

**ECONOMIC GLOBALIZATION, REFUGEE PRODUCTION, AND THE  
UNDERMINING OF INTERNATIONAL LAW: A THIRD WORLD  
PERSPECTIVE**

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## ABSTRACT

Globalization in general and economic globalization in particular, as operated through the agencies of the International Monetary Fund (IMF), the World Bank and Multinational Corporations (MNCs) is seen as a “saviour” (mostly by the developed countries) necessary for the attainment of rapid and vigorous economic growth and development. However, based on its present organizing principles, economic globalization all too often is also “savage” in terms of the significant contributions it makes in the production of refugees and other attendant disasters in the “third world.” As exemplified in the cases of Nigeria, Sudan and other third world countries, the policies, programmes and activities of these formidable forces of globalization, i.e. IMF, World Bank and MNCs, as driven by the influence of the developed countries, have contributed significantly in the instigation and exacerbation of such conditions as wars, ethnic conflict, poverty, *coup d’etat*, unemployment and other related disasters. And these are conditions highly instrumental in the generation of massive refugee flows in the “third world” countries. In other words, the present international economic structure is weighed heavily in favour of the relatively powerful developed states, to the detriment of relatively powerless “third world” countries.

Using the Third World Approaches to International Law (TWAIL) perspective, the dissertation contends that the reason why economic globalization’s negative impact on the “third world” remained unchecked is because of the existence of the colonial- type relationship between the “third world” and the developed world in the conduct of international relations and in the formation of international economic law. Economic

globalization as promoted by international economic law has whittled down the sovereignty of most the “third world” and transfers it to IFIs and MNCs. As a result the capacity of the “third world” countries to effectively discharge their social and welfare functions to their citizens is being minimized. Thus, economic globalization has generated and exacerbated inequality, unemployment, poverty, ethnic conflicts and wars in some “third world” countries. As previously stated, these are known conditions from where massive refugee flows in the “third world” originate. Similar to the situation during the colonial era, the developed countries who are reaping the benefits of economic globalization have refused and are still refusing to take responsibility for the negative consequences such as large scale refugee flows which this phenomenon has generated and is still generating in the “third world.” Instead, these developed states have adopted measures such as a narrow interpretation of international refugee law, interception of refugees at their borders, imposition of visa requirements, Safe Third Country agreements and a host of other non-entrée measures in order to limit the numbers of refugees and asylum seekers that can enter their countries or access their refugee determination systems.

As this kind of development represents a bleak and ominous portent to international peace and security, the dissertation suggests a number of alternative approaches in tackling, ameliorating and possibly arresting the grave impacts of globalization in the “third world,” with particular reference to refugee production. Because the present non-entrée model favoured by most developed countries in curbing massive refugee flows into their countries have proved ineffective if not

counterproductive, the dissertation proposes a reconceptualization of that model. In doing so, the dissertation challenges members of the international community to undertake some proactive measures such as the institution of an Impact Monitoring Commission and reference of serious issues to the International Court of Justice for advisory legal opinions as a more effective way of dealing with refugee flows. Indeed, members of the international community will need to demonstrate strong political will in order to bridge the gap between the obligations they have voluntarily accepted under the various international instruments, especially toward refugees, and their actual fulfillment. A task which is not only difficult but almost impossible to achieve except if the negative and sinister side of economic globalization is contained or at least minimized.

The dissertation concludes that, if the present operational paradigms of economic globalization are left unmonitored and unregulated it would constitute a “dance of death” for international refugee law and refugeehood.

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And to God be the glory for the accomplishment of this programme.

## ACRONYMS

|       |  |
|-------|--|
| AU    | AFRICAN UNION  |
| BITS  | BILATERAL INVESTMENT TREATIES                        |
| BPE   | BUREAU FOR PUBLIC ENTERPRISES                        |
| CAT   | CONVENTION AGAINST TORTURE                           |
| EU    | EUROPEAN UNION                                       |
| GNP   | GROSS NATIONAL PRODUCTS                              |
| ICCPR | INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS |
| ICJ   | INTERNATIONAL COURT OF JUSTICE                       |
| IDPS  | INTERNALLY DISPLACED PERSONS                         |
| IFIS  | INTERNATIONAL FINANCIAL INSTITUTIONS                 |
| IGOS  | INTERNATIONAL GOVERNMENTAL ORGANIZATIONS             |
| IJRL  | INTERNATIONAL JOURNAL OF REFUGEE LAW                 |
| IMF   | INTERNATIONAL MONETARY FUND                          |
| ING   | INTERIM NATIONAL GOVERNMENT                          |
| KNU   | KAREN NATIONAL UNION                                 |
| MIGA  | MULTILATERAL INVESTMENT GUARANTEE AGENCY             |
| MNCS  | MULTINATIONAL CORPORATIONS                           |
| MOSOP | MOVEMENT FOR THE SURVIVAL OF OGONI PEOPLE            |
| NAFTA | NORTH AMERICAN FREE TRADE AGREEMENT                  |
| NATO  | NORTH ATLANTIC TREATY ORGANIZATION                   |
| NGOS  | NON-GOVERNMENTAL ORGANIZATIONS                       |



|        |  |
|--------|--|
| OAU    | ORGANIZATION OF AFRICAN UNITY                          |
| OECD   | ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT |
| OPEC   | ORGANIZATION OF PETROLEUM EXPORTING COUNTRIES          |
| RSISTF | RIVER STATES INTERNAL SECURITY TASK FORCE              |
| RUF    | REVOLUTIONARY UNITED FRONT                             |
| SAP    | STRUCTURAL ADJUSTMENT PROGRAMME                        |
| SLORC  | STATE LAW AND ORDER RESTORATION COUNCIL                |
| SPDC   | SHELL PETROLEUM DEVELOPMENT COMPANY                    |
| SPLA   | SUDANESE PEOPLES LIBERATION ARMY                       |
| TNC    | TRANSNATIONAL CORPORATION                              |
| TWAIL  | THE THIRD WORLD APPROACHES TO INTERNATIONAL LAW        |
| UAC    | UNITED AFRICAN COMPANY                                 |
| UK     | UNITED KINGDOM   |
| UN     | UNITED NATIONS   |
| UDHR   | UNIVERSAL DECLARATION OF HUMAN RIGHTS                  |
| UNHCR  | UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES          |
| UNTS   | UNITED NATIONS TREATY SERIES                           |
| US     | UNITED STATES  |
| WTO    | WORLD TRADE ORGANIZATION                               |

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## Chapter One

### An Overview, Conceptual And Analytical Framework, and Methodology

#### 1.0. THE RESEARCH PROBLEM<sup>1</sup>

This dissertation examines how economic globalization precipitates the production of refugees, with a focus on the “third world” countries, and how this phenomenon in turn results in the undermining of international refugee law. However, the position of this dissertation is not that globalization is solely or even largely responsible for massive refugee flows in most “third world” countries but significantly responsible. The dissertation is not advocating for the eradication of economic globalization but merely constraining it in a humane way.<sup>2</sup> This is because, “the peoples of this planet do not have a problem with international trade or globalization as an end but worry about the means of its implementation.”<sup>3</sup> The dissertation argues that economic globalization as driven by international financial institutions (IFIs) and multinational corporations (MNCs) on the “third world” populations has produced many adverse

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<sup>1</sup> The format of this overview largely follows the approach adopted by Dr. O.C. Okafor in his book: *Re-Defining Legitimate Statehood: International Law and State Fragmentation in Africa* (The Hague/Boston/London: Martinus Nijhoff Publishers, 2000) at 1-11.

<sup>2</sup> It will be very difficult especially at this age of technological advancement for the third world to pull out of globalization or to defeat it. Rather what I advocate in this dissertation is humane constraints on economic globalization so that the third world countries could partake in globalization as its subject rather than as “the object and the victims of globalization.” What this means is that nations can no longer “escape each other” See S. Aluko, “The Economic and Political Failure of Globalization in Africa” on line: <http://www.aboutsudan.com/conferences/khartoum/aluko.htm> (visited: 10/12/2002). See also, W.J. Clinton, “Remarks As Delivered At Cornell University” (2005) 38 Cornell Int’l L. J. 1 at 3.

<sup>3</sup> A. J. Walling, “Early to Bed, Early to Rise, Work Like hell and Globalize” (2003/2004) Kansas Journal of Law and Public Policy 161 at 165.

consequences, one of which is massive refugee flows.<sup>4</sup> To this end, it will be crucial to understand the roles of (IFIs) (particularly the International Monetary Fund [IMF], the World Bank) and MNCs - the main engines that drive economic globalization.<sup>5</sup> It will also be important to understand the ways in which the developed countries that control these bodies have used them to advance their own interests too often at the expense of the so-called “third world” countries.<sup>6</sup> And so, the crucial point which this dissertation will explore is, why, despite increasing growth in the number of refugees from the “third world,” the international community (especially the developed countries) is unwilling or reluctant to check the negative impact of economic globalization as one of the several factors that contribute to this growth in the number of “third world” refugees. Thus, the dissertation will explore the international relations and international economic law background to the current “third world” refugee crisis in particular, and global refugee

---

<sup>4</sup> I am not unmindful of the good side of economic globalization. Economic globalization, through the operation of global market, if well managed would be “necessary to create the economic growth that can bring people out of poverty.” But the problem is that the “process by which globalization’s rules are being written and implemented” is creating inequality, undermining democracy, eroding community values and “degrading the environment” particularly in the third world countries. See K.A. Elliot, *et. al.*, *Assessing Globalization’s Critics: Talkers are No Good Doers???* (United States: Institute for International Economics, 2002) at 2 & 19. Similarly, Anthony Anghie, observes that: “globalization is an inescapable and complex phenomenon, about which it is hardly possible to generalize. But there is considerable evidence that globalization, in its current form, despite the opportunities and advantages it is supposed to create, has intensified inequalities between the West and the Third World.” See A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005) at 247.

<sup>5</sup> As observed by Aqueil Ahmad, Multinational Corporations (MNCs), backed by their respective governments, and international financial organizations such as the World Bank, the International Monetary Fund (IMF), the World Trade Organization (WTO) ... are the key agents of global economy.” Thus, the focus of this dissertation will be on the responsibilities of these major agents of economic globalization and the developed countries that support them. See A. Ahmad, *Globalization and the Developing Countries, With Especial Reference to Cuba* (Greensboro: Department of Sociology University of North Carolina, 2001), also reprinted on line: <http://globalization.icaap.org/content/v1.1/aqueilahmad.html> (visited: 07/25/05).

problems in general, and attempt to link these to the present attitude of the developed countries to international refugee law. This exploration is important because current international economic law (which promotes economic globalization) helps in “creating relations of domination, relations that almost render irrelevant the formal sovereignty”<sup>7</sup> of the “third world” countries. It is also important because of the ways large scale refugee flows undermine international refugee law – a law whose continued relevance, the international community recently reaffirmed as the bedrock instrument for the protection of refugees.

Indeed, in mid- December 2001, there was an unprecedented meeting in Geneva of 156 countries.<sup>8</sup> The purpose of the meeting was to brainstorm on issues pertaining to the refugee question.<sup>9</sup> At the end of this gathering, members of the international community reaffirmed their support of, belief in, and commitment to, the *Convention*

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<sup>6</sup> “Currently, the global economy is strongly influenced by the industrialized countries where the MNCs and the international financial organizations are headquartered. This has sometimes produced negative consequences for less influential nations.” See A. Ahmad, *ibid*.

<sup>7</sup> A. Anghie, “Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations” (2002) 34:3 *New York University Journal of International Law and Politics*, 513 at 622.

<sup>8</sup> UNHCR, “Global Consultations: An Agenda for Protection: on line < <http://www.unhcr.ch/cgi-bin/texis/vtx/global-consultations> > (visited: 17/01/2002).

<sup>9</sup> The refugee question is largely a human rights issue. People flee their homes for fear of violations of their human rights. If states, individuals, IFIs, and corporations conduct their activities in such a manner as to uphold human rights, refugee problems will be minimized if not eradicated. In 1999, Sadako Ogata, then High Commissioner for Refugees, declared: “My office has witnessed over recent years an intensification of human rights violations in countries of origin of refugees, and a considerable decline in the level of protection and assistance to refugees and asylum seekers in countries of asylum- all this at a time when the international community is taking not unjustified pride in the human rights framework it has put in place through a myriad of instruments and monitoring mechanisms. The plight of hundreds of thousands of refugees is always a graphic reminder of our inability to bring peace and security to the lives of too many ordinary people.” (Sadako Ogata (1999) as quoted in B. Gorlick, “Human Rights and Refugees: Enhancing Protection Through International Human Rights Law” (2000) 69 *Nordic Journal of International Law* 117 at 139-140).



*Relating to the Status of Refugees (1951)*<sup>10</sup> “as a cornerstone in the universal protection of refugees, and in its capacity to meet the needs of refugees requiring protection throughout the world.”<sup>11</sup> This pledge was very much like the 1993 UNHCR Executive Committee Programme reaffirmation of the *1951 Convention Relating to the Status of Refugees* and its *1967 Protocol Relating to the Status of Refugees* as the “cornerstone”<sup>12</sup> and the “centre of the international legal framework for the protection of refugees.”<sup>13</sup>

The *1951 Refugee Convention* was strategically crafted as a way of helping to contain the critically serious refugee crisis that arose in the aftermath of the Second World War.<sup>14</sup> The main refugee challenge that faced the international community at that time concerned how to shelter the mainly European victims of that war. Even at the time of the adoption of the *1951 Refugee Convention*, there were other refugee problems in other regions of the world such as South Asia (arising from the partition of India and Pakistan),<sup>15</sup> and in the Middle East (arising out of the Palestinian refugee crisis of this

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<sup>10</sup>UNHCR, *ibid.* See also, *Convention Relating to the Status of Refugees* (28 July 1951) entered into force April 22, 1954. Hereinafter called 1951 Refugee Convention.

<sup>11</sup> G.S. Goodwin-Gill, “The *IJRL* 1991 Colloquium on the Forty years of the 1951 Convention: Introduction and Acknowledgements” (1991) 3:3 *IJRL* 389 at 393.

<sup>12</sup> Executive Committee of the High Commissioner’s Programme, Report of the Forty-fifth Session of the Executive Committee of The High Commissioner’s Programme U.N. Doc. A/AC.96/839, at Para. 19 (c). See also, J. Fitzpatrick, “Revitalizing the 1951 Refugee Convention” (1996) 9 *Harv. Hum. Rts. J.* 229.

<sup>13</sup> Report of The United Nations High Commissioner for Refugees, Addendum, U.N. GAOR, 48<sup>th</sup> Sess., Supp. No. 12A, U.N. Doc. A/48/12/Add.1 (1993) at Para. 19(b). See also, J. Fitzpatrick, “Revitalizing the 1951 Refugee Convention,” *ibid.* at 229.

<sup>14</sup> J.I. Garvey, “Toward a Reformulation of International Refugee Law” (1985) 26:2 *Harvard Int’L J.* 483 at 500.

<sup>15</sup> P. Penz, “Ethical Reflections on the Institution of Asylum” a paper delivered at a conference at the Centre for Refugee Studies, York University on 07/02/2002) (on file with the author).

era).<sup>16</sup> But these other refugee situations did not seem to attract the attention of the makers of international refugee law. Thus, the *1951 Refugee Convention* was conceived in order to address the specific problems of European refugees who were “ethnically, or politically related to” the European receiving states or states of asylum.<sup>17</sup> As a result of their ethnic, cultural, or political affinity with the host community, these refugees had little difficulty securing warm and hospitable receptions in their various European states of asylum.<sup>18</sup> The *1951 Convention* was at that point limited to events that occurred in Europe before January 1951. However, the limitations imposed under the *1951 Convention* were abrogated by the *1967 Protocol Relating to the Status of Refugees*. This protocol enlarged the scope of the application of the Convention, extending it beyond its European geographical limitations to all persons who have and can prove a well founded fear of persecution arising from their race, religion, nationality, membership of a particular social group or political opinions and who are outside their countries of origin.<sup>19</sup>

Despite the seemingly giant stride made by the international refugee regime in expanding the geographical scope of the *1951 Convention*, the regime still retained the restrictive definition of a refugee contained in the *Convention*. These undue definitional restrictions were redressed to a very limited geographical extent in some regional

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<sup>16</sup> J.C. Hathaway, “The Emerging Politics of Non-entrée” (1992) issue 91 *Refugee* (December) 40. See also, R. Khalidi, “Attainable Justice: Elements of A Solution to the Palestinian Refugee Issue” (1998) *International Journal* (Spring) 233, noting that more than 700,000 Palestinians became refugees as a result of the fighting of 1947-48 between Israel and Palestine.

<sup>17</sup>J.C. Hathaway, *Ibid.*

<sup>18</sup> *Ibid.*

instruments such as the *1969 African Refugee Convention*<sup>20</sup> and the *1984 Latin American Cartagena Declaration*.<sup>21</sup> These instruments expanded the definition of refugeehood within their respective regions to include those who have fled their countries of origin as a result of external aggression, occupation, foreign domination, or events seriously disturbing public order in those countries.<sup>22</sup> The instruments also included those who fled generalized violence, internal conflicts, massive violation of human rights, or circumstances that seriously disturbed public order.<sup>23</sup>

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<sup>19</sup> *Protocol Relating to the Status of Refugees of 31 January 1967* 606 UNTS 267, Art. 1.

<sup>20</sup> *OAU Convention Governing the Specific Aspects of Refugees Problems in Africa*, 1001 UNTS 45, came into force 20 June 1974.

<sup>21</sup> *Cartagena Declaration On Refugees* 19-22 November 1984, Jean-Pierre Colombey, *Collection of International Instruments and Other Legal Texts Concerning Refugees and Displaced Persons*, Volume II Regional Instruments (Geneva: UNHCR, 1995) 206.

<sup>22</sup> *OAU Refugee Convention*, Art.1 (2) (3), *supra* note 20.

<sup>23</sup> *Cartagena Declaration on Refugees*, Art. XXX (III) (3), *supra* note 21. The definition of refugees in this dissertation is extended to include internally displaced persons (IDPs). This is because, like refugees, IDPs are very vulnerable people who have lost effective protection of the governments of their countries, either because they were unwilling to accept such protection, or because governments refused or were unable to protect them. The government might be unwilling to protect IDPs, if it officials suspect that the IDPs are supporting its enemies, such as rebels, or the government might be unable to protect them because it has lost control of the territory where the IDPs reside. The only difference is that refugees have crossed international borders. In fact, the Nigerian government seems to have appreciated this issue when it recently inaugurated its National Commission for Refugees and gave the Commission the added task or mandate of addressing the problems of the IDPs as well. See W. Gunther Plaut, *Asylum: A Moral Dilemma* (Toronto: York Lanes Press, 1995) at 88 & 89. See also, F. Peter-Omale, "Communal Clashes Displace 750,000 Nigerians-Atiku" *ThisDay News* (Nigeria) February 18, 2003, on line: <http://www.thisdayonline.com/news/20030218news09.html> (visited: 11/06/2003). See further, L. Axworthy, *Navigating A New World: Canada's Global Future*, (Canada: Alfred A. Knopf, 2003) at 414, stating that "the UN High Commission for Refugees is hamstrung by an outmoded mandate going back to WWII that limits its task to those who cross borders to escape from political persecution. It's time to insist that if national governments can't or won't protect internally displaced persons and grant them basic rights, then the responsibility should reside with the international community." See also, A. Dieng, "Addressing the Root Causes of Forced Population Displacements in Africa: A Theoretical Model"(1995) *IJRL* (special issue)119 at 120. See further M. Mutua, "The Interaction Between Human Rights, Democracy and Governance and the Displacement of Populations" (1995) *IJRL* (special issue) 37 at 38, observing that though "the two categories, refugees and internally displaced persons, trigger different regimes of international law, both are created by similar social and political failure..."

However, since the 1970s, there have been tremendous transformations in the refugee regime. These changes have resulted from large scale movements of asylum seekers from the so-called “third world” to many of the industrialized countries of the North.<sup>24</sup> These asylum seekers, who very often are culturally, politically, racially, and economically different from the residents of countries in the North, have too often been perceived as threats to the cultural cohesion and “social solidarity of the communities in the developed states.”<sup>25</sup> As such, these asylum seekers have encountered varying levels of resentment and rejection within the populations of their prospective “host” states, as well as the reluctance or unwillingness of many of the governments of these countries to admit them to asylum.

However, it is not only the international refugee regime that has undergone a transformation. Many states have also been transformed by the globalization of international society.<sup>26</sup> Profound transformations have occurred in the governance architecture of our world. Many matters that were hitherto within the largely exclusive preserve of states have been transferred in effect to the jurisdiction of supranational organizations such as the World Trade Organization (WTO), IMF, and the World Bank. MNCs and nongovernmental organizations now compete with states for governance

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<sup>24</sup> J.C. Hathaway, “Emerging Politics of Non-entrée”, *supra* note 16 at 40.

<sup>25</sup> *ibid.*

<sup>26</sup> S. Sassen, “Regulating Immigration in a Global Age: A New Policy Landscape” (2000) 570 *Annals of the American Academy of Political & Social Science* 65 at 66. See also A.G. McGrew, “Human Rights in a Global Age: Coming to Terms with Globalization” in T. Evans ed., *Human Rights Fifty Years on: A Reappraisal* (Manchester/New York: Manchester University Press, 1998) 188 at 201, stating that: “Globalisation highlights the ways in which relations between state and citizen are not simply determined by endogenous factors but rather are conditioned by the intersection of domestic and external forces.”

power.<sup>27</sup> For instance, the World Bank and the IMF have played very profound roles in shaping the key policies of many governments (especially those of the many “third world” states that have drawn from the Bank’s credit facilities).<sup>28</sup> Such key policy contributions “included advising [and pressuring] the governments to privatize public sector activities, cut government spending on health and education; deregulate labour markets, lower minimum wages, alter existing constitutional arrangement and deregulate investment and financial sectors.”<sup>29</sup>

All these policy measures were aimed at creating an enabling environment for the operation of the so-called “free market economy” and for the thriving of MNCs. Thus, the Bank and the IMF have encouraged policies that open up to developed country exports the markets of largely “third world” countries (the reverse is largely not the case). Through the intervention of these institutions, states are being increasingly divested of their hitherto primary functions of providing policy directions to their populations. As a result, the governance role of states has now been effectively reduced to maintenance of law and order, and the promotion of the private sector (especially foreign investment).<sup>30</sup>

The prosecution of the trade and financial liberalization agenda of these institutions tends to pose real, and all- too-often enormous, dangers and challenges to the

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<sup>27</sup> S. Sassen, *ibid.* at 71.

<sup>28</sup> A. Orford & J. Beard, “Making the State Safe for the Market: The World Bank’s Development Report 1997” (1998) 22 *Melbourne University Law Review*, 195.

<sup>29</sup> *ibid.*

<sup>30</sup> A. Orford, “Contesting Globalisation: A Feminist Perspective on the Future of Human Rights” in B.H. Weston, & S.P. Marks eds. *The Future of International Human Rights* (Ardsley, New York: Transnational Publishers, Inc., 1999) 157 at 168.

promotion and protection of the human rights of the citizens of the affected states.<sup>31</sup> As states have also become more and more marginalized and thwarted in the regulation of the economic system affecting their populations, they have become increasingly less able to ensure the provision of adequate health care and education to their populations. States are also less able to prevent the impoverishment and immiseration of their people.<sup>32</sup> Thus, “the conditions imposed by the IMF and World Bank have all- too-often led both directly and indirectly to serious human rights violations.”<sup>33</sup> This situation makes immense contributions to the production of massive refugee flows in the “third world”.

Apart from the IMF and World Bank, the activities of most multinational corporations have impacted negatively on the ‘third world’ countries where they operate and led in some key ways to the generation of refugees. These are large corporations that have branches and subsidiaries doing business in many different parts of the world at the same time, with the biggest and most effective ones based in the United States, Europe and Japan.<sup>34</sup> In fact, as at 1992, the 20 largest MNCs have their home bases in the G-7

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<sup>31</sup> *ibid.* at 159.

<sup>32</sup> *ibid.* at 161. Recently, the then Nigerian Minister of State for Finance, Alhaji Jubril Martins-Kuye, while announcing Nigeria’s temporary withdrawal from IMF and World Bank imposed conditionalities, observed thus: “We will rather govern ourselves politically and economically as we deem most appropriate without taking any dictation from anybody whatsoever...” See E. Ujah & K. Larewaju, Why FG Dumped IMF’s Economic Pills” Vanguard 7<sup>th</sup> March, 2002, on line: <<http://www.vanguardngr.com/news/articles/2002/march/07032002/f3070302.htm>> ( Visited: 07/03/2002). This withdrawal proved, however, to be only temporary. The IMF is back in the Nigerian game.

<sup>33</sup> A. Orford, “Contesting Globalization” *supra* note 30. at 166. The author contends, “...The policies, projects, and actions of the IMF, the World Bank, and the WTO shape the economic and political systems of many states. In turn, the actions of those institutions have a significant impact upon the promotion and protection of human rights in each of the states.”(*ibid.* at 175).

<sup>34</sup> M. Ataman, “The Impact of Non-State Actors on World Politics: A Challenge to Nation-States” (2003) 2:1 Alternatives 42 at 47.

countries.<sup>35</sup> These corporations have played and are still playing very effective roles in steering the foreign policy of states, particularly those of the third world countries and in setting the agenda of international politics.<sup>36</sup> They wield enormous influence in the national decision-making process of many countries; consequently, many “different economic schools of thought treat MNCs differently.”<sup>37</sup> Liberal economists see the MNCs as the “vanguard of the new world order” because of their possession of efficient means of production and their ability to invest freely across the globe and in the generation of wealth world wide from their investment.<sup>38</sup> But the Mercantilist and Nationalist would consider the MNCs as instruments of their home states, put in place to serve the national interests of those home states. According to Muhittin Ataman, “MNCs serve national interests of home countries as instruments of global economic development, a mechanism which spreads ideology, and a tool of diplomacy. They are highly centralized and are dominated by the parent company which is located in the home country.”<sup>39</sup> Similarly, theorists of “dependency” persuasion “consider MNCs as instruments of colonialization, which are “sometimes manipulated and controlled” by

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<sup>35</sup> *ibid.* at 48.

<sup>36</sup> *ibid.* at 49.

<sup>37</sup> *ibid.*

<sup>38</sup> *ibid.*

<sup>39</sup> *ibid.* at 50-51. See also, A. Ahmad, “Globalization and the developing Countries, With Especial Reference to Cuba” (Greenboro: Department of Sociology University of North Carolina at Greensboro, 2001), reprinted on line: <http://globalization.icaap.org/content/v1.1/aqueilahmad.html> (visited: 7/25/2005). Stating that “MNCs and the international financial organizations are seen as agents of global economy. Their main purpose is to serve the interests of the industrialized West although they claim to be promoters of international trade and development.”

their home government, and used in expanding the marketing base of their home states.<sup>40</sup>

On their part, Marxists generally see the MNC as “the instrument of exploitation and as an extension of the imperialism of strong capitalist states.”<sup>41</sup> Thus, according to Muhittin Ataman,

“MNCs may be considered as instruments of economic development for less developed countries. However, when we look at the functions they perform in host countries, we see that they have a very strong bond with the home government which become source of concern for host countries. MNCs challenge the state sovereignty of the host countries. Host countries may lose control over their economies. They create political and social division and prevent the development of domestic industries in host countries.”<sup>42</sup>

Some of these corporations operate outside the bounds of the prescribed safety measures that they almost always adopt in their operations in developed countries. This has too often led to environmental degradation and other types of ecological disasters in “third world” states. Consequently, these MNCs have had some clashes with the local populations in some of the “third world” states where they operate. In order to enable them operate without restrictions enacted by the local populations, these MNCs have tended to provoke (or stand aside and watch) some of the governments in these “third world” states use their instruments of coercion to forcibly (even savagely) contain their

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<sup>40</sup>M. Ataman, *supra note* 34 at 51.

<sup>41</sup> *Ibid.* at 49.

<sup>42</sup> *Ibid.* at 50.



citizens' protests.<sup>43</sup> In the process, all- too- many of the citizens of these "third world" countries have had their human rights *grossly* violated. A case in point is the negative impact of the activities of Shell (one of the agents of globalization) in creating the conditions that have led to the displacement of large numbers of Ogonis from their homes. Displacement has caused them to become refugees both within and outside Nigeria.

The Ogoni people have been farmers from time immemorial, and have depended on agriculture and fishing as their means of livelihood. However, the discovery of oil on their land in 1959 and the unsafe exploration and exploitation activities of Shell have put an end to their various farming activities. Oil spills emanating from ruptured pipelines have spread over vast areas of the community's land, killing crops, fish, and trees. In addition, accidental fires that destroy several kilometres of forests and farmlands are now common occurrences in Ogoniland.<sup>44</sup> In the process, many Ogoni people have lost their lives and means of livelihood, or have experienced health problems caused by such activities as gas flaring and other unsafe environmental practices. Many others have been displaced from their homes as refugees and internally displaced persons.

When the Ogoni people protested against the devastating effects of Shell's activities in their area, Shell actively encouraged the Nigerian government to send troops

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<sup>43</sup> J. Galtung, "The Third World and Human Rights in the Post -1989 World Order" in Tony Evans, ed., *Human Rights Fifty Years On: A Reappraisal* (Manchester & New York: Manchester University Press, 1998) 211 at 215, the author observes thus: "...But this is less true for military power and political power. As other sectors shrink, the military budget increases relatively and absolutely. Some of that power may be used to discipline a restive population, some to fight with neighbours over such scare resources as water..."

<sup>44</sup> S. Olukoya, "Oil Spills in Yorla Cause Hard Times" on line: <http://www.mosopcanda.org/text/review.html> >

to the area to quell the dissent and enable the company to operate without inhibition, instead of negotiating with the people about how to solve this problem. This was possible because of the convergence of interests between the Nigerian government and Shell in the exploitation of oil in Ogoniland. The occupying Nigerian armed forces have committed several atrocities against the Ogoni people such as rape, murder, torture, unlawful arrests and illegal detentions. The persecuted Ogoni people have fled their homes in search of asylum elsewhere.<sup>45</sup>

Shell is not alone in these unwholesome practices; many other MNCs, especially those operating in “third world” countries, are in the same league. Another good example is Talisman – a Canadian Oil company that until recently operated in Southern Sudan (note that on March 9, 2003, Talisman sold its oil interest in Sudan to an Indian oil company for \$771 million).<sup>46</sup> It was recently alleged that, in 1999, Talisman requested the Sudanese government to remove villagers from the vicinity of its oil operations.<sup>47</sup> As a result of that request, the Sudanese government launched one of the largest military operations in the history of the country’s civil war in order to achieve that purpose.<sup>48</sup>

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<sup>45</sup> O.O. Ibeanu, “Insurgent Civil Society and Democracy in Nigeria: Ogoni Encounters with the State, 1990-1998” Research Report for ICSAG Programme of the Centre for Research and Documentation (CRD), Kano ( on file with the author) at 20.

<sup>46</sup> S.J. Kobrin, “Oil and Politics: Talisman Energy and Sudan” (2004) 36 N.Y.U. J. Int’L & Pol. 425.

<sup>47</sup> G. Fraser, “Sudan Helped Talisman, Lawsuit Says” *The Toronto Star*, March 23, 2002, at A26. As stated before, Talisman (following pressure mainly from human rights organizations) has sold its venture in Sudan to an Indian corporation.

<sup>48</sup> *Ibid.*

Some of these MNCs, as agents of globalization, are in some cases much more powerful and rich than their host governments in the “third world”.<sup>49</sup> As such, these MNCs often dictate to governments. They often work to ensure the installation of the government of their choice or the removal of a government that they perceive as probably or actually working against their interests. For instance, in the year that Salvador Allende, the former president of Chile, was overthrown, the annual revenue of ITT was greater than the Gross National Product of Chile for that year. It has been alleged that ITT contributed to the overthrow of Allende’s government.<sup>50</sup> The activities of such corporations are contributing to the creation of conditions that generate large volumes of refugees.<sup>51</sup>

The overall point that is being made here is that, because of globalization (especially economic globalization), states can no longer claim autonomy in many key areas of macro-level decision making. Some of the decisions that have been taken by external actors (such as MNCs and the Bretton Woods institutions) with respect to the framework of governance of weaker (usually “third world”) states have had profound

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<sup>49</sup> K. Hossain, “Globalisation and Human Rights: Clash of Universal Aspirations and Special Interest” in B.H. Weston and S.P. Marks, eds., *The Future of International Human Rights* (Ardsley, New York: Transnational Publishers, Inc., 1999) 187 at 191, noting that: “...in an increasingly competitive global economy, developing countries have been encouraged to undertake export promotion and to establish export processing zones where the MNCs were offered exemptions not only from fiscal levies, but from the obligation to comply with laws that protect the rights of workers.”

<sup>50</sup> B. Stern, “How to Regulate Globalization?” in M. Byers, ed., *The Role of Law in International Politics* (Oxford: Oxford University Press, 2000) 247 at 248.

<sup>51</sup> A. Orford, “Locating the International: Military and Monetary Interventions after the Cold War” (1997) 38:2 *Harvard International Law Journal* 443 at 444, stating that: “...One of the major projects of international institutions in the post Cold War era – economic liberalization, itself poses threats to democracy and human rights.” Of course violations of human rights constitute one of the major root causes of refugees generation. Emphasis added. See also B.S. Chimni, *Globalisation, Humanitarianism and the Erosion of Refugee Protection* (Oxford: Refugee Studies Centre, 2000) at 6.

impacts on the lives and welfare of the citizens of these states. For instance, through the activities of MNCs and other transnational corporations (TNCs), cross-border economic activities can take place with very minimal state involvement.<sup>52</sup> All these activities take place in the shadow of international law (in this case, international economic and monetary laws).

Indeed, globalization tends to erode the capacity of states to set their peculiar economic, social, and political agendas.<sup>53</sup> States are unable to promote autonomously the human rights, and economic and social welfare of their population.<sup>54</sup> The profoundly negative impacts of some of the activities of the agents of globalization have created conditions that have sometimes facilitated (violent) confrontations between local populations and their governments. In this kind of situation, the government often resorts to the application of repressive measures against its citizens as a means of asserting control over its territory, people, and resources and also of keeping the country “safe” for the market. These are conditions that contribute to poverty, unemployment, instability, conflict, and misery.<sup>55</sup> In such circumstances, people tend to flee their country or state of origin for fear of death, persecution, or other violations of their human rights as refugees.

Ironically, while the leaders of developed countries have, through their support for economic globalization, encouraged the freer movement of *goods and capital* (and even toxic waste to some extent) across international borders, they have insisted on

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<sup>52</sup> S. Sassen, *supra* note 26 at 69.

<sup>53</sup> R.B. Bilder, & D.P. Stewart, “Human Rights at Millennium” (2001) 95 AJIL 227 at 229

<sup>54</sup> *Ibid.*

retaining and exercising (and even increasing) their control over the movements of *people* across these same borders.<sup>56</sup> This is so notwithstanding the fact that the activities of too many of the agents of globalization help create the conditions that precipitate the flight of people from their homes in search of refuge.<sup>57</sup> This policy tends to negate the essence of international refugee law, which is a sort of compromise between the power of the state to exercise control over the admission of persons to its territory (i.e., exercise of power of sovereignty), and the compelling humanitarian need to assist those who require international protection.<sup>58</sup> As well, this policy is at variance with the globalization framework that these states otherwise appear to have subscribed to and fully embraced.<sup>59</sup>

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<sup>55</sup> M. Ndulo, 'Globalization and Empire: The Democratization Process and Structural Adjustment In Africa' (2003) 10 *Indiana Journal of Global Legal Studies* 315 at 316.

<sup>56</sup> S. Sassen, *supra*, note 26 at 70. Most of the developed countries of the North have adopted several restrictive measures aimed at preventing refugees and asylum seekers from reaching the territories of their states as well as from having access to their asylum determination process. These measures include imposition of visa requirements on states generating large volumes of refugee flows, carrier sanctions on ships or air craft that brought undocumented asylum seekers into their territories, an expedited determination process without opportunity for judicial review, application of the concepts of safe third country and safe country of origin, and a host of other measures. See J.C. Hathaway & J.A. Dent, *Refugee Rights: Report on Comparative Survey* (Toronto: York Lanes Press Inc., 1995) at 5-6, see further UNHCR Executive Committee of the High Commissioner's Programme: Standing Committee, 18<sup>th</sup> Meeting: Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach, UN doc. Ec/50/SC/CRP.17, 9 June 2000. Reprinted in (2000) 12:1 *IJRL* 488 at 491 & 492 Paras. 12, 13 and 17. See also M. Fullerton, "Failing the Test: Germany Leads Europe in Dismantling Refugee Protection" (2001) 36 *Texas International Law Journal* 231 at 234.

<sup>57</sup> The implementation of the IMF conditionalities with their concomitant austerity measures was the major cause of the crisis in the former Yugoslavia, which triggered massive flows of refugees. See A. Orford, "Locating the International: Military and Monetary Intervention" *supra* note 51 at 456-460. The author observed at 455 that: "The social impact of IMF economic liberalization and shock therapy stabilization programs also had unacknowledged political effects. Those programs arguably fuelled the nationalist dynamic by rapidly restructuring republican and federal levels of government, by implementing policies with divisive social consequences, and by advocating the removal of mechanisms that provided some state support to individuals who would suffer under unrestrained economic liberalism."

<sup>58</sup> J. Fitzpatrick, "Flight From Asylum: Trends Toward Temporary 'Refuge' and Local Responses to Forced Migrations" (1994-1995) 35 *Va. J. Int'l L.* 13 at 34 -35.

<sup>59</sup> A. Sassen, *supra* note 26 at 70.

This is because the free movement of goods and capital across borders and the liberalization of trade, commerce, and finance have made the various areas of the world interdependent and interconnected, such that policies formulated in one place can produce a negative effect in another place. Therefore, it would seem anachronistic to think of any country today as being *exclusively* for people from a particular ethnic or cultural background. Refugees as human beings are granted the right to freedom of movement by various international instruments such as the *Universal Declaration of Human Rights*.<sup>60</sup> This right ought to help limit the entitlement of states to exclude refugees from their territories.<sup>61</sup> Besides, refugees and asylum seekers, as particularly vulnerable people escaping from persecution, are also vested with the right to seek and enjoy asylum in any place of their choice. It can be argued that the existence and exercise of this right imposes obligations on states to assist in its realization by granting refugees asylum. In fact, “when the contemporary refugee regime was established, it was predicated on the willingness of states to relinquish a certain amount of sovereignty, in

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<sup>60</sup> *Universal Declaration of Human Rights*, Adopted and Proclaimed by General Assembly Resolution 217A (III) of 10 Dec. 1948.

<sup>61</sup> F. G. Whelan, “Citizenship and Freedom of Movement: An Open Admission Policy?” in M. Gibney, ed., *Open Borders? Closed Societies?: The Ethical and Political Issues* (New York/Westport/Connecticut/London: Greenwood Press, 1988) 3, at 7-8, the author observed that: “Freedom of movement might account among the basic liberties...The same reasons that make internal freedom of movement important as an expression of individual liberty would seem to apply internationally, especially from the point of view of someone who does not know in what country he is going to find himself. Although the existence of reasonably stable bounded political and administrative units, and individuals having a legal domicile, may be desirable institutions, there is no special reason why free movement across international borders need be more inconsistent with these institutions than are municipal, county, and U.S. state borders with the practice of internally free movement as it exists in the U.S.”

order to ensure that the basic human rights of specific category of threatened individuals – refugees - would always be protected.”<sup>62</sup>

Thus, one of the plausible inferences that can be drawn from the provisions of refugee law is that the law seeks to create a form of cosmopolitan citizenship for those whose rights have been and are likely to continue being abused. Thus, one of the cardinal principles of refugee law, is that if an asylum seeker is able to demonstrate that his/ her fundamental human rights have been seriously violated or to show the existence of a well founded fear of such serious violation, such a person ought not be returned to her/ his state of origin. This is the principle of *non-refoulement*, a cornerstone principle of refugee law, which has been strengthened further by the provisions of some other regional and international reinforcing instruments such as the *Torture Convention* (Article 3),<sup>63</sup> and *European Convention on Human Rights and Fundamental Freedom* (Article 3).<sup>64</sup>

Again, Article 14 of the *Universal Declaration of Human Rights (UDHR)* affords a person fearing persecution in her/ his state of origin the right to seek asylum in any other state of her/ his choice, although some still argue that the provision does not fetter the sovereign power of the state to regulate who enters its territory.<sup>65</sup> As well, it could be

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<sup>62</sup> J. Kumin, “New Approaches To Asylum: Reconciling Individual Rights and State Interests” (2004) 22:1 *Refuge* 3.

