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The Struggle for Protection of the Rights of Refugees and IDPs in Africa: Making the Existing International Legal Regime Work

By
Zachary A. Lomo*

I. INTRODUCTION

This paper focuses on the role that international human rights law, policy, and domestic legislation play in the protection of the rights of refugees and internally displaced persons in situations of civil war and ethnic conflict. I draw conclusions from my research experiences with refugees from the East African region,¹ which hosts hundreds of thousands of refugees and internally displaced people.

Broadly, international human rights law provides for those rights that should be enjoyed by every individual in order to lead a decent life. These human rights apply to all situations, whether during peacetime or war, and they apply regardless of gender, race, ethnicity, religion, nationality, citizenship, language, sexual orientation, and physical or mental abilities.

In this paper I argue that the existing international legal framework provides sufficient protection to all the victims of forced migration, both refugees and internally displaced persons. What is lacking in this framework is the ability of all key players to learn from past mistakes and the political will to use the available legal mechanisms in a way that can optimally protect them. Second, I argue that the staff members of many institutions, including the United Nations High Commission for Refugees (UNHCR), are not sufficiently competent to

* LL.M., Harvard Law School, 2000. The author presented this paper at the Berkeley Journal of International Law's spring 2000 symposium entitled "A Legacy of War: Displaced Masses in the Twenty-First Century," held April 14-15, 1999. I am greatly indebted to Lauren Gerber and Shawn Gould for their meticulous work editing and proof reading the several drafts of this paper. My thanks also go to Dr. Barbara Harell-Bond, Principal Investigator of the E.U. Refugee Health and Welfare Project for her initial suggestions and advice on the first draft and for allowing me to use data from the research we carried out under the umbrella project. I would also like to acknowledge the invaluable suggestions and criticisms of Joel Ngugi, S.J.D. candidate, Harvard Law School. All errors and omissions are my own.

1. From 1997 to 1999, I worked as Legal Research Officer on a study on the extent to which refugees enjoyed their rights in Uganda and the East African region under an E.U. umbrella project on Refugee Health and Welfare in and outside camps and settlements.

implement existing provisions for protecting the constituencies for whom they are responsible. Third, I note that many states have failed to enact laws necessary or to create the institutional frameworks to give effect to the international human rights protection regime. Fourth, many countries in Sub-Saharan Africa are populated by people who are uninformed about their rights and impoverished, and are thus amenable to manipulation, sectarianism and coercion. Fifth, the geo-political and economic interests of some states directly impact how the body of human rights law is implemented or interpreted. Finally, there is confusion among intellectuals and scholars about doctrinal and conceptual issues relating to the international refugee protection regime.

Part II of the paper provides an overview of the current problems affecting Africa, ranging from economic woes to civil wars and ethnic conflict. Part III highlights the conditions of refugees and IDPs in Africa: where they live, the type of assistance available to them, and the key stakeholders in the humanitarian industry. Part IV looks at the domestic legal frameworks for addressing the needs of refugees and IDPs and their compatibility with international standards. Part V discusses some of the protection problems faced by refugees and IDPs in light of the international human rights framework. Part VI summarizes the lessons learned from the struggle to protect the rights of refugees and IDPs in Africa.

II. CONTINENT IN CRISIS

Africa is a continent beset with crises. Since colonial rulers transferred political power to African successors, many countries south of the Sahara have experienced dramatic changes. Institutions have been recast, often by the use of force, and leadership has changed frequently and violently. Despite its abundant wealth of natural resources, Sub-Saharan Africa is economically very poor. In 1999, the estimated combined gross domestic product (GDP) of all Sub-Saharan countries excluding South Africa was a mere \$300 billion, less than that of the Netherlands.² In 1999, the region's foreign debt was estimated at \$227 billion.³

African countries, especially those south of the Sahara, suffer not only from weak economies but also from deteriorating terms of trade with the rest of the world. Globalization has not benefited Africa; in fact, some pundits argue that Africa has been completely unaffected by globalization.⁴ At the beginning of the third millennium, much of the African continent is engulfed in interstate and civil wars and ethnic conflict. Ethiopia and Eritrea were recently at war, six African countries are involved in both a civil and interstate war in the Democratic Republic of Congo,⁵ and there are civil wars in Angola, Burundi, Congo-

2. See Donald L. Sparks, *Economic Trends in Africa South of the Sahara, 1999*, in AFRICA SOUTH OF THE SAHARA, 2000, at 11 (28th ed. 1999).

3. See *id.* at 13.

4. See *id.*

5. The conflict currently involves Angola, Burundi, Namibia, Rwanda, Uganda and Zimbabwe; Chad pulled out in 1999.

Brazzaville, Guinea Bissau, Namibia, Senegal, Sierra Leone, Somalia, Sudan and Uganda. Liberia recently emerged from a bloody seven-year civil war and current indicators are that fighting might flare up again.⁶ These conflicts have precipitated massive waves of displacement both within and outside of affected countries. Currently, crises exist in Burundi, the Democratic Republic of Congo (DRC), Angola, Sudan, Somalia, and Sierra Leon, where hundreds of thousands of people have been forced out of their homes and live either as internally displaced people (IDPs) or as refugees in neighboring countries.

