowing for police practices in direct violation of human rights standards.¹⁸⁰

Thus, the belated connection between the requirement to implement counterterrorism measures and the duty to continue to comply with pre-existing human rights obligations may have played a role in Kenya’s construction of its counterterrorism strategies resulting in incidents such as the 2006 and 2007 renditions.

¹⁷⁸ See, for example, UN Department of Public Information “Press Conference on Human Rights in Context of Counter-Terrorism” (29 October 2007) (stating that “[the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism] stressed that the Counter-Terrorism Committee was willing to have a dialogue with human rights actors and include human rights compliance in best practice. For example, he said that the Committee had built on his report from Turkey as they reviewed that country’s counter-terrorism practices ... ‘There is a lot of room for mainstreaming of human rights into the counter-terrorism work.’” See also, Flynn *supra* note 170 at 383.

¹⁷⁹ Security Council, “May 2008 Counter Terrorism: Briefings to the Council” (May 2008) available at: <http://www.securitycouncilreport.org/site/c.glKWLeMTIsG/b.4065781/>

¹⁸⁰ Commonwealth Human Rights Institute, “Stamping out Rights: The Impact of Anti-Terrorism Laws on Policing” (2007) at 12.

B. THE PERCEPTION OF A PARTICULARISED TERRORIST THREAT IN KENYA BY KENYA AND OTHER STATES

As a result of Kenya's geographical proximity to Somalia and previous bombings in Nairobi and Mombasa, Kenya is often considered to be at a heightened risk of terrorism.

In August 1998, the US Embassy in Nairobi was bombed, killing over 200 people and injuring a further 5000.¹⁸¹ An Israeli-owned hotel in Mombasa - the Kikambala Paradise Hotel - was also bombed and two surface-to-air missiles were fired at an Israeli commercial airline on 28 November 2002.¹⁸²

In addition to previous attacks on Kenyan soil, the border Kenya shares with Somalia is also perceived to heighten the risk of terrorist attacks in Kenya due to the political instability in Somalia as discussed above.¹⁸³ In a statement made on behalf of the Kenyan High Commission for Security and Border Control, an official noted that:

[t]o understand the challenges in the management of border security in Kenya, it is necessary to appreciate that Kenya is one of only three countries in the world, along with Ethiopia and Djibouti, that shares a border with a country without a Government for over sixteen years. This situation negates the entire approach to border security, and has impacted adversely to Kenya's internal security; a fact that is quite often forgotten by many.¹⁸⁴

Kenya has closed its border with Somalia on a number of occasions.¹⁸⁵ Other states, such as the UK and the US, have also taken the position that the shared border increases the threat of terrorism in Kenya not only as a result of the instability in Somalia but also on the basis that Somalia may provide a base and potential shelter for Al-Qaeda operatives.¹⁸⁶

Since the bombings in Kenya, both the UK and the US have issued travel warnings on various occasions, advising against all but essential travel to Kenya due to the threat of terrorist attacks against "Western interests".¹⁸⁷ According to media reports, the

¹⁸¹ Embassy of the United States, Nairobi, Kenya, "Ceremony to Mark the Tenth Anniversary of the Bombing of the US Embassy: Remarks by US Ambassador Michael Ranneberger" (7 August 2008).

¹⁸² "UK Condemns Kenya Bomb Attack" *BBC News* (28 November 2002).

¹⁸³ Kenya shares a border with Ethiopia, Tanzania, Uganda, Somalia and Sudan.

¹⁸⁴ Kenya High Commission for Security and Border Control, "Challenges for Law Enforcement in Border Security" Presentation made at the 2007 the 2007 Fifth Special Meeting of the Counter-Terrorism Committee with International, Regional and Subregional Organisations, "Prevention of Terrorist Movement and Effective Border Security" (2007) at 5 – 6.

¹⁸⁵ See, for example, "Kenya Shuts Border with Somalia" *International Herald Tribune* (3 January 2007).

¹⁸⁶ See for example, 'Our Man in Africa: Lovely Country, It's Just a Pity You're Corrupt from Head to Toe' *The Guardian* (11 November 2006) (reporting that Kim Howells, Minister of State for Foreign Affairs stated that, "Mr Howells said the 'terrorist movement' had been active in Kenya for some time, and the rise of the Islamic courts in Somalia has raised the risks of attacks. 'There seems to be a revival of AQ [Al Qaida] activity in Somalia ... and Kenya has a long porous border with what is probably the most stark example of a failed state in the world. There is a perception that Kenya is wide open. Al-Qaida watches these things very closely.'" Andrew Cawthorne, "U.S. says al-Qaeda behind Somali Islamists" *Reuters* (15 December 2006).

