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THE NEW NAME OF LAWYERS COMMITTEE FOR HUMAN RIGHTS

A Decade of Unrest

Unrecognized Rwandan Refugees in Uganda and
the Future of Refugee Protection in the Great Lakes

A Case Study



The Kibati camp, April 2004

About Us

For the past quarter century, Human Rights First (the new name of Lawyers Committee for Human Rights) has worked in the United States and abroad to create a secure and humane world by advancing justice, human dignity and respect for the rule of law. We support human rights activists who fight for basic freedoms and peaceful change at the local level; protect refugees in flight from persecution and repression; help build a strong international system of justice and accountability; and make sure human rights laws and principles are enforced in the United States and abroad.

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Introduction

Tucked away in the extreme corner of southwestern Uganda just miles from the Tanzanian and Rwandan borders are over a thousand makeshift huts crammed into an area less than two acres in size. This place of rough shelter which local people call “Kibati”¹ has been a temporary home since 2001 to some 7,000 displaced Rwandans and Burundians who have come to Uganda in search of safety from the conflict and political turmoil which has wracked the Great Lakes region during the past decade.

Only the most precarious of protection is available in Kibati, a temporary camp at the edge of the large Nakivale settlement which has housed recognized refugees since 1959. Although the Kibati group has not been forced back across the Ugandan border, no opportunity has been provided to the members of the Kibati group to have their applications for recognition as refugees assessed—a step needed to give them legal status and access to vital international assistance. In the absence of recognition as refugees the thousands of men, women and children of the Kibati group have been left struggling to survive in a harsh legal and humanitarian limbo for much of the past two and a half years.

Now even the system of bare survival with which the Kibati group has been subsisting in Uganda may itself be in jeopardy. As efforts to repatriate Rwandan refugees get underway in Uganda further to a special agreement with the United Nations High Commissioner for Refugees (UNHCR) there is a danger that the Kibati group will once again feel driven to flee, compelled by the fear that they will be forced to return home to persecution.

The reluctance to recognize the group as refugees stems from the belief that the majority of the group previously lived in Tanzania as refugees and had full protection from persecution there. But this presumption that the Kibati group is constituted of “irregular movers” has not been tested on a case by case basis. Those who admit that they spent time in Tanzania say that they fled to Uganda because of fears that they would be forcibly returned to their countries of origin. Although a blanket application of the “irregular mover” designation should not be allowed to deny genuine refugees due protection, the Ugandan government, guided by UNHCR, has not inquired in more detail into such claims for protection. At the same time, Ugandan officials have made imaginative efforts to protect and assist the asylum seekers, despite the legal limbo into which they have been cast.

¹ *Kibati* comes from the words *Ibaati* or *Amabaati*, which in the local language means “corrugated iron sheets.” Few of the rough shelters have such coverings.

Adding to the plight of the group, and to the concerns of the Ugandan government, are the security tensions which the presence of the group has clearly generated amid pressures to identify and render for prosecution those responsible for international crimes. Suspicions that some among the group may have been involved in the Rwandan genocide in 1994 are part of the backdrop to the Kibati group's uncertain status. Refugee law does not permit those who have committed serious crimes to be considered to be refugees. Neither does it allow subversion of the civilian and humanitarian character of asylum by permitting camps to be used as bases to plan further violent attacks. The failure to institute a process which would identify and separate both alleged criminals and those engaged in military activity from the mass of genuine refugees renders the whole population subject to suspicion. There are clear concerns about the nature and character of the Kibati population, settled only 40 miles from the Rwandan border.

The Kibati Group and Refugee Protection in the Great Lakes Region

The Kibati group's search for durable protection in the Great Lakes region is a story of the increasingly difficult questions facing those who flee into exile in Africa—and those charged with protecting them. Many of those who make up the Kibati group were first forced into exile as a result of the horrors of the Rwandan genocide and its aftermath. This extraordinary exodus of refugees, government militias, and rebels set in motion events which engulfed the Great Lakes region in a decade of suffering. Since that time members of the Kibati group have been forced to move between Rwanda, Burundi, Tanzania, the Democratic Republic of Congo (DRC), and Uganda, seeking out pockets of stability amid waves of inter-state and civil war, and hostage to a complex web of political interests and diminishing regional and international commitment to refugee protection.

Although many of those who initially fled the genocide and its aftermath in Rwanda in 1994 have been able to return home, millions more have fled across the borders of the Great Lakes region in the last decade as a result of ongoing conflicts in Burundi, the Democratic Republic of Congo, and Sudan. Even in exile they continue to face violations of their basic rights. Among the challenges faced are those which relate to the very complexity of the roots of their flight. Refugees in the Great Lakes are frequently viewed, for example, not just as passive victims, but as active agents in conflict. Refugee camps are often understood in stark terms as staging posts for those bent on waging war or as shelters where those guilty of serious abuses can hide. The failure to separate out armed elements and criminals from the refugee population has been a source of tension—and conflict—in the region. As states and the international community are hampered in their response to refugees it has also fuelled the spontaneous movement of refugees from one county to another seeking more stable refuge.

Ten years after the Rwanda exodus, in a region which has enjoyed a reputation for providing generous sanctuary, there are now indications that fatigue is setting in. Concerns about the security and economic implications of hosting large numbers of refugees—intensified by the rhetoric of the global war on terror—are generating harsher measures against the displaced. Diminishing international support and a continuing lack of adequate “burden sharing” with hard-pressed states in the region has exacerbated the situation. As refugees and the displaced become easy scapegoats, there are reports of a resurgence of the use of force against refugees, increasing disregard for the voluntary nature of repatriation, and a diminished respect for the

role and authority of the UNHCR. Return home for refugees is being heavily promoted—often prematurely and in a way in which refugees feel they have little choice. Many feel compelled to seek safety across a new border—thus creating a new cycle of displacement and adding to the phenomenon of “irregular movement.” Even the framework of protection itself is arguably under threat as proposals for a radical re-working of both the mechanisms and standards of refugee protection are being mooted both within the region and at the global level

At the same time there are signals that there may be new opportunities to move policy and practice in a positive direction. Conflict as a whole in the region is abating through negotiated peace settlements in the DRC, Burundi, and southern Sudan. New refugee legislation is under consideration and human rights protection efforts at the regional and sub-regional level are improving. Looking to the future, states in the region and their international partners are engaged in preparations for an International Conference on the Great Lakes Region which will focus on an integrated approach to peace, security, and development. The first summit of heads of state is slated for Dar es Salaam in November 2004. As the United Nation’s IRIN news service reported in January 2004, “[t]he year 2004 is set to be a momentous one in the Great Lakes Region in terms of peace prospects, if the achievements made in 2003 are anything to go by.”²

At a time when refugee protection policy and practice is at a crossroads in the region, the way in which governments, international organizations, and local communities have by turns faltered and succeeded in responding to the plight of the Kibati group presents critical issues for reflection.

² U.N. Integrated Region Information Networks (IRIN), “GREAT LAKES, Year Ender: Prospects for Peace Increase as Region Moves into 2004,” January 9, 2004.

Part I

Origins of the Kibati Group

The Kibati camp is situated at the edge of an 86 square mile block of government-owned land, which has been “gazetted,” or dedicated, as a refugee settlement for almost half a century—the Nakivale settlement in the Mbarara district of Uganda. The Nakivale camp was first founded as a temporary shelter in 1959 for thousands of Rwandan Tutsis escaping a mainly Hutu revolt in Rwanda which scattered thousands to Uganda, Burundi, Tanzania, and Zaire (now the Democratic Republic of Congo). Since then, the fate of the Nakivale camp and the refugees who live there have remained closely bound with political developments in the region, and most particularly Rwanda. Many of the key members of the current Rwandan government and army are former refugees who were born and raised in the Nakivale settlement but who re-entered Rwanda with the Rwandan Patriotic Front (RPF) during the genocide. After the RPF established dominance in July 1994 thousands more Tutsi refugees who had lived in Nakivale for decades also returned to Rwanda. But while Rwandan Tutsi refugees were on their way home, over two million Rwandan Hutus were streaming the other way, fleeing not only across the border into Uganda but into countries throughout Central and Southern Africa.³

A decade later, although the majority of Rwandan refugees across the region—both Hutu and Tutsi—have returned, Nakivale is still home to approximately 15,000 Rwandan refugees and smaller numbers of Burundians, Congolese, Somalis and Sudanese. New refugees are also arriving every day. As Burundi’s civil war continues to seethe and the situation remains politically uncertain in some parts of Rwanda, a small but steady stream of Burundian and Rwandan refugees are trickling into southwestern Uganda.

Reception and Protection of Refugees in Uganda

Uganda has a generous history of refugee protection despite intermittent policy shifts occasioned by declared political and security necessities. The first refugees formally to be received by Uganda were a group of Polish refugees who were brought to Uganda by the British Colonial government in the 1940s. At the end of 2003, the UNHCR estimated that there were

³ In 1995, UNHCR estimated that there were more than two million Rwandan refugees spread out across the region, including 1,252,800 in Zaire, 626,000 in Tanzania, 287,000 in Burundi and 97,000 in Uganda. “Annex II: Statistical Tables,” in UNHCR, *The State of the World's Refugees: in search of solutions*, (Oxford: Oxford University Press, 1995).

approximately 206,000 refugees in Uganda, including 160,000 from Sudan, 32,000 from the DRC and 12,000 from Rwanda.⁴ Other sources put the number of Rwanda refugees much higher. The U.S. Committee for Refugees estimates that the population was 20,000 at the end of 2002⁵ and the Refugee Law Project in Uganda has estimated the number to be 25,000.⁶ Uganda also has a huge population of internally displaced persons with over 1.2 million living in camps and settlements in the north of the country.⁷

Uganda acceded to the 1951 U.N. Refugee Convention in 1976 and the 1969 Organization of African Unity (OAU) Refugee Convention in 1987.⁸ Although domestic implementing legislation has not yet been passed, a procedure for the examination of applications for asylum is in place.⁹ Asylum seekers who arrive in Uganda and identify themselves to the Uganda authorities have their applications for protection assessed by the Ugandan Refugee Eligibility Committee (REC). If recognized as refugees they are generally transferred to camps where they are granted land and provided with humanitarian assistance by the Ugandan government and the international community.¹⁰

First Kibati Group Arrivals

It was in September 2001 that a group of Rwandans and Burundians arrived in Uganda who may be seen as the forerunners of the current Kibati caseload. In line with the usual procedure the majority of the group were assessed and recognized as refugees by the REC. During interviews, however, a number of those arriving disclosed that they had not come directly from their countries of origin. This group told Ugandan officials that they had first sought protection as refugees in Tanzania when they left Rwanda and Burundi. After a period of time, however, they had begun to feel unsafe. Anti-refugee statements by Tanzanian government officials urging refugees to “go home” were on the increase, refugee camps were threatened with closure, and an organized repatriation program for Rwandan refugees was reportedly imminent.

The members of the group particularly expressed fears that if they had stayed in Tanzania, or were returned there, they would suffer a repeat of the violence and coercion to which Rwandan refugees had been subjected by Tanzania during a repatriation operation in December 1996. On December 5, 1996 the UNHCR and the Tanzanian government had issued a joint statement

4 UNHCR, *Global Appeal 2004*, December 2003.

5 U.S. Committee for Refugees, *World Refugee Survey 2003*, 2003.

6 Refugee Law Project, “Ongoing Repatriation of Rwandese Refugees in Rwanda,” December 1, 2003, available online at <http://www.refugeelawproject.org/rwanda%20update1.doc>. UNCHR itself has acknowledged that up to 25,000 Rwandans may be subject to its repatriation program. See “Return to Rwanda from DRC, Uganda and throughout Africa,” in *Voluntary Repatriation in the Great Lakes and Central African Region*, March 2004.

7 See World Food Program figures quoted in IRIN, “UGANDA: More than a Million Displaced,” September 29, 2003.

8 See the 1951 United Nations Convention relating to the Status of Refugees, 189 U.N.T.S. 150, *entered into force* April 22, 1954 [hereinafter “the 1951 U.N. Convention”] and the 1969 Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 U.N.T.S. 45, *entered into force* June 20, 1974, [hereinafter the “1969 OAU Convention”], and UNHCR, “States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol,” February 1, 2004, available online at www.unhcr.ch.

9 See Zachary Lomo, Angela Naggaga and Lucy Hovil, “The Phenomenon of Forced Migration in Uganda: An Overview of Policy and Practice in Historical Context,” Refugee Law Project, Working Paper No. 1, available online at <http://www.refugeelawproject.org/working%20papers/RLP%20WP8.pdf>, at p. 9-10.

10 In December 2003 a new Refugees Bill was introduced in the Ugandan Parliament. “Refugees Bill 2003,” Bill No. 20 printed in Bills Supplement No. 8 to the Uganda Gazette No. 58, Vol. XCVI, November 21, 2003.

declaring Rwanda “safe for return” and announcing December 31 as the date by which the almost 600,000 Rwandan refugees in the country were expected to go home. When tens of thousands of refugees began to march out from the camps and deeper into Tanzania to avoid the repatriation effort, the army got involved. As a result, approximately 500,000 Rwandan refugees were forcibly repatriated with UNHCR formally supporting the effort. An estimated 50,000 managed to remain in the country, either by dispersing into the countryside, or by posing as Burundian refugees; a couple thousand crossed over into Uganda. In an operation which had resulted in the forced return of thousands of refugees and in deaths and “disappearance,” the protection role of UNHCR and its ability to promote ensure safe and dignified and *voluntary* return had been severely compromised.¹¹

The asylum seekers freshly arrived in Uganda from Tanzania told officials they were convinced that if returned to Tanzania they would either be forced back home against their will in an echo of the 1996 repatriation operation or face harassment and violence from both government and host communities there. UNHCR would, they felt, have no power to intervene. Having consulted with UNHCR, however, the REC decided that, despite their fears, the group would be ineligible for refugee status in Uganda on the grounds that the consisted of “irregular movers.” It was determined that the group had already been provided with sufficient access to “protection elsewhere” in Tanzania and did not need duplicate protection in Uganda. The refugee status applications of these 20 to 30 “honest” interviewees were thus rejected and the group told that if they wished to access international protection and assistance they should return to Tanzania. Despite the decision, however, the Ugandan Government took no concrete steps to force the group back across the border. They were allowed to remain in Uganda encamped informally at the fringe of the official refugee settlement in Nakivale, forming the seed of what was to become the current Kibati group.¹²

The Kibati Group Begins to Grow

During the next months Rwandans and Burundians continued to arrive into Uganda seeking asylum and two new verification operations were carried out by the REC. In February 2002 approximately 2,870 of the new arrivals were accepted as refugees and settled in the Nakivale refugee settlement. The following month, an additional 1,053 were similarly verified. Although these protection seekers were granted refugee status on the basis that they had arrived directly from either Rwanda or Burundi, it was generally understood that a majority of them had been formally recognized as refugees, or at least had been resident (whether having identified themselves to the authorities or not), in Tanzania prior to their arrival to Uganda. There appeared to be an unspoken policy on the part of officials questioning the new arrivals to accept assertions that the refugees had just recently arrived from Rwanda and Burundi at face value with little further inquiry—whether on the basis of compassion or mere pragmatism.

As the numbers of those arriving from across the border with Tanzania grew, it became impossible to continue to ignore the fact that the majority of those arriving had spent time

¹¹ For a description of the operation, see Beth Elise Whitaker, “Changing Priorities in Refugee Protection: The Rwandan Repatriation from Tanzania,” UNHCR New Issues in Refugee Research, Working Paper No. 53, February 2002.

¹² It is unclear whether members of this initial rejected caseload are still in Kibati. Some are assumed to have joined friends or relatives elsewhere in Uganda, some even on the grounds of “family reunification.”

either as refugees or otherwise in Tanzania. Concerns began to grow on the part of the Ugandan authorities and UNHCR that continued assessment and/or definitive recognition of the Tanzanian-origin caseload as refugees in Uganda would act as a pull factor for the tens of thousands of refugees and other Rwandan and Burundian nationals seeking refuge in an increasingly unwelcoming Tanzania. The numbers of Rwandans in Tanzania coming forward voluntarily to return home was dropping—an official total of only 156 returns were recorded by UNHCR in April 2002.¹³ As the Tanzania government grew frustrated with the pace of return, humanitarian assistance was cut and camps temporarily closed in an effort to encourage an exodus home. By May 2002 it was reported that “rumors about a possible forced repatriation” echoing the 1996 experience had begun circulating among the refugees.¹⁴

Across the border in Uganda, the response of the authorities to the rising numbers of new arrivals presumed to be from Tanzania was to put verification missions on hold. No further assessments of status were carried out by the REC. Newly arriving asylum seekers were directed to join the rejected asylum seekers in the Kibati camp and to await a decision from the authorities on their fate. The shift in practice by the government has been described by one senior official as reflecting an assessment that if decisions on status were delayed the population would just “get tired” and either return to Tanzania or Rwanda.¹⁵ Although some refugees did leave the camp, overall the numbers of the Kibati group continued to climb.

The Question of Exclusion

As the Kibati camp expanded it was not just the question of irregular movement which was preoccupying the authorities. Complicating the response was a suspicion that there were individuals among group who might have been involved in the genocide in 1994. This presented not just challenges of security, but of law. Under international law individuals who have committed serious crimes (including crimes against humanity and genocide) cannot be considered refugees. States have a legal obligation to identify and separate them out from the refugee group (screening and separation). Although such persons continue to be entitled to protection of their human rights, they do not qualify to be recognized with the special status of refugee because of the egregious nature of their past actions.

The mechanism of international refugee law which gives effect to these obligations is called exclusion.¹⁶ In many ways exclusion can be viewed as a permanent valve which mediates between the obligation to protect those threatened with serious human rights violations (refugees) and the goal of combating the impunity of the authors of such violations. Once exclusion is found to be relevant in the case of a particular asylum seeker, however, a chain of state obligations are triggered. In respect of some of the most serious of crimes, for example, there is a strict obligation to either try or extradite individuals. Such obligations present challenges which are not only practically complex, but highly charged politically as well.

¹³ See IRIN, “RWANDA-TANZANIA: Focus on Rwandan Refugees in Tanzania,” May 9, 2003.

¹⁴ Ibid.

¹⁵ Interview with Ugandan government official, April 2004.

¹⁶ The clauses governing exclusion can be found in the 1951 U.N. Convention, article 1F and the 1969 OAU Convention, article I(5).

In the context of already tense Uganda-Rwanda relations, the question of how to deal with those who might be identified as genocide suspects in the Rwandan refugee population was going to be a highly complex matter. The Ugandan authorities kept a close eye on the Kibati group. Ten years after the Rwandan exodus there was a sense that many Rwandans claiming to be refugees who persisted in remaining outside Rwanda were attempting to avoid not *persecution* but *prosecution*—using the cloak of asylum to avoid being held accountable for their crimes. The fact that the numbers of the Kibati group had been growing at a time when the Rwandan refugee population in Tanzania had been subject to scrutiny in a screening operation commenced in January 2002 raised particular concerns.¹⁷ Among the results of the screening was the arrest and rendition to the International Criminal Tribunal for Rwanda (ICTR) of Victor Rutanganira, an ICTR indictee found in a Kigoma refugee camp.¹⁸ By May 2002, although it was reported that the Tanzanian government had screened “in” more than 99 percent of cases, the Rwandan government continued to insist that approximately one hundred additional key actors in the genocide remained in Tanzania. There was speculation that some who had been residing in the camps might even have fled to Uganda and Zambia prior to the screening, fearing imminent identification.¹⁹

The fact that the Ugandan authorities did not carry out any examination of the arriving asylum seekers left the Kibati group shrouded in suspicion and set in motion tensions around the security and identity of the group which have to date not been resolved. The question of exclusion and whether it applies to any of the members of the Kibati group is a matter which echoes throughout every aspect of the discussion in this report, from the quality of physical security available to the group to measures to create an environment in Rwanda more conducive to refugee return.

Announcement of the Tanzanian Rwandan Refugee Repatriation Operation 2002-2003

In September 2002 the governments of Rwanda and Tanzania and the UNHCR formally agreed a plan for the repatriation of Rwandan refugees from Tanzania, and UNHCR’s policy shifted from *facilitating* return to actively *promoting* it. In a Joint Communiqué issued on September 27, 2002 in Geneva the governments of Rwanda and Tanzania, and UNHCR declared that “a formal voluntary repatriation operation of Rwandese refugees” would be launched in mid-November 2002 and that the parties would “endeavour to complete [the voluntary repatriation] by the end of December 2002.”²⁰

The tripartite agreement which set out the framework for the repatriation program emphasized that the principle of *voluntary* return would be central to the operation. It was also confirmed that Tanzania would continue to “provide adequate mechanisms for processing individual applications for refugee status from Rwandese nationals.”²¹ This was clear recognition that

17 IRIN, “RWANDA-TANZANIA: Security Concerns for Rwandan Refugees,” January 23, 2002.

18 Internews, “ICTR Genocide Suspect Arrested in Tanzanian Refugee Camp,” March 4, 2002.

19 IRIN, “IRIN Focus on Rwandan Refugees in Tanzania,” May 9, 2002.

20 See “Final Communiqué at the Conclusion of the Informal Consultations between the Governments of the Republic of Tanzania, the Republic of Rwanda and UNHCR on the Situation of Rwandese Refugees in Tanzania, Geneva 26-27 September 2002,” on file with Human Rights First.

21 Ibid.

Rwandan nationals were expected to continue to present new claims for protection and that Rwanda might not be safe for all. At the same time, however, no explicit provisions were included in the agreement for how to deal with those who were already refugees in Tanzania and did not wish to return. The agreement simply provided that “upon completion of the voluntary repatriation exercise” a plan of action would be agreed “to undertake individual screening of the residual caseload.”²² Certainly the implication of the terms of the agreement was that Rwandan refugees who did not wish to return home would be permitted to remain in Tanzania, pending further review of their cases. Nervous refugees in Tanzania, however, heard a different message.

Cessation of Refugee Status

The September communiqué indicated that both the Rwandan and Tanzanian governments had asked UNHCR to consider the application of the cessation clause—which allows for the withdrawal of refugee status—to Rwandan refugees.²³ The inclusion of the question of cessation in the tripartite agreement was one element which seemed to fuel increasingly strident assertions by the Tanzanian authorities in the latter half of 2002 that there would be no real choice for Rwandan refugees to stay in Tanzania after the deadline—even for those refugees who considered that it was still impossible to go home.

Cessation of refugee status is a mechanism within refugee law which involves a determination that a refugee is no longer in need of international protection.²⁴ There are a variety of circumstances in which a refugee’s status may be declared to have ceased, including when “the circumstances in connection with which he [or she] has been recognized as a refugee have ceased to exist.”²⁵ Cessation can be applied on an individual basis, or, as is done more frequently, to a group of refugees sharing similar reasons for their original flight. Once the cessation clause is applied to a particular refugee or group of refugees they cease to be refugees and may be returned, even involuntarily, to their home country. It is clear, however, that even if cessation is declared generally for a particular group of refugees, individuals within the group should be afforded the opportunity to make a case that the particular circumstances of their cases merit continued international protection. Tanzanian government officials seemed to imply, however, that for individual Rwandan refugees in Tanzania this would not be the case.

Tensions Rise

In addition to the inclusion of the concept of cessation in the agreement, and despite the explicit terms of the agreement, it was the preamble to the tripartite agreement which set the political tone in which preparations for the repatriation operation ensued. The preamble acknowledged

22 Ibid.

23 In particular UNHCR undertook to produce a position paper on the application of the cessation clause to the Rwandan caseload in 2003. Indications from UNHCR in April 2004 are that the paper will issue in October 2004.