<sup>63</sup> *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* of 10 December 1984 reprinted in *Collection of International Instruments and other Legal Texts Concerning Refugees and Displaced Persons*, Vol. 1, Universal Instruments (Geneva: UNHCR, 1995) 233.

<sup>64</sup> *European Convention on Human Rights and Fundamental Freedom* (entered into force 3 Sept. 1953) 213 U.N.T.S. 222.

<sup>65</sup> P. Matthew, “Legal Issues Concerning Interception (2003) 17 *Georgetown Imm. Law Journal* 221. See also, B. L. Aust, “Fifty Years Later: Examining Expedited Removal and the Definition of Asylum Seekers

argued that the right to seek and enjoy asylum espoused in Article 14 is not legally binding, since the article is a mere Declaration of the General Assembly. It should be pointed out, however, that the *Universal Declaration* has been recognized and affirmed in a number of subsequent international instruments; at least parts of the *Declaration*, which arguably include Article 14, have attained the status of customary international law.<sup>66</sup> The argument could further be made that states cannot deny the exercise of this right to an asylum seeker who has a well founded fear of persecution without breaching its obligations under the various international instruments that regulate refugee and asylum matters. This is because under the principle of *ibi jus ubi remedium*,<sup>67</sup> that is, where there is a right there must be a remedy, an asylum seeker should be able to count on the protection of any state of her/ his choice when her/ his country of origin proves itself unable or unwilling to afford her/ him protection.<sup>68</sup> But the protection afforded refugees/asylum seekers in a number of international and regional instruments is under the threat of being dismantled in this era of economic globalization. This is because of

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Through the Lens of the Universal Declaration of Human Rights” (1998) 20 Hamline Journal of Public Law & Policy 107 at 129. See further P. Matthew, “Australian Refugee Protection in the Wake of the TAMPA” (2002) 96 American Journal of International Law 661.

<sup>66</sup> C. Bostock, “The International Legal Obligations Owed To The Asylum Seekers On The Mv Tampa” (2002) 14 IJRL 14.

<sup>67</sup> Oputa JSC in the Nigerian case of *Nosiru Bello v. A.G. of Oyo State* (1986) 5 N.W.L.R. 828 held that “once there is a right there must be a remedy.” See also, *Hill v. CA Parsons & Co. Ltd.* [1972] 1 Ch. 305, per Lord Denning MR.

<sup>68</sup> In *Re Singh and Minister of Employment and Immigration* (1985), 17 D.L.R. (4<sup>th</sup>) 422 at 499, the Supreme Court of Canada per Wilson J held *inter alia*: “I believe therefore that a Convention Refugee who does not have a safe haven elsewhere is entitled to rely on this country’s willingness to live up to the obligations it has undertaken as a signatory to the *United Nations Conventions Relating to the Status of Refugees*.” I submit that these obligations extend also to the one undertaken by countries under the *UDHR* since the Refugee Convention in its preamble affirms its provisions.



the significant contributions of economic globalization to the generation of massive refugees flows.

Indeed, the major premise of my dissertation is that traditionally, globalization has been looked upon as “saviour,” but, in fact, all-too- often, it has functioned as a “savage”<sup>69</sup>(in terms of its highly significant contribution to the production of refugeehood). Analysis of refugee law and politics area provides ample evidence for the savagery that globalization can often inflict. To achieve my objective, this thesis will be divided into eight chapters. This introductory chapter offers an overview and the conceptual /analytic framework upon which arguments of the subsequent chapters will be based. Chapter two will discuss the theoretical framework on which the whole thesis will be anchored. The focus will be on outlining the nature of the Third World Approaches to International Law (TWAIL) school of thought as the analytical approach that best explains the roles played by international law, IFIs, some non-state actors like MNCs (as agents of economic globalization), and the governments of many developed countries (which support and control the other actors), in the generation of massive refugee flows in the “third world” and in the consequent undermining of international refugee law. Chapter three will attempt to establish a nexus between globalization and massive refugee flows in the “third world.” This chapter will examine critically the policies of the IMF and the World Bank, as well as the activities of MNCs in the “third world” and how these policies and activities have tended to undermine the powers of the state to promote and protect the human rights of its citizens. Undermining that ultimately leads to massive

refugee generation. The chapter will contend that the concern of the IMF, the World Bank, and MNCs is, in the main, the opening up of “third world” markets to the unhindered flows of capital and goods, and the operation of free trade in “third world” states with as little restraint as possible. The chapter will examine the measures used by these bodies to achieve these objectives, such as the imposition of stringent conditionalities on “third world” states as *sine qua non* for granting them credit facilities or other developmental assistance. The chapter will also discuss how the roles of these agents of globalization all- too- often contribute very significantly to the creation of the conditions that lead to refugee flows.

In Chapter four, I will critically examine the various structural adjustment programmes launched at the instance of the World Bank and IMF by the Nigerian governments that governed between 1979 and 2005. The serious impact of these programmes on the human rights of Nigerians and their tendency to produce refugeehood will also be discussed. I will do this by reviewing the regimes of Shehu Shagari, Muhammed Buhari, Ibrahim Babangida, Sanni Abacha, and Olusegun Obasanjo. These regimes introduced one form of structural adjustment programme (SAPs) or another in Nigeria at the instance of the World Bank and IMF. In all these cases, the reactions of Nigerians were mostly negative and resistant. The government (and MNCs sector) response to this resistance has led to gross violations of the human rights of many Nigerians. The ways in which these globalization programmes contributed and can contribute to the precipitation of refugee flows in Nigeria will be examined. The

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<sup>69</sup> For a more incisive discussion of the saviours and savages metaphor, see M. Mutua, “Savages, Victims,

operations of multinational oil corporations in Nigeria (especially Shell in Ogoni land) will also form part of the subject of this chapter. Since 1958, when oil exploration and exploitation started in Nigeria (especially in the Niger Delta region of the country), many serious human rights and environmental problems have been closely associated with these extractive activities. This has brought the Niger Delta people, especially the Ogonis, into confrontation with both the oil companies and the Nigerian government. I will examine these conflicts, the role of Shell and other oil companies in the instigation and exacerbation of these conflicts, and the extent to which the activities of the companies have contributed and still contribute in significant ways to the generation of both Convention refugees and internally displaced persons (IDPs) in Nigeria.

MNC type oil corporations in Sudan played an infamous role in fueling the war in that country in a way that is similar to the situation in the Niger Delta of Nigeria. Indeed, that war has been pejoratively referred to as a “resources war.” Thus, the focal point of Chapter Five will be the impact of the activities of such MNCs (as agents of globalization) in the exacerbation of the civil war in the Sudan, with its attendant consequence of greater refugee production.

In chapter six, the following questions will be examined: Is globalization undermining one of the fundamental principles of refugee law, i.e., the principle of *non-refoulement*? The chapter will critically survey some of the refugee policies of the developed, industrialized countries of the North, especially those in the West, and how most of these policies conflict with their obligations under international law. Such

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and Saviours: The Metaphor of Human Rights” (2001) 42 Harvard International Law Journal 201.

policies include the imposition of visa requirements on countries that generate large volumes of refugees, interdiction of asylum seekers on the high seas, and the development of the concept of safe countries of origin and safe third countries, etc. This chapter will contend that these policies contravene the *non-refoulement* obligations that most of these states have assumed as a result of the *1951 Refugee Convention*, the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic Social and Cultural Rights*, the *Convention Against Torture*, the *European Convention on Human Rights and Fundamental Freedoms* etc. It will be argued as well that the *non-entrée* policies imposed on asylum seekers during periods of massive exodus of refugees (which globalization makes significant contributions to launching) constitute a violation of the time honoured refugee principle of *non-refoulement*.

Chapter seven will deploy the Third World Approaches to International Law (TWAAIL) analytical tool introduced in chapter two in an attempt to dissect the contributions being made by economic globalization to the production of massive refugee flows and also to determine how this results in the undermining of the international refugee regime. The analysis will be offered in the light of the previous discussions in chapters one to six of the dissertation.

In Chapter eight, I will conclude by summarizing the main points of the dissertation. I will contend that the international community should make the stoppage or at least the minimization of refugee crises around the world a major priority among its

other responsibilities.<sup>70</sup> This could be achieved by a serious effort to ameliorate all the forms of human rights abuses and violations that precipitate refugee flows, especially those that are attributable to tough regulations imposed by economic globalization. I will contend that the IMF, the World Bank and MNCs (the agents of globalization) should be made much more responsible and accountable for their activities in “third world” states. An *Impact Monitoring Commission*, an international body that will monitor, regulate, and, where need be, adjudicate on the impacts of the policies and activities of the IFIs and MNCs in their host states, should be established. The proposed body, although analogous to the UN Human Rights Commission, should focus on the activities of actors like the IMF, the World Bank and MNCs. Alleviating refugee crises requires not only the commitment of adequate resources, but also a tremendous show of political will on the part of the international community.<sup>71</sup> Thus, this chapter will also suggest reference to the International Court of Justice for advisory legal opinions on some issues pertaining to whether a given policy of the IFIs or a given activity of MNCs contravenes any of the recognized and protected rights enunciated in a number of regional or international instruments. The court may also prescribe remedies for the breach. Hence, it will be suggested that the response of the international community to refugee problems should be proactive rather than reactive; steps need to be taken to stem any globalization activities that contribute significantly to the production of refugeehood or have the potential of doing so. This will be crucial because, as Okafor has rightly observed:

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<sup>70</sup> Refugees: “Human Rights Have No Borders (1997)” on line: <<http://www.amnesty.org/ailib/intcam/refugee/chapter7.htm>> (visited: 01/02/2002).

...Such a dramatic reduction in the number of the world's asylum-seekers can neither be achieved nor sustained without a serious attempt to understand and tackle the root causes of large scale refugee flows especially those root causes that have so far failed to receive as much attention as they deserved.<sup>72</sup>

It is contended that the adverse impact of economic globalization is one of the root causes of refugee flows that have not been given much attention by the international community.

### **1.1. LITERATURE REVIEW**

A considerable number of notable scholars have written on issues that are similar to the ones addressed in this dissertation. However, the dissertation is original in its specific contributions to the literature. It does not merely reproduce existing knowledge. The originality of the dissertation stems from

- (a) at a theoretical level, its reinforcement of both the refugee and globalization literatures by showing globalization as “savage,” i.e., as part of the (refugee) problem, and not a solution as its proponents would want to claim.
- (b) at an empirical as well as normative level, its elaboration of the specific case studies of Nigeria and Sudan to demonstrate the ill effects of globalization on the production of refugee flows and the undermining of international refugee law.

As stated earlier, globalization (especially economic globalization) has brought about many transformations in the state, such that most states have lost much of their

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<sup>71</sup> *Ibid.*

sovereignty over some traditional areas of state control. According to Saskia Sassen, despite the transformations brought about by economic globalization, states still exercise control over immigration matters, as somehow separate from other processes.<sup>73</sup> Sassen also argues that states treat the immigration process as a unilateral sovereign affair while at the same time they embrace globalization.<sup>74</sup> To Sassen, this signifies that there needs to be reconsideration of how to handle the regulation of immigration in this era of globalization. As Sassen put it: “What is now experienced as a crisis in the state’s control over its borders may well be the sign that we need to redraw the map within which we confront the difficult question of how to regulate and govern immigration flows in an increasingly interdependent world.”<sup>75</sup>

By the same token, Christopher W. Rudolph has contended that, whereas states accept the prosperity accruing from globalization and the facilitation of unhindered flows of trade and capital, they have not shown the same willingness to open their borders for the easy mobility of labour.<sup>76</sup> He argues that this is so despite the fact that globalization affects transnational migration.<sup>77</sup> The reason why states have this attitude is because they see globalization as a threat to their sovereignty, and states always want to maintain the

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<sup>72</sup> O.C. Okafor, “Convention Refugeehood, Early Warning Signs, and the Structural Crisis of Legitimate Statehood in Contemporary Nigeria” (2003) 9 Buffalo Human Rights Law Review 1 at 2-3.

<sup>73</sup> S. Sassen, “Regulating Immigration in Global Age: New Policy Landscape,” *supra* note 26 at 66.

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.* at 68.

<sup>76</sup> C.W. Rudolph, “Globalization, Sovereignty, and Migration: A Conceptual Framework” (1998-1999) 3 UCLA Journal of Int’l L. and Foreign Affairs 325.

<sup>77</sup> *Ibid.* at 327.

powers that will allow them to retain sovereignty.<sup>78</sup> This fact simply demonstrates “that corporate interests do not necessarily correspond with the interests of a nation’s immigration policy.”<sup>79</sup> I will use the works of these two scholars in my dissertation, but my work will be different from theirs in that the focus of the thesis is on how globalization contributes significantly to the production of refugee flows.

Sarah Collinson’s work is concerned with the great stresses that the international refugee regime has undergone and is undergoing worldwide in this era of globalization.<sup>80</sup> She opines that powerful states direct their efforts toward creating trade and investment regimes that support the processes of global economy, but are less concerned with creating comprehensive labour regimes because, as she puts it, “...the global market does not depend on flows of labour in the same way it depends on global capital and commodity flows.”<sup>81</sup> According to Collinson, the international refugee regime is left in the hands of the judiciary, non-governmental organizations (NGOs), and inter-governmental organizations (IGOs) “to do what they can to invoke international human rights instruments to protect migrants and refugees, usually in opposition to the governments concerned.”<sup>82</sup> The situation in Asia and the Middle East is worse, since a significant number of countries in these regions do not accord any legitimacy to existing

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<sup>78</sup> *Ibid.* at 336.

<sup>79</sup> *Ibid.* at 333.

<sup>80</sup> S. Collinson, “Globalization and the Dynamics of International Migration: Implications for the Refugee Regime” (London: Centre for Documentation and Research, UNHCR, 1999) 1 at 8, reprinted on line:

< <http://www.unhcr.ch/refworld/pubs/pubon.htm> >.

<sup>81</sup> *Ibid.* at 8.

<sup>82</sup> *Ibid.*



international human rights instruments.<sup>83</sup> She laments that: “[I]ndeed, current trends in the world political economy imply an erosion of protection for all individuals from the vagaries of the global market (migrants and non-migrants alike). There is certainly no powerful global lobby for the rights and well-being of migrants which can match the global lobby promoting the rights of capital.”<sup>84</sup>

B.S. Chimni’s work focuses to a large extent on the selective application of the principle of humanitarian intervention by powerful states to further their own selfish agenda, and how this is eroding refugee protection in this era of globalization.<sup>85</sup> Chimni argues that the reason for this trend of events is because “humanitarianism is the ideology of hegemonic states in the era of globalization marked by the end of the Cold War and a growing North-South divide.”<sup>86</sup> To Chimni, the practice of selective humanitarian intervention is threatening “legitimate boundaries between international refugee law, human rights law and humanitarian law.”<sup>87</sup> According to Chimni, the reason for the transgression of the distinctive and separate spaces between them lies “in the bid to exclude and incarcerate those who seek to escape the consequences of the brutal globalization process.”<sup>88</sup> Chimni further states that, from the way the principle of humanitarian intervention is being employed, “refugee flows will henceforth justify the

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<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.* at 8

<sup>85</sup> B.S. Chimni, Globalization, *Humanitarianism*, *supra* note 51 at 3.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

use of force against the country of origin.”<sup>89</sup> Chimni’s work will be a good and valuable resource for my own work. However, my thesis is concerned with the ways in which globalization all- too- often contributes to the production of refugeehood and the crisis in refugee law and is, as such, different from this erudite scholar’s work.

In the case of Anne Orford, the focus of her globalization work has been on the consequences of the economic restructuring programmes of the IMF and the World Bank on the human rights of the target countries.<sup>90</sup> Her case study was Yugoslavia. Like many other scholars, she has contended that the shift of most decision-making authority from government to non-governmental bodies such as the IMF and the World Bank has affected the concept of “popular sovereignty and substantive democracy.”<sup>91</sup> She opines that, in some cases, the conditions prescribed by the IMF and World Bank constitute a challenge to both the existing constitutional and governmental arrangements.<sup>92</sup> She contends that the conditions imposed on Yugoslavia by the IMF and the World Bank contributed significantly to the civil war and genocide that occurred in the former Yugoslavia.<sup>93</sup> Orford seeks in her work to demonstrate that the intervention in the former Yugoslavia by NATO was not born out of this body’s altruistic concern, and that the

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<sup>89</sup> *Ibid.* at 11.

<sup>90</sup> A. Orford, “Locating the International: Military and Monetary Interventions after the Cold War” (1997) 38:2 *Harvard International Law Journal* 443.

<sup>91</sup> *Ibid.* at 470. See also, J. Fried, “Globalization and International Law- Some Thoughts for States and Citizens” (1997) 23 *Queen L.J.* 259; J.F. Hollifield, “Migration, Trade, and the Nation-State: The Myth of Globalization” (1998-1999) 3 *UCLAJILFA* 595; J. Delbruck, “Global Migration—Immigration—Multiethnicity: Challenges to the Concept of the Nation-State (1994) 2 *Indiana Journal of Global Legal Studies* 45; A. Orford and J. Beard, “Making the State Safe for the Market: The World Bank’s World Development Report 1997” (1998) 22 *Melbourne University Law Review* 195.

<sup>92</sup> A. Orford, “Locating The International,” *supra* note 51 at 443.

<sup>93</sup> *Ibid.* at 456-459.

activities of international institutions contributed much to bringing about the crisis in that country in the first place. Orford's work is not concerned with the linkage between these IMF/World Bank policies and the refugee flows that resulted therefrom and helped foment a crisis in the international refugee regime.

While Alan Simmons' book<sup>94</sup> centres on the response of countries in the North American hemisphere to globalization and on its concomitant consequences of inequality, social conflict, and international migration, his particular interest is regional trade agreements like NAFTA and their impact on migration generally. The book is not particularly concerned with refugee flows.

It is also axiomatic that the issue of the application of restrictive, *non-entrée*' measures by the developed industrial countries of the North to preclude refugees and asylum-seekers from the "third world" from accessing their territories and asylum processes is no longer a new phenomenon. Consequently, a number of articles, such as those by James Hathaway & J.A. Dent,<sup>95</sup> James Hathaway and Alexander Neve,<sup>96</sup> and M. Fullerton<sup>97</sup> have left some indelible footprints on this landscape. The works of these scholars have been a good resource for my work. Nevertheless the focus of my thesis is different from theirs, since I intend to show that, in the light of the basic acceptance of the thrust of globalization by the developed, industrialized countries, the adoption and

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<sup>94</sup> A. B. Simmons, ed. *International Migration, Refugee Flows and Human Rights in North America: The Impact of Trade and Restructuring* (New York: Center for Migration Studies, 1996).

<sup>95</sup> J.C. Hathaway & J.A. Dent, *Refugee Rights: Report on Comparative Survey*, *supra* note 56.

<sup>96</sup> J.C. Hathaway & A. Neve, "Fundamental Justice and the Deflection of Refugees from Canada" (1996) 34:2 Osgoode Hall Law Journal 214.

implementation of these *non-entrée* policies is both morally reprehensible and inconsistent with the obligations accepted by these states in a plethora of both international and regional human rights instruments (especially obligations with respect to *non-refoulement*).

As earlier stated, the response of the international community to refugee problems has always been reactive rather than proactive. Consequently, globalization as a process that all- too -often contributes in a significant way to the production of refugee flows (as opposed to their amelioration) has not been seriously addressed. Some scholars, such as Chimni and Orford, who have made attempts in this direction have not focused squarely on this issue.

## 1.2. RESEARCH QUESTIONS

To achieve the objective of this dissertation, it will be pertinent to raise and seek answers to the following questions:

- (1) How does economic globalization contribute to the creation of the conditions that trigger refugee flows? What can be done to alter the present structure of the international economy, which constitutes one of the root causes of refugee flows?
- (2) In what ways can the various agents of globalization be made accountable and responsible for the actions that precipitate refugee crisis? Can the institution of an international monitoring and regulating

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<sup>97</sup> M. Fullerton, "Failing the Test: Germany Leads Europe in Dismantling Refugee Protection, *supra* note

body and the granting of jurisdiction to the International Court of Justice in an advisory capacity over matters concerning IFIs and MNCs, as ways of maintaining oversight of globalization agents such as MNCs and IFIs, be justified and supported under the law?

- (3) What are the rationales for the restrictive *non-entrée* measures adopted by the developed, industrialized countries of the North, which prevent asylum seekers and refugees from accessing their territories? Are these measures morally and legally defensible in the light of the economic globalization accepted by these countries (and considering the principle of *non-refoulement*)?
- (4) Does international law play any role in the production of refugees in the third world?

### **1.3. EXPECTED FINDINGS**

I envisage the following findings from the thesis:

- (1) Wars, ethnic conflicts, abuse of political powers, and gross violations of human rights are some of the root causes of refugee flows. However, economic globalization also makes a highly significant contribution to the production of refugeehood in the “third world”. Some globalization practices encourage the abuse of human rights, the undemocratic restructuring of countries’ politics “through the imposition of conditions requiring

constitutional and institutional reforms,”<sup>98</sup> the widening of the gap between the rich and the poor. These help to exacerbate the already tense situations in most “third world” countries caused by the poverty that emanates from imbalances in the structure of the international economy, which tilts in favour of the developed countries of the North. In most cases the consequences are civil wars, ethnic conflicts, genocides, and other human tragedies that provoke refugee flows.

- (2) Precluding refugees and asylum seekers from accessing the territories of the developed states of the North is no real solution to the problems of refugees, and such measures in the long run are not in the best interests of those developed states. Resolving the current world refugee crises will require the commitment of adequate resources and political will by the developed states. Making the agents of globalization such as the IMF, the World Bank, the WTO, and MNCs accountable and responsible for the actions that have instigated and continue to instigate refugees’ crises is one such measure, that could be employed to arrest or at least minimize the crises.
- (3) The interests of developed countries (especially in the West) in the welfare of “third world” refugees have declined since the fall of the Soviet Union, the collapse of communism, and the renewed dominance of capitalism. This is because, for the most part, the geopolitical and strategic considerations that motivated their supposedly liberal attitude to asylum seekers no longer exist.

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<sup>98</sup> A. Orford, “Locating the International: Military and Monetary Interventions after the Cold War” *supra*

Granting asylum to “third world” refugees seems to be of little strategic value to most of these states, since this can no longer be used to demonstrate their “moral superiority over communism.”<sup>99</sup> Consequently, these developed, industrialized states have adopted various restrictive measures to preclude asylum seekers from accessing their territories and their asylum procedures.

(4) International law (i.e. international economic law) has been used and is still being used to give legitimacy to the continuous subordination of the “third world” countries, and it has also been implicated in the creation and sustenance of global injustice and inequity, which permit the continuous exploitation<sup>100</sup> of “third world” countries. This exploitation has been shown to contribute to the generation of large scale refugee flows in these countries

#### **1.4. THE METHODOLOGY OF THE STUDY**

I will examine my hypothesis through various methodological perspectives, one of which is the doctrinal method. In this respect, I will analyze the works of the various authors who have written on this topic and related areas. The plethora of international instruments pertaining to refugees and human rights issues will also be examined critically in this study. Legal data contained in the relevant international treaties will also

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note 51 at 453.

<sup>99</sup> R. Hansen, “Asylum Policy in European Union” (2000) 14 *Georgetown Immigration Law Journal* 779.

<sup>100</sup> “Exploitation” according to 10<sup>th</sup> edition of *Concise Oxford Dictionary* means: make use of unfairly; benefit unjustly from the work or actions of. It is in this sense that I used the word throughout this dissertation.

be analyzed in this study. The state practice and response of the international community to refugees' crises will be surveyed as well.

Secondly, I will also examine and analyze the contribution of economic globalization to the production of refugeehood. This will be achieved by reviewing the available secondary evidence, i.e., by making reference to works of acclaimed social science scholars in this field of study, and examination of relevant case studies. The intention is to make a deduction from an analysis of these pieces of knowledge and other evidence.

The interdisciplinary method will also be used. To this end secondary data contained in the studies of respected social science scholars will be consulted and deployed. I will embrace policy scholarship in this work as well.

### **1.5. WHY THIS STUDY**

This dissertation will be beneficial to members of the international community as a whole in the development of policy-making decisions that will help to checkmate refugee crises the world over. Among the greatest threats to world peace today are refugee crises that seem to be unending, perhaps because of the double standards of the refugee receiving, developed countries in handling the globalization question. A better appreciation is needed of the fact that tackling the root causes of refugee crisis, especially the negative impact of economic globalization in creating the conditions that trigger refugees flows, will help in solving the problems or at least in minimizing the size, of the



crises. The international community needs to understand more systematically that making international financial institutions, MNCs, and all other agents of globalization accountable and responsible for activities and policies that help foment refugees flows will assist in nipping the crises in the bud. The international community will be in a better position to combat this seemingly endless crisis or at least reduce its effects to a bare minimum.

The developed countries of the North stand to gain, since they will spend less money on their various asylum determination systems, which currently eat up sizable chunks of their resources. This money is much more than the amount these states tend to invest in direct assistance to refugees and asylum seekers in the “third world.” The “third world” countries will also benefit from the study, since they presently bear the greatest burden of the various refugee crises. Under a new regime, most of the countries of the “third world” currently sheltering large numbers of refugees will be able to channel the resources used in catering to these refugees in the development of the social, economic, and political infrastructures of their countries. This change will help to some extent to bring about peace, security, stability, and prosperity in various regions of the world. In that atmosphere of peace and stability, globalization with a much more human face will flourish, and humankind will be better for it. The task begins with the analysis of the theoretical framework for the dissertation.

## **Chapter Two**

### **THE IMPACT OF GLOBALIZATION ON REFUGEE FLOWS AND THE INTERNATIONAL REFUGEE REGIME: A TWAIL THEORETICAL APPROACH**

#### **2.0. INTRODUCTION:**

The focus of this chapter will be on explicating the nature of the Third World Approaches to International Law (TWAIL) school of thought as the analytical approach that best explains the roles of international law, IFIs, MNCs and many developed countries (as agents and promoters of globalization) in the generation of refugee flows in “third world” countries, and in the undermining of international refugee law. This exposition will aid our understanding as to why the continued, unchecked nature of globalization’s negative impact on refugeehood in the “third world” should in part be attributable to the persistence of a colonial type undercurrent in the conduct of international relations and the formation of international economic law.

Since the discussion will focus particularly on TWAIL, this chapter is thus not dedicated to the exposition of other theoretical approaches such as critical legal theory, critical race theory, dependency theory, and postcolonial theory, which are somewhat tangential to this thesis. However, I will allocate some space to a brief discussion of these theories and the reasons for not utilizing any of them in this dissertation as my preferred theoretical optic. This is not to say that TWAIL does not intersect with most of these theories in various ways.

Critical legal theory, which was born in the 1970s as a challenge to the liberal ideology that dominated Western legal discourse before that time, has as its credo:

...To explore the manner in which legal doctrine and legal education and the practices of legal institutions work to buttress and support a pervasive system of oppressive, inegalitarian relations. Critical theory works to develop radical alternatives, and to explore and debate the role of law in the creation of social, economic and political relations that will advance human emancipation.<sup>101</sup>

In their analysis, some critical legal scholars reject the “doctrine of rights analysis”<sup>102</sup> and advocate the replacement of “the concept of individual rights...with the concept of interdependent community.”<sup>103</sup> Even those who see potential strategic transformation benefits to rights discourse still see rights analysis as a convenient tool for the perpetuation of inequity in society’s power distribution generally. This group of scholars is concerned with the use of law as tool to fight injustices against people within Western society. As Oloka-Onyango and Tamale have noted: “...even the best critical legal studies begin and end their analyses within the western context.”<sup>104</sup> Thus, these limitations exclude the application of this theory to “third world” countries and their peoples, who occupy a central point in this dissertation.<sup>105</sup>

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<sup>101</sup> P. Fitzpatrick & A. Hunt, “Critical Legal Studies: Introduction” in P. Fitzpatrick & A. Hunt (eds.), *Critical Legal Studies* (Oxford/New York: Basil Blackwell, 1987) at 1-2.

<sup>102</sup> C. Aylward, *Canadian Critical Race Theory* (Halifax: Fern Publishing, 1999) at 24.

<sup>103</sup> D. Kennedy, “Legal Education as Training for Hierarchy” Excerpt from D. Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System* (Cambridge, Mass.: Afar, 1983) at 25.

<sup>104</sup> J. Oloka-Onyango & S. Tamale, “The Personal is Political or Why Women’s Rights Are Indeed Human Rights: An African Perspective on International Feminism” (1995) 17:4 *Human Rights Quarterly* 691 at 721.

<sup>105</sup> D. Santos, *Human Rights and Migrant Domestic Work: A Comparative Analysis of the Social-Legal Status of Filipina Migrant Domestic Workers in Canada and Hong Kong* (A Ph.D. Thesis, York University, Toronto, Canada, March 2004) at 52, noting that “...this theoretical framework is borne of the western experience and says very little of the various injustices suffered by the people of a different race and economic status...”

On the other hand, scholars of critical race theory, contend that any effort to effectively address the deep-rooted injustices in the legal system<sup>106</sup> must embrace the following, among others:

(1)“ an acknowledgement and analysis of the centrality of racism, not just the White supremacy form of racism, but also the systemic and subtle forms that have the effect of subordinating people of colour.”<sup>107</sup>

(2)“a total rejection of the colour-blind approach to law, which ignores the fact that Blacks and Whites have not been and are not similarly situated with regard to legal doctrines, rules, principles and practices.”<sup>108</sup>

(3) “a deconstruction which asks the question: How does this legal doctrine, rule, principle, policy or practice subordinate the interests of Black people and other people of colour?”<sup>109</sup>

And (4) “a reconstruction which understands the duality of law, recognizing both its contribution to the subordination of Blacks and other people of colour and its transformative power.”<sup>110</sup>

Thus, what can be gleaned from this is that these scholars are concerned with promoting awareness of the contributions of law to the creation and perpetuation of racism, which has led to entrenchment of systemic injustices against peoples of colour within Western societies. Like the critical legal theorists, this group of scholars is

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<sup>106</sup> *Ibid.* at 54.

<sup>107</sup> C. Aylward, *supra* note 102 at 34.

<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.*

generally not concerned with addressing global injustices that affect the peoples of the “third world” and that arise from North-South relationships. As a result of this deficiency, the applicability of this theory to my dissertation, which has “third world” peoples as its central focus, is very limited.

In the case of dependency theory, the argument of scholars of this persuasion is predicated on the fact that the very serious economic disadvantages that “third world” countries have faced within the current global economic system have their roots in the historical, rapacious, colonial exploitation these countries suffered at the hands of some of the developed countries. As Tamanaha argues: “the sources of underdevelopment (in the third world) were to be found in the history and structure of the global capitalist system.”<sup>111</sup> Dependency scholars argue that the attainment of independence by “third world” countries did not end the system of exploitation. Rather, after decolonization, “third world” countries were incorporated into the world market system from positions of weakness. Consequently, the sustenance of the wealth of the developed countries now rests on keeping the “third world” in “...a state of permanent dependency and underdevelopment.”<sup>112</sup>

However, this theory, which would have been a good analytical tool in my work, suffers from one important shortcoming that makes it inadequate for my thesis. Scholars of this school pay little attention to law. “They regarded law as peripheral, a mere

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<sup>110</sup> C. Aylward, *ibid.* at 34. See also, D. Santos, Ph.D thesis, *supra* note 105 at 52-54.

<sup>111</sup> B. Tamanaha, “The Lessons of Law and Development Studies” (1995) 89 AJIL 470 at 477. Emphasis added.

<sup>112</sup> *Ibid.* at 477.

emanation of the economic forces of society.”<sup>113</sup> As Snyder puts it: “Legal forms and ideas are secondary and ultimately derivative.”<sup>114</sup> But my thesis involves understanding and explaining the important place of international law in the ill-treatment of “third world” refugees.<sup>115</sup>

Like the arguments of the dependency theory, the main plank of the arguments of postcolonial theorists is that the present underdevelopment of the “third world” countries is a product of “...economic disadvantages bequeathed to the South by colonialism.”<sup>116</sup> This, they argue, was achieved by transforming “third world” economies into “...satellites of the Northern economies” by making them the providers of raw materials and markets for the Northern economies.<sup>117</sup> Consequently, this led to the “large scale transfer of resources from the South to the North.”<sup>118</sup> However, unlike the dependency theory, this school of thought pays great attention to law, especially international law. Its proponents believe that the international legal systems regulating economic relations contribute to the entrenchment of the global economic injustices being suffered by “third world” countries.<sup>119</sup> Important, too, is the fact that TWAIL is sometimes regarded as its progeny. If so, where is the point of departure between the two, and why is the TWAIL

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<sup>113</sup> Y. Ghai, “Law, Development and African Scholarship” (1987) 50 *Modern Law Rev.* 750 at 771.

<sup>114</sup> F.G. Snyder, “Law and Development in the Light of Dependency Theory” (1980) 14 *Law & Society Rev.* 723 at 780.

<sup>115</sup> And as such, law is central to my dissertation.

<sup>116</sup> C. Thomas, “Critical Race Theory and Postcolonial Development Theory: Observations on Methodology” (2000) 45 *Vill. L. Rev.* 1195 at 1199.

<sup>117</sup> *Ibid.* at 1200.

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid.* at 1201.

approach preferred in the analysis of this thesis? This question will be the subject of the discussion that follows.

### **2.1. TWAIL AS THE MOST USEFUL APPROACH**

The regime of international law is illegitimate. It is a predatory system that legitimizes, reproduces and sustains the plunder and subordination of the third world by the West. Neither universality nor its promise of global order and stability make international law a just, equitable, and legitimate code of global order governance for the third world. The construction and universalization of international law were essential to the imperial expansion that subordinated non-European peoples and societies to Europeans' conquest and domination.<sup>120</sup>

Makau Mutua, one of the most insightful and self-identified TWAIL scholars, has in a very lucid way identified three broad purposeful objectives of TWAIL. First, to understand, deconstruct, and unpack the uses of international law as both a medium and vehicle for the creation and perpetuation of international norms and institutions that subordinate non-Europeans to Europeans.<sup>121</sup> Second, to produce and present an alternative international legal structure for just and fair international governance.<sup>122</sup> Third, to seek through the instrumentalities of scholarship, policy, and politics “to eradicate the conditions of underdevelopment in the Third World.”<sup>123</sup> In collaborating with this position, another TWAIL scholar sees “the analytic broadening and deepening of international praxis” so as to justly and effectively address the concerns brought to the

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<sup>120</sup> M. Mutua, “What Is TWAIL?” (2000) 94 ASIL Proceedings 31.

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*

<sup>123</sup> *Ibid.*

international stage by the “third world” countries as the lodestar of TWAIL scholarship.<sup>124</sup>

Consequently, TWAIL is both a reactive and proactive response to conditions that create and sustain global injustice. As a reactive response, it addresses “international law as an imperial project.”<sup>125</sup> In its proactive nature, it seeks to transform the internal conditions in the “third world.”<sup>126</sup> According to Mickelson, one common strand that binds all TWAIL scholars is the sharing of a “sense of anger at a system that appears indifferent to third world concerns; an anger that frequently wells into outrage at the injustices perpetrated.”<sup>127</sup> She therefore identified three common characteristics that constitute matters of fundamental concerns to TWAIL scholars. These are: “An emphasis on interconnectedness of subject areas, illustrated by an unwillingness to draw rigid boundaries between various areas of the law (such as economics, human rights, or the environment);”<sup>128</sup> “ emphasis on considerations of morality, ethics and justice; in other words, an unwillingness to separate law from wider concerns or to define law in a narrow ‘legalistic’ fashion;”<sup>129</sup> “ emphasis on history, typified by an unwillingness to look at any

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<sup>124</sup> O.C. Okafor, “TWAIL Matters: International Law, Global Institutions and the Struggle Against Global Injustice in Our Time” at 2 (being a paper delivered at “International Law/Relations and Diversity” Workshop at the Faculty of Law, University of Toronto (on file with the author).

<sup>125</sup> M.Mutua, *supra* note 120 at 31.

<sup>126</sup> *Ibid.*

<sup>127</sup> K. Mickelson, “Rhetoric and Rage: Third World Voices in International Legal Discourse” (1998) 16:2 *Wisconsin International Law Journal* 353 at 397.

<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid.*



problem as ahistorical or to separate the law from the historical context within which it developed.”<sup>130</sup>

However, the broad objectives of TWAIL as outlined by Mutua are by no means exhaustive. The other main principles of this school of thought are as follows:

(1) Globalization is widening the economic gap between developed countries and the “third world.”<sup>131</sup>

(2) This phenomenon of globalization is reminiscence of the era of colonialism, when the developed countries (especially the West) had hegemonic claims over “third world” territories and exploited their people and resources.<sup>132</sup>

(3) International law helped in reinforcing this claim by constructing and labelling “third world” countries and peoples as uncivilized and the developed countries and people as civilized.<sup>133</sup>

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<sup>130</sup> *Ibid.*

<sup>131</sup> B.S. Chimni, “Third World Approaches to International Law: A Manifesto” in A. Anghie, *et. al.* (eds.) *The Third World and International Order: Law, Politics and Globalization* (Leiden: Martinus Nijhoff Publishers, 2003) 47. See also, A. Anghie, “Time Present and Time Past: Globalization, International Financial Institutions, and the Third World” (2000) 32:2 *New York University Journal of International Law and Politics* 243 at 246, observing that “...globalization intensifies inequalities both within and between states and that, on the whole, it further undermines the precarious position of the poorest and most vulnerable, the vast majority of whom live in third world countries.”

<sup>132</sup> A. Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law* (1999) 40:1 *Harvard Int'l. L.J.* 1 at 36&37.

<sup>133</sup> A. Anghie, “Francisco De Vitoria And The Colonial Origins of International Law” (1996) 5:3 *Social & Legal Studies* 321 at 333, noting that “Vitoria’s jurisprudence demonstrates, ... how the construction of the barbarian as both within the reach of the law and yet outside its protection creates an object against which sovereignty may express its fullest powers by engaging in an unmediated and unqualified violence which is justified as leading to conversion, salvation, civilization. Non-European peoples have been continuously characterized as the barbarians compelling the further extension of international law’s ambit.” See also, A. Anghie, “Finding the Peripheries, *ibid.* at 30.

(4) Although the “third world” countries have some direct political control of their territories, in reality they are still being dominated by the developed countries, which have maintained effective control over international institutions (especially IFIs) and other important non-state actors like the multinational corporations (MNCs).<sup>134</sup>

(5) At best, colonialism has merely been replaced with neo-colonialism, and international law is seriously implicated in the creation and sustenance of this global inequity and injustice, which involves the continuous subordination and exploitation of “third world” countries.<sup>135</sup>

(6) There appear to be some tendencies on the part of international law and international institutions not only to facilitate, but also to legitimate “key aspects of global injustice”<sup>136</sup> that have negative consequences for “third world” countries.

(7) In any case, the “third world” as an analytical category (which is a concern of self-identified TWAIL scholars) is a group of states and populations with a shared sense of subordination at the global level. These states and populations are by no means “inflexibly moored to a fixed space.”<sup>137</sup>

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<sup>134</sup> M. Bedjaoui, *Towards A New International Economic Order* (New York: Holmes & Meier, 1979) at 81, observing that “traditional international law has helped to make independence a completely superficial phenomenon, beneath the surface of which the old forms of domination survive, and the economic empires of the multinational corporations and the powers that protect them prosper.”

<sup>135</sup> A. Anghie, “Finding the Peripheries,” *supra* note 132 at 1. J. Gathii, “International Law and Eurocentricity” (1998) 9 *European Journal of Int’l L.* 184 at 203 & 207.

<sup>136</sup> O.C. Okafor, “TWAIL Matters” *supra* note 124 at 2. See also, B.S. Chimni, “Third World Approaches to International Law: A Manifesto” *supra* note 131 at 60 & 61. See further, M. Mutua, *What Is TWAIL?* *supra* note 120 at 35.