¹⁸⁷ In May and June 2003, the U.K. Foreign and Commonwealth Office issued a travel advisory warning against all but essential travel to Kenya, see Foreign and Commonwealth Office, "Review of Foreign and Commonwealth Office Travel Advice" (April 2004). The US issued similar travel warnings, see, for example, "Avoid Kenya, US Warns" *BBC*

Horn of Africa “ranks alongside the Middle East as the area of greatest concern to British counter-terrorism officials, coming second only to Pakistan, where al-Qaeda's core leaders are concerned...”¹⁸⁸

As a result of the attacks against US interests in Kenya and its geographical proximity to Somalia, the US has identified Kenya as a key strategic ally in its “war on terror”¹⁸⁹ and has provided Kenya with substantial funding in this regard. Kenya receives a range of assistance from the US to pursue its counterterrorism strategies, including: “military training for border and coastal security, a variety of programs to strengthen control of the movement of people and goods across borders, aviation security capacity-building, assistance for regional efforts against terrorist financing, and police training. [The East African Counterterrorism Initiative] EACTI also includes an education program to counter extremist influence and a robust outreach program.”¹⁹⁰ According to the Kenyan media, the US “has increased its military aid to Kenya by nearly 800 per cent since the September 11, 2001 terrorist attack.”¹⁹¹

In 2006, for example, the US Ambassador to Kenya announced the donation of six boats to the Kenyan Navy, estimated at \$3 million USD to “help the Government of Kenya combat insecurity and terrorism. This is timely in view of heightened concerns by Kenya about potential exploitation of the Kenyan coast by criminal groups and terrorists. The donation of the boats is part of a much broader effort to help the Government of Kenya protect its borders. This is particularly important in view of the deteriorating situation within Somalia.”¹⁹² In May 2007, the US and Kenya announced \$14 million USD of “new funding to Kenya’s security forces aimed at countering “terrorist activities” in the Horn of Africa.”¹⁹³ The assistance was described as including:

- Training and equipment of various Kenyan law enforcement and security programs, \$5.5 million
- Training and equipping of four coastal security patrol units, \$1.5 million
- Construction of Coastal Maritime Training Facility on Camp Manda, \$3 million

News (15 May 2003). See also, Jeremy Clarke, “US Warns of Kidnaps by Islamic Militants in Kenya” *Reuters* (29 September 2007) (citing the US Embassy in Nairobi as stating that “Islamic extremists in southern Somalia may be planning kidnapping operations inside Kenya” of Westerners and tourists); Joyce Mulama, “Opposition to Anti-Terror Law That “Violates Even Basic Human Rights”” *Inter Press Service (Johannesburg)* (12 March 2007) (citing a travel advisory issued by the US warning of “possible terrorist attacks in the East African country during the upcoming World Cross Country Championships”).

¹⁸⁸ David Blair, “Al Qaeda Target West from Horn of Africa” *Telegraph* (24 October 2007) <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2007/10/22/wqaeda122.xml>

¹⁸⁹ “Steep Rise in US Military Aid” *The Nation (Nairobi)* (9 September 2007) (depicting Kenya as a “frontline” state in the US-led “war on terror”).

¹⁹⁰ William Pope, Deputy Coordinator for Counterterrorism US State Department Speaking at the East African Counterterrorism Initiative Conference 21 April 2004 <http://www.state.gov/s/ct/rls/rm/2004/31731.htm>

¹⁹¹ “Steep Rise in US Military Aid” *The Nation (Nairobi)* (9 September 2007) (citing a report by the Center for Defence Information).

¹⁹² “Ambassador Ranneberger to Dedicate Boats for Kenyan Navy” Press Release, US Embassy in Nairobi (5 October 2006).

¹⁹³ “Kenya Gets US Anti-Terror Funds” *BBC News* (4 May 2007).

- Through Port Security Initiative, provide training on security management and planning at Mombasa, \$450,000
- Grant of two boats with equipment for Mombasa Port, \$260,000
- Provision of secure IT network and case management project for [the Anti-Terrorism Police Unit] ATPU, \$2.08 million (over two years)
- Support of cyber forensics lab and cyber crime training, \$1.24 million (over two years)
- Border Control Management course to enhance operational planning skills, \$200,000.¹⁹⁴

Despite the US' central role in the development and implementation of counterterrorism measures in Kenya, it is not clear how proactively the US requires such measures to be taken in full compliance with Kenya's international human rights obligations. To the contrary, the US' approach to counter-terrorism under the Bush administration has been regularly condemned for its failure to accord with basic human rights standards.