24 Cessation of refugee status is provided for in both the 1951 U.N. Convention and the 1969 OAU Convention—although the basis upon which a declaration of cessation can be made is described in broader terms in the latter Convention. The provisions dealing with cessation can be found in article 1C of the 1951 U.N. Convention and article I(4) of the 1969 OAU Convention.. For a more detailed discussion of the application of the cessation clauses, see Human Rights First, “New UNHCR Guidelines on the Cessation Clauses: An information note for African NGOs,” June 2003, available online at http://www.humanrightsfirst.org/intl_refugees/law_and_policy/Cessation.htm.

25 1951 U.N. Convention, art 1C(5).

unambiguously “the wish expressed by both the Governments of the United Republic of Tanzania and the Republic of Rwanda to see the refugees repatriated voluntarily as expeditiously as feasible.”²⁶ Media reports surrounding the agreement and governmental statements strongly emphasized this perspective. On October 10, 2002 *Asia Intelligence Wire* quoted Tanzanian Minister for Home Affairs Mohammed Seif Khattib as saying that all 22,000 Rwandan refugees in the country would be required to repatriate by the end of the year.²⁷ Three refugee camps would be closed—Lukole A and B and the Mbuba reception center. In addition, and more ominously, anyone refusing to return would be “interrogated and steps taken against them.” An October 14 article in the *East African* declared that Burundian refugees would also be swept up in the repatriation drive: the article cited government insistence that 540,000 Burundi refugees would be “repatriated to their country immediately.”²⁸

Another event that seemed to have added greatly to refugee concerns was a meeting in the first week of December 2002 between President Paul Kagame of Rwanda and President Benjamin Mkapa of Tanzania in Dar es Salaam. Although officially described as a summit focusing on “regional security issues,” members of the Kibati group with whom Human Rights First spoke expressed fears the meeting would open the way to the involvement of Rwandan troops in a forced repatriation exercise. Many strongly believed that Rwandan troops had been involved in forcing refugees to repatriate in 1996. The meeting itself seemed an echo of a meeting between a Rwandan envoy and the Tanzanian authorities in Dar es Salaam on November 21, 1996 just weeks before the 1996 repatriation operation began.

The result of the rising level of repatriation rhetoric was panic among many of the refugees—and an outflow into other countries in the region. Thousands of Rwandan refugees in Tanzania began to make plans to leave in advance of the December 31 deadline, fleeing towards Kenya, Malawi, Mozambique, Zambia, and Zimbabwe in the last months of 2002 and early 2003.²⁹ Meanwhile in Uganda approximately 25 arrivals were being officially registered every week at the Kibati camp, with 3,040 arrivals recorded by December 12, 2002. New arrivals also began to appear in other parts of Uganda. On December 14, for example, a Ugandan daily newspaper, the *New Vision*, reported that “68 Hutu refugees from Rwanda [were] stranded at Rakai police station without food and other essentials.”³⁰ Human Rights First met with a family with two children who were surviving on the charity of the police officers at Kalisizo police station near Rakai. The family had arrived at the Mutukula border post, fleeing camps in Tanzania. Human Rights First also visited smaller spontaneously constituted camps on the Tanzanian border, in addition to individual groups of asylum seekers who were “being kept” at police stations within in Masaka and Rakai districts.³¹

26 See “Final Communiqué at the Conclusion of the Informal Consultations between the Governments of the Republic of Tanzania, the Republic of Rwanda and UNHCR on the Situation of Rwandese Refugees in Tanzania, Geneva 26-27 September 2002,” on file with Human Rights First.

27 *Asia Intelligence Wire*, “All 22,000 Rwandan Refugees in Tanzania Set to Return Home by Year End,” October 10, 2002.

28 Faustine Rwambali and Mike Mande, “Dar Wants Refugees out by December 31,” *East African*, October 14, 2002.

29 In Malawi alone, for example, up to 750 Rwandans were arriving weekly during December 2002 in an influx directly attributed to the Tanzanian repatriation deadline. See UNHCR, Monthly Update on operations in Africa, December 2002, Part II.

30 See “Hutu Refugees Stranded in Rakai,” *New Vision*, December 14, 2003.

31 Although these persons were not formally detained, they remained under the control of the local police for the purposes of protection and assistance.

The Deadline Approaches

By December 18, 2002, a spokesperson for UNHCR in Tanzania was telling Human Rights First that over 40,000 Rwandans had returned home under the terms of the repatriation agreement and that of the approximately 4,000 refugees left in Tanzania, 2,000 were expected to make requests to stay in exile. The spokesperson confirmed the statements of newly arrived members of the Kibati group that the conduct of “village sweeps” by the Tanzania authorities in November and December had been intensifying. Round-ups, she said, were being regularly carried out to identify Rwandan refugees and nationals residing outside the camps. Those discovered during the round-ups were being transferred to Mwisu camp where UNHCR was assisting with screening for protection needs.

As the Tanzanian repatriation deadline drew near, Ugandan officials on the ground began to worry that even larger numbers of refugees would move across the border, triggering a humanitarian emergency. The Nakivale Camp Commandant, local police, and other officials alerted the Office of the Prime Minister and UNHCR and the matter was raised at periodic inter-agency meetings. While no particular humanitarian contingency plans for a Tanzanian influx were put in place, the standing contingency plan for refugee inflows foresaw Nakivale as a collection point.

What the political response would be from the Ugandan capital in the event of a large inflow was uncertain. During December 2002 all local officials who spoke to Human Rights First insisted that they would not prevent refugees from crossing the border unless contrary orders were received from the central government. There were conflicting indications, however, about how the Ugandan government would respond. On December 21, 2002, Ugandan Minister of State for Disaster Preparedness and Refugees Christine Amongin Aporu Akol stated publically that Uganda would not accept Rwandan refugees who were leaving Tanzania. “[U]nder our guidelines” she said, “we should not accept these people [Rwandan refugees], because they have asylum protection from Tanzania.”³² At the same time, Ugandan President Yoweri Museveni was making it clear at the highest level of government that those seeking refuge were to be protected irrespective of where and how they came to Uganda.³³ At a minimum it appeared that the Ugandan authorities had agreed that in the event of a major inflow from Tanzania, immediate pushback would not occur.

Aftermath of the 2002/03 Tanzanian Rwandan Refugee Repatriation

In the final days of 2002 the expected volume of outflow of Rwandan refugees into Uganda did not occur. Whether it was the uncertain reception which was being experienced by the Kibati group in Uganda, coupled with the discouraging statements of the ministry, or other factors which discouraged those who might have contemplated fleeing to Uganda is unclear. Certainly

³² IRIN, “GREAT LAKES: Uganda Says No to Rwandan Refugees from Tanzania,” December 19, 2002.

³³ Interview with Ugandan government official, January 2004.

serious questions remained regarding the voluntary nature of the repatriation from Tanzania—despite the principled stance of the tripartite agreement and the clear intention of UNHCR.³⁴

Many Rwandan refugees were making their own arrangements to avoid being caught up in the voluntary repatriation program. In the first months of 2003 thousands of Rwandans and Burundians began to appear in other countries of Central and Southern Africa. In February 2003, 410 Rwandan and Burundian refugees were reported to have arrived in Namibia, for example, from camps in Tanzania and the Democratic Republic of Congo.³⁵ In Uganda, although no dramatic leap in the numbers of new arrivals occurred in the immediate aftermath of the Tanzanian repatriation deadline, the numbers of arriving refugees did not diminish. The perception on the ground was that significant inflows were being experienced. In January 2003 newspaper reports claimed that camps in western Uganda were “overwhelmed.”³⁶ UNHCR continued to insist, however, that the new arrivals should not benefit from recognition as refugees: “irregular movers who have previously found protection in Tanzania will not be provided with assistance or international protection by the office of UNHCR in Uganda.”³⁷ By the end of August 2003, when Human Rights First visited the Nakivale Police post, almost 7,000 asylum seekers had been officially registered in the Kibati camp.

On the Tanzanian side the repatriation was declared a success, with UNHCR announcing in January 2003 that only 100 Rwandan refugees remained in the camps, with another 50 in various prisons in the Kagera region.³⁸ Subsequently, however, an additional 3,000 Rwandan refugees “stepped forward” to request repatriation. It is assumed that many of them were individuals who had either declared themselves previously to be Burundian nationals and were now embracing their true origins, or had moved into Tanzanian villages to self-settle outside the formal camp structures at the time of the 1996 repatriation.³⁹ In February 2003 a Rwandan government delegation visited Tanzania to encourage those remaining to repatriate. The Tanzanian Home Affairs Minister Ramadhani Mapuri declared that within “two weeks, we will have the liberty to lift refugee status.”⁴⁰ By March 2003 UNHCR reported that about 2,600 Rwandan refugees remained in Tanzania.⁴¹

At the same time, as contradictory statements issued from government and local officials, much confusion reigned about the future for the remaining Rwandan refugees in Tanzania. In March 2003, for example, despite statements by local officials that Mkugwa camp in the Kibondo District in western Tanzania would close by April 1, 2003, refugees were eventually told it would

34 Despite the widespread concern, few independent assessments of the operation were carried out. See U.S. Committee for Refugees, “Repatriation of Rwandan Refugees Living in Tanzania,” January 10, 2003, available online at http://www.refugees.org/news/press_releases/2003/011003.cfm.

35 IRIN, “Rwandan Refugees Claim Increased Harassment,” February 6, 2003.

36 See “Rwandan Refugees Overwhelm Uganda,” *East African*, January 27, 2003.

37 Statement by Bushra Malik, UNHCR Public Information Officer Uganda, reported in IRIN, “EAST AFRICA: UNHCR’s Position on Rwandan ‘Refugees,’” February 3, 2003.

38 IRIN, “RWANDA-TANZANIA: Voluntary Repatriation of Rwandan Refugees from Tanzania Complete,” January 3, 2003.

39 IRIN, “RWANDA-TANZANIA: Thousands more ‘Rwandans’ Step Forward for Repatriation,” January 9, 2003.

40 IRIN, “RWANDA-TANZANIA: Remaining Rwandan Refugees to Leave ‘within Two Weeks,’” February 19, 2003. See also “RWANDA-TANZANIA: Government Delegation in Tanzania to Sensitize Refugees,” February 21, 2003.

41 UNHCR News Story, “Rwandan Refugees Fear Forced Returns from Tanzania,” March 10, 2003.

be allowed to remain open—Mkugwa camp houses primarily refugees who are partners in mixed marriages from the Democratic Republic of Congo, Rwanda, and Burundi.⁴²

In June 2003 it was announced that the applications of 931 refugees who had formally requested to stay as refugees in Tanzania had been rejected by the Tanzanian government.⁴³ Only seven applications to stay in Tanzania had been accepted, encompassing a total of 30 individuals who were transferred to Mkugwa Camp. In September 2003, it was reported that at least 910 of those whose applications had been refused in June had been expelled. According to UNHCR the group had been offered voluntary repatriation packages but had refused to participate in the scheme. Tanzania's Deputy Home Affairs Minister Chiligati told the IRIN news service that the refugees had been transported to the border by Tanzanian authorities and received by Rwandan officials. There had, he said, been "no resistance to the operation."⁴⁴ UNHCR also announced that it had carried out its own screening of those who had refused to go home: "we have done our own screening of all cases and those who qualify for refugee status will be resettled to a third country, regardless of whether they have been rejected by the government of Tanzania or not." In September 2003 UNHCR advised that only 100 refugees had qualified for continuing protection and had been transferred to the Mkugwa camp.⁴⁵

Despite the official statements regarding the extent of the repatriation exercise and the small numbers of residual cases, it was clear that many thousands of Rwandans still remained in Tanzania, albeit outside the formal camp systems. In October 2003, the Commissioner for the Kagera region Major Tumainiel Kiwelo spoke of his belief that over 20,000 Rwandans were living "illegally" in the area under his jurisdiction. He stated, however, that their repatriation would be a "gradual and voluntary process."⁴⁶ Whatever the divergent views of the size of the remaining Rwandan population, many new refugees continued to arrive in Uganda during 2003.

Announcement of a Rwandan Refugee Repatriation Program for Uganda

In late July 2003 a tripartite agreement was signed between Uganda, Rwanda and UNHCR initiating a repatriation program for the approximately 25,000 Rwandans thought to be in Uganda. The terms of the agreement echoed those which had been the framework for the 2002 Tanzanian repatriation operation and affirmed that no Rwandan refugee would be compelled to return home. Article 2 of the agreement clearly states that the Contracting Parties "fully recognize the essentially voluntary character of the solution of voluntary repatriation [...] no Rwandan refugee will be compelled to return against his or her will."⁴⁷ Article 3, Clause 1 identifies the Government of Uganda as the party which "undertakes to guarantee the voluntary character of the repatriation of Rwandan refugees." In Rwanda, UNHCR is to have "free and unhindered access to all returnees on its territory."⁴⁸

42 See IRIN, "GREAT LAKES: Refugee Camp to Stay Open Despite Threats of Closure," March 13, 2003.

43 See IRIN, "RWANDA-TANZANIA: Government Dismisses Applications of 931 Rwandan Refugees," June 2, 2003.

44 IRIN, "RWANDA-TANZANIA: Government Expels 910 Former Refugees," September 3, 2003.

45 Ibid.

46 IRIN, "RWANDA-TANZANIA, No Forcible Repatriation of Rwandans, Government Says," October 20, 2003.

47 Tripartite Agreement on the Voluntary Repatriation of Rwandan Refugees in Uganda, Kigali, July 23, 2003, on file with Human Rights First.

⁴⁸ Ibid.

Few Rwandan refugees seemed to be eager to return home when the scheme was first announced.⁴⁹ Two months after the tripartite was signed only 32 families (constituting less than 100 people) of the recognized refugees in the Nakivale camp had registered at the camp commandant's office to seek assistance in returning to Rwanda. By late November 2003 that number stood at 200. In January 2004 a Rwandan government delegation of the Joint Repatriation Commission visited the camp to inform potential returnees about the situation in Rwanda. By the end of March 2004 the official number of recognized Rwandan refugees who had returned from Uganda as a whole under the voluntary repatriation program had climbed to 1,000—and an additional 2,000 had signed up to participate in the scheme.⁵⁰

An official at the Nakivale camp told Human Rights First in September 2003 that although expectations had at first been high for response to the repatriation scheme they had not been fulfilled: “we are open to registration every day, even now, but clearly you can see there is no one registering.”⁵¹ The official believed that refugees were wary of conditions back home, particularly the potential that the *gacaca* justice system would discriminate against returning refugees.⁵² Many were waiting to hear feedback from those who had returned home in the first convoys. In a report on the repatriation process the Refugee Law Project of Makerere University confirmed that the central preoccupations of the population were the operation of the *gacaca* justice system and the accessibility of abandoned land holdings.⁵³ Other reasons for the reluctance to return were cited—and sought—to explain the pace of return. Certainly some refugees confirmed that they were waiting to harvest their crops before signing up for repatriation. In April 2004 a UNHCR spokesperson even commented that efforts to assist refugees to integrate in Uganda, including the so-called self reliance strategy, might be factors which slowed the enthusiasm for return; “[w]e’re shooting ourselves in the foot a bit with this self-reliance thing.”⁵⁴

The way in which the repatriation program was formally introduced to the Nakivale camp population may have added to refugee apprehensions. The initial presentation of the scheme was made in August 2003 by UNHCR officials acting alone—representatives of the government, including the camp commandant, were unable to participate that day. This form of presentation apparently triggered memories of the 1996 Tanzania repatriation which, from the perspective of the refugee population, had been fronted by UNHCR. The result was panic as refugees began to sell their animals at the local market and give away their belongings, convinced that a forced repatriation was imminent. It is thought that about 200 Rwandan refugees left the camp in the period immediately following the visit of UNHCR.

49 For an account of the reactions of recognized Rwandan refugees to the repatriation operation, see Elizabeth Kameo, “When Home is Exile and Exile is Home,” *Monitor*, January 21, 2004.

50 IRIN, “RWANDA-UGANDA: 1,000 Refugees Return from Uganda,” March 30, 2004.

51 Interview with police official at Nakivale settlement, September 2003.

52 The *gacaca* system is a traditional form of village court which has been introduced in Rwanda to deal with accusations relating to the Rwanda genocide in order to speed up the justice efforts. See discussion below in Part III. See also, “Rwandan Refugees Accuse Gacaca of Bias,” *East African*, March 15, 2004.

53 See the Refugee Law Project, “Update on Rwandese Refugees in Uganda, February 20, 2004,” available online at <http://www.refugeelawproject.org/current-issues.htm>.

54 IRIN, “EAST AFRICA: A Refuge from Civil Wars,” April 15, 2004.

In the wake of this incident, a series of meetings was hastily organized by the camp commandant in order to allay refugee fears, including posting local officials at the market in order to dissuade the premature sale of refugee possessions. At the camp itself, a meeting was organized and attended by the government security agencies, local authorities, and UNHCR where the camp commandant explained and distributed copies of the Tripartite Agreements, and clearly emphasized the voluntary nature of the program. The panic appears to have subsided and a number of families who had initially attempted to flee reportedly returned to the camp.

Since that time, the registration process at the camp has been carefully designed in order to ensure that refugees are sure of their decision to leave. On the first visit to the office refugees register, complete required documentation, and have a photograph taken. They then return a second time to sign the photograph and finalize the registration. This provides a chance for the refugees to think through the decision before the formalities are completed. Those who agree to repatriate are transported to the border where they receive a repatriation package, including plastic sheeting, kitchen utensils, jerry cans, soap, and a three month supply of food from the World Food Programme (WFP).

Repatriation and the Kibati Group

As the Kibati group has not been formally granted refugee status in Uganda, there is a question as to whether they can be considered to be covered by the new tripartite agreement.⁵⁵ For the Kibati group to qualify for the repatriation program, they would in theory need to be recognized and accorded refugee status. The Voluntary Repatriation Form itself, for example, requires the entry of a refugee identity card number. But a number of officials told Human Rights First in December 2003 that in practice there would be no barrier to a member of the Kibati group registering for repatriation. In fact, in April 2004 the Nakivale camp commandant advised Human Rights First that about 224 Kibati residents had registered and returned under the repatriation scheme in previous months. In lieu of a refugee identity card number, the word “Kibati” was being entered on the form.

Yet the situation is not so simple. The assistance packages given during the repatriation operation are considered to be valuable commodities—especially by the members of the Kibati group whose livelihood has been so precarious. As a consequence, it is less than clear that registration for return always indicates a genuine desire to repatriate. Within the Kibati group there is clearly a great reluctance towards re-establishment in Rwanda. By the very act of leaving Tanzania during the previous repatriation effort members of the Kibati group made a clear statement about their assessment of Rwanda as a safe place. Members of the group with whom Human Rights First spoke in September and December 2003 were deeply troubled by the announcement of plans for the Uganda repatriation. Some stated that they were preparing to cross back again through western Tanzania and on to Malawi should their forced return to Rwanda appear imminent. By April 2004, officials were noting an increase in people slipping away from the Kibati camp. Many at Kibati continued to speak about moving onwards to

⁵⁵ Article 1 of the agreement clearly defines the scope of the agreement as relating to any Rwandan national who is “a refugee in Uganda and wishes to return.”

Malawi. Both the local police and the Kibati group camp chairman confirmed that the Kibati residents were continuing to move on to third countries, mainly in southern Africa.⁵⁶

The perceived political context within which the repatriation effort is happening, in particular the oscillating relationship between the governments of Rwanda and Uganda, is triggering new concerns among members of the Kibati group. When the Kibati group first began to arrive in Uganda relations between the Ugandan and Rwandan governments were at their most tense. The subsequent thaw, however, has been a cause for alarm among the Kibati group. Further heightening tensions was the statement in September by Deputy Prime Minister and Minister for Disaster Preparedness and Refugees Moses Ali that the Ugandan authorities were committed to enforcing the repatriation of Rwandan refugees, by force if necessary.⁵⁷ By the end of November 2003, however, there seemed to be a softening in the prevailing climate. Certainly the stance of the Ugandan government as oriented towards encouraging return of Rwandan refugees was intact. Moses Ali explained the position:

Right now, we are trying as hard as we can to convince them [...] We are showing them videos of the new Rwanda and we have a team of Rwandan delegates coming here to talk to them with the aim of showing them they have nothing to fear.⁵⁸

But there was room for compromise. “If we have a number who feel they cannot return, we’ll have to consult with UNHCR to discuss the way forward,”⁵⁹ he said.

In April 2004 it was reported that at least nine registered refugees, including two unaccompanied minors, who had returned under the voluntary repatriation program, had come back again to the Nakivale camp from Rwanda citing security problems.⁶⁰ In one instance a man claimed that his wife and child had been killed in a grenade attack on the home he had repossessed upon his return to Rwanda. In another case, a woman told officials that vital elements of her assistance package had been stolen leaving her without the means to re-establish herself. It is as yet unclear how the Ugandan authorities will deal with this group, for the moment they have been received back to the Nakivale camp on a temporary basis. The stories brought back with these refugee returnees will obviously have an effect on those in the camp who may be considering return to Rwanda. As an official commented, despite the will of the Rwandan government to create optimum conditions for return, the Rwandan population at home may themselves be less than excited by the prospect of extending welcome to Hutu exiles.⁶¹

What Future for the Kibati Group?

At the beginning of 2004, ten years after the Rwandan genocide which sparked their initial exodus, Rwandan refugees are still in limbo—and under pressure to return home to an uncertain fate. Some are considering flight anew. Malawi has often been cited during the last two years as

56 Interview with Kibati camp chairman, September 2003.

57 Interview with Minister for Disaster Preparedness and Refugees Moses Ali, broadcast on Radio One, September 2003.

58 IRIN, “RWANDA-UGANDA: Refugees Welcome to Stay, Minister Says,” November 20, 2003.

59 Ibid.

60 Interview with Ugandan government official, April 19, 2004.

61 Ibid.

the ultimate safe destination by nervous Kibati residents. But in November 2003 Malawi itself signed a tripartite repatriation agreement with Rwanda and the UNHCR for the return of 5,500 Rwandan refugees. There is nowhere else for the group to run.

Part of the stalemate within which the Kibati group is caught is the reluctance on the part of Uganda to screen the population and clearly identify their protection needs.⁶² This would allow those genuinely seeking protection to access their rights, while at the same time identifying those who pose security threats or are genocide suspects. The reluctance to carry out such a screening must be understood, in the first instance, in the context of the complex political currency which the group represents in the region and, particularly, in terms of the relationship between the governments of Rwanda and Uganda.

Second, a lack of available resources and technical capacity is also hampering the effort. Absent are a clear legal and operational framework and examples of successful past models which can be drawn upon to augment the guidelines. Efforts to carry out screenings of Rwandan refugees in the region since 1994 have been marked by failure.⁶³ The responsibility can, however, no longer be shirked. If nothing is done in Uganda and members of the group take flight to other countries—before any assessment of either identity or protection needs—burden-shifting will be the result. As the Malawi Minister for State for Poverty Reduction and Refugees Ludovic Shati put it in colloquial terms, clear decisions need to be made now about how to deal with the Rwandan refugee population and those hiding among it—states “cannot keep anybody who has committed a sin.”⁶⁴

Response to the Rwandan refugee population still in exile across the Great Lakes presents complex challenges to states in the region, particularly now as return programs are underway and the most difficult cases remain unsolved and exposed to scrutiny. Further, as other refugee populations in the region prepare to return home in ever greater numbers to Burundi, Sudan, and the DRC, the development of a comprehensive model to deal with the Rwandan population could set markers for the success of other return operations.