<sup>137</sup> O.C. Okafor, “TWAIL Matters” *ibid.* at 2-3. I used the term “third world” as an analytical category in the same sense as the following TWAIL Scholars used it, Makau Mutua, Obiora Okafor, Karin Mickelson, and B.S. Chimni. And this is best captured in the words of Julius Nyerere: “The third world consists of victims and the powerless in the international economy... Together we constitute a majority of the world’s

Thus, some TWAIL scholars have criticized international law for good reasons for facilitating the colonization and unjust domination of the “third world” territories and peoples.<sup>138</sup> Anthony Anghie leads this group of TWAIL scholars. In a number of path-breaking articles, Anghie has demonstrated the various ways international law was and is still being deployed to advance the interests of the powerful, developed countries at the expense of “third world” countries and peoples.<sup>139</sup> He traces the historical injustice that the people of “third world” countries have suffered and are still suffering at the hands of the powerful, developed countries, (especially during the colonial period). Anghie contends that the colonial project was used in dispossessing the non-European world through the implementation of “a civilizing mission of suppressing and transforming”

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population, and process the largest part of certain important raw materials, but we have no control and hardly any influence over the manner in which the nations of the world arrange their economic affairs. In international rule-making, we are recipients not participants.” Thus, according to Mutua, “third world” is more of a stream of “similar historical experiences across virtually all non-European societies that has given rise to a particular voice, a form of intellectual and political consciousness.” These historical experiences relate to colonialism, which has currently spawned neo-colonialism. In this regard Chimni contends that: “...once the common history of subjection to colonialism, and/or the continuing underdevelopment and marginalization of countries of Asia, Africa and Latin America is attached sufficient significance, the category third world assumes life.” Thus, the presence of the “third world” helps to organize and offer very important opposition and resistance to hegemonic policies. Along similar lines, Mickelson, sees the “third world” “...not as a bloc, but as a distinctive voice, or, more accurately, as a chorus of voices that blend, though not always harmoniously, in attempting to make heard a common set of concerns.” See M. Mutua, “What Is TWAIL?” *supra* note 120 at 35; O.C. Okafor “TWAIL Matters,” *supra* note 124; K. Mickelson, “Rhetoric and Rage” *supra* note 127 at 360; B.S. Chimni, “Third World Approaches to International Law: A Manifesto” *supra* note 131 at 49; J. Nyerere, “South-South Option” in A. Gauhar (ed.), *The Third World Strategy: Economic and Political Cohesion in the South* (New York: Praeger Publishers, 1983) 9 at 10.

<sup>138</sup> Anthony Anghie, “Francisco De Vitoria,” *supra* note 133. J. Ngugi, “Making New Wine for Old Wineskins: Can The Reform of International Law Emancipate the Third World in The Age of Globalization” (2002) 8 UCDJILP 73.

<sup>139</sup> A. Anghie, “Colonialism and the Birth of International Institutions: Sovereignty, Economy, And the Mandate System of the League of Nations” (2002) 34 New York University Journal of International Law and Politics, 513. A. Anghie, “Finding the Peripheries,” *supra* note 132. A. Anghie, “The Heart of My Home”: Colonialism, Environmental Damage, and the Nauru Case” (1994) 34:2 Harvard International Law Journal 445. A. Anghie, “Time Present and Time Past,” *supra* note 131.

“third world” peoples perceived as different for the benefit of developed countries.<sup>140</sup> The peoples of the “third world” countries were regarded as barbaric and backward; it was seen as necessary to place them under the tutelage of developed countries (which were the colonial powers) to be normalized and transformed from their barbarity.<sup>141</sup> Thus, these powerful developed countries in their civilizing mission assumed the responsibility for formulating policies considered to be the best in developing the barbaric and backward “third world” peoples and countries.<sup>142</sup> Thus, Anghie contends that international law was used and is still being used as a mask to justify both the subordination and control of the peoples of the “third world” and the exploitation of their resources during the colonial era as well as at the present time.

Sharing the analytical landscape with Anghie is Sornarajah, who contends that “...international law that was shaped in the colonial era was not a neutral discipline but an instrument of naked power skillfully dressed up so as to hide its objective of controlling the colonized world for the benefit of the colonial powers...”<sup>143</sup>

In a very persuasive argument, Sornarajah contends that, since the 19<sup>th</sup> century, liberalism has been the driving force of globalization and that the variety of liberalism of that period justified the conquest of other people. The conquered were mainly “third world” peoples,

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<sup>140</sup> A. Anghie, “The Heart of My Home”, *ibid* at 447.

<sup>141</sup> A. Anghie, “Time Present and Time Past” *supra* note 131 at 276. The idea that backward peoples need to be governed by people of intelligence during a period of pupilhood played a role in United States domestic jurisprudence. Chief Justice Marshall of the U.S. Supreme Court, in the case of *Cherokee Nation v. Georgia*, held that the Indians “are in a state of pupilage; their relation to the United States resembles that of a ward to his guardians.” See *Cherokee Nation v. Georgia*, 30 U.S. (5Pet.) 1 (1831), as cited in A. Anghie, “The Heart of My Home” *supra* note 139 at 455.

<sup>142</sup> A. Anghie, “Time Present and Time Past,” *supra* note 131 at 280.

who were classified or branded as uncivilized (excluded from the scope of international law on the notion that they needed to be lifted to the same standard of civilization of Europeans) and subjected to “subsequent control through imperialism.”<sup>144</sup> These views, Sornarajah contends, provided the justification for the control and exploitation of the natural resources of the colonized “third world” countries, the massive transfer of resources away from these colonized countries, and “the conduct of unbalanced trade,” which conferred vast fortunes on the colonial powers.<sup>145</sup>

Aligning himself with this position, Obiora Okafor, observes:

International law and global institutions were the legal fictions that were deployed to help create and justify the European domination of what many now characterize as the third world, as well the excessive economic, political, and social benefits that accrued to Europeans there from.<sup>146</sup>

By the same token, another perceptive TWAIL scholar (former Justice of International Court of Justice) Justice Weeramantry, argues that international law not only permitted the land of the “third world” countries to be appropriated, but also encouraged the subjugation of its peoples, and allowed “their economies to be damaged, their cultures to

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<sup>143</sup> M. Sornarajah, “The Asian Perspective to International Law in the Age of Globalization” (2001) 5 *Singapore Journal of International and Comparative Law* 284 at 285.

<sup>144</sup> M. Sornarajah, “Economic Neo-Liberalism and the International Law on Foreign Investment” in A. Anghie *et. al.* (eds.), *The Third World and International Order: Law, Politics and Globalization* (Leiden: Martinus Nijhoff Publishers, 2003) 173 at 173-174.

<sup>145</sup> M. Sornarajah, *ibid.* at 174.

<sup>146</sup> O.C. Okafor, TWAIL Matters, *supra* note 124 at 15. See also, B.S. Chimni, “Third World Approaches to International Law: A Manifesto,” *supra* note 131 at 47, stating that “...international law is the principal language in which domination is coming to be expressed in the era of globalization.”

be destroyed, their boundaries to be redrawn and their peoples to be dismembered” by clothing these actions with the appearance of legality.”<sup>147</sup>

Even in the contemporary period, the era of globalization, international law and some global institutions (especially IFIs) still facilitate and legitimize the domination and exploitation of “third world” countries. A good example is in the realm of international economic law and the global institutions that administer this law. Under this regime and the direction of some global institutions (like IFIs and the WTO), “third world” countries are being encouraged and at times forced to embrace policies (such as trade liberalization, privatization, deregulation, and other structural adjustment programmes (SAPs) that have proven to be detrimental to their economic growth and development. In contrast, the powerful developed countries are protected from implementing any of the policies imposed on “third world” countries.

Through the imposition of onerous SAPs and other loan conditionalities, the international financial institutions, acting in concert with the powerful developed countries that control them, have seriously eroded the sovereign powers of most “third world” countries that have taken their credit facilities. These “third world” countries are coerced into abandoning engagements in some sensitive social and economic activities

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<sup>147</sup> C. Weeramantry, “International Law and the Developing World: A Millennial Analysis” (2000) 41:2 *Harvard Int’l. L. J.* 277 at 284. Before then, Justice Weeramantry observed elsewhere that colonialism “...was one of history’s principal manifestations of force legitimized by law... was a forcible expropriation of territory on an unprecedented scale that was rigorously upheld by a law described as international.” See C. Weeramantry, “A Response To Berman: In The wake of Empire” (1999) 14 *AM. U. Int’l. L. Rev.* 1555 at 1556. In his further observation on the use of international law as instrument of injustice, Weeramantry says: “In some of its applications, international law can achieve international justice in a very visible fashion. Yet, it can also entrench international injustice... In the whole enterprise of colonialism, that underlying spirit was often lost sight of through emphasis on legalism and form. International law, studied

(such as education, health, and running state owned public companies) that impact on the welfare and interest of their people. The “third world” countries are being compelled to relinquish their governance powers over these very sensitive social and economic matters to the private sector (comprised largely of MNCs). At the same time, similar programmes are still being run by powerful developed states in their respective countries.<sup>148</sup> Indeed, it seems international institutions (particularly IFIs) have become mechanisms deployed to advance the interests of powerful developed countries while they pretend to provide impartial advice that will further the interests of “third world” countries and peoples. In this regard, Anghie asserts: “In an interdependent- indeed globalized- economy, it is inevitable that powerful states would seek to advance their own interests by shaping the international economic system to suit their purposes- and this can be achieved through the operations of the IFIs.”<sup>149</sup>

TWAIL scholars have painstakingly exposed the intentions of international law, international institutions and the powerful states that control them in this imposition of double standards that undermine the “third world” countries and their peoples. This imposition has produced and is still producing misery and other forms of global injustices in its wake. Explicating this issue, Obiora Okafor argues that: “By effectively seizing control of macro economic and (even macro-political) policies of these much weaker states via so-called loan ‘conditionalities’ and structural adjustment programs, IMF, the

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and applied legalistically, became one of the principal supports of colonialism.” See C. Weeramantry, *ibid* at 1557.

<sup>148</sup> R.A. Dahl, *On Democracy* (New Haven: Yale University Press, 1998) at 175-76, observing that “In no democratic country does a market-capitalist economy exist (nor in all likelihood can it exist for long) without extensive government regulation and intervention to alter its harmful effects.”

World Bank and the governments of certain privileged countries have virtually become the framework governors of these states...”<sup>150</sup> Rajagopal, a highly esteemed TWAIL scholar, sees this as a disguised continuation of the violence against “third world” countries and their peoples that started in the colonial era. He contends that what has changed is merely the locus of the violence, not the nature. As he puts it: “In the latter half of the twentieth century the physical violence of the Western intervention has been replaced by the economic violence of structural adjustment and debt crisis, mediated by the IMF and the World Bank. It is not the nature of violence then, but the locus of violence that has changed, from inter-state to intra-state.”<sup>151</sup>

In this regard, Chimni contends that international law is being used to relocate “sovereign economic powers in international institutions”<sup>152</sup> and thereby significantly limit the capacity of “third world” countries to seek independent development programmes that will best advance the interests of their peoples. According to Chimni, “These developments seek to accommodate the interests of a transnational ruling elite which came to have unprecedented influence in shaping global policies and law.”<sup>153</sup> It would seem that a plan to advance the interests of “third world” countries and their peoples is not part of these developments, since “third world” countries have only occasional participation in the transnational ruling elites that are being favoured. As a

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<sup>149</sup> A. Anghie, “Time Present and time Past” *supra* note 131 at 269.

<sup>150</sup> O.C. Okafor, Does TWAIL Matters, *supra* note 124.

<sup>151</sup> B. Rajagopal, “International Law and the Development Encounter: Violence and Resistance At the Margins” (1999) 93 ASIL Proceedings 16 at 20.

<sup>152</sup> B.S. Chimni, “Third World Approaches To International Law: A Manifesto” *supra* note 131 at 52.

<sup>153</sup> *Ibid.*



consequence, “third world” countries are being confined to a very difficult and disadvantageous position in the global scheme of things. Thus, this situation is reminiscent of the colonial period when “third world” countries and their peoples were considered uncivilized and were seen as people in need of rescue. This view prompted the setting up of the mandate system and its successor, the trusteeship systems.<sup>154</sup> Though these systems recorded some positive achievements, they were largely used to legitimize the continued domination and exploitation of “third world” countries and their resources.

It would appear that the developed countries have been framing and reframing international law at various historical epochs to advance their interests. During the colonial period, they devised the concept of sovereignty to vest themselves with control over their own territories, and, at the same time, they empowered themselves to colonize other countries, mainly “third world” countries through conquest.<sup>155</sup> As Anghie put it:

The colonial confrontation was not a confrontation between two sovereign states, but between a sovereign European state and a non-European state that, according to the positivist jurisprudence of the time, was lacking in sovereignty. Such a confrontation poses no conceptual difficulties for the positivist jurist who basically resolves the issue by arguing that the sovereign state can do as it wishes with regard to the non-sovereign entity, which lacks the legal personality to assert any legal opposition.<sup>156</sup>

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<sup>154</sup> A. Anghie, “The Heart of My Home” *supra* note 139 at 448.

<sup>155</sup> J. Ngugi, “Making New Wine for Old Wineskins” *supra* note 138 at 84.

<sup>156</sup> A. Anghie, “Finding the Peripheries”, *supra* note 132 at 3.

To legitimize this devious project, the language of international law was deployed to brand/label other countries, mostly in the “third world,” as uncivilized, while the developed countries (mostly European) were considered civilized. Again, Anghie notes:

The violence of positivist language in relation to non-European people is hard to overlook. Positivists developed an elaborate vocabulary for denigrating these peoples, presenting them as suitable objects for conquest, and legitimizing the most extreme violence against them, all in the furtherance of the civilizing mission-the discharge of the white man’s burden.<sup>157</sup>

Reinforcing this view, another prominent TWAIL scholar, Rajagopal, contends that, during this period, the international policy objectives of the imperial and colonial powers did not include bringing “economic development to the natives” because the “third world” natives were considered lazy, “lacking in dynamism or impeded by inappropriate cultural values.”<sup>158</sup> Thus, only civilized countries were capable of exercising sovereign authority and power, and could subject others (the uncivilized “third world”) to control and domination as part of their civilizing mission. Since “third world” countries lacked international personality, they were devoid of any *locus standi* to contest any ill treatment received from the developed, colonial powers.<sup>159</sup> Overall, the major motivation behind these actions of the developed countries was to advance their commercial interests by opening up new markets in the “third world” for the acquisition

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<sup>157</sup> *Ibid.* at 7.

<sup>158</sup> B. Rajagopal, “International Law and Development Encounter, *supra* note 151 at 17.

<sup>159</sup> A. Anghie, “The Heart of My Home” *supra* note 139 at 497. See also, A. Anghie, “Finding the Peripheries, *supra* note 132 at 25, noting that “...once non-European states were excluded from the realm of sovereignty, they were precluded from making any sort of legal claim in the realm of international law

of raw materials and for the sale of finished products from the developed world. Indeed, “there is no doubt that imperial expansion was driven by the economic exploitation of non-Europeans and their resources for the advantage of Europeans.”<sup>160</sup>

During this period, sovereignty was regarded as sacrosanct, and only states could exercise sovereign powers. But in this era of globalization, the developed countries are deploying international law, international institutions, and international economic law in redefining, reformulating and readjusting the meaning of sovereignty by allowing non state actors to exercise functions that were hitherto within the jurisdictional competence of the state. As a consequence, the sovereignty of the “third world” countries is eroded. This process leads to the nearly complete dissolution of the sovereignty of “third world” countries, particularly in the economic realm. It permits intrusive incursions (by non-state actors and some of the developed countries that control them)<sup>161</sup> into the economic policies of “third world” countries. Part of the argument being made by these developed

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because only sovereign states were able to participate as full members with all attendant rights and powers.”

<sup>160</sup> M. Mutua, *What is TWAIL?* *supra* note 120 at 34.

<sup>161</sup> Antony Anghie has observed that the World Bank “operates according to a weighted voting system, which is based on contributions made by members to the Bank and according to which the United States exercises roughly 17% of the vote. China and India exercise roughly 3% of the vote each. The IMF, similarly, is run by a group of Executive Directors and also operates on weighted voting system.” In the same token, B.S. Chimni, contends that “in 1993, the IMF boasted of a membership of 175 countries. Of these 23 were developed countries, 17 were east European countries including eight states of the former Soviet Union, and the remaining 135 countries were third world countries, including six central Asian countries of the former Soviet Union. Nearly 4.4 billion people or 78% of the world’s 1990 population live in the third world.” Chimni observes that “despite constituting overwhelming majority of the membership the third world countries as a whole had a voting share of 34% of the IMF. Without the OPEC countries (which act as creditor states in the institution) this share is reduced to 24%.” See A. Anghie, *Time Present and Time Past: Globalization, International Financial Institutions, and the Third World* (2000) 32: 2 *New York University Journal of International Law and Politics* 243 at 264. See also, B.S. Chimni, “Marxism and International Law” *A Contemporary Analysis* (1999) *Economic and Political Weekly*, 337 at 344. See Chapter One (pages 8-10) of the dissertation for an elaborate consideration of this issue in respect of the MNCs.

countries and their scholars (to justify their hegemonic control over the economy of the “third world”) is that free enterprise is a basic norm of international relations, and that sovereignty as a political concept cannot be extended to “economic relations between states.”<sup>162</sup>

Thus, international law is being deployed in this way to entrench in the global economic system the dominance of transnational corporations (such as MNCs) and IFIs, thereby ensuring that they operate independently, without the restrictions of national boundaries or “domestic economic considerations.”<sup>163</sup> Reacting to this current trend, a respected former Judge of the International Court of Justice, Justice Christopher Weeramantry, argues, “For centuries, we have been familiar with subjugation of nations by the sword. We are moving into a future where such subjugation could well be the result of economic, rather than military, activity.”<sup>164</sup> Identifying with this position, Ngugi observes: “The fact that globalization is resulting in the countries of the South losing control over power to determine and shape economic policies that are most conducive to their development focuses on a key aspect of the process: inequality- in power, capacity and resources, in the trading and economic relationship and in the distribution of gains and losses.”<sup>165</sup> According to Sornarajah, the outcome desired by the powerful developed

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<sup>162</sup> J. Gathii, Rejoinder: TWAILING International Law” (2000) 98 Michigan Law Review 2066 at 2067.

<sup>163</sup> J. Ngugi, Making New Wine for Old Wineskins” *supra* note 138 at 93. J. Gathii, “Good Governance As a Counter Insurgency Agenda to Oppositional And Transformative Social Projects in International Law” (1999) 5 Buffalo Human Rights Review 107 at 150, observing that “Like the World Bank, the IMF also claims autonomy from the U.N. under its articles of Agreement and its Relationship Agreement with the United Nations.”

<sup>164</sup> C. Weeramantry, “Opening Tribute To Hugo Grotius” (1999) Am. U. Int’l. L. Rev. 1516 at 1519.

<sup>165</sup> J. Ngugi, Making New Wine for Old Wineskins” *supra* note 138 at 95.

countries, that is, continued subjugation of the “third world,” was achieved through the work of some respected and highly qualified publicists, who, in anticipation of decolonization, started engaging in the manipulation of existing international law so as to accommodate the interests of private sectors and powers.<sup>166</sup>

Consequently, new theories were created, many of which departed from the existing, traditional international law orthodoxy, in order to justify the new approach to foreign investment.<sup>167</sup> This was done through the internationalization of the foreign investment process and the development of legal principles that would protect foreign investment from control by the domestic laws of the newly independent “third world” countries. As a result, the powers of private investors (mainly foreign) were enhanced, while the control that the host “third world” countries could exercise over these investors was diminished.<sup>168</sup> As in the colonial period, “third world” countries are considered incapable of managing their affairs (in this case in the economic realm). Hence, the international financial institutions and MNCs have been empowered to assume the roles and responsibilities that were discharged by the mandating and administering authorities (i.e. trustees,) under the Mandate and Trusteeship systems of the colonial era. In this project, international law became an instrument for the establishment of the superiority of market over state controls and for the furtherance of political systems “within states that would enhance the market.”<sup>169</sup> This is tantamount to spreading and expanding the

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<sup>166</sup> M. Sornarajah, “Economic Neo-Liberalism” *supra* note 144 at 175.

<sup>167</sup> *Ibid.*

<sup>168</sup> *Ibid.* at 173.

<sup>169</sup> *Ibid.* at 178. See also, “Time Present and Time Past” *supra* 131 at 256.

dominance of multinational corporations, and strengthening the political and economic hegemony of the powerful, developed states that currently direct world events.<sup>170</sup>

It does not appear that the “third world” countries are given any stake in all these. While this arrangement effectively subordinated the welfare of the “third world” peoples to the interests of the developed countries, international law provided the mask that helped to cover the system of exploitation that is undermining “third world” countries and their peoples.<sup>171</sup> Thus, the instrumentality of international law has been used not only to marginalize “third world” countries, but also to legitimize the marginalization that has produced and continues to produce grave consequences for these groups of states and their peoples.

It has become a matter that cannot be seriously disputed (especially in this age of globalization), that is, that the majority of the populations in the “third world” are living in abject poverty and misery, while the relatively very small populations of the powerful developed countries live in stupendous affluence.<sup>172</sup> This state of affairs is a reflection of disparate powers (economic, political, and social) being exercised by these countries at a global level. The developed countries, *vis-a-vis* the “third world,” exercise a

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<sup>170</sup> M. Sornarajah, “Economic Neo-Liberalism and Foreign Investment”, *ibid.* at 178. See also A. Anghie, “Time Present and time Past” *ibid.* at 275, noting that: “.... Globalization appears to enhance the powers of transnational economic actors, such as multinational corporations, whose activities cannot be easily regulated by the state, or even by international law. The activities of these corporations, however, transcend borders and profoundly affect the lives of developing countries to whom these actors are linked primarily in economic terms, as sources of profit and loss.”

<sup>171</sup> A. Anghie, “The Heart of My Home” *supra* note 139 at 462.

<sup>172</sup> K. Rittich, “Transformed Pursuits: The Quest for Equality in Globalized Markets” (2000) 13 *Harv. Human Rights J.* 231. See also, T.A. Canova, “Global Finance and the International Monetary Funds’ Neo-liberal Agenda: The Threat to the Employment, Ethnic Identity and Cultural Pluralism of Latino Community” (2000) 33 *U.C. Davis L. Rev.* 1547. See further, M. Sornarajah, “Economic Neo-Liberalism” *supra* note 1444 at 189. B.S. Chimni, “The Third World Approaches to International Law” *supra* note 131.

“disproportionate amount”<sup>173</sup> of political, economic, and social power at the global level to advance their own interests, and (in most cases) at the expense of “third world” countries.

It is disturbing that the negative consequences for “third world” countries that arise from this exercise of powers (by the developed countries), which subordinate “third world” interests, are too often characterized as misfortune as opposed to injustice. In his assessment of this situation, Chimni notes that globalizing international law (and the developed countries) seeks to absolve themselves of any blame for the contributions they have made to the dire situations of “third world” countries by placing the blame on “third world” peoples for being incapable of governing themselves.<sup>174</sup> According to Chimni, to achieve this, international law tends to overlook history, “and, abandoning the principle of differential treatment, legitimizes itself through the language of blame.”<sup>175</sup> This, Chimni argues, is a very convenient way not only to legitimize the status quo but also “to rehabilitate the idea of imperialism.”<sup>176</sup> Justice Christopher Weeramantry reinforces this view by observing that “...international law claims to further justice and to offer a means of redressing problems of which we are acutely aware-problems of expropriation and disempowerment. On the other hand, it is the same international law that appears to have helped in creating this situation.”<sup>177</sup>

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<sup>173</sup> O.C. Okafor, *TWAIL Matters*, *supra* note 124 at 4.

<sup>174</sup> B.S.Chimni, “Third World Approaches to International Law” *supra* note 131 at 61.

<sup>175</sup> *Ibid.*

<sup>176</sup> *Ibid.*

<sup>177</sup> C. Weeramantry, “A Response To Berman” *supra* note 147 at 1558.

The concern of TWAIL scholars in this type of situation is not only “to reveal the (usually masked) hands of international law, global institutions, and global power in the creation and maintenance of these situations, as a way of showing that these situations are in fact better understood as global injustices,”<sup>178</sup> but also to proffer alternatives to the current international regime and to start redressing injustices. This, some TWAIL scholars believe might be achieved through reformation or retrenchment of those aspects of international law that help in creating and sustaining the “unjust situation of “third world” people *vis-à-vis*” the powerful developed states of the North.<sup>179</sup>

Chimni belongs to the group of TWAIL scholars who believe that positive reconstruction or reformation of international law will produce a beneficial outcome that could lead to emancipation of ‘third world’ countries and peoples. As he puts it: “A critique that is not followed by construction amounts to an empty gesture. Imaginative solutions are called for in the world of international law and institutions if the lives of the poor and marginal groups in the third and first worlds are to be improved.”<sup>180</sup> Elsewhere, Chimni warns of the dangers of not articulating and proposing alternatives to the current regime of international law, which undermines the interests of “third world” countries. As he put it:

...It is, therefore not unusual to see a third world scholar speaking of rejecting rules which are prejudicial to the interests of the developing countries embracing a theory of international law and world order which seeks to justify and protect the status quo and has little to say on the

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<sup>178</sup> O.C. Okafor, TWAIL Matters, *supra* note 124 at 6.

<sup>179</sup> *Ibid.*

<sup>180</sup> B.S. Chimni, “Third World Approaches to International Law” *supra* note 131 at 72.



situation of the developing world. This eventually leads him to assume positions which strengthen that which he had set out to fight.<sup>181</sup>

On the other hand, some other “third world” scholars like James Ngugi have proffered a more radical approach. According to Ngugi: “In order for the third world to have any benefits from the international regime, the third world must move out of the episteme of international law as presently configured and engage it from outside.”<sup>182</sup> But Rajagopal thinks this could be achieved by reconceiving international law that is people centered, “... and justice based rather than state centered, universal, and rights based”.<sup>183</sup> Elsewhere, he urges the recognition of the contributions of social movements (in the “third world”) in the expansion of international law and international institutions, and in the fight against global injustices.<sup>184</sup> As Rajagopal points out: “...The very architecture of

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<sup>181</sup> B.S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (New Delhi: Sage Publications, 1993) at 19.

<sup>182</sup> J. Ngugi, “Making New Wine for Old Wineskins” *supra* note 138 at 76. Ngugi was concerned that TWAIL scholars, by adopting the language and idiom of international law, “fail to build an alternative oppositional template from which to address the problem of domination in international law.” See J. Ngugi at 79. But some other scholars like Chimni think it will be more helpful and result oriented to work within or inside the realm of international law. The aim would be to provide alternative approaches through either reformation or reconstruction that will advance the interest of the “third world” countries. I think there could be a middle ground between these two positions. The ‘third world’ countries should reject some international law concepts, doctrines, or principles, which cannot be reasonably reformed or reconstructed for the benefit of their peoples. Work needs to be done inside the realm of international law to provide an alternative template for those principles, concepts, or doctrines that could be reconstructed to the benefit of the “third world”. In other cases, the doctrines and concepts of international law that contribute to creating, facilitating, and sustaining injustices and inequities that undermine the welfare and interests of “third world” countries should be repudiated. The reformation of others that could advance the well being of the peoples of third world peoples should be undertaken.

<sup>183</sup> B. Rajagopal, “PostDevelopment As a Vision For A Third World Approach to International Law” (2000) 94 ASIL Proceedings 306 at 307.

<sup>184</sup> B. Rajagopal, “International Law and The Development Encounter,” *supra* note 151 at 16, observing that “...despite this, the praxis of various popular movements and community initiatives that have successfully deployed the rights discourse in their struggles against the violence of development remain invisible in human rights and international legal scholarship.” Again, elsewhere, Rajagopal argues,

contemporary international law has been constituted by its continuous evocation of and interaction with the category ‘third world,’ which has included not only states, but also these social movements. The evocation of third world masses, whether real or imaginary, was essential to the expansion of international institutions.”<sup>185</sup>

There may be divergent views among TWAIL scholars about the most effective approaches to enhancing “third world” interests within the regime of international law. However, there is common ground among TWAIL scholars regarding, developing or suggesting alternative approaches to the present regime of international law. That unanimity is predicated on the resolve of TWAIL scholars to proffer viable alternatives in the effort to fight and root out the present unjust global order. According to Mutua, “the purpose of such scholarship or work must be to eliminate or alleviate the harm or injury that the third world would likely have suffered as a result of the unjust international legal, political, and economic order.”<sup>186</sup> Another goal is to determine “...what exactly the problems are that prevent international law from being the vehicle of international justice that it should be.”<sup>187</sup>

This is important because the devices and technologies deployed and used by international law and institutions to legitimize the subordination and exploitation of

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“...international law can no longer pretend that mass resistance from the third world does not fundamentally shape its domain.” See B. Rajagopal, “International Law and Third World Resistance: A Theoretical Inquiry” in A. Anghie, (eds.) *et. al. The Third World and International Order: Law, Politics and Globalization* (Leiden: Martinus Nijhoff Publisher, 2003) 145 at 146.

<sup>185</sup> B. Rajagopal, “From Resistance to Renewal: The Third World, Social Movements, and the Expansion of International Institutions” (2000) 41:2 *Harvard Int’l. L. J.* 529 at 532. Furthermore, the author notes: “It is important for the discipline of international law to rethink its categories and learn how to take the local more seriously in its problematic and contested relationship with the third world.” (*ibid.* at 578.

<sup>186</sup> M. Mutua, “What Is TWAIL” *supra* note 120 at 36.

“third world” countries and their peoples in the colonial era are not historic artifacts headed to the archives, but instead still part of the tools of control being deployed to regulate the contemporary relationships between “third world” countries and powerful, developed countries. The disempowerment of the “third world” countries associated with the colonial relationship still exists in the present era of globalization. The profound consequences of massive violence, injustice, oppressions, deprivation, depravity, misery and other vices (such as massive refugee flows), which were the painful fallout of the “third world’s” colonial encounter with the powerful, developed countries are unfortunately being reenacted and replicated in contemporary globalization processes (as they are conducted by international financial institutions and MNCs).

## **2.2. CONCLUSION: WHY TWAIL FRAMEWORK IS PREFERRED IN THIS THESIS**

In sum, TWAIL scholars have come to the conclusion, or rather realization, that the mere attainment of political independence and the exercise of somewhat direct control over political activities in their territories have not meant that “third world” countries have overcome the “historical poverty” that colonialism played a significant role in foisting on them.<sup>188</sup> They argue that colonialism was simply replaced with neo-colonialism, and that notwithstanding the fact that “third world” countries have been granted political independence, they are still economically dominated and subjugated by the powerful, developed countries that control international law, international institutions

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<sup>187</sup> C. Weeramantry, “International Law and the Developing World” *supra* note 147.

<sup>188</sup> L.A. Miller, *Global Order: Values and Power in International Politics* (U.S.A.: Westview Press, 1998) at 147.

(especially IFIs), and some non state actors (particularly MNCs) that propel the course of globalization.

In other words, the present international economic structure is weighed heavily in favour of the relatively powerful developed states, to the detriment of relatively powerless “third world” countries. The policies, programmes and activities of these formidable forces of globalization (i.e., the IMF, the World Bank and MNCs), as driven by the influence of the developed countries imposed on “third world” countries, appear to have made and are still making significant contributions to the instigation and exacerbation of conditions such as wars, ethnic conflict, poverty, *coups d'état*, unemployment, and other similar catastrophic events. These conditions are highly instrumental in the generation of massive refugee flows in “third world” countries, as well as in undermining the international refugee regime.

It is unfortunate that, when catastrophes happen, the powerful, developed countries are too quick to place the blame on the doorsteps of “third world” countries for engaging in maladministration and making poor policy choices that generated negative, disastrous consequences.<sup>189</sup> The developed countries try to shift the blame away from

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<sup>189</sup> See G. P. Smith, “The United Nations and the Environment: Sometimes a Great Notion?” (1984) 19 Tex. Int’l. L.J. 335 at 337-338, contending that: “All too often, under the guise of poverty, far too many members of the United Nations have refused to take responsibility and, instead, have sought unrestricted support from others in order to compensate for their errors of omission and commission...Opportunism cannot admit to an unabated ‘no-strings’ redistribution of wealth from rich to poor. Rather, opportunity comes from initiative, hard work, and self-respect.” Contrast with K. M’Baye, *Le droit au développement comme un droit de l’homme*, (1972) 5 *Revue Des Droits DEL’Homme* 505 at 522, noting that: [The rich countries] are responsible because they are the authors of international events and their consequences. Since these events have been launched with their own interests as the sole consideration...it is clear that if they profit from the advantages, they should at least partake of the inconveniences. They decide about peace or war, the international monetary regime, the conditions of international relations, impose ideologies, etc., etc. They do and undo the knots of politics and the world economy. What would be more

themselves by refusing to accept responsibility for their roles in the production of misery and disaster that arise from the policies the developed countries imposed on the “third world” countries. If and when they intervene to take action toward ameliorating these problems, they want these interventions to be seen as an act of altruistic concern rather than as acceptance of responsibility for their roles in bringing about the state of affairs.<sup>190</sup>

TWAIL’s approach, with its engagement in an in-depth (as opposed to peripheral) study and understanding of the problems of the “third world” and its peoples, is able to rebut this stance by tracing the historical root causes of the problems and how they are being replicated in the contemporary world of globalization. In addition, TWAIL approaches not only seek to understand the problems of the “third world” and its peoples, they also seek to articulate and propose viable alternatives to current international law so as to accommodate the interests and concerns of the “third world” countries.

Thus, TWAIL scholars advocate the use of international law “with a sense of justice, fairness, and historical perspective when addressing the issues that face developing countries.”<sup>191</sup> What is more, the case studies of this dissertation (i.e., Nigeria and Sudan) are ‘third world’ countries, and some of the important agents of globalization, i.e., IFIs and MNCs, along with the powerful countries that control them,

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natural than that they should assume the responsibility for the events and the state of affairs of which they are the authors? (As quoted in K. Mickelson, *Rhetoric and Rage*” *supra* note 125 at 403.

<sup>190</sup> See O.C. Okafor, “After Martyrdom: International Law, Sub-State Groups, and the Construction of Legitimate Statehood in Africa” (2000) 41:2 *Harvard Int’l. L. J.* 503 at 528, noting that: “...No longer can the international legal regime...be viewed exclusively as an ameliorative order. Rather, its involvement and contributions to the very formation of these problems must be better appreciated and accepted if they are to be identified, tackled, and, if at all possible, rooted out.”

<sup>191</sup> J. Gathii, “Alternative and Critical: The Contribution of Research and Scholarship on Developing Countries to International Legal Theory” (2000) 41:2 *Harvard Int’l. L. J.* 263 at 264.

are based in and controlled by developed countries. Moreover, the main plank of the dissertation is an inquiry into the contributions being made by economic globalization to the generation of refugeehood in the “third world” and to the consequent undermining of international refugee law. Thus, TWAIL’s optic, with its rich body of literature, provides the best analytical tool in understanding how refugee flows result from the globalization processes instigated by IFIs, MNCs, and the powerful countries that control these bodies. More importantly, it provides an insight about the role of international law in this scheme of things. Hence, the TWAIL theoretical model is the theory most applicable to illuminating and understanding the main arguments in this thesis.

This will lead us to a discussion in the chapter that follows of the nexus between economic globalization and the production of large scale refugee flows in the “third world.”

## Chapter Three

### GLOBALIZATION AND REFUGEE FLOWS: ANY NEXUS?

#### 3.0. INTRODUCTION

This chapter examines the linkages between economic globalization<sup>192</sup> and the generation of refugee flows in the “third world.” In this regard, the roles of international economic and monetary law, international institutions, MNCs, and the developed countries (the agents of globalization) in the creation and perpetuation of the conditions that give rise to the global injustices that generate refugee flows will be examined and thoroughly analyzed.

Hence, this chapter offers a critical analysis of economic globalization, in the context of the “third world,” and explains the ways in which globalization helps produce refugeehood. A critical analysis of the various IMF/World Bank policies imposed on “third world” countries, and of the activities of the MNCs that operate there, and how these contribute to the production of refugee flows, will also be offered. The reason this negative effect of globalization on “third world” refugeehood continues unchecked is in part attributable to the persistence of colonial type undercurrent in the conduct of international relations and the formation of international economic law.

In fact, immediately after the Second World War, one of the greatest challenges that faced the international community [read European] was the issue of refugee flows in the aftermath of that war. Persecution arising from human rights violations, civil strife, and wars is considered the principal root cause of refugeehood. However, recent events

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<sup>192</sup> Henceforth referred to as “globalization.”

have shown that one of the often neglected root causes of refugee production is globalization.

Refugees include all persons who, as a result of a well-founded fear of persecution arising from their race, religion, nationality, membership of a particular social group, or political opinions are outside the borders of their countries of origin.<sup>193</sup> The category may also encompass persons who have fled from external aggression, occupation, foreign domination, or events seriously disturbing public order in their countries of nationality.<sup>194</sup> Further, refugees may include those who have fled from generalized violence, internal conflicts, and massive violation of human rights or circumstances that seriously have disturbed public order.<sup>195</sup> As I use it in this dissertation, the term covers all those who have lost the effective protection of the government of their country, or who are unwilling to accept such protection because the government is unwilling or unable to offer such protection, even though the individuals are still within the borders of their country of origin or nationality.<sup>196</sup> But how does globalization contribute to the production of refugees?

Globalization operates in part through the agency of the World Bank, the International Monetary Fund (IMF), and Multinational Corporations (MNCs). Some of

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<sup>193</sup> *Protocol Relating to the Status of Refugees* of 31 January 1967 606 UNTS 267, art. 1.

<sup>194</sup> *OAU Convention Governing the Specific Aspects of Refugees Problems in Africa*, 1001 UNTS 45, came into force 20 June 1974, Art. 1(2) (3).

<sup>195</sup> *Cartagena Declaration on Refugees* 19-22 November 1984, as reprinted in Jean-Pierre Colombey, *Collection of International Instruments* (Geneva: UNHCR, 1995) at 206.

<sup>196</sup> L. Axworthy, *Navigating A New World: Canada's Global Future* (Canada: Alfred A. Knopf, 2003) at 414. See also, M. Mutua, "The Interaction Between Human Rights, Democracy and Governance and the Displacement of Populations" (1995) *IJRL* (Special issue) 37 at 38, observing that "though the two



the prescriptions that the IMF and World Bank have imposed on or encouraged “third world” countries to adopt have in many cases proved to be antithetical to the protection and promotion of human rights. In some cases, the application of the IMF/World Bank prescribed conditionalities have helped generate or sustain wars and other related crises, which have in turn induced refugee flows. Indeed, most of the IMF/World Bank conditionalities and other globalization processes are tailored toward the creation of an enabling environment for the largely unrestricted and unregulated operation of MNCs.<sup>197</sup> Unfortunately, some of these MNCs operate their businesses in ways that violate the human rights of the citizens of these “third world” countries, and the crises that result from such operations/activities often lead to the generation of refugees.<sup>198</sup>

### 3.1. THE STING OF GLOBALIZATION

Globalization can be described as a phenomenon that involves, encourages, and spurs greater interconnectedness and interdependence among the various countries of our world. The world is perceived as “an interconnected whole” and this leads to the appreciation of the fact that certain types of decisions (in this case of an economic nature)

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categories, refugees and internally displaced persons, trigger different regimes of international law, both are created by similar social and political failure.”

<sup>197</sup> A. Orford & J. Beard, “Making The State Safe For The Market: The World Bank’s World Development Report 1997” (1998) 22 Melbourne University Law Review 195 at 200.

