10th May 2016

Press Release

GOVERNMENT STATEMENT ON REFUGEES AND CLOSURE OF REFUGEE CAMPS

The Kenya National Commission on Human Rights is deeply concerned by the Statement issued by the Principal Secretary for Ministry of Interior on Friday 6th May 2016 titled "Government Statement on refugees and Closure of Refugee Camps". The statement communicates the Government’s decision to end the hosting of refugees and to close down Dadaab and Kakuma refugee camps citing national security concerns. The government also announced that it has disbanded the Department of Refugee Affairs (DRA) as a first step towards the above measures.

The National Commission raises these concerns pursuant to its constitutional functions under Article 59(2) (a) and (g) which mandates the Commission “to promote the respect for human rights and develop a culture of human rights in the republic” and to “act as the principal organ of the state in ensuring compliance with obligations under treaties and conventions relating to human rights” respectively.

The National Commission, as always, acknowledges that Kenya has legitimate security concerns and appreciates the ongoing efforts by the government to combat insecurity especially terrorism. The National Commission however maintains that security policies and practices must be consistent with human rights standards and principles in keeping with Article 238(2) b of the Constitution which provides that; “national security shall be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms.” The National Commission shall persistently hold this position.

The proposed measures by the government are a serious threat to the rights of refugees and asylum seekers and amount to a breach of Kenya’s obligations under national, regional and international human rights law. Refugees and asylum seekers as a group are not a threat to national security; they are vulnerable persons in need of protection having fled persecution and suffering from their respective countries. Further, the proposed measures amount to blanket condemnation of all refugees and asylum seekers living in Kenya as criminals or terrorists which is unfair, discriminatory and unlawful.

By unilaterally closing the refugee camps the Kenya government would be in grave breach of the principle of non-refoulement, which protects asylum seekers and refugees from being returned to places where their lives or freedoms could be threatened. The principle of non-refoulement is core to the international refugee protection regime and has since become a customary norm of international law. It is anchored in the 1951 Refugee Convention and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.

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Commissioners: Jedidah Wakonyo Waruhiu, Shatikha S. Chivusia
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Kenya is a signatory to both Conventions. By dint of Article 2(5) and (6) of the Constitution of Kenya, the general rules of international law as well as any Treaty or Convention ratified by Kenya shall form part of the law of Kenya. Furthermore, Kenya has domesticated this principle under Section 18 of the Refugees Act (2006).

The National Commission notes with concern that the latest directive adds into the worrying trend of government policies and measures that are unlawful and unconstitutional especially in respect of human rights and freedoms.

On 18th December 2012, the Department of Refugee Affairs (DRA) issued a similar directive seeking to implement a forced encampment policy of all refugees and asylum seekers citing national security concerns. The directive was subsequently declared by the High Court (Re: Petition 19 of 2013 as consolidated with Petition 115 of 2013) as unconstitutional and in violation of numerous rights of refugees.

Despite the High Court order, the then Cabinet Secretary, Ministry of Interior and Coordination of National Government, Joseph Ole Lenku, issued another similar directive on 26th March 2014, ordering all refugees to the camps, again citing 'security challenges'. This directive was followed by the infamous Operation Usalama Watch, a major security operation that commenced on 5th April 2014 which targeted foreign nationals including refugees and asylum seekers mainly from the Somali community. The operation was characterized by massive human rights violations including arbitrary arrests, widespread extortion, torture, cruel inhuman and degrading treatment, deportations, illegal detentions and forced encampment of refugees. The said directive by the Cabinet Secretary was obviously contemptuous of the High Court order which is not only an unacceptable act of official impunity but also an affront to the rule of law, values as well as principles of the Constitution.

In December 2014, the National Assembly passed the controversial Security Laws (Amendment) Act, 2014 (SLAA) which amended sections of twenty two (22) security related laws aimed at giving the security agencies more powers in combating terrorism and insecurity. The National Commission together with other actors moved to the High Court in Petition 628 of 2014 as consolidated with Petition 630 of 2014 to challenge the constitutionality of that law. Several sections of the law were declared unconstitutional as they violated the provisions of the bill of rights and international law including the rights of refugees. The Act had for instance prescribed a limit of the number of refugees or asylum seekers permitted to stay in Kenya to 150,000 persons.

The Department of Refugees Affairs (DRA) is a statutory body established under Section 6 of the Refugee Act. The decision by the government purporting to disband such a body without amending or repealing the law through the required legislative process is in itself blatantly illegal and ultra vires. The consequences of disbanding the Department of Refugee Affairs in such a hasty manner leaves the entire refugee management system in utter disarray. For example, the Commission has received a report of death of a female refugee in Dadaab Refugee Camp on the night of 8th May 2016 for the simple reason that there was no officer of DRA to authorize her travel to access specialized treatment outside the camp.
The National Commission urges the government to ensure that its policies and practices are compliant with the Constitution and other national laws. There can be no rule of law in a society where leaders and those who enforce the law are not themselves subject to that law. A government that does not itself follow the law encourages citizen disobedience of the law. Impunity breeds contempt of law and erodes public confidence in the institutions of governance. This can only lead to anarchy. The National Commission draws the attention of state officers who act in this manner to the implications of their actions under Articles 10 of the Constitution on national values and principles of good governance as read together with Article 21(3).

Finally, the proposed forced repatriation of refugees and asylum seekers will certainly be counterproductive and will in itself become a threat to our national security. Somalia, South Sudan, Burundi and some parts of Eastern Congo remain volatile locations. There are reports of harassment and persecution of number of the refugees that were deported during Operation Usalama Watch. Returning thousands of desperate refugees to Somalia, for example, will lead to further radicalization and create a breeding ground for recruitment of the refugees to terror networks.

Based on the foregoing, the National Commission urges the government to rescind the current directive. The National Commission reminds the Government of its obligations to protect the fundamental human rights and freedoms of all persons living within its borders including refugees and asylum seekers.

Thank you

Signed:

[Signature]

Kagwiria Mbgori
CHAIRPERSON