



COMMENTS TO THE COMMITTEE AGAINST TORTURE  
IN CONSIDERATION OF KENYA'S FIRST PERIODIC  
REPORT

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## INTRODUCTION

1. As a complement to the alternative reports submitted to the Committee against Torture with respect to Kenya's First Periodic Report,<sup>1</sup> the present submission focuses on Kenya's adherence to its obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "CAT") when pursuing counterterrorism strategies, in particular Article 3 of the CAT.
2. The Redress Trust ("REDRESS"), Reprieve and Muslim Human Rights Forum ("MHRF") have conducted primary research and legal analysis on this issue in Kenya and all three organisations represent individuals who claim to have been victims of violations of the CAT in the context of the "war on terror".
3. REDRESS is an international human rights non-governmental organisation based in the United Kingdom with a mandate to assist torture survivors, to prevent further torture, and to seek justice and other forms of reparation. It has accumulated a wide expertise on the rights of victims of torture to gain both access to the courts and redress for their suffering and has advocated on behalf of victims from different regions throughout the world. Since its establishment more than 15 years ago, REDRESS has regularly taken up cases on behalf of individual torture survivors at the national and international level and provides assistance to representatives of torture survivors. REDRESS has extensive experience in interventions before national and international courts and tribunals, including the United Nations Committee against Torture and Human Rights Committee, the European Court of Human Rights, the Inter-American Commission on Human Rights, the International Criminal Court, the Special Court for Sierra Leone, and the Extraordinary Chambers in the Courts of Cambodia.
4. Reprieve is an international human rights non-governmental organisation based in the UK that provides legal representation for prisoners being held on death row in the United States and beyond, in Guantanamo Bay and other secret prisons around the world. Reprieve's director Clive Stafford Smith has over twenty years experience of representing prisoners facing the death penalty in the southern United States, and he was one of the first US attorneys to gain access to prisoners in Guantanamo Bay. Over the past five years, Reprieve attorneys have directly represented over fifty prisoners held in Guantanamo Bay and assisted many more. None of Reprieve's clients were given the opportunity to challenge their transfer to Guantanamo Bay, and many more were also victims of further "extraordinary rendition" before being taken to Guantanamo. As a result, over the past three years Reprieve has broadened its focus to provide assistance to individuals subject to extra-legal transfer and

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<sup>1</sup> IMLU and Coalition of Kenyan NGOs, "Alternative Report to the United Nations Committee against Torture: 41<sup>st</sup> Session, 3<sup>rd</sup> to 21<sup>st</sup> November" (15 October 2008); Human Rights Watch, "Submission to 41<sup>st</sup> Session of the United Nations Committee against Torture on Kenya" (15 September 2008); Kenya National Human Rights Commission, "Presentation to the Committee against Torture to Inform its Review of Kenya's Initial Country Report on the Implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" (30 September 2008); OMCT, "Addressing the Economic, Social and Cultural Root Causes of Torture in Kenya: An Alternative Report to the Committee against Torture (November 2008).

detention in locations other than Guantanamo Bay, including East Africa. Reprieve's "War on Terror" work has included extensive investigation in East and North Africa, Central Asia and Europe, close co-operation with domestic and regional inquiries into rendition, and litigation in domestic courts in the US, Europe and East Africa.

5. Muslim Human Rights Forum conceived in October 2005 articulates the human rights of all peoples of Kenya, their neighbours in the region and the world in general as enshrined in the Universal Declaration of Human Rights, the African Charter on Peoples' and Human Rights, the constitution of the Republic of Kenya and all universally recognized documents that Kenya is signatory to. MHRF works through a multi-sectoral, inter-institutional inter-play and cross-fertilization. MHRF seeks to actively engage everyone in promoting, protecting and advancing the human rights of all. Through its Counter-Terrorism Monitoring Programme, MHRF has been at the forefront of the advocacy on behalf of individuals illegally detained by Kenyan authorities and others in the name of the "war on terrorism".
6. The adoption of counterterrorism strategies in Kenya has been viewed as a particular priority for that State, both as a result of its obligations under United Nations' Security Council Resolution 1373 (2001) which requires states to adopt specific measures to counter terrorism,<sup>2</sup> and because of factors such as its geographical proximity to Somalia<sup>3</sup> which remains politically unstable,<sup>4</sup> previous terrorist attacks on the United States' Embassy in Nairobi in 1998, and Israeli interests in Kenya.<sup>5</sup>
7. While REDRESS, Reprieve and MHRF recognise states' national security concerns, both organisations are gravely concerned that some of the counterterrorism strategies employed by Kenya are not in full compliance with its international human rights and humanitarian obligations, particularly the

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<sup>2</sup> Security Council Resolution 1373 U.N. Doc. S/RES/1373 (2001) adopted 28 September 2001. *See also*, African Union, Convention on the Prevention and Combating of Terrorism 1999 and its 2002 Protocol; African Union, "Plan of Action of the African Union High-Level Intergovernmental Meeting on the Prevention and Combating of Terrorism in Africa" Mtg/MLIG/Conv.Terror/Plan.(I) (11 – 14 September 2002).

