Declaration of Haitian-American Human Rights Lawyer Alexus McNally, Esq., Concerning the Legality of Kenya's National Police Service Deployment to Haiti

I. INTRODUCTION AND EXPERT QUALIFICATIONS

- 1. I, Alexus McNally, am a Haitian American human rights lawyer with expertise in international law and in applying the national laws of countries through localized impact litigation. I earned a Doctor of Jurisprudence from Indiana University Maurer School of Law and a LL.M. from Paris II Panthéon-Assas University in 2020. I am barred in Washington, DC. For the past three years, I have advocated for access to justice for indigent accused globally, supporting strategic litigation efforts in transitional countries including Myanmar, Palestine, and Tunisia. I am currently the principal investigator for a research study concerning the juvenile justice system in Trinidad and Tobago. I also serve as the Co-Chair of the International Development Working Group for Women of Color Advancing Peace and Security.
- 2. My father and his wife were just attacked on October 25, 2023, in Haiti, and their house was overrun by gang members. They shot holes in the house, tore down the doors and windows, and took everything they could carry. They also fatally wounded our dog. Despite this enormous trauma and loss, and my strong desire to see the perpetrators held accountable, I cannot support the deployment of Kenya's National Police Service to Haiti, as it is a violation of international, Haitian, and Kenyan law. Moreover, the deployment of 1,000 Kenya National Police Officers, who do not speak either of Haiti's official languages, to confront approximately 200 Haitian gangs will likely worsen the security situation, result in human rights abuses, and lead to the senseless deaths of innocent Kenyans and Haitians.

II. MILITARY INTERVENTIONS IN HAITI

3. Every military intervention in Haiti, particularly those occurring through the United Nations system and operating under United Nations safeguards, has caused disastrous and irreparable harms to Haitian civilians. Military interventions in Haiti are characterized by their impunity. The <u>United States occupied Haiti</u> between 1915 and 1934 with the stated purpose of "restor[ing] order and maintain[ing] political and economic stability." However, <u>US Marines forced Haitians to engage in unpaid labor</u> to build infrastructure² and carried out

¹ "U.S. Invasion and Occupation of Haiti, 1915–34." U.S. Department of State. Accessed November 14, 2023. https://history.state.gov/milestones/1914-1920/haiti.

² Davis, Christopher. "History as an Enemy and an Instructor: Lessons Learned from Haiti, 1915-34." *Journal of Advanced Military Studies* 11, no. 1 (2020): 37–38. https://doi.org/10.21140/mcuj.2020110101.

summary executions against those that rebelled.³ The United Nations Security Council ("UNSC" or "UN Security Council") has authorized at least five peacekeeping missions in Haiti since 1993.⁴ Each of these missions is marked by significant blunders and human rights violations, from the introduction of cholera into Haiti, to widespread sexual exploitation and abuse of Haitian people by UN peacekeeping officers. In June 2004, the UN Stabilization Mission in Haiti ("MINUSTAH") deployed.⁵ This intervention marked the first time in its history that the UN deployed a mission using Chapter VII of the UN Charter which authorizes the use of force, without an active conflict or peace agreement to enforce, by declaring the political and humanitarian crises in Haiti a threat to international peace and security.⁶ Innocent civilians died in UN raids, including women and children. Communities were left without recourse due to the UN's immunity from legal prosecution for excessive use of force and other misconduct, and the UN's refusal to provide accountability mechanisms.⁷

4. In 2015, MINUSTAH had one of the <u>highest rates of sexual abuse and exploitation</u> of any peacekeeping mission in the world. From 2010 to February of this year, the UN has recorded <u>463 paternity claims against its personnel.</u> The UN has no jurisdiction over peacekeepers, and punishment is left to the countries that contribute the troops. Prior to the United Nations' intervention in 2010, Haiti was cholera free. The UN took more than five years to admit that its reckless disposal of waste caused the outbreak which claimed over 10,000 lives and infected more than 800,000 people. This concession came after years of dedicated international advocacy and a <u>lawsuit filed</u> on behalf of the victims. The international advocacy and a <u>lawsuit filed</u> on behalf of the victims.

