Title: Submission to the UN Special Rapporteur on the Human Rights of Migrants: Externalisation Measures in Kenya and the East Africa Region

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1. Examples of Externalisation Measures

Although Kenya is itself a destination country for displaced populations, notably from Somalia, South Sudan, DRC and Ethiopia because of its political stability and economic opportunities, it has also become part of wider border externalisation efforts funded by donor countries, especially those from the European Union. These measures are embedded in migration management partnerships, technical assistance, and informal arrangements that position Kenya as a gatekeeper for refugee and migrant flows from the Horn of Africa.

a) **Legal basis**: These arrangements often rely on informal Memoranda of Understanding (MoUs), bilateral migration dialogues (e.g., EU, Horn of Africa Migration Route Initiative or Khartoum Process), and technical cooperation agreements rather than binding treaties.
b) **Responsible entities**: The Executive (Ministry of Interior), the Directorate of Immigration and Registration of Persons, Kenya Defence Forces, and the Kenya Police Service implement these measures with coordination by European actors (e.g. EU Trust Fund for Africa).
c) **Practicality**: These measures are limited by porous borders and local resistance; yet, they function symbolically and politically by projecting cooperation with European migration deterrence goals. In practice, this has led to increased arrests, surveillance, and even detention of refugees in transit countries like Sudan or Eritrea, countries, that are themselves producing refugees.

In Kenya, joint efforts with donor states have included the establishment of screening and registration hubs that serve as informal "return hubs," sometimes delaying or discouraging movement rather than facilitating protection. Under the guise of security cooperation, border agencies and police forces have taken on roles that blur the line between protection and exclusion.

2. Transparency and monitoring

a) Legal basis and public availability

In the context of migration management, border control, and returns, most externalisation frameworks such as the Khartoum Process or bilateral Memoranda of Understanding between EU states and countries like Sudan, Ethiopia, or Kenya are not publicly disclosed. These agreements frequently bypass legislative oversight by being framed as "technical cooperation" rather than migration control. As a result, affected populations, including refugees, are kept in the dark about the legal grounds on which their movement is restricted or surveilled.

b) Access to information laws

Despite some countries like Kenya having access to information laws, in practice, requests for documentation on migration cooperation are routinely denied often on grounds of national security. This lack of transparency is compounded when external partners (such as EU actors or international agencies) contract out enforcement or data collection to implementing partners like IOM or UNHCR, creating a layered system of responsibility with little public accountability.

c) Monitoring mechanisms in practice

In Kenya, while formal monitoring and evaluation frameworks exist such as those led by the Kenyan National Coordination Mechanism (KNCM) and supported by donor programs like the Better Migration Management (BMM) initiative, IOM and UNHCR with protection risks assessment. Their implementation in practice is limited in transparency and inclusiveness. Monitoring tends to be state or agency-led, with minimal involvement of independent human rights institutions, civil society organizations, or refugees themselves. Even where evaluations or reporting frameworks are developed, their findings are rarely made public. Additionally, the use of third-party contractors or security actors in implementation further restricts access and oversight, making rights-based scrutiny difficult

d) Human rights impact assessments

There is no consistent practice of conducting human rights impact assessments prior to the implementation of externalisation measures. When assessments are conducted by donors or agencies, they are rarely published**,** leaving serious gaps in accountability. This absence is particularly alarming given the well-documented abuses in transit and asylum countries many of which host these EU-funded initiatives. Refugees cannot freely leave camps (Dadaab, Kakuma) due to encampment policy. The system, while useful for assistance, also becomes a tool of containment aligned with donor objectives to prevent movement toward northern borders. Urban refugees in Nairobi face harassment, forced relocations, or denial of documentation. This discourages movement beyond designated areas. The idea behind resettlement is "stay here you may get a durable solution".

e) Complaint mechanisms

For refugees subjected to interception, detention, or exclusion under these frameworks, complaint mechanisms are non-existent. There are no clear avenues for challenging the misuse of their data, the denial of asylum, or mistreatment in detention.

3. Cooperating States

Cooperating East African states primarily benefit from financial and technical assistance in exchange for efforts to contain irregular migratory flows toward Europe. This support often includes infrastructure development, border surveillance systems, biometric registration technology, and capacity-building for immigration, police, and military actors. For example, under the Khartoum Process and EU Trust Fund for Africa, countries such as Sudan, Ethiopia, and Kenya have received funding and training aimed at strengthening border management and counter-trafficking capabilities.

In return, donor governments, particularly from the European Union, seek to reduce secondary movements toward Europe by reinforcing migration controls in transit and origin countries. These arrangements often take the form of informal agreements, such as Memoranda of Understanding, and are typically not subject to parliamentary oversight or public scrutiny. While framed in terms of development or security cooperation, they function as tools of migration deterrence.

In Kenya, the broader policy landscape also includes initiatives like the Shirika Plan (launched in 2024 with UNHCR), which promotes refugee inclusion and reflects a progressive stance in refugee policy. However, this should be viewed as a complementary but distinct track from the migration control agenda funded by external actors.

4. Non-State Actors

a) Role in development and implementation

- International and intergovernmental organisations, including IOM and UNHCR, frequently implement EU-funded programs related to registration, return, and border management. While their mandates emphasize protection, their operational involvement in managing migration flows such as through biometric registration or voluntary return schemes can align with deterrence objectives of external actors like the EU.