Resolution of the situation of the Kibati group within the context of a coordinated repatriation effort for Rwanda refugees in the region requires three steps:

- the first is an **examination of the challenges facing the development of solutions** to the plight of refugees in the region (Part II of this report) and an **overview of trends in the broader legal and policy framework of refugee protection** in Uganda and the Great Lakes region (Part IV of this report);

⁶² A similar concern arose in April 2003 when refugees fleeing clashes in eastern Democratic Republic of Congo reached northern Uganda. There were reports that among the arriving refugees were those who had committed the very atrocities that caused the refugees' flight (See Amnesty International USA, “Protect Congolese Refugees in Western Uganda,” November 14, 2003). Some refugees, claiming to be apprehensive for their safety, and frustrated that their denunciation of the alleged perpetrators had not resulted in any action by the authorities, traveled from the camps to Kampala seeking safety. The concerns were also dismissed by government and UNHCR and no screening was carried out. (See IRIN, “DRC-UGANDA: Congolese Refugees Fleeing to Kampala,” October 30, 2003).

⁶³ See Human Rights First, “Chapter 2: Screening the Exodus—Three Case Studies” in *Refugees, Rebels and the Quest for Justice* (New York, 2002); and William O'Neill, Bonaventure Rutinwa and Guglielmo Verdirame, “The Great Lakes: A Survey of the Application of the Exclusion Clauses in Central African Republic, Kenya and Tanzania,” *International Journal of Refugee Law* 12, Special Supplementary Issue (Winter 2000).

⁶⁴ IRIN, “MALAWI-RWANDA: Kigali, Lilongwe Sign Repatriation Agreement,” November 5, 2003.

- the second is an **assessment of the humanitarian situation and physical security** of the Kibati group, and the identification of those factors which will ground the determination of their status and protection needs (Part III of this report); and
- the third is the **institution of a well-planned status determination and screening procedure** which will clarify who among the Kibati group must be protected as refugees, and whether there are those among them who must be separated out and held accountable for serious crimes (Part v of this report).

Part II

Challenges To Protection

The situation of the Kibati group is a microcosm of the complex challenges facing refugees in the Great Lakes region—and indeed internationally—today. The following broad themes have infused the responses of the Ugandan government, other governments in the region, and international agencies to the Kibati group throughout their exile, and represent critical trends in the state of refugee protection in the region as a whole:

- preoccupation with the security and political implications of hosting refugee groups;
- erosion of the principle of voluntary repatriation; increasing pressure on UNHCR to support—and promote—return as a solution;
- diminishing support—locally and internationally—for the provision of asylum for refugees and the principle of non-refoulement; and
- greater readiness to consider the use of force as a tool of refugee management.

Preoccupation with the Security and Political Implications of Hosting Refugee Groups

In times of conflict and political turmoil, refugee populations frequently become objects of political and military calculations. During the last decade related conflicts in the Great Lakes region and the sheer size of the refugee population have particularly exacerbated the political and security dimensions of how refugees are treated and perceived.

At one end of the scale, the simple recognition of refugee status by a host government may be seen by the country of origin as a hostile act. This is despite the fact that African refugee law explicitly provides that the grant of refugee status is intended to have a “strictly humanitarian” effect. Article 11(2) of the 1969 OAU Convention is quite clear in this regard: “the grant of asylum to refugees is a peaceful and humanitarian act, and shall not be regarded as an unfriendly act by any member State.” Thus active combatants cannot in law be granted protection as refugees: by definition they are hostile parties to the conflict.⁶⁵ In reality, however, even when combatants are

⁶⁵ The requirement to separate combatants from the civilian refugee population is also a requirement of the laws of armed conflict and humanitarian law, reflecting U.N. Charter principles. See Fifth Hague Convention (Convention V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 3 Marten Nouveau Recueil (ser. 3) 504, 205

not involved, the very fact that refugee status is determined to apply can have political undertones—this has certainly been the case with respect to the Kibati group. Recognition that a person is a refugee inescapably infers a judgment that the authorities of the country of origin—or in the case of the Kibati group, the country of “first asylum”—is unable or unwilling to protect the refugee from the persecution which he or she fears.

It is not just from the perspective of state security that refugees become hostage to political reckoning. The number of refugees who return home to a country emerging from conflict, and the speed with which they do so, can be computed as indicators of political gain. It is important to recall that the politicization of refugee protection in the region emanates not only from host countries and countries of origin but also from the broader international community. The latter’s failure to help prevent the Rwanda genocide and to respond effectively to the refugee emergency which ensued, for example, may make donor governments outside the region particularly eager to encourage the return of Rwandan exiles—whether through the activities and policies of UNHCR or bilaterally. This may result in their being over-supportive of the policies of the Rwandan government and perhaps prone to overlook shortcomings in governance and human rights protections in Rwanda.

Refugees and those accompanying them are also often portrayed not just as passive victims, but as active agents in conflict. Refugee camps are often understood in stark terms as staging posts in the Great Lakes for those bent on fueling war. Recent allegations about the character of refugee camps, including the presence of the Kibati group, in Uganda illustrate this trend. The 1969 OAU Convention itself makes explicit the connection between the presence of refugees and questions of security. Paragraph 4 of the Preamble to the Convention declares that states are “[a]nxious to make a distinction between a refugee who seeks a peaceful and normal life and a person fleeing his country for the sole purpose of fomenting subversion from outside.” In the next paragraph, states vow that they are “determined that the activities of such subversive elements should be discouraged.”

One of the most egregious aspects of the response to the Rwandan emergency was the failure to separate out from the refugee population the armed elements and others who were destroying the humanitarian nature of the camps in eastern Zaire in 1994 and 1995. The result was an extraordinarily overt reconstruction of the structures and operations of the former Rwandan armed forces, the *Forces Armées Rwandaises* (FAR), in the camps, the intimidation and killing of refugees, and a diversion of humanitarian resources to a war machine bent on continuing the genocide. Ultimately, thousands of Rwandan refugees were killed and hundreds of thousands displaced when the border camps were attacked and destroyed by forces of Rwanda’s fragile new government, which viewed the settlements as posing immediate threats to its security.⁶⁶

Security Concerns and the Rwandan Refugee Population in Uganda

The response by the region’s governments to the situation of the Kibati group echoes the geopolitics of the Great Lakes. As the Rwandan government urges return of refugees to Rwanda

Consol. T.S. 299, *entered into force* January 26, 1910) and the Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, *entered into force* October 21, 1950), (the Third Geneva Convention) arts. 4B(2) and 21.

66 See International Panel of Eminent Personalities, “The Kivu Refugee Camps” in *The Preventable Genocide*, (OAU, July 2000).

for purposes of ensuring its own security, and identifying those who have still not been held accountable for serious abuses during the 1994 genocide, the security implications of the continued sojourn of large numbers of Hutu Rwandans outside Rwanda are myriad.

The Rwandan authorities have clear concerns about the nature and character of the Kibati population, settled as they are only 40 miles from the Rwanda border. It is worth recalling that in addition to the Kibati population, over 25,000 Rwandan refugees, mainly Hutu, remained in Uganda at the beginning of 2004. Within this population, the Kibati group has been making particularly assiduous efforts to avoid being subject to return. A senior Ugandan official told Human Rights First in December 2003 that Rwanda would not “keep a deaf ear” to the presence of such large numbers of Rwandan exiles clearly intent on remaining outside the control of the Rwandan government on Ugandan territory. There certainly was, he said, “potential” for attack.

Oscillations in the relationship between the Ugandan and Rwandan governments were a key factor in this analysis. Strong bonds underlie the relationship, beginning with the dramatic history of exile and triumphant return from Uganda of the Rwandan refugees who now constitute the current régime. President Kagame and key members of his government grew up in Uganda’s refugee camps. Later, twists in the course of the war in the Democratic Republic of Congo, in which Uganda and Rwanda had originally fought side by side, created foes of the former allies. These fluctuations in the relationship have had an impact on the protection and situation of Rwandan refugees in the region. In January 2003, for example, newspaper reports began circulating that a Congolese rebel had arrived in Rwanda claiming that the Ugandan government was training 500 anti-Rwanda rebels in Nakivale and another 1,500 in Kyangwari camp in Masindi (the second largest concentration of Rwandan refugees in Uganda).⁶⁷

Ugandan Chief of Military Intelligence Colonel Noble Mayombo angrily denied that the army had in any way been involved in operations in the refugee settlements in Nakivale or Kyangwari. In March 2003, however, tensions between Rwanda and Uganda were particularly high, exacerbated by the potential for clashes between their armies and proxies in the DRC. During a visit to the United States by President Kagame of Rwanda that same month, the Rwandan government issued a statement indicating that the presence of ex-FAR and *interahamwe*, the Kinyarwanda word for the genocidal militia associated with the former Rwandan government, in the DRC “continued to pose a threat to Rwanda’s security.”⁶⁸ In April 2003 President Kagame warned that Rwanda would re-enter the Democratic of Congo if it felt its security was being threatened by the failure of that government to control *interahamwe* militia.⁶⁹

In July 2003 the Burundian government began to voice concerns about its own security with respect to Rwandan rebel militia suspected to be embedded in the refugee camps in Tanzania and intending to use Burundian territory to launch attacks on Rwanda. It called for an

67 See “Rebel Flees to Kigali, Angers Kampala,” *Monitor*, January 7, 2003.

68 See IRIN, “RWANDA: Kagame Briefs Bush on Situation in Great Lakes Region,” March 5, 2003.

69 IRIN, “DRC-RWANDA: Kagame Denies Troop Presence in DRC,” April 8, 2003. In October 2003 the government of the DRC began to make strong statements about its growing frustration with the continued presence on the territory of ex-FAR and *interahamwe*. It was estimated that approximately 14,000 Rwandan ex-combatants remained in DRC. In November 2003 the governments of DRC and Rwanda had agreed that they would complete the repatriation of former soldiers and *interahamwe* militia within the year through the U.N. Third Party Verification Mechanism (IRIN, “DRC-RWANDA: Kigali, Kinshasa Recommit to Repatriation Deal,” November 28, 2003).

international force along its border with Tanzania to monitor “infiltrating” Hutu rebels.⁷⁰ Under a year later, Rwanda massed its troops along the Burundi and DRC borders in anticipation of Hutu militia incursions, and was accused of actually crossing over into the territory of Burundi and the DRC.⁷¹ An investigation was launched by a South African military team from the U.N. Mission in the DRC in April 2004 into the allegations that attacks on Rwanda from insurgents in the DRC had in fact already occurred.⁷²

Accusations also flew in early 2003 that *interahamwe* were in Uganda and would not be prevented from launching attacks on Rwanda. The Rwandan authorities sought permission to inspect Oruchinga and Nakivale refugee camps, alleging that dissidents were being permitted to train there.⁷³ On March 11, Rwanda denied rumors of massive deployment of troops along its border with Uganda⁷⁴ but confirmed that it would “do what it takes to defend [Rwandan] interests in so far as security is concerned.”⁷⁵

In October 2003 the Uganda government announced the arrest of two people who it said had gained access to the Kibati camps with intentions of espionage.⁷⁶ According to reports the two men were identified by Kibati camp residents as Rwandan government agents working with intelligence organs and were found in possession of government employee identification documentation. Some of those with whom Human Rights First spoke in the Kibati camp stated that they believed that some other of the more recently arriving “refugees” were also agents of the Rwandan authorities, intent on monitoring activities in the camp. It was later confirmed by camp officials that a number of additional new arrivals had in fact been identified as government agents although they had not been arrested—monitoring of their activities had been the preferred method of control. One had even applied for the voluntary repatriation program. A few months subsequently these individuals were reportedly no longer in the camp.

In the wake of the concerns expressed by Rwanda about the alleged training of dissidents in Ugandan refugee camps Ruud Lubbers, the U.N. High Commissioner for Refugees, addressed the issue after a visit to the Nakivale camp: “[w]e did not find any evidence that this is a camp for training dissidents to fight.”⁷⁷ The fact that neither the UNHCR nor the Ugandan government, however, had actually assessed the identity and character of the Kibati group individually—or addressed squarely the implication that genocidaires might be among the group—left continuing room for speculation.⁷⁸ No screening for those who might have been guilty of such serious crimes has been carried out. From the point of view of the local community, and of the national authorities on both sides of the border, the uncertainty surrounding the status of the Kibati group has led to suspicion and in some cases hostile action

70 See IRIN, “BURUNDI: Defence Minister Wants International Observers along Border,” July 22, 2003.

71 See IRIN, “BURUNDI-DRC-RWANDA: Rwanda Deploys Troops along Border with Burundi, DRC,” April 26, 2004.

72 IRIN, “GREAT LAKES: Kigali Denies Massing Troops on Burundi Border,” April 22, 2004.

73 See “Short Plans Crisis Meeting for Kagame,” *East African*, March 10, 2003.

74 IRIN, “RWANDA-UGANDA: Kigali Denies Massing Troops along Border with Uganda,” March 12, 2003.

75 IRIN, “RWANDA: Kigali Ready to Defend its Security, Kagame Says,” March 13, 2003.

76 See, Felix Basiime, “Arrested Rwandans Accused of Espionage,” *Monitor*, October 16, 2003.

77 IRIN, “Rwanda is Safe for Returning Refugees Says UNHCR Head,” April 16, 2003.

78 Although the profile of the Kibati group raises questions about involvement in the genocide, Human Rights first did not find any evidence, or hear allegations on the ground, of military or related activity in the camp.

against the asylum seekers. In addition to eroding the protection and security of the Kibati group itself the result of this inaction has also been an inflaming of already delicate Ugandan-Rwandan relations.

The Privileging of Return as a Durable Solution

The return of the last of Rwanda’s refugees is a today clearly a key priority of the Rwandan government and the international community. On occasion, however, it has been pursued with a vigor that has raised serious protection questions. The experience of the Kibati group and their fellow Rwandan refugees in Tanzania and Uganda exemplifies the problems generated by the tensions between the imperatives of protection and the desire of a country of origin to encourage return, coupled with increasing exhaustion of support for asylum in host countries, a greater willingness on the part of host countries to use force as a tool of refugee management, and new international imperatives to encourage repatriation.

Return and Refugee Policy in the Great Lakes

Of the three core recognized durable solutions to the plight of refugees repatriation has generally been embraced as the ideal, by refugee groups, countries of origin, host countries, and the international community. But each of these actors has often very different conceptions of the circumstances within which repatriation can be considered to be desirable in a particular situation.

The prospect of going home in safety and dignity is for many refugees the dream of the exile experience. Return also has significance and meaning beyond individual homecomings—refugee return in many ways signals the real end of the conflict and a hope that a country can restore itself. Citing the situation in the Democratic Republic of Congo, U.N. High Commissioner for Refugees Ruud Lubbers has suggested that the drive to repatriate can itself even act as a catalyzing “instrument for peace.”⁷⁹

There is a danger, however, that the desire to encourage return can obscure the fact that genuine obstacles to safe return may still exist. In fact, premature promotion of return can undermine the opportunity in the long term to ensure sustainable return and reconstruction in the country of origin. The conflicts that gave rise to the Burundi and Rwanda refugee outflows have been protracted, reflecting highly complex political dynamics. At the same time, at various points over the last ten years, forced return has been imposed on these populations. As a result, tens of thousands of refugees in the region have found themselves forced to flee as refugees twice or three times over. Unsustainable return has shown itself often to be the crucible of renewed conflict—Burundi is a particularly extreme case in point. Cycles of return and flight are inevitable if sustainability as a central pillar of a return program is sacrificed in the cause of garnering short-term increases in the number of returnees.

Despite these experiences, return—in some cases aggressively promoted return—is the preferred solution of governments to the plight of refugees in the Great Lakes region. Refugee policy since the 1994 Rwandan exodus has abandoned the much lauded “open door” approach which was

79 See IRIN, “GREAT LAKES: IRIN Interview with UN High Commissioner for Refugees Ruud Lubbers,” August 22, 2003.

previously its hallmark.⁸⁰ The complexity of the Rwandan outflow both in its security aspects and sheer volume completely overwhelmed the capacity of states in the region to respond to the needs of refugees and set the stage for the conclusion that return was the only way to control the situation. The widespread use of force in the operations which returned hundreds of thousands of Rwandans from both Tanzania and the then Zaire in 1996 highlighted the extreme shift in the policy which had been adopted. Since then ultimatums, threats, deadlines, camp closures, arrests, intimidation, restriction of access to humanitarian assistance, and bars on freedom of movement have been some of the tactics used by governments in the region to induce refugees to make the decision to go home.

The Return Home of Rwandan Refugees

At the end of 2003, approximately 80,000 Rwanda refugees remained scattered throughout Central and Southern Africa, resisting strenuous efforts by both the Rwandan government and the international community to persuade them to go home.⁸¹

The Rwandan government has been playing an unusually active role in encouraging the return of its refugee population in exile. This reflects a desire to see the refugees return and take part in rebuilding their country, as well as vital security and justice issues which flow from Rwanda's history of genocide. The Rwandan government can be understood as having two major preoccupations around the continued sojourn of a large exile community outside Rwanda. The first is a fear that refugees who remain outside the country may be intent on fomenting dissidence against the Rwandan government. This concern is rooted in very real experience. In 1994 current President Paul Kagame led an army which surged home from refugee camps abroad intent on halting the genocide. Once in power, it became clear that fleeing militia had taken control of refugee camps in the then Zaire and were using the camps as rear bases to attack the new government. This was the trigger for Rwanda's invasion and destruction of the refugee camps in eastern Zaire in 1996, supported by Zairean allies.

A second goal is justice: preventing those who committed serious crimes in 1994 from enjoying continued impunity by hiding under the cloak of refugee status abroad. The question of whether there is a need to exclude individuals from protection as refugees is often not addressed by a receiving country when refugees first arrive. In Africa the mechanism of group or *prima facie* recognition of refugee status is frequently the preferred approach in situations of mass influx—individual examinations of applications for asylum are generally not conducted. Group recognition, however, does not permit the identification of those who may need to be excluded on the grounds of their suspected culpability for serious crime—unless screening of the caseload is subsequently carried out. Although some minimal screening was carried out in a number of countries in the years after the initial Rwandan outflow, it was conducted too late and faced myriad problems both in terms of procedure and access to information.⁸²

80 For a discussion of the open door policy see, Bonaventure Rutinwa, "The end of asylum? The changing nature of refugee policies in Africa," *New Issues in Refugee Research*, Working Paper No. 5, May 1999.

81 IRIN, "UN Refugee Agency Launches Repatriation Campaign," November 7, 2003.

82 For a detailed account of the difficulties encountered in carrying out screening operations of Rwandan refugees in the Great Lakes region, see Human Rights First, (formerly Lawyers Committee for Human Rights) *Refugees, Rebels and the Quest for Justice*, (New York: Lawyers Committee for Human Rights, 2002).

Rwanda has suggested that much of the resistance on the part of refugees abroad to return is due either to fear that they will be tried for their crimes, or to widespread intimidation of vulnerable refugees by those who wish to remain outside the remit of Rwandan and international accountability processes. The Rwandan government has said that some of the refugees who returned home, in particular in the immediate aftermath of the genocide, accused camp leaders in the then Zaire (many of whom had positions of responsibility in the former government implicated in the genocide) of intimidating and assaulting those who wished to go home.⁸³ This domination of the refugee population continues to be reported. In January 2004, for example, the spokesperson for the U.N. Mission in the Democratic Republic of Congo claimed starkly that Hutu militants were holding over 3,000 refugees and former combatants hostage or “captive” in North Kivu to prevent their return to Rwanda.⁸⁴

That there are individuals who have committed genocide or serious crimes and are exploiting the shelter of refugee status to avoid prosecution is highly likely. In March 2004 the Rwandan government announced that it was compiling a list of those it believed had masterminded the genocide and who were still abroad—approximately 300 of the “most wanted”—for distribution to host countries.⁸⁵ The profile, age, and professions of members of the Kibati group, and indeed remarks by members of the group itself to Human Rights First, raise questions about the involvement of some in the events of 1994. At the same time, there are a range of legitimate reasons why many of those bona fide refugees who are still in exile fear return—completely unconnected to culpability for acts relating to the genocide.

A Well-Founded Fear of Persecution?

While major improvements in the human rights situation in Rwanda must be acknowledged, Rwanda is not absolutely secure for all citizens. Most recently, for example, many in the political opposition left the country fearing reprisals for challenging the ruling Rwandan Patriotic Front (RPF). In April 2003 Amnesty International reported a “government orchestrated crackdown on the political opposition” in the run up to elections.⁸⁶ The U.S. Department of State, summed up the human rights situation in Rwanda in 2003 bleakly:

The Government’s human rights record remained poor, and it continued to commit serious abuses. The right of citizens to change their government was effectively restricted. [...] Arbitrary arrest and detention, particularly of opposition supporters, and prolonged pretrial detention remained serious problems.⁸⁷

Thousands of Rwandans, including the Kibati group, fear returning home—to avoid it they are willing to continue moving across the region, seeking out ever more precarious exile abroad.

83 PANA, “Rwanda Says Threats Hamper Voluntary Refugee Repatriation,” February 3, 2001.

84 IRIN, “Hutu Militants Holding 3,000 Hostages,” January 20, 2004.

85 BBC News, “Rwanda to List ‘Most Wanted 300,’” March 22, 2004 available online at <http://news.bbc.co.uk/1/hi/Africa/3557951.stm>. ICTR indictees have also been found outside the region—authorities in the Netherlands in February 2004 arrested an asylum seeker who had been a lieutenant colonel in the Rwandan army at the request of the ICTR (See Agence France Press, “Rwandan War Crimes Suspect Arrested in the Netherlands,” February 25, 2004).

86 IRIN, “Rwanda: Amnesty International Criticizes ‘Government-Orchestrated Crackdown’ on Political Opposition,” April 23, 2003.

87 U.S. Department of State, “Rwanda,” in *Country Reports on Human Rights Practices*, February 25, 2004 at introduction.

Although it can be assumed that some of this number are guilty of committing crimes during the 1994 genocide and wish to avoid prosecution (which would, if true, exclude them from protection as refugees) many others arguably possess well-founded fears of persecution should they return to Rwanda.

Although Human Rights First interviewed only a fraction of the Kibati group, every individual with whom we spoke expressed a fear of return.⁸⁸ Rwandans cited a variety of reasons including “disappearances” and killings of family members or friends, and problems relating to mixed marriages. Concerns were also expressed about the impossibility of making a living in Rwanda or accessing lands confiscated from them due to discrimination related to their ethnicity particularly around suspicions that Hutus in exile bore some responsibility for the genocide. UNHCR reported in November 2003 that, “[o]ne of the fears expressed is that they may not be able to recover their land and property.”⁸⁹ Where a person is systematically and absolutely prevented from providing for his or her basic economic needs based on the grounds enumerated in the Refugee Conventions, that person may be considered to be in need of international protection.

A number of those interviewed by Human Rights First admitted that they had been in prison in Rwanda, some after having been convicted of crimes, and had escaped. Some showed physical scars which appeared to be those of handcuffs. They were reluctant, however, to discuss the reasons for their imprisonment. Refugee concerns about retribution for perceived involvement in the genocide are paramount. Efforts by the Rwandan authorities to pursue accountability for crimes committed during the 1994 genocide, is certainly a major factor in the return effort. In particular the extension of the traditional *gacaca* system of community justice is dissuading Rwandan refugees from risking repatriation.