<sup>3</sup> *See*, 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) (noting 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".) States such as the U.K. and the U.S. have also identified Kenya as vulnerable to terrorist attacks due to its shared border with Somalia. *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); Andrew Cawthorne, "U.S. says al-Qaeda behind Somali Islamists" *Reuters* (15 December 2006); David Blair, "Al Qaeda Target West from Horn of Africa" *Telegraph* (24 October 2007).

<sup>4</sup> further information on the conflict in Somalia, *see* Human Rights Watch, "Shell-Shocked: Civilians under Siege in Somalia" (August 2007).

<sup>5</sup> In August 1998, the U.S. Embassy in Nairobi was bombed, killing over 200 people and injuring a further 5000. *See*, Embassy of the United States, Nairobi, Kenya, "Ceremony to Mark the Tenth Anniversary of the Bombing of the U.S. Embassy: Remarks by U.S. Ambassador Michael Ranneberger" (7 August 2008). An Israeli owned hotel in Mombasa, the Kikambala Paradise Hotel, was bombed and two surface-to-air missiles fired at an Israeli commercial airline on 28 November 2002. *See*, "UK Condemns Kenya Bomb Attack" *BBC News* (28 November 2002).

absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment and the absolute principle of non-refoulement.

8. In this respect, this submission first sets out the substantive and procedural inadequacies of Kenyan law in failing to expressly prohibit the deportation, extradition, rendition, expulsion or return (“refoulement”) of a person where there are substantial grounds to believe that the individual would be at a risk of torture or cruel, inhuman or degrading treatment or punishment (“other ill treatment”) as a result of the transfer.
9. The submission then highlights three instances of mass removals of Kenyan and foreign nationals from Kenya to Somalia in 2007, in addition to the appearance of a Kenyan national at the United States’ detention facility at Guantanamo Bay, Cuba following his arbitrary detention in Kenya. In all four cases, no assessments were made as to whether substantial grounds existed to believe that the individuals would be at risk of torture or other ill-treatment as a result of the removal, and none were afforded the opportunity to challenge their removal from Kenya on the grounds of Article 3 of the CAT.

#### A. THE FAILURE TO EXPRESSLY IMPLEMENT THE ABSOLUTE PRINCIPLE OF NON-REFOULEMENT INTO KENYAN LAW

10. Article 3(1) of the CAT sets out that:

[n]o State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

11. The absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment (“absolute prohibition of torture”) imposes a negative duty on states to refrain from torturing and also a range of positive obligations, including the obligation to “prevent such acts by not bringing persons under the control of other States if there are substantial grounds for believing that they would be in danger of being subjected to torture”.<sup>6</sup> Any other approach would allow states to circumvent the absolute prohibition of torture by arguing that they did not inflict the torture themselves. The principle of non-refoulement is thus an inherent and indivisible part of the absolute prohibition of torture.<sup>7</sup>
12. As the Committee against Torture has previously found, the principle of non-refoulement not only reflects a treaty obligation of state parties to the CAT but also constitutes a jus cogens norm: “non-refoulement must be recognized as a

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<sup>6</sup> See, General Assembly, “Interim Report of the Special Rapporteur of the Commission on Human Rights on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN General Assembly, 55th Session, Item 116(a) of the provisional agenda, Human Rights Questions: Implementation of Human Rights Instruments” U.N. Doc. A/55/290. (2000) at 27.

<sup>7</sup> *Soering v. United Kingdom*, Application No. 14038/88 (Eur. Ct. H.R. 1989) at para. 88, noting that such an approach would be “contrary to the spirit and intention of [Article 3 of the European Convention on Human Rights which prohibits torture]”.

peremptory norm under international law, and not merely as a principle enshrined in Article 3 CAT".<sup>8</sup>

13. The absolute principle of non-refoulement as set out in Article 3(1) of the CAT contains both a substantive and a procedural dimension. As such, where an individual is removed in violation of Article 3(1), a substantive breach will be found. In relation to the procedural dimension, the Human Rights Committee found in *Alzery v. Sweden* 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".<sup>9</sup>
14. As an inherent and indivisible part of the absolute prohibition of torture, the requirement in Article 2(1) of the CAT that states take "effective legislative, administrative, judicial or other measures to prevent acts of torture" must equally encompass the obligation to enforce the absolute principle of non-refoulement.<sup>10</sup> To find otherwise would mean that the absolute principle of non-refoulement may not be "practical" and "effective",<sup>11</sup> as legislative, administrative, judicial or other measures governing permissible deportations, extraditions, renditions, expulsions, returns and other transfers may not explicitly prohibit refoulement on the basis of Article 3 of the CAT, and/or may not set out procedures which the individual to be removed could use to challenge the removal on the basis of an Article 3 risk.
15. Indeed, none of Kenya's laws dealing with deportations, extraditions, renditions, expulsions, returns or other transfers expressly refer to the absolute principle of non-refoulement or provide procedural mechanisms through which to challenge the removal on the basis of Article 3.
16. Section 8(1) of the Immigration Act 1967 provides that:

[t]he 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.

