

Articles

Forced Displacement and Refugee Rights in the Great Lakes Region

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Résumé

Le présent essai tente d'apprécier le traitement des réfugiés dans la région des Grands Lacs à la lumière des instruments juridiques nationaux, régionaux et internationaux en matière de protection des victimes de déplacement forcé. Il démontre que la plupart des législations nationales, pour autant qu'elles existent, sont manifestement inappropriées pour assurer la protection des réfugiés, tandis que, de plus en plus, on assiste à la violation des instruments régionaux et internationaux conçus pour assurer la protection des individus forcés de quitter leurs pays d'origine. Plus particulièrement, l'auteur se préoccupe des réfugiés refoulés aux frontières, leur rapatriement forcé, et le déni de leurs droits fondamentaux dans leur pays d'asile. En vue de transcender ces problèmes et d'autres problèmes connexes, l'auteur préconise une approche holiste qui intègre des stratégies de prévention, de même qu'un système de réponse plus efficace qui s'inscrit dans un cadre humain de recherche de solutions qui implique à la fois les pays hôtes et les pays d'origine des réfugiés.

Introduction

One of the distinctive geo-political features of the Great Lakes region is that it is a zone of refugees. Of the six countries which constitute the region—Burundi, Democratic Republic of Congo (DRC/formerly Zaire), Kenya, Rwanda, Tanzania and Uganda—all but two, Kenya and Tanzania, are refugee-generating states while all of the six countries harbour thousands of refugees, most

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of them from within the region itself. The region also has a significant number of internally displaced persons.

This essay examines the law and practice relating to refugee protection in the Great Lakes region. As far as laws are concerned, the essay will restrict itself to the East African jurisdictions of Kenya, Tanzania and Uganda partly because they bear most of the refugee burden in the region, and also because these are the countries with whose language of the law and legal traditions the author is most familiar. However, with state practice, greater reference will be made to the situation as it obtains in all the countries of the Great Lakes region.

The existing national regimes for the protection of refugees are generally inadequate. Countries of the region are party to international instruments for the protection of refugees and the advancement of human rights. However, some major host countries have no refugee-specific legislation while others have laws which are not comprehensive and which are geared, much more, towards controlling refugees than protecting their rights.

Even though states have, in practice, endeavoured to meet the standards enshrined in international instruments, there have been instances where their conduct has fallen short of the requirements of those standards. Among the most serious actions are the rejection of refugees at the frontier, their forcible return to their countries of origin, restrictions on their basic freedoms such as freedom of movement, and failure to provide them with adequate physical security.

Apart from the lack of adequate legislation, there are other factors which contribute to the failure of states to adequately protect the rights of refugees. These are the sheer size of the problem and the impact of refugees on host communities, especially with regard to external and internal insecurity, the overstretching of local infrastructure, and damage to the environment.

Traditionally, problems of refugee protection have been addressed through efforts at strengthening the procedures for refugee determination and improving the rights of refugees. However, such an approach is no longer adequate as it cannot deal

with the new problems associated with refugees, such as those outlined above. An effective system for refugee protection must be holistic and address the refugee problem at the levels of prevention, response and solution.

At the level of prevention, states should, individually and collectively, take steps to promote respect for human rights as is provided for under the major international human rights instruments. Where forced migration has occurred, care must be taken to ensure that the intervention is legal, timely and adequate.

At the level of response, states should enact laws which are sufficiently comprehensive to give effect to their obligations under international refugee and human rights instruments. Also, measures should be taken to minimize insecurity and other negative impacts associated with the presence of refugees in host countries.

At the level of solutions, care should be taken to ensure that the measures adopted are compatible with the rights of refugees. In particular, where repatriation is seen as the most desirable and feasible solution, it should take place in dignity and only where the security of the people being repatriated is assured. Also, countries of origin should be made to pay compensation to host countries for the cost of sheltering refugees. Furthermore, compensation should be paid to refugees for the losses they suffer on account of being forced into exile. These measures, if implemented, may go some way to mitigate the present pathetic situation of refugees receiving protection in the Great Lakes as well as elsewhere.

The Current Refugee Scene in the Great Lakes

The Great Lakes region represents an interesting forced migration picture: It is at one and the same time a refugee-producing as well as a refugee-hosting region. According to the 1997 edition of the *World Refugee Survey*,¹ as of 31 December 1996, Kenya hosted approximately 186,000 refugees—150,000 from Somalia, about 30,000 from Sudan, more than 5,000 from Ethiopia, and approximately 1,000 from various other countries.² Around the same time, Tanzania hosted slightly more than 335,000 refugees

—240,000 from Burundi, 50,000 from Rwanda, 45,000 from Zaire, and 5,000 from other countries.³ The number of refugees in Tanzania increased significantly in the course of 1997 due to the influx of Zairians and Burundians fleeing conflicts in their countries. The official figure of the Zairians in Tanzania 1997 stands at 74,000 while that of Burundians is about 300,000 and is rising at the rate of between 100 and 600 a day.⁴ As for Uganda, it hosted about 225,000 refugees, of whom about 200,000 were from Sudan, nearly 20,000 from Zaire and about 5,000 from Rwanda.