³ Danticat, Edwidge. "The Long Legacy of Occupation in Haiti." The New Yorker, July 28, 2015. https://www.newyorker.com/news/news-desk/haiti-us-occupation-hundred-year-anniversary.

⁴ Government Accountability Office. (2006). *Peacekeeping: Cost Comparison of Actual UN and Hypothetical U.S. Operations in Haiti*. (GAO Publication No. 06-331). Washington, D.C.: U.S. Government Printing Office.

⁵ United Nations Security Council (UNSC) Res 1542 (30 April 2004) UN Doc S/RES/1542.

⁶Wisner, Sandra. "As the UN Leaves Haiti, Its Victims Still Wait for Justice." Al Jazeera, October 15, 2019. https://www.aljazeera.com/opinions/2019/10/15/as-the-un-leaves-haiti-its-victims-still-wait-for-justice. Keeping the Peace in Haiti, An Assessment of the United Nations Stabilization Mission in Haiti Using Complicane with its Prescribed Mandate as a Barometer of Success, Harvard Law School Student Advocates for Human Rights and Centro de Justica Global, March 2006, available at https://www.fidh.org/IMG/pdf/KeepingthepeaceJusticiaGlobal-4.pdf

⁷ "Un Admits Civilians May Have Died in Haiti Peacekeeping Raid." The Independent, January 10, 2006. https://www.independent.co.uk/news/world/americas/un-admits-civilians-may-have-died-in-haiti-peac ekeeping-raid-6112175.html.

⁸ United Nations General Assembly (UNGA) Special Measures for Protection From Sexual Exploitation and Sexual Abuse Report of the Secretary-General (2015) UN Doc A/69/779, 9.

⁹ Hu, Caitlin, and Etant Dupain. "Dozens of Children Were Left behind by UN Personnel in Haiti. Their Mothers Want Justice." CNN, September 17, 2023.

https://edition.cnn.com/2023/09/15/americas/haiti-un-peacekeepers-trust-fund-sexual-abuse-as-equals-intl-cmd/index.html.

¹⁰ Moloney, Anastasia. "A Decade after U.N.-Linked Cholera Outbreak, Haitians Demand Justice." Reuters, October 22, 2020.

https://www.reuters.com/article/us-haiti-cholera-un-feature-trfn-idUSKBN2772RM.

- Nevertheless, the UN continues to <u>resist taking legal responsibility</u> over the outbreak or paying compensation to the victims.¹¹ The UN's own experts have called its response "a critical failure...in providing adequate remedies to victims of the cholera epidemic."¹²
- 5. On October 2, the United Nations Security Council authorized the deployment of a Multinational Security Support Mission to Haiti ("MSS"). Though approved by the UNSC, it would not be a UN force, but would instead be under Kenya's leadership. The UNSC resolution was <u>drafted by the United States and Ecuador</u>.

 It authorizes the force to deploy for one year, with a review after nine months. This non-U.N. mission would be funded by voluntary contributions, and the United States has already <u>pledged up to \$200 million</u>, ¹⁴ but so far refused to contribute any of its own armed forces into Haiti. Notably, the <u>humanitarian response plan</u> for Haiti is less than 30% funded, demonstrating challenges with voluntary contributions and wider international support. ¹⁵
- 6. The UN's authorization of the MSS rather than a UN peacekeeping mission allows the UN to avoid accountability and mitigate its exposure should the operation fail or any human rights violations occur. Moreover, the fact that the MSS is explicitly not a UN mission, raises serious questions as to whether it will implement meaningful measures that would prevent the types of harms that have accompanied previous foreign interventions in Haiti and offer recourse to Haitians should those harms occur. At the same time, Kenya would not benefit from the same immunity that the UN enjoys. The actions of Kenyan troops would be susceptible to investigation and prosecution in various fora.

¹¹ "Un Response to Haiti Cholera Epidemic Lambasted by Its Own Rights Monitors." The Guardian, May 4, 2020.

https://www.theguardian.com/world/2020/may/04/united-nations-un-haiti-cholera-letter-rights-monit ors#:~:text=For%20six%20years%20the%20UN,responsibility%20or%20to%20pay%20compensation. ¹² "UN Inaction Denies Justice for Haiti Cholera Victims, Say UN Experts," April 30, 2020. UN Office of the High Commissioner for Human Rights.

https://www.ohchr.org/en/press-releases/2020/04/un-inaction-denies-justice-haiti-cholera-victims-say-un-experts?LangID=E&NewsID=25851.