In its State Party Report to the Committee, Kenya acknowledges that the Act makes no express references to the absolute principle of non-refoulement as prohibiting removals, even in those cases where the criteria set out in section

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<sup>8</sup> Committee Against Torture, "Summary Record of the 624th Meeting", U.N. Doc. CAT/C/SR.624, (2004) at paras. 51 - 52.

<sup>9</sup> Human Rights Committee, *Alzery v. Sweden*, U.N. Doc. CCPR/C/88/D/1416/2005 (10 November 2006) at para. 11.8.

<sup>10</sup> See, Committee against Torture, "General Comment No. 2: Implementation of Article 2 by States Parties" U.N. Doc. CAT/C/GC/2/CRG.1/Rev.4 (23 November 2007) at para. 19. See also, Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary* (Oxford University Press, 2008) at 50 (characterising Article 2(1) as an "umbrella clause" encompassing Article 3).

<sup>11</sup> As required by the Committee against Torture, see for example, "Initial Report of Peru" U.N. Doc. CAT/C/SR.193 (9 November 1994) at para. 44; "Initial Report of Morocco" U.N. Doc. CAT/C/SR. 203 (16 November 1994) at para. 51.

8(1) would otherwise be fulfilled.<sup>12</sup> Moreover, the Act does not set out a process for the independent review of a removal order, which would enable the individual to be removed to invoke the principle of non-refoulement. While Kenya submits 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,”<sup>13</sup> it does not clarify the legal basis for this review process nor whether the absolute principle of non-refoulement could be invoked therein.

17. 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.
18. Section 18 of the Refugee Act 2006, which is not yet in force<sup>14</sup> does provide 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, this provision only reflects the principle of non-refoulement as set out under Article 2(3) of the Convention Governing Specific Aspects of Refugee Problems in Africa and Article 33(1) of the Convention Relating to the Status of Refugees, and not the absolute principle of non-refoulement under Article 3 of the CAT. As with Article 33(2) and IF of the Convention Relating to the Status of Refugees, section 21(1) of the Refugee Act provides an exception to the general principle of non-refoulement under refugee law in that it enables the Minister to expel a refugee on the grounds of national security.

However, no such exception is permitted under Article 3 of the CAT under which the principle of non-refoulement is absolute.<sup>15</sup> The principle of non-

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<sup>12</sup> 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” U.N. Doc. CAT/C/KEN/1 (6 June 2007) at para. 54.

<sup>13</sup> *Id.* at para. 56.

<sup>14</sup> See IMLU and Coalition of Kenyan NGOs, *supra* note 1 at para. 81.

<sup>15</sup> This is confirmed in regional and international treaties including, for example, Article 2(2) of the CAT; Committee against Torture, *Aemei v. Switzerland*, U.N. Doc. CAT/C/18/D/34/1995 (1997) at para. 9.8; Human Rights Committee, General Comment No. 20, U.N. Doc. HRI/GEN/1/Rev.1. (1992) at 30 and No. 29, U.N. Doc.

refoulement applies regardless of whether the individual is seeking asylum; allows no limitations, derogations or exceptions, even in the context of national security concerns;<sup>16</sup> and applies to all persons, however, “undesirable or dangerous” their alleged conduct.<sup>17</sup>

19. Finally, in its 2002 report to the U.N. 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”.<sup>18</sup> As a result, the Attorney General prepared the Suppression of Terrorism Bill 2003 which later lapsed.<sup>19</sup> A later bill - the Anti-Terrorism Bill 2006 - was also proposed but was never formally introduced before Parliament.

Both Bills contained provisions on extradition and expulsion. 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 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).)

Clause 37 in both the 2003 and 2006 Bill provided for the extradition of individuals suspected of offences under the proposed legislation.

Both Bills failed to reference the absolute principle of non-refoulement or the procedural basis upon which individuals could challenge extradition on this basis.

20. Despite these shortcomings in the law, Kenya noted in its State Party Report 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”.<sup>20</sup> Such a statement fails to provide legal certainty given the absence of any reference to the absolute principle of non-refoulement under Article 3 in any of the legislation dealing with the relevant deportations, extraditions or expulsion. This is of particular concern given the absence of procedural safeguards in the relevant legislation by which an individual could

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CCPR/C/21/Rev.1/Add.11 (2001) at para. 7; *Chahal v. United Kingdom*, European Court on Human Rights, App. No. 22414/93 (1996) at para. 79.

<sup>16</sup> See, *Agiza v. Sweden*, Committee against Torture, U.N. Doc. CAT/C/34/D/233/2003 (2005) at para. 13.8 and *Alzery v. Sweden*, *supra* note 9.

<sup>17</sup> See, *M.B.B. v. Sweden*, Committee against Torture, U.N. Doc. CAT/C/22/D/104/1998 (1999) at para. 6.4.

<sup>18</sup> 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).”)

<sup>19</sup> Kenya Gazette Supplement, ‘The Suppression of Terrorism Bill, 2003’ 38 Kenya Gazette Supplement Nairobi, 30 April 2003 at 443.