Burundi, a refugee producer, was also host to a total of 12,000 refugees, of whom 10,000 were Zairians and 2,000 were Rwandans. Rwanda, itself a refugee-producing country, played host to 15,000 Zairians and 5,000 Burundians, making a total of 20,000 refugees under its protection. Zaire, despite its own problems, provided protection to 455,000 persons, of whom 200,000 were Rwandans; 100,000 Angolans; 40,000 Burundians and 15,000 Ugandans. In total, therefore, at the end of 1996, the Great Lakes region was host to some 1,253,000 refugees or about a quarter of all refugees on the African continent

Also, as of 31 December 1996, there were close to a million internally displaced persons within the Great Lakes region. The countries in which such persons were found (with the relevant numbers in bracket) were Burundi (400,000), Zaire (400,000), Kenya (100,000) and Uganda (70,000) (*World Refugee Survey 1997*: 6, table 5). At the same time, there were 100,000 Burundians in Tanzania who were in a refugee-like situation (p. 11, table 9). These figures must have increased with the escalation of the conflicts in Zaire in early 1997 and in Burundi throughout 1997.

Human Rights Violations as the Immediate Cause of Refugee Flows

It is now common knowledge that the main cause of refugee flows in the world is the violation of human rights. In a comprehensive review of the causes of refugee migration, Schmeidl (1996) identifies five reasons: (1) colonialism and violent decolonisation,

(2) ethnic and other types of communal conflicts, (3) repressive regimes built on severe human rights violations, (4) political rebellion and threats to governments, and (5) systematic and profound economic oppression. As she rightly points out, all these reasons can easily be considered under the general label of human rights violations and political violence (Schmeidl 1996:20). Colonial domination is a violation of the right of peoples to self-determination and, therefore, colonial wars are a form of struggle for the realization of this important right. So-called 'ethnic violence' is, in fact, either a violent form of resistance to the abuse of the human rights of one ethnically defined group by another such group or a result of violent reaction towards such resistance. Economic oppression is not only a violation of economic rights, it could, depending on the degree of severity, also amount to a violation of civil and political rights such as the right to life. As the UNHCR points out, "an accumulation of abuses accompanied by violence, which leads to further abuses and a generalized climate of fear, is a sequence that frequently produces mass exodus' (UNHCR 1993:22).

Virtually all the above-mentioned factors have played a part in producing refugees in the Great Lakes region. In the 1960s and 1970s, violent decolonisation in southern Africa accounted for the bulk of refugees who fled into the Great Lakes countries, mainly Tanzania. In the 1970s, political violence in Uganda resulted in many taking flight to neighbouring countries, including Kenya and Tanzania (Pirouet 1988). Today, most of the refugees in the Great Lakes region come from Burundi and Rwanda in the west and Sudan and Somalia in the north, all of which are battling with chronic political violence which, though characterized in Western media as 'tribal wars', are actually rooted in struggles for political rights as a means of accessing socio-economic amenities in those countries (Rutinwa 1997).

International Standards of Refugee Protection

International refugee law is mainly treaty law. The principal instruments on refugees are the Convention Relating to the Status of Refugees of 1951⁵ and the 1967 Protocol Relating to

the Status of Refugees⁶ which, together, establish a global regime for refugee protection. The other major sources of refugee rights are the provisions of human rights instruments which apply to all persons regardless of their immigration status as well as those which refer to asylum seekers specifically. Human rights instruments relevant to refugees include the Universal Declaration of Human Rights, 1948,⁷ the International Covenant on Economic Social and Cultural Rights, 1966 (ICESCR)⁸ and the International Covenant on Civil and Political Rights, 1966 (ICCPR).⁹ There are also regional instruments such as the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms and the African Charter on Human and Peoples' Rights, 1981.¹⁰ Furthermore, there are specialized instruments which are of great importance to refugee protection such as the UN Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment of 1984¹¹ which has a very unequivocally worded provision on non-refoulment. As Grahl-Madsen (1972) points out, the provisions of the 1951 Convention and those under human rights instruments have to be read together in order to ascertain what rights are due to refugees.

In addition to the right of a refugee to be recognized as such, the other main rights of refugees deducible from the refugee and human rights instruments read together are aptly summarized by the South African government as follows:

First, there is a duty of non-refoulment, which requires that refugees not be returned, directly or indirectly, to the risk of persecution. Second, there are security rights, including protection from physical attack, and assistance to meet basic human needs. Third are basic dignity rights, including protection against discrimination, family unity, freedom of movement and association, and freedom of religion. Fourth are self-sufficiency rights, including rights to work and education.¹²

Rights of Refugees Under Municipal Regimes

The states of the Great Lakes region are signatories to the existing international and regional instruments for refugee protec-

tion. However, they have no adequate municipal systems for the implementation of the obligations assumed under the international conventions. While Kenya has no refugee-specific legislation at all, Tanzania and Uganda have legislation which, rather than providing for protection of refugees, seeks to enable their control. On all the major rights of refugees outlined above, the legislation in all three countries falls below the standards required under the international instruments.

Recognition of Refugee Status

The 1951 Refugee Convention and the 1967 Protocol define a refugee as a person outside his/her own country, who has a well-founded fear of persecution for reasons of race, religion, nationality, and membership of a particular social group or political association and who, as a result of that fear, is unable or unwilling to return to such country or avail himself/herself of its protection.¹³

The 1969 OAU Convention extends the definition of a refugee to cover also those compelled to leave their own countries because of external aggression, occupation, foreign domination and events seriously disturbing public order in either part or the whole of their countries of origin or nationality.¹⁴ Even though the main refugee-hosting countries in the Great Lakes region are signatories to the 1951 Refugee Convention and the 1969 OAU Convention, their laws do not make adequate provisions to ensure that persons who meet the above criteria are recognized as refugees.

The definition of a refugee in Kenya is found in the Immigration (Amendment) Act, 1972¹⁵ under which a person recognized as a refugee is entitled to a Class M Entry Permit which gives him or her right of entry and permission to work. This definition is similar to the one found under the 1951 Refugee Convention and its 1967 Protocol but it is not wide enough to include all persons recognized as refugees under the OAU Convention of 1969.