<sup>198</sup> S. Agbakwa, “A Line in the Sand: International (Dis) Order and the Impunity of Non-State Corporate Actors in the Developing World” in A. Anghie *et. al.*, eds., *The Third World and International Order: Law, Politics and Globalization* (Leiden: Martinus Nijhoff, 2003) 1 at 3 & 4, observing that “ever since MNCs emerged on the international scene in the 15<sup>th</sup> century, they have moved like poltergeists through -- international community, dominating and affecting the lives of people the world over but especially in the Third World.”

can no longer be addressed *mainly* at the domestic level.<sup>199</sup> Due to this global interdependence, events occurring in one part of the globe often affect other parts of the world, either in a direct or indirect way.<sup>200</sup>

These close linkages among countries make for the free flow of some of the factors of production, especially goods and capital.<sup>201</sup> The idea of globalization is predicated on the fact that goods and capital should move as freely as possibly and that their free flow should not be hindered by national boundaries. In other words, globalization is a process of “denationalization” of the economic activities of various countries of the world.<sup>202</sup> As Robert Dahl has noted, “A country’s economic life, physical environment, national security and survival are highly, and probably increasingly, dependent on actors and actions that are outside the country’s boundaries and not directly subject to its government.”<sup>203</sup> Thus, through

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<sup>199</sup> D. S. Petito, “Sovereignty And Globalization: Fallacies, Truth, And Perception” (2001) 17 New York Law School Journal of Human Rights 1139 at 1142

<sup>200</sup> I. Simonovic, “State Sovereignty and Globalization: Are Some States More Equal?” (2000) 28 Georgia Journal of International and Comparative Law 381 at 388.

<sup>201</sup> European Commission, “Responses to the Challenges of Globalization: A Study on the International Monetary and Financial system and on Financing for Development” on line: <http://www.globalpolicy.org/socecon/un/unctad/2002/0228euglobal.htm> at 18 (visited: 06/17/02). See also P. G.Cerny, “Globalization And Other Stories: The Search For A New Paradigm For International Relations,” (1996) 51 International Journal 617 at 626, who sees globalization as something that: “...Creates permissive conditions for a range of distinct but intertwined structural trends- that is, it expands the playing field within which different market actors and firms interact. It transforms the international economy from one made up of holistic national economies interacting on the basis of national comparative advantage into one in which a variety of competitive advantages are created in ways which are not dependent on the nation-state as a social, economic, and/or political unit.” See further, E. Benvenisti, “Exit And Voice In The Age Of Globalization” (1999) 98 Michigan Law Review 167 at 212.

<sup>202</sup> J. Delbruck, “Globalization Of Law, Politics, and Markets—Implications For Domestic Law: A European Perspective” (1993) 1 Indiana Journal of Global Legal Studies 9 at 11.

<sup>203</sup> R. Dahl, *Democracy And Its Critics* (New Haven: Yale University Press, 1989) at 319. See also S. Collinson, *Globalization And The Dynamics of International Migration: Implications For Refugee Regime* (working paper No.1: New Issues in refugee research) (London: Centre for Documentation Research

the instrumentality of international law (i.e., international economic law), external influences (especially those of the developed countries) can be brought to bear in the framing and execution of the internal/domestic policies of other countries (especially in the “third world”).

However, processes of globalization tend to favour countries that possess infrastructural facilities such as capital and expertise to invest in other countries. As McGrew notes, “Whilst globalization may be a necessary ingredient in creating a more integrated world community, it is not by itself a sufficient condition for doing so. One of the reasons for this lies in the highly uneven nature of processes of globalization.”<sup>204</sup> Similarly, Cook and Kirkpatrick state that “where administrative, institutional and organizational structures are weak, the capacity to manage the globalization process is undermined.”<sup>205</sup> Consequently, the European Union (EU) countries, Japan, and United States (U.S.) account for about 75 percent of both inflows and outflows of direct foreign investment in the world.<sup>206</sup> These developed countries operate “open economic policies” that allow for the free flows of goods and capital in and out of their countries. In addition,

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UNHCR, 1999) at 2, describing “globalization as a set of processes that are global in scope, that transcend the territorial borders of states, and which, as a consequence, profoundly affect the nature and functions of state governance in world political economy...” See further, A. Slaughter, “The Real New World Order” (1997) 76:5 Foreign Affairs 183 at 192.

<sup>204</sup> A.G. McGrew, “Global Politics In Transitional Era” in A.G. McGrew, *et. al.*, eds., *Global Politics: Globalization and the Nation-State* (United Kingdom: Polity Press, 1992) 312 at 320. See also M. Jaffer, “Globalization and the South” on line: [http://www.ms.dk/uk/politics\\_press/globalization/pabjaffer.htm](http://www.ms.dk/uk/politics_press/globalization/pabjaffer.htm) (visited: 14/05/2002), stating that “human made processes must be for all human beings. Globalization is not. It is for the empowered, the well resourced and the financially capable.” See further, S. Collinson, “Globalization and the Dynamics of International Migration,” *ibid.* at 5, contending that “not every person, group, country or business is equally involved in global economy, nor do they all benefit equally from it.”

<sup>205</sup> P. Cook & C. Kirkpatrick, “Globalization, Regionalization and Third World Development” (1994) 31 *Regional Studies* 55 at 62.

<sup>206</sup> European Commission, Responses to the Challenges of Globalization...”*supra* note 201 at 12.

they encourage and often compel “third world” countries to embrace liberalization in their economic policies in order to enable the unhindered, unrestrained, and unbridled flow of goods and capital in and out of their countries. One of the often-touted benefits of globalization is that:

Countries that are able to pursue policies of external openness to foreign trade and capital, thus permitting the adoption of new technology and know-how, combined with respect for property rights and the rule of law domestically, have the best chance of rapid economic development.<sup>207</sup>

This might be true for the developed countries, but, for most “third world” countries, such an assertion is difficult to prove, given the very negative consequences of globalization on these countries, especially the effects of the structural adjustment programmes that have been imposed on the “third world” countries by the IMF and World Bank, and the impacts of the activities of MNCs in these countries. Perhaps, this was the fact that prompted one scholar to note that:

...Contemporary globalization marginalizes the developing world, either deliberately or accidentally, by creating or exacerbating difficult socio-economic conditions that effectively imprison more than eighty percent of the world’s population in a penitentiary of poverty.<sup>208</sup>

The reason for this is obvious. When a country embraces globalization, which implies international economic integration, some policies that might impact on the

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<sup>207</sup> *Ibid* at 19. See also, K. A. Annan, *We the Peoples: The Role of the United Nations in the 21<sup>st</sup> Century* (New York: United Nations, 2000) at 9, stating that “the benefits of globalization are plain to see: faster economic growth, higher living standards, accelerated innovation and diffusion of technology, and management skills, new economic opportunities and countries alike.”

<sup>208</sup> O. Aginam, “Global Village, Divided World: South-North Gap and Global Health: Challenges At Century’s Dawn” (2000) 7 *Indiana Journal of Global Legal Studies* 603 at 606.

interests, welfare, and human rights of its citizens are taken beyond the sphere of its national domestic policy domain.<sup>209</sup> As Anne Orford has noted,

The inability of most people to contest and challenge decisions about many issues that shape their lives is presented as inevitable and natural, as a consequence of the disciplines and requirements of international competitiveness and globalization.<sup>210</sup>

Again, external economic integration brought about by globalization exposes a country to the vagaries of turbulent economic changes that take place in other parts of the world. Thus, the relationship between the state and its citizens is not determined only by internal factors, but also by some exogenous influences.<sup>211</sup> This is particularly the situation for almost all of the “third world” states. In this situation, the impact of an economic crisis in one country can be felt quite profoundly in another, as evidenced by the Asian economic crises of 1997-98. Consequently, as the capacity and autonomy of the state are being eroded, very serious questions are raised about its ability to deliver upon its human rights responsibilities particularly in the economic and social realm.<sup>212</sup>

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<sup>209</sup> A. Giddens, *The Consequences of Modernity* (Cambridge: Polity Press, 1990) at 520. The author contends that: “Globalization should be understood as the re-ordering of time and distance in our lives. Our lives in other words are increasingly influenced by activities and events happening well away from the social context in which we carry on day to day activities.” See also J. Mitchell, “The Nature And Government Of the Global Economy” in A.G McGrew, *et. al.*, eds., *Global Politics: Globalization And The Nation State* (United Kingdom: Polity Press, 1992) 174 at 176, stating that “...One consequence of globalization was that all major economies were affected by the economic policies of the dominant economy.”

<sup>210</sup> A. Orford “Locating the International: Military and Monetary Interventions After the Cold War.” (1997) 38:2 *Harvard International Law Journal* 443 at 476.

<sup>211</sup> A.G. McGrew, “Human Rights In A Global Age: Coming To Terms with Globalization” in Tony Evans, ed., *Human Rights Fifty Years On: A Reappraisal* (Manchester: Manchester University Press, 1998) 188 at 201.

<sup>212</sup> *Ibid.* at 197.

The consequences of this type of failure at times contribute to the creation of environments where large scale refugee flows are generated.

Thus, most states, especially almost all of the “third world” countries, have been relegated to acting as mere enforcers of ready made politico- economic policies. They of course almost always possess the coercive instruments of repression (such as the police, army, and secret services) that enable them achieve this purpose.<sup>213</sup> These countries are required to make rules that ensure that the free market economy will thrive in their countries; the rules must be such that they will give confidence to private foreign investors, especially the MNCs.<sup>214</sup> Chimni has considered (and rightly too) this state of affairs as tantamount to the use of international law to relocate the “sovereign economic powers in international institutions,” thereby limiting and undermining the sovereignty and abilities of the “third world” countries “to pursue independent self-reliant development.”<sup>215</sup>

Presently, the IMF and the World Bank are the two major institutions where decisions on the international monetary, financial, and even political policies that impact on the “third world” are made.<sup>216</sup> However, the implementation of some of the policies of the IMF/World Bank which, in the main, are tailored toward opening the markets of

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<sup>213</sup> J. Hippler “Democratisation Of the Third World After The End Of the Cold War” in J. Hippler, ed., *The Democratization of Disempowerment: The Problem of Democracy in the Third World* (London: Pluto Press with Transnational Institute, 1995) 1 at 24.

<sup>214</sup> A. Orford and J. Beard, “Making the State Safe for the Market, *supra* note 197 at 209-210.

<sup>215</sup> B.S. Chimni, “Third World Approaches to International Law: A Manifesto” in A. Anghie & *et. al.* eds., *The Third World and International Order: Law, Politics and Globalization* (Leiden: Martinus Nijhoff Publishers, 2003)47 at 52.

<sup>216</sup> European Commission, “Responses to The Challenges of Globalization” *supra* note 201at 64. See also W. Finnegan, “The Economics of Empire” *Harper’s Magazine* May 2003 at 44

“third world” countries for the free flow of goods and capital, and also for the provision of the enabling environment for the unmolested and unhindered operations of the MNCs has produced some destabilizing political, economic, and social consequences in the “third world.” This is principally because the implementation of IMF/World Bank conditionalities in the “third world” has engineered “cut backs in social services and the welfare” of the populations of these countries. In this way, the seeds of anger, animosity, and pervasive protest against these institutions and their “third world” partners are being sowed.<sup>217</sup> As McCorquodale and Fairbrother have noted,

...Decisions about investment by these globalized organizations are based almost exclusively on financial concerns, including generating profits for banks in the developed states and for other transnational corporations. As such, these concerns are external to the state in which the investment is made, and subsequently fail to focus on social welfare within the state.<sup>218</sup>

Thus, both the IMF and the World Bank, as agents of globalization, play very significant roles in determining the policies of the many governments in the “third world” that receive their financial facilities.<sup>219</sup> Some of the policies/conditions that these IFIs have almost always imposed on these countries include:

Advising the (“third world”) governments to privatize public sector activities, cut government spending on health and education; deregulate the labour markets, lower minimum wages, alter existing constitutional arrangements and deregulate investment and financial sectors.<sup>220</sup>

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<sup>217</sup> Committee for A Workers’ International, “Smash the IMF and World Bank! A Socialist Alternative to Global Capitalism” on line: <http://users.pandora.be/militant.links/ml/imf.html> (visited: 6/25/02) at 1.

<sup>218</sup> R. McCorquodale and R. Fairbrother, “Globalization and Human Rights” (1999) 21 Human Rights Quarterly 735 at 744

<sup>219</sup> A. Orford & J. Beard, “Making the State Safe for the Market,” *supra* note 197 at 195.

These policy measures aim at opening up the markets of the “third world” countries to the MNCs that originate mostly in the rich countries of the G7, and, at the same time, at stripping the various governments of these “third world” countries of their capacity to provide for and defend the interests and welfare of their citizens.<sup>221</sup> Consequently, a combination of these and other internally generated problems often lead to political instability, gross human rights abuses, civil unrest, regional conflict, wars, and famine in these “third world” countries. These conditions contribute to the generation of refugee flows in the “third world”. According to Aginam, the destabilizing impacts of a globalizing world can be seen in the upsurge in the number of refugees fleeing civil wars, regional conflicts, and other disasters, as well as in the “emergence, re-emergence, and prevalence of infectious diseases.”<sup>222</sup>

Thus, globalization has further exacerbated the already wide inequalities in income, development, and other aspects of life between the developed states and the “third world.” About 820 million individuals fortunate to live in the high income nations came by their wealth, at least in part, through their ability to exploit the resources of poorer nations; resources that include oil, minerals, and food.<sup>223</sup> In countering this argument, the proponents of globalization contend that globalization “expand the choice

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<sup>220</sup> *Ibid.*

<sup>221</sup> A. Orford “Contesting Globalization: A Feminist Perspective On The Future of Human Rights” in B.H. Weston & S.P. Marks, eds., *The Future of International Human Rights: Commemorating the 50<sup>th</sup> Anniversary of the Universal Declaration of Human Rights* (Ardsley, New York: Transnational Publishers, Inc., 1999) 157 at 168.

<sup>222</sup> O. Aginam, *supra* note 208 at 606. See also B.S. Chimni, *Globalisation, Humanitarianism And The Erosion of Refugee Protection* (Oxford: Refugee Studies Centre, University of Oxford, 2000) at 9, stating that “the international financial institutions which Northern states control compel poor countries in the South to follow economic policies which lead to mass violations of human rights.”



available to” countries, individuals and groups.<sup>224</sup> But the problem is that when those with the opportunities of exercising “their expanded choice”, do that, the opportunities left available for the have-nots may shrink or completely disappears.<sup>225</sup> Indeed, it would seem, that instead of creating order, the rule of law, and the protection of human rights, globalization is creating the conditions for disorder, authoritarian rule, and the disintegration of the state, with attendant violations of human rights and massive production of refugees.<sup>226</sup>

The objective of using globalization processes to provide the enabling environment for the smooth operations of the MNCs, so as to “penetrate juicy sectors of third world economies,”<sup>227</sup> is mainly achieved through the agency of the World Bank and IMF. These two institutions have handed several economic prescriptions to the “third world” countries as the panaceas needed to solve their economic growth and other developmental problems. The most popular of the prescriptions imposed on the “third world” states by the IMF/World Bank is the Structural Adjustment Programmes (SAPs). The ways in which the various SAP policies imposed on the “third world” and the activities of most of the MNCs that do business in the “third world” create conditions that help or could help to produce refugee flows are the subject of the discussion that follows.

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<sup>223</sup> O.Aginam, *ibid.* at 607.

<sup>224</sup> K.A. Elliot, *Assessing Globalization's Critics: Talkers Are NO Good Doers???* (United States: Institute of Economics, 2002) at 22.

<sup>225</sup> *Ibid.*

<sup>226</sup> R. McCorquodale and R. Fairbrother, “Globalization and Human Rights” *supra* note 218 at 758. See also, C. Chinkin, “International Law and Human Rights” in T. Evans, ed., *Human Rights Fifty Years On: A Reappraisal* (Manchester: Manchester University Press, 1998) 105 at 116.

<sup>227</sup> O.Aginam, *supra* note 208 at 607.

### 3.2. SAP AS INSTRUMENT OF GLOBALIZATION

Structural adjustment programmes (SAPs) are macro-economic conditions designed and packaged by the IMF/World Bank (empowered by international economic law)<sup>228</sup> to be applied by the “third world” as the condition for receiving grants, loans and other facilities from these institutions, as well as for receiving further credit facilities or grants from other financial institutions or having their debts rescheduled or reduced by the clubs of creditors and donors.<sup>229</sup> The policy objectives of SAPs are ostensibly to bring about stabilization and growth, elimination of budget deficits, reduction of debts, and a stop to inflation.<sup>230</sup> According to the former managing director of the IMF, Michel Camdessus, “our prime objective is growth. In my view, there is no longer any ambiguity about this. It is with a view toward growth that we carry out our special responsibility of

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<sup>228</sup> According to Antony Anghie, both international law and international institutions “have played a significant role in the furthering the processes of globalization.” He argues that “treaty regimes such as that of the WTO/GATT and the operation of international financial institutions such as the Bank and the IMF have vigorously and effectively promoted the economic policies and processes associated with globalization: liberalization, privatization, and the creation of legal regimes facilitating commercial transactions and foreign investment.” Supporting this position, B.S. Chimni contends that international law is “the principal instrument through which the rule of private property is being extended in the world economy.” Furthermore, he argues that international law “is the means through which the rights of transnational capital are being safeguarded, among others things, by prescribing uniform global standards – ignoring the phenomenon of uneven development – in key areas such as technology and foreign investment” while guarantying the “observance of these standards through endowing international institutions with the means to enforce them.” See A. Anghie, “Time Present and Time Past: Globalization, International Financial Institutions and the Third World (2000) 32:2 New York University Journal of International Law and Politics, 243 at 247. See also, B.S. Chimni, “Marxism and International Law” (1999) Economic and Political Weekly (special) 337.

<sup>229</sup> C. Abugre, “Still Sapping The Poor: A Critique of IMF Poverty Reduction Strategies” on line: <http://www.globalexchange.org/wbimf/imf0600.html> at 4 (visited: 5/20/02).

<sup>230</sup> M. Kufekisa-Akapelwa, “From Structural Adjustment Programme To Poverty Reduction: Lessons Learnt and the Way Forward-Zambia” on line: <http://www.ccjp.org.zm/sapless.htm> (visited: 05/15/02)

helping to correct balance of payments disequilibria.”<sup>231</sup> All these are intended, at least in principle, to bring the economies of the “third world” countries “back on track.”

Thus SAPs, as they are imposed on “third world” countries by the IMF and the World Bank (two Bretton Woods institutions), are premised on economic liberalization, predicated on market forces, and grounded in the unhindered participation of the private sector in the running of the economies of these states and in the provision of social services. The policy rationale behind SAP is that the import and export of goods should be undertaken without barriers. It is also anchored in the ideology that states should not be engaged in economic planning, but instead should provide the enabling environment for the smooth operations of the market forces. The argument is that economic liberalization, as opposed to a state planned economy, is the recipe for development and growth, which the “third world” countries must embrace in order to overcome their economic problems and quagmire. As Caroline Thomas has noted:

The IFIs promote the idea that the free market is the only alternative to centrally planned economies. It is presented as ‘common sense’ or natural that we are now reaching the end of history, where the free market gains universal acceptance as the legitimate form of economic organization, with its attendant social and political relation. IFIs promote the ideal of the perfectly functioning free market, free of state interference or control, in which inequality is a good thing because it generates progress and wealth. Wealth created by the rich will trickle down to the poor, as investment of the profits of the rich will lead to the creation of new jobs.<sup>232</sup>

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<sup>231</sup> M. Camdessus, Statement Before the Economic and Social Council of the United Nations, July 11, 1990 as quoted in Jacques J. Polak, *The Changing Nature of IMF Conditionality* (Princeton N. J.: Princeton University Press) at 19. W. Finnegan, contends, however, that “the idea that open markets and increased trade lead invariably to economic growth may be sound in theory, but it has repeatedly failed the reality test.” See W. Finnegan, “The Economics of Empire” *Harper’s Magazine* May 2003.

<sup>232</sup> C. Thomas “International Financial Institutions and Social and Economic Human Rights: An Exploration” in T. Evans, ed., *Human Rights Fifty Years On: A Reappraisal* (Manchester: Manchester University Press, 1998) 161 at 167.

In this regard, Aginam observes that: “the ideology of SAPs is, therefore, a revival of economic liberalism with market oriented strategies, free trade, and minimal state intervention as its key elements.”<sup>233</sup>

Thus, the rationale for the SAP based prescriptions imposed on the “third world” by the two Bretton Woods institutions is that SAP will enable them to stabilize their economies, achieve growth and development, and then be in the position to service and repay their huge debts, which are owed to these institutions and other creditors and donor clubs. However, in reality, SAPs do very little to achieve these objectives, except perhaps *vis-a-vis* the debt service and repayments to the IFIs. As Aginam observes,

Advocates of SAP have long maintained that there is no alternative to SAPs and that adjustments have resulted in the stabilization of most economies so much that these countries can now repay their debts to IFIs. But at what cost does this marginal stabilization come? It is through the exploration of this question that the hollowness of SAPs emerges. What are the implications of marginal stabilization that is achieved through cuts in social programs-health, housing, education and jobs? A developing country that adopts SAPs and is incapable of providing housing, food, clothing, jobs and education to 80% of its citizens is only comparable to the proverbial saying of “robbing Peter to pay Paul.”<sup>234</sup>

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<sup>233</sup> O. Aginam, “Global Village, Divided World...” *supra* note 208 at 620.

<sup>234</sup> *Ibid.* at 621.

The IMF<sup>235</sup> and the World Bank<sup>236</sup> impose SAPs<sup>237</sup> on the “third world” states without regard to the peculiarities of an individual country’s problems and circumstances. The contents of the prescriptions are similar for almost all the countries- deregulation of trade, devaluation of the national currencies, withdrawal of subsidies from health, education, agriculture, and housing, privatization of public enterprises, retrenchment of workers from public sectors of the economy, and freezing wages. A one-size-fits- all approach has far-reaching socio-political implications, since it precludes governments from fulfilling their obligations to citizens. Consequently, the private sector is enabled to take over the provision of most of the social services that were hitherto within the

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<sup>235</sup> The purpose of IMF is articulated in Article 1 of the Articles of Agreement of the International Monetary Fund. The purpose is stated to be among others: (1) to promote exchange rate stability, (2) to facilitate the expansion and balanced growth of international trade, and (3) to assist members “with maladjustment in their balance of payment and shortening the duration and lessening the degree of disequilibrium in the international balances of payments of members.” See G. Brucculeri, “A Need to Refocus the Mandate of the International Monetary Fund and the World Bank (2004) 17 Windsor Review of Legal and Social Issues 53 at 54. See also, Articles of Agreement of the International Monetary Fund, (Washington D.C.: IMF, 1978) Article I.

<sup>236</sup> The purpose of World Bank is outlined in Article I of the Banks Articles of Agreement. The purpose is stated to be among others: “to assist in the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes, including the restoration of economies destroyed or disrupted by war, the reconversion of productive facilities to peacetime needs and the encouragement of the development of productive facilities and resources in less developed countries.” See IBRD Articles of Agreement (as amended February 16, 1989) (Washington D.C.: IBRD, 1989).

<sup>237</sup> In September 1999, IMF discontinued with structural adjustment (SAP) and replaced it with Poverty Reduction Growth Facility (PRGP) “and their policy framework papers to Poverty Reduction Strategy Papers (PSRP) as the new preconditions for loan and debt relief.” In principle PRGP is intended to promote country’s ownership of the economic reform programmes. This turn out to be mere delivery of repackaged structural adjustment programmes (SAPs). The idea is to build “broader political and popular support for reform”, by persuading people of the country of the “merit of implementing the reform.” There seems to be an assumption that the “actual contents” of the reforms is beyond argument.” As a result both the conditionalities and the effects are still the same. It is for this reason that I decided to retain SAP as still central to Bretton Woods’s institutions policies. See, A. Storey, “Structural Adjustment, State Power and Genocide: The World Bank and Rwanda” paper presented at the conference on “The Global Constitution of Failed States”: Consequences of New Imperialism?” Sussex, 18-20 April 2001 (on file with the author) at 20-21. See also, A. Shah, “Structural Adjustment – A Major Causes of Poverty” on line: <http://www.globalissues.org/TradeRelated/SAP.asp?p=1> (visited: 09/29/05).

exclusive domain of the state at a very high cost to the interests and welfare of the citizens, and to the stability of the state. As Philip R. Trimble notes,

As globalization accelerates international law and institutions will inevitably be implicated. Currently, both are strongly oriented toward preserving the status quo. If they remain static, then market-driven “private” forces may come overwhelmingly to dominate the lives of the world’s people. Decisions by corporate executives, bankers, currency traders, and information moguls increasingly could come to displace decisions by governments on such matters as mortgage interests rates, the types of jobs available, the content of education, and attitudes towards family and religion.<sup>238</sup>

This has led to a situation where very fundamental matters that impact on the welfare, human rights, interests, and health of citizens are left in the hands of private sectors dominated in most cases by the MNCs. This scenario is a grave omen for the human rights of the citizens of “third world” countries. This is so because the private sector is motivated for the most part by the profits, interests, and concerns of their shareholders. As such, the MNC led private sector often pays very scant attention to the interests of the citizens of its host states. In their desire to promote SAPs, the IMF and the World Bank have given support and encouragement to governments that grossly abuse rights, including the right to equitable, sustainable, and participatory development.<sup>239</sup> This is perhaps because the numerous funding conditions imposed upon

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<sup>238</sup> P. R. Trimble, “Globalization, International Institutions, and The Erosion Of National Sovereignty And Democracy” (1997) 95 Michigan Law Review 1944 at 1946-1947. See also D. Held, “Democracy And Globalization” (1997) 3 Global Governance 251 at 260-261.

<sup>239</sup> C. Abugre, “Still Sapping the Poor: A Critique of IMF Poverty Reduction Strategies” on line: <http://www.globalexchange.org/wbimf/imf0600.html>) at 5 (Visited: 5/20/02). See also, B. Rajagopal, “International Law and Third World Resistance: A Theoretical Inquiry” in A. Anghie *et. al.* eds. *The Third World and International Order: Law, Politics and Globalization* (Leiden: Martinus Nijhoff Publishers, 2003) 145 at 161, stating that “During the last couple of decades, it has become increasingly hard to place much hope in the capacity of third world states to act as real guarantors of democratic aspirations of the masses in the third world, as state sovereignty has been parcelled out up (to international institutions such WTO and Bretton Woods institutions) and down (to market actors and NGOs)”

“third world” countries by these international financial institutions, such as economic structural adjustment programs, demand very strong government action for smooth implementation. Hence authoritarian and military governments are preferred by foreign investors as being better positioned to implement these policies successfully. The adverse consequence of this is that new democracies are very often put in great jeopardy.<sup>240</sup> According to the World Bank’s former Chief Economist, Joseph Stiglitz, the IMF in theory supports democratic institutions in the countries where it offers assistance, but, in practice, its imposition of policies on these countries undermines the democratic process.<sup>241</sup> Describing the impact of IMF/World Bank policies on living conditions, Dr. Rajni Kothari observes that,

We live in an era of curious stupefying paradoxes. Literacy percentages are going up so are the total number of illiterates. Food stocks are continuously piling up but so are the number of people without access to adequate food, those suffering from hunger and starvation, while in the meanwhile there has taken place a major decline in the quality of food available to the people, thanks to the excessive use of pesticides and chemical fertilizers, more so in the poorer countries as the more hazardous pesticides are banned in the rich countries and both exported to and dumped in the poor countries. The number of people below the poverty line, measured in terms of minimum necessary nutritional standards, is said to be going down and yet malnutrition as well as severe physical debilities and destitution are on the increase, especially those affecting women and children, the simple physical capacity of the youngest generation to withstand the strains of living becoming ever more unstable and fragile.<sup>242</sup>

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<sup>240</sup> Robert McCorquodale and Richard Fairbrother, *supra* note 218 at 755.

<sup>241</sup> J. Stiglitz, “The Insider: What I Learned at the World Economic Crisis” *The New Republic*, 17<sup>th</sup> April 2000.

<sup>242</sup> As quoted in V.R. Krishna Iyer, “Globalization Threatens Humanism” on line: <http://202.64.82.162/daga/press/ia/glob/glob02.htm> (visited: 8/8/02) at 7.

Hence, the implementation of SAPs in “third world” countries has not brought the development and growth promised by the IMF/World Bank, which imposed them. Instead, the policy measures of SAPs have *helped* in spreading poverty, misery, despair, hunger, destitution, and desperation in these countries, especially among the poor masses who bear the brunt of the consequences of these programs.<sup>243</sup> This happens largely because the relationship between international financial institutions and populations is not concerned with human rights, human values, the quality of life, or human dignity, but rather with technical issues that relate to, maintaining an order that supports free market principles.<sup>244</sup>

Thus, it would seem that the main reason that the SAPs are imposed on the “third world” is to enable them to conserve funds for servicing and repayment of the debts owed to the IFIs and other donor and creditor clubs. Indeed, “the IMF and World Bank SAPs

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<sup>243</sup> S. Granada, “Speech by Susan Granada of Jubilee Network” on line: <http://www.ceji-iocj.org/English/international/Speech-SusanGranada> (visited: 5/15/02). See also J. Galtung, “The Third World and Human Rights in the Post – 1989 World Order” in T. Evans (ed.) *Human Rights Fifty Years On: A Reappraisal* (Manchester: Manchester University Press, 1998) 211 at 215, stating: “But this is less true for military power and political power. As other sectors shrink, the military budget increases relatively and absolutely. Some of that power may be used to discipline a restive population, some to fight with neighbours over such scarce resources as water. Some power may one day be directed against metropolitan powers, but unpredictable terrorism is more likely given power asymmetry. Democracy and human rights may make the political power of a third world state more legitimate, but with the economy globalized, in the hands of the TNCs, and money privatized in countries with shrinking public sectors, relatively speaking, there may be less resources available to alleviate misery.”

However, it is not SAPs alone that have precipitated these conditions. Internal misconduct by governments of some “third world” countries has also contributed in the production of this state of affairs. This is evident in the misplacement of national priorities and misallocation of resources by many governments in the “third world” countries. For instance, despite the enormous poverty faced by many Nigerians, that country’s President, Mr. Obasanjo, embarked on the construction of Olympic-size stadium costing millions of dollars. See S.C. Agbakwa, “A Path Least Taken: Economic And Social Rights And The Prospects of Conflict Prevention and Peacebuilding in Africa” (2003) 47:1 *Journal of African Law* 38 at 59.

<sup>244</sup> T. Evans, Introduction: Power, Hegemony and Universalization of Human Rights” in T. Evans (ed.) *Human Rights Fifty Years On: A Reappraisal* (Manchester: Manchester University Press, 1998) 2 at 15.



turn countries into loan repayment machines, generating easy profits for the world's biggest companies and banks."<sup>245</sup> Consequently, most "third world" countries apply substantial parts of their earnings to debt servicing and repayments, thereby leaving them with little or nothing to devote to social and other essential sectors that will improve the living conditions of their people. As Geepu Nah Tiepoh, has noted,

...Economic adjustment as supported by the international institutions has failed during the last decades to achieve even its basic objective of forcing indebted African economies to produce ample foreign exchange for sustainable debt servicing. On the other hand, it has led to large capital outflows from these economies. Between 1986 and 1990 the IMF alone extracted over \$3 billion in debt service payments from low-income sub-Saharan African countries.<sup>246</sup>

For instance, between 1984 and the mid-1990s, some governments of very poor African countries transferred \$96 billion to rich industrialized countries, "which was one and a half times the amount owed them in 1980."<sup>247</sup> Furthermore, "in 1993 alone, sub-

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<sup>245</sup> Committee for Workers' International (CWI), "Smash the IMF and World Bank! A Socialist Alternative To Global Capitalism" on line: <http://users.Pandora.be/militant.links/ml/imf.html> (visited: 6/25/02) at 3. See also B. Rich, *Mortgaging the Earth: The World Bank, Environmental Impoverishment, And The Crisis of Development* (Boston: Beacon Press, 1994) at 8, stating that "the goal of the creditor countries was to avoid major debt forgiveness or loan defaults by pressuring poorer nations to earn more foreign exchange to service their debts."

<sup>246</sup> G. Tiepoh, "Debt And Adjustment Under The New Globalization Consensus: Can Africa Still Resist?" On line: <http://www.theperspective.org/globalization.html> (visited: 05/15/02). Agbakwa has contended that "despite all the praises for the market system of wealth creation as the most effective that humanity has yet devised, "it remains an imperfect force since two-thirds of the world's population have gained little or no substantive advantage from rapid economic growth. [Even] in the developed world, the lowest quartile has witnessed trickle-up rather than trickle-down." S.C. Agbakwa, "Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights" (2002) 5 *Yale Human Rights & Development Law Journal* 177 at 201.

<sup>247</sup> G. Tiepoh, *Debt and Adjustment*, *ibid.*

Saharan African governments paid \$196 million more to the IMF than they have received from it.”<sup>248</sup> According to the Nigerian former Finance Minister Adamu Ciroma,

In 1984 our indebtedness to the IMF was only US\$5.5 billion. From that time to date we paid US\$17.5 billion as interest. If you fail to pay such interest, you will be surcharged; so much of the payments we make go for interest payment; not the principal. But up till now, the outstanding debt stock remains at US\$28 billion.<sup>249</sup>

Many countries of the “third world” have been compelled to apply over 50 percent of the government’s accrued revenue toward debt servicing, which translates into about 20 percent to 25 percent of their total export earnings.<sup>250</sup> African countries alone in 1998 paid US\$5 billion in servicing their debts.<sup>251</sup> Consequently, the indebted “third world” countries have, between 1982 and 1998, paid over four times their original debts and still

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<sup>248</sup> *Ibid.*

<sup>249</sup> A. Ciroma, quoted in Social/Economic Policy, “One World, Two Standards” *Newswatch* May 8, 2002, on line: <http://www.globalpolicy.org/soecon/bwi-wto/imf/2002/0508double.htm> (visited: 5/20/02). The former Nigerian Finance Minister further contended that “the IMF adopted this strategy so that no “third world” nation would be out of debt. Their plan is that all countries should have a permanent debt, which is unfair.” It is estimated that “today the underdeveloped world owes a total of US\$2.5 trillion in international debt to big banks and the IMF and World Bank.” “Developing nations pay the West nine times more in debt repayment than they receive in aid from Western countries.” An instance of this was the case of Mozambique when flood destroyed the homes of over a million people. Aids given to Mozambique to contend with the disaster was about US\$40 million, whereas Mozambique pays more than US\$70 million in debt repayment and service to Western banks each year. See Committee for a Workers’ International (CWI) “Smash the IMF and World Bank! A Socialist Alternative to Global Capitalism” on line: <http://users.pandora.be/militant.links/ml/imf.html> (visited: 6/25/02) at 3.

<sup>250</sup> S. Sassen, “Governance Hotspots: Challenges We Must Confront in the Post-September 11 World” on line: <http://www.ssrc.org/sept11/essays/sassen.htm> (visited: 5/18/02).

<sup>251</sup> *Ibid.* It was also reported in an authoritative Western media outlet that the “IMF took 390 million pounds Sterling more out of Africa than it put in 1997.” B.B.C. News Online, Overdrawn: The Developing World’s Debt Crisis, April 28, 1999: [http://news.bbc.co.uk/hi/english/world/newsid\\_140000/140581.stm](http://news.bbc.co.uk/hi/english/world/newsid_140000/140581.stm), see S.C. Agbakwa, “Reclaiming Humanity” *supra* note 2446 at 197.

have their debt stock up to about the same number.<sup>252</sup> This has resulted in important social sectors like education, health, and housing being starved of funds, and has stunted economic growth, thereby creating socio-political problems with their attendant destabilizing effects. These conditions make significant contributions to the generation of large scale refugees flows in the “third world”. This has also diminished the ability of “third world” countries to participate meaningfully in the globalization processes, since their building capacities have been adversely affected and undermined. In this regard, Aderemi Medupin has aptly observed that

If education is not well-funded, there can be no successful capacity building; ditto for the other critical areas like housing and health care which even the World Bank acknowledged to be essential for real and sustained growth. All these now suffer neglect due to debt burdens.<sup>253</sup>

Thus, the debt of the “third world” countries has become a weapon in the hands of both the IMF/World Bank in manipulating and coercing these countries into active engagement in globalization activities notwithstanding the negative impact of such engagements on them.<sup>254</sup>

A critical examination of some of the World Bank/ IMF imposed conditionalities on the “third world” will demonstrate that they were intended to impoverish these countries, devastate their peoples, and create viable conditions for the operations of the

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<sup>252</sup> E. Toussaint, *Your Money or Your Life: The Tyranny of Global Finance* (Pluto Press, 1999) at 1. See also S. Sassen, “Governance Hotspots: Challenges We Must Confront in the Post-September 11 World” on line: <http://www.ssrc.org/sept11/essays/sassen.htm> (visited: 5/18/02).

<sup>253</sup> A. Medupin, “Sovereign Risks and Liberalising Globalisation: Nigeria in Perspective” (2001) 1:2 *Journal of Economic, Social and Cultural Rights* 74 at 82.

<sup>254</sup> J. Pilger, “The New Rulers of The World?” on line: <http://pilger.carlton.com/globalisation> (visited: 04/22/03).

MNCs. As McCorquodale and Fairbrother have observed, “It should also be realized that many of the economic decisions made by the globalized economic institutions are made on the basis of very dubious information and analysis.”<sup>255</sup> For instance, one of the World Bank/IMF requirements for granting new loans or rescheduling payments of any of the “third world” countries is reduction of government expenditures on health, education, and other social services.<sup>256</sup> This usually leads to imposition of user fees where the education or health services were formerly free, or to increases in tuition fees. The immediate consequence of the introduction of or increase in tuition is that many children of school age drop out of school and remain with little or no education. Those who cannot afford the exorbitant cost of health services are left to live with poor health, and it is impossible for them to make any meaningful contribution to society. Other consequences are premature deaths and high infant mortality. Most of the victims of these strangulating conditionalities find themselves in the streets hawking foreign made goods, or they become social misfits. As the United Nations itself has observed, “If government invests in human development rather than debt repayment, an estimated three million more

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<sup>255</sup> R. McCorquodale and R. Fairbrother, *supra* note 218 at 745.

<sup>256</sup> U.S. Network for Global Economic Justice, “World Bank/IMF Fact Sheet” on line: <http://www.globalexchange.org/wimf/facts.html> (visited: 06/14/2002). See also, IMF, Nigeria Letter of Intent and memorandum on Economic and Financial Policies of the Federal Government: Memorandum on Economic and financial Policies of the Federal Government for 2000 (Washington, D.C.: IMF, 2000). See further, IDA & IMF, Uganda: Decision Point Document For the Enhanced heavily Indebted Poor Countries (HIPC) Initiative (Washington: World Bank, 2000), also reprinted on line: [http://www.worldbank.org/hipc/country-cases/uganda\\_DP.pdf](http://www.worldbank.org/hipc/country-cases/uganda_DP.pdf).

children would live beyond their fifth birthday and a million cases of malnutrition would be avoided.”<sup>257</sup>

In some cases, “third world” states are required to trim their budgets by engaging in massive retrenchment and laying off of workers, as well as by removing all regulations that might hinder foreign ownership of local businesses and resources.<sup>258</sup> In most of these “third world” states, governments are the major employers, and retrenchments usually lead to a large number of persons being thrown out of jobs. This privatization of the market in some “third world” countries has led to lowered living standards for the people, for example in Hungary and also in Poland [note Hungary, Poland and much of Eastern Europe are considered part of the so-called ‘second world’], where about thirty-eight percent of the people live below poverty level, with more than fifteen percent of them unemployed in 1994.<sup>259</sup> With the elimination of obstacles to the acquisition of local businesses or any other resources, the MNCs purchase formerly government-controlled public enterprises or start new ones.<sup>260</sup>

These MNCs in turn employ these retrenched workers at very low wages since many of them are desperate to work at any wage. The governments in these

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<sup>257</sup> As quoted in Committee for a Workers’ International (CWI), “Smash the IMF and World Bank! A Socialist Alternative to Global Capitalism” on line: <http://users.pandora.be/militant.links/ml/imf.html> (visited: 6/25/02) at 4.

<sup>258</sup> U.S. Network for Global Economic Justice, “World Bank/IMF Fact Sheet” on line: <http://www.globalexchange.org/wimf/facts.html> (visited: 06/14/2002).

<sup>259</sup> Z. Eisenstein, “Stop Stomping On The Rest Of US: Retrieving Publicness From The Privatization Of The Globe” (1996) 4 *Indiana Journal of Global Studies* 59 at 65.

