

TO PROTECT OR TO CONTROL? IMPERIALISM AND THE REFUGEE PAST,
PRESENT AND FUTURE

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INTRODUCTION

¶1 Which hemisphere has the responsibility to address the worsening refugee crisis? Is it the South, by far the greatest contributor to modern refugee flows, to develop solutions to the problem? Or, should the North accept its historical responsibility for producing much of the contemporary instability of the developing world which has led to the crisis?²

¶2 There is little doubt that Northern imperialism has long fueled the creation and continuation of situations which produce refugees, but its manifestation is surprising: Current refugee flows can literally be traced back to the actions of past colonial powers. Whether states with the political and economic wherewithal to accept a significant proportion of the refugee flow are willing to accept them is a question that is influenced by blatantly imperialistic policies. These policies represent a continuation of the controlling and dominating attitudes which are associated with the past.

¶3 This paper attempts to track imperial influences from the colonial period to modern international relations and policies informed, by the self-interest of sovereign states grappling with the forces of globalization and unmanageable flows of refugees. This paper intends to reveal both the North's responsibility to provide for the needs of contemporary refugees and the motivating reasons behind responding to those needs.

¶4 From Africa to the Middle East, history has seen an endless stream of colonial expeditions from the North carried out with complete disregard for their impacts on regions of the world which were already well-organized. In an attempt to make the continents function in a way which was beneficial to the colonial powers, they seized and reorganized vast regions of Africa, Asia and the Americas. However,

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² This may be considered a bold statement; however, it shall be elaborated upon in much greater depth below.

these reorganizations seldom gave attention to the structures already in place, often based on hundreds, if not thousands, of years of social and political evolution. Consequently, after the period of decolonization in the years following the First World War, the earlier reorganization left a patchwork of post-colonial ‘states’, based not on the ethno-tribal realities of the region in question, but rather on the often arbitrary carving up of regions by conflicting colonial powers. As Dr. Makau Wa Mutua stated in relation to the damage done to Africa during the colonial period: “African states and borders are distinctly artificial and are not ‘the visible expression of the age-long efforts of [the indigenous] peoples to achieve political adjustment between themselves ...’”.³

¶5 The independence of previously colonized states was followed by the inevitable re-shuffle of power among populations whose differences had, up to that point, been kept somewhat under control by the military and political might of colonial administrations. This post-colonial residue has been the impetus for numerous internal and international conflicts, civil wars, insurgencies and acts of genocide. These incidences of mass-violence initiated the flows of displaced persons that continue to the present day.⁴ Section III of this paper uses the example of Rwanda to exemplify this colonial background, thus placing the current refugee crisis and the regime developed to address it in the correct context. The paper will then move on to examine the effect of imperialism on present and future refugee issues.

¶6 The North’s historically imperialistic attitudes have not only created refugee-producing situations; in more recent times, those attitudes continue to have a significant effect on the way these governments respond to refugee flows.⁵

¶7 Globalization – the decreasing power and influence of states, once the fundamental building block of the international community, in the face of the increasing power of non-state actors in the international community –has proven to be a damaging force on the modern refugee regime, as discussed in Section IV. In fact, it has been described by some as *eroding* the refugee system by perpetuating an ever-expanding North-South divide in which the Northern Hemisphere increasingly restricts the flow of refugees

³ Dr. Makau wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT’L L. 1113, 1114 (1995). This shall be discussed in greater detail below with regard to Rwanda.

⁴ The patterns of which, both historical and geographical, shall be discussed at section II below.

⁵ The term “Protracted refugee situations” has been defined by the UNHCR as applying to those who have lived in exile for more than five years with no immediate prospect of finding a durable solution to their plight. *See, e.g.*, Jeff Crisp, *No Solutions in Sight: The Problem of Protracted Refugee Situations in Africa*, in NEW ISSUES IN REFUGEE RESEARCH 2003 (UNHCR,

from the Southern Hemisphere.⁶ This restriction has taken many forms, justified by countless policy considerations and “pressing” national or international interests. Its overall effect, however, has been to shift the refugee burden and constrain refugee flows to their regions of origin.

¶8 In the aftermath of the attack on the World Trade Centre on September 11th 2001, anti-terrorism has become a focus of international law and policy and has, unsurprisingly, been used as a justification for numerous and often serious violations of human rights.⁷ The refugee regime has not avoided this new paranoia. In fact, it has been one of the areas of the international human rights regime to be hit directly, through worldwide restrictions on freedom of movement and a heavily encouraged suspicion of those traveling without documentation – often an unavoidable reality for the genuine refugee. Anti-terrorism and the actions of the United Nations Security Council will be examined in Section V with a view to exposing the vulnerability of the refugee regime to such restrictive practices.

¶9 With the ever-growing reluctance of the West to recognize its responsibility to address the crisis of protracted refugee flows, should we resign ourselves to the reality that the refugee system is doomed due to the atmosphere dominated by the self-serving policy considerations of the West? Or is there a light at the end of the tunnel for refugees? Perhaps, even though the refugee crisis is set to worsen rather than improve, imperialism will continue to stymie the actions of the few individuals, states or international institutions who are willing to address the crisis. The question that remains to be answered is whether the refugee regime as it now exists is serving to *protect* or to *control* the refugee population.

A BRIEF HISTORY OF REFUGEE FLOWS

¶10 The last three decades have witnessed a large increase in refugee flows that has coincided with a growing unwillingness of states to grant asylum.⁸ Statistics show that this increase is continuing. According to the United Nations High Commissioner for Refugees (UNHCR), at the beginning of 2005, the

Working Paper No. 75, 2003). However, the use of the term in this paper is not confined to such a definition, but rather refers to any situation of long-term instability that produces flows of refugees and asylum-seekers.

⁶ See e.g., B. S. Chimni, *Globalization, Humanitarianism and the Erosion of Refugee Protection*, 13 J. REFUGEE STUD. 243 (2000).

⁷ See, generally, Joan Fitzpatrick, *Speaking Law to Power: The War Against Terrorism and Human Rights*, 14 EUR. J. INT’L L. 241 (2003).

⁸ Adam Roberts, *More Refugees, Less Asylum: A Regime in Transformation*, 11 J. REFUGEE STUD. 375 (1998).

number of people “of concern”⁹ rose to 19.2 million from 17 million the previous year.¹⁰ Writing to mark the 50th anniversary of the adoption of the 1951 Convention Relating to the Status of Refugees (“Refugee Convention”), Marilyn Achiron stated:

Crises such as Kosovo have multiplied, spilling millions of people into headlong flight in search of a safe haven. Intercontinental travel has become easy and a burgeoning business in human trafficking has swelled the number of illegal immigrants. States say their asylum systems are being overwhelmed with this tangled mass of refugees and economic migrants and are urging a legal retrenchment.¹¹

One of the main focuses of this paper is the assertion that this increasing flow of refugees is reflective of, and severely affected by, historical and contemporary imperialistic practices. Therefore, it is important to address, at least briefly, the evolution of the international refugee crisis.

¶11 Although the phenomenon of people fleeing crisis has been in existence for centuries, the origins of these flows and the sophistication of the system developed to address them has changed and evolved substantially over time. As history has been punctuated by times of unrest, it **has also** been marked by the movement of large numbers of people from regions of unrest to regions capable of offering some form of protection. However, the direction of these refugee flows, and thus the focus of the refugee regime, has shifted substantially from an East-West to a South-North movement. The shift in direction has resulted in a total change in attitude towards the refugee issue, as explored in more depth below. This change in attitude has been both positive and negative. On a positive note, it has resulted in the necessary expansion of the definition of a refugee. However, it has caused Western nations to impose increasing restrictions on the application of that definition, and thus on the recognition of refugee status.

¶12 The refugee regime was in its early days a Euro-centric institution, borne out of European conflicts and designed to address the mass movements of their victims. As early as the late seventeenth century, and the French Revolution, people sought asylum in Europe.¹² From that point on, in particular during the nineteenth and early twentieth centuries, Europe was witness to numerous national and political

⁹ This category is described by the UNHCR as including refugees, asylum seekers, internally displaced persons, stateless persons and returnees.

¹⁰ *Refugees by Numbers (2005 edition)*, UNHCR: The UN Refugee Agency, at <http://www.unhcr.org/cgi-bin/texis/vtx/print?tbl=BASICS&id=3b028097c> (July, 8 2005). Interestingly, though this point will be elaborated upon below, of the ten major refugee-producing nations, five are to be found in the African continent and four in the Middle East. With regard to Africa, *see, e.g.*, Crisp, *supra* note 6.

¹¹ Marilyn Achiron, *The 1951 Refugee Convention: A ‘Timeless’ Treaty Under Attack*, UNHCR at <http://www.unhcr.org/1951convention/timeless.html>.

revolutions. However, it was not until the creation of the League of Nations¹³ that the response to refugee flows was to move from an *ad hoc* and state-centric system to a “truly international refugee regime”.¹⁴ The two world wars – and in particular the horrors of the Holocaust and the mass exodus of Jews from Nazi Germany – were the major catalyst for this significant change in the status of, and priority given to, the refugee issue.¹⁵

¶13 When the Second World War ended in 1945, 30 million people were left displaced¹⁶ and the international community (that is, the Allies) began a succession of attempts to institutionalize the international refugee regime. First the United Nations Relief and Reconstruction Agency (UNRRA), then the International Refugee Organization (IRO),¹⁷ and eventually, in 1950, the UNHCR were established to tackle the growing refugee crisis in Europe.¹⁸ The UNHCR, a permanent body, went on to play a fundamental role in the consolidation of future developments in the refugee regime.¹⁹ In July 1951, the Refugee Convention was signed.²⁰ Though initially still Euro-centric and situation-specific,²¹ the Refugee Convention was the first attempt to create what was essentially a refugee “bill of rights” by providing a definition of “refugee” and an extensive list of obligations regarding the treatment of persons meeting that definition.²²

¶14 It was not until well after the end of the Second World War that the international refugee regime truly expanded from being a situation-specific Euro-centric system to one with near-universal application.²³ With the spread of the refugee crisis from Europe to Africa and Asia came the realization that the problem was not temporary and the 1951 definition of a refugee would not be relevant to the new

¹² Laura Barnett, *Global Governance and the Evolution of the International Refugee Regime*, in *NEW ISSUES IN REFUGEE RESEARCH 2002*, at 1 (UNHCR, Working Paper No. 54, 2002).