The principal refugee-specific legislation in Tanzania and Uganda are the Refugee Control Act, 1966¹⁶ and the Control of

Alien Refugees Act,¹⁷ none of which adopt definitions of a refugee as found under the main international instruments. Instead, they vest wide and discretionary powers to determine who is a refugee in the relevant ministers.¹⁸ Such discretion leaves room for refugee determinations which could be politically motivated.

In the past, many countries in the Great Lakes pursued an open door policy, admitting all asylum seekers particularly in situations of mass influx. Recently, however, there has been a growing trend of refusing entry to asylum seekers or returning them to their countries of origin before the situations that caused their flight have abated. A good example is Tanzania's closure of its boundary with Burundi in 1993 and with Rwanda after the Genocide of 1994 in order to prevent further influxes of refugees. Not only did this act deny the refugees an opportunity to seek asylum, it also amounted to a rejection of the refugees at the frontier, an action prohibited by the norm of non-refoulement.

Security Rights

The 1951 Refugee Convention does not make reference to security rights as such. However, these rights are provided for in the International Convention on Civil and Political Rights which guarantees the 'inherent right to life'¹⁹ and the right to protection against 'torture... cruel, inhuman or degrading treatment'.²⁰ The question of security is also addressed by several Conclusions of the UNHCR Executive Committee such as Conclusion 72 which affirms the importance of the physical security of refugees, Conclusions 39, 54, 50, 64 and 73 on the security needs of women refugees, and Conclusions 47 and 59 which cover the rights of refugee children.

The physical security of refugees is a particularly big problem in all the countries of the Great Lakes region. In Kenya, a field research conducted by the Lawyers Committee in 1995 revealed horrific details of physical attacks against refugees, including killings and rapes which were perpetrated by armed bandits as well as some elements of the security forces. Kenyan

security forces as well as aid workers were also victims of raids by armed bands.²¹ In Tanzania, the influx of Rwandese refugees after the 1994 genocide caused great insecurity and instability in the border areas, particularly in Karagwe and Ngara districts. Cases were reported of refugees causing the violent deaths of some members of the local populations and of other refugees (Rutinwa 1996). Refugee settlements in northern Uganda also have come under frequent assault by rebel groups, in some situations claiming the lives of refugees and Ugandan refugee protection officers as well.²²

The most insecure refugees are the Rwandese refugees who sought refuge in the then Zaire (now Democratic Republic of Congo) since the Genocide. These refugees were first held as hostages in camps in Zaire by the EX-FPR (Front Patriotique Rwandais) and the Interahamwe, serving as human shield to prevent the latter from being arrested and sent to Rwanda where they feared prosecution for the crimes they had allegedly perpetrated. These camps were eventually dismantled by Kabila's AFDR forces, assisted by elements of the Rwanda army and, in the process, some refugees lost their lives. Some refugees were repatriated but others, numbering a few hundred thousands, remained in eastern Zaire. Those who remained were caught up in the fighting between the AFDR forces and the then Zairian army and now, it has emerged that some tens of thousands of refugees may have suffered deliberate mass extermination. Up to now, it is not entirely clear how those deaths occurred, although it is strongly suspected that they were carried out by Kabila's AFDR forces and the elements of the Rwandan army which assisted them in ousting Mobutu from power. These allegations remain to be proved and the UN-appointed team of investigators has not been able to do its work due to disagreements with the government of Congo over several aspects of the mission. Whatever the outcome of the investigation, if it will ever be carried out, the fact remains that the security rights of refugees from Rwanda in the Democratic Republic of Congo were not protected. This episode is the epitome of the insecurity of refugees in the Great Lakes region.

Non-Refoulement

The norm of non-refoulement is found under Article 33, paragraph 1, of the 1951 Convention which provides:

No contracting state shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

Other instruments providing for non-refoulement include the 1984 Convention Against Torture, the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War,²³ the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa,²⁴ the 1981 African (Banjul) Charter of Human and Peoples' Rights,²⁵ the 1968 American Convention on Human Rights²⁶ and the 1950 European Convention on Human Rights.²⁷ The principle of non-refoulement is expressed in a number of important declarations such as the 1985 Cartagena Declaration (South America) which reiterates that non-refoulement and non-rejection at the frontier is a 'corner-stone' of international protection, having the status of *jus cogens*.

Perhaps non-refoulement is the most ignored of all the rights of refugees in the Great Lakes region. The right is neither protected under municipal laws or respected in practice. Kenya's law is silent on non-refoulement. In practice, Kenya has occasionally threatened to carry out the forcible repatriation of refugees for various reasons such as security, immorality, environmental degradation and the cost of protection.²⁸ In 1993, Kenya actually asked the UNHCR to repatriate all Somali, Ethiopian and Sudanese refugees in the country on the ground that their presence had compromised the security of the country (Rutinwa 1996).

In Tanzania, the Minister as well as other authorities responsible for refugees are expressly allowed to order the return of refugees by section 9 of the Refugee Control Act which provides:

9-1) The Minister or any competent authority appointed by the Minister in that behalf may order any refugee to return by

such means or route as he shall direct to the territory from which he entered Tanganyika.

9-2) A court convicting any refugee of an offense under the provisions of this section may order deportation of such refugee to the territory from which he entered Tanganyika.

The only refugees exempted from the above provision are those who:

in the opinion of the Minister, the competent authority or court (who ever is handling the case)? will be tried or punished for an offense of a political character after arrival in the territory from which he came or is likely to be subject of physical attack in such territory.