<sup>260</sup> J. Mutethia, “Africa and Globalization” on line: <http://www.globalpolicy.org/socecon/develop/africa/glob.htm> (visited:05/20/02), stating that “African countries are being asked to impose austerity measures on the populations, to sell state-owned enterprises to foreign multinationals and to give up more and more of their political independence.”

circumstances also promise, under the constraint of international law (i.e., international economic law), not to enforce labour and environmental laws. In this way, the profit margins of these MNCs are enhanced at the expense of these countries and their citizens. But the proponents of privatization argue that the sale of government owned public enterprises benefits both the government and the people.<sup>261</sup> According to this line of reasoning, the sales of these firms provide governments with needed funds to take care of some of its responsibilities.<sup>262</sup> However, it should be noted that the large part of the money realized from the government disinvestments from these enterprises, as well as from the retrenchment of workers, are channelled toward debt service and repayments to the IFIs. In fact, the United Nations has acknowledged the central role played by these corporations in the organization of the world economy and the competition among them to establish their presence in developed countries' home markets; the latter leads to the establishment of regional, independent networks of partners overseas.<sup>263</sup> Some of the privatization exercises carried out in the "third world" at the instance of the World Bank and the IMF were not done in a transparent manner, and the loss of billions of dollars was caused this way. This trend has led a former World Bank chief economist to describe it as "briberization." He cited as an example the 1995 Russian sale of public enterprises,

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<sup>261</sup> A. J. Walling, "Early to Bed, Early to Rise, Work Like Hell and Globalize" (2003/2004) 13 Kan. J. L. & Pub. Pol'y 161 at 84.

<sup>262</sup> *Ibid.*

<sup>263</sup> Z. Eisenstein, *supra* note 259 at 66.

which was intended to provide funds from “kick backs” for President Boris Yeltsin’s re-election bid.<sup>264</sup>

As part of IMF/World Bank imposed conditions, “third world” countries are asked to eliminate tariffs on goods to be imported into their countries.<sup>265</sup> Usually the taxes imposed on these goods are designed to protect domestic producers against foreign competitors who enjoy the advantages conferred by advanced technologies and other infrastructural facilities that enable them produce goods at cheaper rates. When these tariffs are eliminated, the local producers are unable to compete with the foreign companies, whose goods then have easy access to domestic markets. The result is that the domestic producers are forced to close their businesses and, in some cases, sell them to the MNCs or other foreign entrepreneurs. Professor Noam Chomsky has lamented the negative impact of this kind of trade liberalization on “third world” economies:

India (has always) had very advanced agricultural research projects, programmes and so on. But they are being destroyed, bought up by multinationals. The Indian scientists are very good. They now get five times more salaries working for multinationals. This is an agrarian country. It needs agricultural research. Take pharmaceuticals. India has had quite an effective pharmaceutical industry. Drugs in India were much cheaper than in Pakistan because India used to produce them itself. Now it has got to stop. Neoliberalism means you destroy the pharmaceutical industry.<sup>266</sup>

The IMF/World Bank has also often asked many “third world” countries to remove subsidies on some essential goods such as fuel, bread, etc., as a condition for granting

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<sup>264</sup> G. Palast, “The Globalizer Who Came In from The Cold”( on file with the author).

<sup>265</sup> N. Ogbulie “Hard Time Awaits Nigeria As EU Unfolds New Trade Policy” *ThisDay* 10/06/02 on line: <http://www.thisdayonline.com/news/20021006news06.html> (visited: 10/06/2002).

them loans or rescheduling their debts. The removal of subsidies has led to increases in the prices of these essential goods, which then became far less affordable. As is the case with the other conditions of the World Bank/IMF, the removal of subsidies on these essential goods and services helps to free more money for servicing or paying debts owed to these IFIs.

IMF/ World Bank conditionalities also demand that “third world” countries devalue their currencies so as to enhance their exports by making them cheap, while imported goods become very expensive. This diminishes the wages and salaries of workers such that they cannot afford access to health, education, and other essential services. Those engaged in the production of goods for export are pushed out of business, since their goods sell at very low prices following the devaluation of the currency.

Despite the implementation of the IMF/World Bank SAPs, “third world” countries have not emerged from their indebtedness and destitute economic situation; it would seem instead that the application of these stringent SAPs has tended to exacerbate their crises and their pauperized economic conditions. For instance,

In Zimbabwe the government has been asking for an IMF and World Bank loan. For almost five years now, these institutions have demanded that the government cut food subsidies, reduce expenditure on education and collect more money through taxation. As well, the government is asked to privatize state owned factories and mines. Another demand has been that the government withdraw troops from Democratic Republic of Congo. They were sent there at the request of the Congolese government. As well, the

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<sup>266</sup> Professor Noam Chomsky, as quoted in V. R. Krishna Iyer, “Globalization Threatens Humanism” on line: <http://202.64.82.162/daga/press/ia/glob/glob02.htm> (visited: 8/8/02) at 18.



government is told not to proceed with the planned confiscation of White owned land and redistributing it to landless Blacks.<sup>267</sup>

The implementation of the SAP in Zimbabwe through the liberalization of trade and finance has opened up Zimbabwe's market to all manner of cheap imports, while local producers and manufacturers do not have similar access to external markets.<sup>268</sup> The result is that large numbers of businesses have been forced to close; this has caused the layoff of workers, and the unemployment problem has been exacerbated. Liberalization has further led to the undermining of the agricultural sector, which employed over 70 percent of the population.<sup>269</sup> This has resulted in food shortages. Generally, the application of the SAP in Zimbabwe has increased the level of poverty in the country, principally because of privatization, which led to a lot of people to lose their jobs, and currency devaluation which resulted in the decline of the purchasing power of the local currency. Devaluation also caused the price of goods to rise following the elimination of subsidies on some essential items. The stringent nature of the structural adjustment imposed on Zimbabwe and its devastating impact has led to it being described as "...nothing less than economic, social and political terrorism against a country already

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<sup>267</sup> J. Mutethia, *supra* note 260 at 4. See also A. Am, paw, "Ghana And HIPC: What Should Be Done? On line: <http://www.jubilee2000uk.org/opinion/archive/ghana.htm> (visited: 05/15/02) stating that: "the IMF and World Bank know how to advise countries to correct balance of payments problems. The reality is that these two institutions have been major causes of the debt crises of the Third World debtor countries and have not changed their flawed advice since the crisis broke out." The IMF/World Banks suspended aid to Zimbabwe in 1998 until the state curbed the military and undertook other political reforms. This is notwithstanding the implementations of other SAP policies imposed on the country by the IMF/World Bank. See A. Goldsmith, "Donors, Dictators and Democrats in Africa" (2001) 39:3 *Journal of Modern African Studies* 411 at 416.

<sup>268</sup> Executive Committee Structural Adjustment Participatory Review Initiative (SAPRI), "Adjustment Debate Leaves World Bank Behind (2000) Social Watch 91 at 92.

<sup>269</sup> *Ibid.*

ravaged by poverty.”<sup>270</sup> In this regard, the U.S. network for Global Economic Justice has observed that “The great majority of the people of the South are enduring increased poverty, decreased access to basic services, and decreased control over their own economies.”<sup>271</sup>

The result is that the capacity of the government of Zimbabwe to take measures that will enhance or raise the living standards of its people has been emasculated, if not totally removed. The result is the growing political destabilization of the country.<sup>272</sup> The increased poverty has occasioned political protests and strike action, and the response of the government has been to arrest, torture, and jail critics of the government, especially journalists.<sup>273</sup> The opposition is subjected to all manner of brutal repression and persecution,<sup>274</sup> and all these developments are recipes for refugee flows.

In Zambia, implementation of SAPs has resulted in the loss of subsidies on farm inputs by peasant farmers, the loss of jobs by those who work in government enterprises, and the introduction of fees in schools and hospitals.<sup>275</sup> Consequently, poverty in Zambia

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<sup>270</sup> J. Shaoul, “IMF Tightens The Screws On Zimbabwe” on line: <http://www.wsws.org/articles/1999/aug1999/zimb-a18.shtml> (visited: 5/15/02).

<sup>271</sup> U.S. Network for Global Economic Justice, “World Bank/IMF Fact Sheets”, *supra* note 256.

<sup>272</sup> J. Shaoul, “IMF Tightens the Screws on Zimbabwe” on line: <http://www.wsws.org/articles/1999/aug1999/zimb-a18.shtml> (visited: 5/15/02). See also C. Thomas, “International Financial Institutions And Social And Economic Human Rights” *supra* note 232 at 163, stating that “the process of globalization is rendering it impossible for many states to exercise a basic minimum control over the domestic economy, and therefore it is directly undermining the states’ ability to deliver social and economic rights to citizens.”

<sup>273</sup> J. Shaoul, “IMF Tightens the Screws on Zimbabwe” on line: <http://www.wsws.org/articles/1999/aug1999/zimb-a18.shtml> (visited: 5/15/02).

<sup>274</sup> *Ibid.*

<sup>275</sup> M. Kufekisa-Akapelwa, “From Structural Adjustment Programme to Poverty Reduction: Lessons Learnt and the Way Forward-Zambia” on line: <http://www.ccjp.org.zm/sapless.htm> ( visited: 05/15/02). See also, R. E. Howard, “Civil Conflict in Sub-Saharan Africa: Internally Generated Causes,” (1996) 51

has increased; the reported number of children with stunted growth syndrome has risen to 53 percent in 1998, a climb from the 50 percent mark in 1996. Significant numbers of children of school age have dropped out of school due to the increased cost of education. Indeed, in “third world” countries, particularly in sub-Saharan Africa, “where only one child in two goes to school, governments transfer four times more to banks and lenders in the West than they spend on health and education.”<sup>276</sup>

In Mozambique, which occupies the unenviable position of world’s poorest country, the implementation of economic structural adjustment programmes has led to loss of about 30,000 jobs, “leaving only 95,000 out of 7,000,000 adults employed.”<sup>277</sup> This further fuels the tension in the already overheated system.

Thus, the application of the IMF/World Bank structural adjustments programmes has instigated and encouraged social and political instabilities that have led to one type of crisis or another. The enforcement of these harsh conditionalities has largely favoured political dictatorship; it seems that “the IMF prefers dictatorships to democratic governments, because dictators can successfully impose SAPs.”<sup>278</sup> As Jeffrey Sachs

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International Journal 26 at 32, stating that “in Africa today, schools are closing down as governments retrench in the face of structural adjustment programmes imposed by the International Monetary Fund.”

<sup>276</sup> Committee for a Workers’ International (CWI), “Smash the IMF and World Bank! A Socialist Alternative to Global Capitalism” on line: <http://users.pandora.be/militant.links/ml/imf.html> (visited: 6/25/02) at 4.

<sup>277</sup> S. Carter, “Do Economic Structural Adjustment Programmes Really Create A Sustainable Climate For a Market Economy and International Trade? The Case of Zimbabwe” (on file with the author)

<sup>278</sup> U.S. Network For Global Economic Justice, “World Bank/IMF Fact Sheets on line: <http://www.globalexchange.org/wbimf/facts.html> (visited: 06/14/02). See also K. Hossain, “Globalization and Human Rights: Clash of Universal Aspirations And Special Interests” in B.H. Weston & S.P. Marks, eds., *The Future of International Human Rights* (Ardsley, New York: Transnational Publishers, Inc., 1999) 187 at 190 stating that “the vigorous promotion of market forces inherent in the process of the globalization of the world economy thus has social and economic consequences that can undermine or impede the promotion and realization of human rights, in particular social and economic rights.”

notes, “until now, the U.S. and Europe have insisted on stringent International Monetary Fund –led measures including massive debt servicing (\$1.5 billion or 4 percent of GDP), a denial of debt cancellation, crumbs of aid, and demands for the elimination of fuel subsidies that, as we have seen in the recent past, are a guaranteed trigger of violence.”<sup>279</sup> As Orford and Beard contend, “...The social impact of Bank economic liberalization programs has contributed to the increased levels of insecurity, authoritarianism and political destabilization in many states.”<sup>280</sup>

Even some “third world” leaders have acknowledged the devastating consequences of globalization, as well as the stringent IMF/World Bank conditionalities imposed on them in order to enhance globalization processes. Nigerian President Olusegun Obasanjo observed: “our societies are overwhelmed by the strident consequences of globalization and the phenomenon of trade liberalization. The option open to us has narrowed as our increasingly shrinking world imposes on our countries a choice of integration or the severe conditions of marginalization and stagnation.”<sup>281</sup>

Indeed, IMF/World Bank policies tailored toward ensuring and enhancing the unfettered operations of the MNCs, especially in the “third world,” have sparked social

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<sup>279</sup> J. Sachs, *Financial Times*, June 14, 2000, as quoted in J. Mutethia, *supra* note 260. See also I. Simonovic, “State Sovereignty And Globalization: Are Some States More Equal? (2000) 28 Georgia Journal of International and Comparative Law 381 at 386, stating that, “Globalization exposes national economies not only to the benefits but also to the instabilities related to the changes of the global market. The financial crises in Asia and the Russia Federation impacted economies all over the world. A number of developing countries have become victims of the world market...and are now even worse off.”

<sup>280</sup> A. Orford and J. Beard “Making the State Safe for the Market, *supra* note 197 at 199.

<sup>281</sup> O. Obasanjo, Statement by the Nigerian President O. Obasanjo at the summit of heads of state and government of the Group of Fifteen held in Cairo, Egypt, 19-20 June 2000. As quoted in J. Mutethia, “Africa And Globalization” on line: <http://www.globalpolicy.org/socecon/develop/africa/glob.htm> (visited: 5/20/02).

and political turmoil, especially in countries that are ethnically divided. This might be because many of the leaders of these ethnic groups see the implementation of the measures prescribed under the SAPs as a pretence by one or two ethnic groups to marginalize and undermine their interests in the country.<sup>282</sup> As the Secretary General of the United Nations observed:

In many African countries painful structural adjustment programmes have led to a significant reduction in social spending and consequent reductions in the delivery of many of the most basic social services. Especially when this is coupled with a perception that certain groups are not receiving a fair share of diminishing resources, the potential for conflict is evident.<sup>283</sup>

Thus, the IMF/World Bank and the MNCs are the real powers in most of “third world” countries, since they virtually dictate the economic policies of these countries. These policies have failed to produce the purported and desired effects of a good life, economic progress, stability, and development for these countries. This is very much like the colonial period when international law was used to give legitimacy to the domination and exploitation of “third world” countries, i.e., their resources and peoples. In the present age of globalization, international economic and monetary laws in the hands of the IMF/World Bank and the developed countries that control them are serving very much the same purpose, that is, undermining the sovereignty of ‘third world’ countries. The consequences of both eras are almost the same (i.e., the colonial period and the current globalization period), since the policy prescriptions of these institutions tend to

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<sup>282</sup> J. Stiglitz, “What I Learned at the World Economic Crisis” on line: <http://www.tnr.com/041700/stiglitz041700.html> (visited: 06/14/02).

orchestrate poverty, famine, inequality, destitution, and desperation. These problems help to produce various forms of social and political instability, which then causes significant refugee flows.<sup>284</sup>

### 3.3. GLOBALIZATION AND THE PRODUCTION OF INSTABILITY

Thus, the implementation of SAPs and the activities of MNCs in the “third world” have created conditions that trigger off wars, riots, ethnic strife, and other forms of catastrophic situations that generate instabilities in these countries and then massive refugee flows.<sup>285</sup> For instance, as Michel Chossudovsky notes regarding the Rwandan crisis:

The brutality of the massacres has shocked the world community, but what the international press fails to mention is that the civil war was preceded by the flare-up of deep-seated economic crisis. It was the restructuring of the agricultural system, which precipitated the population into abject poverty and destitution. This deterioration of the economic environment which immediately followed the collapse of the international coffee market and the imposition of sweeping macro-economic reforms by the Bretton Woods institutions-exacerbated simmering ethnic tensions and accelerated the process of political collapse...<sup>286</sup>

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<sup>283</sup> Secretary General of The United Nations’ Report, “The Causes Of Conflict and The Promotion Of Durable Peace and Sustainable Development In Africa” (1998) 10 African Journal of Intern. & Comp. Law 549572.

<sup>284</sup> V.R. Krishna Iyer, “Globalization Threatens Humanism” on line: <http://202.64.82.162/daga/press/ia/glob/glob02.htm> (visited: 8/8/02) at 16.

<sup>285</sup> Even the United Nations acknowledges the fact that the conditionalities that normally accompany IMF/World Bank loans and grants are often antithetical to peace and can generate wars or crisis or at least exacerbate them. As the UN Secretary General observed in this report: “...It is particularly necessary to avoid situations in which conditionalities are imposed that are antithetical to the peace process, or in which in international financial institutions and the donor community cut off funds from a weak government making a good faith, popularly supported effort to pursue reconciliation or implement peace agreements. Where economic reform is needed, it is necessary to consider how best to provide for a “peace-friendly” structural adjustment programme while easing the conditionality that normally accompanies loans from the Bretton Woods institutions.” *Supra* note 283 at 568.

Several factors contributed to the Rwanda genocide of 1994. One such factor was the ethnic tensions and animosities that existed between the Hutus and the Tutsis. This ethnic tension could partly be attributed to the colonial legacy left behind by Belgium. In that regard the colonialist authorities used the minority Tutsis in the administration of the country. This resulted in the Tutsis been accorded many privileges over the majority Hutus.<sup>287</sup> The Hutus resented this treatment and demanded improvement in their conditions. According to Gregory Gordon, “this led to a 1959 Hutus uprising in which Tutsis were massacred throughout the country.”<sup>288</sup> This marked the inauguration of the cycle of violence between the parties that ultimately culminated in the genocide of 1994.<sup>289</sup>

However, “the 1990 Rwanda ethnic strife between the Tutsis and the Hutus was largely (not solely) fuelled by the collapse of the Rwanda economy under the tutelage of the IMF.”<sup>290</sup> The Rwandan economy has depended mainly on coffee, which provides

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<sup>286</sup> M. Chossudovsky, “IMF-World Bank Policies and Rwandan Holocaust” on line: <http://www.hartford-hwp.com/archives/35/033.html> (visited: 6/25/02).

<sup>287</sup> S. Gordon, “A War of Media, Words, Newspapers, and Radio Stations”: The ICTR Media Trial Verdict and a New Chapter in The International Law of hate Speech” (2004) 45 Va. J. Int’l L. 139 at 154. See also, A. Storey, “Structural Adjustment, State Power and Genocide: The World Bank and Rwanda” Paper presented at the conference on “The Global Constitution of Failed States”: Consequences of New Imperialism?” Sussex, 18-20 April, 2001, at 3, stating that” Tutsi were systematically favoured in employment and education and accorded the status of superior race.”

<sup>288</sup> G.S. Gordon, *ibid.* at 154.

<sup>289</sup> *Ibid.*

<sup>290</sup> S. Aluko, “The Economic and Political Failure of Globalization in Africa” on line: <http://www.aboutsudan.com/conferences/khartoum/aluko.htm> (visited 10/12/2002). Chossudovsky was of the view that the drop of the coffee price by more than 50 percent, following political pressure from Washington on the coffee producers on behalf of U.S. coffee traders, dealt a serious blow to the Rwandan economy, and contributed in the exacerbation of the ethnic tensions in that country. See M. Chossudovsky,

about 80 percent of its foreign exchange earnings. Because of the fragile nature of the Rwandan economy, that is, a mono-product economy that depended on coffee, the drop in price precipitated a crisis in the state. Notwithstanding the drop in the price of coffee, which diminished the finances that accrued to the state, a large portion of state finances was devoted to debt servicing. This occasioned the demise of state institutions, with the result that the pre-existing inter-group tensions in the country were further exacerbated. In the bid to resuscitate the economy and ease social and political tensions in the country, the Rwandan government approached the World Bank for further loans. As conditions for the loan and other forms of assistance, the World Bank gave the country the usual prescriptions: trade liberalization, devaluation of currency, phasing out of subsidies on agriculture, and retrenchment of workers in public enterprises.<sup>291</sup>

All these conditions were imposed on Rwanda by the World Bank in the midst of a very debilitating social, economic, and political crisis that had already engulfed the country. Many aspects of the crisis arose from implementation of the reform measures already prescribed by the IFIs. In carrying out the latest rounds of conditionalities imposed on it by the World Bank, Rwanda devalued its currency by 50 percent in November 1990, in the heat of the invasion by the rebel Rwandan Patriotic Front from Uganda.<sup>292</sup> The devaluation further aggravated the already tense situation in the country: the prices of essential goods skyrocketed, and state workers were retrenched enmasse. Social services were also cut, and the state apparatus and other public enterprises

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“IMF-World Policies and Rwandan Holocaust” on line: <http://www.hartford-hwp.com/archives/35/033.html> (visited: 06/25/02).

<sup>291</sup> *Ibid.*



virtually collapsed. Even in the heat of the civil war in June 1992, the IMF ordered the further devaluation of the currency, and that led to another round of escalation in the prices of essential goods and services. The implementation of a trade liberalization scheme as part of the IMF imposed conditionalities also led to the destabilization of local markets following the importation of heavily subsidized cheap food into the country.

Under IMF/World Bank imposed SAP, “third world” countries are compelled to grow a limited variety of foods and to remove subsidies on agriculture. This happens while the developed countries still subsidize their farmers to the tune of about \$350 billion a year, and allow their cheap food to flood “third world” markets. “Third world” countries do not have similar advantages in the markets of the developed states.<sup>293</sup> This has caused the undermining of local farming in the “third world”, and has forced many farmers into unemployment.<sup>294</sup> As Michel Chossudovsky further observes,

Under “the free market” system imposed on Rwanda, neither cash crops nor food crops were economically viable. The entire agricultural system was pushed into crisis, the State administrative apparatus was in disarray due to the civil war but also as a result of the austerity measures and sinking civil service salaries...A situation which inevitably contributed to exacerbating the climate of generalized insecurity which had unfolded in 1992...<sup>295</sup>

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<sup>292</sup> *Ibid.*

<sup>293</sup> J. Vidal, “Hunger Still Stalks a World of Plenty” *The Guardian Weekly* August 22 to 28 2002 at 6. See also W. Finnegan, *The Economics of Empire* *supra* note 216 at 42 stating that “Not only is the case for President Bush’s opinion that ‘free trade is good for both wealthy and impoverished nations’ empirically feeble; there is plenty of evidence that rich countries, starting with the United States, have no intention of playing by the trade rules and strictures they foist on poorer, weaker countries as ‘a single sustainable model.’”

<sup>294</sup> J. Vidal, *ibid.* at 6.

<sup>295</sup> M. Chossudovsky, “IMF-World Bank Policies and the Rwandan Holocaust” on line: <http://www.hartford-hwp.com/archives/35/033.html> (visited 6/25/02).

The implementation of the IMF/World Bank's SAP contributed immensely to breeding poverty in Rwanda, because many people lost their jobs following the privatization of public enterprises, and also because many became poor through the devaluation of the national currency. This state of abject poverty further exacerbated the conflicts and state of instability in Rwanda as many jobless and destitute citizens of that country became easy recruits for the rebels and other warring factions. The Rwandan case demonstrates the extent to which the application of the harsh conditionalities of the IMF/World Bank and other donor nations can contribute to creating situations that can degenerate into wars and generalized social disorder. One of the horrifying consequences of this war and general anarchy was the production of large number of refugees, who fled Rwanda into the Democratic Republic of Congo (formerly Zaire) and Tanzania.<sup>296</sup> By the end of 1994, over 1.7 million refugees were said to have fled Rwanda; this estimate included one million in Zaire, 550,000 in Tanzania, 160,000 in Burundi, and 5,000 in Uganda.<sup>297</sup>

Market deregulation has also contributed to sustaining warring parties in their fight for control of state power. During the Cold War period, these rebel leaders had depended

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<sup>296</sup> As at 1994, about nine-tenths of the population of Rwanda was displaced, see S. Browne "Aid And Conflict in Rwanda" WIDER ANGLE, August 1999 No. 1/99 at 3. Also, the genocide led to the massacre of over 800,000 people between April and June 1994. See A. Storey, "Structural Adjustment, State Power and Genocide: the World Bank and Rwanda" *supra* note 237 at 4.

<sup>297</sup> B. K. McCalmon, "States, Refugees, And Self-Defense" (1996) 10 Georgetown Immigration Law Journal 215 at 222. See also, T. Howland, "Refoulement of Rwandan Refugees: The UNHCR'S Lost Opportunity to Ground Temporary Refuge in Human Rights Law" (1998) 4 U.C. Davis Journal of International Law and Policy 73 at 78, the author gave 2.5 million as the estimated numbers of refugees that fled Rwanda as at the end of 1994.

on patronage from the superpowers to sustain their struggle.<sup>298</sup> For instance, in Angola, the former rebel leader, Jonas Savimbi, was able to sustain his campaign and maintain some level of independence for a very long time because of his engagement in diamond trading, which he controlled in the northern part of the country.<sup>299</sup> With this trade in diamonds, made possible in part by liberalization and globalization, the UNITA rebels of Angola were able to run a nearly independent state, purchase their arms, and food, and maintain a pseudo-state apparatus. As Mark Duffield observes,

Maintaining the political entities associated with post-nation state conflict usually requires transregional linkages. At the same time, the marketing of local resources and procurement of arms and supplies is based on access to global markets and, very often, transcontinental smuggling or grey commercial networks. In many respects, contemporary war economies reproduce the networked structures associated with globalization, such as parallel and trans-border trade patterns.<sup>300</sup>

The warlords in Angola not only depended on these external trade networks and supports to market the resources under their control, but also used them to purchase their needs - arms, food, clothing, fuel, and equipment spare parts. They were known to have exported high value commodities like diamonds, hardwoods, narcotics, etc. As Mark Duffield further notes, “today’s warlords and failed states may act locally, but in order to

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<sup>298</sup> M. Duffield, “Globalization And War Economies: Promoting Order Or The Return of History?” (1999) 23 *Fletcher Forum of World Affairs*, 21 at 26 & 27.

<sup>299</sup> *Ibid.* at 27. UNITA controlled about 60 percent to 70 percent of Angola and this generated billions of dollars for them. *Ibid.* at 30.

<sup>300</sup> *Ibid.* at 27. Arguing that: “...the same forces of globalization that have encouraged parallel trade—particularly market liberalization and deregulation—have also made possible the expansion of economic activity that contributes to instability.” The UNITA war effort in the late 1990s was largely underwritten by de Beers, the world acclaimed dealer in diamonds.

survive, they have to think globally.”<sup>301</sup> For instance, the former Liberian warlord Charles Taylor was able to sustain his war effort and campaign because of his trading in hardwood and diamonds. Taylor was reputed to have supplied in the early 1990s, “a third of France’s tropical hardwood requirements through French companies.”<sup>302</sup>

Similarly, the war in Sierra Leone was sustained for several years by the Revolutionary United Front (RUF), led by Thomas Sankoh, through its trade in diamonds. The war was motivated in part by the greed for wealth.<sup>303</sup> The RUF did not seem to have any constituency, and acted only for its own interest.<sup>304</sup> Their aim was not only to kill the armies of their rivals, but also to maim and kill civilians and cause a general sense of insecurity, which would enable them continue with their trade in diamonds and other resources under their control. Most wars generally are rooted in

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<sup>301</sup> Mark Duffield, *ibid.* at 29.

<sup>302</sup> *Ibid.*

<sup>303</sup> I am not suggesting that the wars in Liberia and Sierra Leone would not have been fought, if economic globalization had not played any role. I cannot discount the fact that many years of corruption, misrule, and “governmental neglect of the population” in both Sierra Leone and Liberia, which was the lot of these two countries, must have contributed to generating the conflicts. One cannot ignore the contributions made to the conflicts by the colonial legacy of flawed state structure that encouraged corruption and other forms of misrule. Rather, the argument is that, as a result of the ability of the warlords to sustain conflict through engagement in international trade made possible by the liberalization of trade and commerce, there were very few incentives for them to accept and embark on any meaningful peaceful resolution of the conflicts. The wars with their attendant consequences were thereby prolonged and heightened (especially in terms of massive refugees production). See B. Akinrinade, “International Humanitarian Law and the Conflict in Sierra Leone” (2001) 15 *Notre Dame Journal of Law, Ethics and Public Policy* 391 at 392 & 396. See also S. Selvendran, “UN Report Links Liberian President With Illicit Diamond Trade and Rebels in Sierra Leone While UN Peacekeeping Forces Struggle To keep Order” (2001) 17:2 *International Enforcement Law Reporter* 74. See further, J. O’Connell, “Here Interest Meets Humanity: How To End The War and Support Reconstruction in Liberia, and the Case For Modest American Leadership” (2004) 17 *Harvard Human Rights Journal* 207 at 213-216. Also see, O. C. Okafor, “Convention Refugeehood, Early Warning Signs, and The Structural Crisis of Legitimate Statehood in Contemporary Nigeria” (2003) 9 *Buffalo Human Rights Law Review* 1.

<sup>304</sup> L.Axworthy, *Navigating A New World: Canada’s Global Future*, *supra* note 196 at 345, observing that the primary aim of most rebel leaders and warlords is to control the mineral resources in the area of their occupation.

complex causes. The Liberian and Sierra Leonean wars are no exception. Indeed, some of the root causes of these two wars are traceable to “a history of corrupt and unaccountable governance; a deep rooted political culture of violence; a crisis in youth employment and opportunities.”<sup>305</sup> However, the point being made here is that trade in diamonds and other mineral resources in the two countries fuelled the wars. The recognition of the devastating impact of trade in diamonds on these wars prompted the General Assembly of the United Nations to pass a resolution authorizing the certification of all diamonds originating from these countries.<sup>306</sup> This resolution was a recognition that trade in diamonds could be linked to the fuelling of the crisis and undermining all legitimate efforts to peaceful resolutions of the conflicts.<sup>307</sup> As a result of both wars (i.e. in Sierra Leone and Liberia) about two million and one million people respectively fled their “homes in the 1990s” to neighbouring countries and around the world in search of refuge.<sup>308</sup>

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<sup>305</sup> T. Kelsall, “Politics, Anti-politics, International Justice: Notes on the Special Court for Sierra Leone” Being a paper submitted to the conference (‘Settling Accounts: Truth, Justice and Redress in Post-conflict Societies,’ held at Weatherhead Centre for International Affairs, Harvard University, 1-4 November 2004) at 8.

<sup>306</sup> General Assembly of the UN, “The Role of Diamonds in Fuelling Conflicts” A/58/L.59 “Despite the devastation that armed conflicts bring, there are many who profit from chaos and lack of accountability, and who may have little or no interest in stopping a conflict and much interest in prolonging it. Very high on the list of those who profit from conflict in Africa are international arms merchants. Also high on the list, usually, are the protagonists themselves. In Liberia, the control and exploitation of diamonds, timber and other raw materials was one of the principal objectives of the warring factions. Control over those resources financed the various factions and gave them the means to sustain the conflict. Clearly, many of the protagonists had a strong financial interest in seeing the conflict prolonged.” See Secretary General of the UN Report, “The Causes of Conflict and Promotion of Durable Peace and Sustainable Development in Africa” (1998) 10 African Journal of Intern. & Comp. Law 549 at 553. See also H. Hongju Koh “1999 Country Reports on Human Rights Practices” (2000) The DISAM Journal (Spring) 74 at 82.

<sup>307</sup> General Assembly of the UN, “General Assembly Reaffirms Strong Support for Global Certification Scheme to Disrupt Diamond Smuggling” GA/10319.

<sup>308</sup> J. O’Connell, “Here Interest Meets Humanity” *supra* note 303 at 213 & 214.

The war in Afghanistan, with its attendant massive generation of refugee flows,<sup>309</sup> cannot be blamed solely on globalization, but this phenomenon helped in sustaining and exacerbating that war. The argument being made here is not that this war would not have been fought without globalization of trade and commerce; instead, the argument is that, all too often, scholars and commentators tend to overlook the contributions made by the globalization phenomenon to creating, and at times prolonging and sustaining, the war efforts of both the rebels and government parties to the conflicts. Almost all the warring factions and warlords were engaged in one form of transborder trading or another to sustain their war efforts and followings. For instance, Ahmad Shah Massoud, who built and maintained a very extensive network of resistance against the Taliban, had nearly sole control of the trade in emeralds and other gems in Northeastern Afghanistan, which was then under his control.<sup>310</sup> Before the 1999 agreement he signed with a Polish firm, Inter-Commerce, for the supply of emeralds to the company, he was estimated as earning about \$40-60 million per annum from the trade, while the agreement with Inter-Commerce was estimated to have earned him \$200 million per annum.<sup>311</sup>

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<sup>309</sup> H. Hongju Koh, *supra* note 306 at 83. Before the United States led attack on Afghanistan in 2001, an estimated 2.6 million Afghans were living outside the country as refugees; while about 250,000 were internally displaced. See also, M. Bearden, "Graveyard of Empires: Afghanistan's Treacherous Peaks" in James F. Hoge & Gideon Rose, eds., *How Did This Happen? Terrorism and the New War* (New York: BBS Public Affairs, 2001) 81 at 92, stating: "The West fleetingly saw the Taliban as the source of new order and a possible tool in yet another replay of the Great Game: the race for the energy riches of Central Asia. U.S. and foreign oil firms were looking for ways to pipe the vast natural-gas reserves of Turkmenistan to energy-starved markets in Pakistan. By 1996, most of the route of the proposed pipeline was loosely under Taliban control, and the match of politics, power, and energy seemed attractive." See further, R. Menon, "The Restless Region: The Brittle States of Central and South Asia" 97 at 98, in James F. Hoge & Gideon Rose (eds.)

<sup>310</sup> B. R. Rubin, "The Political Economy of War and Peace in Afghanistan" (2000) 28:10 *World Development* 1789 at 1793.

<sup>311</sup> *Ibid.* 1797.

The Taliban were also engaged in transborder trading and smuggling with Pakistan, Saudi Arabia, Dubai, and Iran. As Barnett R. Rubin has noted, “The Taliban, like their opponents, are thus not throwbacks to medieval times but actors in today’s global economy and society. For the first time in history, *Ulama* dominate political and military life in Afghanistan because of geopolitics and resources made available by globalization.”<sup>312</sup> Thus, globalization, through market liberalization, not only, in some cases, creates the conditions that trigger wars and other general situations of anarchy, but also sustains, promotes, and exacerbates the wars. The leaders of the warring factions have no incentive to engage in any meaningful peace process, since they can sustain their war efforts through the sale of resources under their control in a global free market. As the Secretary General of the United Nations has noted,

During the cold war, external efforts to bolster or undermine African governments were a familiar feature of super-power competition. With the end of the cold war, external intervention has diminished but has not disappeared. In the competition for oil and other precious resources in Africa, interests external to Africa continue to play a large and sometimes decisive role, both in suppressing conflict and in sustaining it.<sup>313</sup>

All these wars have led to the loss of millions of lives and caused damage to property worth millions of dollars. They have also led to the displacement of large numbers of persons as refugees. As observed by the Secretary General of the United Nations, “...In 1996 alone, 14 of 53 countries of Africa were afflicted by armed conflicts, accounting for more than half of all war-related deaths worldwide

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<sup>312</sup> *Ibid.*

<sup>313</sup> Secretary General of The UN Report, *supra* note 283 at 552.

and resulting in more than 8 million refugees, returnees and displaced persons.”<sup>314</sup>

In fact, all over the world there were over 60 “separate armed conflicts during the 1990s, claiming hundreds of thousands dead and creating more than 17 million refugees.”<sup>315</sup>

It must be recognized that the implementation of SAPs in “third world” countries has led to the production of states of hopelessness and desperation among the highly impoverished populations of these countries.<sup>316</sup> In this state of desperation and destitution, the citizens of these countries have responded through protests, strikes, riots, and demonstrations of all forms of dissent and disobedience.<sup>317</sup> A few examples will suffice. In 1989, there was an anti-SAP riot in Caracas as a result of 200 percent increase in the price of bread. The government response was to send in soldiers, police, and other security personnel, who opened fire on unarmed men, women, and children. The result was the deaths of many persons and the arrest and detention of several others. Similar riots took place in 1984 in Tunis over increases in the prices of food, especially bread.<sup>318</sup> Nigeria and Morocco witnessed anti SAP protests and riots in 1989 and 1990

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<sup>314</sup> *Ibid.* at 549 & 550.

<sup>315</sup> Committee for a Workers’ International (CWI), “Smash the IMF and World Bank! A Socialist Alternative to Global Capitalism” on line: <http://users.pandora.be/militant.links/ml/imf.html> (visited: 6/25/02) at 5 -6.

<sup>316</sup> M. Chossudovsky, “Global Impoverishment and the IMF-World Bank” on line: [http://aidc.org.za/archives/global\\_imp\\_and\\_IMF.html](http://aidc.org.za/archives/global_imp_and_IMF.html) (visited: 5/20/02).

<sup>317</sup> S. Agbakwa, “Reclaiming Humanity, *supra* note 246 at 198&199.

<sup>318</sup> M. Chossudovsky, “Global Impoverishment and the IMF-World Bank” on line: [http://aidc.org.za/archives/global\\_imp\\_and\\_IMF.html](http://aidc.org.za/archives/global_imp_and_IMF.html) (visited: 5/20/02).



respectively, all against government implementation of IMF/World Bank sponsored economic reforms.<sup>319</sup>

It is fair to say that some of these anti-SAP riots and demonstrations have instigated regime change in some “third world” countries. At the very least, it is correct to say that those involved in the overthrow of the governments in question have often cited the riots that arose from price increases as the reason for their taking over the government. For instance, on March 25, 1985, President Nimeiry of Sudan cut subsidies on bread, soap, and gasoline, as much as 66 percent on some essential commodities, as part of the implementation of an austerity package imposed on the country by the IMF.<sup>320</sup> This led to nationwide protests and riots and, on April 6, 1985, there was a military coup ousting Nimeiry from power.<sup>321</sup> In Liberia, the leaders of the coup that ousted President Tubman from power cited, as one of the reasons for their intervention, the rice riots that arose in the aftermath of price increases necessitated by the austerity package that was imposed to satisfy IMF prescriptions.<sup>322</sup>

Unfortunately, the response of most governments in the face of the resistance of their citizens to the implementation of these IMF and World Bank austerity measures has in almost all cases been brutally similar: deployment of police and other security agents who have arrested, detained, or killed protesters and massively violated the human rights of all citizens. As a result of these gross abuses of the human rights of the populations of

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<sup>319</sup> *Ibid.*

<sup>320</sup> H. S. Bienen and M. Gersovitz, “Consumer Subsidy Cuts, Violence and Political Stability” (1986) 19:1 *Comparative Politics* 25 at 40.

<sup>321</sup> *Ibid.*

these countries, many have fled their respective countries for fear of persecution and other forms of abuse of their rights, and have sought refuge in other countries. Similarly, Jacques J. Polak has observed that "...Disregard for human rights has not in general constituted a bar to access to the Fund, as is evident from the Fund's active financial relations with repressive regimes in countries such as Chile, Democratic Republic of Congo, Uganda, Liberia, or Romania."<sup>323</sup> B.S. Chimni has noted that "...The international financial institutions which Northern states control compel poor countries in the South to follow economic policies which lead to mass violation of human rights."<sup>324</sup> Of course, violations of human rights are root causes of refugee flows.<sup>325</sup> Perhaps it is this fact that prompted Yinka Adegugbe to observe that,

The IMF and World Bank are our greatest enemies. This may not be obvious to our ill-equipped, unwise and fraudulent leaders who with their so-called special advisers have sold their soul to the devil. Until we have leaders that can stand up and negotiate us out of this bondage called contract with these Bretton Wood institutions, our promised land will remain out of reach.<sup>326</sup>

As stated previously, economic globalization processes are designed, implemented or executed in ways that create a favourable environment for the operations of MNCs (especially in the "third world"). As observed by Robert McCorquodale, "...Of the world's biggest economies, only 49 are states, while the remaining 51 economies are

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<sup>322</sup> *Ibid.* at 33.

<sup>323</sup> J. J. Polak, *The Changing Nature of IMF Conditionality*, *supra* note 231 at 31.

<sup>324</sup> B.S. Chimni, *Globalization, Humanitarianism*, *supra* note 222 at 9.

<sup>325</sup> A. Orford, "Locating The International," *supra* note 210 at 444.

corporations. Thus, the Heads of State [of many “third world” countries] may have much less impact on both individuals and on world events than those in charge of transnational corporations.”<sup>327</sup> Similarly, the Committee for a Workers’ International has noted that “the multinationals are in control of the world market and world trade”.<sup>328</sup> The biggest three banana companies have 80 percent of world banana trade: “the three biggest cocoa companies have 83 percent of world cocoa trade, etc.”<sup>329</sup> Thus, “the world’s biggest companies now control 70 percent of world trade. Global capitalism is led by a few hundred giant multinationals, which are often richer than nations.”<sup>330</sup> Since these corporations are, in some cases, more powerful and richer than their host governments in the “third world,” the corporations for the most part dictate to governments on matters that ordinarily should be in the exclusive domain of these countries, and guided only by the interests of their populations.<sup>331</sup>

Thomas Donaldson notes that “with the exception of a handful of national states, multinationals are alone in possessing the size, technology, and economic reach

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<sup>326</sup> Y. Adekugbe, “Globalization or Gbajuelisation” *Nigerian World* Feature Article Wednesday, August 7, 2002.