¹³ In 1921, the League of Nations High Commissioner for Refugees was established under the direction of Fridthof Nansen. This agency was the precursor to the UNHCR and represented “the first time that the refugee problem was recogni[s]ed as an international issue”. *Id.* at 4.

¹⁴ *Id.* at 3.

¹⁵ *See id.*

¹⁶ *Id.* at 5.

¹⁷ For a more detailed analysis of the development and downfall of these institutions, *see* Kim Salomon, *The Cold War Heritage: UNRRA and the IRO as Predecessors of UNHCR*, in *THE UPROOTED* (Göran Rystad ed., 1990).

¹⁸ *See* Barnett, *supra* note 14, at 6.

¹⁹ *Id.*

²⁰ *Id.* at 7.

²¹ The definition, found in Article 1 of the Convention, had temporal and geographical limitations which meant that it only applied to those fleeing events that occurred in Europe before 1951 – essentially the Second World War. Achiron stated that one reason for this initial limitation was that “the drafters felt ‘it would be difficult for governments to sign a blank check and to undertake obligations towards future refugees, the origin and number of which would be unknown.’” Achiron, *supra* note 13.

²² For an in-depth analysis of the Refugee Convention, *see, e.g.*, JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* (1991); and GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* (1996).

²³ Barnett, *supra* note 14, at 9.

waves of refugees.²⁴ As a result, in 1967 the UN General Assembly adopted the Protocol Relating to the Status of Refugees, which waived temporal and geographic limitations and thus allowed more universal application²⁵ of the refugee standard.

¶15 It was in the 1970s and 1980s, during and after the Cold War, that the refugee crisis began to increase dramatically. By the 1970s, the majority of refugees came from the developing world, and it was at this point that the developed world – the host countries – began to restrict the flow of refugees and became less willing to receive them.²⁶ Increasingly, the source of these refugee flows was civil wars taking place in particular countries and regions. During the 1980s, some of the causes of mass migrations were peculiar to the Cold War, while the 1990s saw some refugee situations develop due to the end of the Cold War – particularly the breakup of the Soviet Union.²⁷

¶16 However, the most persistent refugee flows in this period and beyond have been created by post-colonial states that have “inherently fragile national identities, frontiers and institutions.”²⁸ Without the distraction of the Cold War, the lid was removed from numerous simmering internal conflicts, most notably those conflicts in post-colonial states in Africa and the Middle East.²⁹ These new conflicts increased mass migrations on a global scale, vastly increasing the number of asylum claims made in the developed world.³⁰ This change placed great pressure on the international refugee regime, prompting further restrictions and limitations by the West.

¶17 A brief examination of the evolution of the refugee crisis has shown that the internationalization of the modern refugee regime has been a relatively recent phenomenon. However, while the last 50 years has seen significant developments in the scope and applicability of the refugee regime, there has also been a dramatic shift in the willingness of states to accept and apply that system. It is no coincidence that this shift in attitude has paralleled a shift in the direction of refugee flows.³¹ This paper will focus on the flow originating from the post-colonial chaos of the Great Lakes region of Africa in order

²⁴ Achiron, *supra* note 13.

²⁵ Barnett, *supra* note 14, at 9.

²⁶ *Id.* at 10.

²⁷ Roberts, *supra* note 9, at 378.

²⁸ *Id.*

²⁹ In fact, Bill Clinton was quoted as arguing on this very point that the end of the Cold War “lifted the lid from a caldron of long-simmering hatreds. Now the entire global terrain is bloody with such conflicts.” See Ann Devroy, *President Cautions Congress on ‘Simplistic Ideas’ in Foreign Policy*, WASHINGTON POST, May 26, 1994, at A31.

³⁰ Barnett, *supra* note 14, at 10.

³¹ This shall be discussed in more detail below with regard to the effect of globalisation on the refugee regime.

to exemplify what many consider to be one of the root causes of contemporary forced migration: the reorganization of the post-colonial state.

COLONIALISM AS A ROOT CAUSE OF MODERN REFUGEE SITUATIONS

¶18 It should be noted at the outset that this paper does not seek to maintain that colonialism is the single cause for the current instability of the African continent.³² It is accepted that while colonialism is certainly one of the significant causes for current refugee-producing situations, other prevailing factors – such as the economic situation at the time – have also had an impact on these situations. However, internalist explanations, which conveniently apportion the blame for mass displacements of people on the country of origin, are one-sided, and do not capture the complex reality of the root causes of refugee flows.

³³ There is no doubt in this author’s mind that, were it not for the actions of the West in the colonial era, the situation in Africa today – in Somalia, Liberia, South Africa, Sierra Leone, Uganda, Burundi, Rwanda, and Sudan, to name a few – would be a very different one. The consideration of externalist explanations for the current state of Africa strengthens the argument upon which this paper is based: that the developed world has an inherent responsibility to address the refugee crisis to which it greatly contributed.

¶19 In the hundred years between the mid-1800s and mid-1900s, the African continent was to be changed forever. European colonialism in Africa – dubbed by many as the “Scramble for Africa” – began in the middle of the nineteenth century, and led to a colonial African state that was “a deeply divided, intensely fragmented, highly violent, and rarely legitimate agglomeration of several distinct nations and political communities.”³⁴ These expansionist and colonialist campaigns were essentially motivated by the urge to gain access to the significant and hitherto unexploited resources and markets of the African hinterland.³⁵ Although the various colonial powers promulgated a myriad of supposedly selfless justifications for the “need” to colonize the “uncivilized” world,³⁶ the primary motive was economic and

³² Although the practice of European colonialism was by no means restricted to the continent of Africa, due to the use of Rwanda as a key example of the downstream effects of colonialism, this paper will concentrate on that region.

³³ B. S. Chimni, *The Geopolitics of Refugee Studies: A View from the South*, 11 J. REFUGEE STUD. 350, 360 (1998).

³⁴ Obiora Chinedu Okafor, *After Martyrdom: International Law, Sub-State Groups, and the Construction of Legitimate Statehood in Africa*, 41 HARV. INT’L L.J. 503, 506 (2000).

³⁵ *Id.* at 509.

³⁶ According to Mutua, “[m]orally, the justification for coloni[s]ation was steeped in European racism . . . [African peoples] were not properly human, and could not be left to themselves but must be ‘led’ towards civili[s]ation by other peoples: that is, by the peoples of Europe”. Mutua, *supra* note 4, at 1127.

strategic power at a time of tremendous growth of European capitalism.³⁷ In 1884, the Berlin Conference – which provided a procedure for legitimizing a process of encroachment upon African autonomy which had long been under way – made it clear that the “relationship between Europe and Africa had taken a new, formally colonialist turn”.³⁸

¶20 The fundamental problem with these colonial campaigns was the effect they would have on the future of the region. The “Scramble for Africa” effectively “Balkanized” Africa into ahistorical units³⁹ which, as would become clear in time, were unable to function after gaining independence. The creation of the colonial state interrupted the natural, or “organic”,⁴⁰ evolution of political and social structures by imposing arbitrary political boundaries, which were completely unreflective of the tribal or ethnic realities on the ground. Mutua described the situation following the Berlin Conference:

In 1884-1885, the European imperial powers met in Berlin and without the consent or the participation of the African people, demarcated the Continent of Africa into colonies or spheres of influence. In many cases, kingdoms or tribes were split with such reckless abandon that they came under two or three European imperial powers. This event was the genesis of many present-day conflicts and virtually insoluble problems in the African Continent.⁴¹

The post- World War I Mandate System was created to deal with the colonies of those defeated in the war, and exhibited a further attempt by the West to legitimize the colonial state.⁴² The Mandate System was ostensibly designed to prepare the colonies for independence by purportedly committing the international community to the development and welfare of colonial peoples.⁴³ However, it instead permitted the colonial system to continue under a new guise.⁴⁴ The process of decolonization, initiated in the 1960s and a major focus of the United Nations, was to mark the beginning of the descent of Africa – a continent composed of a patchwork of “doomed” nation-states – into protracted instability. Mutua argues that at independence “the West decolonized the colonial state, not the African peoples subject to it”.⁴⁵

³⁷ *Id.* at 1126.

³⁸ Okafor, *supra* note 36, at 509-10.

³⁹ Mutua, *supra* note 4, at 1114, 1123.

⁴⁰ Okafor, *supra* note 36, at 510.

⁴¹ Mutua, *supra* note 4, at 1142.

⁴² *Id.* at 1137-38.

⁴³ *Id.* at 1138.

⁴⁴ Much of the damage done in Rwanda for example was in fact the result of the actions of the Belgians as the power holding the Mandate for that region of Africa. See below.

⁴⁵ Mutua, *supra* note 4, at 1116.

¶21 The leaders of these newly-formed post-colonial states were faced with complex and serious problems, not the least of which was how to deal with the borders drawn by the colonialists,⁴⁶ which often divided cohesive ethnic groups between two or more states.⁴⁷ In addition to inheriting arbitrary borders, these new leaders inherited a belief that what mattered at independence was the maintenance of a cohesive nation-state – clinging on to “this fiction of European creation to the bitter end”.⁴⁸ This state, referred to as a “political refugee”,⁴⁹ would be the stage for countless incidents of mass violence and, as a result, the continual displacement of large numbers of people. Nothing better exemplifies this doomed state, and the protracted flow of refugees from its borders, than the crisis which unfolded in Rwanda in the 1990s.

THE EXAMPLE OF RWANDA

¶22 In 100 days, as many as one million Tutsis and moderate Hutus were slaughtered by Hutu militias in a campaign of genocide sanctioned, and in fact orchestrated, by the Hutu-dominated Rwandan government. In addition to the vast number of people killed, millions more were displaced. First Tutsis fled the mobs of *Interahamwe*⁵⁰ charged with carrying out the genocide. Then, as the genocide began to lose pace and the Tutsi-dominated Rwandese Patriotic Front (RPF)⁵¹ gained control of the region, Hutus flooded across Rwanda’s borders in huge numbers.⁵² So many horrors unfolded during this period with such ferocious murders that a Christian missionary who witnessed the carnage was compelled to remark, “There are no devils left in Hell. They are all in Rwanda”.⁵³

¶23 There is no question that what occurred in Rwanda in 1994 was an atrocity of almost unimaginable magnitude. Likewise, there is little doubt that those who were responsible – both those ordering and those carrying out the genocide – came as close to ‘evil’ as any since the Second World War. In fact, Michael Barnett noted that the Rwandan genocide “has the macabre distinction of exceeding the

⁴⁶ See Okafor, *supra* note 36, at 511-12.