This proviso is, however, not adequate to guarantee non-refoulment because the grounds on which a person cannot be returned are not coterminous with the concept of persecution. Therefore, this proviso notwithstanding, certain refugees may still be refouled even while they face the possibility of other forms of persecution. Uganda has a very identical provision as Tanzania and this is spelt out in section 20 of the Control of Alien Refugees Act.

Sections 5 and 6 of the Tanzanian Act and sections 11 and 12 of the Ugandan Act create a wide range of offenses, including trivial ones such as failure to obey the orders of the camp commandant and serious ones such as a refusal to surrender firearms. If these provisions are read together with sections 9(2) and 20(2) of the Tanzanian and Ugandan Acts respectively, it would mean that refugees convicted by a court of any of these offenses can be returned to their country of origin.

By and large, both Tanzania and Uganda have, compared to other countries, made some effort to recognize the non-refoulment norm. However, there are instances where this norm has been violated. For example in the aftermath of the Rwanda emergency of 1994, hundreds of thousands of refugees fled into Tanzania. The refugees were initially allowed to enter and remain in Tanzania. Later, Tanzania closed her border with Rwanda and Burundi, and in July 1995, the then Minister for Foreign Affairs declared

of those arrested were Burundians or Congolese. He said since September 21, some 18,000 people had been arrested in the Kigoma region. Another 8,000 had been arrested in the north-west Ngara region while 2,000 Rwandan Tutsis were expelled from Kagera region to Rwanda.³¹

And on 18 November 1997, it was reported in the East African section of *Features Africa Network News Bulletin*,³² that:

(Congolese) Army Expels Hutus to Rwanda, Burundi

Humanitarian sources report that Burundian and Rwandan armies, with the backing of the DRC authorities, have begun a sweep to expel Hutus settled around Uvira and Bukavu. More than 2,000 people have been rounded up in the past two weeks and taken across either the Burundian or Rwandan border.

The same source also posted the following story on 19 November 1997:

CNDD Fears for Refugees Security in Eastern DRC

Jerome Ndiho, the Brussels spokesman for the Conseil national pour la défense de la démocratie (CNDD) has said 2,000 Burundian Hutus have been expelled by Democratic Republic of Congo army, assisted by the Burundian and Rwandan armies, in the Uvira region.

These stories are sufficient proof that non-refoulement is virtually a dead letter in the Great Lakes region. As non-refoulement is the foundation of refugee protection, it is not far-fetched, therefore, to say that the end of the open-door policy towards refugees in this region is at hand, if not already here.

Basic Dignity Rights: Freedom of Movement

Of all the basic dignity rights, freedom of movement is perhaps the most important because, as the EXCOM has repeatedly pointed out, the ability to move is typically a prerequisite for the enjoyment of other refugee rights such as employment, education and association. It is also essential for refugees to be able to access the institutions responsible for the protection of their rights, including courts of law (Rutinwa 1997). Freedom of movement for refugees is provided for under Article 26 of the 1951 Conven-

tion as well as under Article 12 of the International Convention on Civil and Political Rights, which provides that 'everyone lawfully within the territory of a state shall, within that territory, have the right to liberty of movement and freedom to choose his residence'. A similar provision is found under Article 13 of the Universal Declaration of Human Rights.

Even though all the three East African countries guarantee the right of freedom of movement for their respective citizens,³³ this right is not specifically guaranteed for refugees or any other aliens. In fact law, where it is available, and practice are restrictive of this right for refugees. In Kenya, for example, asylum seekers are confined to specified reception Centres, mainly Thika and Ruiru. Upon being granted refugee status, they are transferred to camps such as Kakuma in the North West and Dadaab in the North East. Following a sudden influx of refugees in Kenya in 1993, Thika ceased to serve the sole purpose of a reception centre and assumed a dual status as some kind of a permanent settlement for asylum seekers and refugees.³⁴

In Tanzania and Uganda, the power to establish refugee camps and settlements is established in law. The relevant Ministers³⁵ have the power to designate places as areas for the reception and residence of any refugees or category thereof and it is an offense for refugees to leave such designated areas without first obtaining a permit from the relevant authorities.³⁶ Competent authorities may order that refugees be moved from one place to another³⁷ and failure to comply with such orders constitutes an offense which, like any other offense,³⁸ could upon conviction, entail repatriation to the country of origin.

Recently, Tanzania has been enforcing this provision rigorously, rounding up refugees outside the camps and sending them back to their camps.³⁹ Some of the refugees who have refused to comply with orders to remain in camps have been forcibly sent back to their countries of origin. For example, it has recently been reported that:

the Tanzanian army has arrested or expelled more than 28,000 illegal aliens since September in a security crackdown along its western Kigoma and Ngora border regions. According to

the UNHCR, most of those arrested were Burundians and Congolese. Also included in the sweep were old-caseload Rwandan refugees (Awori 1997).

On 29 November 1997 the *Daily News* (T) carried the following report:

Tanzania Rounds up 33,000 Aliens

Tanzanian authorities have rounded up more than 33,000 people classified as illegal aliens in a major crackdown in the northwest regions. A senior official of the United Nations Refugee Agency said yesterday.

Vincent Parker, spokesman for the UN High Commissioner for Refugees (UNHCR), told a news conference that a total of 33,592 people had been arrested so far. Parker said that the bulk of those detained had been registered as refugees and returned to camps.