<sup>327</sup> R. McCorquodale & R. Fairbrother, *supra* note 218 at 738. See also, J. Pilger “The New Rulers of the World?” on line: <http://pilger.carlton.com/globalisation> (visited: 04/22/03), stating that multinational corporations act as the “principal motors of globalisation.”

<sup>328</sup> Today there are about 5,000 strategic multinational corporations controlling 75 percent of world trade. See S. Aluko, *The Economic and Political Failure of Globalization in Africa* (Nigeria: 2000) at Para. 16, (on file with the author).

<sup>329</sup> Committee for a Worker International (CWI) “Smash the IMF” *supra* note 217 at 8.

<sup>330</sup> *Ibid.* at 5.

<sup>331</sup> See J. Pilger, “The New Rulers of the World?” on line: <http://pilger.carlton.com/globalisation> (visited: 04/22/03) stating that “the central problem with the free trade agenda is that it pits the world’s most powerful corporations against the fledgling industries of developing countries, and removes the regulations protecting them.”

necessary to influence human affairs on global basis.”<sup>332</sup> The sales of some of the MNCs in a year are much bigger than the GNP of most “third world” countries. According to 1981 figures supplied by the UN, EXXON was said to have made sales of US\$63.896 billion and General Motors, US\$63.211 billion, whereas in that same year the GNP of Nigeria was US\$48, billion, Kenya, US\$15.307 billion, and Chile US\$15.770 billion.<sup>333</sup>

Furthermore, some of MNCs collude with the governments of their host countries to violate the human rights of local citizens by paying for military operations that invade and destroy villages and towns, as well as by providing weapons for carrying out other forms of human rights abuses against the populations of their host countries.<sup>334</sup> Thus the MNCs sometimes contribute to the exacerbation of existing conflicts by supplying arms and transportation facilities to local armies or by giving support to rebels. In other cases, the MNCs exploit resources in disputed areas of the “third world” countries and, by so doing, encourage the coercive activities of governments or rebels through payment of

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<sup>332</sup> T. Donaldson, *The Ethics of International Business* (New York: Oxford University Press, 1989) at 31. See also B. Stern, “How To Regulate Globalization?” in M. Byers (ed.) *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford: Oxford University Press, 2000) 247 at 248 where the author stated: “Moreover, transnational firms are major actors in contemporary international relations, their importance being comparable to the economic weight of many States. As an example, it may be recalled that the annual turnover of ITT was higher than the Gross National Product of Chile at the time President Allende was overthrown, and it has been contended that ITT contributed to that event.”

<sup>333</sup> K.C. Abraham, “Globalization And Liberative Solidarity” in George Matthews Chunakara (ed.) *Globalization and Its Impact On Human Rights* on line: <http://www.religion-online.org/cgi-bin/researchd.dll/showchapter? Chap...> (Visited: 7/16/02). See also B.S. Chimni, *Globalisation, Humanitarianism, supra* note 2021 at 4, stating, “The assets of the top three billionaires in the world are more than the combined GNP of all the least developed countries and their 600 million people.”

<sup>334</sup> A.K. Sacharoff, “Multinationals In Host Countries: Can They be Held Liable Under the Alien Tort Claims Act For Human Rights Violations? (1998) 23:3 Brook. J. Int’l. L. 927 at 963.

royalties and provision of other forms of assistance that help to sustain their campaigns.<sup>335</sup>

The activities and operations of some MNCs have damaged and devastated the environment of their host states in the “third world.” The harmful effects constitute a threat to both the lives and the health of citizens.<sup>336</sup> Through the massive discharge of hazardous substances into the environment, the people’s sources of food and water are polluted.<sup>337</sup> The immediate consequence is the aggravation of the already poor health and living conditions of the populations in the affected areas of these countries.

When the emboldened and courageous citizens in some “third world” countries challenged the MNCs over the conditions foisted on them by their activities which adversely affect their lives and livelihoods, by way of protest the response of MNCs in most cases has been to instigate, actively encourage and collude with their host governments in intimidating, arresting, killing, committing other human rights violations against the citizens of these countries. For instance, Enron Corporation, which was a Texas based corporation, had the single largest foreign investment in India by virtue of its ownership of 50 percent of Dabhol Power Corporation.<sup>338</sup> Because of what they perceived to be the adverse effects of the power plants on their environment and

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<sup>335</sup> Oxfam, “Globalization: Submission to the UK Government’s White Paper On Globalization” on line:<http://www.Oxfam.org.uk/policy/papers/global/global12.htm> ( visited:6/17/02).

<sup>336</sup> Amicus Brief for *Beanal v. Freeport McMoran* on line: <http://www.earthrights.org/beanal/amicus.html> (visited: 3/26/02).

<sup>337</sup> *Ibid.*

<sup>338</sup> A. Ganesan, “Business and Human Rights-The Bottom Line” on line: <http://www.hrw.org/advocacy/corporations/commentary.htm> (visited: 3/26/02).

economy, the people of the area of the plant site demonstrated against it.<sup>339</sup> The response of the police was to arrest, detain, and bring trumped up charges against the protesters. Interestingly, Enron paid the officers that committed these abuses and the abuses in most cases took place at the entrance to an Enron plant.<sup>340</sup>

The harmful environmental practices of MNCs in the “third world” have unfortunately seemed to receive the tacit approval of the international financial institutions. The former U.S. Treasury Secretary in the Clinton administration and a former chief economist at the World Bank, who is now president of Harvard University, has stated that,

I think the economic logic behind dumping a load of toxic waste in the lowest wage country is impeccable and we should face up to that...I’ve always thought that under-populated countries in Africa are vastly under-polluted; their air quality is probably vastly inefficiently [high] compared to Los Angeles or Mexico City.<sup>341</sup>

Some MNCs export pesticides unregistered or banned (known to have adverse effects both on people’s health and the environment) in their own countries of origin to the “third world”. For instance, in the United States about “forty-three pesticides have been banned by the EPA and ten have severely restricted uses,” yet American corporations are still able to export these pesticides, and developing nations are often the destination. One large American Oil Company, for example, sells a host of banned or severely restricted pesticides to developing countries, including DDT, aldrin, dieldrin,

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<sup>339</sup> *Ibid.*

<sup>340</sup> *Ibid.*

heptachlor, chlordane, endrin, lindane, BHC and silvex.<sup>342</sup> Like the other adverse environmental practices of the MNCs, the export of pesticides to “third world” countries helps to contaminate peoples’ water supplies and their soil, and to expose the populations to serious health problems.<sup>343</sup>

The situation is made even worse because of the absence of relevant resources and quality control inspections in these countries to “test, monitor, or regulate the pesticides imported across their borders.”<sup>344</sup> Poor health conditions, coupled with the absence of basic health facilities, lead to the exacerbation of the poverty situations in some “third world” countries, and to the heightening of tensions between the government and the governed.<sup>345</sup>

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<sup>341</sup> Memo by Lawrence Summers, “Let Them Eat Pollution,” *Economist* (London), Feb. 8, 1992, at 66; as quoted in S. Agbakwa, “Reclaiming Humanity” *supra* note 246 at 203.

<sup>342</sup> J. H. Colopy, “Poisoning The Developing World: The Exportation of Unregistered And Severely Restricted Pesticides from the United States (1994-1995) 13:1 *UCLA Journal of Environmental Law & Policy* 167 at 170. Even the international financial institutions encourage the practice of exporting or manufacturing in the “third world” hazardous pesticides banned in the developed countries. For instance, the World Bank lent about one billion dollars to India to set up the pesticides and fertilizer industry. The industry created is engaged in the manufacture of DDT and BHC, which banned or restricted in developed countries. See J.H. Colopy *ibid.* at 181. See also B. M. Rich, “The Multilateral Development Banks, Environmental Policy, And the United States (1985) 12 *Ecology L.Q.* 697.

<sup>343</sup> J. H. Colopy *ibid.* at 168.

<sup>344</sup> *Ibid.*

<sup>345</sup> A.K. Sacharoff, “Multinationals in Host Countries: Can They Be Held Liable Under the Alien Tort Claims Act for Human Rights Violations? (1998) 23:3 *Brook. J. Int’l L.* 927. The coup of 1954 in Guatemala was orchestrated by the United Fruit Company a U.S. multinational corporation that feared that the land reform policies of then government would affect it adversely and lead to expropriation of its property. See also B. Stern, “How to Regulate Globalization?” *supra* note 332, stating that ITT played a significant role in the removal from power of President Allende of Chile. It is observed that, in some of the coups or removals from power instigated by the MNCs, the successor to the throne has in most cases become a dictator who grossly violates human rights with the active support, encouragement, and connivance of the MNCs. This has led to vocal opponents of such governments fleeing the country for fear of persecution.

MNCs have seemed to sustain military dictators who are known to have abused the human rights of their peoples. Generally, most MNCs seem to prefer to deal with “dictatorial regimes able to override public concern for the environmental impact of projects like oil pipelines” or for the impact of human rights violations associated with their activities in “third world” countries.<sup>346</sup> For instance, in Myanmar, Total (a multinational corporation), is alleged to have provided the military junta with the intelligence they used against the Karen National Union (KNU).<sup>347</sup> Total /Unocal is engaged in a joint venture business for the construction of the Yadana gas pipeline project with the Myanmar military junta, i.e., the State Law and Order Restoration Council (SLORC), which is known for gross abuses of the human rights of its citizens. In a 1991 agreement for the exploration of oil and gas in Myanmar, which was made between Total/Unocal and SLORC, SLORC was to clear the pathway for the passage of the pipeline and for provision of security for the Yadana Gas project.<sup>348</sup>

To execute its part of the joint venture, SLORC used violence and intimidation to force the villagers along the pipeline route to relocate elsewhere.<sup>349</sup> Also, the villagers were forced to “work on the preparation of the area for the construction of the pipeline” without pay.<sup>350</sup> Following these abuses, a widespread “atmosphere of terror and

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<sup>346</sup> Earth Rights International, “Full Text of the “Robinson Cable” on line: <http://www.earthrights.org/burma/robinson.html> (visited: 3/26/02) at 3.

<sup>347</sup> *Ibid.*

<sup>348</sup> *John Doe1 &ors v. UNOCAL CORP, TOTAL S.A. and ors.* On line: <http://www.earthrights.org/unocal/fedcomplaint.html> (visited: 3/26/02) at 8.

<sup>349</sup> *Ibid.* at 3.

<sup>350</sup> *Ibid.* at 10.



repression throughout the country” was imposed or heightened.<sup>351</sup> In the process, many of the villagers lost their lives; others suffered various forms of human rights abuses, such as beatings, burnings, the confiscation of their properties, and rape. Many did flee the country out of fear of persecution.<sup>352</sup>

Moreover, some of these forces of globalization (acting mainly through the MNCs backed by their home governments in the developed states) have instigated and encouraged coups against democratically elected governments in many countries of the “third world,” such as Guatemala, Iran, Brazil, and Chile, in order to sustain trade in particular goods (such as oil) that are of interest to them.<sup>353</sup> For instance, the overthrow of the elected government of Iran in 1953 happened because of the vested interest of some forces of globalization in the oil deposits of that country. Guatemala’s democratically elected government was removed in 1954 at the instigation of the United Fruit Company in order to maintain its monopoly in the banana trade.<sup>354</sup>

Similarly, Elf Oil Company played a big role in the Congo-Brazzaville civil war that was fought in part over control of the country’s petroleum resources.<sup>355</sup> In 1992, after his election as the President of Congo Brazzaville, Pascal Lissouba invited several other

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<sup>351</sup> *Ibid.* at 8.

<sup>352</sup> *Ibid.*

<sup>353</sup> J. Hippler, “Democratisation of the Third World After the End of the Cold War” *supra* note 213, at 3.

<sup>354</sup> *Ibid.*

<sup>355</sup> I. Garys & T. L. Karl, *Bottom Of the Barrel: Africa’s Oil Boom and the Poor* (Maryland: Catholic Relief Services, 2003) at 34. See also, J. Havermans, *Congo Brazzaville: A Democratisation Process Scourged by Violence* (Searching for Peace in Africa, 2000), reprinted on line: [http://www.conflict-prevention.net/dev/ECCP/ECCPSurveys\\_v0\\_10.nsf/0/0AF3400E905F6...](http://www.conflict-prevention.net/dev/ECCP/ECCPSurveys_v0_10.nsf/0/0AF3400E905F6...) (Visited: 06/29/2004).

oil multinational companies to exploit the country's oil fields.<sup>356</sup> Elf, which had been in the country for many year's felt threatened by these invitations and decided to sabotage the country by supporting the President's rivals and by providing the current, President Denis Sassou-Nguesso, with funds to purchase arms for his militia "in exchange for future access to oil under his government."<sup>357</sup> In the civil war that ensued, over 800,000 Congolese fled from their homes as refugees for safety elsewhere between 1998 and 1999.<sup>358</sup> In almost all these *coups d'etat* supported by MNCs, the dethroned elected governments were replaced by dictators who engaged in various forms of gross human rights violations.<sup>359</sup> These events invariably led to refugee flows from these countries.

### 3.4.CONCLUSION

Globalization is making significant contributions to the creation of tensions in the world today, through its role in the genesis and sustenance of wars, poverty, despair, desperation, and destitution around the world, but especially in the "third world".<sup>360</sup> This is because the present form of economic globalization widens and supports the extension of the gap between the rich and poor nations, as well as the gap between the rich and the poor within the same country. The much touted and avowed benefits of globalization are thereby made a mere dream for most and, in fact, an illusion for almost all of the "third

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<sup>356</sup> I. Garys & T. L. Karl, *ibid*.

<sup>357</sup> *Ibid*.

<sup>358</sup> *Ibid*. See also, J. Havermans, *supra* note 355.

<sup>359</sup> J. Hippler, *supra* note 213 at 3.

<sup>360</sup> T. Masland, "Nelson Mandela: The United States Of America Is A Threat To World Peace" *Newsweek* on line: <http://www.msnbc.com/news/806174.asp> (Visited: 9/11/2002), quoting the former South African President Nelson Mandela as saying that the President Bush's decision to attack Iraq is motivated by his desire to please the arms and oil industries in the United States.

world.” As Dr. K.C. Abraham has observed, “On the global level the gap between the rich nations and the poor nations has increased. The average per capita income of the developed world is \$2,400 and that of the developing countries \$180.”<sup>361</sup>

It is contended that this dire economic situation is made possible partly because the current organizing principles of the processes of globalization favour countries with the expertise, capital, and influence to invest and trade in other countries. These resources are lacking in the “third world”. Also, because globalization is being engineered through the agency of IFIs, which imposes stringent economic policies and conditionalities, the enabling environments created for MNCs to operate without regard to the interests, health, human rights, and general well being of the citizens of their host countries in the “third world.” Unfortunately, the language of international law is used to give legitimacy to these manipulations, which encourage continued exploitation and domination of “third world” countries.

The implementation of SAPs, which are one of the operating mechanisms of globalization in the “third world,” has resulted in insecurity in most of these countries. This has arisen because the application of some of the prescriptions of SAPs has resulted in increased unemployment, the absence of basic health care facilities and education, and lack of access to other basic needs, especially food, in some parts of the “third world.” Responding to this state of misery and despair, the people have resorted to protests, riots, demonstrations, and other forms of civil disturbance. The reaction of the governments of

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<sup>361</sup> Dr. K.C. Abraham, “Globalization And Liberative Solidarity” in George Matthews Chunakara ,ed., *Globalization And Its Impact On Human Rights* on line: <http://www.religion-online.org/cgi-bin/researchd.dll/showchapter?Chap...> (Visited: 7/16/02).

far too many of these “third world” countries has been to arrest, detain, kill, imprison, or persecute critics. Consequently, some of the affected people fearing persecution have fled their countries to other places in order to seek refuge. In some cases, the implementation of the SAPs has resulted in increased ethnic tensions, conflicts, and wars with their attendant refugee flows.

Thus, this chapter has explicated in detail the erosion of “third world” control of economic policies through the imposition IMF/World Bank conditionalities directed by developed countries. This control of “third world” economic policies is being legitimated through the language of international law (in this case international economic law). The exploration in this chapter also shows that these policies and the activities of the MNCs have helped and are still helping in the creation of conditions and circumstances that generate massive refugee flows.

In the next two chapters, I will examine the specific impacts of these IMF/World Bank policies and of the activities of the MNCs in both Nigeria and Sudan. The contributions of these policies and activities to the production of refugeehood in the two countries will be surveyed. After that, the focus of this inquiry and analysis will shift to an examination of how the policies and activities of these agents of globalization have contributed and still contributing to a reduction of the abilities of states to respect one of the fundamental principles of refugee protection (i.e., the principle of *non-refoulement*).

## **Chapter Four**

### **THE POLITICS OF GLOBALIZATION IN NIGERIA AND THE PRODUCTION OF REFUGEEHOOD**

#### **4.0. INTRODUCTION**

The preceding chapter explored the linkages between economic globalization and the generation of refugeehood in the “third world.” This chapter will examine the impact of the SAP measures that have been implemented in Nigeria by various governments (both past and present), and will attempt to show how these programmes have undermined the human rights of most Nigerians and caused refugee flows. The chapter will also critically examine the activities of MNCs in Nigeria, especially in the Niger Delta, and will attempt to show how these activities contribute to the production of the refugee flows that originate in Nigeria. The exploration of Nigerian case study in this chapter will support the position that the reason why globalization’s negative impact on “third world” refugee flows remains unchecked is in part because of the continued existence of colonial type undercurrent in the conduct of international relations and in the formulation of the principles of international economic law. However, it is important to note that I am not saying that globalization is solely or even largely responsible for massive refugee flows in Nigeria and other “third world” countries but only significantly responsible.

Indeed, Nigeria, a country of about 120 million people, is a product of British political experimentation. Nigeria emerged in 1914 following the amalgamation of the Northern and Southern protectorates of Nigeria by the then British Governor-General, Lord Lugard. What emerged was a deeply flawed state structure that cobbled together

different nations into one country without determining the will of the peoples affected. Of course one of the driving forces behind this amalgamation of many different nations into one country by the former colonizer (Britain) was trade and commerce.<sup>362</sup> This expansion enabled the former colonizer to exploit both the territory and resources of the new country, Nigeria. International law helped in creating and sustaining this flawed state of affairs. This was because under the rubric of the principles of sovereignty, non-interference in the internal affairs of a state, and the doctrine of *uti possidetis*,<sup>363</sup> the different federating units of Nigeria (especially the minorities) were precluded from opting out of the federation or debating the terms of their continued membership of the Nigerian federation.

Thus, the granting of political independence to Nigeria led to the replacement of external colonialism by internal colonialism. Like the former colonizer, the new internal colonizers seem to have had as their main objectives the control of the land and the resources, particularly the petroleum, which was located in the southern part of the country.<sup>364</sup> This plan quite often led to creation of ethnic and other tensions in the country. Because of the apparent separation between the Nigerian peoples and the state

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<sup>362</sup> A. Anghie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law" (1999) 40:1 Harvard International Law Journal 1 at 36 & 37. See also, M. Mutua, "What Is TWAIL?" (2000) ASIL Proceedings (94<sup>th</sup>) 31 at 34.

<sup>363</sup> According to the Black Law Dictionary, *Uti Possidetis* is "a phrase used to signify that the parties to a treaty are to retain possession of what they have acquired by force..." See, Black Law Dictionary Revised 4<sup>th</sup> Edition (Minnesota: West Publishing co., 1968) at 1715.

<sup>364</sup> C.E. Welch, JR, and M. Sills, *The Martyrdom of Ken Saro-Wiwa and the Future of Ogoni Self-Determination* (Denver: University of Colorado, 1996).

imposed on them through the mechanism of colonialism,<sup>365</sup> the country became a tinderbox waiting to be ignited by any slight misunderstanding.

Notwithstanding its huge human and material resources, the country has moved from one turbulent situation to another. Most of these crises have been facilitated or sustained by some forces of globalization. In its history, the country has had several constitutions. The latest is the 1999 Constitution, which provides in section 14(2) (b) that “the security and welfare of the people shall be the primary purpose of government.”

A reading of section 14(2) (b) and section 16 (1) (b) of the constitution points to the fact that the welfare, interest, protection of the human rights, and provision of security for the Nigerian population shall form the centrepiece of government policy formulation and implementation.<sup>366</sup> Despite the constitutional provisions that mandate the Nigerian government to protect the welfare and human rights of its people, the government seems to be unable to accomplish this, partly (not mostly) because of its possession and exercise of only limited sovereignty over its territory and peoples. The sovereign powers of the Nigerian state are being shared among the government, the IFIs, the MNCs, and the

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<sup>365</sup> J. Oloka-Onyango, “Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-State Actors, and the struggle for Peoples’ Rights in Africa” (2003) 18 *American University International Law Review* 851 at 888. See also, O.C. Okafor, “Convention Refugeehood, Early Warning Signs, and the Structural Crisis of Legitimate Statehood in Contemporary Nigeria” (2003) 9 *Buffalo Human Rights Law Review* 1.

<sup>366</sup> The Constitution of the Federal Republic of Nigeria 1999 (Abuja: Ministry of Justice, 1999). See also, G. Fawehinmi “Chief Fawehinmi’s Electoral Declaration” *Nigeriaworld* feature article Wednesday, April 24, 2002, at 9. (On file with the author).

developed countries that protect and control them.<sup>367</sup> Writing in respect of American MNCs, Michael Breed observes that

American MNCs have achieved an enormous amount of economic and political power as a result of their massive size and international scope. The 100 largest MNCs are larger in terms of their revenue than most states' entire economies. MNCs operating in developing countries often have control over more human and financial resources than the states that are supposed to regulate them. This combination of power and control can lead to human rights violations, for which the MNCs face very little accountability. Their power and control over resources in developing countries also combine to turn MNCs into powerful ambassadors for United States, who frequently interact with both the governments and the populations of developing countries.<sup>368</sup>

This observation is very relevant to Nigerian case. As a result of this absurd arrangement, the power to make economic policies and decisions that impact on the Nigerian peoples

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<sup>367</sup> It is important to note that in today's world, large MNCs are not only big business entities, but also very "powerful economic and political entities" that wield enormous influence on political leaders the whole world over. In the case of third world countries of which Nigeria is one, large MNCs "exert even more control" over them, principally, because the third world countries are "disadvantaged in trade negotiations with global corporations." "For example, developing countries often lack resources and negotiating experience, and have very little to offer in complex deal making. Even if a country has labor laws on the books that protect children and workers, government officials often do not enforce them due to weak bargaining power, or fear that the corporation will relocate to another country." Again, even where the third world countries attempt to "establish strong social safety nets to take care of their workers and children, it is difficult to integrate a developing country's economy into the global economy and to simultaneously protect the people." This is so because, "the policies and practice of the World Trade Organization (WTO) and financial institutions, such as the World Bank and IMF, facilitate international commerce and marginalize human welfare, equity, and social justice. With the pressure of competition stemming from the race to the bottom, developing countries often lower their regulatory requirements for global corporations, ignoring or eliminating laws that protect children or laws that make it difficult to terminate worker. In the final analysis, developing countries remain at the mercy of large corporations whose primary objective is maximizing profits at any price." See R. López, "Corporate Social Responsibility in a Global Economy After September 11: Profits, Freedom, and Human Rights" (2004) 55 Mercer Law Review 739 at 753-755.

<sup>368</sup> L. M. Breed, "Regulating Our 21<sup>ST</sup>-Century Ambassadors: A New Approach To Corporate Liability for Human Rights Violations Abroad" (2002) 42 Virginia Journal of International Law 1005 at 1007-1008.



largely rests now with the TNCs.<sup>369</sup> This absurdity is being given legitimacy by international economic law which has divested “third world” countries of most of their powers to make economic policies that affect their peoples, and vested it in the IFIs and MNCs.

Nigeria’s economy enjoyed relative stability following the birth of the country in 1914. In fact, it experienced a boom in the 1970s.<sup>370</sup> But, in the 1980s, following the glut in the international oil market and the reckless looting of the economy by politicians and other officials of the Second Republic, the Nigerian economy was plunged into a crisis.<sup>371</sup> In their efforts to resuscitate the economy, various Nigerian governments were compelled by powerful external forces [mainly IFIs] into formulating and implementing

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<sup>369</sup> S. Pillay, “And Justice for All? Globalization, Multinational Corporations, and the Need for Legally Enforceable Human Rights Protections” (2004) 81 *University of Detroit of Mercy Law Review* 489 at 499-500, observing that: “host-states welcome MNCs for their capital infusions into local economies, which can create or improve infrastructures, improve standards of living, new or improved infrastructures and even increase jobs. These dynamics are replete with inequities in bargaining power between the host-state and MNCs. Their capital infusions into domestic markets and their net worth, often greater than the GDP of host countries, give MNCs trumping leverage. Even if a host-state were inclined, the economics are such that the host-state is rarely in a position to insist that an investing MNCs respect human rights.” See also, K.M. Taylor, “Thicker than Blood: Holding Exxon Mobil Liable for Human Rights Violations Committed Abroad” (2004) 31 *Syracuse Journal of International Law and Commerce* 273 at 281, stating that “the economic power of many MNCs dwarfs that of most nations. For example, based upon 1999 statistics, only eleven nations have a larger national budget than Exxon’s \$100.7 billion yearly revenue. MNCs’ economic power brings with it serious political clout and often puts MNCs, with their clear goals, in an advantageous position when negotiating with often divided governments.”

<sup>370</sup> M. Dent and B. Peters, *The Crisis of Poverty and Debt in the Third World* (England/USA: Ashgate Publishing Company) at 99, stating that, in the days of Nigeria’s oil boom, the then head of state, General Gowon, stated that money was no problem for the country’s development. See also, A. Apter “Death and The King’s Henchmen: K. Saro-Wiwa and The Political Ecology of Citizenship in Nigeria” in Abdul-Rasheed Na Allah, ed., *Ogoni’s Agonies: Ken Saro-Wiwa and The Crisis in Nigeria* (Trenton, NJ: African World Press, Inc., 1998) 121 at 133.

<sup>371</sup> P. Lewis, “From Prebendalism to Predation: The Political Economy of Decline in Nigeria” (1996) 34:1 *The Journal of Modern African Studies* 79 at 81, stating that the Nigeria economy “was highly sensitive to fluctuations in oil earnings, which furnished more than 95 percent of foreign and 80 percent of government revenues.”

economic and political policies that tended to undermine the welfare, interests, and human rights of the Nigerian populace.

One of the economic policies adopted and implemented by almost all Nigerian governments since the mid-1980s, at the instance of the IMF and World Bank, is the Structural Adjustment Programme (or SAP). This economic reform plan was grounded on the devaluation of Nigeria's currency, the removal of subsidies on essential goods (e.g., fuel), the privatization of public enterprises, the liberalization of trade and investment, the mass retrenchment of workers in the public sector, and the creation of an enabling environment that will allow the establishment and prosperity of foreign investment. The implementation of these measures had debilitating effects on the welfare, interests, and human rights of the Nigerian populace.

In addition, different Nigerian governments have colluded with and aided MNCs, (especially the oil companies doing business in the country) in the conduct of their operations in ways that have led to gross violations of the human rights of Nigerians. The implementation of structural adjustment programs in Nigeria, as well as the activities of MNCs that adversely impact the general well being of Nigerians, have not been left unchallenged. Nigerians have, through riots, peaceful demonstrations and other forms of civil disobedience, registered their disapproval of the various IMF/World Bank SAPs, as well as of the activities of the MNCs that undermine their human rights and other interests.

As has become customary for most "third world" governments, (in most cases with the active encouragement of the developed countries and their powerful economic

and political agents, i.e. IFIs and MNCs), the response of various Nigerian governments has been to apply all manner of repressive measures in order to suppress popular dissent including killings and indefinite detentions in prisons. In the process, a large number of people fled the country for fear of persecution and violation of their human rights. IFIs and MNCs may be considered independent economic entities, but, in reality, they are agents of the developed countries that protect and control them, and, through their instrumentality, power the engine of economic globalization.

#### **4.1. STRUCTURAL ADJUSTMENT PROGRAMMES AND THE VIOLATION OF HUMAN RIGHTS IN NIGERIA: A RECIPE FOR REFUGEE PRODUCTION**

##### **4.11. The Evolution of SAP in Nigeria**

In 1982, when the Shehu Shagari administration introduced the first austerity measures to rescue the Nigerian economy from its supposedly crisis ridden state, poverty and destitution in the country has not attained its present troubling and devastating height. The crisis experienced by the Nigerian economy arose mainly from the downward slide in oil prices in the early 1980s, as well as from the profligacy and mismanagement of the economy by the government of the day.<sup>372</sup>

The austerity package of the Shagari administration, which was prompted by the IMF/World Bank, included the cutting of public expenditures, the devaluation of the naira, and the introduction of fees for education and health services.<sup>373</sup> Despite the biting

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<sup>372</sup> Peter Lewis, "From Prebendalism to Predation," *ibid.* at 81 &82.

<sup>373</sup> Y. Bangura, "IMF/World Bank Conditionality and Nigeria's Structural Adjustment Programme" in K. J. Havnik ,ed., *The IMF and the World Bank in Africa: Conditionality, Impact and Alternatives* (Uppsala: Scandinavian Institute of African Studies, 1987) 95 at 97 & 98, stating that "the IMF and World Bank have been deeply involved in formulation and implementation of Nigeria's structural adjustment programme."

effects of these harsh economic measures on the Nigerian populace, the IMF and World Bank were not satisfied. They considered the measures that were implemented by the government to be not far reaching enough. As a result, these two institutions refused to assist Nigeria in its effort to secure debt relief and new credit lines from creditor clubs. The democratic Shagari government, although sympathetic to the main thrust of IMF/World Bank SAP measures,<sup>374</sup> lacked the political will to adopt and implement the toughest aspects of these measures because of the catastrophic social and political consequences that their implementation would have in the country.

Meanwhile, the aspects of the SAP measures introduced by that regime through the 1982 *Economic Stabilization Act*<sup>375</sup> had already started impacting on the lives of ordinary Nigerians. The Nigerian economy was now marked and marred by mass retrenchments, the dwindling purchasing power of the national currency, sharp increases in the dropout rates from school, and a general state of hopelessness and despondency. In many cases, workers were unpaid for several months. Students did not receive their scholarships, and food and other essential goods became scarce.<sup>376</sup> Consequently, there were sharp increases in armed robbery incidents; students and workers engaged in anti-government attacks and in organized riots and demonstrations.<sup>377</sup>

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The author further stated that “the IMF and World Bank exerted considerable pressure on Nigerian policy makers in trying to get the latter to accept an adjustment programme that is pivoted around a market-determined exchange rate.”

<sup>374</sup> *Ibid.* at 101.

<sup>375</sup> *Economic Stabilization (Emergency) Act 1982* (Lagos: Federal Ministry of Finance, 1982).

<sup>376</sup> J. Ihonvbere “A Critical Evaluation of the Failed 1990 Coup in Nigeria” (1991) 29:4 *The Journal of Modern African Studies* 601 at 607.

<sup>377</sup> *Ibid.* at 607.

This was the state of affairs when the military overthrew the government on December 31, 1983, in a *coup d'état*. The military junta led by Gen. Mohammadu Buhari cited the poor state of the economy and the general state of hopelessness and despondency in the system as the reasons for staging the coup. Thus, aside from the Nigerian populace, whose economic fortunes dwindled as a result of the implementation of the IMF induced austerity measures, the first major casualty of the implementation of that programme was Nigerian democracy. The second republic was thus truncated through the overthrow of a democratically elected government, and the country was taken into the grip of military dictatorship.

The new military regime of General Buhari continued with the IMF/World Bank induced austerity measures introduced by the Shagari administration. It reduced capital expenditure by almost 40 percent, and imposed a wage freeze.<sup>378</sup> In addition, the Buhari regime increased the debt service ratio to 44 percent, with a view to appeasing the IMF/World Bank and gaining support for its austerity programme.<sup>379</sup> The regime also implemented a policy that initiated private sector control of the public sector of the economy, and they introduced user fees in the education and health services sectors.

Despite the government's implementation of all these austerity measures, the IMF and World Bank refused to give their support to the regime's economic policies, largely because of its refusal to devalue the naira and privatize public enterprises. In fact, the IMF, acting through the United States, its major shareholder, used its influence to

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<sup>378</sup> Yusuf Bangura, *supra* note 373 at 102.

<sup>379</sup> *Ibid.* at 103.

block a loan of about two billion naira that the regime was seeking from Saudi Arabia. The IMF also prevented other creditors from rescheduling the country's debts and opening new lines of credit for it.<sup>380</sup> Unfortunately, at that point in time, the Buhari regime had alienated itself from all sections of Nigerian society in its effort to satisfy the IMF and World Bank. For instance, workers protested against the wage freeze and the massive retrenchment in the public sector, while students protested against the introduction of fees in schools and the health services sector. There were also protests against the gross violations of the human rights of Nigerians who opposed the regime's economic measures.<sup>381</sup>

This scenario prepared the stage for the collapse of the Buhari regime on August 27, 1985, when another military *coup d'état* was effected. The leader of this coup, General Ibrahim Babangida, who later emerged as the President, observed:

The last twenty months have not witnessed any significant changes in the national economy. Contrary to expectations we have so far been subjected to a steady deterioration in the general standard of living and intolerable suffering by the ordinary Nigerian has risen higher, scarcity of commodities has increased, hospitals still remain mere consulting clinics while educational institutions are on the brink of decay. Unemployment has stretched to critical proportions.<sup>382</sup>

The Babangida regime took a populist approach to the IMF/World Bank involvements in the planning and implementation of Nigerian economic policies. Nigerians were

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<sup>380</sup> *Ibid.* at 104.

<sup>381</sup> *Ibid.* at 104 & 105.

<sup>382</sup> Major General Ibrahim Babangida, *Newswatch*, September 9, 1985 at 19. See also "A Soldier and President" *West Africa*, August 24 1987, at 1616, stating that "Babangida's rise to power was a product of the on-going debate over the suitability of the economic medicine prescribed by the International Monetary Fund."

invited to publicly debate the issue a few days after the seizure of power. Before the end of the debate promoted to determine whether or not to accept the IMF credit facilities, however, the government introduced several far reaching policies along the lines of the IMF's prescriptions. This was promulgated as economic emergency measures.

Under this programme of economic emergency, which lasted for fifteen months, the salaries of public sector workers were cut between 2 and 20 percent.<sup>383</sup> Also, as part of the policy measures taken because of the economic emergency that the regime had declared, the importation of maize and rice was banned, and about 80 percent of the subsidy on petroleum was removed. In addition, the freeze on wages was extended, and significant reductions were made to the subventions to public parastatals and government ministries.<sup>384</sup> Eventually, at the end of the nationwide debates, Nigerians overwhelmingly rejected the IMF facility with its conditionalities. However, the Babangida regime provided a dubious interpretation of the verdict of Nigerians who rejected the IMF loan; it was depicted as meaning a rejection of the loan but not the IMF structural adjustment measures. Such an interpretation was not only "transparently dishonest," but was also an affront to the intelligence and sensitivities of Nigerians who roundly and unequivocally rejected both the loan and its accompanying conditionalities.<sup>385</sup>

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<sup>383</sup> Yusuf Bangura, *supra* note 373 at 107.

<sup>384</sup> J. O. Ihonvbere, "Economic Crisis, Structural Adjustment and Social Crisis in Nigeria" (1993) 21:1 *World Development* 141 at 143.

<sup>385</sup> P.M. Lubeck, "Restructuring Nigeria's Urban-Industrial Sector Within the West African region: the Interplay of Crisis, Linkages and Popular Resistance" (1992) 16:1 *International Journal of Urban and Regional Research* 6 at 12. See also, Special Correspondent, "A Soldier and a President" *West Africa*, 24 August 1987 at 1616. Further, see P. Mosley, "Policy-Making Without Facts: A Note of Structural Adjustment Policies in Nigeria, 1985-1990" (1992) 91 *African Affairs* 227 at 228-230. See also, Y.

Consequently, the government in its 1986 budget clearly adopted most of the IMF/World Bank's SAP measures. This consisted in part of an increase in petroleum prices, the elimination of import licensing, the devaluation of the national currency, and the privatization of state enterprises. As Peter Lewis noted,

...18 agricultural parastatals were liquidated or sold, and the state-owned import company for consumer commodities was closed. Staff reductions were implemented in other public firms and agencies. Fuel prices nearly doubled at the beginning of 1986, although considerable subsidies remained on both petroleum products and fertilisers.<sup>386</sup>

The Babangida (IMF/ World Bank induced) SAP package also included the introduction of user fees on a number of social services such as education and health, as well as the allocation of about 45 percent of the country's foreign exchange earnings to the servicing of debts.<sup>387</sup>

It was not long before these measures started impacting very negatively on Nigerians; through the Second Tier Foreign Exchange Market (SFEM), the naira was devalued by 320 percent (N 3.200) within a period of six years between 1982 and 1987 compared to its 1981 value of (N1= US1.63), and this change led to sudden, astronomical increases in the prices of essential goods.<sup>388</sup> Also, the purchasing power of average

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Bangura, "IMF/World Bank Conditionality and Nigeria's Structural Adjustment Programme" *supra* note 373 at 105-108. Again see, P. Lewis, "From Prebendalism to Predation" *supra* note 371 at 83.

<sup>386</sup> P. Lewis, *ibid.* at 84.

<sup>387</sup> J. O. Ihonvbere, "Economic Crisis," *supra* note 384 at 145.

<sup>388</sup> Y. Bangura, "IMF/World Bank Conditionality and Nigeria's Structural Adjustment Programme" *supra* note 373 at 110 & 112. Today, the Nigerian naira which was stronger and higher in value than the U.S. dollar before the introduction of IMF/World Bank imposed SAPs on the country exchanges for over 128 naira for one U.S. dollar, see S. Ayeoyenikan and L. Anyikwa, "Atiku Seeks Labour's Participation in Poverty Reduction" *The Guardian* (Nigeria) November 08 2002, on line: <http://www.ngrguardiannews.com/news/article8> (visited: 08/11/2002).



Nigerian consumers decreased sharply on a weekly basis, and very large numbers of workers were ousted from their jobs. Unemployment increased in the country, and many states of the federation were unable to pay their workers' salaries just a few months after the implementation of the IMF/World Bank SAP started.<sup>389</sup> Trade liberalization, through the removal of tariffs, encouraged the flooding of Nigerian markets with imported goods that rendered local manufactured goods uncompetitive. Local manufacturers were therefore forced to produce below their installed capacity.<sup>390</sup> This development exacerbated the already serious unemployment situation in the country, as the manufacturers who were forced out of business laid off workers.

Consequently, there was a sharp increase in poverty in the country, with hunger ravaging the masses, particularly the unemployed. The working poor were equally affected, and with the dwindling purchasing power of the naira, many were subjected to misery and destitution. Almost everywhere in the country, there were hunger and anger, which led to a state of hopelessness.<sup>391</sup> Different segments of the Nigerian society, such as students, market women, workers, and intellectuals, reacted to these developments by mounting protests, strikes, demonstrations and other forms of civil disobedience to pressure the governments into dismantling the programmes. As Peter Lewis has noted,

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<sup>389</sup> Y. Bangura, *ibid.* at 114.

<sup>390</sup> P. Mosley, "Policy-Making Without Facts" *supra* note 385 at 231 & 232.

<sup>391</sup> "The country is rich but the people are poor... Nigeria is rich in land, people, oil and natural gas resources. If more wealth had been channelled to the development of its people... Nigeria could have poised for a promise... Loss of self-confidence on the part of the people of Nigeria, the prevailing sense of failure and shame, the experience of national humiliation, the state of mass demoralization, confusion and anxiety regarding tomorrow- this is the essential predicament of Nigeria today." (World Bank Report on Nigeria 1996 as quoted in B. Awe, "Conflict and Divergence: Government and Society in Nigeria" (1999) 42:3 African Studies Review 1 at 3&4).