Drawn from traditional community models of justice, the *gacaca* system is designed both to meet the demands of justice and speed up the process of national reconciliation. The new system in its pilot phase was launched officially in June 2002 at a time when over 115,000 prisoners were awaiting trial for genocide in Rwanda alone.⁹⁰ Under the *gacaca* system, lay judges selected by their communities are empowered to render judgments on those accused of certain categories of crimes, but not those that carry the death penalty. The *gacaca* system allows for reduced sentences and community service for those who confess to their crimes, name their accomplices, and apologize to the victims. Although these proceedings represent, perhaps, the only realistic prospect of any kind of trial at all for the thousands of detainees languishing in appalling conditions of detention, international human rights monitors have found them wanting in fairness.⁹¹ Further, in some areas a pattern of killings of *gacaca* witnesses has occurred—by early May 2004 seventeen persons had been convicted of killing genocide survivors.⁹²

88 Interviews were conducted with approximately 150 Kibati camp residents during Human Rights First's visits in November 2002, September and December 2003, and April 2004.

89 IRIN, “RWANDA-UGANDA: Refugees Welcome to Stay, Minister Says,” November 20, 2003.

90 See IRIN, “Gacaca Court System Becomes Operational,” June 18, 2002.

91 Human Rights Watch called for “intensive and sustained monitoring of the new system given the inherently political nature of the jurisdictions and the absence of the right to counsel for both victims and the accused.” See Human Rights Watch, “Rwanda: New Elections May Speed Genocide Trials,” October 4, 2001.

92 See IRIN, “Kagame Dismisses District Leaders over Genocide Related Deaths,” May 14, 2004.

Some Kibati camp residents expressed concern to Human Rights First that the *gacaca* process was not solely driven by a need for justice and reconciliation. In particular land issues were cited. A number claimed that the desire to hold onto lands which had been confiscated from refugee families would foster unfounded accusations of involvement in the genocide against returning refugees. In the loose context in which the *gacaca* community justice approach works these kinds of complex motivations may be difficult to identify and guard against. Some of the Kibati group indicated that as long as the *gacaca* system remained in operation they would resist return. It was clear also that some feared not just the vagaries of the formal systems of accountability but also extrajudicial “revenge” killings by both genocide survivors and perpetrators. In 2003, killings of potential witnesses to crimes committed during the genocide continued. As the U.S. Department of State acknowledged, “assailants killed several witnesses to the genocide, reportedly to prevent testimonies and undermine the rural justice system introduced in 2002.”⁹³

In this climate of uncertainty, measures taken by the Rwandan government which could be expected to allay fears about return are unfortunately having the opposite effect. Speaking on the occasion of the signing of a tripartite repatriation agreement with the Zambian government, UNHCR Regional Coordinator for the Great Lakes Warimu Karago pointed out that Rwanda had begun to take steps to facilitate the safe return of refugees. She cited in particular the detainee releases of over 40,000 persons in early 2003 and the introduction of the *gacaca* trials.⁹⁴ But the mass releases of prisoners in February were perceived by many refugees as measures to free up of prison space—Kibati group members interviewed by Human Rights First viewed it as a clear statement by the Rwandan government that it expected to be in a position to arrest returning refugees.⁹⁵ Further, those released were not completely free to resume their lives—they were transferred to so-called “solidarity camps” for “re-education” and could be expected to be tried subsequently under the *gacaca* system. In March 2004 over 4,500 additional prisoners were released and the Rwandan authorities extended a deadline of March 15 by one year for detainees to win a measure of clemency by admitting their role in the genocide.⁹⁶

The majority of Burundians in the Kibati group cited the general insecurity caused by the civil conflict in their country—most came from the central regions where the war was the most intense in late 2002. A report by a local human rights group in Burundi at the end of September 2003 warned that, despite the signing of a ceasefire, the human rights situation had not improved. In describing the rights violations suffered by vulnerable citizens the report found that of the over 57,000 refugees repatriated between January and May 2003, “46 percent of them have no houses, 22 percent have no land, 15 percent of children do not attend schools and 34 percent have no access to medical care.”⁹⁷ The issue of land is not only a question of access to the means of survival, its resolution is critical to the resolution of the conflict itself.⁹⁸ In October

93 US Department of State, “Rwanda,” *Country Reports on Human Rights Practices*, February 25, 2004 at Section 1 (a).

94 See IRIN, “5,000 Refugees to be Repatriated from Zambia,” January 20, 2003.

95 Some commentators also expressed concern that the releases might interfere with the progress of justice, raising the specter of potential witness intimidation, and undermining popular confidence in the process. See African Rights, “Prisoner Releases: A Risk for the Gacaca System,” January 16, 2003.

96 IRIN, “RWANDA: 4,500 Prisoners Released,” March 23, 2004.

97 See IRIN, “BURUNDI: NGO Slams Poor Human Rights Record during Past Six Months,” September 30, 2003.

98 See International Crisis Group, *Refugees and Displaced Persons in Burundi—Diffusing the Land Time-bomb*, October 7, 2003.

2003 opposition leader Charles Mukasi was arrested and a headline in the IRIN news service on November 11, 2003 reporting on the publication of two U.N. reports on Burundi and the Democratic Republic of Congo said it all: “Great Lakes: Human Rights Situation Remains Bleak, UN Reports.”⁹⁹

Increasing Pressure on UNHCR to Support—and Promote—Return as a Solution

The international community has also played a particularly robust role in encouraging repatriation of the Rwandan refugee caseload. The guilt felt by the international community in the wake of its massive failure to halt the genocide in 1994 is perhaps to some extent be assuaged by the picture of refugees returning home to a successful Rwanda. Rwanda has been eager to seek and generate support for return from the international community. As President Kagame declared on January 31, 2003, “[i]t is my intention to request the international community to continue to support Rwanda in carrying through with these meaningful and historic processes, which will deliver on the expectations of both the people of Rwanda and the international community.”¹⁰⁰ To this end, by January 2004, tripartite agreements setting out the framework for refugee return operations had been negotiated between Rwanda, UNHCR, and host nations across Africa, including Burundi, Central African Republic, Democratic Republic of Congo, Malawi, Mozambique, Namibia, Republic of Congo, Tanzania, Uganda, Zambia, and Zimbabwe.¹⁰¹

The context within which the international community has been compelled to engage in the Rwandan return effort is reflected in how UNHCR has been struggling to facilitate returns while advocating for the continued protection of those refugees who still fear harm at home. There is some evidence that over the last number of years governments in the region have been adopting increasingly intolerant approaches to UNHCR’s mandate and activities—especially where UNHCR operations have related to protection issues surrounding the repatriation of refugees. Although this has not been noted directly in terms of the treatment of the Kibati group during their current Uganda sojourn, it forms part of the background to their experience to date in the region.

At the beginning of December 2002 Human Rights First learned that the senior UNHCR official in Rwanda was declared *persona non grata* in Kigali. He was forced to leave within seventy-two hours. There was some suggestion that the concern of the Rwandan government related to the official’s handling of an allegation that Congolese refugees had been forced home from Rwanda to the Democratic Republic of Congo. Other commentators believe that the decision to expel the UNHCR staffer was more likely linked to a desire to censure the perceived “soft” approach of the UNHCR in Rwanda to repatriation of Rwandans from Tanzania. In early 2002 the UNHCR office in Rwanda had sent staff on a mission to a number of refugee settlements in Tanzania, including Ngara. There the officials had advised refugees of the content of the tripartite agreement, in particular emphasizing the core principle that repatriation would be voluntary. It was also pointed out by UNHCR during the visit to Ngara that there would be a screening procedure for

99 IRIN, “GREAT LAKES: Humanitarian Situation Remains Bleak, UN Reports,” November 11, 2003.

100 See IRIN, “RWANDA: Kagame Pleads for International Support,” February 4, 2003.

101 UNHCR, “Return to Rwanda from DRC, Uganda and Throughout Africa,” in *Voluntary Repatriation in the Great Lakes and Central African Region*, March 2004.

people in the residual refugee caseload who believed that they required continuing protection. It is understood that there was disappointment on the part of the Rwandan government that more had not been done to encourage return.

At least four officials of UNHCR have also been expelled from regions in Tanzania which have been the particular target of the repatriation effort. The head of the UNHCR Ngora Office, Golam Abbas, was given 24 hours to leave Tanzania in January 2003. He was accused by the Tanzanian Minister for Home Affairs Mohammed Seif Khatib of “delaying the exercise of repatriate refugees to their countries.”¹⁰² Prior to that decision other UNHCR staff had been refused entry to the camps by the government on the basis that they were opposing governmental repatriation policy. At the time of Mr Abbas’ expulsion the government of Tanzania also announced that three other UNHCR staff members had been expelled for “unpeaceful activities” related to the admission and repatriation of refugees.¹⁰³

More recently, in April 2003, the Ugandan government asked the UNHCR Representative in Uganda, Saihou Saidy, to leave the country, apparently for voicing opposition to a relocation operation proposed, and ultimately conducted, for Sudanese refugees residing in Kiryandongo camp.¹⁰⁴ In reporting to the Ugandan parliament, Deputy Prime Minister and Minister of Disaster Preparedness and Refugees Moses Ali stated that the relocation plan had been “frustrated by the former UNHCR Representative in Uganda who had a hidden agenda and is still being investigated.”¹⁰⁵ Ali claimed that “militant youth” in the camp had been “mobilised by the [UNHCR] Representative and some elements in NGOs [non-governmental organizations] like IRC [the International Rescue Committee]” and had “terrorized innocent refugees.”¹⁰⁶ As the Refugee Law Project, Uganda, pointed out, “the response of UNHCR to the relocation [...] was consistent with its mandate of international protection. [...] It is unfortunate that the government decided to interpret UNHCR’s concerns as measures deliberately calculated to undermine its policy.”¹⁰⁷

UNHCR officials, staff of non-governmental humanitarian organizations, and journalists have reported increased intimidation, verbal abuse, and threats of deportation by government officials taking a hard-line stance on issues relating to the repatriation of refugees in the region. This response to UNHCR is not new. Indeed, UNHCR must be seen to be doing its job including by criticism of host government policy where necessary, even where the consequences result in expulsion of staff. In recent years, however, the phenomenon seems to be manifesting itself in more extreme terms. Most of the pressure also seems to be exerted around the return effort for the Rwandan refugee population. It is worth recalling, for example, that during the 1996 Tanzanian repatriation operation UNHCR officials were also challenged for their opposition to

102 Agnether Kasenene, “Afisa wa wakimbizi atimuliwa nchini” (A refugee official is expelled), *Nipashe*, January 11, 2003.

103 Ibid.

104 See also, BBC News, “Uganda Kicks Out U.N. Man,” April 14, 2003, available online at <http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/2946719.stm>.

105 See Statement to Parliament on Relocation of Sudanese Refugees from Kiryandongo to West Nile by Rt. Hon. Lt. Gen. Moses Ali, 1st Deputy Prime Minister and Minister for Disaster Preparedness and Refugees, September 11, 2003, on file with Human Rights First.

106 Ibid.

107 See Refugee Law Project, “Briefing on the Plight of Achol Pii Refugees and Refugee Policy in Uganda,” May 2003, available online at <http://www.refugeelawproject.org/current-issues/uganda-undermine/background.htm>.

the conduct of the army during the operation and at “least one was expelled altogether.”¹⁰⁸ U.N. staff members have commented to Human Rights First that an increasing militarization of refugee management and failure of governments to adhere to international standards in the region will inevitably bring UNHCR into increasing conflict with governments.

Although the Ugandan authorities have taken a measured approach to the presence of the Kibati group there, there is some suggestion that UNHCR Uganda’s reluctance to respond to the protection needs of the Kibati group has been related to pressures which the office is experiencing on the ground more broadly in the region—and specifically with respect to return of the Rwandan refugees population. This has been manifest, for example, in the notable gap between UNHCR policy directives emanating from headquarters on the movement of Rwandan refugees to second countries of asylum and the stance which is being taken publically by UNHCR at the national level (see discussion below).

Diminishing Support—Locally and Internationally—for the Provision of Asylum for Refugees

Tanzania has one of the most generous histories of refugee protection in Africa, having hosted refugees for much of its independent history at a rate proportional to its population second only to the efforts of Guinea. The philosophy of brotherhood as propounded by the socialist ruling party, the Chama Cha Mapenduzi, and the founding president of Tanzania, the late Julius Nyerere, was an essential foundation stone of this policy. The 1990s saw Tanzania host the largest number of refugees in all Africa when in one day alone in July 1994 some 250,000 Rwandans, mainly Hutus, crossed over into Tanzania. It is in the history of Tanzania’s struggle to provide protection to its Rwandan refugee population that the most extreme contours of a state’s capacity to provide refuge can be traced.

The enormity of the task facing refugee hosting countries in the region in the aftermath of the Rwanda genocide can not be underestimated. In situations of conflict where the security situation is complex, lack of support from outside the refugee hosting area can result in situations where “potential host countries increasingly deny asylum by closing their borders, thereby further exacerbating the situation of displaced persons within the conflict area.”¹⁰⁹ This was certainly the case in March 1995, for example, when Tanzania found itself with tens of thousands of refugees massing on the Burundi border, and over half a million more Rwandan Hutus within its territory. As the OAU Panel of Eminent Personalities declared in its report, *Rwanda: the Preventable Genocide*, “[i]t could only be a matter of time before [Tanzania] decided it simply could not afford to be solely responsible.”¹¹⁰ Tanzania closed its border, repatriated hundreds of Rwandan refugees, and, according to some reports, fired on asylum seekers attempting to cross to safety. Later in 1996, as the border closure policy was relaxed and the numbers of Rwandan refugees in Tanzania rose to over 600,000, the pressure on Tanzania again

108 See Beth Elise Whitaker, “Changing Priorities in Refugee Protection: the Rwandan repatriation from Tanzania,” *New Issues in Refugee Research*, Working Paper No. 53, February 2002 at p. 9; Human Rights Watch reported that two Roman Catholic priests were deported by the Tanzanian authorities for opposing the forced repatriation of Rwandan refugees in 1996. The priests said that refugees did not want to return to Rwanda. *IRIN Update 61*, December 18, 1996.

109 See *Report of the U.N. Secretary-General on the Protection of Civilians in Armed Conflict*, U.N. doc. no. S/2001/331, March 30, 2001, at para. 31.

110 International Panel of Eminent Personalities, *Rwanda: The Preventable Genocide* (Organization of African Unity, July 2000) at para. 19.8.

reached overwhelming proportions. A massive repatriation effort got underway in a heavily militarized operation in which excessive use of force was widely reported and over half a million refugees were returned to Rwanda.

Since 1996 governments in the region have emphasized the political, economic and environmental costs of hosting refugees—real and perceived.¹¹¹ In January 2002, in the context of meetings of the Tripartite Commissions for Repatriation to both Rwanda and Burundi, President Mkapa of Tanzania was quoted as saying the refugee situation in Tanzania was “unbearable.”¹¹² Faced with a lack of funding and an inability to respond to the food needs of the over 500,000 refugees in its care, UNHCR Tanzania echoed his concern declaring simply in February, “[t]he situation is dire.”¹¹³ That same month the Tanzanian Home Affairs Minister Mohamed Seif Khatib warned that the government would forcibly repatriate refugees if security in the camps deteriorated as a result of the food situation. “We may have riots in the camps because of hungry refugees. They might leave their camps and run rampant in the villages [...] Should things deteriorate to this extent we may have to consider the possibility of repatriating the refugees forcefully.”¹¹⁴

In June 2003 a joint OCHA, ICRC, and UNHCR assessment of Burundian refugee camps in the Kibondo district confirmed that reduced food rations, restrictions on refugee economic activity and freedom of movement had been creating greater insecurity.¹¹⁵ These conditions had also forced many refugees to return prematurely to Burundi. In March 2004, a report by Refugees International found that, “[w]hile the conduct of the Tanzanian government does not rise to the level of refoulement, the government is implementing policies that create conditions under which the refugees conclude that they have no real option but to return home. Repatriation under such circumstances is not voluntary.”¹¹⁶ Refugees caught outside the camps were being arrested and returned to the Burundian border without documentation, rendering them unable to access any assistance upon return. Refugees were also being intimidated and pressured to leave the camps by local officials.

Host governments have the primary responsibility to protect bona fide refugees on their territory. But fulfillment of state responsibility towards refugees—especially as it relates to those whose very identity is defined by their need for international protection—requires international assistance. It is disingenuous to imagine, for example, that some of the complex issues of security which faced host states in the region in the aftermath of the Rwanda exodus, or the enormity of the basic humanitarian assistance needs which clamored to be met, could ever be dealt with alone. And it is not just a matter of discretionary compassion. The international community has clear obligations, for example, to intervene where required to maintain international peace and

111 A study by the Centre for the Study of Forced Migration at Tanzania’s University of Dar Es Salaam found that in Tanzania “although assertions as to the impact of the refugees on the environment, security, infrastructure, administration and development were partially true, many were exaggerated and outdated.” The study found, for example, that the presence of refugees on the Tanzania health sector was beneficial. See IRIN, “Tanzania: Focus on the Impact of Hosting Refugees,” October 15, 2003.

112 IRIN, “BURUNDI-RWANDA-TANZANIA: Meeting Held of Voluntary Repatriation of Refugees,” January 15, 2002.

113 IRIN, “Food Situation in Refugee Camps ‘Dire,’” February 19, 2003.

114 Ibid.

115 See IRIN, “BURUNDI-TANZANIA: Team Decries Insecurity in Refugee Camps,” June 6, 2003.

116 See Refugees International, “Burundian Refugees in Tanzania: mounting pressure to return,” March 23, 2004.

security. U.N. Security Council Resolution 1296 (2000), for example, invites the U.N. secretary-general to bring to the attention of the Security Council, “situations where refugees and internally displaced persons are vulnerable to the threat of harassment or where their camps are vulnerable to infiltration by armed elements.”¹¹⁷

The African approach to refugee protection, as enshrined in the 1969 OAU Convention, explicitly recognizes that there is collective responsibility of state parties to assist other states in providing protection to refugees. Article 11(4) of the Convention declares: “[w]here a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the OAU, and such other Member States shall in the spirit of African solidarity and international co-operation take appropriate measures to lighten the burden of the Member State granting asylum.” The principles of collective responsibility and burden-sharing are also found—if less strikingly—in the 1951 U.N. Convention, especially in the fourth clause of the Preamble, which stresses that: “the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international cooperation.”¹¹⁸

The responsibility of the international community to assist in protecting refugees in the Great Lakes is particularly acute. The conflict and turmoil which has been at the root of the refugee flows in the region has been driven by a complex inter-relationship of forces driven from outside, including the provision of political support, direct military presence, and the channeling of arms.¹¹⁹ In practice, however, the will to effectively share the responsibility to protect refugees in the Great Lakes—in a timely, consistent and coordinated manner—has been intermittent.

Preoccupation by the international community with the situation in Afghanistan and Iraq, for example, contributed in 2003 to the inadequacy of international support—material and political—to the Great Lakes refugee population. Some states were forced to impose ration cuts.¹²⁰ Insufficient international assistance was also clearly one of the key factors underlying the Tanzanian government’s decision to force Rwandan refugees home in 1996. UNHCR’s support for the effort at the time was fueled by “the declining availability of funding to support Rwandan refugee programs”—particularly in the context of a shift in the international spotlight to the Balkans.¹²¹ That the presence of refugees without adequate outside support could generate an impossible burden was reflected in a statement by the Tanzanian home affairs minister in September 2003, in which he declared that the refugee situation in the Great Lakes amounted to “a potential threat to international peace and security.”¹²² He cautioned that “the rights accorded

117 U.N. Security Council Resolution 1296, UN doc. no. S/Res/1296(2000), April 19, 2000.

118 1951 U.N. Refugee Convention, preamble.

119 See, for example, the report of the U.N. Security Council’s International Commission of Inquiry (Rwanda) U.N. doc. no. S/1996/195, March 14, 1996. The commission, established in November 1995, issued a number of reports, including one in March 1996 which alleged that sources of arms for the rearmament of Hutu militia in the refugee camps included Belgium, France, Bulgaria, China, and South Africa.

120 See IRIN, “TANZANIA: Lack of Food Leads to Ration Cuts in Refugee Camps,” February 3, 2003

121 UNHCR supported the effort, although it did criticize the use of the military. For an analysis of the operation see, Beth Elise Whitaker, “Changing Priorities in Refugee Protection: the Rwandan Repatriation from Tanzania,” New Issues in Refugee Research, Working Paper No. 53, February 2002.

122 IRIN, “TANZANIA: Call to Review Laws, Conventions,” September 15, 2003.

to refugees under the 1951 U.N. Convention Relating to Refugees far exceed the financial resources and integration capacities of host countries such as Tanzania.”¹²³

The message may be getting through to the international community that there is a need for it to more responsibly share the obligation to protect with hard pressed governments in the region. In February 2004 the Danish government announced that an unprecedented \$8 million was being offered to support programmes in refugee camps and refugee hosting areas in Tanzania.¹²⁴ That same month the European Union announced a \$38 million dollar humanitarian aid package to assist the displaced in Burundi and Tanzania.¹²⁵

A Readiness to Consider the Use of Force as a Tool of Refugee “Management”?

Key among the concerns expressed by members of the Kibati group to Human Rights First was the fear that they would ultimately be forced back to Rwanda against their will, echoing the use of force which most commentators agree was a hallmark of the 1996 repatriation. In late 2003 as discussions around repatriation from Uganda of the Rwandan caseload began to be solidified in a tripartite agreement, an event occurred which heightened the anxiety of the Kibati group—this time in relation to their immediate physical security in Uganda. This event was the relocation by the Ugandan police and military of over 16,000 Sudanese refugees from Kiryandongo in Central Uganda to Arua and Yumbe in the northwest. The operation appears to have been conducted almost as a military operation, against the expressed will of many the refugee community, and deliberately outside the scrutiny of either UNHCR or NGOs.¹²⁶

The decision to relocate 16,000 Sudanese refugees from Kiryandongo in central Uganda to the northwest of the country was a highly controversial one, opposed by many in the refugee community and local and international advocates. While acknowledging that health conditions were deteriorating and that there was severe congestion in the Kiryandongo camp, objectors to the move cited the lack of security in the West Nile camp locations which had been identified as the refugees’ destination. These camps had a history of rebel violence and incursions. Exacerbating concerns was the fact that prior to their original transfer to Kiryandongo, the refugee group in question had twice fallen victim to lethal rebel attacks in Pader district Acholi Pii camp—killing almost 150 refugees.

The relocation operation began in the early hours of Monday September 1, 2003, when the Kiryandongo camp was cordoned off by Ugandan police and military. Humanitarian workers in the camp told Human Rights First that they were barred from use of any of their communication equipment, including radios and telephones, and forbidden to exit the camps until the operation was over. They were also asked to remain in their residences until the operation was over. UNHCR was also prevented from overseeing the operation. In fact there are suggestions that

123 Ibid.

124 IRIN, “BURUNDI-DRC-TANZANIA: Denmark Gives US\$8 Million for Refugee Programmes,” February 19, 2004.

125 IRIN, “BURUNDI-TANZANIA: EC Aid for Vulnerable Displaced People,” February 10, 2004.

126 For a report on the relocation operation, see Refugee Law Project, “Briefing on the Plight of Acholi Pii Refugees and Refugee Policy in Uganda,” May 2003, available online at <http://www.refugeelawproject.org/current-issues/uganda-undermine/background.htm>.