That Africa is once again verging towards another humanitarian crisis was reinforced on February 28, 2000, when the UNHCR and the WFP made a passionate appeal to the international community for 81 U.S. million dollars to feed refugees in sixteen African countries. The appeal follows a "big rise in the number of refugees" on the continent, especially in Tanzania, Kenya, Guinea and Zambia following fighting in the neighboring countries.⁷

But displacement is not only caused by wars and ethnic conflict. So-called development and conservation projects and the restructuring of economies have displaced many urban and rural people from their homes, forced to live in abject poverty. Recent semblances of democratization in some African countries notwithstanding, these conflicts are symptomatic of the dire human rights situation on the continent.

The lack of accurate statistics makes estimates of the exact number of refugees and IDPs currently in Africa difficult.⁸ In 1999, the World Food Program estimated that the total number of refugees and IDPs in sixteen African countries was 1.9 million, and projected an increase to 2,065,000 in the year 2000.⁹ The U.S. Committee for Refugees estimated that 2,944,000 refugees were living on the African continent at the end of 1997.¹⁰ Although a country-by-country statistical synopsis is beyond the scope of this paper, a regional overview is illustrative. According to the High Commissioner for Refugees, "Africa's single biggest refugee crisis"¹¹ is in the East African and Great Lakes Region, where over 300,000 Burundian refugees were forced to flee Burundi for Tanzania following fighting in Burundi between the rebels and the Tutsi-dominated Burundi army. Kenya is host to some 192,000 refugees, the largest percentage of whom are Somalian. Uganda currently shelters 192,800 refugees, 170,000 of whom

6. See Human Rights Watch, *World Report 2000* <<http://www.hrw.org>> (hereinafter HRW Report).

7. UNHCR, *Refugee Daily* (visited Feb. 29, 2000) <<http://www.unhcr.ch/news/media/daily.htm>>.

8. See, e.g., Corelli Barnett, *Who has Counted the Refugee?*, DAILY MAIL, March 26, 1999; see also, Jeff Crisp, *Who has Counted the Refugees?*, UNHCR and the Politics of Numbers, 1999, *Working Paper No.12*; UNHCR WORKING PAPERS: NEW ISSUES IN REFUGEE RESEARCH.

9. The sixteen countries are: Angola, Chad, DRC, Djibouti, Eritrea, Ethiopia, Gabon, Guinea, Kenya, Liberia, Rwanda, Sierra Leone, Sudan, Tanzania, Uganda and Zambia. See UNHCR, *Refugee Daily* (visited Feb. 9, 2000) <<http://www.unhcr.ch/news/media/daily.htm>>.

10. See U.S. COMMITTEE FOR REFUGEES, *WORLD REFUGEE SURVEY 4* (1998) (hereinafter U.S. COMMITTEE 1998).

11. UNHCR, *Refugee Daily* (visited Jan. 24, 2000) <<http://www.unhcr.ch/news/media/daily.htm>>.

are Sudanese.¹² In West Africa, Guinea hosts over 500,000 refugees, 350,000 of whom are from Sierra Leone. Finally, in Cote d'Ivoire there are an estimated 202,000 refugees, 200,000 of whom are Liberians.¹³

Africa also has more internally displaced persons than any other continent. Sudan alone hosts 4 million IDPs—the largest IDP population—as a result of the over fifteen years of civil war between the rebel Sudan People's Liberation Army (SPLA) and the predominantly Muslim governments of the North. Sierra Leone is estimated to have up to 1 million IDPs, following the intensification of fighting between the Revolutionary United Front (RUF) of Foday Sanko.¹⁴ In the DRC, there are 1.12 million IDPs as a result of civil war and inter-ethnic clashes. In 1998, more than 300,000 Angolans fled their homes when civil war erupted again. By the end of 1998, U.N. and Angolan government estimates placed the total number of Angolan IDPs between 1 million and 1.5 million.¹⁵

Beyond the statistics, and often ignored, however, are the numerous problems faced by refugees and IDPs that transcend the absence of food. These include issues of physical security, threats of forcible return to the country of origin where conditions are not ripe for return, the right to freedom of movement, refugee status determination, and absence of strong domestic institutional mechanisms for implementing the international protection regime.

In the *Mission Statement*, the organizers of this Symposium assert that although the international community has progressively come to "recognize refugees as legal persons worthy of human rights protection," in practice, "these persons have not been guaranteed enjoyment of their basic human rights despite their legalized status under international law." Indeed, every human being has a legalized status both under the municipal laws of most countries and international human rights law. Article 6 of the Universal Declaration of Human Rights (UDHR) stipulates that "[e]veryone has the right to recognition as a person before the law," and Article 16 of the International Covenant on Civil and Political Rights (ICCPR) similarly provides for recognition before the law. Thus, the basic human rights documents recognize every individual as worthy of human rights protection. The 1951 U.N. refugee convention, itself a human rights instrument, not only re-affirms the standards set by the Charter of the United Nations and the UDHR, but also recognizes the peculiar circumstances of refugees as persons who have "lost the protection" of the governments of their countries of origin. In contrast to refugees, internally displaced persons, who are also human beings worthy of human rights protection, are trapped within their countries of origin. For this reason, governments are reluctant to allow the international community to critically scrutinize the condition of IDPs under the pretext of *sovereignty*, as understood in traditional international law.

12. See UNHCR, The World <<http://www.unhcr.ch/world/world.htm>>.

13. See U.S. COMMITTEE 1998, *supra* note 10.

14. See HRW Report *supra* note 6.

15. See U.S. COMMITTEE FOR REFUGEES, WORLD REFUGEE SURVEY 49-50 (1999). For statistical updates, the U.S. Committee for Refugees annual reports together with those of the UNHCR provide reliable and up-to-date information (hereinafter U.S. COMMITTEE 1999).