C. THE PRIORITISATION OF COUNTERTERRORISM STRATEGIES WITHOUT ADEQUATE ASSESSMENT OF THEIR COMPLIANCE WITH INTERNATIONAL HUMAN RIGHTS LAW

Kenya has been unable to enact anti-terrorism legislation which, as noted above, was advocated for by the Counter-Terrorism Committee Executive Directorate on its visit to Kenya. In its 2002 report to the Counter-Terrorism Committee, Kenya noted that, “[a]fter September 2001, the Government of Kenya realised that the existing domestic legislative framework was inadequate to effectively deal with the multifaceted aspects of terrorism”.¹⁹⁵ As a result, the Attorney-General prepared the Suppression of Terrorism Bill 2003 which later lapsed.¹⁹⁶ A later bill - the Anti-Terrorism Bill 2006 - was also proposed but was never formally introduced before Parliament. Both bills have been criticised as a matter of policy and on specific human rights and constitutional grounds. While neither bill has been formally reintroduced, from REDRESS and Reprieve's research in Kenya, some members of civil society were of the view that draft counterterrorism legislation may be proposed again at some point in the near future. Therefore, the analyses on previous bills remain relevant.

¹⁹⁴ “Joint U.S.-Kenya Statement regarding the official visit of the Minister of State for Provincial Administration and Internal Security to the United States” *Press Release of the US Embassy in Nairobi* (4 May 2007).

¹⁹⁵ Security Council, “Letter dated 29 July 2002 from the Chairman of the Security Council Committee established pursuant to Resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council” S/2002/856 (31 July 2002) (containing “Report of the Republic of Kenya submitted to the Security Council Committee established pursuant to resolution 1373 (2001).”)

¹⁹⁶ Kenya Gazette Supplement, “The Suppression of Terrorism Bill, 2003” 38 Kenya Gazette Supplement Nairobi, 30 April 2003 at 443.

(I) General Policy Concerns

Three central policy concerns have been advanced in relation to both bills. First, in the course of REDRESS and Reprieve's research, a number of members of civil society were of the opinion that the Kenyan government had not developed a national counterterrorism policy tailored specifically to Kenya but rather had introduced the Suppression of Terrorism Bill in order to meet US demands.¹⁹⁷ In relation to the 2003 Bill, the then opposition party, Kenya African National Union (KANU), was reported to have characterised the Bill as "a step along the way to the setting up of a US military base in Kenya".¹⁹⁸ Similarly, the Anti-Terrorism Bill 2006 was also reported to have been dismissed by a parliamentary committee on the basis that it was an "American priority".¹⁹⁹

Second, a number of members of civil society were of the opinion that counterterrorism should not be dealt with in isolation but should rather form part of a broader initiative to deal with the range of security issues facing Kenyan society.²⁰⁰

Finally, a number of individuals in civil society interviewed by REDRESS and Reprieve commented that as police powers would be increased substantially under the proposed legislation, general police reform was a necessary prerequisite to the enactment of an anti-terrorism bill. This was due to reports of corruption, the use of torture and ill-treatment within the general police force and the lack of transparency of the role, mandate and operation of the Anti-Terrorism Police Force (ATPU) which was responsible for the 2006 and 2007 mass detentions and removals from Kenya.

Indeed, in the recent Concluding Observations of the Committee against Torture on Kenya's First State Party report, the Committee noted its "deep concern the numerous and consistent allegations of widespread use of torture and ill-treatment of suspects in police custody" and recommended that,

[a]s a matter of urgency, the State party should take immediate steps to prevent acts of torture and ill-treatment of suspects in police custody and to announce a zero-tolerance policy of all acts of torture or ill-treatment by State officials or others working in their capacity. The State party should promptly adopt effective measures to ensure that all persons detained are afforded, in practice, with the fundamental legal safeguards during detention, including the right to a lawyer, to an independent medical examination and to notify a relative. Furthermore, the State party should keep under

¹⁹⁷ "House Team Dismisses Revised Anti-Terrorism Bill" *The East African Standard* (6 June 2006)

¹⁹⁸ "Kenya's Terror Bill Rejected: A Kenyan Parliamentary Committee has Opposed a New Draft Bill Aimed at Combating Terrorism in the East African Nation" *BBC News* (15 July 2007); *See also*, Law Society of Kenya, "Report on the Public Forum Held on 4th July 2003 to Discuss the Suppression of Terrorism Bill 2003" (containing a number of comments by participants that the proposed legislation was a US priority and Kenya "under pressure" from the US to enact it).