UNHCR was deliberately deceived about the timing of the relocation, believing that it was to occur on September 15.¹²⁷

Kiryandongo refugees with whom Human Rights First spoke described the arrival of the military and police personnel as a “rebel invasion,” with mud and grass huts torched by riot police in anti-riot gear: “[t]hey were shooting at random, and hitting people with tear gas and bullets.”¹²⁸ At least four women were reported to have sustained bullet wounds. Those who escaped their huts unharmed were then forced on to trucks without adequate time for them to prepare their belongings. Struggles ensued when the refugees refused to board the vehicles and it was alleged that three babies died of suffocation when police used tear gas to disperse those resisting the transfer. In the wake of the operation, there were claims that as many as six adult refugees had been killed in the chaos.¹²⁹

NGO workers and refugees said that anti-riot armored personnel carriers, water cannon tanks, rubber bullets, and anti-riot tear gas were all used to effect the operation. Minister Ali confirmed in a statement to the Ugandan Parliament that personnel of the Internal Security Organization were involved, in addition to the army and police. The character of the operation and the use of the military apparatus were justified by the minister by reference to the existence of a group of self-styled “Baghdad boys” within the camp who had allegedly “held refugees hostage in appalling conditions.”¹³⁰ The predawn deployment of military and police was required because, he said, “the refugees were highly mobilized and would resist the government team.”¹³¹ The report presented to parliament on the operation—styled “Operation Hope”—portrayed it as a military victory against an armed opposition, with a declared objective “to investigate external and internal opposition and sabotage of government policy.”¹³²

Uganda’s Commissioner for Refugees later denied there was any undue use of force. Police, he said, were brought in only to control a group of riotous youth opposed to the relocation.¹³³ Officials with the Ugandan Human Rights Commission who carried out a preliminary investigation also reported in October 2003 that there was no evidence that refugees had been killed.¹³⁴ This assessment was seconded by UNHCR itself: “[w]e heard stories to that effect but no one making the accusations has managed to give us any details so far.”¹³⁵ UNHCR did, however, confirm sending the government “a protest note over the manner the relocation has been handled and the refusal of our staff to access these refugees.”¹³⁶ The Refugee Law Project at Makerere University, which also carried out an investigation of the incident, found the reality

127 IRIN, “UGANDA: UN Taken by Surprise over Refugee Relocation,” September 2, 2003.

128 Interview with escapee from Kiryandongo, September 3, 2003.

129 IRIN, “UGANDA: UN Taken by Surprise over Refugee Relocation,” September 2, 2003.

130 Statement to parliament on relocation of Sudanese refugee from Kiryandongo to West Nile by Rt., Hon. Lt. Gen. Moses Ali, 1st Deputy Prime Minister and Minister for Disaster Preparedness and Refugees, September 11, 2003, on file with Human Rights First.

131 Ibid.

132 Ibid.

133 BBC news, “Uganda Denies Refugee Deaths,” September 2, 2003.

134 See IRIN, “UGANDA: Government Accused of Violating Refugee Rights,” October 13, 2003.

135 See IRIN, “UGANDA: UNHCR Says No Evidence of Killing in Refugee Camp,” September 8, 2004.

136 See Agence France Presse, “UNHCR Protests Forcible Relocation of Sudanese Refugees in Uganda,” September 2, 2003.

less than clear-cut. “We’ve spoken to many refugees from inside the camp who told us the same things—about seven or so people dying in different ways. They show remarkable consistency.”¹³⁷

The government strongly denies that there was any inappropriate use of force, and it has proved impossible to produce firm evidence of the alleged deaths. In responding to a report that 26 Kiryandongo-origin Sudanese refugees had been buried in West Nile at the end of September, the minister for disaster preparedness and refugees stated that he was convinced that the refugees had died of natural causes and not as a result of the transfer operation.¹³⁸ It is clear, however, that the operation involved military personnel and considerable force and was deliberately carried out outside the scrutiny of independent observers.

The effect of reports surrounding the incident on the fears of the Kibati group was dramatic. In the aftermath of the Kiryandongo relocation a senior government official indicated that similar methods would be used if there was any resistance to the Rwanda repatriation. Minister for Disaster Preparedness and Refugees Moses Ali told Uganda-based Radio One, “Next is Nakivale.”¹³⁹ Both the recognized refugees in the Nakivale and Oruchinga camps and the Kibati group appeared to be under threat of summary and swift forced return to Rwanda. In late 2003 there were indications that military and other law enforcement officials were undergoing specific training in order to prepare for a possible forced repatriation. There were suggestions that administrative and military officials based in the Nakivale area may have been present at the Kiryandongo relocation to elucidate lessons for a future Nakivale operation. Indications were that preparations were under way to be ready to engage the military if necessary to effect repatriation of Rwandans. One official told Human Rights First, “[t]he Kibati repatriation will be swifter than the Kiryandongo. Rwanda is just a short distance away. We will send the army to load off to Rwanda.” “But we will not hurt them,” he added.¹⁴⁰

Uganda has been a leader in refugee protection in the region. Its willingness recently to resort to the use of force against refugees sets a dangerous precedent that may begin to resonate more widely. The Kiryandongo operation is the latest in a series in the region which suggest that force as a means to enforce refugee policies whether in terms of repatriation or relocation may be reasserting itself as a trend in the Great Lakes. The deployment of hundreds of police in Tanzania’s police round up of refugees into for repatriation in 2002 and the forcing back of Congolese refugees from Rwanda by Rwandan military and police during September and October of 2002 indicated the trend. The U.S. Committee for Refugees found that during that latter incident, “Rwandan government authorities and RCD-Goma [the *Rassemblement Congolais pour la Démocratie-Goma*, a Congolese rebel movement backed by Rwanda] representatives misled, intimidated, and forcibly returned several thousand Congolese refugees residing in Gihembe and Kiziba camps in Rwanda to a dangerous area of eastern DRC.”¹⁴¹ It was reported that refugees were physically forced to dismantle their homes, that the infrastructure of the camp was

137 Quoted in IRIN, “UGANDA: UNHCR Says No Evidence of Killing in Refugee Camp,” September 8, 2003.

138 See “Refugees Die in West Nile,” *New Vision*, September 29, 2003.

139 Interview with Minister for Disaster Preparedness and Refugees Moses Ali broadcast on Radio One Uganda, September 2003.

140 Interview with government official, September 2003.

141 For a full report on the incident, see U.S. Committee for Refugees, “The Forced Repatriation of Congolese Refugees Living in Rwanda,” December 16, 2002.

destroyed and that refugees were herded onto buses for transportation. In Tanzania, there has reportedly been an effort over the last year or two to ensure that key officials, including district and regional commissioners, who are involved in overseeing repatriation from Tanzania, are either army veterans or security personnel. Particular difficulties arose in early 2004 when the district commissioner in Kibondo, a former military officer, began to harass Burundian refugees to leave the camps, declaring them “dangerous” and encouraging the view that the refugees constituted an imminent security threat.¹⁴²

142 See Refugees International, “Burundian Refugees in Tanzania: Mounting pressure to return,” March 23, 2004.

Part III

The Kibati Group in Limbo

For over two and a half years now the Kibati group has been awaiting answers to their requests for protection from the Uganda government and UNHCR, and unsure of the future. The life they have carved out on the edge of the Nakivale settlement is harsh but slowly improving—a testament to their resilience and to the efforts of some in the local community. The section which follows is an attempt to trace the key humanitarian and protection challenges facing the group.

Who is in the Kibati Group?

Since March 2002 no attempt has been made by either the Ugandan authorities or UNHCR to “verify” or actually assess the individual identities and status of the Kibati caseload. For the moment, Rwandan Hutu and Burundian asylum seekers arriving in southwestern Uganda are simply directed to the Kibati camp, registered by the local police, and the question of their status formally placed in limbo—any suspicions that individuals who bear criminal responsibility for the Rwanda genocide are among them are not explicitly explored.

In discussions about the group it is generally assumed that it consists only of Rwandan refugees who previously had sought or received protection as refugees in Tanzania. Assumptions about the group’s homogenous character are at the root of much of the policy decisions that have been made about the group. In reality, however, there appear to be a variety of individuals in the Kibati caseload, raising different issues of law and policy, and presenting different protection challenges.

Human Rights First found three basic categories of protection seekers amongst the group:¹⁴³

- Rwandan/Burundian nationals who held refugee status in Tanzania immediately previous to their arrival in Uganda, either residing inside or outside formal camp structures;
- Rwandan/Burundian nationals who or who had spent time in Tanzania without identifying themselves to the authorities previous to their arrival in Uganda; and

¹⁴³ There were some suggestions that a number of Congolese (Hutu) were also among the Kibati group at a certain point. By April 2004, it was agreed that even if they had been, they were no longer present.

- Rwandan/Burundian nationals who had arrived relatively directly from their countries of origin.

Tanzania Sojourn

Callixte Mugabo told Human Rights First how he had arrived at the Kibati camp on November 2, 2002 with his wife and two children having spent three years in exile as a refugee in Tanzania in Lukole B camp in the Kagera region.¹⁴⁴ A Tanzanian document in his possession indicated that he had been accepted as a refugee by the Tanzanian government in July 1999. Mugabo stated without further elaboration that his father had died in prison in Rwanda and that he too would be imprisoned if returned there. His story is one told by the majority of the Kibati group: flight from Rwanda, refugee status in Tanzania, and growing alarm as Tanzanian officials made strong signals that Rwandan refugees would be forced home with a “deadline” of December 31, 2002.

Human Rights First was unable to ascertain how many of the Rwandans coming directly from Tanzania had been formally recognized as refugees there just prior to their flight into Uganda, whether under group designation or on the basis of individualized screening. Many indicated that they had in fact sought protection in Tanzania on two different occasions. They had first been recognized as refugees in Tanzania in 1994 but later returned to Rwanda in a variety of circumstances. Some claimed to have been forcibly returned during the 1996 repatriation operation. Others said that they had returned voluntarily in 1996, feeling that the situation in Rwanda had sufficiently stabilized.

When some subsequently fled into exile in Tanzania for the second time, many opted to “self-settle” and to remain outside the formal refugee registration system. Many chose this route because they felt that the formal refugee registration system had not provided sufficient protection to them in 1996. Others did re-register as refugees within the formal camp system, but later, concerned by rumors about a new repatriation operation in 2002, left the camps, fearing that they would be subject to a repeat of the 1996 experience.

The Ugandan police officer in charge at the Kibati camp with whom Human Rights First spoke in December 2002 said that the majority of the Kibati population, both Rwandan and Burundian, had not been residing in camps in Tanzania prior to their arrival in Uganda. They had been precariously self-settled outside the camp system, in some cases after a period in a formal camp structure, or after having come directly from Rwanda or Burundi. A number of the protection seekers did hold Tanzanian tax certificates, indicating a high degree of integration outside the camp context. It was when local Tanzanian officials commenced “harassing” them to return to the camps, the police officer said, that they began to flee to Uganda. They feared that return to the camps was just a precursor to forced deportation. It is worth noting in this regard that in November 2001 a delegation of UNHCR officials was sent from Tanzania to Uganda to assess the population at the Kibati camp, and, in particular, to examine whether or not they were persons

¹⁴⁴ Names of those interviewed have been changed to protect their identity. Interview conducted on December 11, 2002 in Kibati camp at the Nakivale settlement. Mugabo claimed that he and his family, among a group of ten others, had left Lukole B camp in Kagera on the October 24, 2002 and traveled to Uganda, crossing the border at Kikagati. At the Ugandan frontier they had met with a group of 30 fellow Rwandan refugees who were waiting for other assistance to cross the border into Uganda—the journey from the Kagera area to the border region had apparently exhausted their meager resources.

who had been granted refugee status in Tanzania. Officials reportedly found no correlation between the names of those registered in Kibati and those who had been recorded as having left from the camps in Tanzania—perhaps an indication that self-settlement in Tanzania had been the norm, or indeed that some had come directly from Rwanda as they claimed.

Ndahirwa, a Burundian national originally from Makambo district, told Human Rights First that he had come from Tanzania to Kibati in August 2002. He said he had been in exile in Tanzania since 1994 residing as a refugee in Lukole B Camp, in Kagera, where he had been receiving assistance from UNHCR.¹⁴⁵ On crossing the border into Uganda he had surrendered his ration card to the Tanzanian authorities. Ndahirwa claimed that some time around June 2002 a delegation of Rwandan officials and parliamentarians had arrived in Tanzania to discuss the return of all Rwandans in exile, resulting in the brief closure of the camp in which he was resident. He understood that the camp was later reopened but by this time he had already made an assessment that it was unsafe to stay in Tanzania.

Direct Flight from Rwanda and Burundi

Kibati Camp representatives claimed that most of the over 200 Burundians in the camp in late 2002 had come directly from Burundi, generally via a brief Rwandan transit. Many of the new arrivals did, however, admit to spending time as refugees in Tanzania during previous periods of exile. After they had been repatriated from Tanzania to Burundi they had once again found that it unsafe for them to remain at home. They said this was why many of them held Tanzanian refugee identity documents.¹⁴⁶

Ichimpaye, a widow with five children, told Human Rights First that before her most recent flight from Burundi she had spent three years as a refugee in the Kigoma area of Tanzania between 1996 and 1999.¹⁴⁷ When she found herself forced to leave Burundi the second time she decided to go to Uganda, unsure of the reception which would await her in Tanzania.

Mpyisi, a Rwandan national, arrived with his wife and child in Kibati in May 2002.¹⁴⁸ He told Human Rights First that he had fled from Rwanda in April 2002 after the “disappearance” of a number of his neighbors who had been—like him—expressing opposition to the government. He showed Human Rights First a Rwandan voting card, which indicated that he had voted in Rwanda in both 2001 and 2002. He also held a certificate dated April 12, 2001 from the local commune certifying that he was a man of good character and had not had any problems with the police authorities. As was the case with many of those who claimed to have arrived directly from Rwanda, Mpyisi told Human Rights First that he had also been a refugee in Tanzania from 1994 to 1996.

Others we spoke to claimed that their flight into Uganda was the first time they had fled. Zana, a young Burundian man from Kirundo province in the Ngozi region, told us how he had left Burundi for the first time in May 2002 traveling to Uganda via Rwanda.

145 Interview conducted at Kibati camp, December 2002.

146 It should be noted that refugees who spontaneously repatriate may not cross at policed border points and therefore are not obliged to surrender documentation.

147 Interview conducted at Kibati camp, December 2002.

148 Interview conducted at Kibati camp, December 2002.

Establishing the identities of populations seeking protection can be a difficult and complex process. Officials in Tanzania, for example, have claimed that as Rwandan repatriation becomes a governmental priority, Rwandans “turn into Burundians overnight.”¹⁴⁹ While the cursory interviews conducted by Human Rights First are not sufficient to determine the identities of the group, that said, those interviewed who declared themselves to us as Burundian did appear to be of that nationality. This view was echoed by local officials in April 2004.

Demographics

The number of the Kibati population has fluctuated over the last two and a half years. As the population in the camp has risen, new arrivals have become increasingly reluctant to declare that they are in possession of any identity documentation. This makes it more difficult for the police to monitor and control the movement of the population. As the group has not been deemed eligible for formal refugee assistance, the usual mode of assessing a refugee population via regular food distribution and accompanying ration card checks is not available. Regular roll call reviews are not conducted. In the absence of an assistance-based monitoring system, the local police officer in charge of the Nakivale settlement keeps a cumulative record of new arrivals and departures. Arriving protection seekers are registered at the local police point on a weekly basis (Mondays) where basic data is recorded and identity documents (those few available) are collected. They are not provided with any identity documentation indicating their status. The police also liaise regularly with the informally elected Kibati camp chairman who informs them of departures and arrivals of those who have not gone through official registration channels.¹⁵⁰

As real-time appraisals of the population are not carried out, the most thorough overall knowledge of the population thus rests with the camp chairman, a state of affairs, which one local official admitted, results in a one-sided understanding. That said the local police have certainly made a very strong effort to build close links with camp members more broadly in order to maintain as accurate a picture as possible of the population and its critical humanitarian and security needs.

The first formal attempt to register the population was carried out on May 28, 2003 when the World Food Program (WFP) carried out an assessment of nutritional needs. This exercise recorded 4,521 individuals. The figure did not tally with the cumulative records of arrivals at Kibati held at the local police station at the time, nor with figures obtained informally from officials by the Refugee Law Project of Makerere University—8,500 as of February 2003.¹⁵¹ Certainly the population of the camp, although rising steadily overall, has fluctuated *inter alia* as the uncertain situation of the camp triggers decisions to leave. Some members of the group have reportedly left Kibati to join relatives formally registered elsewhere in the Nakivale settlement or have bought the ration cards of departing registered camp residents. Others with means have

149 IRIN, “RWANDA-TANZANIA: IRIN Focus on Rwandan Refugees in Tanzania,” May 9, 2002.

150 The chairmanship is an elected position with an indefinite duration. Human Rights First was told, however, that two previous chairmen were deposed as they had “worked badly” for the community.

151 Emmanuel Bagenda, Angela Naggaga, Elliott Smith, “Land Problems in Nakivale Settlement and the Implications for Refugee Protection in Uganda,” Refugee Law Project, Working Paper No. 8, May 2003, available online at <http://www.refugeelawproject.org/working%20papers/RLP%20WP8.pdf>, at p. 3.

bought land in Uganda (particularly, it is reported, in the Masaka region of Central Uganda) or even moved onwards to other countries in search of greater security.

By late 2003 the announcement of a tripartite repatriation agreement for Rwandan refugees had begun to take its toll on refugees remaining in Kibati. In November 2003 over 2,000 Rwandans were recorded as having arrived in the Kyaka refugee camp in western Uganda. Although it has not been officially confirmed, it is reported that many of these Rwandans are in fact members of the Kibati group who may have simply moved inland and declared themselves freshly arrived from Rwanda. Kibati group members told Human Rights First that refugees understand that control of land plot distribution there is reportedly less than strict. In April 2004, the official figure available for the Kibati camp population provided by local officials to Human Rights First was 4,839. It was estimated, however, by local officials that over 5,500 persons were still living at the camp, despite the formal records.

Exact statistics relating to the gender and age breakdown of the Kibati group have not been compiled. At the time of Human Rights First's mission in December 2002 Kibati Camp representatives claimed that there were over 2,000 children in the camp under 15 years of age. This number included approximately 300 orphans.¹⁵² Local police told Human Rights First in December 2002 that they had found 40 percent were children, 50 percent women, and 10 percent men. In September 2003, Red Cross Officials confirmed the view that children still accounted for 40 percent of the entire population.

Humanitarian and Protection Situation

Location and Shelter

The location of the Kibati Camp at the edge of the Nakivale refugee settlement has changed three times since its foundation in 2001, provoked by health and security concerns, and exacerbated by the constant growth of the population.

First situated in a marshy area near the main Mbarara-Kikagati road, the Kibati camp was initially intended to function only as a temporary reception centre. As the population grew in early 2002 this location was deemed to be a health risk by the main UNHCR implementing partner in the camp—the Ugandan Red Cross—due to flooding and sanitation problems and the camp was moved to a more elevated area overlooking Nakivale settlement. In June 2002, Kibati was once again moved, this time to a secluded bush area at the foot of a hill with a few single tracks leading to the Nakivale settlement over three kilometers away. Unfortunately, the clearing of vegetation to accommodate the huge increase in population since that time has left the camp completely exposed once again.

All of those to whom Human Rights First spoke in December 2002 highlighted with great urgency the pitiful state of the shelter available to the Kibati population. Makeshift huts had been constructed out of branches and rushes and neither plastic sheeting nor metallic sheeting had been distributed to help waterproof the structures. In a small minority of cases Human

¹⁵² Human Rights First saw no young girls older than thirteen or fourteen among the children at the camp during their visits. Most girls upon reaching puberty are married to male camp residents, a resident of the Nakivale refugee camp, or someone in the local community, in order to improve her own and her family's prospects of survival.

Rights First observed plastic sheeting where the hut owners had either traveled with it from Tanzania, or obtained materials from other refugees in the official Nakivale settlement. The uncertain nature of the Kibati population's situation has also discouraged attempts to construct even slightly more permanent mud huts—the camp has been relocated three times within two years and its inhabitants have been told they have no legal status in Uganda.

The vulnerable nature of the shelter available was horrifically demonstrated in June 2003 when a prolonged dry spell brought tragedy at the camp. Nine refugee children were burnt to death and more than 650 of the 1,905 huts were destroyed by a fire that swept through the camp. Many of the victim's parents had gone to the outlying villages to collect firewood and to work for food and had returned at the end of the day to find their children dead. "It was the most tragic thing that happened to us this far," the chairman of the camp told Human Rights First in September 2003. The Ugandan Red Cross said the fire had swept across the camp in a very short time, making it impossible to rescue the children or salvage property. In the wake of the tragedy the Nakivale camp commandant made strenuous efforts to oversee the rebuilding of the Kibati camp, insisting on ten and two meter distances between the huts. This arrangement has significantly extended the physical reach of the settlement.

Food

It was only after the June 2003 fire that UNHCR, WFP and the Ugandan Red Cross began to sporadically distribute some basic humanitarian assistance to the Kibati group. Prior to June 2003, and absent their recognized legal status as refugees, the group was considered to be entitled only to basic emergency medical care. Access to food for the first two years of the camp's existence was thus almost entirely the responsibility of the Kibati camp residents themselves. During this period, it is remarkable how the Kibati population has survived, despite the lack of humanitarian assistance and the fact that they have no rights under domestic law to farm or work legally. They have not been granted access to land for farming, as have the recognized refugees in the Nakivale camp. Neither is the population permitted to hunt, as the local area is dedicated primarily to grazing and cultivation. The group is extraordinarily resilient and clearly possessed of sophisticated coping strategies. At the same time local officials have also made creative efforts to assist wherever possible despite the restricting legal framework of the group's "limbo" status. Human Rights First was surprised in December 2002 at the range of foodstuffs available in some households—cassava, matoke, sorghum, rice, beans, sweet potatoes and cooking oil. A few goats and chickens were also observed, but the vast majority of the families seemed to have no access to meat.

Kibati residents work illegally for the local community and refugee populations in and around the Nakivale settlement. In fact, the local and recognized refugee communities are a vital source of survival for the Kibati population as food for work exchange is the principle source of food. Although some local officials expressed concern that the refugee population was being exploited as a result of the very low form of remuneration, the refugees themselves expressed gratitude that the community was able to support them in this way. But the situation remains uncertain. In late 2002 a drought threatened to greatly exacerbate the situation as the local population themselves began to suffer food scarcity. There have also been allegations of the theft of food from local farms which have added to tensions with the local population.

Recognized refugees in the Nakivale settlement were open about the fact that some of the aid received by the refugees during the monthly WFP food distribution ends up with their compatriots in the Kibati group. It is important to recall that thousands of the Rwandan refugees currently residing as recognized refugees in the Nakivale camp are highly likely to have been neighbors of some members of the Kibati group in Tanzania. It is also reported that some members of the group have managed to obtain the ration cards of recognized refugees who may have returned home informally or moved on to live in self-settled environments either in Uganda or elsewhere.