Uganda, too, adopts the practice of confining refugees to designated camps and settlements. Such places are currently found in Oruchinga and Nakivale where some Rwandese and Congolese refugees are settled and in Arua for refugees from Sudan. Also, the power conferred by law on officials has been exercised by successive Ugandan governments to move refugees from one place to another (Kiapi 1993). For example, during the stampede of 1982/83, Rwandese refugees were moved from Oruchinga to Kyaka. In the early 1990s, Sudanese refugees were transferred from Moyo District to Masindi District (Kiapi 1993). It would appear, however, that the requirement that refugees should reside in settlement is applied only in situations of spontaneous large influx of refugees (Kiapi 1993).

Factors Influencing Refugee Policy and Practice

It is clear from the foregoing that the present regimes of refugee protection in the Great Lakes region are below the required standards under refugee and human rights law. Before considering what measures could be taken to improve the quality of refugee protection in the region, it is important to examine the peculiar problems that are specific to the Great Lakes region which con-

strain the capacity of host states in the region to live up to their international obligations. In this regard, the first factor has to do with how refugees flee into these countries. The pattern of movement of refugees into their countries of asylum is not an orderly trickle but a series of mass and rapid influxes. For example, after the Rwanda genocide, some 250,000 Rwandese refugees poured into Tanzania in the space of 24 hours starting on 28 April 1994, a movement described by the UNHCR as the 'largest and fastest exodus' it had ever witnessed throughout its history (Rutinwa 1996). Within the following two months, the number of refugees grew to close to a million people, with another close to two million fleeing to Zaire. Such big influxes of refugees at such speed make it difficult for states to live up to their international obligations.

In the Great Lakes region, refugees seek protection in countries bordering their states of origin. Even though refugee instruments maintain that the granting of asylum to refugees is a peaceful and humanitarian act and is not to be regarded as an unfriendly act by other states,⁴⁰ in reality, granting asylum is resented by countries of origin and it tends to lead to a deterioration in relations between the countries of origin and the host states. A good example is the relationship between the new regime in Rwanda after the genocide and the then Zaire which had hosted hundreds of Rwandese refugees, including those suspected of having participated in the genocide. A more recent example is the acrimonious bickering between Burundi and Tanzania arising out of Tanzania's decision to grant refuge to Burundian refugees fleeing from political violence in their country. In both cases, the tensions have resulted in clashes between the armed forces of the countries concerned, and in the case of the former incident, the overthrow of the Mobutu regime.

Because of these problems, host countries have sometimes found it prudent to curtail some of the rights of refugees, particularly their freedom of movement and expression, in order not to compound the tensions between themselves and the countries of origin. It is also for the same reason that some host countries have had to resort to drastic measures such as the expulsion of

refugees. Indeed, Parker, a spokesperson for the UNHCR in Tanzania, is quoted as saying that one reason for the security sweep referred to earlier was to dispel claims by Burundi's military government that Tanzania was supporting the activities of Hutu rebels based in refugee camps close to the frontier.⁴¹

In the Great Lakes region, as in the rest of Africa, most refugees come from situations of civil war and bring their weaponry with them with the intention of continuing their armed struggle from within the host states. But also, some of them use the weapons to commit crimes, including armed robbery and poaching, in which many lives in host states are lost.⁴² In addition, because of their sheer numbers, refugees put a severe strain on the environment, social infrastructure and other resources. Thus, some of the measures taken by host countries which are restrictive of refugee rights, such as the confinement of refugees to camps, are also intended to minimize the impact of the refugee presence on host communities. In fact, the ongoing exercise in Tanzania of rounding-up all non-camping refugees and returning them to camp has also been justified on this ground.⁴³ In taking these measures, the present government of Tanzania is not really doing anything radically new. For instance, in 1972, when the refugees who had fled genocidal killings in Burundi and settled on the Tanzanian side of the border with Burundi sought to use Tanzania's territory to fight the regime in Bujumbura and Burundi reacted by bombing Tanzanian villages. The government in Tanzania removed the refugees to designated places further inside the country and restricted their political activities, an act characterized by Gasarasi (1988) as calculated to convey a message of tangible goodwill to the country of origin of refugees. Sometimes, host countries find themselves in situations where difficult choices have to be made.

Towards a Holistic Approach to the Refugee Problem

Traditionally, the refugee problem has been seen as the light of the refugee-host country relationship. The principal preoccupa-

tion of refugee lawyers has been how to improve the system of response to the problems encountered by refugees in this relationship. Until recently, the classic approach to dealing with strains in the refugee protection system caused by the ever-increasing magnitude of the refugee problem was to try to improve the efficiency of the procedures for determining refugee status. The aim of the 'proceduralist' approach, as Delahunty (1996:4) has called it, was, 'to create an asylum application process that will combine the virtues of efficiency and fairness in an acceptable fashion... and that is not unduly costly or protracted (from either governments' or applicants' points of view)'.

With the increase and new dimensions, refugee problems have acquired, including threats to international peace and security, however, it is increasingly becoming clear, to adapt Martin's words, that simply creating a speedy but fair asylum adjudication procedure is not the single key for mastering the issue of political asylum. Experience has shown that even those countries operating streamlined adjudication systems with greatly augmented resources continue to have difficulty in getting ahead of the 'political curve' (Martin 1993:1). While Goodwin-Gill (1997:1), a distinguished refugee scholar, believes that 'a fair, efficient and effective procedure for the determination of claims to protection works wonders all round', studies looking specifically at the utility of 'proceduralism' share Delahunty's view that given the magnitude of the problem, procedural improvements will achieve neither fairness and efficiency nor have a deterrent effect (Delahunty 1996; Martin 1993).

It is now recognized that dealing efficiently and effectively with the different facets of the refugee problem requires a holistic approach that addresses not just responses to forced migration, which is what the present system of refugee protection is all about, but also looks at the root causes of the problem with a view to preventing it and facilitating its resolution. In the holistic approach, the present system of refugee protection becomes a sub-system of response complemented by two other sub-systems of prevention and solution.