¹³ Musambi, Evelyne. "Kenya's President Welcomes UN Security Council's Approval to Send a Kenya-Led Mission to Haiti." AP News, October 3, 2023.

https://apnews.com/article/kenya-haiti-multinational-force-gang-violence-2dc8c330f258aa07539db8647f654014.

¹⁴ "UN Security Council Approves Sending Forces to Haiti to Fight Violent Gangs." POLITICO. Accessed November 14, 2023.

https://www.politico.com/news/2023/10/02/un-security-council-approves-sending-forces-to-haiti-to-fig ht-violent-gangs-00119593.

¹⁵ "Haiti Plan de Réponse Humanitaire 2023." United Nations Office for the Coordination of Humanitarian Affairs, November 14, 2023. https://fts.unocha.org/plans/1121/summary.

III. INTERNATIONAL LAW

- 7. The deployment of Kenyan Police Officers into Haiti runs contrary to international law as it constitutes a use of force which should only be authorized as a last resort. The UN is governed by the United Nations Charter. The Charter provides that members of the UN accede to its terms by becoming members. Under Chapter VII of the United Nations Charter, the UNSC may, in some cases, authorize the utilization of military force by a coalition of member states or by a regional organization or arrangement. Article 42 of the Charter states that the use of force can only be carried out as a *last resort* when all possible peaceful means of settling a dispute have been exhausted. Should the Security Council consider that measures [not involving the use of armed force] would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.
- 8. The UNSC's premature authorization of a Multinational Security Support Mission to Haiti violates Article 42 of the UN Charter. The crises in Haiti are multidimensional and require an integrated response. Notably, the UNSC acknowledges within the resolution authorizing the security force that the root causes of gang violence in Haiti "emanate from political, institutional, and socio-economic instability," and cannot be addressed by military intervention. Resolution 2699 (2023). Haiti is suffering from a governance crisis, and the UNSC's tactics so far fail to address this issue. Measures that do not require a use of force must be exhausted and found to be inadequate to maintain or restore international peace and security **before** the UNSC is permitted to authorize a use of force. On October 19, 2023, (after passing resolution 2699 (2023)) the UNSC "authorized the renewal for one year of the sanctions regime on Haiti, continuing a targeted arms embargo, travel ban and asset freeze established in October 2022 to address the widespread violence, criminal activity and human rights abuses plaguing the country."¹⁷ These measures on the security situation in Haiti need to be given time to take effect and deemed inadequate before the UN can authorize a use of force.
- 9. The poor execution of alternative measures does not validate the UNSC's drastic decision to authorize the use of force and the deployment of Kenyan police officers. The UNSC should take steps to strengthen the efficacy of its arms embargo before forces are deployed to Haiti. Current UN embargoes are faulty.

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¹⁶ United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, available at: https://www.un.org/en/about-us/un-charter/chapter-7 [accessed 14 November 2023]

¹⁷ "Security Council Renews Sanctions Regime, Targeted Arms Embargo on Haiti for One Year, Unanimously Adopting Resolution 2700 (2023) | UN Press." United Nations. Accessed November 14, 2023.

 $https://press.un.org/en/2023/sc15455.doc.htm\#:\sim:text=The\%20Security\%20Council\%20today\%20auth\ orized, rights\%20abuses\%20plaguing\%20the\%20country.$

Their ill design allows sophisticated and high-caliber firearms and ammunition to be trafficked into Haiti, exacerbating its deteriorating security situation. Haiti does not officially manufacture firearms or ammunition, and virtually all new rifles, handguns, magazines, and bullets entering the country are imported. In fact, the United Nations Office on Drugs and Crimes found that due to weak oversight and controls, weapons and ammunition from the United States are periodically diverted to Haitian civilians. Due to the poor design of UNSC embargoes and noncompliance of Member States, arms are essentially pouring into Haiti through legal means where they are being siphoned by gang members. The UNSC should strengthen their embargoes, and take steps to ensure that the United States and other states are adequately enforcing the embargoes and preventing weapons from flooding into Haiti and the hands of Haitian gang members.