⁴⁷ *Id.* at 512.

⁴⁸ As lamented upon by Mutua, *supra* note 4, at 1119.

⁴⁹ Ali A. Mazrui, *The African State as a Political Refugee: Institutional Collapse and Human Displacement*, 7 INT’L J. REFUGEE L. 21 (Special Issue 1995).

⁵⁰ An unofficial militia group whose name means “those who attack together”. At its peak, this group was 30,000 strong. See *Rwanda: How the Genocide Happened*, BBC NEWS, Apr. 1, 2004.

⁵¹ The Rwandan Patriotic Front, whose aim was to overthrow Habyarimana and secure their right to return to Rwanda. This group shall be discussed in more detail below.

⁵² These events will be discussed in greater detail below. However, for an in-depth and often shocking account of the genocide, see, e.g., LT. GEN. ROMEO DALLAIRE, *SHAKE HANDS WITH THE DEVIL: THE FAILURE OF HUMANITY IN RWANDA* (2004).

⁵³ Mazrui, *supra* note 52, at 30 (quoting TIME, May, 16, 1994, at cover page, 56-63).

rate of killing attained during the Holocaust”.⁵⁴ But what drove these people to commit such premeditated acts of grave atrocity? As Mazrui noted, Rwanda suffers from an ethnic duality – that is, the existence of two distinct ethnic groups, the majority Hutus and the minority Tutsis⁵⁵ - in combination with an unusually high population density and geographic intermingling.⁵⁶ However, while some may claim that the roots of the genocide, and the ethnic violence that occurred before it and continue to the present day,⁵⁷ lie in tribal conflict pre-dating the colonial period, there can be little doubt that the unique circumstances that led to the atrocities of 1994 were in some way exacerbated by the actions and policies of a succession of colonial powers occupying the region during the early twentieth century.

Colonial Background.

¶24 As stated above, much of the current instability in Africa can be attributed to internal factors – that is, causes which emanate from within the state or states in question. However, the destructive influences of external agents in the continent cannot be idly dismissed.⁵⁸ In Rwanda with the highly polarized relationship between the Hutus and the Tutsis, there can be little doubt that external agents played a substantial role. By favoring one ethnicity over another and attempting to restructure the ethnic situation in a way which best served the interests and sensibilities of the European powers, the colonial administrations in Rwanda entrenched the ethnic duality that existed in a lesser form prior to their arrival. These unequal dealings with the two major ethnic groups in Rwanda created a growing resentment that caused untold suffering on the members of one ethnic group by another.⁵⁹

¶25 Rwanda – then Ruanda-Urundi – was part of German East Africa from 1899 until it was conquered by the British in 1916.⁶⁰ The Germans did not make much of an impression as the colonial power in the region at that time. The real damage was done following the conclusion of the First World

⁵⁴ MICHAEL BARNETT, *EYEWITNESS TO A GENOCIDE: THE UNITED NATIONS AND RWANDA* 1 (2002).

⁵⁵ Although other ethnic groups did exist in the country, such as the Twa. *See, e.g.*, GERARD PRUNIER, *THE RWANDA CRISIS: HISTORY OF A GENOCIDE* 5 (1995).

⁵⁶ Mazrui, *supra* note 52, at 29. Mazrui further distinguished such situations as Rwanda from those which also suffered from a regional duality – such as the Sudan. In these cases, atrocities such as the 1994 genocide in Rwanda were avoided as distinct ethnic groups could effectively secede from one another in distinct regions of the same country. *Id.* at 29-30.

⁵⁷ The BBC noted in an analysis of the genocide that “[e]thnic tension in Rwanda is nothing new. There have always been disagreements between the majority Hutus and minority Tutsis, but the animosity has grown substantially since the colonial period.” *Rwanda: How the Genocide Happened*, *supra* note 53.

⁵⁸ Makau wa Mutua, *The Interaction between Human Rights, Democracy and Governance and the Displacement of Populations*, 7 INT’L J. REFUGEE L. 37, 39 (Special Issue 1995).

⁵⁹ Mutua, *supra* note 4, at 1147.

War.⁶¹ In the peace settlement after the First World War, the territory was ceded to Belgium as compensation for Belgium's sufferings and because it was contiguous with the Belgian Congo.⁶²

¶26 Belgium was given a Mandate by the League of Nations to administer Ruanda-Urundi in its climb to eventual independence. However, during this time the Europeans created a myth about the origins of the Hutu and the Tutsi peoples of the region which would greatly affect the future relations of the two groups, both between themselves and with the colonists. Although the two ethnic groups are actually very similar – speaking the same language and following the same traditions⁶³ – the Belgians saw the two groups as distinct entities, one inferior and one superior. The Hutu were described as:

“generally short and thick-set with a big head, a jovial expression, a wide nose and enormous lips. They are extroverts who like to laugh and lead a simple life.”⁶⁴

By stark contrast, however, the colonists observed:

The Mututsi [Tutsi] of good race has nothing of the negro, apart from his colour. He is usually very tall. He is very thin [...] His features are very fine [...] Gifted with a vivacious intelligence, the Tutsi displays a refinement of feelings which is rare among primitive people. He is a natural-born leader, capable of extreme self-control and of calculated goodwill.⁶⁵

On the basis of these ‘observations’, the Belgian colonists became obsessed with the Tutsi. Prunier notes that writings such as the excerpt above, though seemingly absurd when read today in the context of racial equality and long after the colonial period, were important for a number of reasons. First, they deeply conditioned the views and attitudes of Europeans regarding the Rwandese social groups with which they dealt. Secondly, the writings became the ‘scientific’ basis for the decisions made by the Belgian colonial authorities. Thirdly and most crucially, these stereotypes had a massive impact on the Hutus and Tutsis themselves by inordinately inflating the Tutsi cultural ego while crushing Hutu feelings until they “coalesced into an aggressively resentful inferiority complex”.⁶⁶ It was through these European imagined

⁶⁰ This was the name given to Rwanda and Burundi when they were governed together as a single state under the German colonial administration. See Patrick Brogan, *Burundi and Rwanda*, in *WORLD CONFLICTS* 28 (1998).

⁶¹ *Id.*

⁶² *Id.* Belgian Congo was also place that would suffer greatly at the hands of this colonial power.

⁶³ According to Filip Reyntjens, the “Hutu, Tutsi and Twa do not correspond to the classic anthropological definition of ethnic groups: they speak the same language, share the same religion, live side by side all over the country, and intermarry”. Filip Reyntjens, *Rwanda: Genocide and Beyond*, 9 *J. REFUGEE STUD.* 240, 243 (1996).

⁶⁴ Prunier, *supra* note 58, at 6. This, and the quote cited below at note 71, are extracts from a report written by the *Ministere des Colonies*. See *Ministere des Colonies, Rapport sur l'administration belge du Ruanda-Urundi* (1925).

⁶⁵ Prunier, *supra* note 58, at 6.

⁶⁶ *Id.* at 9.

cultural stereotypes that the colonists set in motion one of the most lethal and protracted situations in African history.⁶⁷

¶27 One of the manifestations of European attitudes toward the Rwandese ethnic groups was the achievement of near-total Tutsi dominance over the Hutu through Belgian replacement of Hutu chiefs with Tutsi. By the end of the Belgian presence in Rwanda in 1959, 43 out of 45 chiefs were Tutsi.⁶⁸ This new structure was not only ethnically unrealistic, but it ran counter to the traditional chiefly system in Rwanda, whereby chiefs were appointed by type, not by ethnic origin. All ruling and governing functions were progressively monopolized in the hands of Tutsi, even in areas where they had no historical legitimacy, and the Hutu people found themselves in a situation where Tutsi were the rulers and they were the subjects.⁶⁹ Of course, many Tutsi recognized that they could benefit from the prevailing attitude of the colonists, realizing that:

Belgians were going to remodel Rwandese society on the basis of what they perceived as ‘real’ Rwandese institutions, that Rwanda was quickly becoming ‘rwandified’ on white man’s terms, and that these developments would not be bad for them if they could only be sure to ride the storm.⁷⁰

In addition, for several decades the Tutsi enjoyed better jobs and educational opportunities than their Hutu neighbors, who were effectively assigned to a permanent underclass.⁷¹ Resentment among the Hutu increased over this time, culminating in a series of riots in 1959 – described as the “pre-independence Hutu revolution”⁷² – in which more than 20,000 Tutsis were killed and around 100,000 fled to Urundi and Uganda.⁷³ When Belgium relinquished power over Rwanda and granted it “independence”⁷⁴ in 1962, it left behind the new Hutu government of Rwanda, headed by President Gregoire Kayibanda.⁷⁵ The Belgian colonial administration had certainly left its mark. Over the subsequent decades, the Tutsi were the scapegoats for every crisis in the region, as a relentless situation of violence developed as a result of the

⁶⁷ However, it should be noted that the operation of colonial policies in favour of one ethnic group over the other was not limited to Rwanda. The creation of a dominant/subordinate population group within the same territory was in fact a commonly used policy of the colonists. Adama Dieng, *Addressing the Root Causes of Forced Population Displacements in Africa: A Theoretical Model*, 7 INT’L J. REFUGEE L. 119, 124 (Special Issue 1995).

⁶⁸ Prunier, *supra* note 58, at 27.

⁶⁹ Reyntjens, *supra* note 67, at 244.

⁷⁰ Prunier, *supra* note 58, at 31.

⁷¹ GUY VASSALL-ADAMS, RWANDA: AN AGENDA FOR INTERNATIONAL ACTION 8 (1994).

⁷² Rachel van der Meeren, *Three Decades in Exile: Rwandan Refugees 1960-1990*, 9 J. REFUGEE STUD. 252 (1996).

⁷³ *Id.* at 255; Rwanda: *How the Genocide Happened*, *supra* note 53. See also, Brogan, *supra* note 64, at 28.