The international refugee regime, and in particular the 1951 U.N. Refugee Convention, has come under considerable criticism from advocates for internally displaced persons for its failure to include these obvious victims of forced migration. Advocates for internally displaced persons have argued that given the changed circumstances, namely, the growing number of people displaced within their countries in need of protection, there is a need to expand the definition of the term "refugee" in the Refugee Convention or to expand the mandate of the UNHCR to include internally displaced people. Having experienced life as a refugee for over eleven years and then having lived as an internally displaced person in Uganda, my country of origin, I argue that the distinction between refugees and internally displaced people should be maintained because there exist subtle but very substantial distinctions between the two groups, both in fact and in law.

First, in fact, the very idea that someone is outside of his or her country of origin completely changes his or her legal status vis-à-vis the human rights he or she can enjoy and the obligations that flow from being a citizen. Second, as a matter of law, refugees are often subject to—and often victims of—immigration law and policy that has dire consequences for them. For example, while most governments will require a refugee to obtain a work permit in contravention of Article 17 of the 1951 Refugee Convention, an internally displaced person does not require one. Second, while a refugee or asylum seeker may be arrested at any time and deported to his or her country of origin by immigration officials, where he or she may face persecution, an internally displaced person does not face the threat of being deported to another country. Using the 1951 Refugee Convention as a "social engineering" tool to address the problems of internally displaced people is to destroy the fragile protection regime available for refugees. This regime is critical today, in the wake of the increasing adoption of containment policies and the rise of xenophobia against refugees and asylum seekers. Proponents of an expansive definition of the term "refugee," such as U.S. Ambassador to the U.N. Security Council Richard Holbrook, would better serve the interests of internally displaced persons by genuinely addressing the root causes of the problem which, as discussed below, are manifest in the despotic nature of African governments.

III.

THE CONDITIONS FACED BY REFUGEES AND IDPs IN AFRICA: AN OVERVIEW

No combined study on the conditions faced by refugees and IDPs in Africa exists.¹⁶ Researchers must therefore rely on newspaper reports and reports compiled by human rights organizations such as Amnesty International¹⁷ and

16. What does exist are general surveys and reports such as the U.S. Committee for Refugees' annual assessment of conditions affecting refugees, asylum seekers and internally displaced persons. See U.S. COMMITTEE 1999 *supra* note 15.

17. In 1997 Amnesty International dedicated its report entitled *Human Rights Have No Borders*, to refugee problems, in particular the refugee crisis in the Democratic Republic of Congo.

Human Rights Watch. Although these reports cover some cases of violations of the human rights of refugees and IDPs, the problems that receive the greatest coverage relate to food shortages, the abduction of children by rebel groups, and attacks on refugee camps and IDP settlements or "protected villages."

In all conflict areas in Africa, IDPs are housed in camps or "protected villages," as they are officially referred to in Uganda.¹⁸ Isolation now appears to be the standard solution to the problem and has been defended vigorously by governments on the ground that that is the best option for securing the safety of IDPs. The same safety arguments have been advanced in relation to housing refugees in settlements and camps. In reality, the primary object of the protected villages is a military one—to isolate the civilians from the rebels and cut their food supplies. In practice, however, the so-called protected villages and camps have exacerbated the problem. Rebels have targeted women and children as well as men; children as young as ten years of age have often been abducted and forced into rebel ranks.¹⁹ At worst, the conditions in protected villages are similar to those in a concentration camp; they are not fit for human beings.²⁰ The same is true of refugee camps. Refugees in camps live in squalid conditions as a result of congestion and lack of proper sanitary facilities.²¹

As internally displaced people are evacuated from their villages, they are often haphazardly resettled before the basic amenities are in place. Moreover, civilians are often forced by soldiers into the camps or protected villages before they have harvested their food crops. This problem compounds the predicament of IDPs because the protected villages or camps are often located far from their homes, resulting in the loss of the displaced persons' livelihoods. In some of the worst cases, refugees have been forcibly evicted from places where they have established themselves, such as transit centers, with wanton destruction of their meager property. For example, in February 1998, the UNHCR and the Government of Uganda ordered the eviction of Sudanese refugees from a transit camp in which they had lived for almost ten years despite the genuine security fears of the refugees, most of whom had been displaced from the previous settlements by rebels. The demolition of the houses of the refugees, which was witnessed by members of our research team, once again raised the pertinent issue of observance of human rights standards by humanitarian organizations in the field. The refugees were not compensated for their property. Food distribution through the local and international NGOs under the auspices of the World Food Programme

18. In Burundi, these camps are called "regroupment" camps. For fairly detailed information about the internally displaced in Burundi, see U.S. COMMITTEE 1999 *supra* note 15 at 51.

19. For example, in Uganda, Guinea, and DRC, rebels have attacked refugees in camps and killed, abducted, mutilated many people including raping many women. See, e.g., Ssemujju Ibrahim Nganda, *UPDF Killed 30 Children says Priest*, THE MONITOR, May 27, 1999, at 1-2; UNHCR, Refugee Daily (visited Feb. 29, 2000) <<http://www.unhcr.ch/news/media/daily.htm>>.

20. For example, a speaker at a seminar organized by the Human Rights and Peace Centre (HURIPEC), Faculty of Law, on the human rights situation in northern Uganda on 26 May 1999 observed that the conditions in protected villages are appalling and these villages are not fit for human beings.

21. The camps for Rwandan refugees in Goma, in the eastern Democratic Republic of Congo, where hundreds of refugees died of cholera between 1994 and 1996, are a case in point.