Despite the insistence by all officials and the Kibati protection seekers themselves that they are in a situation of absolute destitution, there are indications that some within the group have small amounts of money. This they have used to purchase food, and even, we understand, plots of land (or rights to their use) in the official settlement, from the recognized refugee population—recognized refugees in Nakivale are allocated the use of 60 x 40 meters of land for cultivation.

Humanitarian Assistance

The World Food Program (WFP) is responsible for providing food for distribution to recognized refugees in the Nakivale settlement through its implementing partner. Officers from WFP who had regular opportunities to informally assess the situation in the Kibati camp at the time of Human Rights First's visit in December 2002 were deeply concerned about the situation.¹⁵³ They were awaiting receipt of a formal request from the Ugandan government or from UNHCR, however, before they could take any action to formally assess food needs.

There should be no obstacle to UNHCR and the government of Uganda providing the Kibati group food assistance—both as unverified asylum seekers and on urgent humanitarian grounds. In the absence of any assessment of the status of the population, the question as to whether the initial blanket denial of humanitarian assistance was arbitrary and contrary to the principle of non-discrimination in the protection of basic rights was at issue.¹⁵⁴ It is to be recalled that as refugee status is a declaratory status, it is a basic principle of international refugee law that asylum seekers must be treated on the assumption that they may be refugees until their status has been determined. Human Rights First recommended in 2002 that nutritional surveillance should be undertaken at a minimum. This would not require extensive resources, perhaps a monthly monitoring of a sample group of vulnerable persons and key indicators. It would function as an alert for the authorities, lest the situation disintegrate. In May 2003, a WFP assessment was finally carried out. After the tragedy of the June fire, a range of non-food items were distributed, including plastic sheeting, blankets, and cooking utensils. Since then rations at 50 percent of assessed need, including porridge, maize, rice beans and salt, have been distributed on an intermittent basis.

153 The World Food Program operates an extensive program in Uganda. Until January 2003 the Nakivale settlement and the Kibati population were considered to be under the jurisdiction of the Great Lakes program, but latterly formally came within the general Uganda program.

154 See discussion on the right to food for refugees and the question of the right to humanitarian assistance in Human Rights First/West African Refugees and Internally Displaced Persons Network (WARIPNET), *From Response to Solutions—Strengthening the protection of refugees through economic, social and cultural rights*, available online at http://www.humanrightsfirst.org/archives/arc_pubs/ResponseSolutions.htm.

The distribution of humanitarian assistance, at however minimal a level, and the greater attention being paid by the local authorities in helping to maintain access to food, has had a marked effect on the quality of life in the camp.¹⁵⁵ When Human Rights First visited the camp in April 2004 there had been a clear improvement in the variety of goods available in the Kibati “market.” Cattle were observed for the first time as were an extensive range of non-food items, including clothing, pencils, and copy-books. The residents themselves spoke of how the food distribution, however occasional, had significantly relieved pressure on life in the camp. Finally, allegations of the theft of food from the local community were down, somewhat calming the tensions between the camp residents and the local community.

Water

Access to clean water for the Kibati group remains a significant problem. The Kibati camp bore hole at the foot of the hill-perched camp is regularly inundated with seepage flows down, particularly during the rainy season. In December 2002 the Nakivale camp commandant was deeply concerned about the health and safety implications of the water facilities, particularly as the rainy season progressed. At a meeting with Human Rights First in December 2002 he made a point of producing from behind his desk a bottle of clouded and foul smelling water with suspended waste matter which he said he had sampled from the Kibati camp bore hole. The water which Human Rights First observed in the Kibati camp itself appeared to be similarly polluted. It is quite remarkable that no major outbreaks of disease have occurred, although water-borne diseases are the main cause of illness within the camp. Some assistance was provided to the recognized refugee population in 2004 to create rudimentary systems of water collection in the rainy season but this help has not been extended formally to the Kibati group.

Health and Sanitation

The Uganda Red Cross is responsible for the provision of health care and the distribution of food and non-food items to recognized refugees. On humanitarian grounds they have also undertaken to provide limited assistance to the Kibati protection seekers.¹⁵⁶ The Red Cross also runs a vaccination program for children under five years old and an emergency feeding program for malnourished children. In addition to providing basic medical care the Uganda Red Cross has also built three mud latrines for the camp. This system, operated by an elected camp sanitation committee, has been vital for its survival. At the time of Human Rights First’s visit in December 2002 a young Burundian resident of the camp who had completed a number of years of pre-medical education had been appointed liaison person for the camp population with the Red Cross. He provided oversight for basic treatment and alerts the center to emergencies.

Staff of the Red Cross at the Nakivale settlement health center make no distinction between recognized refugees and the Kibati population providing treatment to all. Statistics have not yet

155 A number of other measures—perhaps unorthodox—have also been taken in parallel to ensure that the availability of food is maintained the Kibati camp. The selling of certain food items outside the camp area by registered refugees at certain times, for example, has been disallowed. This restricts the market, ensuring that the prices for key foodstuffs are kept low and within the reach of the Kibati group who do not benefit from regular food distribution. There are a range of questions beyond the scope of this report around the extent to which the rights of recognized refugees can be restricted where necessary and proportional to improve food security.

156 The Church of Uganda provided a day of health care and medicine to the population at the time of one visit.

been compiled, but it is clear from a sampling by Human Rights First that Kibati residents seek assistance at a much greater rate proportionally than recognized refugees. Because of the poor quality of the water, waterborne diseases are particularly common—approximately 50 persons were suffering from serious sickness related to the water supply at the time of Human Rights First’s visit in December 2002 according to the Kibati medical assistant.¹⁵⁷

As the Kibati population is in such a vulnerable situation they also end up receiving a disproportionate portion of the available medical care. This has a knock on effect on the quality and quantity of service available to the recognized refugees in Nakivale, putting a considerable extra strain on resources. The addition of the 3,000 Kibati protection seekers to the Nakivale Health Centre caseload had not, by December 2002, resulted in any proportional budget increase for the Centre. Thus the overall quantity of medication and staff resources available to both the recognized refugee population and the Kibati group has been reduced.

Education

Children in the Kibati camp initially had no access to the educational facilities which are shared by the local population and the recognized refugee community in Nakivale. The Kibati camp leaders told Human Rights First in December 2002 that there were at least two teachers and others in the camp ready to assist in putting together a school for the children. The main obstacle was not simply the lack of materials, resources or shelter for the school—the primary problem was that potential teachers were occupied with working for food to provide for their own families. Some local officials with whom Human Rights First spoke expressed the view that if the children were presented for registration at local schools that they would not be turned away, in line with the education policy of universal free primary education. By April 2004, access to local schools had been negotiated for a number of the children.

Internal and Local Tensions

Within the Kibati camp residents have set up a ten member Committee for Security which is responsible for internal “policing” in the camp. They claim not to use arms or physical punishment. A second committee, headed by the camp chairman deals with internal dispute resolution (based on Rwandan customs and law).

Despite these efforts, local police advise that they are frequently called upon to moderate internal disputes in the camp. Minor thefts of food and other items and fighting between the camp residents are among the main difficulties with which the police have to deal. The fact that access to cultivation and other employment are denied the Kibati group due to their lack of legal status only heightens the opportunity for frustrations to boil over. The police cited problems caused by excessive drinking of the local crude alcohol, waragi and sorghum brew, and indulgence in opium as key exacerbating factors. Accusations of witchcraft and other tensions were also referenced. In 2004 the Nakivale camp commandant banned the consumption of waragi in the camp and gatherings after 10 p.m. in an attempt to lower the incidents of gender-

¹⁵⁷ The main ailments of the Kibati Group in order of frequency as recorded at the Red Cross Health Centre in December 2002 were malaria, including cerebral malaria, respiratory tract infections, dysentery, and other intestinal tract infections.

based violence and altercations between camp residents. Some success has been claimed for this policy.

Major incidents have been avoided between camp residents and the local Ugandan community. In fact, the support of the local community for the Kibati group, through the provision of food for work and other employment has been vital for the survival of the population. The camp representatives themselves expressed appreciation for the behavior of the local population. But the local officials with whom Human Rights First spoke were clearly concerned that tensions could be ignited by the smallest of sparks. Kibati residents had already been arrested by members of the local community, for example, and accused of stealing food crops, goats, and hens. The local police had repeatedly expressed concerns to their superiors regarding the brewing security difficulties but had not, apparently, received comprehensive directions on how to respond and prepare for the long term.

The poverty of the local population coupled with pressure surrounding the availability of land has been an increasingly critical issue.¹⁵⁸ The question of land is one of the biggest points of tension between the Kibati population, the recognized refugee population, and the local community. Due to problems with the official land survey there is even confusion at the local level as to what areas exactly have been demarcated for the refugee settlement. Competing interests have created serious animosities. The land upon which the Kibati camp is now situated, for example, is government-owned land, but not, as yet, formally gazetted as a refugee hosting area. In April 2004 reflecting the extent to which the tensions had escalated, Human Rights First learned that the Nakivale camp commandant had been sued in court—in his personal capacity—for the allocation of land, allegedly without authority, to refugees.

During Human Rights First's December 2002 visit to the Kibati camp a number of local community delegations arrived at the local police point to raise issues relating to the conduct of the refugee population. During 2003 the number of complaints related to land disputes increased, particularly in the form of allegations that the growing Kibati camp was encroaching onto land which the local population intended to cultivate or to use to graze their herds. An exacerbating factor is the fact that the mainly Hutu arrivals are traditionally farmers rather than pastoralists—thus the tensions are in some ways additionally strained by ethnic differences and preconceptions. A report by the Refugee Law Project of Makerere University found that there were particular concerns relating to the political or even perceived criminal background of the Kibati group. One local pastoralist was quoted as saying, "we are very afraid of these people because of the bad things they did when they were in their country."¹⁵⁹ By September 2003 growing resentment was palpable among local leaders about the disruptive presence of the large number of financially desperate Kibati refugees and, on the other hand, a perception that the

158 For a detailed examination of the land question and the Nakivale settlement as a whole see Emmanuel Bagenda, Angela Naggaga, Elliott Smith, "Land Problems in Nakivale Settlement and the Implications for Refugee Protection in Uganda," Refugee Law Project, Working Paper No. 8, May 2003, available online at

<http://www.refugeelawproject.org/working%20papers/RLP%20WP8.pdf>.

159 Ibid., at p. 12.

economic situation of some of the recognized refugee community in the Nakivale camp was better than their own.¹⁶⁰

In early 2004 matters came to a head when the local community became deeply concerned with increasing theft in surrounding villages and the apparent lack of control exercised by the authorities over the movements of the refugee population—in both the recognized refugee Nakivale camp and the Kibati camp. In response, local officials introduced a system of *laissez passé* or refugee movement permits in March 2004 for those refugees who wished to be employed during the week by local residents (those leaving just for the day did not require permission).¹⁶¹ The same form of pass is issued for both recognized refugees in Nakivale as for Kibati residents—the term “asylum seeker” is used on the permit for the latter group. The *laissez passé* received by the Kibati residents is the only formal documentation which they have been issued by the Ugandan authorities. Local officials claim that this system of formalized movement permits including the issue of documents which serve to identify the Kibati group residents, has eased tensions between local and refugee populations.

Local officials who spoke to by Human Rights First were clearly sympathetic to the plight of the Kibati group. As the Nakivale camp commandant pointed out “we are all potential refugees.” But officials repeatedly stressed that the local community needed more substantial support in order to continue responding to the continuing refugee inflow, particularly in the form of support to the local administration and the facilitation of open discussions with the community itself. The resources available to the local police are pitifully few. Only seven officers have been provided, for example, to protect the approximately 17,000 Nakivale residents and 20,000 Ugandan citizens in the area. The officer in charge who oversees policing of the Nakivale camp appears to be someone with great insight into, and concern about, the burgeoning security situation. But with a bicycle as his only mode of transport and a geographical area of 86 sq km to monitor, his job is extraordinarily difficult. Logistical and transport support, including vehicles and basic supplies such as fuel are clearly needed. As one of the most senior officers expressed it; “sometimes we see people in great suffering and we can’t assist—we feel our hands are tied.”¹⁶²

160 Some of the programs which have been put in place for the recognized refugee populations have successfully attempted to include an element of integrated service for the local population. UNHCR, for example, has contributed towards the building of a science laboratory for a local secondary school and all the schools in the Nakivale are shared by refugees and locals. It was suggested to Human Rights First that integration of water service provision to both the refugee and local community might be a useful strategy in reducing tensions, particularly if this involved the creation of long term capacity and a sourcing of new water points.

161 The legal basis of these permits, in particular their implied discretionary status, is questionable under international law as recognized refugees should be entitled to freedom of movement and employment. Article 31(2) of the 1951 U.N. Convention allows states to impose “necessary” restrictions on the movement of refugees, although only on a temporary basis, until such time as the individual refugee’s status is regularized or admission is granted to another country. Article 26 of the same Convention provides that refugees generally have the same right to freedom of movement as any other alien. Article 9 provides, however, that “[i]n time of war or other grave and exceptional circumstances,” a state may take provisional measures (including, for example, restrictions on liberty or movement):... which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that the person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security. For an extensive analysis of the scope of article 31, see Guy S. Goodwin-Gill, “Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention and Protection,” paper prepared at the request of the Department of International Protection (DIP) for the UNHCR Global Consultations, October 2001.

162 Interview with police officer, September 2003.

The support and understanding of local officials has been critical to the survival of the asylum seekers—and not just in Kibati. In December 2002, during the increased inflow of Rwandan refugees coming from Tanzania, Human Rights visited Mutukula border post. There local police had permitted 32 men and 36 women and children who had arrived without means and shelter to take refuge in the accommodation huts which had been built for the use of the border officials themselves. The police were assisting with the collection of food and had organized rudimentary sanitation systems. A similar welcome was extended at other police points with officials sharing their own meager resources with the arriving refugees.

External Threats

It is clear from Human Rights First's discussions with security and other officials that there are concerns about being able to ensure the physical security of the Kibati population—and not just against threats emanating from a disgruntled local population. One police officer suggested that the reason for the last shift of the Kibati camp location to an area concealed from the view of those traveling on the main road into the Nakivale camp was to prevent “terrorists” from attacking the camp. At its foundation, due to the vegetation, it was virtually impossible to identify the existence of the over a thousand makeshift huts from the main road area without guidance from local officials. Since December 2002, however, the doubling of the population, and the use of the bush vegetation for firework and shelter, has resulted in the camp now being completely exposed to view. Although local officials refused to be explicit there was clearly an implication that among the Kibati group were persons who might be perceived as hostile to Rwanda and could become the focus of preemptive attack—whether from the local population or the Rwandan authorities.

It was pointed out by both the camp residents and local officials that the relocation of the camp in June 2002 had also brought the Kibati group nearer to the protective presence of the permanent police post which oversees the Nakivale refugee settlement as a whole. The Kibati population representatives with whom Human Rights First spoke told of excellent cooperation and interaction with the local police officials. They expressed gratitude that the police had decided to re-locate the camp to its current position, suggesting that the resultant proximity to the local police post had contributed to an enhanced sense of security, with better control and responsiveness to internal camp law and order problems. At the same time, however, some camp residents told Human Rights First that there was a belief that some of the group had been “disappearing” from the camp. Suggestions that Rwanda might be responsible added to the sense of insecurity.

Camp residents' concerns that they were at risk from unidentified attackers from outside the local area were echoed by local officials. References were made by local administrative officials to the potential for the population to be harmed by “terrorists,” usually when describing relief about the relocation of the Kibati camp to a concealed area. A senior local officer confirmed to Human Rights First that he “could not rule out security concerns” in relation to the population.¹⁶³ Some allegations had indeed been received of infiltration of the Nakivale settlement by Rwandan intelligence agents, and reconnaissance of the Kibati camps. These

163 Interview with senior official, December 2002.

allegations were impossible to verify given the lack of firm control over the composition of the Kibati population. In October 2003, however, there were newspaper reports that two individuals suspected of working for Rwandan intelligence and posing as asylum seekers found their way into the camps, the two were later reportedly arrested by police.

On the other side of the security question, Rwandan refugees in the area are frequently referred to by the local community as “*interahamwe*.” Suspicions are rife that Rwandan refugees in the area are not all simple victims of political turmoil. Human Rights First was told that refugees in the area had been heard boasting of the birth rate, saying that they were creating an army in exile which would eventually return to Rwanda to reassert their primacy.¹⁶⁴ Despite such concerns about the population and its potential military or criminal character, local officials are convinced that there is no military training taking place. Nor are arms present in the camp. They claim that they are able to keep a very close eye on such matters.

¹⁶⁴ Interview regular Ugandan visitor to the Nakivale camp, April 19, 2004.

Part IV

The Great Lakes Legal and Policy Framework in Flux

The integrity of the legal and policy framework governing refugee protection in the Great Lakes region has been shaken by the events of the last decade. Justifications for restrictionist refugee policy in the region have been sought, not only in the exigencies of practice, but in law. In particular, governments and the international community have sought to engage creatively with the scope of international legal obligations in ways which have tended to narrow the quality of protection available to refugees.

New approaches include proposals for exceptions to the principle of non-refoulement, the creation of “safe zones” in countries of origin, and over-zealous employment of the category of “irregular movers.” In addition, at the global level, developments in Europe and within the framework of the 1951 U.N. Refugee Convention under the guidance of UNHCR are generating proposals which arguably threaten the primacy of the 1969 OAU Convention and the scope of the human rights protections available to refugees in African law. Analysis of the broad trends in refugee law in the region and in Europe is beyond the scope of this report. Imminent re-fashioning of the international legal framework, however, has the potential to critically affect refugee protection in the Great Lakes region. Key issues which might be addressed by refugee advocates and states in the region are highlighted below.¹⁶⁵

Exceptions to the Principle of Non-Refoulement

The principle of non-refoulement is a cornerstone of refugee law. It bars states from returning a refugee “in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”¹⁶⁶ Summary rejection at the border thus violates the principle of non-refoulement—in order for a state to be sure that it is fulfilling its non-refoulement obligations it must ascertain whether an asylum seeker needs protection before he or she is

¹⁶⁵ For a more detailed discussion of challenges to protection in the region see the proceedings of the conference, *Ten Years after the Rwanda Exodus: Assessing Refugee Protection in the Great Lakes*, conference report forthcoming from Human Rights First.

¹⁶⁶ See 1951 U.N. Convention, art. 33. The 1969 OAU Convention extends such protection in addition to all those who are compelled to flee as a result of “external aggression, occupation, foreign domination or events seriously disturbing public order.” See 1969 OAU Convention, art. I(2).

turned away.¹⁶⁷ For the Kibati group, for example, the suggestion that the group can be returned to Tanzania without any individual examination of their claims for protection indicates a potential violation of the non-refoulement provision.

In the immediate aftermath of the Rwandan exodus neighboring countries did keep their frontiers open. By 1995 and 1996, however, governments were coming under immense pressure to stem the flow of refugees. During this period, for example, Tanzania sealed its borders at various times with Rwanda and Burundi and used force to deter entry. Since the Rwandan genocide, border closures and push-backs have occurred at various points with greater frequency in the Great Lakes—usually justified by reference to security concerns. As discussed above, the championing of repatriation as the ultimate solution to refugee situations has been a hallmark of policy in the region. In the wake of the crises faced by UNHCR in Tanzania and eastern Zaire in 1996 around unsafe asylum and the lack of international material assistance, the notion that return under the 1951 U.N. Convention (unlike the 1969 OAU Convention) does not require absolute “voluntariness” began to gain greater currency. The concept of “imposed return” was first suggested at that time by the then Director of International Protection Dennis McNamara.¹⁶⁸ This aggressive promotion of repatriation has led to forced return and, in some situations, breach of the principle of non-refoulement.

In early 1995 Tanzania published a refugee policy which suggested that the best way to deal with security problems in refugee camps was the implementation of repatriation programs.¹⁶⁹ The then government of the DRC raised the stakes even higher in the quest to maintain standards of refugee protection in the region when it formally called for the recognition of a legitimate exception to the principle of non-refoulement on security grounds. Just prior to the Rwandan invasion and the dismantling of the refugee camps in East Kivu, the then prime minister wrote to the U.N. Secretary-General Boutros Boutros-Ghali advising of an intent to derogate from the requirements of asylum for reasons of national security, and citing paragraph 2 of article 3 of the Declaration on Territorial Asylum.¹⁷⁰ The prime minister requested that the secretary-general indicate the place to which the hundreds of thousands of refugees who had already been admitted to Zairean territory could be evacuated. With no operational response forthcoming and an international community unwilling to take the measures needed at a political level (to halt the flow of arms, for example, which was fuelling the militarization of the camps), the situation

167 Article II(3) of the 1969 OAU Convention explicitly recognizes this aspect of the principle, specifically providing that, “no person shall be subjected ... to measures such as rejection at the frontier ... which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened.” Closing the border and refusing to permit fleeing refugees to access safety may also constitute a breach of non-derogable international human rights standards, such as the prohibition on torture.

168 For a discussion of the development of this doctrine see, B.S Chimni, “From Resettlement to Involuntary Repatriation: Towards a critical history of durable solutions to refugee problems,” Working Paper No. 2, New Issues in Refugee Research, UNHCR, May 1999.

169 See Government of Tanzania, *The Tanzania Refugee Policy, Implementation Record and the Position on Rwanda and Burundi Refugee Related Problems*.

170 Declaration on Territorial Asylum, Adopted by General Assembly Resolution 2312 (XXII) of 14 December 1967. Article 3(1) and (2) reads:

No person referred to in article 1, paragraph 1, shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any state where he may be subjected to persecution.

Exception may be made to the foregoing principle only for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons.

exploded. A mass push-back of over half a million refugees, and the deaths of thousands ensued when the Rwandan army, supported by Zairean militia, invaded and destroyed the camps in late 1996.¹⁷¹

In certain situations the international community may be the only actor with the capacity—in practice—to ensure that host states are able to rise to their obligation to protect refugees, honor the principle of non-refoulement and maintain their own security. As the then Organization of African Unity told the world repeatedly between 1994 and 1996 an operation to separate the armed militia operating in the camps clearly depended for its implementation on resources from the U.N. and international community. There was little response. In fact it took until November 1996 for the U.N. Security Council to first even acknowledge that the magnitude of the humanitarian crisis in eastern Zaire constituted a “threat to peace and security in the region.”¹⁷² In the same Resolution the secretary-general was asked to draw up a plan of operations and a framework for the creation of a multi-national force to ensure access to humanitarian relief in order to, “assist the United Nations High Commissioner for Refugees with the protection and voluntary repatriation of refugees and displaced persons.”¹⁷³ But by then it was too late for even the minimal objectives of the Resolution to have any effect—the camps had been destroyed.

The 1951 U.N. Convention does envisage that in some extreme cases threats to security caused by the presence of a refugee may be so great that a government can contemplate his or her removal. Two provisions of the Convention—articles 32 and 33(2)—bear upon this issue. Article 33(2) provides that a refugee may forfeit protection against refoulement if he or she constitutes a danger to the security of the host state, or, having been convicted of a serious crime, poses a danger to the community.¹⁷⁴ Article 32 provides that a refugee may be expelled “on grounds of national security or public order,” and then only pursuant to a decision that has been reached in accordance with due process of law.¹⁷⁵ Both of these exceptions are, however, clearly intended to operate only on an individual basis, and further to a careful examination of each case in its particular circumstances. They are not intended to provide grounds for mass expulsions, prohibited, *inter alia*, by article 12(5) of the African Charter on Human and Peoples Rights.