The Subsystem of Prevention

It was noted in the first section of this essay that the principal cause of forced migration is the violation of human rights. Accordingly, the most effective way of preventing forced migration is to improve respect for human rights in the countries of origin. The improvement not only prevents refugee flows, it also creates conditions for the voluntary return of those already in exile (Franco 1996).

On the protection of human rights as a way of preventing forced migration, a few points must be borne in mind. First, the protection of human rights as a means of preventing refugee flows necessarily involves a measure of interference in the internal affairs of the potential countries of origin. Therefore, care must be taken not to cross the threshold of permissible intervention under international law, particularly the principle of non-interference in the internal affairs of states as enshrined in Article 2 (7) of the Charter of the United Nations. It has been suggested by some writers that the explosion of human rights issues on the international stage has displaced the principle of non-intervention, in particular in matters involving those rights (Reisman 1990; D'Amato 1990). However, as opponents of this view have pointed out, this assertion is not supported by existing law as evidenced by the Charter of the United Nations as well as state practice (Verwey 1995; Jhabvala 1981). Recently, there have been many interventions in countries experiencing political conflicts. These interventions have, among others, been aimed at preventing the exodus of innocent civilians and supplying them with humanitarian assistance within their own territories. The basis for intervention, however, has been the threat to international peace and security, a characteristic of most refugee-generating situations, rather than to protect human rights or prevent refugee flows as such (Benneh 1995; Jhabvala 1981).

The second point to bear in mind is that intervention to protect human rights, where and to the degree permissible, should be appropriate, timely and adequate. Despite the huge costs involved, many of the interventions referred to above have left

much to be desired. For example, what was the point of intervention in Rwanda in 1994 which could not stop the genocide nor the blood letting that has been going on ever since? What was the purpose and utility of intervention in ex-Zaire which did not prevent the mass killing of refugees and gross violations of the rights of Zaireans? Why is the regional embargo on Burundi failing to bring about improvements in the human rights situation in that country?

The main lesson from the failure of humanitarian intervention to make much difference in the above episodes is that, questions of legality apart, temporary military intervention and economic blockades are not useful tools with which to address human rights violations nor its consequences such as refugee flows. This is because, as the UNHCR (1993:22-23) points out:

Human rights violations do not occur in a vacuum. Like other causes of refugee flows, they exist in a complex environment of economic strains, political instability, a tradition of violence, ecological deterioration and ethnic tensions. One factor or another may dominate a particular situation while interacting with others. By the time serious and massive abuses of fundamental rights occur, the chances of averting flows are slim indeed.

This observation is as applicable to the Great Lakes region as it is elsewhere in the world. Contrary to the stereotypical explanations of the present crisis as another incident of 'tribal' people killing each other, the current internecine wars in the Great Lakes are rooted in political-economic problems (Rutinwa 1997) which cannot be resolved by temporary military and humanitarian intervention. The resolution of refugee problems with root causes of this nature calls for approaches which go beyond the traditional durable solutions as well as forcible intervention mechanisms (Rutinwa 1996).

The most appropriate form of intervention to protect human rights remains the framework offered by the human rights instruments themselves and the Charter of the United Nations. While the Universal Declaration of Human Rights and the International Covenants impose the obligation to ensure the realiza-

Host states should also refrain from providing bases for refugees to launch attacks on their countries of origin. Such attacks, which in many instances have the tacit and even military support of the host state, violate basic norms designated to ensure stability in relations among states and which are particularly well-developed in African regional international law⁴⁷. It is true that in the Great Lakes experience, the invasion by refugees of their home countries is sometimes in pursuit of legitimate rights such as securing the right to return to ones own state, which are wrongly denied by the government of the day. However, even legitimate goals must be pursued through appropriate means which are compatible with the system of world order.

Further, host countries should disarm refugees and, wherever possible, avoid putting refugees in camps by allowing them freedom to choose where to live until such a time when they will be able to return to their countries in safety and dignity. Where this is not possible, host countries should endeavour to ensure that refugee camps are small enough to be properly managed.

Often host countries are willing to take the necessary steps to address security problems that arise in the course of refugee protection, but lack resources to do so. Therefore, as was recommended by the symposium to mark the 20th anniversary of the OAU Convention, the international community should provide host states with resources to:

...enable Governments to respond effectively to situations which may contribute to a deterioration in security, law and order in the refugee-hosting areas. In this regard, priority should be placed on isolating and disarming individuals or groups among the refugee populations who may be armed and threatening the lives of innocent refugees, local citizens, and humanitarian personnel, or engaging in other criminal acts. Further to the preceding recommendation, to trace and impound for safe custody or destruction, dangerous weapons illegally circulating or hidden in refugee-hosting areas (Okoth-Obbo 1995).

Similar recommendations were made following a joint evaluation of emergency assistance to Rwanda (Erikson et al. 1996).

International assistance should not be limited to dealing with the problem of security only but to all aspects of refugee protection. In particular, all countries of the world should contribute, in accordance with their ability, towards the costs of maintenance of refugees as well as the costs of mitigating the impact of refugees on host communities. It is true that even at the present, members of the international community do contribute significantly to the costs of refugee protection. However this assistance is voluntary and is always late and inadequate. If the sub-system of response is to function, the element of burden sharing must be re-conceived to make the costs of timely and adequate contribution towards refugee protection a matter of legal obligation binding on states.