WFP and UNHCR is insufficient. Moreover, the supply of relief food to both refugees and IDPs has always been limited by intermittent military activity by the rebels, who sometimes loot the limited amount of food.

This situation is further exacerbated by the international community's lukewarm response to Africa's refugee problems. For example, in 1999, the international community spent \$0.11 per refugee, per day in Africa. In contrast, it spent \$1.28 per day per person in the Balkans. Furthermore, the international community spent \$10 million a week on Kosovar refugees in Albania and Macedonia. Yet, in the same year, UNHCR's annual appeal for \$8 million for refugees in West Africa only raised \$1.3 million.²²

Health standards in protected villages and camps for IDPs are far from ideal. Water in camps is scarce. The environment as a whole in these camps is appalling and the population is subjected to frequent epidemics of cholera and other enteric diseases. There are generally not enough dispensaries and those that do exist have neither sufficient resources, nor qualified staff to meet the needs of the internally displaced people. Although it is generally accepted that refugees enjoy higher standards of health services than do the locals, these services depend on unreliable international funding. Moreover, many refugees would argue that these "higher" standards do not necessarily mean services are always "adequate."²³ The major problem faced by both refugees and internally displaced persons, in settlements and camps respectively, is accessing enough land to feed themselves, a fact that further illustrates how the enjoyment of the right to health is contingent on the freedom of movement.²⁴

Finally, the location of refugee settlements and camps for internally displaced people near military detachments increases the risk of people being caught in crossfire. Even intentional abuses of the rights of internally displaced people by government forces are often not documented by human rights organizations; they have focused mainly on violations and abuse of human rights by rebels. Amnesty International documented abuses of the rights of internally displaced persons in Uganda's northern districts of Gulu and Kitgum by the government forces for the first time in its 1999 report.²⁵

There are several local and international non-governmental organizations operating in Africa that focus on providing various kinds of relief and so-called "development" assistance to both internally displaced people and refugees. But efforts to help both refugees and internally displaced people remain highly contentious because the policies of these organizations, often influenced by the UNHCR and the various countries' own governments, fail to meet human rights standards, in particular with respect to the ever-increasing demand for transparency, accountability and participation.

22. See HRW Report *supra* note 6.

23. See Zachary A. Lomo, The Role of Legislation in Promoting 'Recovery': A Critical Analysis of Refugee Law and Policy in Uganda, (1999) (unpublished manuscript on file with author 1999).

24. See *id.*

25. See AMNESTY INTERNATIONAL, UGANDA: BREAKING THE CIRCLES: PROTECTING HUMAN RIGHTS IN THE NORTHERN WAR ZONE, (1999).

IV.

DOMESTIC INSTITUTIONAL AND LEGAL FRAMEWORK

Although most countries in Africa are parties to the international conventions on refugees,²⁶ and although the 1969 OAU refugee convention imposes obligations on contracting states to "use their best endeavors consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality,"²⁷ many countries have not put in place the requisite institutional and legal structure for responding to the needs of refugees. This lack of domestic legislation to give effect to international treaty obligations not only "creates uncertainty about the status of refugees at the national and local level,"²⁸ but also explains why the policy and practice of both governments and humanitarian organizations are often inconsistent with international human rights standards.

Even where such domestic legislation exists, much of it is inconsistent not only with international human rights law, but also with the countries' own constitutions. For example, Uganda's Control of Alien Refugees Act of 1960 not only provides for the isolation of refugees but also deprives them of their property without due compensation, in complete abrogation of the 1951 U.N. Refugee Convention and the rules of natural justice.²⁹ By 1986, Tanzania's national refugee legislation did not incorporate the basic principles of international conventions on refugees.³⁰ Kenya does not have refugee-specific legislation, but campaigns for enactment of a refugee-friendly law are underway.³¹

While some African governments have taken measures to put in place domestic legislation and institutions to address the problems of refugees in fulfillment of their international obligations, such commitment is lacking with regard to IDPs. Although there is no specific international legal framework to address the needs of the IDPs,³² international human rights law has imposed sufficient

26. Namely, the Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954) [hereinafter U.N. Refugee Convention], and the Organization of African Unity, Convention on the Specific Aspects of Refugee Problems in Africa, opened for signature Sept. 10, 1969, 1000 U.N.T.S. 46 (entered into force June 20, 1974) [hereinafter OAU Convention].

27. See OAU Convention, *supra* note 26, art. II (1).

28. See OXFORD REFUGEE STUDIES PROGRAMME, IMPLEMENTATION OF THE OAU/UN CONVENTIONS AND DOMESTIC LEGISLATION CONCERNING THE RIGHTS AND OBLIGATIONS OF REFUGEES IN AFRICA 7 (1986).

29. Following international criticism of this law, a new law is in the process of being enacted. By August 1999, a draft had been presented to Cabinet and thereafter to be tabled in Parliament. But at the time of writing, information available indicate that it had been shelved.

30. However, in 1998, Tanzania repealed this law but retained restrictions on freedom of movement and isolation of refugees in camps in complete disregard of the provisions of Article 26 of the 1951 Refugee Convention. See HRW Report *supra* note 6.

31. For further information about African countries that have refugee legislation, see REFUGEE STUDIES PROGRAMME, FINAL REPORT ON IMPLEMENTATION OF THE OAU/UN CONVENTIONS AND DOMESTIC LEGISLATION CONCERNING THE RIGHTS AND OBLIGATIONS OF REFUGEES IN AFRICA (1986).