⁷⁴ This event has been described less favourably, as the Belgians, “who had by then abruptly abandoned the Congo”, making as “graceful an exit as the circumstances permitted”. Brogan, *supra* note 64, at 28.

⁷⁵ See van der Meeren, *supra* note 79, at 256.

colonially-entrenched visions about the character of these ethnic groups. Thus, a protracted refugee-producing situation was set in motion.

The 1994 Genocide.

¶28 By 1994 Rwanda had been independent for 32 years, and tensions between the Hutus and Tutsis, embedded in the country's social structure by the various colonial administrations, reached breaking point. Due to the repression of Tutsis by the Hutu majority, Tutsi refugees had been flowing from Rwanda to some extent since the 1960s and, in particular, since the "Hutu revolution" in 1959.⁷⁶ However, no single event in the country would produce refugees to such an extent as the 1994 genocide, and since that time the flow has remained relatively constant.

¶29 The continuous flow of Tutsi refugees from Rwanda to neighboring countries between 1960 and 1990 created a strong population of Tutsis in exile.⁷⁷ By 1990, the number of exiled Tutsis had reached 700,000, and this substantial number was supported by some 1.3 million Tutsis already living in Burundi, Uganda and Tanzania.⁷⁸ On October 1st 1990, the RPF launched a military invasion of Rwanda.⁷⁹ This invasion was seen as the assertion of the right of the Tutsis in exile to return to their homeland,⁸⁰ and soon caused guerilla warfare to spread across northern Rwanda. In July 1992, the parties to the conflict agreed to a very fragile ceasefire, and negotiations began to end the civil war, establish a democracy, and allow the return of Tutsi refugees.⁸¹ It was at this time that the Hutu elite began to sow the seeds of genocide. With talk of widespread concessions being made to the Tutsi minority, a plan evolved in Kigali among senior ministers and army officers to "solve Rwanda's problems by killing all the Tutsis, together with any Hutu who opposed the genocide".⁸²

¶30 The Arusha Agreement was signed August 4, 1993.⁸³ This provided for a "Broad-based Transitional Government," a National Transitional Assembly, united armed forces, and the return of Tutsi

⁷⁶ For example, between 1959 and 1963, an estimated 120,000 Tutsis became refugees in neighbouring countries. *See van der Meeren, supra note 79, at 252.*

⁷⁷ For a good synopsis of the Tutsi diaspora in the surrounding countries of Uganda, Tanzania, Zaire (now the DRC) and Burundi, see VASSALL-ADAMS, *supra* note 78, at 14-17.

⁷⁸ Brogan, *supra* note 64, at 31.

⁷⁹ *See* Reyntjens, *supra* note 67, at 245; van der Meeren, *supra* note 79, at 258.

⁸⁰ van Der Meeren, *supra* note 79, at 258.

⁸¹ Brogan, *supra* note 64, at 31-32.

⁸² *Id.* at 32.

⁸³ *Id.*

refugees.⁸⁴ At this point the situation in Rwanda rapidly deteriorated. Hutu extremists were becoming more and more fearful of the “dangers of the Arusha formula”,⁸⁵ and tensions came to an explosive climax at the beginning of April 1994, when President Habyarimana’s plane was shot down – allegedly by French or Belgian mercenaries.⁸⁶ Within 45 minutes, Hutu militias set up roadblocks across Kigali,⁸⁷ and the genocide had officially begun. The efficiency with which the killing was carried out was chilling, as the BBC subsequently reported:

Within hours, recruits were dispatched all over the country to carry out a wave of slaughter. The early organizers included military officials, politicians and businessmen, but soon many others joined in the mayhem. Encouraged by the presidential guard and radio propaganda, an unofficial group called the Interahamwe [...] was mobilized. [...] Soldiers and police officers encouraged ordinary citizens to take part [...] Participants were often given incentives, such as money or food, and some were even told they could appropriate the land of the Tutsis they killed.⁸⁸

Conservative estimates put the total killed between the beginning of April and the end of May at around 600,000.⁸⁹ However, Prunier calculated that 800,000 Tutsis, and between 10,000 and 30,000 opposition Hutu, were killed in three months.⁹⁰

¶31 In spite of the clear responsibility of the West for the root causes of this situation, the reaction of the international community was one of “willful indifference”.⁹¹ Although it is beyond the scope of this paper, the UN has been heavily criticized for its indifference to the genocide. The peacekeeping force deployed in Rwanda – the UN Assistance Mission for Rwanda (UNAMIR) – numbered 2,500 before the killing began.⁹² As the genocide unfolded, the Security Council ordered the withdrawal of the majority of the force.⁹³ It was not until the full extent of the atrocity was clear, and hundreds of thousands had already been killed, that the UN bowed to international pressure to intervene. However, by then there was a lack of

⁸⁴ *Id.* All of which would have been tremendously difficult to implement, even if the genocide had never taken place. See, e.g., Dallaire, *supra* note 55.

⁸⁵ Brogan, *supra* note 64, at 32.

⁸⁶ *Id.* at 32-33

⁸⁷ *Id.* at 33.

⁸⁸ *Rwanda: How the Genocide Happened*, *supra* note 53.

⁸⁹ The approximate figure reported by Medicines sans Frontières. See Brogan, *supra* note 64, at 33.

⁹⁰ Prunier, *supra* note 58, at 265.

⁹¹ Barnett, *supra* note 57, at 2. This work focuses on the failure of the UN in Rwanda. Barnett stated about the indifference shown by the international community: “The Rwandan genocide is not only about the evil that is possible. It is also about the complacency exhibited by those who have the responsibility to confront that evil”. *Id.* See also, VASSALL-ADAMS, *supra* note 78.

⁹² Brogan, *supra* note 64, at 32.

⁹³ *Id.* at 33.

political will to commit troops.⁹⁴ No state capable of intervention in Rwanda had an interest sufficient to justify such an act. Instead, the international community looked on as the most extreme crime of genocide since the Holocaust⁹⁵ took place.⁹⁶

The Ramifications: Refugees from the Heart of Darkness.

¶32 Although the incredible death toll exacted during the genocide in Rwanda is, in itself, a testimony to the magnitude of this terrible event, almost as strong a legacy of the atrocity has been the displacement of so many Tutsis and Hutu from their homeland. Of course, the end of the genocide did not mean the end of the violence for Rwanda and its neighboring states.⁹⁷ It has been more than a decade since the genocide and yet even now Rwanda is still producing refugees. This year, the UNHCR listed Rwanda as one of the top ten countries of origin for major refugee arrivals during 2005.⁹⁸

¶33 Essentially, what resulted from the progression of ethnic violence since Rwanda gained independence in 1962 was a cycle of population displacements that has continued to the present day. The intractable nature of the situation in and around Rwanda, in the last fifteen years in particular, has led to many attempts to address how to respond to such situations, and their production of so many refugees.⁹⁹

¶34 In the months immediately following the genocide, it was estimated that some two million people, most of them Hutu fleeing the advance of the RPF, were displaced across Rwanda's borders to Zaire, Uganda, Tanzania and Burundi.¹⁰⁰ On April 29, 1994, over 200,000 people crossed at one point into Tanzania, representing the fastest flow of refugees ever witnessed by aid agencies.¹⁰¹ The response of states such as Tanzania to the sudden and substantial influx of refugees from Rwanda is cause for some criticism, as discussed below.

⁹⁴ Barnett, *supra* note 57, at 2.

⁹⁵ Brogan, *supra* note 64, at 32.

⁹⁶ One reason for the lack of intervention on the part of the UN has been identified as the internal nature of the conflict. As Mazrui stated, "one of the tragedies of the African state is that there has not been enough tension and conflict *between* States. The balance between external conflict and internal conflict has tilted too far on the side of internal". Mazrui, *supra* note 52, at 31. For more on the responsibility to protect and the lessons drawn from the UN failure in Rwanda, see Romeo Dallaire, *The Lessons of Rwanda*, 23 REFUGEE SURV. Q. 19 (2004).

⁹⁷ For example, at present situations in the Democratic Republic of the Congo (DRC) and Burundi – whose roots can be traced back to the mass displacements surrounding Rwanda's colonially-established ethnic divide – are causing mass flows of people. UNHCR statistics for 2004 show that the DRC accounted for the second largest movement of people – 38,100 – and Burundi for the sixth largest – 4,200. *Refugees by Numbers (2005 edition)*, *supra* note 11.

⁹⁸ *Id.*

⁹⁹ See, e.g., UNHCR, *Lessons Learned from the Rwanda and Burundi Emergencies* (Dec. 1, 1996); THE INTERNATIONAL RESPONSE TO CONFLICT AND GENOCIDE: LESSONS FROM THE RWANDA EXPERIENCE (David Millwood ed., 1996).

¹⁰⁰ See Reyntjens, *supra* note 67, at 249.

¹⁰¹ VASSALL-ADAMS, *supra* note 78, at 39.

¶35 Much of Rwanda's social, political, and economic structure was destroyed in the genocide.¹⁰² Over the following decade the situation remained extremely unstable. Although a large number of refugees had managed to escape from Rwanda, nearly two million internally displaced persons returned home during this period.¹⁰³ Massacres continued in Rwanda, however, since many who returned had also taken part in the genocide. Hostility between Hutu and Tutsi in Rwanda continues to this day, however, the RPF-led government in Kigali has prevented the fighting from escalating to mid-1990s levels.¹⁰⁴

¶36 Both within Rwanda and across its borders with Uganda, Burundi, and Tanzania, population displacement still occurs. According to the UN Office for the Coordination of Humanitarian Affairs, around 50,000 Rwandan refugees remain in 14 African countries.¹⁰⁵ Although many have returned to Rwanda in the last ten years, a large number remain reluctant to repatriate.¹⁰⁶ In addition, due in no small part to the chronic instability in Rwanda, and the resulting mass displacements of people, Uganda, Burundi, Tanzania, and the Democratic Republic of Congo have recently been the stage for substantial conflict.¹⁰⁷ The legacy of colonialism in the Great Lakes region of Africa lives on with some intensity, and the victims – the displaced – have met with increasing indifference from the rest of the world.