Erosion of respect for the principle of non-refoulement has been a principal casualty of the border closures and repatriation operations of in the region during the decade. It has been attended in parallel by the peddling of a new concept of in-country protection—“safe zones.” If going home is the best solution why should “safe zones” not be created in countries of origin?

171 International Panel of Eminent Personalities, *Rwanda: The Preventable Genocide*, (Organization of African Unity, July 2000), at para. 20.29.

172 Security Council Resolution 1078, U.N. doc. no. S/RES/1078 (1996), November 9, 1996, preamble.

173 *Ibid.*, at para. 10(a)

174 Individuals in this category do not lose their refugee status, but simply their protection against refoulement. Despite the existence of exceptions to the principle of non-refoulement as described in the 1951 U.N. Convention, there may be other bars to removal. There are strong arguments that a principle of non-refoulement, in some respects more broadly drawn than that in the 1951 U.N. Convention, has attained the status of customary international law. See in particular the aggregate of protections available under the International Covenant on Civil and Political Rights, the African Charter and the 1984 U.N. Convention Against Torture, may amount to a bar against the removal of a refugee to whom Articles 32 or 33(2) of the 1951 U.N. Convention apply—or at least may limit the number of countries to which the refugee can be removed.

175 Interestingly, there are no equivalent provisions to article 33(2) or article 32 of the 1951 U.N. Convention in the 1969 OAU Convention. The 1969 OAU Convention does, however, include provisions for the cessation of refugee status which echo in some respects the exceptions to the principle of non-refoulement set out in article 33(2) of the 1951 U.N. Convention and the exclusion clauses therein.

The Creation of “Safe Zones”

In June 1994, at the height of the humanitarian crisis in the aftermath of the Rwandan genocide, the U.N. Security Council mandated the creation of “safe zones” for the protection of civilians in southwest Rwanda. The setting up of “safe zones” was ostensibly aimed at “contributing, in an impartial way, to the security and protection of displaced persons, refugees and civilians at risk.”¹⁷⁶ Unfortunately, due to the complex set of motivations which underlay the establishment of the zones—everything from the prevention of refugee outflows to the protection of members of the former Rwandan government and armed forces who were complicit in the genocide—the areas were never effectively demilitarized. As a result the zones came to be perceived less as humanitarian, than as political and even military, constructs. In April, in an attack on the largest camp at Kibeho, troops from the Rwandan army slaughtered thousands of displaced persons before a helpless group of United Nations Assistance Mission for Rwanda forces and NGO workers.¹⁷⁷

Since that time, the creation of “safe zones” has been a recurring motif, if not of practice, then of desired policy, in the region. “Safe zones” were part of the plan of action, for example, which was adopted at the Inter-governmental Regional Conference on Assistance to Refugees, Returnees and Displaced Persons in the Great Lakes in February 1995 for the “voluntary repatriation” of refugees in the region. In 2001 the Tanzania government urged embrace of the “safe zone” concept at the level of the U.N. Security Council, urging that it be relieved from hosting its massive Burundian refugee population. Although the proposal was accepted at the level of an OAU Ministerial Meeting the plan did not come to fruition due to lack of international support.

In 2003 “safe zones” found their way into Tanzania’s first written refugee policy and then later were championed at a three day regional conference on refugee protection. At that session the Tanzanian home affairs minister urged the international community to “work out a strategy through which safe havens will be created for refugees within the borders of a country in civil strife.”¹⁷⁸ He declared that “the solution indeed lies in the countries of origin rather than in the countries of asylum.”¹⁷⁹

The “safe zone” model in the Tanzanian conception is based on the argument that states of origin are principally responsible for their citizen’s welfare. Promotion of the concept, however, has often been driven by a concern on the part of second countries about the costs of providing asylum. In 1995, when Tanzania first mooted the concept, for example, it was laboring under huge pressure to find ways of supporting the over one million refugees on its territory. In the Balkans when “safe zones” were encouraged and supported by the invention of the ill-fated “right to remain,” Western European states were eager to prevent an outflow of refugees into

176 See Security Council Resolution 929, U.N. doc. no. S/Res/929 (1994), June 22, 1994.

177 Human Rights Watch has cited estimated casualties as high as 8,000. See Human Rights Watch, “Rwanda,” in *World Report 1996* (New York: Human Rights Watch, 1996).

178 IRIN, “TANZANIA: Call to Review Laws, Conventions,” September 15, 2003.

179 Ibid.

the neighboring countries of Eastern Europe.¹⁸⁰ When “safe zones” are endorsed it is usually to undermine the option of asylum.

There are specific provisions of international humanitarian law which envisage the creation of narrowly defined “neutralized zones” to allow for care to be given to the sick, wounded, or vulnerable within a conflict zone. These “safe havens” or corridors must be created, however, by the consent of the warring parties and are intended to be strictly civilian in nature. Over the last fifteen years, however, the international community has begun to try a more interventionist approach to responding to conflicts and has attempted to construct a variety of “safe havens” for civilians, often, critically, without the consent of the belligerents. In most of these situations the overriding motivation has been to prevent refugee flows out of the conflict area. Accompanied by a restriction of access to other territories, “safe havens” thus become “containment” zones and the right of those fleeing harm to seek safety across borders is fatally eroded.

Whether examined from the perspective of law or of practice the “safe zone” model as it has been implemented to date has little to recommend it as a tool of protection. Its conception has been contrary both to refugee and international humanitarian law and where it has been attempted in practice disastrous consequences have generally resulted.¹⁸¹ The bloody outcomes of the “safe zones” experiments in Srebrenica and Rwanda, for example, show that it is extremely difficult to create and maintain conditions of genuine safety for civilians—real enforcement capacity is rarely present. Further, the political impetus for the creation of the zone may blur its humanitarian character and turn it into a target of direct attack, as occurred in Rwanda. The failure of “safe havens” at Srebrenica and Kibeho has been among the most tragic blunders of the international community in the last decade. As the late Arthur Helton commented, “workable internal safety arrangements have proved to be elusive and highly situational.”¹⁸²

The “Problem” of “Secondary” Movement of Refugees

The official stance of both the Government of Uganda and UNHCR to date has to deem the Kibati group “secondary” or “irregular” movers, a much-contested concept discussed in detail below. As a result of this determination the Kibati group has been prevented from benefiting from the rights and privileges enjoyed by recognized refugees in Uganda. Over the last ten years states all over the world have become increasingly preoccupied with the phenomenon of “secondary” or “irregular movement.” Under UNHCR’s Convention Plus initiative, the “problem” of irregular secondary movements has been chosen as one of the three core subjects of state discussions, demonstrating the level of concern which it provokes.¹⁸³ Principally states fear that in some situations:

180 For a discussion of the promotion of a “right to remain” in the former Yugoslavia see Bill Frelick, “Preventive Protection’ and the Right to Seek Asylum,” *International Journal of Refugee Law*, Vol. 4, No. 4 (1992) at p. 439.

181 For a discussion of the failure of the safe zone model in the context of refugee protection, see Karin Landgren, “Danger Zones,” *International Journal of Refugee Law*, Vol. 7, No. 3 (1995).

182 Arthur Helton, *The Price of Indifference*, (Oxford: Oxford University Press, 2002) at p.173.

183 See discussion of Convention Plus at footnote 198 below.

onward movements [of refugees] take place without the necessary valid travel documents or without authorisation, and, that these movements, therefore, undermine the right of States to control who can enter and remain in their territory.¹⁸⁴

The categorization of refugees as “secondary” or “irregular” movers does not appear in the 1951 U.N. or 1969 OAU Refugee Conventions. But during the life of the Conventions soft law and policy has grown up around the question of how states might be permitted to respond to those refugees who, for a variety of reasons, feel compelled to leave a country where they first sought protection (or merely sojourned for a while) and enter another. UNHCR Executive Committee Conclusions No. 15 and 58 provide guidance for how the plight of “irregular movers” should be understood. Executive Committee Conclusions are not binding under international law, but they are considered to be relevant for the interpretation of international standards as they “constitute expressions of opinion which are broadly representative of the international community.”¹⁸⁵

ExCom Conclusion No. 58 defines irregular movers as “refugees, whether they have been formally identified as such or not (asylum seekers) who move in an irregular manner from countries in which they have already found protection, in order to seek asylum or permanent resettlement elsewhere.”¹⁸⁶ Irregular movement involves “entry into the territory of another country, without the prior consent of the national authorities or without an entry visa, or with insufficient documentation normally required for travel purposes or with false or fraudulent documentation.”¹⁸⁷

The movement of refugees from a country where they first sought safety reflects a very basic human imperative—refugees will move when they do not feel they are safe and secure. ExCom Conclusion No. 58 urges governments to work on “removing or mitigating the causes of such irregular movements through the granting and maintenance of asylum and the provision of necessary durable solutions or other appropriate assistance measures.”¹⁸⁸ For a refugee to resort to “irregular movement” in search of safety and assistance is in many ways an indictment of the international community’s failure to find a durable solution for him or her.

Further to ExCom Conclusion No. 58, governments may return refugees to where they have found protection in the first country of asylum, predicated on two conditions: (a) that the refugees have indeed “already found protection” and that (b) “they are protected there against refoulement and they are permitted to remain there and be treated in accordance with recognized basic human standards until a durable solution is found for them.”¹⁸⁹ These conditions may not have been met for most of the Kibati group.

184 See UNHCR, “Addressing Irregular Secondary Movements of Refugees and Asylum Seekers,” Issues Paper, Convention Plus, March 11, 2004 at para. 2.

185 See *Conclusions on International Protection*, UNHCR website, http://www.unhcr.ch/cgi-bin/texis/vtx/excom/+PwwFqzvxxWqx_s_xFqzvxWqx_s_hFqhT0NultFqnnLnqzFqn0k0gAFqwDzmwwwwww5Fqw1Fqn0k0g.

186 See Executive Committee Conclusion No. 58 (1989), on the Problem of Refugees and Asylum Seekers who Move in an Irregular Manner from a Country in which they had Already Found Protection, at para. (a). Executive Committee Conclusions are not binding under international law, but they are considered to be relevant for the interpretation of international standards as they “constitute expressions of opinion which are broadly representative of the international community.” (“Conclusions on International Protection,” UNHCR website, http://www.unhcr.ch/cgi-bin/texis/vtx/excom/+PwwFqzvxxWqx_s_xFqzvxWqx_s_hFqhT0NultFqnnLnqzFqn0k0gAFqwDzmwwwwww5Fqw1Fqn0k0g).

187 *Ibid.*

188 *Ibid.* at para. (c) (ii).

189 *Ibid.*, at para. (f) (i) and (ii).

The Ugandan government and UNHCR have clearly based their decision to deny the Kibati group protection in Uganda on the basis that they had “already found protection,” in Tanzania. But since March 2002 no status determination interviews have been carried out by officials. It is impossible to assert definitively therefore whether members of the group had refugee status in Tanzania, let alone whether the protection available was sufficient. The decision with which Human Rights First takes issue is the refusal to make any individual assessment of the caseload, rather than with the determination that “protection elsewhere” exists in Tanzania. As the Refugee Law Project in Uganda has argued, “the basis for [the refugees’] fears can only be ascertained through impartial scrutiny.”¹⁹⁰

There are those in the group, for example, who did not have refugee status in Tanzania—they should be considered as having applied for asylum for the first time in Uganda. In international law, a state may be relieved from examining an application for asylum, however, if there is another (third) country which can be prevailed upon to consider the claim (eg., by virtue of a multilateral or bilateral agreement regulating return). As ExCom Conclusion No. 15 makes clear, however, “asylum should not be refused solely on the ground that it could be sought from another State.”¹⁹¹ Even if removal to another country is considered, the procedure by which allocation of responsibility for determining a claim for asylum is decided must itself be characterized by due process—and of course it must conform absolutely with the principle of non-refoulement.

It is the country which wishes to return the applicant which is responsible for establishing that the third country is a safe one. Further, although the concept of “safety” is usually equated with the existence in the third countries of a procedure for implementing the 1951 U.N. Convention, the requirement of non-refoulement generally involves a more individuated examination of the subjective safety of the country of return for the particular applicant. As ExCom Conclusion No. 58 declares, the individual must not just be protected “against refoulement” but “permitted to remain there and be treated in accordance with recognized basic human standards until a durable solution is found.”¹⁹²

The question of whether all the members of the Kibati group had “already found protection” in Tanzania is an open one. As a baseline, not all of those in the Kibati group were formally recognized as refugees in Tanzania—some are first time asylum seekers from their countries of origin, others never received refugee status in Tanzania and settled, informally outside the camp context. Second, even if they had been formally recognized as refugees, the actual treatment which they received may not have risen to the level which constitutes sufficient protection. It has been clearly recognized that, “there may be exceptional cases in which a refugee or asylum seeker may justifiably claim that he has reason to fear persecution or that his physical safety or freedom are endangered in a country where he previously found protection. Such cases should be given favorable consideration by the authorities of the State where he requests asylum.”¹⁹³

190 See Refugee Law Project, “The Migration of Refugees from Tanzania to Uganda: Whose Responsibility?” March, 2003.

191 See UNHCR Executive Committee Conclusion No. 15 (1979) on Refugees Without an Asylum Country, at para. (h) (iv).

192 UNHCR Executive Committee Conclusion No. 58 (1989) Concerning the Problem of Refugees and Asylum Seekers who Move in an Irregular Manner from a Country in Which they had Already Found Protection, at para. (f) (i) and (ii).

193 *Ibid.*, at para. (g).

Further, and specific to the Kibati caseload, the Great Lakes Office of UNHCR itself has advised in relation to the Rwandan caseload in the region that, “claims made by Rwandan asylum seekers or refugees that they were compelled to leave their previous country of asylum due too fear of persecution, or because their physical safety or freedom had been endangered, are duly taken into account, and that their cases are assessed on their merits in the second country of asylum.”¹⁹⁴

Certainly, the situation in Tanzania during 2002 and particularly in the run up to the repatriation deadline could reasonably be said to have raised questions about the availability of protection in Tanzania. In fact, to some extent it can be argued that the Ugandan government itself accepted that there were genuine concerns about the quality of protection available in Tanzania. In the early months of the emergence of the Kibati caseload the authorities seemed deliberately to choose to accept the assertions that many of the group were coming from their country of origin directly—despite available contrary evidence. They went on to accord them refugee status. Even after the decision was taken not to continue to grant refugee status to arriving members of the Kibati group, they were not returned across the border.¹⁹⁵

Ultimately of course, the Kibati group has found itself caught up in political realities. It would have been in many respects a condemnation of the Tanzanian government, and of the ongoing and heavily promoted repatriation program, for Uganda to concede during a process of interviews and verification that members of the Kibati group truly did not have sufficient protection in Tanzania. As a senior official with whom Human Rights First spoke put it, “[a]t a certain point senior government officials feared that relations between Uganda and Tanzania would be hurt by the whole verification process; so we had to stop.”¹⁹⁶

In its response to the Kibati group, UNHCR also seemed to be understandably mired in the contradiction between a policy of promoting return in Tanzania and the reality that increasing numbers of Rwandans were arriving into Uganda from Tanzania. At the end of January 2003, against the background of reports that Uganda border posts were being overwhelmed with arrivals from Tanzania, UNHCR was uncompromising. “UNHCR’s position remains that irregular movers who have previously found protection in Tanzania will not be provided with assistance nor international protection by the Office of the UNHCR in Uganda.”¹⁹⁷ Later however that stance began to soften, perhaps reflecting the reality that many who were presenting themselves at the Ugandan border indeed had arguable claims. In April 2003 the High Commissioner himself addressed the question of the Kibati group and stated rather paradoxically that although the Kibati group were “not refugees any more they could register individually as refugees in Uganda.”¹⁹⁸ Ultimately, in practice, however, UNHCR policy on the ground did not alter.

194 See Office of the UNHCR Regional Coordinator for the Great Lakes Region, *Durable Solutions Strategy for Rwandan Refugees*, December 9, 2002.

195 For a discussion of the response of the Ugandan government, see Refugee Law Project, “The Migration of Refugees from Tanzania to Uganda: Whose Responsibility?” March 2003, available online at <http://www.refugeelawproject.org/current-issues/tanzania-to-uganda/back-crisis.htm>.

196 Interview with REC member, November 2002.

197 See IRIN, “EAST AFRICA: UNHCR’s Position on Rwandan ‘Refugees,’” February 3, 2003.

198 See IRIN, “Rwanda is Safe for Returning Refugees,” April 16, 2003.

The Future?

In crafting responses to the Kibati caseload within the legal and policy framework available in the Great Lakes region, proposals for new models of “burden sharing” which are under development at the international level need to be taken into account. Among the proposals which are emerging are those from European Union policy discussions and UNHCR’s Convention Plus process.¹⁹⁹ In many respects the trend of developments seems to signal a desire to further shift the refugee burden from the global North to the global South—and potentially to the Great Lakes region.

One of the most problematic proposals emerging from the discussions at the European level has been the suggestion that states, individually or collectively, might negotiate with states outside Europe to construct “refugee protection centers” (RPCs) which would receive asylum seekers and process their claims for protection: successful applicants would be returned to Europe, failed asylum seekers to their countries of origin. A variation on this proposal is the creation of “refugee protection areas” (RPAs). Under this model asylum seekers who do not qualify for protection could be turned over to countries outside Europe further to special agreements. Recently, for example, it was reported that Tanzania had been approached by the United Kingdom government to consider setting up such a zone.²⁰⁰ The Tanzanian government acknowledges that it had been asked to “settle” failed Somali asylum seekers from the United Kingdom. As part of the deal Tanzania was reported to have been offered 4 million British pounds in additional development aid. In late April 2004 it was announced that this particular plan would not go forward, but there were indications that it might be “repackaged” in a different form.²⁰¹

Proposals to create RPCs and RPAs raise a whole range of critical protection matters which are outside the scope of this report. One question which requires urgent examination is the effect that the construction of agreements outside the purview of the 1969 OAU Convention will have on the quality of protection available to refugees in Africa. One dimension of the challenge is as follows: states in the Great Lakes region are currently bound to honor a broader definition of “refugee” than is accepted by European states. How will these states fulfill their obligations under African law while operating under contract to European states who have committed to a narrower obligation to protect? Will states which agree to act as agents for others be left with the requirement to provide protection to a great number of additional refugees who, while not coming within the European refugee definition, still require protection under African law? It is arguable that many of those who fall within the latter category would also fall within the scope of the additional protections provided by the European Convention for the Protection Human Rights and Fundamental Freedoms. Which state is responsible? As refugee scholar Chaloka

199 The Convention Plus process is an initiative of the U.N. High Commissioner for Refugees which aims to “improve refugee protection worldwide and to facilitate the resolution of refugee problems through multilateral special agreements.” See UNHCR, *Convention Plus at a Glance*, at <http://www.unhcr.ch/cgi-bin/texis/vtx/home/opendoc.htm?tbl=PROTECTION&id=403b30684&page=protect>. The Convention Plus process itself arose out of a previous parent process called the Global Consultations. That initiative culminated in 2001 with the re-affirmation of the centrality of the 1951 U.N. Convention and the identification of a program of action aimed at strengthening the Convention and making it more resilient to the character of modern refugee movements.

200 See Paul Redfern, “Britain Denies Offering Dar Cash for Refugees,” *East African*, March 1, 2004.

201 See “Tanzania Camp Plan Scrapped,” *Guardian*, April 22, 2004.

Beyani points out, there has been a failure to “relate the extent to which the 1951 Convention derives actual complementarity from the human rights systems of the United Nations and those in Africa, Europe and the Inter-Americas” in addition to that of international humanitarian law.²⁰²

Unfortunately states in the region have not been present in the corridors where these new models of “protection” are in incubation. There is a danger that the engagement of African states in the conduct of processes which both employ the 1951 U.N. Convention refugee definition, and restrictive European approaches to its implementation (eg., concepts such as safe country of origin, expanded grounds for exclusion, etc.) may result not only in an erosion of adherence to the 1969 OAU Convention, but also in a lowering of protection standards under the 1951 U.N. Convention.²⁰³ There has been no opportunity to explore the impact which such developments may have on the state of refugee protection in Africa—let alone on the quality of protection available to refugees in Europe.

In Geneva, UNHCR’s Convention Plus process has raised the specter that new models of response to refugee protection challenges may also be embraced at the global level, bringing additional dangers for the African refugee protection system.²⁰⁴ Three areas have been identified for development of multi-lateral agreements within the Convention Plus process: (1) new, coordinated approaches to the use of resettlement; (2) more effective targeting of development assistance; and (3) the question of “irregular movements.”²⁰⁵ At first glance focus on these three topics seems unproblematic. But there are questions surrounding the underlying rationale for their inclusion in the Convention Plus process—a mechanism which lacks transparency—rather than in UNHCR’s traditional standard setting forums. It has been argued, for example, that all three of the selected areas present ample opportunity for states, particularly in the global North, to seek to shift responsibility for refugees back to their regions of origin—and even to avoid the obligation to provide asylum altogether.

First, promoting resettlement—a quota and discretion-based solution which requires the state to act before a refugee can access it as a solution—can provide a way for states to more easily “manage” refugees and control the scope of their protection obligations. Resettlement is not connected to any right which the refugee may spontaneously claim—the rights held by a refugee generally relate to a country of asylum country (host country integration) and the country of origin (voluntary repatriation). There is no question of a *right* to resettlement as such, based on the fulfillment of set criteria. Resettlement is not a solution which can be directly accessed by the refugee—it exclusively requires the involvement of a third mediating party: UNHCR, a

202 See Chaloka Beyani, “*Convention Plus*” and “*Effective Protection*”: *Myths and Realities*, paper developed for the conference, *Ten Years after the Rwanda Exodus—Assessing Refugee Protection in the Great Lakes*. Conference report forthcoming from Human Rights First.

203 See, for example, European Council on Refugees and Exiles, Amnesty International, Human Rights Watch, “Refugee and Human Rights Organizations across Europe Express their Deep Concern at the Expected Agreement on Asylum Measures in Breach of International Law,” April 28, 2004.

204 For a fuller discussion, see Chaloka Beyani, “*Convention Plus*” and “*Effective Protection*”: *Myths and Realities*, Paper developed for the conference, *Ten Years after the Rwanda Exodus—Assessing Refugee Protection in the Great Lakes*. Conference report forthcoming from Human Rights First.

205 African states from the region have been identified as participants in these processes: Kenya and Tanzania in the first, Zambia and Tanzania in the second, and Kenya in the third.

referral agency, or a third state.²⁰⁶ Resettlement is thus probably the durable solution least amenable to human rights analysis. If resettlement is seen, therefore, as an *alternative* to asylum, rather than as an additional tool for finding solutions to the plight of refugees, then the quality of refugee protection diminishes.

Second, the tying of development assistance to a state's willingness to receive failed asylum seekers (nationals or non-nationals) or to create RPAs or RPCs has been contemplated. Indeed it has already been assayed.²⁰⁷ This approach, while it can have benefits in terms of building host state capacity, can also be used to put African states in a position where they are bargaining away hard fought African standards and mechanism of refugee protection. Finally, using concepts such as "first country of asylum," "safe third country" and "irregular mover" can keep refugees nearer their regions of origin—and other states geographically far from the epicenter of a crisis, "safe" from fleeing refugees.

Of course, not all of the ideas being discussed within Convention Plus have the objective of restricting the obligation to protect. There is much room in theory for the development of models which can have a positive impact on the quality of protection. The focus on building protection capacity in countries of origin and encouraging states to augment their refugee protection obligations by agreeing to participate in resettlement programs to resolve long protracted refugee situations (such as the Rwandan refugee population), are two such areas. But the threat that the Convention Plus process may erode the foundations of the refugee protection regime is inherent both in the history of the process itself and the clearly expressed policy goals of its principal state adherents in other fora.