32. In 1992, the secretary-general of the United Nations appointed a special Representative to overhaul existing corpus of international human rights norms and norms of international law with a

obligations on states to address their needs. Article 1 of the African Charter on Human and Peoples' Rights (ACHPR) stipulates that member states of the OAU party to the Charter "shall recognize the rights, duties and freedoms enshrined in this Charter and *shall undertake to adopt legislative or other measures to give effect to them*" (emphasis added). Similarly, Article 2 (2) of the ICCPR provides that states party to it undertake "the necessary steps, in accordance with its constitutional process and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant." Despite the obligations imposed by international human rights law, policy responses to problems faced by IDPs and refugees in the East African region and Africa as a whole, have generally been confused and ad hoc. There has been no harmonization of policy, leading to the creation of different institutional structures for refugees and IDPs. Although a multi-sectoral and interdisciplinary policy would pool resources and expertise, thereby benefiting both refugees and IDPs, this approach is often ignored. In Uganda, for example, there are two *sets* of administration within the Ministry of Disaster Management and Refugees, one responsible for refugees and another for "disasters," under which the internally displaced fall. The refugee section is well staffed, with several "desk" officers for women, children, and protection. It benefits from contributions from the UNHCR of resources such as vehicles and radios. In contrast, the "disaster" section does not enjoy similar access to international funds to improve the conditions of their work. Interventions on behalf of Ugandan IDPs rely heavily on external and ad hoc funding from foreign agencies and international agencies such as the UNDP and the World Bank.³³

Rather than contributing to the creation of a viable institutional infrastructure, the involvement of international organizations often obstructs the development of sound policy and institutions for addressing the plight of IDPs. In Uganda, for example, the U.N. Disaster Management Team meets monthly, and is usually chaired by the UNHCR or the WFP Representative. However, the ministry that is responsible for disaster management is not represented.³⁴ Worse still, most international NGOs run parallel health and education programs instead of improving on existing local programs.

While most African governments will call for international help when faced with refugees crises, in the case of IDPs many countries refuse to release information. The governments base this secrecy on flimsy claims of sovereignty, thus effectively denying the IDPs media coverage and international support. For example, Burundi has restricted journalists' coverage of its *regroupment* policy,

view of preparing some form of international standards for the treatment of internally displaced people as those for refugees.

33. In 1998, the Uganda Government came up with a policy document on Disaster Preparedness and a new piece of legislation on disasters has been drafted. However, the new policy and law on disaster management does not make the "helpers" accountable to their beneficiaries. In fact, the draft law actually contains special provisions to protect those dispensing emergency assistance. Yet, in our research on refugees, we found that among the actors responsible for abrogating the rights of refugees are their "helpers," the so-called humanitarian organizations.

34. See, Geoffrey Mugumya & Erin Mooney, *Uganda, in INTERNALLY DISPLACED PEOPLE: A GLOBAL SURVEY* 73 (Janie Hampton ed., 1998).

an attempt to isolate rebels. Under this policy, internally displaced people are evicted from their homes and confined in camps in which conditions, as noted above, are unfit for human beings. In Uganda, the government concealed, with the backing of Western governments, the plight of IDPs in the northern war-torn districts until late 1998. Journalists who defied the government to visit these war-torn areas and report on the atrocities committed against civilians by both government and rebels have been intimidated and harassed.

The lack of commitment of most African governments to create coherent legal and institutional structures for refugees and internally displaced persons is worrisome because without such a structure, the international legal framework becomes ineffectual.

V.

THE INTERNATIONAL LEGAL REGIME AND THE PROTECTION OF THE RIGHTS OF REFUGEES AND IDPS

A. *The Right to Life and Physical Security*

The greatest danger to both refugees and IDPs in Africa has been the threat of violence to their persons. Both rebels and government troops have murdered innocent civilians, raped women, tortured, mutilated and cruelly treated their victims. Rebels have attacked refugee camps and settlements and "protected villages" of IDPs, setting houses ablaze and destroying property. For example, in 1996, the Lord's Resistance Army in Uganda attacked a Sudanese refugee camps in northern Uganda, killing over two hundred civilians. The Burundian army is accused of killing Hutu civilians in protected villages under the pretext of rebel attacks. In Sierra Leone, the Revolutionary United Front (RUF) rebels have mutilated civilians, killed and raped women and forcibly recruited children to their ranks. In 1999 alone, the RUF raided five camps for Sierra Leonian refugees in Guinea.³⁵ All of this occurred despite the fact that international human rights law protects the right to life and security of the person. Article 3 of the Universal Declaration of Human Rights stipulates that every person has the right to life, liberty and security of person and article 6 of the ICCPR provides that "[e]very human being has the inherent right to life . . ." and "[n]o one shall be arbitrarily deprived of his life." In addition, the Convention against Torture prohibits the use of torture as a policy tool and stipulates that perpetrators of torture be brought to justice.

The provisions of the Geneva Convention relating to armed conflict outlaw wanton acts of violence, murder, torture, mutilation and rape against civilians. Article 3, Common Geneva Conventions,³⁶ establishes the minimum standards

35. See HRW Report *supra* note 6.

36. See The Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 6 U.S.T. 3114, 75 U.N.T.S. 31 (entered into force June 19, 1931); The Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 6 U.S.T. 3217, 75 U.N.T.S. 85 (entered into force Aug. 12, 1949); The Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into

for the protection of human rights of civilians and other non-combatants. Article (3)(1) prohibits:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

Although only States can technically be bound by the provisions of the Geneva Convention, many of the prohibited acts—namely, torture, murder and mutilation by rebels during civil war or ethnic conflict—fall under the category of *peremptory* norms in international law. Therefore, the prohibitions of the Geneva Convention should be binding on non-parties, including non-state actors, as well.