¶37 Rwanda is just one of many African states that are the source of the post-colonial shift in refugee flows from East-West to South-North. However, it is a good example of the shift, and its use is somewhat justified since many African states have experienced similar, though not so extreme, problems. In fact, post-colonial states in Africa share a number of common traits, most of which stem from their colonial experience. These traits include inherited boundaries that cut across ethnic groups, a history of repressive colonial policies, unequal development, lack of meaningful structural changes at independence,

¹⁰² *Country Reports on Human Rights Practices for 2004: Rwanda*, United States Department of State (Feb. 28, 2005).

¹⁰³ Brogan, *supra* note 64, at 34. See below with regard to the growing numbers of internally displaced persons in the place of refugees – that is, those seeking refuge in a state other than their own.

¹⁰⁴ *Id.* This government, however, has been the subject of repeated international criticism for its repression of political opponents and its poor human rights record. See, e.g., International Crisis Group, *Rwanda at the End of the Transition: A Necessary Political Liberalisation* (Nov. 13, 2002).

¹⁰⁵ *Rwanda: Refugees Return from Uganda*, IRIN NEWS, Oct. 6, 2005. See also *Country Reports*, *supra* note 106, at section 2d.

¹⁰⁶ For example, with regard to Rwandan refugees in the Republic of Congo, see *Congo: Rwandan Refugees Reluctant to Return Home*, IRIN NEWS, Oct. 4, 2005.

¹⁰⁷ See, e.g., International Crisis Group, *Crisiswatch No. 26* (Oct. 1, 2005). See also Odhiambo Anacleto, *The Regional Response to the Rwanda Emergency*, 9 J. REFUGEE STUD. 303 (1996).

and rapid population increases.¹⁰⁸ These traits could all be seen in Rwanda, the 1994 genocide, and the subsequent mass displacement of a substantial part of its population.

¶38 The new post-colonial direction of refugee flow has continued until today in some form or another. However, while the flow has maintained momentum, the willingness of receiving nations – the potential countries of asylum – to open their borders to this flow has subsided. This section has established, to some degree, the complicity of the West in creating this mono-directional flow of displaced persons. The next section will seek to answer why Northern governments have tightened their borders and attempted to shift the refugee burden back to the South, rather than facilitating the more equitable distribution of that burden.

GLOBALIZATION AND THE REFUGEE REGIME: FROM RESETTLEMENT TO INTERNAL DISPLACEMENT

¶39 In an article exploring the history of the solutions employed by the international community to deal with the refugee crisis, B.S. Chimni contended “... the dominant states in the international system decide from time to time, in the light of their interests, which solution to the global refugee problem should be promoted as the preferred solution.”¹⁰⁹ This statement was made in relation to the declining willingness of the Northern states to share the refugee burden on the poor Southern hemisphere at the asylum and resource level. The end of the Cold War marked the beginning of a new era in international relations and politics: Globalization. The term “globalization” is extremely broad and, as Jan Aart Scholte describes, “so diverse and so changeable that it sometimes seems possible to pronounce virtually anything on the subject.”¹¹⁰ However, for the purposes of this paper, the term refers to the decreasing power and influence of states in the face of the increasing domination of non-state actors in the international community, and the downstream consequences of such a new balance of power on the policy-making processes of these states.

¹⁰⁸ Dieng, *supra* note 73, at 122. Dieng considers that “[m]anifestations of post-colonial State policies resulting in forced displacements have their origins in colonialism. The tendency of former colonial powers to meddle in the internal affairs of their former colonies is another source of conflict”. *Id.* at 123.

¹⁰⁹ B. S. Chimni, *From Resettlement to Involuntary Repatriation: Towards a Critical History of Durable Solutions to Refugee Problems*, 23 REFUGEE SURV. Q. 55, 73 (2004).

¹¹⁰ Sarah Collinson, *Globalisation and the Dynamics of International Migration: Implications for the Refugee Regime*, in NEW ISSUES IN REFUGEE RESEARCH 1999, at 2 (UNHCR, Working Paper No. 1, 1999) (quoting Jan Aart Scholte, *Global Capitalism and the State*, 73 INT’L AFF. 427, 430 (1997)).

In the last two decades, the fundamental consequence of this international change in the refugee regime is that we have seen a reluctance by nation-states to accept responsibility for the world's refugee burden.

¶40 States have preferred to stop the flow of refugees and push them back into the hands of the countries of origin. Inevitably, international organizations, such as the UNHCR, have been left to assume responsibility in their place.¹¹¹ This unwillingness to protect displaced persons is connected to the “erosion of state authority under the pressures of economic globalization”.¹¹² The motivations that once moved Western governments to protect refugees are being forgotten in favor of a general restriction on the flow of *all* migrants, be they forced or voluntary migrants, in an attempt, albeit implicit, to maintain the North-South divide.

¶41 Countries of first asylum find themselves responsible for a large proportion of the immediate refugee burden. Countries of first asylum are those states that border the countries from which refugees flow.¹¹³ For example, Iran has long shouldered the burden of Afghanistan's displaced people. There are currently around one million registered Afghan refugees in Iran, and this is the lowest this figure has been in 20 years. This fact was taken into consideration in developing the principle of burden-sharing. This principle requires states to cooperate in dealing with the global refugee problem. Some commentators would argue that burden sharing has, since the end of the Second World War, attained the status of customary international law.¹¹⁴ The preamble of the Refugee Convention recognized the need to distribute the refugee burden more widely, stating that, “the grant of asylum may place unduly heavy burdens on certain countries,” and that “a satisfactory solution... cannot therefore be achieved without international cooperation.”¹¹⁵ According to Guy Goodwin-Gill, “comprehensive responses to the problems of persons moving across borders clearly depend upon significant measures of international cooperation for their success.”¹¹⁶

¹¹¹ For example, the future of refugee protection in Europe, and to some extent in Australia, depends on the advocacy efforts of the UNHCR to try to maintain governments' commitment to the Refugee Convention. Collinson, *supra* note 119, at 27.

¹¹² *Id.* at 26.

¹¹³ For example, Iran with regard to refugee flows originating in Afghanistan. Iran has long shouldered the burden of Afghanistan's displaced people. There are currently around one million registered Afghan refugees in Iran, and this is the lowest this figure has been in 20 years. See *Afghanistan-Iran: Tripartite Refugee Agreement Signed*, IRIN NEWS, June 30, 2005.

¹¹⁴ See, e.g., B. S. Chimni, *The Principle of Burden-Sharing*, (Unpublished paper) in INTERNATIONAL REFUGEE LAW: A READER 146 (B S Chimni ed., 2000).

¹¹⁵ *Id.* at 147.

¹¹⁶ GOODWIN-GILL, *supra* note 24, at 294.

¶42 In Africa during the 1970s and 1980s, when it was becoming clear that even the distribution of the refugee burden in that continent was inequitable, member states of the Organization of African Unity (OAU) could resort to Article 2(4) of the OAU Convention. This article provided:

Where a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States... [who] shall in the spirit of African solidarity and international cooperation take appropriate measures to lighten the burden of the Member State granting asylum.¹¹⁷

However, since the early 1990s, the situation has changed in Africa, as well as internationally. As we shall see with regard to the contemporary erosion of the international refugee regime, international cooperation in refugee burden sharing is becoming more difficult to elicit. Burden-sharing, it would appear, has become burden-shifting.

¶43 Resettling refugees in third countries was once the focus of the refugee regime. Originally, this was seen as the most durable solution to the refugee crisis. It involved the movement of refugees from the country of first asylum to a third state¹¹⁸ and, as such, constituted a direct manifestation of the principle of burden-sharing. This solution met a number of objectives, including relieving the strain on receiving countries, contributing to international solidarity, and maintaining the fundamental principles of protection.¹¹⁹ The process of resettlement involves identifying those in urgent need and finding a suitable country prepared to accept them.¹²⁰ According to Rupert Colville, “accepting people for resettlement is a mark of true generosity on the part of governments.”¹²¹ However, it is more and more common that there is a shortfall between the number of places sought by UNHCR for resettlement and the number of places made available.¹²²

¶44 Humanitarian intervention, and humanitarianism in general, it has been argued, are linked to the ongoing process of globalization.¹²³ International intervention has been utilized as a method of

¹¹⁷ Bonaventure Rutinwa, *The End of Asylum? The Changing Nature of Refugee Policies in Africa*, 21 REFUGEE SURV. Q. 12, 18 (2002) (quoting Organisation of African Unity, art. 2(4)).

¹¹⁸ GOODWIN-GILL, *supra* note 24, at 276.

¹¹⁹ *Id.* at 277. It should be noted, however, that Chimni considers the resettlement solution created an “exilic bias” in international refugee law, based on the goals of “separation and alienation”. Chimni, *supra* note 118, at 58.

¹²⁰ Rupert Colville, *Resettlement; Still Vital after All These Years*, 94 REFUGEES 4 (1993).

¹²¹ *Id.* According to Colville, in 1993 only 10 states accepted resettlement cases on a regular basis – setting annual quotas. New Zealand, for example, accepts an annual quota of 750 resettlement cases from the UNHCR. *Id.*

¹²² *Id.*

¹²³ In that it seeks “to legitimize and sustain an international system that tolerates an unbelievable divide not only between the North and the South but also inside them”. Chimni, *supra* note 7, at 245.

containing refugees and preventing refugee flows before they begin. The 1984 United Nations International Conference on Population agreed that:

... through international cooperation within the framework of the United Nations an attempt should be made to avert the causes of new flows of refugees, with due regard to the principle of non-intervention in the internal affairs of sovereign states.¹²⁴

¶45 The prevailing attitude towards the refugee crisis is to tackle the problem of refugees in or near the country of origin.¹²⁵ In the period between 1960 and 1990, African states operated what was in effect an “open door policy” for displaced persons from neighboring states.¹²⁶ However, since the early 1990s, African states have routinely rejected refugees at their borders or returned them to their countries of origin, clearly preferring containment and *refoulement* over granting asylum.¹²⁷ Consequently, today, most refugees never make it to the West. Rather, they find themselves either living in squalor in refugee camps close to or within their countries of origin or, having escaped their country of origin,¹²⁸ then often against their will being repatriated.