- Private technology companies are contracted to provide surveillance, biometric, and data processing systems used at borders and in refugee camps under EU-funded border management initiatives.
- Private Military and Security Companies (PMSCs), though less visible in public reporting, are known to be contracted to train local police or military forces in migration control, particularly under the umbrella of anti-terror or anti-trafficking cooperation funded through the EU Emergency Trust Fund for Africa.
- NGOs also participate either through humanitarian programming that complements migration control efforts, or as implementers of return/reintegration projects that are part of the externalisation chain. This includes reintegration support in countries like Ethiopia and Sudan for returnees expelled from Europe.

b) Implications for transparency, accountability, and human rights
The involvement of non-State entities complicates lines of accountability and limits transparency:

- Privatised roles in biometric data collection or surveillance, especially by tech companies, often occur without public procurement transparency or clarity about data protection safeguards. There is little oversight on how migrants' data is stored, used, or shared across borders, raising serious privacy and due process concerns.
- Delegation to non-State actors, particularly in return or reintegration, can create accountability gaps. Migrants may lack effective avenues to challenge decisions or seek remedies when abuses occur during externally-funded return or detention operations.
- Organizations like IOM or NGOs risk having their humanitarian image used to give migration control policies a false appearance of being rights-based. This makes it harder to tell the difference between protecting people and trying to stop them from moving.

5. Use of Technology

a)Tools used to support externalisation measures
Technology is widely deployed to support migration control and externalisation in Kenya and across East Africa, particularly through EU-funded initiatives and UN-led programs. Common tools include:

- Biometric systems: Iris scans, fingerprints, and facial recognition used during registration and at checkpoints (e.g. UNHCR's Biometric Identity Management System - BIMS, and IOM's MIDAS).
- Surveillance technologies: Includes border surveillance drones, CCTV, and other security infrastructure, often introduced via donor-funded capacity-building initiatives (e.g. EU Trust Fund for Africa).
- Data platforms: Regional or national databases such as RIMS (Refugee Information Management System) or BIMS are used to store and manage sensitive data across agencies.

b) Data storage and control

Biometric and personal data collected by UNHCR is stored on UN servers, typically in global data centres. However, in contexts like Kenya, data is often shared with the host government (e.g. Directorate of Immigration and Registration of Persons) under informal or semi-formal data-sharing agreements.

c) Risks and human rights concerns
The use of such technologies can exacerbate the exclusion and surveillance of refugees and migrants:

- Individuals can be denied aid or movement if their biometric profile is not recognized or they are not properly enrolled, leading to digital exclusion.
- Refugees and migrants have little or no control over their personal data, nor transparency on who accesses it or for what purpose.
- Data collected for humanitarian purposes can be repurposed for border control, without clear legal protections or independent accountability mechanisms.
- Complaints mechanisms within UN agencies are internal, and host states may not have strong data protection laws or effective redress mechanisms.

6. Human Rights Implications

a) Situation of individuals in cooperating States (e.g. Kenya)
Refugees and asylum seekers in Kenya face a restrictive protection environment, despite Kenya's formal commitment to refugee rights under the 2021 Refugees Act :

- Movement restrictions limit refugees to designated camps (Kakuma, Dadaab), with permits needed to travel outside, often denied arbitrarily.
- Urban refugees frequently face police harassment, racialised profiling (particularly Somali refugees), and are at risk of detention or forced encampment.
- Socioeconomic inclusion remains limited despite formal policies, with bureaucratic delays in documentation, access to work permits, and education.

b) Human rights risks in externalisation phases
Externalisation measures such as those supported by the EU under the Khartoum Process or bilateral funding carry systemic risks at multiple stages:

- **Prevention of departure**: Border closures or patrols prevent access to asylum procedures elsewhere, violating the principle of non-refoulement.
- **Interception and detention**: Migrants intercepted within Kenya or along regional migration routes may be detained arbitrarily or without due process.
- **Camp conditions**: Underfunded and overcrowded refugee camps compromise safety, dignity, and access to basic services (e.g., food, healthcare, protection from gender-based violence).
- **Data sharing** (e.g., biometric registration for aid access) can lead to exclusion or surveillance without consent or safeguards.

c) Access to justice and redress mechanisms
Access to justice remains extremely limited:

- Refugees face linguistic, financial, and procedural barriers to legal redress in Kenyan courts.
- Mechanisms to challenge detention, harassment, or loss of services are weak, especially where external actors (e.g., donors or contractors) are involved.
- Oversight mechanisms for externalisation practices especially those involving EU funding are opaque, and often not subject to public or parliamentary scrutiny.
- UNHCR offers some internal complaints procedures, but these lack enforceability and are not judicial remedies.

7. Responsibility and Jurisdiction

a) Responsibility of externalising States:
States that fund, direct, or control migration management policies beyond their borders (e.g., EU member states supporting border controls in Kenya or Sudan) can be held responsible for human rights violations resulting from those policies. This responsibility arises under international human rights law and extraterritorial obligations, especially when the impact on individuals' rights is foreseeable and linked to state actions or omissions.

b) Jurisdictional approaches:
The extraterritorial application of human rights obligations has been recognized in key court decisions such as *Hirsi Jamaa and Others v. Italy* (European Court of Human Rights, 2012), where Italy was held responsible for returning migrants intercepted at sea to Libya, despite the events occurring outside Italian territory. The ruling established that exercising "effective control" over individuals even extraterritorially triggers human rights duties.

c) Legal precedents:

- **Kenya**: to date, no Kenyan court has issued rulings specifically addressing externalisation policies or their human rights implications.
- **UK-Rwanda**: Legal challenges have arisen against policies like the UK-Rwanda asylum plan, reflecting growing judicial scrutiny of externalisation arrangements.

- **International bodies**: UN human rights mechanisms, including the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and Special Rapporteurs, have criticized externalisation frameworks like the Khartoum Process for failing to uphold refugee protection standards.