“Public restiveness over these conditions erupted again in mid-1989, when the SAP riots engulfed universities and commercial districts in several of Nigeria’s major cities.”<sup>392</sup> The response of the government to these challenges led to gross abuses of the human rights of Nigerians in the forefront of these struggles, and the stability of the country was thereby undermined.

Since 1982, every government that has ruled the country has seemed to be in a race to beat the record of its predecessor in the implementation of the IMF/World Bank imposed SAPs in order to appease the IFIs and multinational corporations. The Ernest Shonekan Interim National Government (ING) that came into being as “a child of circumstance,” following the stepping down of General Babangida in August 27, 1993, continued with the implementation of the SAPs by hiking the petroleum products by about 700 percent.<sup>393</sup> This led to the collapse of the short lived ING, which was replaced by the General Sanni Abacha led junta. Under the Abacha regime, the implementation of SAPs was intensified through another devaluation of the naira, massive retrenchment, further reduction of the subsidy on petroleum products, and an increase in user fees on education and health services.

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<sup>392</sup> P. Lewis, “From Prebendalism to Predation”, *supra* note 371 at 86. See also J. Ibrahim “The Transition to Civil Rule: Sapping Democracy” in A. O. Olukoshi, ed., *The Politics of Structural Adjustment in Nigeria* (London: James Currey, 1993) 129. See further, A. Fadahunsi “Devaluation: Implications for Employment, Inflation, Growth and Development” in A. O. Olukoshi, ed., *The Politics of Structural Adjustment in Nigeria* (London: James Curry, 1993) 33 at 47.

<sup>393</sup> P. Lewis, “From Prebendalism to Predation” at 96.

Similarly, the Obasanjo administration that has ruled Nigeria since 1999 has continued with the implementation of the IMF/World Bank induced SAP.<sup>394</sup> Consequently, the demoralization of the Nigerian populace, and the increase in poverty have continued largely unabated. These measures have worsened the plight of ordinary Nigerians, who have already been ravaged by poverty, unemployment, hunger, and hopelessness.<sup>395</sup> The standard of living of Nigerians has continued to fall, and access to adequate health care and good education is becoming more remote by the day.<sup>396</sup>

Thus, the implementation of IMF/World Bank SAPs in Nigeria greatly expanded inequality in the polity and grossly deepened the marginalization of the poor.<sup>397</sup> Both the Nigerian government and the IMF/World Bank seem to have acknowledged and accepted the failure of SAPs imposed on the country.<sup>398</sup> Both sides are now engaged in the formulation and implementation of a new Poverty Reduction Strategic Process (PRSP), which they believe will help in the eradication of poverty in Nigeria. According to the Nigerian Vice- President Abubakar Atiku,

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<sup>394</sup> J. Atoh "Strategic Imperatives for Corporate Nigeria II" *The Guardian* (Nigeria) September 13, 2002, on line: <http://nigeriaworld.com/news/source/2002/sep/headlines/091332-news.html> (visited: 15/09/2002). See also *Guardian Editorial* "Obasanjo's Verdict on IMF" on line: <http://www.ngrguardiannews.com/editorial2/en854701.html> quoting Obasanjo as saying that "for three years, I can't really say we have got much out of the IMF."

<sup>395</sup> J.O. Ihonvbere, "A Critical Evaluation of the Failed 1990 Coup in Nigeria" *supra* note 376 at 614. See also, Y. Bangura, IMF/World Bank Conditionality and Nigeria's Structural Adjustment Programme" *supra* note 373 at 112-115. See further, "Globalization Must Work for People, Not Just For Profit, Says ICAN Boss" *The Guardian*, September 13, 2002 on line: <http://nigeriaworld.com/news/source/2002/sep/headlines/091325-news.html> (visited: 15/09/2002).

<sup>396</sup> In 1980, the average per capita income in Nigeria was \$1000 but by 1993, it had fallen to \$250 following the implementations of SAPs, and today it has fallen below the 1993 level. See EarthAction Alert, Nigeria Crisis: Background Information" on line: <http://www.earthaction.org/en/archive/96-03nig/background.html> (visited: 25/01/2002).

<sup>397</sup> O. Akinbode, "Globalization, Economic and Social Rights" *The Guardian*, March 13, 2002 on line: <http://www.ngrguardiannews.com/editorial2/en851404.html> (visited: 13/03/2002).

We all need to participate actively in serious and constructive dialogue among ourselves and with our development partners, with a view to reaching a consensus on the best ways to eradicate poverty in Nigeria as quickly as possible.<sup>399</sup>

The World Bank's country director in Nigeria observed that poverty "has doubled in the last 20 years and has not come down during the last four years. So there is a real need for the country to take a hard look at what it is doing to try and fight poverty and to ask itself the hard questions."<sup>400</sup>

As IMF/World Bank induced SAPs spread poverty in Nigeria, the citizens found it extremely difficult to have access to basic necessities for their lives and well being.<sup>401</sup> Human rights abuses by agents of government, e.g., arrest, detention, torture, and extra-judicial killings, have intensified as people protest the inconceivably harsh impact of the IMF/World Bank imposed SAPs on them. As Augustine Ikelegbe has noted, "the response of the state to civil society militancy and confrontations has been high handed, suppressive, repressive, brutal, coercive and directed not at resolution but submission."<sup>402</sup>

#### **4.2. SAP AND THE INSTIGATION OF HUMAN RIGHTS VIOLATION (AND INSTABILITY) IN NIGERIA**

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<sup>398</sup> See World Bank, 1998 Annual Report (Washington, D.C.: World Bank, 1998).

<sup>399</sup> S. Ayeoyenikan and L. Anyikwa, "Atiku Seeks Labour's Participation in Poverty reduction" *The Guardian* (Nigeria) November 08 2002, on line: <http://www.nguardiannews.com/news/article8> (visited: 08/11/2002).

<sup>400</sup> M. Tomlinson, as quoted in O. Kanu, "Why We Cut Lending to Nigeria, By World Bank" *ThisDay News*, November 7<sup>th</sup> 2002, on line: <http://www.thisdayonline.com/news/20021107news05.html> (visited: 11/07/2002). The World Bank country Director in Nigeria observed that about 70 percent of the country's population "lives below the international poverty level of \$1 a day."

<sup>401</sup> E. Ochonma "IMF, World Bank and African Economies" *Guardian* (Nigeria), February 1, 2001, on line: <http://www.globalpolicy.org/soecon/bwi-wto/wbank/2001/0201afr.htm> (visited: 10/12/2002).

<sup>402</sup> A. Ikelegbe, "Civil Society, Oil and Conflict in the Niger Delta Region of Nigeria: Ramifications of Civil Society for a Regional Resource Struggle" (2001) 39:3 *Journal of Modern African Studies* 437 at 461.

Of course, armed conflict and political instability are regular and common in Africa. Such inter-state wars and internal instability are themselves a result of external interference and incitement and internal frustration, fuelled largely by the adverse consequences of structural adjustment programmes.<sup>403</sup>

The implementation of structural adjustment programmes in Nigeria has caused the alienation of almost all sections of the country's population from the governments that adopted these economic measures. The speculation seems true in the case of Nigeria that "rapid economic liberalization after years of pervasive state intervention might generate political pressures...which could only be managed by an authoritarian state."<sup>404</sup> The well-being, interests and human rights of the Nigerian population seem of little or no consequence to the various Nigerian governments as they implement the IMF/World Bank induced SAP, which they perceive as more important than the will of the people.

As the impact of the SAP began to strongly hit citizens, especially the poor masses, the citizens became more militant, violent, and sometimes destructive in their resistance to the implementation of the programme. As discussed earlier in this thesis, during the Buhari regime, students protested against introduction of fees in education and health care, while workers fought against wage freezes and massive retrenchment in the public sector. Doctors and market women protested respectively against inadequate allocation of funds to health and the imposition of levies.<sup>405</sup> The government responded

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<sup>403</sup> S. Aluko, "The Economic and Political Failure of Globalization in Africa" on line: <http://www.aboutsudan.com/conferences/khartoum/aluko.htm> (visited: 10/12 /2002).

<sup>404</sup> J. Loxley "The IMF, the World Bank, and Sub-Saharan Africa: Policies and Politics" in Kjell J. Havnevik, ed., *The IMF and the World Bank in Africa: Conditionality, Impact and Alternatives* (Uppsala: Scandinavian Institute of African Studies, 1987) 47 at 53.

<sup>405</sup> Y. Bangura "IMF/World Bank Conditionality and Nigeria's Structural Adjustment Programme" *supra* note 373 at 104&105.

by arresting and detaining dissenters against its SAP. Similar protest and resistance were directed against SAP measures introduced and implemented by the Babangida regime. Like the Buhari regime, the government of Babangida responded by arresting, detaining, and killing the protesters (especially students and workers), and by banning their various associations.<sup>406</sup>

As stated before, following the pressure arising from the annulment of the June 12, 1993, general election, the then President Babangida stepped aside from the leadership of the country and put in place an Interim National Government (ING) headed by Ernest Shonekan. The ING continued with the IMF/World Bank imposed SAPs, which culminated in the hiking of the price of fuel by 700 percent in September.<sup>407</sup>

The Nigerian Labour Congress's response was to call a nationwide strike aimed at paralyzing activities and forcing the ING to rescind the hike. This led to the intervention of the military on November 17, 1993, who forced Shonekan to resign as the head of the ING. This paved the way for General Abacha to assume the mantle of leadership as the head of state. Thus, the implementation of SAPs indirectly led to another coup, which led to the enthronement of a dictator who unleashed a reign of terror aimed at any voice of dissent against his policies, including SAPs. Julius Ihonvbere notes that:

Virtually all the successful and attempted counter-coups have taken place during periods of mass disaffection and action against the state, characterized by demonstrations, strikes, and riots, as well as by alienation and intense competition for power. It has been easy for the army to hijack these struggles

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<sup>406</sup> *Ibid.* at 115.

<sup>407</sup> P. Lewis, "From Prebendalism to Predation," *supra* note 371 at 96.

primarily because of its monopoly of the means of coercion and alleged 'legal right' to use the weapons under its control.<sup>408</sup>

Abacha resisted the implementation of SAPs at an early stage of his administration, but later succumbed to the pressure to apply that programme. Thus, in 1995, the exchange rate was liberalized. This led the naira to crash from 22 for US\$1 in 1993 to 120 for one U.S. dollar. Like its predecessor, the Abacha regime and its implementation of SAPs led to the dismantling of the middle class, in Nigeria, which was hurt by stagflation and the deterioration of the public service.<sup>409</sup>

This unacceptable state of affairs prompted several organizations in Nigeria, such as the NLC, students' organizations, civil society and human rights groups, as well as some individuals, to respond to the menacing impact of the SAPs on the masses by organizing riots, protests, demonstrations, and other forms of dissent to the administration.<sup>410</sup> As a result of their resolute stand against SAP implementation, these groups, and other individuals who raised such voices of dissent, were persecuted, and their rights were grossly abused and trampled upon in a wanton manner. Many of them took flight to exile.<sup>411</sup> Apart from this trends the way in which the IMF/World Bank

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<sup>408</sup> J. O. Ihonvbere, "A Critical Evaluation of the Failed 1990 Coup in Nigeria", *supra* note 376 at 604.

<sup>409</sup> P. Lewis, "From Prebendalism to Predation", *supra* note 371 at 98.

<sup>410</sup> It is important to note that the harsh impact of the SAP was not the only reasons for the fierce protests against the Nigerian government. Anti-government protests were inflamed by the unlawful annulment of June 12, 1993 presidential election in the country. However, the argument being made here is that the debilitating impact of the IMF/World Bank imposed SAP contributed immensely to creating the enabling environment for many of the protests against the government's economic measures.

<sup>411</sup> P. Lewis, *supra* note 371 at 102. See also, EarthAction Alert, on line: <http://www.earthaction.org/en/archive/96-03nig/background.html> (visited: 25/01/2002), stating that in Nigeria, "dissenters and democrats are systematically harassed: many prominent politicians and activists have been arrested, others attacked and intimidated. Many more have fled abroad or are hiding."

induced SAP is being implemented in Nigeria tends to encourage ethnic tensions, clashes, and rivalries.

#### **4.3. SAPS AND THE EXACERBATION OF ETHNIC TENSIONS AND RIVALRIES IN NIGERIA**

Structural adjustment is not popular on the streets of Africa. The fruits of these efforts have yet to ripen, but the hardships they have brought out are already very apparent.<sup>412</sup>

One effect of SAPs, as implemented in Nigeria, and, indeed, in most “third world” countries is the fostering and exacerbation of social tensions, “crises and conflicts, of which ethnic” tensions constitute a part.<sup>413</sup> The obvious reason is that “the neo-liberal development programs formulated by the Bank and the IFIs seem notorious for augmenting inequality and impoverishment among the most vulnerable groups in the “third world” countries in which these programs are implemented.”<sup>414</sup> However, it would be a naïve thesis and one very difficult to prove that ethnic tensions and rivalries in Nigeria are caused only by the introduction and implementation of SAPs.<sup>415</sup> The problems have always been there since the inception of the country (as fallout from the flawed state structure left behind by the colonial legacy) and have severally threatened the state’s very foundation and existence. However, the argument that is being made here is that ethnic tensions have been exacerbated by the

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<sup>412</sup> Boutros Boutros-Ghali, as quoted in J. B. Adeganye “Structural Adjustment, Democratization and Rising Ethnic Tensions in Africa” (1995) 26 *Development and Change* 355 at 361.

<sup>413</sup> J. B. Adeganye *ibid* at 361.

<sup>414</sup> A. Anghie, “Time Present And Time Past: Globalization, International Financial Institutions, And The Third World” (2000) 32:2 *New York University Journal of International Law and Politics* 243 at 252.

<sup>415</sup> J. B. Adeganye “Structural Adjustment, Democratization and Rising Ethnic Tensions in Africa” *supra* note 412 at 364.



growing poverty arising from the implementations of the SAPs and by the inability of the government to provide for the basic needs of its citizens.<sup>416</sup> The situation gives rise to ethnic tensions and rivalry since every action of government is evaluated in terms of its ethnic colouration.

Furthermore, the army of the unemployed, including those ousted from their jobs, constitute a ready recruitment pool for the execution of this ethnic agenda. Hence, some politicians, both military and civilian, utilize ethnic and communal issues in Nigeria to garner support from their political base, and to canvass for economic favours for their constituency from the federal government. As General Buhari observed, “When economic mismanagement and official thievery of national resources on an unprecedented scale led to hunger, poverty and desperation, the whole society became a tinderbox. And it needed only a little elite tinkering to ignite.”<sup>417</sup> Okwudiba Nnoli contends that politicians seeking election to office and favours from government have tended to fan “the fears and animosities of their followers into xenophobia in order to ensure their election as the protectors of ethnic interests.”<sup>418</sup>

Some ethnic warlords and champions in Nigeria found the manipulation of their ethnic or communal groups to commit violent acts much easier in the midst of poverty, since many people in such communities today have nothing to live for, as the government

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<sup>416</sup> *Ibid.* See also W. Connor “Eco-Or Ethno-Nationalism?” (1984) 7:3 *Ethnic and Racial Studies* 342 at 350.

<sup>417</sup> General Buhari as quoted in T. Obateru, “Buhari Hits Obasanjo, Accuses FG of Official Thievery” *Vanguard*, October 18, 2002 on Line <http://www.vanguardngr.com/articles/2002/cover/f18102002.html> (visited: 18/10/2002).

<sup>418</sup> O. Nnoli “The Nigeria-Biafra Conflict – A Political Analysis” in Joseph Okpaku, ed., *Nigeria: Dilemma of Nationhood* (Westport/Connecticut: Greenwood Publishing Company, 1972) 118 at 124.

cannot provide basic necessities for them.<sup>419</sup> Such people are always looking for avenues to vent their anger on the system, and ethnic or communal misunderstandings present them with the opportunity for such action.

It cannot be a mere coincidence that the occurrence of ethnic tensions and rivalries was on the increase in Nigeria (and in other “third world” countries) during the same period when poverty and falling standards of living, arising from the implementation of SAPs, were ravaging the populations of these countries.<sup>420</sup> In the midst of the abject poverty brought about in part by the impact of SAPs, feelings of deprivation are aroused and inflamed, particularly among politically marginalized ethnic groups. This fact is exemplified by the discriminatory allocation of shares of federal government owned public enterprises, and the inequity and clear lack of transparency associated with the first phase of the privatization exercise in Nigeria. For instance,

At the end of the first phase of the exercise from which the Bureau for Public Enterprises (BPE) realised about N20 billion, geopolitical zones in the North emerged as the dominant investors, according to the BPE’s interim reports. Specifically, the South-South zone accounted for only 12 percent of the allocated shares, just like the Southeast. But the Northeast got 13 percent, North-Central (14 percent) and Northwest got the biggest chunk (27 percent) while the Southwest accounted for 22 percent. On regional aggregation, these

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<sup>419</sup> As Executive Governor of Nasarawa state, (one of the states in Nigeria) Alhaji Abdullahi Adamu, has observed: “Employment, and industrial and commercial opportunities will deplete the rank of ready recruits for communal and other conflicts in areas which are prone to them. True human freedom is freedom from want. Such freedom does not entirely guarantee the absence of conflicts, but it minimizes them to a manageable level.” A. Adamu, “Ethnic Conflicts in Nigeria” on line: <http://www.abdullahiadamu.com/speeches/2ethnic.htm> (visited: 19/10/03).

<sup>420</sup> J. B. Adekanye, “Structural Adjustment, Democratization and Rising Ethnic Tensions in Africa” *supra* note 412 at 362. General T.Y. Danjuma, the former Nigerian Defence Minister reacting to spate of ethnic conflicts and unrest in his native Middle Belt region, declared: “I know the basic cause of breakdown of law and order is unemployment, poverty and deprivation.” T.Y. Danjuma as quoted in J. Lohor, “Obasanjo Explains Danjuma’s Role in 1999 Polls” *ThisDay New* (Nigeria) October 29, 2003, on line: <http://odili.net/news/source/2003/oct/29/201.html> (visited: 29/10/2003).

translate into 54 per cent for the North; 24 percent for East (and Mid-West) and 22 percent for the West.<sup>421</sup>

This atmosphere of marginalization (or at least the sense that it was so), combined with poverty and biting unemployment resulting from SAPs, led minor misunderstandings to explode into many major ethnic clashes and disturbances that have claimed the lives of thousands of people and left far too many others displaced from their homes. For instance, today in Nigeria, most ethnic groups in the country tend to blame the Hausa/ Fulani and Yorubas for their marginalization. This might not be a totally untrue and unfounded allegation, as elite members of these dominant ethnic groups still control the levers of political power and patronage, as well as the distribution of valued resources to their groups and cronies.<sup>422</sup> As EarthAction Alert has noted,

Many southerners resent what they see as continued domination by a northern elite, and the ruling military juntas' close identification with the northern Moslems means that ethnic and religious considerations become important in any standoff between military and civilians.<sup>423</sup>

The mindset and utterances of some leaders from these majority ethnic groups, especially the Hausa-Fulani, tend to buttress this view. For instance, Umaru Dikko, a

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<sup>421</sup> M. Okeke, "Regional Patrimonies and Privatization" *The Guardian* (Nigeria) October 23, 2001, on line: <http://www.nguardiannews.com/editorial2/en837303.html> (visited: 10/24/2001).

<sup>422</sup> J.B. Adekanye, "Structural Adjustment, Democratization and Rising Ethnic Tensions in Africa" *supra* note 412 at 366

<sup>423</sup> EarthAction Alert, "Nigeria Crisis: Background Information" on line: <http://www.earthaction.org/en/archive/96-03nig/background.html> (visited: 25/01/2002). See also T. Suleiman "North Wants Power As Means of Livelihood" *ThisDay News* 10/17/2002, on line: <http://www.thisdayonline.com/news/200210117news14.html> (visited: 10/17/2002). A Nigerian Senator, Femi Okurounmu, alleged that the Northerners want power by all means because that is their only means of livelihood.

former transport minister in the Shagari administration, in reaction to the institution of a constitutional conference in 1994 by General Abacha was quoted as saying:

Despite a series of warnings and advice by the Northern elders in which I sent representatives that Abacha should look for an alternative way of solving Nigeria's political stalemate, he has turned deaf ears and gone ahead in setting the Constitutional Conference in motion...no man becomes a hero by selling his father's house to buy a piece of land.<sup>424</sup>

Similarly, the current Vice -President of Nigeria, Atiku Abubakar, said,

Anytime Northerners meet on political issues and say this is the direction we are going, other sections of the country try to go in the same direction...North will continue to control and pilot the political affairs of the country in unity and not in disunity.<sup>425</sup>

He buttressed this point by reference in a speech to how the Northerners sabotaged the presidential ambition of the former Nigerian Vice-President, Dr. Alex Ekwueme in 1999.<sup>426</sup> Before that, the former Premier of the old Northern region, Ahmadu Bello was reported to have said that Nigeria "should be an estate" of Northerners, where other sections of the country should be ruthlessly prevented from exercising power and control over their own affairs.<sup>427</sup> Post-colonial Nigeria has indeed become a new project of internal colonialism, where the colonizer and colonized are divided by great differences

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<sup>424</sup> Umaru Dikko as quoted in B. Olowo "The Great Debate" *West Africa* February 14-20 1994 at 251.

<sup>425</sup> Quoted in U. Yusuf, "Why North Controls Nigeria-Atiku. Govs Halted Ekwueme's Presidential Bid" *Vanguard* (Nigeria) November 3<sup>rd</sup> 2002 on line: <http://nigeriaworld.com/news/source/2002/nov/headlines/3/33-news.html> (visited: 03/11/02). See also A. Orih "How North Can Regain Power, by Atiku" *ThisDay News* on line: <http://www.thisdayonline.com/news/20021103news01.html> (visited: 03/11/02).

<sup>426</sup> U. Yusuf "Why North Controls Nigeria -Atiku. 'Govs Halted Ekwueme's Presidential Bid" on line: <http://nigeriaworld.com/news/source/2002/nov/headlines/3/33-news.html> (visited 11/03/2002).

of religion, language, culture, and ways of life. The new colonizers, like their British predecessors have as their overriding objective the control of the land and resources of the South (especially the petroleum).<sup>428</sup>

Nevertheless, the fact remains that governments operating under the pressure of debt servicing and the implementation of SAPs find it difficult to retain resources that can go around in providing for the basic needs of all the constituent units of the country. This has given rise to a situation where some ethnic groups have demanded power sharing in the country, autonomy in running their own affairs, and self-determination.<sup>429</sup> The government has in most cases responded with reprisals, intimidation and other human rights violations and atrocities; the tensions and conflict among various ethnic groups were thereby increased.

For instance, the April 1990 failed coup attempt was a clear demonstration of ethnic resentment against the Northern part of the country by some junior officers in the military who felt that the North was marginalizing other sections of the county.<sup>430</sup> The obvious resentment of the leaders of that coup was manifested in their attempt to sever the north from Nigeria. Explaining the reason for the expulsion of some sections of the country from Nigeria, the leader of the failed coup attempt Gideon Orkar stated:

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<sup>427</sup> Sir Ahmadu Bello, The Parrot of October 12, 1960 as quoted in R. Oyeyemi "The Northern Agenda: Reason for Political Liberation of Nigeria" *Nigeriaworld* October 24, 2002 on line: <http://nigeriaworld.com/columnist/oyeyemi/102402.html> (visited: 25/10/2002).

<sup>428</sup> C. E. Welch, Jr. & M. Sills, "The Martyrdom of Ken Saro-Wiwa" *supra* note 364.

<sup>429</sup> S. Rasheed, "The Democratization Process and Popular Participation in Africa: Emerging Realities and the Challenges Ahead" (1995) 26:2 *Development and Change* 333 at 338.

<sup>430</sup> P. Lewis, "From Prebendalism to Predation", *supra* note 371 at 91.

...The exploitative, oppressive, dirty games of intrigue of this class where people and stooges that can best be described by the fact that even though they contribute very little economically to the well being of Nigeria, they have over the years served and presided over the supposedly national wealth derived in the main from the Middle belt and Southern parts of the country, while the people from these parts of the country have been completely deprived from benefiting from the resources given to them by God.<sup>431</sup>

He adds:

... The Northern aristocratic class [has a history] replete with numerous and uncontrollable instances of callous and insensitive dominatory, repressive intrigues by those who think it is their birth right to dominate till eternity the political and economic privileges of this great country to the exclusion of the Middle Belt and the South.<sup>432</sup>

The ethnic dimension of that coup was further demonstrated by the fact that “the plotters are now regarded as heroes in some circles.”<sup>433</sup>

The implementation of SAPs with their damaging, harsh impact on the economy and the welfare of Nigeria, including the non-elite members of the military, contributed to that coup.<sup>434</sup> This is because “the prevailing conditions of illiteracy, waste, poverty, unemployment, inflation, disease, lack of basic human needs, exploitation, inequalities, and vulnerability to external pressure,” which caused instability and uncertainty in the country, were worsened by the mindless implementation of the SAPs.<sup>435</sup>

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<sup>431</sup> Major Gideon Orkar, as quoted in J. O. Ihonvbere, “A Critical Evaluation of the Failed 1990 Coup”, *supra* note 376 at 616.

<sup>432</sup> *Ibid.* at 616.

<sup>433</sup> “Nigeria: No Longer at Ease” *African Confidential* (London) July 13, 1990 at 6.

<sup>434</sup> J. O. Ihonvbere “Economic Crisis, Structural Adjustment and Social Crisis in Nigeria” *supra* note 384 at 144, stating that “opposition to the adjustment program has been the cause of two attempted military *coup d’etat* in 1986 and in 1990.”

<sup>435</sup> J. O. Ihonvbere, “A Critical Evaluation of the Failed 1990 Coup in Nigeria,” *supra* note 376 at 602.

Following the failure of the coup attempt, many soldiers and civilians were arrested and detained, and, after a purported trial, several soldiers were executed. Some lucky ones among the alleged plotters and sponsors of the coup fled the country and sought refuge elsewhere.<sup>436</sup> Thus, the poverty, inequality, and hopelessness generated by the implementation of SAPs in Nigeria have contributed to exacerbating ethnic tensions and conflicts in the country, and this disorder has led to the displacement of persons both internally and externally. As Anthony Richmond has noted,

Competition for scarce resources including land, water and employment opportunities will add to existing ethnic rivalry and tensions. As a consequence, there will be more internally displaced persons, religious pogroms and 'ethnic cleansing'.<sup>437</sup>

According to Richmond, globalization has the tendency to generate very serious risks, such as "apocalyptic visions of nuclear catastrophes, or total environmental collapse, as well as economic insecurity, heightened competition, and xenophobia." These are the conditions most likely to generate "greater ethnic conflict..."<sup>438</sup>

Some of the ethnic clashes and communal violence that took place in several parts of Nigeria in 2001 occurred at Nasarawa in Plateau, Benue, Lagos, Bayelsa, and other parts of the North. From these ethnic clashes and communal violence alone, about a one-half million people fled their homes to seek refuge elsewhere. Out of this number, about

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<sup>436</sup> P. Lewis, *supra* note 371 at 102.

<sup>437</sup> A. H. Richmond "Globalization: Implications for Immigrants and Refugees" (2002) 25:5 *Ethnic and Racial Studies* 707 at 718.

<sup>438</sup> *Ibid* at 723.

50,000 people are still internally displaced,<sup>439</sup> while over 17,000 are still residing in Cameroon, a neighbouring West African country, as refugees.<sup>440</sup>

The ethnic clashes in the Middle Belt, between Benue State and its neighbouring states, have also claimed thousands of lives (including 19 soldiers sent to ensure peace and security in the area), and “several other thousands” have fled the area and become refugees in their country. In addition, property worth several million naira has been lost.<sup>441</sup> The position that some of these ethnic clashes and communal conflicts have links with the implementation of IMF/World Bank policies and other globalization forces is bolstered by the remarks credited to the former Nigerian Head of State General Buhari, when he said that, “...the frustration arising from unemployment, hunger and poverty had resulted in a precarious situation across the country leading to a situation where no fewer than 40 ethno-religious and political riots had been recorded in the three years in the democracy.”<sup>442</sup> Similarly, Martin Dent, who co-authored *The Crisis of Poverty and*

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<sup>439</sup> USCR: Country Information: Nigeria, “Country Report: Nigeria 2002” on Line: <http://www.refugees.org/world/countryrpt/africa/nigeria.htm> (visited: 10/12/2002). See also, F. Peter-Omale, “Communal Clashes Displace 750,000 Nigerian-Atiku” *ThisDay News*, February 2<sup>nd</sup> 2003, on line: <http://www.thisdayonline.com/news/20030218news09.html> (visited: 18/02/03), where Nigeria’s Vice-President Atiku named 750,000 as the figure for the people internally displaced as a result of communal clashes in the country. See further, Norwegian Refugee Council/Global IDP Project, *Profile of Internal Displacement: Nigeria* (Geneva: Norwegian Refugee Council/Global IDP Project, 2002) at -6

<sup>440</sup> UNHCR, *UNHCR Global Report 2003* (Geneva: UNHCR, 2003) at 225. See also, “UN Stops Repatriation of 17,000 Nigerian From Cameroun” *The Guardian* (Lagos) June 29, 2004. This states that the UNHCR stopped the planned repatriation of over 17,000 Nigerians who fled from communal crisis in Mambilla Plateau state in 2001.

<sup>441</sup> Norwegian Refugee Council/Global IDP Project, *Profile of Internal Displacement*” *supra* note 439 at 6 & 7. See also, O.C. Okafor, “Convention Refugeehood, Early Warning Signs, and the Structural Crisis” *supra* note 365 at 15 & 16. See further, *Profile of Internal Displacement: Nigeria, ibid.* at 7. See also P. Jason, “The Gathering Storm” *Vanguard* (Nigeria) October 30<sup>th</sup>, 2001) on line: <http://www.vanguardngr.com/news/articles2001/October/30102001/c1302001.htm> (Visited: 30/10/2001).

<sup>442</sup> T. Obateru “Buhari Hits Obasanjo, Accuses FG of Official Thievery” *Vanguard*, October 18, 2002 on line: <http://www.vanguardngr.com/articles/2002/cover/f18102002.html> (visited: 18/10/2002).



*Debt in the Third World*, observes as follows about his experience in dispute settlement among the Tivs of Nigeria: “I have found that among the Tiv people, in Benue state in Nigeria, whom I visit frequently as honorary Chief, there has been an increasing level of violence due to land disputes between clans. Poverty is a great aggravator of violent strife; ...”<sup>443</sup> Perhaps, this provides an answer to some questions raised by Levi Obijofor, a columnist with the Guardian (Nigeria), when he asked: “Why are Nigerians killing more Nigerians now, with or without provocation? Why are communities and ethnic groups locked in internecine conflicts that do not appear to have clear objectives?”<sup>444</sup>

Thus, many ethnic groups in Nigeria see the fruits and pains of SAPs as not being evenly distributed. Some sections of the country without access to power are experiencing disproportionate pains under the programme.<sup>445</sup> This unequal distribution of the pains and benefits of SAPs contributes to heightening ethnic violence and communal strife in Nigeria. According to Segun Olusola, today many different groups in Nigeria particularly marginalized ones “have intensified their demands for rights, particularly

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<sup>443</sup> M. Dent and B. Peters, *The Crisis of Poverty and Debt in the Third World*, *supra* note 370 at 101. See also Rear Admiral Augustus Aikhomu “I’m Not Afraid of My Past” stating that: “Today, there is a lot of insecurity in the country, a lot of killings, there are a lot of communal and religion crises. I am a pensioner, having worked for Nigeria for 37 years. It is my own right to get my pension as at when due. There are thousands of others out there. You can regard me as executive pensioner. I am talking of little fellow that is not expecting so much, worked all his life yet pensions are not being paid. We are now beginning to see an era in this country where civil servants are not paid.” (Interview by C. Nwachuku, *ThisDay*, Saturday 02/11/2002 on line: <http://www.thisdayonline.com/news/Saturday/20021102cov01.html> (visited: 11/02/2002).

<sup>444</sup> L. Obijofor, “Danger Signals” *The Guardian*, October 26, 2001, on line: <http://www.nguardiannews.com/editorial2/en837604.html> (visited: 10/27/2001).

<sup>445</sup> J. O. Ihonvbere, “Economic Crisis,” *supra* note 384 at 148.

human and economic rights, by violent means.”<sup>446</sup> Most have made their demands in a manner that infringed on the rights of others by “terrorizing the whole society.”<sup>447</sup> This happened perhaps because, as Benjamin Barber observes, “If there cannot be equity of justice, there will be equity of injustice; if all cannot partake of plenty, impoverishment, both material and spiritual, will be the common lot.”<sup>448</sup> This is a recipe for disaster, that is, the type that can give rise to huge refugee flows.

One of the policy rationales for the introduction and implementation of SAPs in Nigeria is the need to open up the Nigerian market for foreign investment. This involves the creation of an enabling environment for the smooth, unrestrained, and profitable operations of the MNCs. It is believed that the engagement of MNCs in Nigeria will help to accelerate the growth and development of the economy. Presently, there are several MNCs doing business in the country, especially in the oil industry. MNCs operating in this sector of the Nigerian economy are of particular interest in this study because their activities have proved adverse and detrimental to the environment and general well being of Nigerians, and have ultimately led to refugee flows.

#### **4.4. MNCS IN NIGERIA AND REFUGEE PRODUCTION**

I’m seeing soldiers, bandits, actually coming to take away this stuff (crude oil) and to develop their own homes while pretending to be running Nigeria. Oil has brought nothing but disaster to our people.<sup>449</sup>

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<sup>446</sup> S. Olusola, “The Role of Conflict Prevention For Preventing Refugee Flows” (2001) 8:1 *International Journal on Minority and Group Rights* 51.

<sup>447</sup> *Ibid.*

<sup>448</sup> Quoted in G.O Verhofstadt “The Hypocrisy Behind Our Compassion” *The Guardian* (Nigeria) October 17, 2002 on line: <http://nigeriaworld.com/news/source/2002/oct/headlines/17/15-news.html> (visited 10/18/2002).

<sup>449</sup> K. Saro-Wiwa, *The News*, May 17, 1993, at 23.

This statement by Ken Saro-Wiwa, the former President of MOSOP (Movement for the Survival of Ogoni People) puts in context the sufferings and frustrations of almost every ethnic group in the Niger Delta region, where oil exploration and exploitation activities are being carried out by the MNCs. Shell Petroleum Development Company of Nigeria (SPDC), a Dutch/British-owned MNC, first struck oil in commercial quantities in Ogoniland in 1958. Since then, Shell has developed a huge presence in Ogoniland, “with over 100 oils wells... and seven gas flares, which burn twenty-four hours a day. The oil industry has criss-crossed the land with pipelines and divided it with canals.”<sup>450</sup>

Before this development, the Ogonis who are mainly farmers, hunters, and fisher folks had lived in peace with their neighbours.<sup>451</sup> However, all that changed with the advent of Shell. First, a large segment of the Ogoni population was forced into a smaller land area to make way for oil prospecting.<sup>452</sup> Second, from over 634 million barrels of crude oil, which is the approximate estimate of the quantity of crude oil produced from Ogoniland since 1958, the people have nothing to show for except poverty, disease, environmental disasters, ecological devastation, and other acts of gross human rights violations.<sup>453</sup> The companies engaged in oil exploration and exploitation in the Niger

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<sup>450</sup> J. P. Eaton, “The Nigerian Tragedy, Environmental Regulation of Corporations, and The Human Right To Healthy Environment” (1997) 15 Boston University International Law Journal 261 at 266.

<sup>451</sup> C. R. Ezetah, “International Law of Self-determination and the Ogoni Question: Mirroring Africa’s Post Colonial Dilemmas” (1996-97) 19 Loyola of Los Angeles International & Comparative Law Journal 811 at 814.

<sup>452</sup> *Ibid.* at 815.

<sup>453</sup> S. Pegg, “The Cost of Doing Business: Transnational Corporations and Violence in Nigeria” (1999) 30:4 security Dialogue 473. See also, E.E. Osaghae, “The Ogoni Uprising: Oil Politics, Minority Agitation and the Future of the Nigerian State” (1995) 94:376 African Affairs 325 at 330. See further, Human Rights

Delta have extracted crude oil worth about \$300 billion, returning nothing to the place by way of development.<sup>454</sup> Rather, the people of the region have been ravaged by poverty, pollution and MNCs backed government violence.

Environmentally, the activities of the oil companies operating in the Niger Delta have resulted in serious damage to the agricultural lands, fishing ponds, rivers, and creeks. Most people's source of livelihood has thereby been destroyed. Ruptured oil pipes have released thousands of barrels of oil into the streams that serve both as a source of drinking water and as fishing waters for the people.<sup>455</sup> The negligent and damaging activities of the oil companies have caused serious problems to the inhabitants of these areas. Consequently, the adverse impact of the operations of the oil companies has prompted strong, bitter reactions from the affected populations. Another casualty of the high-handed response of the government of Nigeria (instigated and backed as they have been by the oil companies) to the resistance of the people against the deplorable activities that undermine their livelihood is peace in the area. The Niger Delta is perennially in a near state of war, as both the Nigerian government forces and other security operatives

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Watch, *The Warri Crisis: Fueling Violence* (New York: Human Rights watch, 2003) at 2. See also, Nigeria – Commission on Human Rights, "Report of the Special Rapporteur" on line: <http://www.hri.ca/fortherecord1998/vol2/nigeriachr.htm> (visited: 10/16/2000). See also R. Ezetah, *ibid.* at 815. See further, A. A. Idowu, "Human Rights, Environmental Degradation and Oil Multinational Companies in Nigeria: The Ogoniland Episode" (1999) 17:2 *Netherlands Quarterly of Human Rights* 161 at 167. The author put the number of barrels of oil carted away from Ogoni at 900 million.

<sup>454</sup> C. Marecic, "How Many Wrongs Does It Take To Make A Human Rights?" (1997) 22 *Vermont Law Review* 201 at 204-207. See also, I. Gary & T. L. Karl, *Bottom of The Barrel: Africa's Oil Boom and the Poor* (Maryland: Catholic Relief Services, 2003) at 5. E.E. Osaghae, "The Ogoni Uprising: Oil Politics," *ibid.* at 325. See further, M. D. Fleshman, "Nigeria: Blood and Oil: A Special Report" on line: <http://www.prairienet.org/acas/blood&oil.htm> (visited: 06/10/00).

<sup>455</sup> M. D. Fleshman, "Nigeria: Blood and Oil, *ibid.*

detailed to protect the oil installations in the area, often attack the people who protest against oil companies activities that adversely affect them.

Unfortunately, the people of the Niger Delta feel marginalized in Nigerian politics as well as in the military.<sup>456</sup> Their powerlessness in these two all important institutions in Nigeria gives both the federal government of Nigeria and the oil companies the leverage to operate with reckless abandon in the region, and to employ a campaign of highhanded repression against any form of substantial dissent or protest against the harmful damage being done by these MNCs to the environment and lives of the people that inhabit the area. Thus, the effort on the part of the Nigerian government to protect its oil investment has led it to enter into security agreements with MNCs producing oil in the country.<sup>457</sup> The government roles under the agreement are to recruit and train a supernumerary police that will be specifically responsible for the protections of MNCs' oil installations, other equipment, and staff.<sup>458</sup> For their part, the MNCs will pay for the services rendered by the government and adequately compensate the force, better than the compensation its members would receive in their regular, state sponsored police duties.<sup>459</sup>

Some of the oil companies (for example, Shell) have admitted providing handguns and other arms (such as beretta, semi-automatic rifles, pump-action shotguns

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<sup>456</sup> O. Omoruyi, "The Politics of Oil: Who Owns Oil, Nigeria, States or Communities?" NigeriaWorld January 31, 2001 on line: <http://nigeriaworld.com/feature/publication/omoruyi/oil.html> (visited: 10/25/2001).

<sup>457</sup> S. Dolezal, "The Systematic Failure to Interpret Article IV of the International Covenant on Civil and Political Rights: Is There A Public Emergency in Nigeria?" (2000) 15 American University International Law Review 1163 at 1192.