<sup>20</sup> *Id.* at para. 53.

challenge the removal – and thus invoke Article 3 - through independent review.

## B. INSTANCES IN WHICH INDIVIDUALS HAVE BEEN REMOVED FROM KENYA WITHOUT AN ARTICLE 3 ASSESSMENT

21. In the specific context of counterterrorism, a number of cases arose in 2007 which suggest that Kenya violated the absolute principle of non-refoulement under Article 3 by removing individuals from Kenya to territory where substantial grounds may have existed to believe that they were at risk of torture and other ill-treatment and without the opportunity to challenge the removal decision.

### (1) Mass Returns at the Border between Kenya and Somalia

22. On 3 January 2007, Kenya closed its border with Somalia on national security grounds.<sup>21</sup> 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, entering Kenya and posing a terrorist threat.<sup>22</sup> However, the closing of the border also meant that those fleeing the conflict in Somalia could not enter Kenya.

23. Of those who managed to cross into Kenya, reports emerged of the Kenyan military transporting truckloads of individuals back into Somalia<sup>23</sup> without consideration of their potential refugee status or whether reasonable grounds existed to believe that they were at risk of torture and other ill-treatment in Somalia in violation of Article 3 of the CAT and Article 7 of the International Covenant on Civil and Political Rights (the "ICCPR").

24. At the time, the United Nations' 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.'"<sup>24</sup> Under international law, individuals enjoy the "right to seek and to enjoy in other countries asylum from persecution".<sup>25</sup> In this respect, the return of individuals to Somalia potentially violated the principle of non-refoulement under international refugee

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<sup>21</sup> "Kenya Shuts Border with Somalia" *International Herald Tribune* (3 January 2007).

<sup>22</sup> 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.

<sup>23</sup> "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, *id.* at 3 (reporting the return of 400 individuals to Somalia).

<sup>24</sup> "Kenya Closes Somalia Border" *The Times Online* (4 January 2007).

<sup>25</sup> 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 on Human and Peoples' Rights (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.")



law as set out under Article 2(3) of the Convention Governing Specific Aspects of Refugee Problems in Africa and Article 33(1) of the Convention Relating to the Status of Refugees, both of which Kenya has ratified.

25. The returns also engaged Article 3 of the CAT as the individuals were not afforded the opportunity to challenge their return by way of independent judicial or administrative review.
26. Furthermore, had the individuals been granted the opportunity to challenge their removal, some may have been able to substantiate a claim under Article 3 of the CAT.
27. In order to substantiate a claim of non-refoulement, a 'present and personal' risk must be shown.<sup>26</sup> Article 3(2) of the CAT provides that the circumstances in the receiving state or territory constitute a weighty but not determinative factor:<sup>27</sup>

[f]or 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.

28. 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.<sup>28</sup>
29. 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.<sup>29</sup>

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<sup>26</sup> On the requirement of a personal and present risk, *see*, Committee against Torture, "General Comment 1, Communications concerning the return of a person to a State where there may be grounds he would be subjected to torture (article 3 in the context of article 22)", U.N. Doc. A/53/44 (1998) annex IX at 52 at para. 6.

<sup>27</sup> *See also*, Committee against Torture, *Z.Z. v. Canada*, U.N. Doc. CAT/C/26/D/123/1998 (2001) at para. 8.4 (setting out that it is insufficient just to show that the receiving state has a bad human rights record).

<sup>28</sup> For a background to the conflict in Somalia, *see* Human Rights Watch, *supra* note 4 at 10 – 27.

<sup>29</sup> International Crisis Group, "Policy Briefing: Somalia: the Tough Part is Ahead" Africa Briefing No. 45 (26 January 2007) at 1.

30. The political instability in Somalia as illustrated above as well as the presence and control exercised by Ethiopian troops may have given rise to claims under Article 3 in individual cases, particularly given the practice of torture by Ethiopia as set out in the U.S. State Department's last Country Reports on Human Rights Practices which noted:

[a]lthough the constitution and law 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 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.<sup>30</sup>

31. Notably, both the Committee against Torture and the Human Rights Committee have interpreted the absolute principle of non-refoulement to 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.<sup>31</sup> 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.

## (2) Mass Renditions to Somalia

32. In 2007, at least 150 Kenyan and foreign nationals, including children,<sup>32</sup> were arbitrarily detained in Kenya, many of whom were fleeing across the border from the conflict in Somalia.
33. However, as there has been no official investigation into these detentions, these figures are only approximate and 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 permission to view the Occurrence Books in which all detentions should be registered.

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<sup>30</sup> U.S. State Department, "Country Reports on Human Rights Practices: 2007" Released by the Bureau of Democracy, Human Rights and Labor (11 March 2008).

<sup>31</sup> Committee against Torture, "General Comment No. 1" *supra* note 26 at para. 2; Committee against Torture, *Korban v. Sweden*, U.N. Doc. CAT/C/21/D/88/1997 (1998).

<sup>32</sup> According to the official flight manifests of African Express Airways on 27 January 2007 11 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).

Similarly, these organisations do not have the power to obtain access to official documents or to require officials to testify about the detentions.