¹⁹⁹ "House Team Dismisses Revised Anti-Terrorism Bill" *The East African Standard* (6 June 2006)

²⁰⁰ Joyce Mulama, "Opposition to Anti-Terror Law That "Violates Even Basic Human Rights"" *Inter Press Service (Johannesburg)* (12 March 2007) (citing the Chairperson of Muslim Human Rights Forum as stating that "Terrorism is just a small part of (security problems) to Kenyans.")

systematic review interrogation rules, instructions, methods and practices with a view to preventing cases of torture.²⁰¹

(2) Concerns about Particular Aspects of the Bill

In addition to the policy concerns set out above, many of the provisions in both bills were criticised on the grounds that they failed to adhere to human rights obligations set out in the Kenyan Constitution and international law. Amnesty International expressed concern that the enactment of the 2003 Bill “could encourage the creation of a two-tier justice system, providing the legal framework for arbitrary arrests, illegal detention and searches and a flawed judicial system.”²⁰²

Key criticisms related to:

- *The Definition of Terrorism* (Clause 3 of 2003 Bill; Clause 3 of 2006 Bill²⁰³)

The definition of “terrorism” in both bills has been criticised as being too vague²⁰⁴ and the elements of the crime of “terrorism” unclear, with the consequences that the bills failed to ensure legal certainty as to the offences contained therein; provided wide discretion to the authorities to determine whether an alleged act fell within the terms of the proposed legislation and opened up the potential for the abuse of the

²⁰¹ Committee against Torture, “Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Concluding Observations of the Committee against Torture: Kenya” UN Doc. CAT/C/KEN/CO/1 (21 November 2008) at para. 13. *See also*, Human Rights Committee 2005 at para. 18.

²⁰² Amnesty International, “Kenya: Draft anti-terrorism legislation may undermine Kenyan constitution and international law,” AFR 32/004/2004 (9 September 2004) at 2.

²⁰³ Under section 3 of the 2003 Bill, terrorism was defined as:

“the use or threat of action where –

- (a) the action used or threatened –
 - (i) involves serious violence against a person;
 - (ii) involves serious damage to property;
 - (iii) endangers the life of any person other than the person committing the action;
 - (iv) creates a serious risk to the health or safety of the public or a section of the public; or
 - (v) is designed seriously to interfere with or seriously disrupt an electronic system;
 - (b) the use or threat is designed to influence the government or to intimidate the public or a section of the public; and
 - (c) the use or threat is made for the purpose of advancing a political religious or ideological cause;
- Provided that the use or threat of action which involves the use of –
- (i) firearms or explosives;
 - (ii) chemical, biological, radiological or nuclear weapons; or
 - (iii) weapons of mass destruction in any form,

shall be deemed to constitute terrorism whether or not paragraph (b) is satisfied.

(2) In this section –

- (a) “action” includes action outside Kenya;
- (b) a reference to any person or to property is a reference to any person, or to property, wherever situated;
- (c) a reference to the public includes a reference to the public of a country other than Kenya; and
- (d) ‘the government’ means the government of Kenya or of a country other than Kenya.”

The definition of terrorism in the 2006 Bill was relatively similar to that in the 2003 Bill. However, a new clause (a) was added: “an act or omission in or outside Kenya which constitutes an offence within the scope of a counter terrorism convention.”

²⁰⁴ *See for example*, Special Rapporteur for Human Rights while Countering Terrorism, “Communications to and from Governments: Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism (Mr. Martin Scheinin)” UN Doc. A/HRC/4/26/Add.I (15 March 2007) (noting that he had sent a letter to the Government on the Bill on 21 June 2006 and had not had a response as of 31 January 2007).

legislation through politically motivated arrests or personal vendettas.²⁰⁵ As the East African Law Society noted with respect to the 2003 Bill, “[t]he Bill’s definition of “terrorism” is so absurdly wide as to mean anything, and thus nothing. In its current form it would include domestic violence, street and school fights, sports melees or bar brawls. All of these are offences, but none of them amount to terrorism.”²⁰⁶