Burden sharing in a refugee situation is both a question of morality and functional necessity (Fonteyne 1997). The moral underpinning of the principle of burden sharing is the concept of common humanity and the responsibility of the international community to preserve human life, to promote the well-being of all men, to diminish human suffering and to assist states in protecting refugees which, indeed, is the basis of international refugee law as a whole.⁴⁸

Burden sharing is also a norm of functional necessity to implement an international refugee policy effectively. The foundation of refugee protection is the norm of non-refoulment which proscribes rejection at the frontier or returning refugees to places where they may face persecution. However, given that most people in flight do not choose their place of refuge, there is always a possibility of refuge being sought in states which are clearly unable to bear the burden of protection. Burden sharing is the only way of ensuring that the norm of non-refoulment is observed by such states.

The principle of burden sharing is already expressed in several instruments relevant to refugee protection. The 1951 Convention recognizes that '...the grant of asylum may place unduly heavy burdens on certain countries...' and calls for '...international cooperation' in bearing these burdens.⁴⁹ Article 11(4) of the 1969 OAU Convention reads that:

where a Member state finds difficulty in continuing to grant asylum to refugees, such member state may appeal directly to other Member states and through the OAU, and such other Member state shall, in the spirit of African solidarity and international cooperation take appropriate measures to lighten the burden of their member granting asylum.

There are several United Nations Resolutions in which the notion of burden sharing appear, the most important perhaps being the General Assembly Declaration on Territorial Asylum of 1967⁵⁰ whose Article 2(2) is very similar to the burden sharing provision in the OAU Convention mentioned above.

The norm of burden sharing can also be inferred from human rights instruments which call upon states to assist, and cooperate with, each other with a view to achieving the full realization of the rights recognized. These include the ICESCR⁵¹ and the African Charter of Human and Peoples Rights.⁵²

The repeated reference to the principle of international cooperation in various instruments cited above demonstrates that it is an integral part of the working principles governing refugee policy at the UN level (Fonteyne 1987:191).

The Subsystem of Solutions

As pointed out in the UNHCR, *Handbook on Voluntary Repatriation*:

the purpose of international protection is not ? that a refugee remain a refugee forever, but to ensure the individual's renewed membership of a community and the restoration of national protection, either in the homeland or through integration elsewhere (1996: 3).

The three 'durable solutions' under international refugee law are voluntary repatriation, integration into the local community in the country of first asylum, and resettlement in third states. These solutions are implied in the Statute of the UNHCR under which the principal responsibility of the UNHCR is to provide international protection to refugees and to seek:

permanent solutions for the problem of refugees by assisting Governments and, subject to approval of the Governments concern, private organizations to facilitate the voluntary repatriation of... refugees, or their assimilation within new national communities.⁵³

The UNHCR is also authorized to 'engage in such additional activities, including repatriation and resettlement, as the General Assembly may determine.'⁵⁴ In law, none of the three solutions is more preferred than the other. However, in practice, voluntary repatriation is often regarded as the best solution to the plight of refugees.

In the Great Lakes, all the three solutions have been employed in the past to provide a durable solution to the refugee problem. In the 1960s and the 1970s, several thousands of refugees from Burundi and Rwanda were naturalized in Tanzania and Uganda. At the same time, a significant number of refugees were resettled in third states. Others, particularly those from southern Africa, returned voluntarily after the reasons of their flight had abated.

Recently, host countries in the Great Lakes have increasingly turned to repatriation as the only durable solution to the plight of refugees under their protection. Moreover, recent repatriation exercises, such as Tanzania's compulsory repatriation of Rwandese refugees in December 1996, have not conformed fully with the principle of voluntary repatriation. In other instances such as those noted earlier in this essay, the so-called repatriations have been outright expulsions undertaken in a less than humane manner.

As noted above, the resort by the Great Lakes states to repatriation as the only solution to forced migration is due to a combination of a number of mutually reinforcing factors. These include the sheer number of refugees, which makes it difficult for them to be absorbed into the host communities; the impact of refugees on host communities; inadequate support from the international community to meet the costs of protection; diminishing opportunities for third country resettlement; and the changing political climate in the host countries.

Ideally, all the three durable solutions should be available to refugees. However, given the current realities both at regional and international levels, it is fair to say that only repatriation seems to be the realistic option in the near future. Indeed, in situations like that of Rwanda after the genocide where close to half of the entire population of the state sought refuge in other countries and the rest were internally displaced, repatriation seems to be the most practical and desirable solution to forcible relocation. What is important is to ensure that the exercise is compatible with the principles of repatriation and protection, which require that repatriation must be voluntary and the refugees should return in conditions of peace and dignity.

Finally, the present refugee law tends to ignore the responsibility of the country of origin and concentrate on the responsibilities of the host countries. This is understandable given the political and ideological context in which it was initially nurtured. However, that approach is no longer justifiable nor adequate. The present system was introduced to deal with the refugee problems that had been caused by a defunct Nazi regime. However, as Garvey (1985:483) points out:

the problem of the refugee is today profoundly different. The persecutors are not defeated and defunct regimes. Instead the persecutors are existing governments, able to insist on the prerogatives of sovereignty while creating or helping to generate refugee crisis.

Accordingly, the articulation of the legal responsibilities of states of origin could help not only to relieve the flow of refugees, but also 'serve as a deterrent by rendering the expelling state accountable for damage to other states and the international community' (Garvey 1985).