34. 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”<sup>33</sup> 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,”<sup>34</sup> it was also denied access to certain police stations where it was alleged detainees were being held. In an official press release the KNHRC noted that in attempting to access police stations it was “met by recalcitrant and obstructionist police officers who have denied [the KNHRC] access citing ‘orders from above’”.<sup>35</sup> As such, the figures given here can only ever provide a rough estimate of the number of individuals detained rather than a definitive figure, which could only be determined through official disclosure or investigation.

(a) Detention in Kenya

35. The individuals were first held in Kenya for several weeks without charge.<sup>36</sup> Many were denied access to a lawyer and to consular assistance,<sup>37</sup> and were deprived of the opportunity to challenge the legality of their detention<sup>38</sup> or to have their potential refugee status considered, in violation of Kenya’s obligations under international law.
36. Some former detainees have alleged that they were tortured; that the conditions of their detention amounted to ill-treatment;<sup>39</sup> and that they were interrogated by the intelligence services of foreign governments.<sup>40</sup>

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<sup>33</sup> Section 16(1)(a) of Act No. 9 of 2002.

<sup>34</sup> Section 16(b).

<sup>35</sup> Kenya National Human Rights Commission, “Press Statement: Arbitrary Arrest and Illegal Detention by the Police of Alleged Terror Suspects” (31 January 2007).

<sup>36</sup> In contravention of Article 9(2) of the International Convention of Civil and Political Rights (“ICCPR”).

<sup>37</sup> In contravention of Article 36(1) of the Vienna Convention on Consular Relations 1963. See “Canada ‘Strong Protests’ Man’s Deportation to Somalia” *CBC News* (22 January 2007). 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 “Inside Africa’s War on Terror: War on Terror Detentions in the Horn of Africa” (May 2006) at 13; Reprieve telephone conversation with official of the Foreign and Commonwealth Office (2 February 2007); Ethiopia Secret Prisons Under Scrutiny” *Associated Press*, (5 April 2007).

<sup>38</sup> In contravention of Articles 9(3) and 9(4) of the ICCPR.

<sup>39</sup> Amnesty International, “Horn of Africa: Unlawful Transfers in the ‘War on Terror’” AI Index: AFR 25/006/2007 (June 2007) at 1 (noting that “Some 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”). Muslim Human Rights Forum (2007) *supra* note 32 at 7 – 13.

<sup>40</sup> 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 U.S. Role” *McClatchy Newspapers* (16 March 2007); “US citizen held in Ethiopia: Lawyer” *Yahoo News Online* (April 4, 2007); See also Reprieve and Cageprisoners Interview with Mohammed Ezzouek, London, 14 and 15 February 2007.; U.S. Presses for Release of American Held in Ethiopia” *Washington Post*, March 23, 2007.

37. Twenty-seven detainees were later released without charge; four were initially charged but these charges were later dropped; and seven individuals were deported to their country of origin.

(b) Habeas Corpus Applications and Production of Flight Manifests

38. As civil society organisations and lawyers had been able to access some of the detainees in custody 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 those individuals (however, there may have been other individuals, about whose detention human rights organisations were unaware). 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, but had rather been transferred to Somalia, without any due process or consideration of the risk of torture or other ill-treatment.
39. 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.<sup>41</sup> However, only three of the six Kenyans were released as a result of these applications,<sup>42</sup> the other three were transferred from Kenya to Somalia before the High Court had the opportunity to hear their case.<sup>43</sup>
40. A similar pattern of removals to Somalia on flights leaving Kenya on 20 January 2007, 27 January 2007 and 10 February 2007<sup>44</sup> was revealed as the result of thirty-four habeas corpus applications filed by MHRF in the High Court of Nairobi.<sup>45</sup> As a result of these applications, the Kenyan government first produced two flight manifests demonstrating that along with others previously unknown to MHRF, the thirty-four individuals had been transferred from Kenya to Somalia.
41. However, MHRF 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 a 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".<sup>46</sup> He attached a third flight manifest to his affidavit, which

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<sup>41</sup> REDRESS Interview with MHRF (August 2008).

<sup>42</sup> 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 32 at 9.

<sup>43</sup> See, Muslim Human Rights Forum (2007) at 9.

<sup>44</sup> The three flight manifests are annexed to Muslim Human Rights Forum's 2007 report, *supra* note 32.

<sup>45</sup> Muslim Human Rights Forum (2007) *supra* note 32 at 6. Muslim Human Rights Forum, "Horn of Terror: Revised Edition" (2008) at 22.

<sup>46</sup> "Replying Affidavit" in *Swaleh Ali Tunza & Ors v. Commandant Anti Terrorism Police Unit & Ors* (27 February 2007) at para. 4.

demonstrated that the three individuals as well as a Tunisian national, Ines Chine, had been deported to Somalia on 10 February 2007.