Second, from a liberal perspective, traditional conceptions of sovereignty and how it defines obligations in international law are not just changing but are an anachronism altogether, i.e., the “state is now widely understood to be the servant of the people and not vice-versa.”³⁷ Furthermore, the Additional Protocols of 1977 to the Geneva Conventions remedied the lacunae in the Conventions because they address the problems of internal conflicts. Read together, the Geneva Conventions remain the fundamental basis for the protection of the rights of civilians in situations of conflict. Protocol II to the Geneva Conventions specifically addresses violations of human rights in situations of civil war.³⁸ It “develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions or application, [and] shall apply to all armed conflicts” that are not previously covered.³⁹

Protocol II, like Common Article 3, prohibits at “any time and in any place whatsoever,” acts of “(a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; (b) collective punishments” However, as shown above, both rebels and government forces have continued to attack refugees and IDPs, provisions of law notwithstanding. Thus, the problem is not so much a lack of legal framework but rather a failure in the implementation of the law.

B. Refugee Status Determination and the Right Against Expulsion and Refoulement

The 1951 U.N. Refugee Convention and the 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa define the term “refu-

force Aug. 12, 1949); The Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Aug. 12, 1949).

37. See Kofi Annan, U.N. Secretary General Address to the United Nations General Assembly, New York, Sept. 20, 1999.

38. See Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 U.N.T.S. 3 (entered into force Dec. 12, 1977).

39. See *id.* art. 1(1).

gee.” The Executive Committee of the UNHCR has adopted conclusions on asylum and refugee status determination, and following its recommendations the UNHCR created the *Handbook on Procedures and Criteria for Determining Refugee Status*. Nonetheless, adequate asylum and refugee status determination procedures are lacking in Africa. This is primarily because UNHCR staff members working on refugee status determination often apply non-legal rules of convenience. Some staff lack proper legal training in refugee law.⁴⁰ Those who have proper training are often compromised by the bureaucracies of their organizations. For example, the UNHCR’s branch office in Kampala rejected the application for assistance of 60 Rwandan asylum seekers on the ground that it contacted “Kigali” about their case and, from information provided, concluded that *none of these students were refugees*. The UNHCR did not give the students a chance to corroborate and challenge the authenticity of the information it had received from Kigali. The fear that staff that are sympathetic to local governments has infiltrated UNHCR offices throughout Africa.

When contrasted with Western European asylum practices, African refugee policies used to be a source of praise. However, the 1990s seem to have cast doubt on that image. Many African countries are taking measures that are inconsistent with the obligations they have assumed under international law. For example, refugees have been forcibly returned to their countries of origin against the express prohibitions contained in Articles 32 and 33 of the 1951 U.N. Refugee Convention and Article II (3) of the 1969 OAU Refugee Convention.⁴¹

In December 1996, Tanzania surprised many when it acted with the complicity of the UNHCR to *refoule* Rwandan Hutu refugees, in breach of international law. In a statement jointly signed by the Tanzanian government and the UNHCR, the Tanzanian authorities gave hundreds of thousands of Rwandan refugees three weeks to return to their country, despite the fact that conditions there were not ripe for such a return. An estimated 300,000 refugees tried to flee to other countries but were forced back across the border by Tanzanian soldiers. Over 400,000 Hutu refugees crossed into Rwanda in three weeks. What was Tanzania’s justification? Tanzania argued that the international community had failed to respond to its call for assistance.⁴² Earlier in 1996 Burundian authorities forced over 75,000 Rwandans refugees back to Rwanda and in November and December, some 700,000 refugees returned to Rwanda. Simi-

40. For example, during a meeting with Mr. Hans Thoolen, the then Representative of the High Commissioner of Refugees in Kampala on 16 July 1998, I was stunned when he argued that refugees had no right to identity card or papers. Article 27 of the 1951 U.N. Refugee Convention clearly stipulates this right. See *supra* note 26.

41. Article 32 of the 1951 Refugee Convention forbids the expulsion of a refugee without due process of law and article 33 stipulates that “[n]o Contracting State shall expel or return (‘refouler’) a refugee in a manner whatsoever to the frontier 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.” U.N. Refugee Convention, *supra* note 26, arts. 32-33.

42. See Amnesty International, Africa Regional Summary <<http://www.amnesty.org/ailib/aireport/ar97/afrsum.html>>.

larly, thousands of Burundi Hutu refugees in former Zaire returned to Burundi for fear of being killed by Zairian armed groups and other armed factions.⁴³

Such acts are difficult to understand in light of exhortations contained in the OAU Refugee Convention, which stipulate that the "grant of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by a Member State."⁴⁴ The interactions of states in the region suggest that granting refugee status has been interpreted as an unfriendly act and refugees have paid heavily for conflicting state interests.