Both bills also contain other provisions dependant on the definition of “terrorism”, such as the offence of “incitement” to commit terrorist acts under Clause 8 of both bills; the criminalisation of the support or aiding of “terrorism” under Clauses 11, 14 and 17 of the 2003 Bill and 13, 15, 17 and 18 of the 2006 Bill; and the declaration of an organisation as “terrorist” if the Minister for Security “believes that it is concerned in terrorism” under Clause 9 of the 2003 Bill and 11 of the 2006 Bill.²⁰⁷ As Amnesty International notes, “[s]tarting from the argument that “terrorism” itself is vaguely defined, how would a court of law adjudicate a case of incitement to commit an act of “terrorism”?”²⁰⁸

In a letter to the Kenyan government on the 2006 Bill, the UN Special Rapporteur on the Protection and Promotion of Human Rights while Countering Terrorism underscored his concerns about the definition of “terrorism” contained in the Bill and its implications for other sections of the Bill, noting that:

the Special Rapporteur pointed to the overly broad definition of terrorism as contained Article 3 of the draft bill. Furthermore, he highlighted the vague reference to “any specified person” in Article 21 (1b) and (2c). Second, the Special Rapporteur underlined that Articles 6 and 7 of the draft bill are vaguely phrased and do not require any proof of intent on the person of the alleged perpetrator to support/commit a terrorist offence. Given the very broad and vague definition of “terrorism” and the lack of any intent requirement, articles 8 and 9 on incitement and aiding and abetting also carry the danger of being misused. Third, Part III of the draft bill confers large powers on the Minister to declare that an organization is “terrorist”, if he “believes that it is engaged in terrorism” (art. 11 (4)), based on an assessment of vaguely formulated criteria, such as “promotes and encourages terrorism or is otherwise involved in terrorism” (art. 11 (5 c and d)). Consequently, the Special Rapporteur underlined the need for revising the definition of terrorism contained in the draft bill by introducing clear and precisely formulated provisions, limiting its scope to acts that are genuinely terrorist in nature, and the need for clear and precise provisions

²⁰⁵ See for example, Amnesty International, “Kenya: Memorandum to the Kenyan Government on the Suppression of Terrorism Bill 2003,” AI Index: AFR 32/003/2004 (September 2004) at 3 – 4; Law Society of Kenya, “Report on the Public Forum Held on 4th July 2003 to Discuss the Suppression of Terrorism Bill 2003”.

²⁰⁶ EALS statement on Kenya’s draft Anti-Terrorism Law (29 May 2003).

²⁰⁷ Amnesty International, “Kenya: Memorandum to the Kenyan Government on the Suppression of Terrorism Bill 2003,” AI Index: AFR 32/003/2004 (September 2004) (noting its concern that the power to declare an organisation as a terrorist organisation “is being given on a fundamental right issue without any checks and balances, contrary to the concept of the rule of law. No right of review of the Minister’s decision is provided for in the Bill.”)

²⁰⁸ Amnesty International, “Kenya: Draft anti-terrorism legislation may undermine Kenyan constitution and international law,” AFR 32/004/2004 (9 September 2004) at 13.

with regard to the proscription of allegedly terrorist organizations and appropriate judicial oversight.²⁰⁹

- “Uniforms” (Clause 12 of the 2003 Bill)

Clause 12(2) of the 2003 Bill enabled a member of the police force to “arrest a person without a warrant if he has reasonable grounds to suspect that the person is guilty of an offence under this section”. The offence set out in 12(1) was that “a person who, in a public place – (a) wears an item of clothing; or (b) wears, carries or displays an article, in such a way or in such circumstances as to arouse reasonable suspicion that he is a member or supporter of a declared terrorist organisation”. The offence carried the penalty of a fine or up to six months’ imprisonment or both despite the vague nature of the offence, its infringement on the right to freedom of expression and its potential to result in discriminative practices and profiling of communities thought to be ‘associated’ with ‘terrorists’. This provision was removed from the 2006 Bill.

- *Powers of Search and Seizure* (Clause 26 of 2003 Bill; 27 of 2006 Bill)

The vague definition of “terrorism” set out in both bills also has serious implications with respect to the powers of search and seizure granted to a police officer above the rank of inspector in “a case of urgency” where “communication with a judge to obtain a warrant would cause delay that may be prejudicial to the maintenance of public safety or public order”. In such circumstances, the bills grant police officers wide powers to enter and search premises, persons and vehicles and arrest and detain persons “if he has reason to suspect” that an offence is being committed or likely to be committed or there is evidence of the commission of an offence. The 2006 Bill requires the matter to be brought before a judge within 48 hours.