42. 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.<sup>47</sup> The Court requested counsel to serve the Attorney General and return to the Court the following Monday.<sup>48</sup> However, over the weekend, the four Kenyan nationals were released and the Canadian national, Bashir Maktal, was removed to Somalia.
43. 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.
44. 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.”<sup>49</sup> However, at the time of the removals, only the deportation orders for Kamilya Mohammedi Tuwein, Ahmed Musallam Al-Ma’ashaani and Hassan Salim Kashub were produced in court with the flight manifests attached. No other deportation order was provided to the legal counsel for whom habeas corpus applications had been made and only the flight manifests were produced in court.<sup>50</sup>
45. Based on credible information obtained by MHRF, non-governmental organisations now believe that the number of individuals rendered may be closer to 120.
46. 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.

#### (c) Transfer to and Detention in Somalia

47. Given the context in Somalia, it is probable that some of the individuals may have been able to substantiate a claim under Article 3 of the CAT in order to challenge their removal, on the basis that there were substantial grounds for believing that they would be at risk of torture and other ill-treatment in Somalia.
48. Indeed, reports of other non-governmental organisations contain testimonies of former detainees alleging that detainees were subjected to torture and

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<sup>47</sup> Article 72(2) of the Kenyan Constitution.

<sup>48</sup> REDRESS Interview with MHRF (August 2008).

<sup>49</sup> 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.

<sup>50</sup> REDRESS interview with MHRF (August 2008).

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.”<sup>51</sup> In common with the returns at the Kenyan-Somali border discussed in Part I, the individuals sent to Somalia again had no opportunity to challenge their removal.

49. As set out above, each state involved in the transfer of an individual to a state where substantial grounds exist to believe that he or she would be at risk of torture or other ill-treatment incurs responsibility under the absolute principle of non-refoulement. This responsibility results from the exposure of the individual to a risk of torture. It is irrelevant for the purposes of establishing liability under the absolute principle of non-refoulement whether or not the individual is ultimately tortured, as the breach is determined at the point of removal and is not determined by subsequent events.
50. While 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, any information, including allegations of torture and other ill-treatment which takes place subsequent to removal, “are relevant to the assessment of the State party’s knowledge, actual or constructive, at the time of removal”.<sup>52</sup>
51. In cases where torture [or other ill-treatment] results from a transfer in violation of the absolute principle of non-refoulement the removing state will not only be responsible under Article 3 but also Article 1 of the CAT. Indeed, where an individual is ultimately tortured, any state involved in the transfer may incur additional and separate responsibility even if it had no direct involvement in the treatment after the completion of the transfer. As the Human Rights Committee found in *Mansour Ahani v. Canada*:

[i]n 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.<sup>53</sup>

#### (d) Transfer to and Detention in Ethiopia

52. Of those transferred to Somalia, four British nationals were returned to the U.K. from Baidoa via Kenya on 12 February 2007. The remaining detainees are

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<sup>51</sup> Cageprisoners, *supra* note 37 at 5 (quoting former detainee, Mohammed Ezzouek). See also, Muslim Human Rights Forum (2008) *supra* note 45; Human Rights Watch, “Why Am I Still Here?” The 2007 Horn of Africa Renditions and the Fate of those Still Missing” (October 2008) at 22 - 27.

<sup>52</sup> *Agiza v Sweden*, *supra* note 16 at para. 13.2.

<sup>53</sup> Human Rights Committee, *Mansour Ahani v. Canada*, U.N. Doc. CCPR/C/80/D/1051/2002 (2004) at para 12.

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:

[p]ursuant 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.<sup>54</sup>

53. Former detainees again allege that detainees were tortured and subjected to other ill-treatment in Ethiopia. One former detainee estimated that the size of the cells in which at least four people were initially was 8 foot by 8 foot.<sup>55</sup> Thereafter, the men were allegedly held in metal cages.<sup>56</sup> Former detainees also report instances of denial of access to medical treatment.<sup>57</sup> For example, one former detainee reported that two women gave birth while in custody and 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".<sup>58</sup> 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.<sup>59</sup>
54. In Ethiopia, some former detainees 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,

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<sup>54</sup> Federal Democratic Republic of Ethiopia, Ministry of Foreign Affairs, 'Ethiopian Government Press Statement' (9 April 2007). See also, BBC, "Ethiopia Admits Terror Detentions" (10 April 2007).

<sup>55</sup> Cageprisoners, *supra* note 37 at 7; Sveriges Radio: "Konflikt" (26 May 2007).

<sup>56</sup> Cageprisoners, *supra* note 37 at 7; Sveriges Radio: "Konflikt" (26 May 2007).

<sup>57</sup> Cageprisoners, *supra* note 37 at 7.

<sup>58</sup> Sveriges Radio: "Konflikt" (26 May 2007).

<sup>59</sup> Human Rights Watch, *supra* note 51 at 14. See also, Muslim Human Rights Forum (2008) *supra* note 45 at 24 – 27.

made to stand up until 10p.m., threatened with death and with the rape of his wife.<sup>60</sup>

55. Amnesty International reported that, “[w]hile in custody in Ethiopia, the detainees were questioned by US agents. Most had their fingerprints, DNA and photographs taken.”<sup>61</sup>
56. Since the three flights to Somalia and subsequent transfers to Ethiopia, at least 72 detainees are known to have been released accordingly to MHRF’s most recent figures.<sup>62</sup>
57. 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.<sup>63</sup> 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”.<sup>64</sup> 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 not rendered from Kenya.<sup>65</sup>
58. As such, these individuals would be victims of enforced disappearance which the Committee against Torture has also recognised as a form of torture and for which Kenya would also be responsible as a result of the violation of the substantive dimension to the absolute principle of non-refoulement.