Notes

1. U.S. Committee for Refugees, *World Refugee Survey*, 1997 edition.
2. *id.*, p. 4, Table 3.
3. *id.*, p. 4, Table 3.
4. See Reuters, 'Tanzania hold thousands of Illegal Aliens-UNHCR' 14 November 1997, Web posted at: 18:12 SAT, Johannesburg time (16: GMT) and Horace Awori, 'Tanzania orders refugees to remain in camps' in Features Africa Network News Bulletin, November 13, 1993, where the figures of refugees, as given by Mr. J. Rugumyamheto, the Principal Secretary in the President's Office are quoted.
5. 189 U.N.T.S. 2545, entered into force on April 22, 1954 (hereinafter 'the 1951 Convention').
6. 606 U.N.T.S. 8791, entered into force on October 4, 1967 (hereinafter 'the 1967 Protocol').
7. U.N.G.A. Res. 217A (III), December 10, 1948 (hereinafter 'the Universal Declaration').
8. U.N.G.A. Res. 2200 (XXI), December 19, 1966, entered into force January 3, 1976.
9. U.N.G.A. Res. 2200 (XXI), December 19, 1966, enter into force March 23, 1976.
10. 21 ILM 58 (1982).
11. U.N.G.A. Res. 39/46, 10 December 1984.
12. South African Government, 'Green Paper on International Migration', Government Gazette, 30 May 1997, p. 34. For works pointing out specific provisions of refugee and human rights instruments where these rights are provided, see Hathaway, K., and Neve, A., 1996, *Toward the Reformulation of International Refugee Studies*, York University, Canada, pp. 22-32, and Rutinwa, B., *Principle of International Law Applicable to Labour Migrants and Refugee* (Centre for Southern African Studies, University of Western Cape, forthcoming).
13. Article 1A(2).
14. 1969 OAU Convention, Article 12(2).
15. No. 6 of 1976.
16. Refugee control Act (1966).
17. Control of Alien Refugees Act, Cap. 64.
18. Section 2 and 3 of the Tanzanian and Ugandan Acts respectively.
19. ICCPR, Article 6.

20. ICCPR, Article 7.
21. Lawyers Committee for Human Rights, 1995, *African Exodus: Refugee Crisis, Human Rights and the 1969 OAU Convention*, pp. 64-71.
22. 'Protection in Camp' in (20) RPN (September 1996), p. 19, col. 3.
23. Article 3.
24. Article 11(3).
25. Article 12(3).
26. Article 22(8).
27. Article 3.
28. Rutinwa, B., and Kathina M., 'Refugees: Mps Demand for Repatriation Unacceptable' in *Daily Nation*, 4th May 1996. (Forum Section).
29. *Guardian* (T), 19 July 1995, p. 1.
30. As reported by Awori H., editor/publisher, in *East African News*, 4 October 1997. This and all other issues under the same title are available at <http://www.AfricaOnline.com>.
31. Awori, H., *East African News*, 6 October 1997, Web posted at 18:12 SAT, Johannesburg time (16:12 GMT).
32. Awori, H., id, Web Posted on 18 November 1997.
33. See Articles 81, 17 and 29 of the Kenyan, Tanzanian and Ugandan Constitutions respectively.
34. Opondo, E., 'The Refugee Policy in Kenya' (Draft PhD Thesis, Oxford) Ch. 5.
35. Section 4(1) of the Refugee (Control) Act of Tanzania and section 8(1) of the Ugandan Act.
36. Sections 12(2)(c) and 21(3)(a) of the Tanzanian and Ugandan Acts respectively.
37. Under sections 12(1)(b) of the Tanzanian Act and section 8(3) of the Ugandan Act.
38. Section 12(2) of the Tanzanian Act and section 8(5) of the Uganda Act.
39. See e.g. Awori, H., 'Tanzania Orders Refugees to Remain in Camps' in *Features Africa Network News Bulletin*, 13 November 1997.
40. E.g. 1969 OAU Convention, Article II(2).
41. Reuters, 14 November 1997, under 'Tanzania Holds Thousands of Illegal Aliens-UNHCR'.
42. Within the first three months of the influx of Rwandese, 68 Tanzanians were shot dead by refugees and several cattle were looted. See Rutinwa B. 'Refugee Protection and Security in East Africa', 20 Refugee Participation Network (1996), pp. 11-14.

43. See, e.g. 'Tanzania Orders Refugees to Remain in Camps' in Features: Africa Network News Bulletin, 13 November 1997, East African News Section.
44. The Royal Norwegian Ministry of Foreign Affairs, Norwegian South Policy for a Changing World, (1995) pp. 69-70.
45. Extracted from Rutinwa, B., 'The Law Relating to Refugees and Internally Displaced Persons in the Commonwealth'. Consultancy Paper for the Commonwealth Intergovernmental Group on Refugees and Internally Displaced Persons, Commonwealth Secretariat, London, January 1997. (These recommendations formed part of the proposal for action by the Commonwealth Secretariat presented to and approved by the Commonwealth Heads of state and Government at its Biennial meeting, Edinburgh, Scotland, October 1997).
46. This is a practice, very common during the colonial and immediate post-colonial period, where laws of the countries were made by adopting wholesale provisions from laws of other countries, especially the so-called parent systems of the mother country. There have been attempts in the past to introduce uniform legislation in East and Southern Africa based on the Zimbabwean model of legislation.
47. See B. Rutinwa, 'Norms of International Law Applicable to Armed Activities of Communities in Exile', paper presented at a Conference on Light Weapons and Peace Building in Central Africa, Cape Town, SA, 23-25 July 1997.
48. Report of the Working Group on Current Problems in the International Protection of Refugees and Displaced Persons in Asia, IJHL, San Remo, 1981, quoted by J.P.L. Fonteyne, 1987, p. 178 fn. 75.
49. The 1951 United Nations Convention, Preamble.
50. UNGA Res 2312(XXII).
51. Article 2.
52. Article 23(2).
53. Statute of the UNHCR para. 1. UNGA res. 428(V).
54. Statute, para 9.

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