More disturbing, however, are the heinous mass killing of refugees with the tacit complacency of some states. In 1996, Kabila's AFDL, supported by Rwandan government forces, attacked and bombarded refugee camps indiscriminately and committed several massacres. About 500 Rwandans refugees and displaced Congolese from the Democratic Republic of Congo, formerly Zaire, were massacred by AFDL members in mid-November 1996 at Chimanga refugee camp, 60 kilometers south of the town of Bukavu.⁴⁵ Governments in the region, in particular Uganda and Rwanda, that brought Kabila to power, actively frustrated an international investigation of the massacre. They further engaged in propaganda vilifying the Hutu as *interahamwe* and projected themselves as the saviors, thus effectively holding the international community at bay.⁴⁶

These events not only test the international community's willingness and ability to protect refugees and internally displaced people, but they call into question the values cherished by many democratic governments and international institutions and NGOs. Many states, and in particular the United States, with its allies Rwanda and Uganda, worked hard to assimilate Kabila into the coalition of "New African Leaders," which openly undermined international efforts at investigating the massacre. Although Rwanda and Kabila denied the massacre, refugees from the eastern Democratic Republic of Congo and human rights organizations have documentation of Rwanda's involvement in the killings of innocent refugee women and children and men. Today, western governments have endorsed leaders whose hands have been tainted in blood as the "beacon of hope" for the continent; the wrong leaders have been "anointed" for the wrong reasons as the solution to the problems in the region.⁴⁷

43. See *id.*

44. OAU Convention, *supra* note 26, art. 2(2).

45. See Amnesty International Report, *In Search of Safety: the Forcibly Displaced and Human Rights in Africa*, 1997.

46. Furthermore, some reports implicate the Rwandan Patriotic Front (RPF) government in the shooting of the late president Habyarimana, which sparked off the genocide. Moreover, Robert Gersony's report, commissioned by the U.N. Secretary General, implicates the RPF in gross violations of human rights before they seized power.

47. The situation is similar in Kenya. Part of the E.U. research team discovered that refugees from Somalia, Democratic Republic of Congo, Burundi, Rwanda, and Sudan have regularly been harassed, arbitrarily detained, rounded-up, relocated to rural camps or deported. Yet, Kenya is a signatory to the 1951 U.N. refugee convention.

C. Settlement Policy and Restrictions on the Right to Freedom of Movement

Refugee policies in the region isolate refugees in agricultural settlements or camps whether or not they have the ability to support themselves through farming. This requirement has resulted in the isolation of refugees from nationals, and has limited their right to freedom of movement. Article 26 of the 1951 U.N. Refugee Convention provides that “[c]ontracting states shall accord refugees lawfully in their territories the right to choose their place of residence.” It further provides that contracting states shall guarantee the right of refugees lawfully in their territories the right to “move freely within their territories, subject to any regulations applicable to aliens generally in the same circumstances.”

Government and UNHCR officials, including local and international NGOs, would claim that refugees’ freedom of movement from these designated areas is actually not impeded. In practice, however, considerable obstacles to travel, even in emergencies, exist for African refugees. For example, our research in both Kenya and Uganda has demonstrated that refugees must navigate a hierarchy of power before they can finally get a “movement permit” that authorizes them to leave the settlement or camp. In Uganda, in order to “legally” leave the settlement, a refugee must first get a letter from the chairman of the Refugee Welfare Committee, allowing her to visit the Ugandan camp commandant, where she must get another letter that permits her to travel to a specific destination for a limited period of time. The offices of the camp commandants are not always nearby, nor are these officials always available when a refugee has reached their offices. Moreover, such permission is not always forthcoming because both gatekeepers have wide powers of discretion.⁴⁸

While refugees’ right to freedom of movement is constrained through legislation or through administrative practices, the methods of constraining their movement are even more dangerous for IDPs. For example, authorities in Burundi have mined the border with Tanzania, preventing people from fleeing fighting between government forces and rebels. This act is inconsistent with article 14 of the UDHR on the right to seek and enjoy asylum in other countries. It further violates the provisions of the Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and On Their Destruction. Uganda settles many Sudanese refugees in settlements close to the border with Sudan, an area prone to fighting between government forces and rebel groups. This policy has led to repeated attacks on refugees, and continues today, despite the fact that the 1969 OAU refugee convention stipulates that “[f]or reasons of security, countries of asylum shall, as far as possible, settle refugees at a reasonable distance from the frontier with their country of origin.” These refugees have made several desperate pleas to be relocated, to avoid the persistent attacks by rebels. In 1996, the Lord’s resistance army killed over 200 refugees in the Acholi pii refugee camp in the Kitgum district. Refugees

48. See Zachary A. Lomo, *The Role of Legislation in Promoting ‘Recovery’ A Critical Analysis of Refugee Law and Policy in Uganda* 6 (Apr. 1999) (unpublished manuscript, on file with the author).

pleaded with the government and the UNHCR to move them to safe parts of the country in the south, but their pleas were rejected. The UNHCR claims that it does not have the funding to relocate refugees but the Kosovo refugee crisis contradicts the UNHCR's claim. When Kosovar Albanians sheltered close to the borders in Albania and Montenegro were in danger of being attacked, the UNHCR mobilized their evacuation.

Geo-political interests, more than anything else, have undermined the ability of the existing international human rights regime to protect refugees and internally displaced persons. For example, Uganda and Sudan have traded accusations of supporting each other's rebels. It is a fact that the SPLA rebels obtain their supplies through Uganda, and the SPLA presence is very well known among the local people. Uganda denies that it supports the rebels and has challenged the international community to verify this. In fact, observation missions that included officials from Sudan were sent to Uganda before the break of diplomatic relations in 1994. The problem is that it is very difficult to distinguish between the rebels and the refugees because the two have merged within the refugee communities in the settlements, largely because the rebels need manpower.

In Africa, it the rule rather than the exception that refugees are settled close to the borders. From Guinea to Liberia, Tanzania to Kenya this is the case. One explanation for this practice is the dangerous concept of temporary protection, based on the flawed idea that refugees will remain for a brief period and then return to their countries of origin. Tanzania, particularly while under the rule of the late Mwalimu Julius Nyerere, was the only country that had a deliberate policy of integrating refugees into the local communities and even granting them Tanzanian citizenship in line with Article 34 of the 1951 U.N. Refugee Convention.