- *Incommunicado Detention* (Clause 30 of 2003 Bill)

The 2003 Bill provided that a person arrested “under reasonable suspicion of having committed an offence” could be held in “police custody for a period not exceeding thirty-six hours from his arrest, without having access to any person other than a police officer of or above the rank of inspector or a government medical officer.” The 2006 Bill did not contain such a provision. Referring to the 2003 Bill, Amnesty International commented that the “[p]rovisions ... are drastic and would amount to legitimising incommunicado detention, which can increase the risk of torture, ill-treatment and “disappearances”.”²¹⁰

- *Exclusion Orders* (Clause 31(3) of both bills)

The 2003 Bill provided that the Minister could issue an exclusion order against any person who “is or has been concerned in the commission, preparation or instigation

²⁰⁹ Human Rights Council, “Communications to and from Governments: Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (Mr. Martin Scheinin)” UN Doc. A/HRC/4/26/Add.1 (15 March 2007) at para. 37.

²¹⁰ Amnesty International, “Kenya: Memorandum to the Kenyan Government on the Suppression of Terrorism Bill 2003,” AI Index: AFR 32/003/2004 (September 2004) at 11.

of acts of terrorism in Kenya; or is attempting or may attempt to enter Kenya with a view to being concerned in the commission, preparation or instigation of acts of terrorism”. Clause 31(3) provided that an exclusion order could not be made against a Kenyan national, “unless such a person is a citizen of more than one country”. The 2006 Bill removed the ability of the Minister to exclude dual nationals under Clause 31(3).

- *Extradition of Terror Suspects without Legal Safeguards* (Clause 37 of both bills)

Clause 37 provided for the extradition of individuals suspected of offences under the bills without setting out any legal safeguards to ensure the rights of the individual to be extradited, particularly in relation to the absolute principle of *non-refoulement*.

- *Immunity of Police Officers* (Clause 40(3) of the 2003 Bill)

Clause 40(3) of the 2003 Bill set out the powers of police officers which include the use of force “as may be necessary for any purpose, in accordance with this Act” and provides them with immunity from criminal and civil proceedings “for having, by the use of force, caused injury or death to any person or damage to or loss of any property”.

Despite the failure to enact either piece of legislation, members of civil society continue to express the concern that the establishment of a range of agencies and institutions with counterterrorism mandates but about which very little is known has created an environment in which counterterrorism measures can be pursued covertly and without compliance with Kenya’s international human rights obligations.

For example, the ATPU, a specialised unit within the police force, was established in February 2003; Nicholas Kamwende has been the Commandant of the ATPU since 2004. Under the Police Act 1988, the Commissioner of Police, appointed by the President, is empowered to create specialised units to respond to particular types of crimes and may have therefore established the ATPU by way of a circular.²¹¹ In its reporting to the Counter-Terrorism Committee, Kenya has confirmed that the ATPU is located in the Office of the President with the role of “overseeing the prevention and suppressing the financing of terrorist acts.”²¹² According to the Commonwealth Human Rights Institute, the “internal structure of the [ATPU] is quite similar to the structure of other units of the force, however, it does not operate under a regular chain of command. For example, unlike the heads of other units, the Commandant of the ATPU reports directly to the Commissioner of Police, which is out of line with the otherwise existing police hierarchy, where there are often several other levels of authority that decisions pass through”.²¹³

²¹¹ Section 48 of the Act provides that, “[t]he Commissioner may at any time, if it appears to him to be expedient in the interests of public order and safety so to do, appoint persons to be special police officers for such period and within such area as he may consider necessary, and every such officer shall during the period of his service as a special police officer be deemed to be a police officer.”

²¹² Security Council, “Letter dated 4 March 2004 from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council” UN Doc. S/2004/181 (10 March 2004) (containing “Third Report of the Republic of Kenya Submitted to the United Nations Counter-Terrorism Committee (CTC)”).

²¹³ See, Commonwealth Human Rights Institute, “About a Police Force: Different Sides of the Commonwealth: Counter-Terrorism Police in Kenya and New Zealand” 9 *Commonwealth Police Watch E Magazine* (November 2007).

Beyond this information, however, very little is known about its mandate or role. In interviews with members of civil society, REDRESS and Reprieve were often told of the perception that the ATPU operates “above the law” and “outside of any formal legal structure” and as a result, does not register arrests and detentions and operates on a roving basis rather than being based in particular police stations. Interviewees claimed that the commanding officers at police stations have no power or authority to deal with ATPU detainees. In addition, while the regular police force is heavily under-resourced, many individuals referenced the extensive resources available to the APTU and their concern that this could breed corruption.