¶46 The effects of globalization on the international refugee regime have taken a variety of forms. Two of the most blatant upshots of the new era into which the refugee regime has moved are repatriation and internal displacement. Each is moving towards taking the place of asylum and resettlement, and each signifies an increasing restriction on the movement of refugees from South to North.

¶47 What follows is a brief consideration of repatriation and internal displacement in the context of globalization.¹²⁹ Interestingly, in the aftermath of the 1994 genocide in Rwanda, the creation of ‘safe zones’ allowed the use of involuntary repatriation and internal displacement to prevent the flow of refugees to other unstable states in the region. With regard to Internally Displaced Persons (IDPs), it suffices to say that, in the months following the Rwandan genocide, as many people became internally displaced as became external refugees.¹³⁰

¹²⁴ GOODWIN-GILL, *supra* note 24, at 292.

¹²⁵ Roberts, *supra* note 9, at 379.

¹²⁶ Rutinwa, *supra* note 129, at 12.

¹²⁷ *Id.*

¹²⁸ Barnett, *supra* note 14, at 12.

¹²⁹ A paper could be written on each of these issues alone. However, their inclusion in this paper is intended simply to serve as an example of the consequences of globalisation on the refugee regime.

¹³⁰ Two million people were internally displaced during the last eight months of 1994. For more detail on internal displacement in Rwanda, see Larry Minear and Randolph C. Kent, *Rwanda's Internally Displaced: A Conundrum within a Conundrum*, in THE FORSAKEN PEOPLE (Roberta Cohen and Francis M. Deng eds., 1998).

REPATRIATION

¶48 It has been argued that, in the period of globalization, the refugee regime has been moving closer to the human rights regime.¹³¹ One of the consequences of this has been the view that resettlement is akin to “institutionalizing exile at the expense of human rights”¹³² and that the only recourse available to those dealing with the refugee crisis, if they are to respect human rights, is *voluntary* repatriation.¹³³ However, the concept of repatriation is far removed from one of the foundational principles of the international refugee regime, protection. Repatriation has nothing to do with protecting displaced persons, but rather with removing such persons from host countries. The language of human rights, or more specifically, the right for displaced persons to return to their countries of origin rather than be forced into an existence in exile,¹³⁴ has been used to divert attention from the often forcible repatriation. States essentially see incoming refugees as a heavy financial burden. Therefore, it is containment, not protection, that drives this ‘solution’ to the refugee crisis, and its use has in some cases resulted in what is, in effect, the mass-*refoulement* of refugees.¹³⁵

¶49 According to the UNHCR, the last three years marked an unprecedented level of return, with more than 5 million refugees going home. In 2004 alone, “an estimated 1.5 million exiles return[ed] to their countries in 27 large-scale repatriation programs”.¹³⁶ Compare those figures with the approximately 1.2 million refugees who returned to their countries of origin between 1985 and 1990.¹³⁷

¶50 UNHCR reported these figures with an air of pride. However, the extension of the organization’s mandate to cover the repatriation of refugees has been the subject of some criticism. In particular, the focus of discussion has been whether the UNHCR has been *facilitating* or *promoting* repatriation. Goodwin-Gill noted on the distinction between these actions that “[t]he former presupposes an informed and voluntary decision by an individual, while the latter anticipates varying degrees of

¹³¹ Chimni, *supra* note 7, at 254.

¹³² GOODWIN-GILL, *supra* note 24, at 268.

¹³³ Chimni, *supra* note 7, at 254. Chimni stated that, since the early 1980s, there have been “calls to rethink the exilic basis of international refugee law” and to develop a new approach based on human rights – that is, repatriation. Chimni, *supra* note 118, at 58.

¹³⁴ Which was recognised by the UNHCR Executive Committee as being a “fundamental premise”, although the Committee also recognised that all repatriation movements had to be “free, voluntary and individual”. See GOODWIN-GILL, *supra* note 24, at 272.

¹³⁵ Roberts, for example, noted that in the 1990s, some repatriations “raise[d] the question as to whether [*non-refoulement*] ... continues to exercise its old normative force”. See Roberts, *supra* note 9, at 380.

¹³⁶ *Refugees by Numbers*, *supra* note 11.

¹³⁷ Roberts, *supra* note 9, at 389.

encouragement by outside bodies”.¹³⁸ UNHCR, as an international organization, ostensibly beyond the control of any one nation state, has had to step into the void left by the North. However, the tightening of states’ borders and the unwillingness to give asylum has left the UNHCR with no choice but to become involved in new initiatives which often seem quite distant from its initial *raison d’etre*.¹³⁹ As Chimni stated, “the tasks of UNHCR are being redefined in the matrix of the policy of containment and the accompanying language of security”.¹⁴⁰

Involuntary Repatriation in Rwanda.

¶51 The actions of the UNHCR in assisting, even promoting, the repatriation of Rwandan refugees from Tanzania is an example of the unwitting involvement of the organization in the modern move from protection to containment. Even though voluntary repatriation can be a realistic and valuable solution to refugee problems, often refugees are coerced into returning to their countries of origin.¹⁴¹ Since the mid-1990s, involuntary or imposed, return has almost become an accepted policy to be employed in certain circumstances to deal with particular flows of refugees. Under the doctrine of imposed return, “refugees may be sent back to 'less than optimal conditions in their home country' against their will.”¹⁴² Often, 'less than optimal conditions' actually translates to a political and economic situation in the country of origin that is far from improving, and has possibly even worsened, since the refugees in question fled.

¶52 One of the clearest examples of the international community's preference for containment¹⁴³ was the decision of the governments of the states surrounding Rwanda to create a ‘safe zone’ within Rwandan territory, to which they could return the great numbers of displaced. Tanzania was identified as providing exemplary protection to Rwanda’s refugees in the aftermath of the 1994 genocide. However, due to the sheer mass of people crossing into the country, Tanzania eventually closed its borders and

¹³⁸ GOODWIN-GILL, *supra* note 24, at 273.

¹³⁹ Roberts, *supra* note 9, at 381.

¹⁴⁰ Chimni, *supra* note 7, at 256.

¹⁴¹ Roberts, *supra* note 9, at 390.

¹⁴² Chimni, *supra* note 118, at 63 (quoting Reuters, Sept. 29, 1996).

¹⁴³ Rutinwa, *supra* note 129, at 20.

established a “no more refugees” policy.¹⁴⁴ Interestingly, a decline in international assistance was identified as one of the main reasons for Tanzania’s border closure.¹⁴⁵

¶53 After establishing its closed borders and “no more refugees policy,” the Tanzanian government expected that the refugees already in the country would return to Rwanda in the not too distant future.¹⁴⁶ In 1996, this expectation translated into the forcible return of the majority of the Rwandan refugees, most of whom had been in Tanzania since the end of the genocide.¹⁴⁷ Van der Meeren noted that the emphasis placed by the UNHCR on the repatriation of the two million displaced Hutus carried enormous risks of future conflict in Rwanda.¹⁴⁸ However, the Tanzanian government believed that regional instability left it with no choice but to repatriate the majority of the refugees. It has been argued that the UNHCR determined that conflict prevention in Tanzania was more important than refugee protection in this particular instance.¹⁴⁹

¶54 The case of Tanzania also reminds us that, while such practices of forced repatriation have been reported here in a negative manner, it must be remembered that host states in the South are often extremely poor countries on whom the North has essentially turned its back.¹⁵⁰ As for the involvement of the UNHCR in such practices, Roberts summed up the true state of affairs as follows:

The harsh fact is that not only has *refoulement* reared its ugly head, but also UNHCR has felt obliged in particular instances to offer a degree of cooperation in this process. UNHCR has indeed been presented with a classic dilemma: does it stick to the moral-cum-legal ground and have nothing to do with such forced repatriation, or does it provide some much-needed assistance to the long-suffering refugees involved?¹⁵¹

¶55 It is the pragmatic reality that, while international institutions have been left to maintain and uphold the international refugee regime in this era of globalization, the nation-state still dictates the form and direction that such action can take. If states are closing their borders to refugee flows, then

¹⁴⁴ For specific analysis of the Tanzanian response to the Rwandan refugee crisis, see Bonaventure Rutinwa, *The Tanzanian Government’s Response to the Rwandan Emergency*, 9 J. REFUGEE STUD. 291, 295 (1996).

¹⁴⁵ *Id.* at 298. Rutwina argued that the international community needed to “reaffirm the existence of a joint responsibility to support refugees and to put in place a credible system of distributing the burden of refugees equitably”. *Id.* at 301.

¹⁴⁶ In fact, on 5 December 1996, the Tanzanian government and the UNHCR issued a joint statement that “all Rwandese refugees in Tanzania are expected to return home by 31 December 1996”. See Beth Elise Whitaker, *Changing Priorities in Refugee Protection: The Rwandan Repatriation from Tanzania*, in NEW ISSUES IN REFUGEE RESEARCH 2002, at 1 (UNHCR, Working Paper No. 53, 2002).

¹⁴⁷ *Id.* Whitaker also noted that Tanzania, while forcibly returning Rwandan refugees, allowed those who feared execution on return to apply for asylum under the Refugee Convention. This resulted in the skewing of refugee protection through the creation of a situation in which “ ‘innocent’ refugees were sent home . . . and *genocidaires* continued to receive protection in Tanzania”. *Id.* at 12.

¹⁴⁸ Van der Meeren, *supra* note 79, at 264.

¹⁴⁹ Whitaker, *supra* note 159, at 13.

organizations such as UNHCR have no choice but to shift their focus to dealing with refugee crises at their source. This fact has been even more pronounced with regard to the current crisis of IDPs and their place in the international refugee regime.

Internal Displacement

¶56 What better way to control the problem of mass refugee movements, the reasoning goes, than to prevent those fleeing crisis from crossing the border and escaping their country of origin? Quite simply, internal displacement is containment in its purest form. Increasingly, in situations of internal conflict the victims find themselves displaced within their borders, beyond the help of the international refugee regime, and often beyond the attention of the rest of the world.