206 Of course there are broader arguments relating to the scope of the requirement of solidarity between countries who are signatories of the Refugee Convention—the African Refugee Convention specifically refers to the fact that a host country may appeal to others to assist in sharing the "burden." Further, once a refugee is chosen by a state to engage with a resettlement procedure, principles such as legitimate expectations and due process provide rights which the refugee can claim.

207 See discussion, for example, of the proposed Swiss-Senegalese agreement in Human Rights First, "Senegalese, Swiss NGOs Defeat Delicate Accord," *Africa Refugee Rights News*, Vol. 1, Issue 1, at http://www.humanrightsfirst.org/intl_refugees/intl_refugees_news/newsletter_01.htm#senegalese.

Part V

Conclusions and Recommendations on the Plight of the Kibati Group

Conclusions

The people of the Kibati group have been denied the protection of refugee status based on the presumption that they have come from a safe country of asylum and are not directly fleeing persecution. This determination has been made by the government of Uganda, on the advice of UNHCR, without consideration of the individual facts of each case and in an arguably arbitrary manner.²⁰⁸ As a result, Ugandan authorities have not been able to screen out those who should be denied refugee status on the grounds that they are attempting to avoid prosecution for serious international crimes. Neither have they been able to identify the genuine protection needs of the group.

The legal status and protection needs of the members of Kibati group must be thoroughly assessed—most in the group have never had an opportunity to present their case for protection to the Ugandan authorities. All of those interviewed by Human Rights First in the Kibati camp expressed fears of return to Tanzania, Rwanda, and Burundi. If their status is not clarified, the return of members of the group to these countries without individual examination of their claims for protection, and depending on the individual circumstances of the case, could result in violations of the principle of non-refoulement.

In the light of questions about the character of the Kibati group, any procedure to establish legal status and identify protection needs must include screening to identify those who should be excluded from refugee status. Those among the group who are responsible for grave human rights crimes must be brought to account in a fair and impartial judicial proceeding before national or international courts.

²⁰⁸ The presumption that the Kibati members are not entitled to asylum has been applied on a group basis without possibility of challenge following the decision by the Uganda government to halt all individual status determinations of arriving Rwandans in March 2002. See article 3 of the 1951 U.N. Convention: “[t]he Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.” Although group recognition is permissible under the 1951 U.N. and 1969 OAU Refugee Conventions, denial of protection on a group basis is not.

In the interim, the Government of Uganda is to be commended that it has not taken steps to return the Kibati group to either Tanzania or Rwanda. Uganda has respected its international obligations as a signatory to both the 1951 U.N. Convention and the 1969 OAU Convention and under customary international law to ensure that any action taken to remove a person from its jurisdiction does not conflict with the principle of non-refoulement.

Finally, response to the situation of the Kibati group must not be formulated in isolation. It is preferable that a coordinated approach is taken in the Great Lakes region as a whole to policy and practice around the finding of solutions for the Rwandan refugee population. Developing an effective framework to deal with the Kibati group might not only provide a blueprint for Rwandan refugees elsewhere—it could be a model for a more successful and collaborative approach to dealing with residual caseloads more broadly when return movements are underway.

Recommendations

- 1) **A status determination procedure to identify the protection needs of the members of the Kibati group should be instituted by the Ugandan authorities, with the assistance of UNHCR, as a matter of urgency.**

In addition to examination of needs for protection of the newly arrived asylum seekers, the question of the legal status of members of the Kibati group who have not come directly from their country of origin should be determined in line with the advice of the Great Lakes Office of UNHCR:

...claims made by Rwandan asylum seekers or refugees that they were compelled to leave their previous country of asylum due to fear of persecution, or because their physical safety or freedom had been endangered, [should be] duly taken into account, and [...] their cases are assessed on their merits in the second country of asylum.²⁰⁹

- a) The group designation of the Kibati asylum seekers as “irregular movers” and therefore ineligible for the status and rights of refugees, without any individual examination of their need for protection, should be rescinded. While ExCom Conclusion No. 58 provides that states may deem persons to be “irregular movers” and return them to a third country, this is predicated on two conditions: (a) that they have “already found protection” in that country and that (b) “they are protected there against refoulement and they are permitted to remain there and be treated in accordance with recognized basic human standards until a durable solution is found for them.”²¹⁰ In the case of the majority of the Kibati group, these two conditions have not been clearly established—no examination of individual claims for protection of Rwandan refugees has been carried out since March 2002.
- b) A small number of members of the Kibati group made claims for asylum upon their arrival in Uganda which were considered and assessed negatively in 2001 and 2002.

209 See Office of the UNHCR Regional Coordinator for the Great Lakes Region, *Durable Solutions Strategy for Rwandan Refugees*, December 9, 2002.

210 UNHCR Executive Committee Conclusion No. 58 (1989) on the Problem of Refugees and Asylum-Seekers who Move in an Irregular Manner from a Country in which they had Already Found Protection,” at para. (f) (i) and (ii).

These applications were refused on the grounds that the applicants had arrived in Uganda after traveling through, or sojourning in, Tanzania and had therefore received “protection elsewhere.” These determinations appear to have been based on errors of fact and law and should be reviewed on a case by case basis.

- c) Some members of the Kibati group have only recently fled Rwanda and Burundi. Their fear of return must be assessed in the context of experiences since 1994 which are at the core of a number of claims, including, for example, the political turmoil surrounding the Rwandan presidential elections in 2003. Most of these people have not had their claims for protection assessed—either individually, or on the basis of group recognition.
 - d) In April 2004 there were indications that the Ugandan authorities were considering assessing the asylum applications of Burundian nationals (then 47 families) at the Kibati camp. We very much welcome this development and urge the government to carry out such assessments without delay.
- 2) **The exclusion provisions of the 1951 UN Convention and 1969 OAU Convention must be applied as an integral part of the procedure which determines the legal status and protection needs of the members of the Kibati group.**
- a) The conduct of a screening operation to examine the application of the exclusion clauses is a requirement of international law. Article I(5) of the 1969 OAU Convention and Article 1F of the 1951 U.N. Convention oblige state parties to exclude those who fall within their remit from refugee status.²¹¹ Based on the profile of the Kibati group, and interviews with individual group members, there are serious reasons for considering that there may be those among the group who may have committed international crimes. Assessment of the Kibati group’s legal status is not only an obligation of international law—it is also a matter of political necessity and a requirement of security. Ambiguity surrounding the constitution of the Kibati group has been the source of threats to the security of the refugee population and host community and has caused tensions in between the government of Uganda and Rwanda.
 - b) A specialized exclusion unit operating under the remit of the Ugandan Refugee Eligibility Committee should be instituted to oversee the application of the exclusion clauses within a thorough screening and status determination procedure. Members of the unit should be trained in international criminal and refugee law, and experienced in questioning witnesses and assessing credibility. This unit might form the basis of a permanent expert body which would deal with exclusion matters within the refugee population as a whole and contribute to assessment of the protection needs of the residual Rwandan refugee caseload in Uganda at the close of the ongoing voluntary repatriation program.
 - c) Specific guidelines for both the **application of the exclusion clauses** in the Rwandan context and for the conduct of the **screening procedure** itself should be drawn up by the Ugandan government, working in collaboration with the UNHCR. The procedural

211 See in this regard, *inter alia*, UNHCR, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, HCR/GIP/03/05, September 4, 2003 at Section I A, para. 1.

and interpretative guidelines contained in UNHCR's *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* and Chapter 5 of Human Rights First's report *Refugees, Rebels and the Quest for Justice*, provide a useful framework.²¹²

- d) In addition to the full complement of issues identified in the guidelines and recommendations referred to above, the following elements require particular attention in the design of the screening procedure:
- i) provision of clear information to applicants about the object and purpose of the screening;
 - ii) the development of special measures to protect witnesses;
 - iii) arrangements for hearings to be conducted in strict privacy and for separate interviews of family members;
 - iv) provision of competent and independent interpretation where needed, with due regard to objections by asylum seekers about the suitability of particular interpreters;
 - v) institution of a scheme of independent advice and assistance for those subject to the screening operation—the government of Uganda and UNHCR might seek support from competent civil society organizations in this regard;
 - vi) measures for the maintenance of the confidentiality of the application, particularly with respect to the asylum seeker's country of origin;
 - vii) provision of written reasons in the event of a negative decision;
 - viii) establishment of a procedure for an independent review of a decision to exclude or to deny refugee status on another ground, with jurisdiction to address questions of fact and law.
- e) In addition to the full complement of issues identified in the guidelines and recommendations referred to above, the following matters might be taken into consideration in drawing up guidelines on the interpretation and application of the exclusion clauses:
- i) *The threshold of proof adopted throughout the screening should reflect the exceptional nature of the exclusion clauses.* The standard utilized should be lower than the common law standard of "proof beyond a reasonable doubt" but higher than the "balance of probabilities." In establishing the factual basis, "clear and convincing" evidence should be required and the benefit of the doubt should operate in favor of the claimant.

212 See UNHCR, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, HCR/GIP/03/05, September 4, 2003, and Human Rights First (formerly the Lawyers Committee for Human Rights), *Refugees, Rebels and the Quest for Justice* (New York: Lawyers Committee for Human Rights, 2002).

- ii) In the establishment of criminal responsibility mere membership of a particular group should not be considered conclusive evidence of participation in acts attributed to the group, neither should former combatant status be determinative.
 - iii) *The cases of those who were minors at the time of the commission of the alleged offences requires particular attention*—Ugandan law provides for criminal responsibility at the age of twelve;²¹³ the Rome Statute a maturity requirement of 18 years.²¹⁴ In considering such cases the particular elements of individual responsibility should be scrupulously applied, and relevant defenses and mitigating circumstances explored. In no case should the exclusion clauses be applied to those who were less than 16 years old at the time of the alleged crime.
 - iv) The proffering of extradition or rendition requests from either Rwanda or a third state, or information that an individual is the subject of a charge, indictment or proceeding for a serious crime, or is on a government “list” of wanted persons, should not, without substantiating evidence, be considered grounds for exclusion. In all cases a decision to render or extradite an asylum seeker should accord with provisions of international human rights law protecting the right to life and physical integrity. This may require inquiry into the standards and law relating to trial in the requesting state.
 - v) Requests for rendition by the International Criminal Tribunal for Rwanda should be honored without delay. In such cases, should the individual be acquitted by the Tribunal the request for asylum should be considered afresh.
- 3) **Prior to the institution of the screening process, a plan for how to deal with those excluded from refugee status (excluees) should be agreed.**

Where requested, support for finding solutions to the excludee caseload should be offered by the international community, with guidance provided by the U.N. High Commissioner for Human Rights. Chapters 7 and 8 of Human Rights First’s report *Refugees, Rebels and the Quest for Justice*, provide guidance on the prosecution and protection options which provide the framework for such a plan.²¹⁵ Although an excludee will be deprived of the protection of the 1951 U.N. and 1969 OAU Conventions, this does not mean that he or she forfeits the basic rights and protections that are available under applicable human rights law. These rights continue to protect the excludee in the host state, in addition to shielding him or her from serious harm in the country of intended return. There may also be requirements to consider options, and indeed obligations for prosecution either in Uganda, Rwanda or in a third state. These are complex issues. For example, where the crime of genocide is at issue there is a question as to whether returning an excludee to face trial under the *gacaca* systems, even if all

213 Uganda Penal Code, Section 14 (2).

214 See Rome Statute of the International Criminal Court, U.N. doc. A/CONF.183/9 (1998), entered into force July 1, 2002, art. 26.

215 See “Chapter 7—Ending Impunity: From Aspiration to Reality?” and “Chapter 8—Into Uncharted Territory: New Challenges to Rights,” in Human Rights First (formerly the Lawyers Committee for Human Rights), *Refugees, Rebels and the Quest for Justice* (New York: Lawyers Committee for Human Rights, 2002).

safeguards are in place, sufficiently fulfils the obligation on a host state to seek to ensure that a suspect is tried for this most serious of crimes—the *aut dedere aut judicare*, obligation.²¹⁶

- a) Among the overlapping categories of excludees in respect of whom arrangements must be made are:
 - i) Persons who may be returned to Rwanda;
 - ii) Persons in respect of whom there are human rights bars to removal to Rwanda (where to return the individual could be expected to result in the violation of their basic human rights);
 - iii) Persons in respect of whom there is an obligation on Uganda to extradite or prosecute;²¹⁷
 - iv) Persons in respect of whom there is jurisdiction in Uganda to prosecute.
 - b) If it is determined that there is no need for international protection, and no other human rights bars to return exist, members of the Kibati group may be returned to Rwanda. The provisions of ExCom Conclusion No. 96 on the return of persons found not to be in need of international protection are relevant here.²¹⁸ Uganda may, for example, seek particular undertakings from the government of Rwanda in respect of particular returnees, and international institutions operating in Rwanda may be requested to assist in monitoring adherence. In respect of children, the principle of the best interests of the child should be paramount in making any decision to enforce return.²¹⁹
- 4) **A formal program of registration at the Kibati camp should be carried out and identity documentation issued, in tandem with the assessment of status.**

ExCom Conclusion No. 91 urges states to “take all necessary measures to register and document refugees and asylum-seekers on their territory as quickly as possible upon their arrival, bearing in mind the resources available and where appropriate to seek the support and co-operation of UNHCR.”²²⁰ Particular attention should be paid to the registration of children—it is unclear how many in the Kibati group are separated or unaccompanied children and who may require special protection measures.

216 The Cairo Guiding Principles on Universal Jurisdiction developed by legal experts explicitly to deal with the exercise of universal jurisdiction in the African context suggest that: “resort to [...] alternative forms of justice does not relieve States of their responsibility and duty to prosecute individuals or to extradite or transfer for trial individuals accused or suspected of serious crimes under international law.” Africa Legal Aid, *African Perspectives on Universal Jurisdiction for International Crimes*, Report of the Experts Meeting, Cairo, Egypt, July 30-31, 2001.

217 Most of the options for trial will be at national level. The International Criminal Tribunal for Rwanda has been able to focus on the prosecution of only a handful of the most senior architects of the genocide. This is reflected in its trial rate—between its inception in 1995 and the end of January 2004, the Tribunal had convicted only 18 people for their involvement in the genocide—and presided over one acquittal.

218 See UNHCR Executive Committee Conclusion No. 96 (2003) on the Return of Persons Found not to be in Need of International Protection.

219 In all determinations involving children, the best interests of the child should be the primary consideration. The special needs of refugee children are particularly recognized in both the African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force November 29, 1999, art. 23 and Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2, 1990, art. 22.

220 UNHCR Executive Committee Conclusion No. 91 (2001) on Registration of Refugees and Asylum-seekers, October 5, 2001.

- 5) International law requires that refugees not be returned to their country of origin against their will—in the absence of a decision that cessation of protection applies, a refugee’s decision to repatriate must be fully voluntary.²²¹

The 1969 OAU Refugee Convention is explicit about the requirement of voluntariness: “[t]he essential voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will.”²²² Involuntary return of refugees can amount to a violation of the principle of non-refoulement—both when it occurs as a result of direct action by a state or as a result of a package of indirect measures, e.g. cuts in food rations, anti-refugee rhetoric, harassment by the local administration, etc. The principle of voluntariness must be central to the implementation of the tripartite arrangements for the return of Rwandan refugees.

- a) A positive effort must be made by Uganda and UNHCR to ensure that Rwandan refugees have access to independent information about both the situation in Rwanda and the options for remaining in exile. Without adequate information, refugees cannot make the informed choices necessary. Among the measures which might be taken are:
- i) the conduct of “go see” programs—as proposed in the context of the repatriation operations in Zambia and Namibia;²²³
 - ii) support for NGOs to work with the refugee population to ensure access to impartial information;
 - iii) attentiveness to the different situations of different sectors of the refugee community i.e., women, men, girls, and boys, within the context of information programs;
 - iv) in the presentation of the repatriation program, there should be clarity about the fact that, in the absence of a declaration of cessation, those who do not wish to repatriate may remain in the country of asylum as refugees. This may help prevent the kind of informal flight from countries of asylum observed in the course of the Tanzanian repatriation operation.
- b) There may be some among the Rwandan refugee population who do not wish to repatriate and who may be responsible for serious human rights violations or engaged in fomenting plans for violent attacks on Rwanda. Where application of the exclusion clauses has not been considered in a particular case, and where there are indications that they may be applicable, a formal screening should be undertaken. It should be born in mind that the majority of Rwandan refugees have been recognized on a group basis, and therefore have not had their cases subjected to individualized scrutiny.

221 Under the cessation clauses of the 1951 U.N. Convention refugee status can be declared as ceased when it is determined with due process that the refugee has no further need of international protection. Article 1C of the 1951 U.N. Convention and article I(4) of the 1969 OAU Convention deal with cessation.

222 1969 OAU Convention, art. V(1).

223 See IRIN, “ZAMBIA: Rwandan Refugees Reluctant to Return Home,” March 3, 2004; IRIN, “NAMIBIA: Rwandan Refugees to Assess Conditions for Repatriation,” April 28, 2004.

c) Finally, mass expulsions of non-nationals, on the basis of nationality, race, ethnicity, or religion are barred by article 12(5) of the African Charter on Human and Peoples Rights.²²⁴

6) UNHCR and states in the region should be encouraged to identify the parameters for, and urge a coordinated approach to, the application of the cessation clauses of the 1951 UN Convention and 1969 OAU Convention to Rwandan refugees.

States are, of course, entitled to operate their own procedures, and consider the application of the cessation clauses independently. A comprehensive and transparent approach in the region may, however, help to prevent onward movements of refugees and other consequences.

a) Detailed guidelines specific to the application of cessation to the 1994 Rwandan refugee caseload should be drawn up by states, in collaboration with UNHCR. These might include:

i) recommendations on procedures whereby individuals who allege a continuing fear of persecution are provided with an opportunity to present information relating to why they should not have the cessation clauses applied;

ii) description of the categories of person who may be particularly in need of protection. Decision makers should be urged, however, to examine every case on its individual merits, in particular the application of the exclusion clauses. Many of those who fear return to Rwanda fear association with, or indeed prosecution for, the acts committed during the 1994 genocide. Among those who might be considered for special attention are:

(1) members of the political opposition, including members of political parties both inside and outside Rwanda that have not been legally registered;

(2) persons associated with, or imputed to have been associated with, former governments of Rwanda and their family members;

(3) former members of the army of the current government, the RPA, including deserters;

(4) persons fearing victimization within the *gacaca* community justice process due to their particular circumstances; and

(5) persons who have previously suffered egregious human rights violations.

7) Sustainable return to Rwanda requires the engagement and collaboration of a range of partners.

The 1969 OAU Convention provides that:

refugees who freely decide to return to their homeland [...] shall be given every possible assistance by the country of asylum, the country of origin, voluntary agencies and international and intergovernmental organizations to facilitate their return.²²⁵

²²⁴ African Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986, art. 12(5).

- a) UNHCR must receive adequate funding and political support to ensure the effective operation of its returnee monitoring and assistance mechanism inside Rwanda. Such a role for UNHCR is clearly mandated in the tripartite agreements which have been negotiated to date for the return of the Rwandan refugee population. UNHCR, however, cannot fulfill this vital function without additional assistance. The Office of the High Commissioner for Human Rights might also consider playing an enhanced a role in this regard.
 - b) The Rwandan government should be encouraged and supported to take more vigorous steps to ensure adequate protection for those refugees who wish to return home. Reflecting the concerns expressed by Kibati group members, among the measures which might be contemplated are:
 - i) reform of law surrounding property, land and inheritance and restitution for confiscated lands;
 - ii) reform of the *gacaca* system, including the framework for its interaction with the national courts system in order to ensure improved due process, rights of appeal, and enhanced protection of witnesses; and
 - iii) strengthening of security for returning refugees, especially in rural areas.
- 8) While voluntary repatriation may be the preferred option for many refugees, a comprehensive approach which considers the implementation of all three of the durable solutions is essential.**
- a) Resettlement and local integration options must be explored in tandem with repatriation. Not all Rwandan refugees will be able to return home in safety. Provision must be made for their integration in countries of asylum or their resettlement where required.
 - b) Countries of asylum in the region must be assisted to continue to provide a protective environment for refugees—a necessary complement to sustainable return. As voluntary repatriation operations get underway, international support to host and refugee communities in the asylum country must not diminish disproportionately to need. This may take the form of increased material assistance or offers of resettlement for those refugees who may pose a security risk to the country of asylum or for whom it is otherwise unsafe.
 - c) Consideration should be given by states operating resettlement programs to prioritize Rwandan refugees who cannot return to Rwanda and for whom integration in countries in the region is not appropriate. A coordinated approach to resettlement may assist countries in the region in offering integration options for others in the residual caseload for whom return is not possible. For example, UNHCR reportedly agreed to assist in a resettlement exercise of this kind in October 2001, following an agreement between the

225 1969 OAU Convention, art. V(5).

defense ministers of Uganda and Rwanda to relocate political opponents from their respective countries in the territory of a third party.²²⁶

9) Surveillance of the humanitarian situation in the Kibati camp should be continued, and food and non-food item distribution integrated with that of the Nakivale camp population.

- a) The refusal to provide humanitarian assistance, or to provide it to the same extent (relative to need) as is furnished to recognized refugees in the Nakivale settlement, based solely on the assumption that the Kibati group consists of “irregular movers” is inconsistent with Uganda’s obligations under refugee and human rights law and those of UNHCR derived from the U.N. Charter.
- b) Uganda, supported by its international partners, is required to ensure “humane treatment for refugees and asylum seekers who, because of the uncertain situation in which they find themselves feel compelled to move from one country to another in an irregular manner.”²²⁷ Even when persons are declared “irregular movers,” if they cannot be returned they must be “permitted to remain in the host country and be treated in accordance with recognized basic human rights standards until a durable solution is found for them.”²²⁸
- c) The fact that the exclusion clauses may apply to some members of the Kibati group, and that some of the group may not in fact be refugees, should not be a factor in decision-making around the provision of assistance.²²⁹ The fact that humanitarian assistance is now being provided on an intermittent basis does not relieve the Ugandan authorities and their international partners of their obligations to protect the rights of the Kibati group.
- d) Reduction in, or denial of, food rations and other assistance as an inducement to repatriate is unacceptable and is a violation of fundamental standards of international law.
- e) Additional funds should be allocated to the Ugandan Red Cross and the World Food Program to permit them to provide adequate assistance to the recognized refugee community in Nakivale and the Kibati group. The presence of the Kibati population has generally added to the burden on those whose responsibility it is to assist and protect recognized refugees in the Nakivale settlement. Support for the provision of enhanced equipment to the local police post, particularly adequate transport, might also be considered.

226 IRIN, “RWANDA-UGANDA: Uganda, Rwanda Defence Ministers Pledge to Resolve Conflicts Amicably,” October 30, 2001.

227 UNHCR Executive Committee Conclusion No. 58 (1989) on the Problem of Refugees and Asylum-Seekers who Move in an Irregular Manner from a Country in which they had Already Found Protection, at para. (c) (iv).

228 Ibid.

229 See UNHCR, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, HCR/GIP/03/05, September 4, 2003 at Section II B, para 30, which states “in situations of mass influx [...] all persons should receive protection and assistance, subject of course to the separation of armed elements.”