### (3) Further Renditions to Somalia in July 2007

59. 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.<sup>66</sup> MHRF 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”.<sup>67</sup>
60. When the chief of the Anti-Terrorism Police Unit, Nicholas Kamwende, appeared in the High Court of Nairobi following a summons to explain the

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<sup>60</sup> Sveriges Radio: “Konflikt” (26 May 2007)

<sup>61</sup> Amnesty International, *supra* note 39 at 2. *See also*, Human Rights Watch, *supra* note 51 at 14 – 15.

<sup>62</sup> *See also*, Amnesty International *supra* note 39; Muslim Human Rights Forum (2008) *supra* note 45; 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).

<sup>63</sup> *See*, Muslim Human Rights Forum (2008) *id.* at 13.

<sup>64</sup> Human Rights Watch, *supra* note 51 at 18.

<sup>65</sup> “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).

<sup>66</sup> “Kenyan Police Official Says Missing Terror Suspects were Released, not Sent to Ethiopia” *International Herald Tribune* (8 October 2007).

<sup>67</sup> Muslim Human Rights Forum (2008) *supra* note 45 at 33.



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”.<sup>68</sup> However, as with the mass renditions to Somalia in January and February 2007, the MHRF 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 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.”<sup>69</sup> Two of the individuals, Burhan Adam Abdallah and Ismail Noor Hassan, have since been released from Addis Ababa.<sup>70</sup> Abdikadir Mohamed Aden is still in detention in Addis Ababa where he was left behind after the release of the other eight Kenyans on 3 October 2008.

#### (4) The Case of Guantanamo Bay Detainee, Mohamed Abdulmalik

61. On 13 February 2007, Mohamed Abdulmalik<sup>71</sup>, a Kenyan citizen born in Kisumu in 1973, was picked up by the Anti-Terrorism Police Unit in a café in Mombasa.<sup>72</sup> He was detained and held incommunicado in the Kilindini Port and 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; was never brought before a judge; and his detention was never subject to judicial review.
62. Nothing was heard of Mr. Abdulmalik until 26 March 2007, when the U.S. Department of Defense issued a press statement announcing Mr. Abdulmalik's detention at Guantánamo Bay.<sup>73</sup> The U.S. 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”.<sup>74</sup>
63. Although Mr. Abdulmalik has been held at Guantánamo Bay for more than one year, his U.S. lawyer was only allowed to meet with him for the first time in April 2008. As a non-U.S. national, Mr. Abdulmalik has to date not been able

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<sup>68</sup> “Anti-Terror Boss in Court” *The Nation* (9 October 2007).

<sup>69</sup> Human Rights Watch, *supra* note 51 at 13.

<sup>70</sup> See, Muslim Human Rights Forum (2008) *supra* note 45 at 31 (noting in footnote 50 the release of the two men on 21 June 2008 from Addis Ababa).

<sup>71</sup> He has variously been referred to as Malik; Adbdulmalik Mohamed; Mohamed Abdulmalik Abdujabber; Abduljabar Ibrahim and Abdulmalik Rajab Mohamed by the Anti-Terrorism Police Unit and in the media.

<sup>72</sup> *Mariam Mohamed & another v. Commissioner of Police & another* [2007] eKLR, Replying Affidavit (29 October 2007) at para 3.

<sup>73</sup> 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>

<sup>74</sup> George Munyori, “US Defends Transfer of Terror Suspect to Guantanamo Bay,” CapitalFM.co.ke (29 March 2007).

to exercise his right under international law to challenge the lawfulness of his detention in a U.S. court<sup>75</sup> and has not even received the less than adequate combatant status review<sup>76</sup> setting out any allegations against him.<sup>77</sup> 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.<sup>78</sup>

64. The High Court found that:

[i]t 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 ...

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 18<sup>th</sup> 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

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<sup>75</sup> See, Article 9(4) of the ICCPR.

<sup>76</sup> The administrative proceedings held at Guantánamo Bay which set out the charges against detainees.

<sup>77</sup> 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 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.

<sup>78</sup> *Mariam Mohamed & another v. Commissioner of Police & another* [2007] eKLR.