- 10. Article 40 of the United Nations Charter emphasizes that the actions of the Security Council should prevent the aggravation of situations. However, the deployment of a mere 1,000 Kenyan police officers, who have no effective way to communicate with the Haitian populace, into a highly chaotic and dangerous landscape, can only serve to aggravate the situation. Further, resolution 2699 (2023) does not provide sufficient guidance for how Kenyan forces will successfully mitigate the crises and restore order. It remains unclear how 1,000 Kenyan forces will stabilize Haiti against the 200 gangs that terrorize the country. Approximately 100 gangs comprised of 20,000 active gang members control 80% of Haiti's capital. Even Kenyan officials estimated that the project would take three years and require 10,000 to 20,000 personnel to be successful. The 1,000 police officers currently slated to be deployed is a far cry from this number, calling into question what can realistically be accomplished by the mission.
- 11. The gangs are deeply embedded in some neighborhoods, and dislodging them will require sophisticated understanding of local conditions and careful building of trust. However, 90% of Haitians speak only Haitian Creole; only 10% of

²⁰ Global Initiative Against Transnational Organized Crime. *Gangs of Haiti: Expansion, power, and an escalating crisis.* Geneva, Switzerland, 2022.

¹⁸ United Nations, Office of Drugs and Crimes. *Haiti's Criminal Markets: Mapping Trends in Firearms and Drug Trafficking*. 2023.

¹⁹ Ibid, 17.

[&]quot;New Gang Battle Lines Scar Haiti as Political Deadlock Persists." Crisis Group, August 17, 2022. https://www.crisisgroup.org/latin-america-caribbean/haiti/new-gang-battle-lines-scar-haiti-political-de adlock-persists.

²¹ "U.N. Approves Sending International Force to Haiti to Help Quell Gang Violence." CBS News. Accessed November 14, 2023. https://www.cbsnews.com/news/haiti-un-mission-international-force-kenya/.

²²Robles, Frances, and Abdi Latif Dahir. "Haiti, Desperate for Peace, Turns to Police Notorious for Violence." The New York Times, October 4, 2023.

https://www.nytimes.com/2023/10/04/world/africa/kenya-police-haiti.html.

Haitians speak French; and none speak English as a native language.²³ The Kenyan forces speak neither Haitian Creole or French. This language barrier will certainly complicate and undermine the mission as the forces will not be able to communicate with their Haitian counterparts, the civilians, or the gangs. Gross human rights violations and senseless Haitian and Kenyan deaths are almost inevitable under these circumstances, where Kenyan forces have been authorized to secure "critical infrastructure sites such as the airport, ports, schools, hospitals and key intersections." Resolution 2699 (2023).

IV. HAITIAN LAW

- 12. The deployment of Kenya police officers in Haiti violates Haiti's constitution as foreign forces are prohibited from operating in the country. Article 263 of Haiti's Constitution stipulates that "no armed corps may exist in the national territory," aside from the National Armed Forces and the National Police. The Kenya National Police would constitute an "armed corps," and thus is prohibited from operating in Haiti. The legal effect of a resolution under international law is separate from the legal effect of the resolution under a country's domestic law. Security Council resolutions that are binding as a matter of international law are generally considered non-self-executing, and therefore considered not automatically binding as a matter of domestic law. Meaning that Haiti must adopt measures required to implement Security Council resolutions in compliance with national law. To date, no such measures have been adopted that would bring the deployment of the Kenya National Police to Haiti in compliance with Haitian law.
- 13. It is of utmost importance to note that an action challenging the constitutionality of the Multinational Security Support Mission cannot be brought in Haiti because its Constitutional Council, "Conseil Constitutionnel," is not operating. Article 190 of Haiti's Constitution grants the Constitutional Council the power to determine "the constitutionality of the law, of the regulations and of the administrative acts of the Executive Power." Article 190(8) of the Haitian Constitution provides that "[w]hen on the occasion of a pending legal proceeding before a jurisdiction, an exception of unconstitutionality is raised, the Constitutional Council may be referred to the matter on remand from the Court of Cassation," ("Supreme

https://guides.loc.gov/haiti-reimagined/haitian-creole#:~:text=World%2oDigital%2oLibrary.,is%2omon olingual%2C%2ospeaking%2oHaitian%2oCreole.