Tied to the settlement policy is a provision for humanitarian assistance. Generally, the UNHCR and international and local NGOs condition their intervention on governments agreeing to settle refugees in camps and settlements. Likewise, assistance to refugees is contingent upon refugees agreeing to live in the settlements. For example, in Kenya it was not initially the policy of the Kenyan Government to restrict refugees to camps. Although some refugees, for example, those from Uganda, were settled in camps, this was not the general policy. But when the refugee crisis increased and Kenya sought the intervention of the international community, the UNHCR conditioned its involvement on the Kenyan Government's allocation of land for refugees. This signaled the opening of infamous camps like Kakuma and Dadab. Now, only refugees described as "vulnerable" are allowed to remain in Kenya's urban centers.⁴⁹ Food is being used as a policy tool, a fact acknowledged by the UNHCR Representative, Branch Office, in Kampala on February 17, 1999, during a workshop organized by the UNHCR and the Ugandan Government to convey their policy on man-

49. CR, *Comprehensive Policy on Urban Refugees*, 1997.

agement of refugee affairs. As a policy, assistance for refugees is contingent upon living in a camp or settlement, rather than legal status.

VI. CONCLUSION

From the foregoing discussion, four lessons can be learned from the African experiences with displaced masses. First, it is clear that the existing international human rights legal framework provides sufficient the legal grounds for protecting every displaced person in Africa, whether refugee or IDP. What is lacking is the commitment from African states to strictly adhere to these instruments and to ensure their implementation both in law and practice. The African Commission of Human and People's Rights' seminar on the protection of refugees and IDPs held in Harare, Zimbabwe, in February 1994, reached a similar conclusion.⁵⁰

Second, violations of human rights still remains the primary cause of not only forced displacement, but also of the suffering of refugees and internally displaced people in Africa. This state of affairs may continue beyond the first decades of the new millennium. Despite the rhetoric of "good governance" by the international community, most African countries lack viable political structures that allow free entry and exit of political power. The viability of a country's political structure is crucial to its stability and development in the broad sense, namely, for human rights, social justice, peace, equity and environmental concerns. That is why the "belly first" philosophy subscribed to by many African countries and leaders, including the so-called "new breed" of African leaders, is tenuous. African countries must thus first uphold fundamental human rights, thereby increasing access to politics and promoting a culture of tolerance. So far, South Africa is the only African country to approximate this model, with Nelson Mandela's courageous and visionary choice not to run for a second term in office.

Third, and related to the creation of viable political structures, most African countries do not have strong and impartial social and legal institutions to ensure respect for human rights. Judicial systems and now, increasingly, human rights commissions, in most African countries are inefficient, under-funded and compromised by those in power. The problem is compounded by the low level of literacy and high poverty rate on the African continent. As a result, the bulk of the population does not understand the justice systems. In addition, the large rural population in Africa exacerbates this problem, making it difficult to successfully educate citizens about human rights. Furthermore, human rights groups and civil society generally are limited in their effectiveness because they have a narrow domestic resource base and depend entirely on handouts from abroad. Donor countries are wary of those human right organizations that take a

50. See SARDC & ACHPR, PROTECTION OF THE AFRICAN REFUGEES AND INTERNALLY DISPLACED PERSONS 1 (1995).

more robust approach to advocacy for fear of endangering their "good relationship" with host countries.⁵¹

Fourth, internal conflicts in Africa are far from over, particularly given the involvement of international actors. To a large extent, these international actors either actively or inordinately⁵² perpetrate and perpetuate conflicts. In particular, many western states have formed alliances with some of the continent's worst dictators, largely to further their own economic interests. Many western governments have made premature conclusions about the progress of African countries in making the decision to form alliances, thereby promoting political intolerance. The conflicts in the region have further demonstrated, as Stephen Stedman has fairly stated, that the fundamentals relating to "the ethics of choice among tools, approaches, and criteria of intervention and *the interests that are at stake in our choices*"⁵³ (emphasis added), are far from being resolved. From the point of view of some academics and politicians, the disparity between the treatment of refugees and IDPs calls for a redefinition of the term refugee. I assert that that is an emotional reaction to a complex problem that betrays a lack of understanding of the real legal problems encountered by those who have been forcibly displaced. For example, many countries still require refugees to obtain work permits before they can work. That is not required of IDPs. Second, many asylum seekers and refugees are subject to immigration laws and face dangers of deportation. IDPs do not worry about being deported or harassed by immigration officials. To attempt to do some social engineering on behalf of IDPs through the fragile framework for refugees is a less effective way of helping IDPs. My thesis is that the existing international legal framework provides an open-ended vocabulary for engaging everybody: individuals, states, rebels, churches, mosques, and civil society in addressing abuses against refugees and IDPs. If ever this is going to be realized, a concerted effort to move beyond rhetoric to action is required. Nothing short of this will make either the existing regime or "bold new measures" work.

51. See Zachary A. Lomo, *The Struggle for the Protection of Human Rights in Uganda: A Critical Analysis of the Work of Human Rights Organizations*, 5 E. AFR. J. PEACE & HUM. RTS. 161 (1999).

52. For a discussion on the role of international actors in influencing internal conflicts, see J.J. Stedman, *International Actors and Internal Conflicts* <<http://www.rbf.jpws/public.html>>.

53. *Id.*