PART III: CONCLUSIONS AND RECOMMENDATIONS

As has been indicated, the mass detentions and extraordinary renditions to Somalia, Ethiopia and Guantánamo Bay that occurred in 2006 and 2007 involved a range of violations of Kenya's obligations under international law. Kenya has also violated its international obligations by failing to conduct a full, independent and impartial investigation into these detentions and removals and provide an effective remedy and full and adequate reparation to those whose rights have been violated.

The mass detentions and extraordinary renditions also reveal the inadequacy of Kenyan law in protecting against *refoulement* as required by both international refugee law and international human rights law. Moreover, they, and the failure to investigate, remedy and repair may also be indicative of a broader disregard for its pre-existing obligations under international human rights law when developing and implementing counterterrorism strategies.

A. RECOMMENDATIONS TO THE GOVERNMENT OF KENYA

REDRESS and Reprieve make the following recommendations to the Government of Kenya that:

- It carry out a full, independent and impartial investigation capable of identifying and punishing those responsible for the mass detentions and extraordinary renditions as a matter of urgency;
- It provide an effective remedy and full and adequate reparation to those subjected to the mass detentions and extraordinary renditions;
- It carry out a thorough inquiry into how Kenyan nationals were removed from Kenyan territory in violation of their procedural and substantive rights under international law; identify all of the Kenyan nationals who have been or continue to be held in Somalia, Ethiopia, Guantánamo Bay or elsewhere as a result of the removals and restore their full Kenyan nationality and provide them with full and adequate reparation for their removal, including guarantees of non-repetition; and where a Kenyan national continues to be detained, to make full diplomatic representations on their behalf to ensure their release and return to Kenya;
- It carry out any strategy employed to counter terrorism in full compliance with Kenya's pre-existing obligations under international law, particularly in relation to the absolute prohibition of torture and other ill-treatment (which includes the absolute principle of *non-refoulement*) and the absolute prohibition on enforced disappearance²¹⁴;

²¹⁴ See also, Security Council, Resolution 1456, UN Doc. S/RES/1456 (2003) at para. 6 (requiring that, "States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law).

- It reform its laws and practices to specifically and expressly prohibit any deportation, extradition, rendition, expulsion, return or other transfer in its national law and practice where substantial grounds would exist for believing that the individual would be at risk of torture or other ill-treatment in the receiving state or on further transfer to another state or territory;
- In reforming its laws and practices, it ensure that in all removal cases, individuals are afforded the opportunity under Kenyan law to challenge their removal by way of an independent review process;

B. CONCLUSIONS AND RECOMMENDATIONS TO THE UN SECURITY COUNCIL

The UN Security Council should take more robust action in requiring Kenya to ensure that its counterterrorism strategies comply with its international human rights obligations.

While the Counter-Terrorism Committee now includes human rights in its mandate, many more steps could be taken to ensure that states such as Kenya are implementing counterterrorism strategies in compliance with their international human rights obligations. Since Resolution 1456 was not adopted under Chapter VII of the UN Charter and does not specifically require the CTC to consider human rights in carrying out its mandate to monitor the implementation of Resolution 1373,²¹⁵ the Security Council should make clear that states are required to adhere to their international human rights obligations when implementing Resolution 1373.

Moreover, the CTC should assess more rigorously states such as Kenya's compliance with international human rights obligations when pursuing counterterrorism measures. The first time the CTC questioned Kenya about its compliance with its human rights obligations was in 2004 and even then only at a very general level. In its Third Report to the CTC, Kenya was asked, "Are the measures taken by Kenya to combat terrorism compliant with all its obligations under international law (Has it adopted measures to combat terrorism in accordance with international human rights, refugee, and humanitarian law?)" In response, Kenya stated:

All legislative and administrative measures taken must not be contrary or *ultra vires* to the provisions of the Constitution of Kenya, which at Chapter V provides for the protection of fundamental rights and freedoms of the individual ... The Constitution of Kenya embodies the principles contained in various international human rights covenants, which Kenya is also a part to. So far there has been no Constitutional challenges against any measure taken.²¹⁶

²¹⁵ Flynn *supra* note 170 at 380.

²¹⁶ Security Council, "Letter dated 4 March 2004 from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council" UN Doc. S/2004/181 (10 March 2004) (containing "Third Report of the Republic of Kenya Submitted to the United Nations Counter-Terrorism Committee (CTC)").