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²³ "Research Guides: Freedom in the Black Diaspora: A Resource Guide for Ayiti Reimagined: Haitian Creole." Haitian Creole - Freedom in the Black Diaspora: A Resource Guide for Ayiti Reimagined - Research Guides at Library of Congress. Accessed November 14, 2023.

²⁴ Acosta, Luis. *Legal Effect of United Nations Resolutions Under International and Domestic Law*. From Library of Congress. https://tile.loc.gov/storage-services/service/ll/llglrd/2019669646/2019669646.pdf ²⁵ Ibid, 7.

²⁶ Edwin F. Feo, "Self-Execution of United Nations Security Council Resolutions under United States Law," UCLA Law Review 24, no. 2 (December 1976): 387-421

Court"). The de facto government in Haiti has not established the Constitutional Council, further underscoring the governance issues that trouble Haiti and that cannot be resolved by a military intervention. Only on February 26, 2023, did Prime Minister Ariel Henry appoint judges to fill the vacancies on the Supreme Court on. "The ad hoc procedure adopted for the appointment of the judges violated article 175 of the amended 1987 Constitution, which confers the authority to the President to appoint magistrates to the Court from a list of three candidates per seat submitted by the Senate."27 Article 178 provides that "[t]he Supreme Court does not try cases on their merits," and article 182 stipulates that "[t]he Supreme court rules on conflicts of jurisdiction." Presently, if a petition against the deployment of a Multinational Security Support Mission was filed in Haiti, a trial judge would refer it up to the Supreme Court as it is beyond their competence. However, the Supreme Court would also refuse to take up the case as the matter is outside of its jurisdiction. Even if the supreme court were to take up any related matters, its legitimacy and independence would be in question because of the unconstitutional appointments of the justices. Haiti's weak institutions must not be exploited to subvert its constitution and violate its sovereignty. As such, the deployment of Kenyan Police Officers to Haiti must be stopped to avoid transgressing Haiti's Constitution.

V. KENYAN LAW

- 14. The deployment of Kenya's police officers in Haiti violates Kenyan Law as (1) the intervention has not been approved by the Parliament of Kenya; (2) the National Police Service is legally mandated to operate within Kenya; and (3) a state of emergency has not been declared in Kenya. Article 240(8) of Kenya's Constitution stipulates that only the National Security Council "may, with the approval of Parliament— (a) deploy national forces outside Kenya for— (i) regional or international peace support operations; or (ii) other support operations..." To date, the Parliament of Kenya has not approved the deployment of the proposed 1,000 National Police Officers to Haiti.
- 15. Parliamentary approval was obtained in advance of other UN-backed military interventions. In 2011, before Kenya Defense Forces joined the African Union Mission in Somalia ("AMISOM") and dispatched to Somalia to fight the al-Shibaab insurgency, Kenya's parliament approved the request.²⁸ Just last year, in 2022, the parliament approved the deployment of 900 Kenya Defense Forces to the Democratic Republic of the Congo ("DRC") as part of a joint military force

²⁷ United Nations Security Council (UNSC) United Nations Integrated Office in Haiti Report of the Secretary-General (14 April 2023) UN Doc S/2023/274, 2-3.

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²⁸ Times, Global. "Kenya's Parliament Approves Military to Join AMISOM." Global Times. Accessed November 14, 2023. https://www.globaltimes.cn/content/687697.shtml.

from the East African Community backed by the UN.²⁹ As a national force, Kenya National Police Officers cannot be deployed to Haiti without the approval of Kenya's parliament. Foreign policy decisions by the government are unlawful when they violate any provision of the Constitution. Therefore, without parliamentary approval, no Kenyan forces can be deployed to Haiti. The deployment of Kenyan police rather than soldiers in Haiti is also a departure from Kenya's custom with previous foreign military interventions which are generally composed of Kenya Defense Forces.