¶57 Since the late-1980s, internal displacement has become a global crisis. In fact, Roberta Cohen and Francis Deng argued that the predicament of IDPs today, and the challenge this poses to the international community, “is no less acute than the refugee crisis that confronted Europe in the aftermath of the Second World War.”¹⁵² The reason for this crisis is the shift by the international community from protection to containment. Thanks in no small part to that cornerstone of international relations, sovereignty,¹⁵³ IDPs receive no formal protection or assistance from international instruments and remain at the mercy of domestic jurisdictions.¹⁵⁴ Although their plight may be equally as serious as that of a ‘refugee,’ one who has crossed an international border, the Convention definition of a refugee requires *alienage*, and thus, IDPs are excluded from the scope of global protection.¹⁵⁵

¶58 At the beginning of October 2005, the UNHCR held the fifty-sixth session of its Executive Committee. A major focus of this session was the problem of internal displacement and the place of the UNHCR in addressing that problem. The High Commissioner for Refugees, Antonio Guterres, stated:

... the plague of internal displacement demonstrates all too clearly that racism, xenophobia, ethnic conflict, violent nationalism and religious

¹⁵⁰ Chimni, *supra* note 118, at 66.

¹⁵¹ Roberts, *supra* note 9, at 390.

¹⁵² Roberta Cohen and Francis M. Deng, *MASSES IN FLIGHT: THE GLOBAL CRISIS OF INTERNAL DISPLACEMENT 2* (1998).

¹⁵³ See, e.g., Francis M. Deng, *The Plight of the Internally Displaced: A Challenge to the International Community*, *The Brookings-Bern Project on Internal Displacement*, at <http://www.brook.edu/fp/projects/idp/20040408plight.pdf> (Apr. 8, 2004). Here Deng suggests that this problem could be overcome by a positive reading of sovereignty – that is, that sovereignty requires a state to discharge a minimum standard of responsibility to its citizens and, if it fails, then the international community may step in without threatening that states’ sovereignty, but rather, reinforcing it. *Id.*

¹⁵⁴ Barnett, *supra* note 14, at 13.

¹⁵⁵ Hathaway, *supra* note 24, at 29.

fundamentalism are still alive and strong in our world today. ... the inability to address internal displacement has become the single biggest failure in the humanitarian action of the international community.¹⁵⁶

¶59 As was the case with repatriation, the UNHCR has been forced to extend its mandate to cover IDPs as people “of concern” to the organization. According to UNHCR officials, in 2004 there were an estimated 25 million IDPs worldwide.¹⁵⁷ This means that the number of people internally displaced across the world has surpassed the total number of people “of concern” to the UNHCR, which was 13.6 million at July 2005.¹⁵⁸ In 2004, the UNHCR provided varying degrees of assistance to 5.6 million of the 25 million IDPs; a relatively small proportion, but a rise from the previous year.¹⁵⁹ Unfortunately, while there would appear to be few alternatives to the involvement of the UNHCR, a refugee organization once concerned wholly with protection, in the IDP crisis, this current trend of involvement reflects the malleability of the organization to the dictates of its powerful donor states.¹⁶⁰ In a report by the UNHCR Executive Committee on the role of the organization in the IDP crisis a revealing statement was made that:

The importance of addressing the problems of the internally displaced has become increasingly apparent in the light of UNHCR’s focus on the *prevention* and solution of refugee problems. [emphasis added]¹⁶¹

¶60 Both the initial creation of the IDP crisis and the willingness of the UNHCR to address that crisis and assist IDPs are borne out of a desire to prevent the creation of refugee flows by containing the movement of displaced persons within their country of origin. With regard to both repatriation and internal displacement, the humanitarian community is in a very difficult position.

¶61 While morally these may be the least preferable solutions to the refugee crisis, refugees are being returned, and people are being internally displaced in the tens of millions. These people need such organizations as the UNHCR to provide humanitarian assistance. However, as Chimni argued, it is crucial that the humanitarian community “should be more aware of the function it has been assigned in the larger scheme of things and that it should critique from this perspective the practices of the Northern states”.¹⁶²

¹⁵⁶ *Opening statement by Mr. Antonio Guterres, United Nations High Commissioner for Refugees, at the Fifty-sixth Session of the Executive Committee of the High Commissioner’s Programme*, UNHCR: The UN Refugee Agency [hereinafter Guterres], at <http://www.unhcr.org/cgi-bin/texis/vtx/print?tbl=ADMIN&id=43411aa54> (Oct. 3, 2005).

¹⁵⁷ *Refugees by Numbers*, *supra* note 11. See also, Cohen, *supra* note 166, at 31.

¹⁵⁸ *Refugees by Numbers*, *supra* note 11. The total number of people “of concern” was reported to be 19.2 million. However, this figure was inclusive of the 5.6 million IDPs currently under the protection or assistance of UNHCR. *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ That is, Northern states. Chimni, *supra* note 125, at 398.

¹⁶¹ *Protection Aspects of UNHCR Activities on Behalf of Internally Displaced Persons*, UNHCR Executive Committee, 45th Sess., U.N. Doc. EC/SCP/87 (1994) (emphasis added).

¹⁶² Chimni, *supra* note 118, at 72.

ANTI-TERRORISM AND ASYLUM-SEEKERS: UNWITTING VICTIMS

¶62 The ‘traditional’ flows of refugees have been essentially eliminated by the various restrictive policies adopted by the North designed to protect their interests in the global market. However, one group of displaced persons maintained some ability to breach the ever-strengthening defenses of the Northern states – asylum-seekers.¹⁶³ However, since the tragic events of September 11, 2001, the “War on Terror” threatens to further restrict an already eroding international refugee regime. This international campaign has not only targeted terrorists, asylum-seekers have come under the spotlight of governments, and become one of its victims. Antonio Guterres has identified “confronting rising intolerance in modern societies” as one of the challenges facing the UNHCR. In his opening address to the Committee, Guterres stated:

The rise of populism has led to a systematic and willful confusion in public opinion, mixing security problems, terrorism, migrant flows and refugee and asylum issues.

Preserving asylum means challenging the notion that refugees and asylum seekers are the agents of insecurity or terrorism rather than its victims. Unfortunately, there are many situations today where the concept of asylum is misunderstood, where it is even equated with terrorism. Terrorism must be fought with total determination. But asylum is and must remain a central tenet of democracy.¹⁶⁴

¶63 One of the effects of globalization on the international refugee system has been the significant change in attitude to asylum-seekers in the North. This has been perpetuated by the media and supported by many in the political institutions of states determined to protect themselves from the refugee problem.¹⁶⁵ The current rhetoric of anti-terrorism has been adopted as a convenient tool of further exclusion by governments eager to latch on to any justification to keep forced migrants from remaining within their borders. As Chimni put it, “[t]hose who now seek refuge find that they represent security threats to states and regions and that all roads lead quickly home.”¹⁶⁶

¶64 Today, asylum-seekers are have been characterized as “welfare cheats, competitors for jobs, security threats [and] abusers of host state generosity”.¹⁶⁷ Of all these stereotypes, however, the

¹⁶³ When people flee their own country and seek sanctuary in another state, they apply for ‘asylum’ – the right to be recognised as bona fide refugees and receive legal protection. *Refugees by Numbers*, *supra* note 11.

¹⁶⁴ Guterres, *supra* note 171.

¹⁶⁵ See, e.g., Jeff Crisp, *A New Asylum Paradigm? Globalization, Migration and the Uncertain Future of the International Refugee Regime*, in *NEW ISSUES IN REFUGEE RESEARCH 2003* (UNHCR, Working Paper No. 100, 2003), in which Crisp addresses the current attitude of the media in the United Kingdom to asylum-seekers.

¹⁶⁶ Chimni, *supra* note 7, at 245.

¹⁶⁷ Matthew J Gibney, *Beyond the Bounds of Responsibility: Western States and Measures to Prevent the Arrival of Refugees*, *GLOBAL MIGRATION PERSPECTIVES* No. 22, 3 (Jan. 2005), available at <http://www.gcim.org/gmp/Global%20Migration%20Perspectives%20No%2022.pdf>.

international community currently has settled on one in particular: the asylum-seeker as a security threat. This linkage has even been provided for in the very instrument that is the cornerstone of the refugee regime, the Refugee Convention. The exclusion clauses incorporated into the Refugee Convention provide for the exclusion of certain classes of persons from the protection of the refugee regime due to acts committed by them which may render them ‘undeserving’ of refugee status.¹⁶⁸ Article 1F provides:

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: ...

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.¹⁶⁹

¶165 Acts of terrorism have commonly fallen under Article 1F(a),¹⁷⁰ as war crimes or crimes against humanity, and Article 1F(b),¹⁷¹ as serious non-political crimes. However, it should be noted that international law provides no definition for ‘terrorism,’ and the labeling of one group as ‘terrorists’ and another as ‘freedom fighters’ is an inherently political judgment.¹⁷² In addition to Article 1F, a Convention refugee will lose the protection of the refugee regime if they fall under the Article 33(2) exception to the prohibition on *non-refoulement*, which states:

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, ...¹⁷³

¶166 In and of themselves, these provisions are not problematic. Geoff Gilbert said these provisions recognize that “there is an intrinsic link ‘between ideas of humanity, equity and the concept of refuge,’”¹⁷⁴ and it would run counter to this link to protect those who have acted contrary to such ideas. Furthermore, the drafters of the Convention wished to ensure that those guilty of grave crimes did not escape

¹⁶⁸ And as a consequence, *non-refoulement* protection under Article 33 of the Convention is unavailable.

¹⁶⁹ *1951 Convention Relating to the Status of Refugees*, art. 1(F).

¹⁷⁰ For example, Article 1F(c) has been used to exclude those found to have been involved with the LTTE in Sri Lanka. *See Refugee Appeal No. 1248/93 Re: TP 24-38* (July 31, 1995) (decision of the New Zealand Refugee Status Appeals Authority).

¹⁷¹ *See, e.g.,* Walter Kalin & Jorg Kunzli, *Article 1F(b): Freedom Fighters, Terrorists, and the Notion of Serious Non-Political Crimes*, 12 INT’L J. REFUGEE L. 46 (Supp. 2000).

¹⁷² Geoff Gilbert, *Current Issues in the Application of the Exclusion Clauses*, in *REFUGEE PROTECTION IN INTERNATIONAL LAW* 425, 440 (E Feller, V. Turk and F. Nicholson eds., 2003).

¹⁷³ *1951 Convention Relating to the Status of Refugees*, art. 33(2).