A preferable approach would be to adopt the detailed guidelines recommended by the High Commissioner for Human Rights which included a list of questions the CTC could ask states such as:

When taking the measures in question, how is compliance secured with the right of all persons to leave any country, including one's own country (CCPR art. 13, para.4, UDHR art. 13), the right of persecuted persons to seek asylum when entering the territory or jurisdiction of the State (UDHR art. 14 and the Refugee Convention, regional instruments e.g. African Charter art. 12, ACHR art. 22), and the right of *non-refoulement* (CCPR art. 7, CAT art. 3, Refugee Convention art. 33, regional instruments e.g. ECHR art. 3, ACHR art. 22)²¹⁷

Are procedural guarantees related to deportation of an alien respected, including the requirement of an individualised decision, the right to present reasons against expulsion, the right to have one's case reviewed by an authority independent from the decision-making authority, and the right to be represented in such proceedings? If these requirements are not followed in all cases, how is the test of "compelling reasons of national security" applied and monitored (see CCPR art. 13, Refugee Convention art. 32, or regional instruments, e.g. ECHR Protocol 7 art. 1)?²¹⁸

C. CONCLUSIONS AND RECOMMENDATION TO THE AFRICAN UNION

At the African Union level, no explicit connection between member states obligations and counterterrorism strategies has been made. However, the Plan of Action contains a number of potentially problematic provisions including mandating states to "amend, where necessary, national laws relating to bail and other criminal procedural issues so as to give effect to the requirements of expeditious investigation and prosecution of those involved directly or indirectly in the crime of terrorism. These measures should include issues such as the protection of witnesses, access to dockets and information, and special arrangements on detention and access to hearings"²¹⁹ and "for purposes of criminal responsibility, place the mastermind, the apologist, the accomplice, the instigator and the sponsor of a terrorist act on the same pedestal as the perpetrator of such an act."²²⁰

As such, the African Union should also state explicitly the requirement that member states such as Kenya implement the respective African Union counterterrorism measures in full compliance with their international and regional human rights obligations, including in the development of the model law on counterterrorism. Moreover, the Peace and Security Council should integrate detailed questions into the annual reports which must be submitted by member states such as Kenya to the

²¹⁷ Proposals for "Further Guidance" for the submission of reports pursuant to paragraph 6 of Security Council Resolution 1373 (2001) (intended to supplement the Guidance of 26 October 2001) (23 September 2002) at para. 8(a).

²¹⁸ Proposals for "Further Guidance" for the submission of reports pursuant to paragraph 6 of Security Council Resolution 1373 (2001) (intended to supplement the Guidance of 26 October 2001) (23 September 2002) at para. 8(c).

²¹⁹ Plan of Action at para. 12(a).

²²⁰ Plan of Action at para. 12(b)

Council as well as ensuring that the monitoring of human rights is integrated into the work of the Commissioner for Peace and Security in the Commission and the African Centre for the Study and Research on Terrorism.

D. CONCLUSIONS AND RECOMMENDATION TO THE US GOVERNMENT

As discussed in Part II of this Report, the US is perceived to have played a key role in influencing the development of Kenya's counterterrorism strategies. Given the 2006 and 2007 mass detentions and 'extraordinary renditions' and the concern that they are symptomatic of a deeper underlying disconnect between the counterterrorism strategies pursued by Kenya rather than isolated incidents, the US has a significant role to play in ensuring that Kenya complies with its pre-existing human rights obligations when implementing counterterrorism strategies, particularly those funded by the US government.

The Obama administration has already exhibited leadership and significant foresight in putting in motion the closure of the detention facility at Guantánamo Bay and the closure of other known and secret detention sites throughout the world. However, the US has not yet explicitly denounced the practice of 'extraordinary rendition' or addressed its direct role in encouraging states to cooperate with it in carrying out such practices. As a world leader it implicitly sent the signal that the obviolation of international human rights obligations in the name of the 'war on terror' is acceptable. Consequently, the US has a responsibility to show the necessary leadership to end the practices it helped to create - to work to ensure that all states end the practice of 'extraordinary rendition'; acknowledge its illegality; and provide full and adequate reparation to those who have been its victims.

To date, many of the parliamentary and other investigations that have been opened around the world have proceeded without the cooperation of the US government. Vital information about transfers of individuals, detention and interrogation practices have been withheld, some on the basis of questionable assertions of 'state secrets' privilege, others on no basis at all.

The US government should respond to requests for mutual cooperation and assistance from judicial bodies and the Kenyan National Human Rights Commission and release all relevant data in its possession to facilitate investigation, prosecutions and other judicial processes.

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