- 16. The deployment of Kenya National Police, rather than Kenyan Defense forces, further contravenes Article 243(3) of the Kenya Constitution and Section 6 of the National Police Service Act. Article 243(3) of the Kenya Constitution states that "[t]he National Police Service is a national service and shall function throughout Kenya," meaning that Kenyan police officers are only supposed to operate within Kenya. As Haiti is a sovereign nation far beyond the boundaries of Kenya, Kenyan police officers may not be deployed to Haiti.
- 17. Section 6 of the National Police Service Act carves out only one exception for when Kenyan police officers can be deployed internationally: "...in case of an emergency...in defense of Kenya," once a state of emergency has been declared. As a state of emergency has not been declared in Kenya and the proposed forces would not be acting in defense of Kenya, Kenyan police officers may not be deployed to Haiti.
- 18. Further, National Police Officers cannot be deployed to Haiti pursuant to Section 108 of the National Police Service Act because this provision is in direct contravention with Article 243(3) of the Kenya Constitution which stipulates that the Kenya National Police must only function within Kenya. Section 108 of the National Police Service Act outlines a procedure by which states can request the services of the Kenya National Police. However, this section violates the constitution and is therefore invalid, null and void. Moreover, Haiti is not a reciprocating country as defined under Section 107 of the National Police Service Act, which requires that the President of Kenya declare a reciprocating country by notice in the Gazette. To date, such a declaration has not been made; thus, Haiti cannot be considered a reciprocating country and cannot utilize the services of Kenyan police officers.
- 19. Section 108 of the National Police Service Act further stipulates that the President may act on the application of the government of a reciprocating country. In addition to Haiti not being a reciprocating country, the government of Haiti has not filed an application to Kenya to trigger the deployment of Kenyan National Police Officers. Even if such an application were filed, it would not be

²⁹ Al Jazeera. "DR Congo: Kenyan Peacekeepers Arrive in North Kivu." Al Jazeera, November 12, 2022. https://www.aljazeera.com/news/2022/11/12/dr-congo-kenyan-peacekeepers-arrive-in-volatile-north-kivu.

valid as the current Haitian government is illegitimate. Former Haitian President Jovenel Moïse named Ariel Henry to the post of Prime Minister two days prior to his assassination, but had not formally installed him. Mr. Henry's nomination failed to comply with several material constitutional provisions. Article 137 of Haiti's Constitution provides that "[t]he President of the Republic chooses a Prime Minister from among the members of the Party having the absolute majority in the Parliament. The majority is established on the basis of the electoral results of those elected in each of the two Chambers. In default of this majority, the President of the Republic chooses the Prime Minister in consultation with the President of the Senate and that of the Chamber of Deputies." At the time Mr. Henry assumed the role of Prime Minister, all Chamber of Deputies seats and two thirds (2/3s) of Senate seats were vacant, depriving the chamber of the requisite quorum to function. As such, there was no majority party in Parliament, nor was there consultation with Parliamentary leaders as required by Haiti's Constitution, and Mr. Henry was not ratified. To date, there is not a single democratically elected government official in office.³⁰ The deployment of Kenyan National Police under these circumstances would only serve to prop up a weak and unelected government that is responsible for the current crises in Haiti.

VI. CONCLUSION

20. For the foregoing reasons, Kenya National Police Officers must not be allowed to deploy to Haiti. The deployment of Kenyan National Police Officers in Haiti would violate international, Haitian, and Kenyan laws. Further resolution 2699 (2023) lacks specificity, guidelines, and accountability mechanisms to facilitate the successful execution of the mission. This Multinational Security Support Mission to Haiti has been set up to fail, and Kenya will serve as a scapegoat for the initiative that has been largely spurred and designed by the United States. Haitian civil society and human rights groups are mobilizing to hold the actors of the next militarized intervention accountable. Unlike the UN with previous interventions, Kenya will not have immunity from any legal controversies arising from this mission.

Signed,

Alexus McNally, Esq.

November 15, 2023

³⁰ Sullivan, Becky. "As Its Only Remaining Elected Officials Depart, Haiti Reaches a Breaking Point." NPR, January 18, 2023.

https://www.npr.org/2023/01/18/1149556481/haiti-last-elected-official-political-crisis.