¹⁷⁴ Gilbert, *supra* note at 189, at 428.

prosecution.¹⁷⁵ However, problems arise in the application, or rather the over-application, of the exclusion clauses for political reasons. It has long been accepted that, given the gravity of the consequences of excluding someone from the protection of the Refugee Convention,¹⁷⁶ the exclusion clauses should be interpreted narrowly and applied carefully.

¶67 While the UNHCR also considers that those guilty of “heinous acts” should not be permitted to “abuse the institution of asylum in order to avoid being held legally accountable for their acts,”¹⁷⁷ it has stated very clearly that it is “important to apply [the exclusion clauses] with great caution,” and that they should “always be interpreted in a restrictive manner.”¹⁷⁸ However, since September 11, 2001, and the initiation of an international fight against terrorism, the international community has overtly encouraged the heavy use of the exclusion clauses as a means of preventing terrorism. The consequences of this practice on the refugee regime are already being witnessed, not just in the United States as one might expect,¹⁷⁹ but also at the international level. Geoff Gilbert recently stated with concern:

The so-called war against terrorism has targeted a group of mainly innocent bystanders, applicants for refugee status. The next few years will see developments at the international, regional and domestic level, through changes in either law or policy, which restrict refugee rights in the name of security.¹⁸⁰

THE AFTERMATH OF 9/11: THE SECURITY COUNCIL AND ANTI-TERRORISM

¶68 A particularly stark example of this international encouragement of the use of the exclusion clauses is the actions of the UN Security Council in the aftermath of September 11, 2001. On September 28, 2001, the Security Council passed Resolution 1373.¹⁸¹ This resolution, which reaffirmed the “need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace

¹⁷⁵ *Id.*

¹⁷⁶ The consideration of exclusion only takes place if and when a person has been found to have a well-founded fear of being persecuted for a Convention reason. Thus, if excluded, this person faces the risk of being returned to persecution. The UNHCR has been careful to note that, while a state is not permitted to grant asylum to an excluded person, there is no obligation upon the state to expel that person. *See, e.g., Background Note On The Application Of The Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees*, 15 INT’L J. REFUGEE L. 502, 508 (2003).

¹⁷⁷ *Id.* See also, UNHCR – The UN Refugee Agency: *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees*, 15 INT’L J. REF. L. 492, 493 (2003), for a more concise account of the application of Article 1F,

¹⁷⁸ UNHCR, *supra* note 194, at 493.

¹⁷⁹ Given the events of 11 September 2005. *See, e.g.,* Lori Adams, *Refugee Rights in the US Scaled Back by Recent Anti-terrorism Legislation: Are We Violating the United Nations Refugee Convention?*, 19 N.Y. L. SCH. J. HUM. RTS. 807 (2003).

¹⁸⁰ Geoff Gilbert, *Editorial: Protection After September 11th*, 15 INT’L J. REFUGEE L. 1, 4 (2003).

¹⁸¹ S.C. Res. 1373, U.N. Doc. S/RES/1373 (2001).

and security caused by terrorist acts,”¹⁸² created a strong but undesirable link between ‘refugee’ and ‘terrorist’. The particular damage was done by Articles 3(f) and (g), which called upon all states to:

Take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts;

Ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists;¹⁸³

It is on the basis of this resolution that states have moved so readily to equate refugee with terrorist. Resolution 1373 gave the ultimate legal basis for states to heavily and unreservedly apply the exclusion clauses by directly identifying asylum-seekers as possible “perpetrators, organizers or facilitators of terrorist acts.”

¶69 Resolution 1373, and the work of the Counter-Terrorism Committee (CTC) created by that resolution,¹⁸⁴ encouraged the Office of the High Commissioner for Human Rights to offer guidance to the Chair of the CTC on the impact anti-terrorism measures could have on human rights.¹⁸⁵ However, the Resolution also included a note alluding to the premise that “human rights must be safeguarded in the struggle against terrorism.”¹⁸⁶ The OHCHR required that the CTC, when reviewing a state’s compliance with Resolution 1373, verify that the state’s asylum procedures remained intact, that procedures were in place to ensure that extradition requests for suspected terrorists were not politically motivated, and that, even when excluded, asylum-seekers were not returned to torture.¹⁸⁷

¶70 Whether or not such notes of guidance will have an affect on the practice of states remains to be seen. However, what needs to be borne in mind by states when considering how to deal with asylum-seekers in the context of national security is that, as the United Kingdom Immigration Appeal Tribunal stated in *Gurung v Secretary of State for the Home Department*,¹⁸⁸ the exclusion clauses are not to be

¹⁸² *Id.* at Preamble.

¹⁸³ *Id.* art. 3(f)-(g) (emphasis added).

¹⁸⁴ The CTC is made up of all 15 members of the Security Council and its mandate is to monitor the implementation of Resolution 1373. See S.C. Res. 1373, *supra* note 200, art. 6.

¹⁸⁵ Office of the High Commissioner for Human Rights, *Note to the Chair of the Counter-Terrorism Committee: A Human Rights Perspective On Counter-Terrorist Measures* (Sept. 23, 2002), at <http://www.un.org/Docs/sc/committees/1373/ohchr1.htm>.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ [2002] UKIAT 04870, 15 October 2002, (2002) 14 *International Journal of Refugee law* 382.

equated with terrorism. Decision-makers in the post-9/11 environment decided that the IAT, “should not adopt an exclusion culture”.¹⁸⁹

¶71 Interestingly, one of the consequences of the post-colonial era has been the emergence of countless groups of people fighting for self-determination. As noted above, the boundary between a ‘terrorist’ and a ‘freedom fighter’ is extremely unclear and necessarily subjective. To the government of the United Kingdom, the IRA was, and still is, a terrorist organization. However, to many in Ireland and abroad, in sympathetic nations such as the United States, the IRA represents the armed struggle against an old colonial power and its members were fighting for the self-determination of the people of the island of Ireland.¹⁹⁰ It could be argued that terrorism is in fact a product of imperialism, or colonialism to be more precise, and that the war against terrorism is thus reflective of the perpetual nature of imperialism. The fact that the campaign against terrorism is serving to further restrict the potential of the international refugee regime to in some way account for the damage done during the colonial period is the final blow in a history of imperialistic assaults on the South.

CONCLUSION

¶72 It is acknowledged that refugee flows, and the situations that cause them, are created and perpetuated by more than just imperialism. However, this article has attempted to explain that imperialism has been, and continues to be, a significant contributing factor to the concentration of post-World War II refugee flows occurring in the South. Colonialism, and its creation, the post-colonial doomed state, have been the root cause of a large number of refugee-producing situations. Since the 1960s, the number of displaced persons has increased exponentially. However, the capacity of the international refugee regime has not kept pace. It has been hampered by a growing unwillingness on the part of its founders to maintain their commitment in a climate of mass migration, economic crisis, and fear of terrorism. Each restriction discussed in this article has revealed many of the imperialistic attitudes of the North in regard to the refugee crisis.

¶73 It is unsurprising that the states of the South have become less committed to the protection of refugees. The direct effect of a growing unwillingness of the North to recognize its responsibility to address

¹⁸⁹ *Id.* at ¶ 73.

the refugee burden and facilitate its equitable distribution has been that poor states of the South are unable and unwilling to accept that burden. Inter-governmental and non-governmental organizations have been forced to step in where states will not. The future of the refugee crisis lies not in the hands of sovereign governments, but in the hands of a relatively small number of individual organizations dedicated to the protection of those fleeing crisis.

¶74 Until the present, dramatic inequity between North and South – perpetuated by the forces of globalization – is somewhat redressed, the refugee regime will continue to be ineffective. While there is such a great divide between these regions, containment will continue to take precedence over protection.

¶75 If the North remains unwilling to share the burden of the refugee crisis that it played no small part in creating, then potential host states in the states in the South will have no choice but to ignore the millions of cries for help, emanating from their stricken neighbors. In other words, while the North closes its borders to the refugee burden, the South will have no choice but to do the same. In the meantime, the UNHCR and other international organizations dedicated to the refugee cause will need to keep working within the countries of origin, at the sources of refugee flows, in order to provide some relief to those who would otherwise have fled to the protection of the international refugee regime.

¶76 Kofi Annan concluded his address to the UNHCR Executive Committee in October 2005 by stating:

With the commitment to strengthening the humanitarian system comes the hope that the world will guarantee a swifter and more predictable response to the victims of war and natural calamities.

But let us acknowledge that humanitarian agencies alone, vital as their work may be, will not resolve crises unless States uphold their responsibilities, address root causes of displacement, and do the political work necessary.¹⁹¹

Unfortunately, the answer to the question posed at the beginning of this article, whether the refugee regime as it stands today is in fact serving to protect or to control refugees, must be that it is undoubtedly serving to control or, more precisely, to *contain*. The refugee is faced with an uncertain future indeed. Should he remain in his country of first asylum, he will most likely be repatriated against his will. Should he manage to travel further afield, he will face assumptions, suspicions and limitations on his rights as a human being

¹⁹⁰ See, e.g., FACETS OF THE CONFLICT IN NORTHERN IRELAND (Seamus Dunn ed., 1995).

that will in all probability lead him to consider returning to his country of origin well before it is safe to do so.

¶77 Refugee law constitutes an extremely narrow exception to the right of states to control immigration.¹⁹² The success of this exception relies heavily on the humane interpretation of that law.¹⁹³ However, the current state of the international refugee regime leaves one feeling that the continuing application of such an interpretation in countries of asylum is unlikely. Of course, there is still a willingness on the part of some states to protect those who are at risk of being persecuted in their country of origin and, as has been noted by Kofi Annan,¹⁹⁴ there is some indication from the United Nations that the current state of the international refugee regime is not tenable. One fact is certain though, while the flow of refugees continues to move in its pre-determined direction from South to North, refugees will continue to suffer from the forces of imperialism.

¹⁹¹ *Address by United Nations Secretary-General Kofi Annan to the Fifty-sixth Session of the Executive Committee of the High Commissioner's Programme*, UNHCR: The UN Refugee Agency, at <http://www.unhcr.org/cgi-bin/texis/vtx/print?tbl=EXCOM&id=43455d812> (Oct. 6, 2005).

¹⁹² Hathaway, *supra* note 24, at 232.

¹⁹³ *Id.*

¹⁹⁴ *Id.*