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.<sup>79</sup>

65. To date, no investigation into how Mr. Abdulmalik ended up at Guantanamo Bay has been conducted; furthermore, the Kenyan government has not, to the knowledge of REDRESS, Reprieve and MHRF, made diplomatic representations on his behalf to the U.S. government for his release and return to Kenya or fair trial before ordinary civilian courts in the U.S. that are 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.”<sup>80</sup> It also denies that he was handed over by the Kenyan authorities to the U.S. thus incurring responsibility regardless of his nationality. However, the Assistant Minister of the Office of the President conceded that “Kenya deported him to Somalia from where he originated ... Where the Americans got him from, is their business.”<sup>81</sup>

#### C. KENYA'S FAILURE TO CONDUCT AN INVESTIGATION AND PROVIDE AN EFFECTIVE REMEDY AND FULL AND ADEQUATE REPARATION IN THESE CASES

66. The absolute prohibition of torture and other ill-treatment imposes a range of positive obligations upon states, including the duty to establish a legal and practical framework to prevent and protect all persons within its jurisdiction from torture and other ill-treatment.<sup>82</sup> In particular, the principle of non-refoulement requires states to take effective measures to ensure that individuals are not exposed to a risk of torture and other ill-treatment elsewhere through removal from their territory. In order to fulfil these positive obligations, where a prima facie case is established that the principle of non-refoulement has been breached, the circumstances surrounding the removal must be investigated.
67. In its Concluding Observations on the United States, the Human Rights Committee found that:

[t]he State should conduct a thorough and independent investigation into allegations that persons have been sent to third countries where

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<sup>79</sup> *Mariam Mohamed & another v Commissioner of Police & another* [2007] eKLR at 7 – 9.

<sup>80</sup> See for example, National Assembly, Official Report: Parliamentary Debates, “Handing over of Kenyans to USA Security Forces” 285 (3 April 2007) at 286.

<sup>81</sup> National Assembly, Official Report: Parliamentary Debates, “Handing over of Kenyans to USA Security Forces” 285 (3 April 2007) at 286.

<sup>82</sup> See, for example, Article 2(1) of the CAT requires that “Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”

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.<sup>83</sup>

68. As the absolute principle of non-refoulement constitutes an integral part of the absolute prohibition of torture<sup>84</sup>, individuals who have an arguable claim that they have been victims of refoulement have the right to an effective remedy and full and adequate reparation. This is as affirmed in Article 14 of the CAT, Articles 2(3), 9(5) and 14(6) of the ICCPR and by the Committee against Torture<sup>85</sup>, the Human Rights Committee<sup>86</sup> and regional courts.<sup>87</sup>

69. In *Agiza v. Sweden*, the 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.<sup>88</sup>

70. The U.N. 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 ("U.N. Basic Principles on the Right to a Remedy and Reparation"), set out that states are obligated to provide victims with "fair, effective and prompt access to justice" (Principle 2(b)) and make available "adequate, effective, prompt and appropriate remedies, including reparation" (Principle 2(c)). Principle 11 defines remedies as including "equal and effective access to justice" and "adequate, effective and prompt reparation for harm suffered;" Principles 18 to 23 define reparation as restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

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<sup>83</sup> See, Human Rights Committee "Concluding Observations of the Human Rights Committee: United States of America" U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (18 December 2006) at para. 16.

<sup>84</sup> See Committee against Torture, General Comment No. 2 *supra* note 10 at paras. 5, 6 (2008); "Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin: Addendum: Mission to Israel, Including Visit to Occupied Palestinian Territory", at para. 18.

<sup>85</sup> Committee against Torture, "General Comment No. 2" *supra* note 10 at para. 15.

<sup>86</sup> See, Human Rights Committee, "General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant", U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004). at paras. 15-17.

<sup>87</sup> See, e.g., *Velasquez Rodriguez Case*, Inter-Am. C.H.R. (Ser. C) No. 4 (1988) at para. 174.

<sup>88</sup> At para. 13.6.

71. 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).<sup>89</sup>

72. However, despite political commitments, no investigation has been conducted to date and Kenya has failed to provide an adequate remedy and full and adequate reparation to any of the individuals for breaches under Article 3 of the CAT.

#### D. CONCLUSION AND RECOMMENDATIONS

73. On the basis of the above, REDRESS, Reprieve and MHRF respectfully request the Committee against Torture to highlight the following in its Concluding Observations/Comments:

- That the Committee remind Kenya that any strategy employed to counter terrorism must be carried out in full compliance with the absolute prohibition of torture and other ill-treatment, including the absolute principle of non-refoulement<sup>90</sup>;
- That Kenya is obliged 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;
- That in all removal cases, individuals must be afforded the opportunity under Kenyan law to challenge their removal by way of an independent review process in order that any individuals who have a potential claim under Article 3 of the CAT are able to make it;
- That where an individual subject to refoulement is subsequently tortured or subjected to other ill-treatment in the receiving state or territory as a result

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<sup>89</sup> 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).

<sup>90</sup> See also, Security Council, Resolution 1456, U.N. 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.")

of a violation of Article 3, Kenya will be responsible under Article 1 of the CAT as well as Article 3;

- That where a claim of violation of Article 3 is made (procedural or substantive), Kenya must carry out an independent and effective investigation capable of identifying and punishing those responsible; and
- That where a violation of Article 3 is found, Kenya must provide victims with an effective remedy and full and adequate reparation. Where an individual is detained as a result of the violation of Article 3, diplomatic representations for his or her fair trial subject to international standards or return to Kenya must be made by Kenya, regardless of the individual's nationality.