<sup>458</sup> *Ibid.*

<sup>459</sup> *Ibid.*

and teargas) to the police and other paramilitary outfits in Nigeria for the protection of its facilities in the Niger Delta.<sup>460</sup> The multinational oil companies operating in Nigeria have admitted, that on a number of occasions, in addition to paying allowances to Nigerian security outfits, they have transported members of the Nigerian security forces in their helicopters and boats to the scenes of demonstrations or protests, in order to suppress the peoples' protests about the adverse impact of oil activities in their communities.<sup>461</sup>

Since 1990, when the Ogonis presented the "Ogoni Bill of Rights" to the federal government of Nigeria,<sup>462</sup> several violent clashes have taken place between the Ogonis and Nigerian security agents, including soldiers reportedly equipped by Shell.<sup>463</sup> For

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<sup>460</sup> J. Nzelibe, "When The Multinational Meets The Patrimonial State: Prospects For Improving Transnational Liability" (1996) 5 *Journal of Int'l L. and Practice* 417. See also, S. Pegg, "The Cost of Doing Business" *supra* note 451 at 475. See further, S. Dolezal, "The Systematic Failure..." *supra* note 457 at 1197. Again, see C. Marecic, "How Many Wrongs Does It Take to Make a Human Right?" *supra* note 454 at 209.

<sup>461</sup> S. Pegg, "The Cost Of Doing Business" *supra* note 453 at 475 & 476. See also, *The Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria*, Communication No. 155/96. The African Commission on Human and Peoples' Rights observed that the Nigerian government "has not taken steps as it should to protect the Ogoni population from harms done by the NNPC-Shell consortium, it has instead actively used its security forces to facilitate and compound the damage." Continuing, the Commission notes that the government "has promoted an atmosphere of terror in a bid to silence the demand for observance of their (Ogoni) rights." Emphasis supplied. See also, C. Baez, *et. al.*, "Multinational Enterprises and Human Rights" (1999-2000) 8 *University of Miami International and Comparative Law Review* 183 at 233.

<sup>462</sup> Ogoni Bill of Rights, online: <http://www.nigerianscholars.africanqueen.com/docum/ogoni.htm> (visited: 10/01/2000) The Ogoni people demanded *inter alia* in their *Bill of Rights*: (1) political autonomy and participation in the affairs of Federal Republic as a distinct and separate unit; (2) political control of Ogoni affairs; (3) the right to control and use a fair proportion of Ogoni economic resources for Ogoni development; (4) adequate and direct representation as of right in all Nigerian institutions; (5) the use and development of Ogoni languages in Ogoni territory; (6) the full development of Ogoni culture and right to religious freedom; and (7) the right to protect the Ogoni environment and ecology from further degradation.

<sup>463</sup> S. Pegg, "The Cost of Doing Business" *supra* note 453 at 476 & 477. Further see, J. Nzelibe, "When the Multinational Meets the Patrimonial State" *supra* note 460 at 417. Again, see O. Douglas, *et. al.* "Alienation and Militancy in Niger Delta: A Response to CSIS on Petroleum, Politics, and Democracy in Nigeria" (2003) *Foreign Policy in Focus* 1 at 4. See also Corporate Watch, "Shell in Nigeria" on line:

instance, a protest staged by the Movement for the Survival of the Ogoni People (MOSOP) on October 31, 1990, led to the death of 80 people and the destruction of over 500 Ogoni homes by police and other security agents, who had acted at the request of Shell to disperse the protesters.<sup>464</sup> Again, on January 4, 1993, MOSOP organized a peaceful protest where over 300,000 Ogonis participated. The aim of the peaceful rally was to sensitize the public to the plight of the Ogonis.<sup>465</sup> The Ogonis used the occasion to demand compensation for damage done to their environment and their main means of livelihood, as well as to call for the cleaning up of the pollution already done to the environment.

The collusive relationship between the multinational oil companies and the Nigerian government in the project of repression and intimidation of the peoples of Niger Delta was exemplified by the events of April 28, 1993.<sup>466</sup> On that day, a private pipeline contractor (Wilbros) engaged by Shell was confronted by some Ogonis while the contractor was bulldozing crops on Ogoni farmland, close to Biara. The contractor was

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<http://www.corpwatch.org/trac/feature/humanrts/cases/nb-shell.html> (10/03/2000). See further, Human Rights Watch, "The Price of Oil: Security" on line: <http://www.hrw.org/reports/1999/nigeria/Nigew991-07.htm> (visited: 03/26/2002), stating that "all the oil companies in Nigeria hire supernumerary police sometimes known as 'spy police,' to protect their installations. These police are recruited and trained by the Nigerian police force, but paid for by the oil companies, at rates well above those paid by the Nigerian government." See further, A. Ikelegbe, "Civil Society, Oil and Conflict in the Niger Delta region of Nigeria" *supra* note 402 at 462 stating that "the MNOC response to militant civil society activity.... has been support for state repression. They seek state security deployment and provide logistic and material support to state security forces, which brutally suppress civil protests."

<sup>464</sup> C. Marecic, "How Many Wrongs Does It Take To Make A Human Right?" *supra* note 454 at 208 & 209. See also S. Pegg, "The Cost of Doing Business" *supra* note 453 at 476. See further P. C. Aka, "Nigeria: The Need For An Effective Policy Of Ethnic Reconciliation in the New Century" (2000) 14 Temple International and Comparative Law Journal 327 at 347. See also, C. E. Welch, JR. & M. Sills, "The Martyrdom of Ken Saro-Wiwa" *supra* note 364.

<sup>465</sup> J. P. Eaton, "The Nigerian Tragedy, Environmental Regulation of Corporations," *supra* note 450 at 269.

operating under the full protection of the Nigerian soldiers.<sup>467</sup> Following a peaceful protest and blocking of the path of the bulldozers, the security forces linked to the contractor responded by beating, wounding and eventually killing some of the villagers.<sup>468</sup> In this particular instance, while admitting no wrong-doing, Shell acknowledged that it provided both transportation and field allowances for the soldiers protecting the contractor.<sup>469</sup>

There was also evidence of a collaborative relationship between the Nigerian government and Shell on the public relations front to combat the adverse publicity both were receiving from Western media abroad.<sup>470</sup> The purpose of these public relations efforts was not only to improve the reputation of both Nigeria and Shell before the international community, but also to counter most of the basic factual claims made against them by NGOs and others pertaining to the adverse impact of their oil exploration and exploitation activities in the Niger Delta.<sup>471</sup> For instance, Shell sponsored a trip to Nigeria by many journalists from respected German newspapers (for example, *siiddeutsche Zeitung*, *Die Welt*, and *Franfurter Allgemeine Zeitung*).<sup>472</sup> These journalists, after visiting Nigeria, presented Shell in a favourable light, and played down the

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<sup>466</sup> S. Pegg, "The Cost of doing Business" *supra* note 453 at 476 &477. See also, A. Ikelegbe, "Civil Society," *supra* note 402 at 453.

<sup>467</sup> S. Pegg, *ibid.*

<sup>468</sup> *Ibid.*

<sup>469</sup> *Ibid.*

<sup>470</sup> J.G. Frynas, "Corporate and State Responses To Anti-Oil Protests in the Niger Delta" (2001) 100 *African Affairs*, 27 at 46.

<sup>471</sup> *Ibid.*

<sup>472</sup> *Ibid.*



environmental and human rights problems associated with Shell's activities in the Niger Delta.<sup>473</sup>

After persistent pressure and protests from MOSOP, Shell was forced to close its operation in Ogoniland in May 1994. Shell, however, requested assistance from the Nigerian government to protect its installations.<sup>474</sup> The response of the government to Shell's request was the establishment of the Rivers State Internal Security Task Force (RSISTF). This security outfit was essentially designed to crack down on the Ogonis and to ensure the provision of a peaceful environment for the operation of the oil companies. Since its establishment, RSISTF has engaged in all manner of flagrant, violent abuses of the human rights of the Ogonis, including unlawful arrests, illegal detentions, rapes, looting, and extortion.<sup>475</sup>

The RSISTF employed violent, repressive measures in its effort to bring back normality to Ogoniland and to ensure the resumption of Shell's operations. The desperation on the part of RSISTF to achieve this outcome was evident in a secret memo sent to the then governor of Rivers State by the chairman of RSISTF, Lt. Col. Paul Okuntimo, in which he noted that "Shell operations [are] still impossible unless ruthless

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<sup>473</sup> J.G. Frynas, *ibid.*

<sup>474</sup> In addition to requesting the assistance of the Nigerian government in the provision of security for its facilities, Shell also employs the services of thugs to intimidate and harass into submission the Ogonis and other inhabitants of the Niger Delta region. For instance, Shell hired some thugs in April 2002 to guide the staff servicing some of its facilities at Kegbara Dere Community in Gokana Local Government of Rivers State. This resulted in a clash between the youth of the area and the thugs on April 8, 2002, leading to the death of about two persons, injuries to other number of victims, and the destruction and looting of properties. See O. Bassey, "MOSOP Alleges Murder of 2 Members" *ThisDay News* 04/15/2002, on line: <http://www.thisdayonline.com/news/20020415news27.html> (visited: 4/15/2002). See also. C. Baez, *et. al.*, "Multinational Enterprises and Human Rights" *supra* note 459 at 232 &233.

<sup>475</sup> J. P. Eaton, "The Nigerian Tragedy, Environmental Regulation of Corporations, *supra* note 450 at 270.

military operations are undertaken for smooth economic activities to commence.”<sup>476</sup> He went on to suggest a “wasting” operation that would involve the killing of Ogoni leaders.

Consequently, over 3,000 Ogoni people were killed and over 30,000 internally displaced. In addition, over 1,000 fled to neighbouring West African countries as refugees, while many others fled to Europe and North America.<sup>477</sup> According to Ledum Mitee, the acting President of MOSOP, said in response to the gesture of former head of state General Abubakar in releasing some political prisoners in 1998:

Nigeria and the world must not forget that the suffering of the Ogoni people are enduring for the sake of Shell’s profits and Nigerian oil revenues. We still live under military occupation. Our environment remains devastated. 2,000 Ogoni people have been killed and thousands have escaped state orchestrated violence as refugees.<sup>478</sup>

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<sup>476</sup> R. Ezetah, “Self-determination”, *supra* note 451 See also Claude E. Welch, JR. & Marc Sills, “The Martyrdom of Ken Saro-Wiwa” *supra* note 362

<sup>477</sup> O.O. Ibeanu, *Insurgent Civil Society and Democracy in Nigeria: Ogoni Encounters With The State 1990-1998*, at 20 (A Research Report Produced for ICSAG Programme of Centre for Research and Documentation (CRD), Kano-Nigeria) (on file with the author). See also, Human Rights Watch, “Protest and Repression in Niger Delta” on line: <http://www.hrw.org/reports/1999/nigeria/Nigew991-08.htm> (Visited 03/26/02), acknowledging the flight into exile of many leaders of MOSOP after the execution of Ken Saro-Wiwa. See further, Corporate Watch, “Shell in Nigeria” on line: <http://www.corpwatch.org/trac/feature/humanrts/cases/nb-shell.html> (visited: 10/03/2000). Stating that “the numbers are staggering- the World Council of Churches estimates that over 3000 Ogoni fled Nigeria to camps in neighbouring countries, only to be forced to live in gruesome conditions. Many have fled Africa altogether, and today the leaders of MOSOP are scattered throughout Europe and North America.” See further, Y. Lawal “Ogonis in USA Drag Shell To Court” *The Guardian* (Nigeria) October 17, 2002, on line: <http://nigeriaworld.com/news/source/2002/oct/headlines/17/11-news.html> (visited: 10/17/2002). In an action against Shell filed at a U.S. court, the National Union of Ogoni Students alleged that Shell instigated and collaborated with the Nigerian government in the violent abuses of the human rights of the Ogonis, which led to the death of many Ogonis, “...and many more...injured or forced to flee Nigeria since the anti-Shell protests began in 1992.”

<sup>478</sup> L. Mitee, “MOSOP Demands The Immediate Release of The Ogoni 20” (Press Release June 19<sup>th</sup>, 1998) on line: <http://www.prairienet.org/acas/mosop20.html> (visited: 10/06/2000). See also, L. Mitee, “The New Millennium and the 10<sup>th</sup> Anniversary of the Movement for the Survival of the Ogoni People (MOSOP) (2000) 2 *Oregon Review of International Law* 118 at 120.

The former President of MOSOP, Ken Saro-Wiwa, reached a similar conclusion when he observed that the Ogoni environment was being degraded and people were being driven from their land. He stated that a “colony of about 18,000 Ogoni people driven from their land and fishing ports in order for the oil companies to take up the farmland are now living in exile in Cameroon.”<sup>479</sup>

The climax of the repression of the Ogonis and other Niger Delta people by Shell and the Nigerian government came in 1994, following the arrest and detention of the MOSOP leader Ken Saro-Wiwa. Ken Saro and his kinsmen were accused of the murder of four prominent Ogonis in a mob action. Despite evidence in support of their innocence, they were tried and convicted in fundamentally flawed judicial proceedings that took place in a military tribunal, and executed by the Federal Government of Nigeria on November 10, 1995.<sup>480</sup> As Michael Birnbaum, an impartial observer to that trial noted:

The judgement of the tribunal is not merely wrong, illogical or perverse. It is down right dishonest. The Tribunal consistently advanced arguments, which no experienced lawyer could possibly believe to be logical or just. I believe

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<sup>479</sup>K. Saro-Wiwa “They Are Killing My People” in Abdul Rasheed Na’Allah, ed., *Ogoni’s Agonies: Ken Saro-Wiwa And The crisis In Nigeria* (Trenton, NJ: African World Press Inc., 1998) 329 at 331. See also, *Ken Wiwa &ors V. Royal Dutch Petroleum Company and Shell Transport and Trading Company &ors* (United States District Court for the Southern District of New York) February 28,2002, on line: <http://www.earthrights.org/shell/mtd02.html> (visited: 03/26/2002) stating that Shell, in conspiracy with the Nigerian government perpetrated the violations of the human rights of the Ogoni people so as to instil fear and anguish, and to break the peoples’ resolve to fight injustices arising from Shell operations on their land. In this process, some would be forced to leave their homes and country, and flee into exile.

<sup>480</sup> Shell was implicated in this case; the company was of accused of having orchestrated the trial. According to Ken Saro-Wiwa at the trial before his sentence to death: “Shell is here on trial...The company has, indeed, ducked this particular trial, but its day will surely come...” quoted in EarthRights International, “Lawsuit Against Shell For Human Rights Violations in Nigeria To Proceed” on line: <http://www.earthrights.org/shell/pr0202.html> (visited: 03/26/2002). In same vein, Judith Chomsky observed that: “Shell had direct involvement in the human rights violations against the Ogoni people.”

that the Tribunal first decided on its verdicts and then sought for arguments to justify them. No barrel was too deep to be scraped.<sup>481</sup>

The lack of concern for the environment and safety of the inhabitants of the Niger Delta during oil exploration and exploitation activities is not unique to Shell. Other oil companies have also engaged in the infamous dehumanizing practices that all too often result in egregious violations of human rights. For instance, on January 4, 1993, soldiers “using a Chevron helicopter and Chevron boats” attacked the villages of Opia and Ikenyan in Delta State.<sup>482</sup> In this incident, which was carried out to protect Chevron oil

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<sup>481</sup> M. Birnbaum Q.C., *A Travesty of Law and Justice: An Analysis of the Judgment in the Case of Ken Saro-Wiwa and Others* (London: Article19, 1995) at 2. See also, Human Rights Watch, “Protest and Repression in The Niger Delta” on line: <http://www.hrw.org/reports/1999/nigeria/Nigew991-08.htm> (visited: 03/26/02). See also, W. Soyinka *The Open Sore of a Continent: A Personal Narrative of the Nigerian Crisis* (New York/ Oxford: Oxford University Press, 1996) at 152, stating that Ken Saro-Wiwa’s fate had long been sealed. “The decision to execute him and his eight companions was reached before the special tribunal was ordered to reconvene and pronounce a verdict that had been decided outside the charade of judicial proceeding. The meeting of the provisional Ruling Council to consider the verdict was a macabre pretence, a prolongation of the cynicism that marked the trial proceedings from the outset.” The dishonesty exemplified by the trial, conviction and execution of Ken Saro-Wiwa and his Ogoni kinsmen has always been the practice of both the oil companies and the Nigerian government in dealing with the Ogoni issue. A European Shell executive observed: “I would go so far as to say that we spent more money on bribes and corruption than on community development projects.” See “Shell Axes Corrupt Nigeria Staff” *Sunday Times* (London), December 17, 1995 as quoted in Human Rights Watch, “Price of Oil: Oil Companies and The Oil Producing Communities” on line: <http://www.hrw.org/reports/1999/nigeria/Nigew991-06.htm> (visited: 03/26/2002). See further, C. Baez, *et. al.*, “Multinational Enterprises and Human Rights” *supra* note 459 at 233.

<sup>482</sup> S. Pegg, “The Cost of Doing Business” *supra* note 453 at 477 & 478. See also, Nigeria- Human Rights Watch World Report, “Oil Companies Complicit in Nigeria Abuses” on line: <http://www.hrw.org/hrw/press/1999/feb/nig0223.htm> (visited: 06/10/00). Shell also provides arms for Nigerian police and other security organizations protecting its facilities all over the country. As observed by Claude Ake in the *Tell Magazine* of 1996: “It is indicative of Shell’s privatization of the state and its prerogatives that it buys substantial quantities of firearms through open tender for its own use. ThisDay of Friday, December 22, 1995, (a Nigerian newspaper with nation wide circulation) reports a case before a Lagos High Court in which an arms dealer, Humanities Nigeria Limited, sued Shell Nigeria for 30 million [naira] for breach of a contract that, Shell awarded in 1993. In a 17 paragraph affidavit sworn by the chief executive of the company, Gabriel Akinluyi, the company says that shell was making the purchase to update the firearms of its security across the country. See C. Ake, “Shelling Nigeria Ablaze” *Tell* (Nigeria) 29 January 1996 at 40. See also Y. Lawal “Ogonis in USA Drag Shell To Court” *The Guardian* (Nigeria) October 17, 2002 on line: <http://nigeriaworld.com/news/source/2002/oct/headlines/1711-news.html> (visited: 10/17/2002). The National Union of Ogoni Student in the USA in an action filed against Shell in

installations and facilities, several people were killed and most parts of the villages were burned.<sup>483</sup>

Thus, the oil companies operating in Nigeria connive with the country's leadership to oppress and dehumanize citizens who protest the activities of the MNCs that cause pollution and other serious damage to their environment. As the executive director of Human Rights Watch, Kenneth Roth, observed,

The oil companies can't pretend they don't know what's happening all around them. The Nigerian government obviously has the primary responsibility to stop human rights abuse. But the oil companies are directly benefiting from these crude attempts to suppress dissent, and that means they have a duty to try and stop it.<sup>484</sup>

By the same token, Chikoko, a resistance movement fighting for the emancipation of the people of the Niger Delta from the clutches of oppression imposed by both the Nigerian federal government and the oil companies, has observed that:

In the wake of the occupation of oil facilities by our people demanding autonomy and an end to corporate rule that has brought poverty, pain, and

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the U.S. court, alleged that: "Shell has ruined our land and our lives. Shell used Nigerian military forces to burn our villages and slaughter innocent men, women, and children in a failed attempt to silence our peaceful protest. It is finally time to bring Shell to trial for planning, financing, and supporting the systematic violation of human rights perpetrated against the Ogoni people in Nigeria."

<sup>483</sup> Nigeria- Human Rights Watch Report, "Oil Companies Complicit in Nigerian Abuses" on line: <http://www.hrw.org/hrw/press/1999/feb/nig0223.htm> (visited: 06/10/00). See also *Larry Bowoto & ors. V. Chevron Corporation & ors.* C99-2506 Cal (United States District Court for The Northern District of California) on line: <http://www.earthrights.org/chevron/complaint.html> (visited: 03/26/02).

<sup>484</sup> Nigeria – Human Rights Watch World Report, "Oil Companies Complicit in Nigerian Abuses" on line: <http://www.hrw.org/hrw/press/1999/feb/nig0223.htm> (visited: 06/10/00). See also *Wiwa V. Royal Dutch Petroleum (Shell)*: United States Court of Appeals for The Second Circuit September 14, 2000, on Line: <http://www.earthrights.org/shell/appeal.html> (visited: 03/26/02), stating that the gross human rights abuse of Ken Saro-Wiwa and other Ogonis was done by the Nigerian government at the instigation of Shell because of the opposition of the Ogonis to Shell's exploration and other oil activities on their land. See further, *The Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria*, Communication No. 155/96 (decision of African Commission on Human and Peoples' Rights). See also, V. Ojaborotu, *Oil Minorities and the Politics of Exclusion in The Niger Delta of Nigeria* (Johannesburg South Africa: Department of International Relations, University of the Witwatersrand, 2003) at 14.

privation environmentally, economically and culturally, the military dictatorship of General Abdulsalami Abubakar last week promised to pursue the military option as his solution to the crisis...We are forced to believe that the decision to buy these submarines with our oil money is not the independent decision of the ruling generals. Shell, Chevron, Mobil, Elf and other transnationals must be seen as the unseen face behind the mask. You of course know that these companies have been in the business of using the military to protect their business interests. Shell has for instance publicly admitted that they paid the soldiers who invaded Ogoniland in October 1993; ...Chevron also admitted that it paid soldiers that killed two Ilaje youths demanding environmental justice in May.<sup>485</sup>

Because oil constitutes the major source of revenue for the Nigerian government and the elites who depend on government patronage, the government and the elites are therefore prepared to do anything to satisfy the oil companies and ensure the free flow of oil from the Niger Delta.<sup>486</sup> As a result, the Nigerian rulers are willing and prepared, in alliance with multinational oil companies, to mount a campaign of intimidation and terrorism against the people and leaders of the Niger Delta region.<sup>487</sup>

In the same vein, Amos Adeoye Idowu has noted that, "it is evident from the activities of the oil producing companies in Nigeria that greater attention is often paid to how profits can be maximized rather than to the preservation and protection of the

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<sup>485</sup> Chikoko On The State Of Nigeria (Press Conference held 30 November, 1998) on line: <http://lists.essential.org/1998/shell-nigeria-action/msg00759.html> (visited: 10/03/2000).

<sup>486</sup> B. Ewulu, "Govt Officials Consume 80% of Nigeria's Revenue" – World Bank Daily Trust (Nigeria) November 7, 2002), on line: <http://www.mtrustonline.com/dailytrust/topstory37112002.htm> (visited: 11/07/2002), wherein the World Bank Country's Director for Nigeria, Mr. Mark Tomlinson, observed that 80 percent of Nigerian revenue is being consumed by government officials (including those that have access to people in power), leaving only 20 percent for 99 percent of the population. (Emphasis added).

<sup>487</sup> "Briefing Note on Ogoniland and the Ogoni People of Nigeria" October 1993, as quoted in C. E. Welch, JR. & M. Sills "The Martyrdom of Ken Saro-Wiwa," *supra* note 364.

environment for the safety of lives and property.”<sup>488</sup> This could possibly be an explanation for the federal government’s authorization of the invasion of Odi, an oil-producing community, in the Niger Delta in November, 1999. The federal government’s excuse for this invasion was the death of twelve police officers who were abducted and killed by a criminal gang in Odi in Bayelsa state, which has been a victim of many years of environmental devastation and dehumanizing operations of the oil companies.<sup>489</sup>

The federal government sent in about 2,000 heavily armed soldiers to fish out the members of the criminal gang that murdered 12 policemen.<sup>490</sup> In a violent operation, the soldiers destroyed the town, and razed buildings to the ground. As the governor of Bayelsa State, Alamiyesegeha, lamented, “The force applied was massive, unwarranted, uncalled for, and it did not yield any criminals they were looking for...the whole town was levelled...the town was the second largest town in Bayelsa state...now it is gone.”<sup>491</sup>

Several people lost their lives in this operation, and many thousands fled the area for safety elsewhere, thereby becoming refugees in their own country. The observation of a group of human rights organizations that visited Odi after the operation was similar. Group members contended that the destruction was complete, with crops razed, yam

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<sup>488</sup> A. A. Idowu, “Human Rights, Environmental Degradation and Oil Multinational Companies in Nigeria: The Ogoniland Episode”, *supra* note 453 at 172.

<sup>489</sup> P. C. Aka, “Nigeria Since May 1999: Understanding The Paradox of Civil Rule and Human Rights Violations Under President Olusegun Obasanjo” (2003) 4 San Diego International Law Journal 209 at 252-253. See also, I. O. Solarin, “Nigerian Federalism: The Lesson of Odi” on line: [http://nigeriaworld.com/feature/publication/solarin/federalism\\_odi.html](http://nigeriaworld.com/feature/publication/solarin/federalism_odi.html) (visited: 10/25/01).

<sup>490</sup> I. O. Solarin, *ibid*.

<sup>491</sup> Governor Alamiyesegeha (Bayelsa state), as quoted in I. O. Solarin, “Nigerian Federalism: The Lesson of Odi” See also T. David-West, Jr. “The Niger Delta: A Call for Reparations” NigeriaWorld on line: <http://nigeriaworld.com/feature/publication/david-west/reparations.html> (visited: 10/25/2001), stating that

barns burned, garri- processing plants wilfully wrecked, canoes set ablaze, and every house in the entire community, with exception of First Bank, a community health centre, and the Anglican church, burned to the ground.<sup>492</sup> Further, they added, “we saw not a single livestock, poultry, or other domestic animal except a stray cat. The community’s 60,000 inhabitants had tied [sic] into the forest or been arrested or killed.”<sup>493</sup>

The invasion of Odi was premeditated and carefully designed to suppress the dissent and protest against the operations of the oil companies by the inhabitants of the area. The goal was the devastation of their environment and means of livelihood, and the creation of a climate in which the oil companies could operate without molestation or hindrance. The statement of the then Nigerian defence minister, General T.Y. Danjuma, on November 25, 1999, at a press conference after the invasion gives credence to this interpretation: “This operation Hakuri II was initiated with the mandate of protecting lives and property particularly oil platforms flow stations, operating rig terminals, and pipelines, refineries and power installations in the Niger Delta.”<sup>494</sup>

There is some evidence that the Nigerian government and the oil companies have instigated and helped in the execution of communal fights and clashes among different ethnic groups in the Niger Delta, with the goal of ensuring the smooth operation of the oil companies. Ethnic conflicts in the Niger Delta existed long before the multinational oil companies’ activities in the regions, but there is evidence showing that the government

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about 1,500 houses were destroyed during the invasion of Odi at the orders of a “democratically elected President” of Nigeria.

<sup>492</sup> “Genocide In Odi,” on line: <http://lists.essential.org/shell-nigeria-action/msg00701.html> (visited: 10/106/2000).

<sup>493</sup> *Ibid.*



appears to encourage and at times instigate ethnic conflicts.<sup>495</sup> The purpose of these evil machinations by the Nigerian government and the oil companies is, perhaps, to divert the attention of the protesters from the damaging operations of the oil companies. Thus, since 1993, several ethnic conflicts have taken place in the Niger Delta. Most of the clashes left behind the fingerprints of the government and the oil companies.

Human Rights Watch, in a study conducted on the Ogoni crisis, provided evidence to show the active role played by the Nigerian government in fomenting and executing some of the ethnic conflicts between the Ogonis and the Adonis in the 1990s.<sup>496</sup> Without provocation, the Adonis, fighting along with some Nigerian soldiers in plain clothes, attacked the Ogonis, destroying over ten Ogoni villages and rendering about 30,000 homeless.<sup>497</sup> The Nigerian army provided the Adonis with other war logistics in their fight against the Ogonis. In fact, the Ogonis were surprised because, prior to the attack, they had no serious problems with the Adonis. According to Osaghae, the Adoni leaders interviewed denied having “any problems with their Ogoni neighbours.”<sup>498</sup> Reinforcing Osaghae’s position, a *Guardian* editorial posed a pertinent question to that effect. According to *The Guardian*, since “the two sides have said they have no case against each other, who then engineered the conflict?”<sup>499</sup>

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<sup>494</sup> General T.Y. Danjuma at a press conference, November 25, 1999, as quoted in “Genocide at Odi.”

<sup>495</sup> J.G. Frynas, “Corporate and State Responses” *supra* note 470 at 34.

<sup>496</sup> Human Rights Watch, *Nigeria: The Ogoni Crisis: A Case-study of Military Repression in Southern Nigeria* (New York: Human Rights Watch, 1995) at 11. See also, J.G. Frynas, *ibid.* at 34.

<sup>497</sup> Human Rights Watch, *ibid.*

<sup>498</sup> E.E. Osaghae, “The Ogoni Uprising: Oil Politics” *supra* note 453 at 337.

<sup>499</sup> *The Guardian* (Lagos), October 12, 1993, at 8. See also, E.E. Osaghae, *ibid.*

Again, more of such ethnic clashes occurred between the Ogonis and the Okrika people in December 1993, and between the Ogonis and Ndoki people in April of 1994.<sup>500</sup> In fact, both the former MOSOP leader (Ken Saro-Wiwa) and the king (Amayanabo) of Okrika (S.P.U. Ogan) were in agreement that there were no problems or disputes of any sort between their two communities. There were also Nigerian government instigated ethnic clashes between the Ijaw and Itsekiri, and between the Ijaw and the Ilaje. In the course of these ethnic conflicts, many lives were lost. Properties worth millions of naira were destroyed, and many people were displaced. MOSOP estimated that about 1,000 Ogonis were killed.<sup>501</sup>

Prior to 1990, when the Ogonis and other oil-producing communities in the Niger Delta had not intensified their agitation for justice and equity in the exploitation of the oil in their land, they all lived in peace with each other. Following the presentation of the Ogoni's Bill of Rights and, subsequently, the *Kaiama Declaration* of the Ijaw people, which demanded that the oil companies operate with regard to the safety of the environment and the inhabitants of the areas and sought the payment of compensation for the damage that previous operations had caused, once peaceful neighbours became sworn enemies. As affirmed in the *Kaiama Declaration* by the Ijaws,

The violence in Ijawland and other parts of the Niger Delta, sometimes manifesting in intra and inter ethnic conflicts are sponsored by the state and

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<sup>500</sup> E. E. Osaghae, *ibid.*

<sup>501</sup> C.E. Welch JR, & Marc Sills, *supra* note 364 see also P. L. Okoronkwo, "Self-Determination and The Protection of The Minority Rights of Niger Delta People of Nigeria" unpublished paper (on file with the author) at 54.

transnational oil companies to keep the communities of the Niger Delta divided, weak and distracted from the causes of their problems.<sup>502</sup>

One of the Nigerian NGOs with an interest in the Niger Delta problems has observed that,

It is true that, in the process of this struggle, we have seen what have appeared essentially as ethnic conflicts, Ijaw-Ilaje, Ijaw-Itsekiri, Ogoni-Andoni, Nembe-Nembe, name it. Our position is that these clashes are instigated by the corporations acting in concert with the controllers of state power in order to divert attention from the demands of our people for self-determination.<sup>503</sup>

Both the federal government of Nigeria and the oil companies are relatively indifferent and insensitive to the sufferings of the inhabitants of the Niger Delta, who bear the adverse impacts of oil production activities in the region. There is little or no meaningful consultation with the people to appreciate what their concerns are and what measures could be taken to solve some of their problems.<sup>504</sup> This approach by the oil

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<sup>502</sup> *The Kaiama Declaration*, on line: <http://www.nigerianext.com/Ijawdeclare.html> at 2 (visited: 10/01/2000).

<sup>503</sup> Chikoko On the State of Nigeria, on line: <http://lists.essential.org/1998/shell-nigeria-action/msg00759.html> (visited: 3 October 2000).

<sup>504</sup> There is not an intention to discount some past and present efforts being made to address the plight and other developmental needs of the peoples of the Niger Delta communities. For instance, in 1992, the federal government of Nigeria established the Oil Mineral Producing Areas Development Commission (OMPADEC) to help in accelerating development in the Niger Delta Oil- Bearing communities. But, as a result of corruption and misallocations of resources, the money meant for the development of Niger Delta communities channelled through this body was "misspent or misappropriated." Again in 2001, the federal government established yet another body, the Niger Delta Development Commission (NDDC) which was charged with functions similar to OMPADEC. But the people of the oil-bearing communities are sceptical of this body especially having regard to the failure of similar experiments in the past. Importantly, the law establishing this body failed to give the beneficiaries any oversight role in the operation of the commission. There is no provision for feedback from the communities as to the usefulness of the projects cited in their areas. Besides, the critical issue of resources allocation was not addressed in the law establishing this body. Important too is the fact that the current efforts by the federal government must be considered against the backdrop of events in 1975, when the government abolished the revenue allocation principle based on derivation, and replaced it with a special account for oil- bearing communities. As a result, non oil

companies and the Nigerian government bred misunderstanding, which often snowballed into violence and disorder. As a judicial commission of inquiry into one of the disturbances in the region observed, there is “lack of meaningful contact and consultation between the oil companies and the communities in which the oil companies operate and therefore lack of understanding between both parties. Where there is such lack of understanding, there is always confusion, disorder and all that makes for disturbances.”<sup>505</sup> Because of the activities of the MNCs, operating in collusion with the Nigerian government, oil for the people of the oil-bearing communities of the Niger Delta can no longer be regarded as “black gold;” it is rather “the excrement of the devil.”<sup>506</sup>

Thus, globalization, operating through the agency of the IMF/World Bank and the MNCs, has contributed significantly to the erosion of the socio-economic rights of Nigerians. This erosion often engenders the diminution of civil and political rights. One of the consequences of this has been that far too many Nigerians have fled in search of refuge. Nigerian oil has brought disaster instead of progress. As Abdul-Rasheed Na’Allah puts it:

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producing states receive more revenues than states populated by oil-bearing communities. Thus, the pre-1975 revenue allocation formula gave oil-producing states more revenue than the present formula. Seen in this light, the increase of the derivation money to 13% should not be considered substantial. See S. Dolezal, “The Systematic Failure” *supra* note 457 at 206-208. See also, P.C. Aka, “Nigeria: The Need For An Effective Policy” *supra* note 464 at 347-348., See further, J. G. Frynas, “Corporate and State Responses” *supra* note 468 at 33 & 34. Again see, V. Ojatorotu, *supra* note 484. See further, I. Gary & T. L. Karl, *Bottom of the Barrel*, *infra* note 506 at 50. See further, E.E. Osaghae, “The Ogoni Uprising: Oil Politics,” *supra* note 453 at 332-333.

<sup>505</sup> Report of the judicial Commission of Inquiry Into The Umuechem Disturbances as quoted in Human Rights Watch, “Price of Oil: Oil Companies And The Oil Producing Communities” on line: <http://www.hrw.org/reports/1999/nigeria/Nigew991-06.htm> (visited: 03/26/2002).

<sup>506</sup> I borrowed those phrases from Juan Pablo Alfonzo (the founder of OPEC) as quoted in I. Gary & T.L. Karl, *Bottom of the Barrel: Africa’s Oil Boom and the Poor* (Maryland: Catholic Relief Service, 2003) at 19.

Oil becomes a curse for Nigeria because it is an international commodity. Postcolonial Nigeria left one form of bondage to enter into another one, that of the multinational companies. In a way, cheap oil replaces the slaves' cheap labour, coal, the cocoa, and the peanuts that the British colonialists exploited from Nigeria. The multinational companies replaced colonial power in Nigeria, and indeed in Third World nations as a whole.<sup>507</sup>

Regrettably, despite the damaging impacts of their activities in Nigeria, especially in the Niger Delta, the multinational oil companies are not in any way remorseful about the disastrous consequences of their operations. They still carry on with the same activities that were being protested by the inhabitants of their host communities. This is evidenced in the reaction of Shell shortly after Ken Saro-Wiwa's execution. In an advertisement placed in the *Globe and Mail* and other newspapers, the company contended that "the situation in Nigeria has no easy solutions. Slogans, protests, and boycotts don't offer answers. There are difficult issues to consider."<sup>508</sup> Further, Shell has contended that it:

Cannot give an undertaking not to provide weapons in future (to Nigerian security outfits), as, due to the deteriorating security situation in Nigeria, we may want to see the weapons currently used by the police who protect Shell people and property upgraded. This would simply bring them up to the same standard of firearms as those provided to police protecting other companies within Nigeria.<sup>509</sup>

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<sup>507</sup> A. Na'Allah, "Ogoni's Agonies -Introduction" in Abdul-Rasheed Na'Allah, ed., *Ogoni's Agonies: Ken Saro-Wiwa and the Crisis in Nigeria* (Trenton, NJ: African World Press, Inc., 1998) 3 at 26.

<sup>508</sup> "Clear Thinking in Troubled Times" (Shell's Advertisement) *Globe and Mail*, November 21, 1995 at A3. See also Abdul-Rasheed Na'Allah, *ibid*.

<sup>509</sup> Shell Letter to Human Rights Watch, November 6, 1996, as quoted in Human Rights Watch, "Price of Oil: The Roles and Responsibilities of the International Oil Companies" on line: <http://www.hrw.org/reports/1999/nigeria/Nigew991-10.htm> (visited: 03/26/2002).

The foundation of the crisis in the Niger Delta today was laid during the colonial period, when the colonizing authority was unable to address adequately the problems of minorities in Nigeria.<sup>510</sup> With the amalgamation of different ethnic nationalities into one Nigeria in 1914, the situation was compounded, since the minorities lost the power to determine and direct their destinies.<sup>511</sup> Ever since, every successive government in Nigeria, acting in collusion with the oil MNCs, is more interested than the previous one in exploiting the oil buried in the bowels of Niger Delta soil. Thus, colonialism, under which international law legitimated the exploitation and misappropriation of the human and material resources of Nigerians (and indeed of most “third world” citizens) for the benefit of outside colonizing powers, left in its trail a legacy that makes the people still vulnerable to foreign exploitation and misappropriation.<sup>512</sup> In this contemporary period, this exploitation is achieved under the guise of economic globalization.

Thus, it could be argued that, instead of bringing improved standards of living to Nigerians through the acceleration of economic growth and development in the country, globalization has instead contributed to the production and spread of poverty, misery, and hopelessness in the country. As a result, it has also contributed immensely to the exacerbation of conflicts in the country, including the Nigerian civil war with its attendant mass refugee flows.

#### **4.5. GLOBALIZATION AND THE EXACERBATION OF THE NIGERIAN CIVIL WAR**

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<sup>510</sup> V. Jakorotu, *Oil Minorities and Politics of Exclusion in the Niger Delta of Nigeria*, *supra* note 484 at 4.

<sup>511</sup> *Ibid.*

<sup>512</sup> *The Social and Economic Rights Action Center For Economic and Social Rights v. Nigeria*, Communication No. 155/96.

We have been watching carefully—indeed anxiously – what has been happening in Nigeria, and we have done so for many reasons... We have vast trade with Nigeria...there are, of course, the relatively newly discovered oil deposits which are being exploited now with such enormous success...<sup>513</sup>

Economic globalization is not a new phenomenon; it was in fact the driving force behind colonialism. Colonialism legitimated the economic exploitation of “third world” countries and their resources for the benefit of the developed countries (particularly Europe), with international law deployed as a tool to justify this exploitation.<sup>514</sup> The former Nigerian colonial administrator Lord Lugard, who presided over the amalgamation of Nigeria, argued that: “the democracies of today claim the right to work, and the satisfaction of that claim is impossible without the raw materials of the tropics on the one hand and their market on the other.”<sup>515</sup> Consequently, the interests of the “third world” countries (including Nigeria) are subordinated to the commercial interests of the developed countries.<sup>516</sup> Even after independence, the developed states were still interested in the former colonies, where they retained substantial commercial interests. Britain retained such interests in Nigeria, even after granting independence to the country in 1960. This stemmed from its desire to protect many of her MNCs doing business in the country. As a result of this desire and pressure from these companies, Britain (and other

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<sup>513</sup> Lord Walton, British Parliamentary Secretary Board of Trade, June 1967, as quoted in S. Cronje *The World and Nigeria: The Diplomatic History of the Biafran War 1967-1970* (London: Sidgwick & Jackson, 1972) at 23.

<sup>514</sup> M. Mutua, “What Is TWAIL?”(2000) 94 ASIL Proceedings 31 at 34.

<sup>515</sup> F. Lugard, *The Dual Mandate in British Tropical Africa* (Hamed, Conn.: Archon Books, 1965) at 61. See also, A. Anghie, “Time Present and Time Past,” *supra* note 414 at 278.

<sup>516</sup> A. Anghie, “The Heart of My Home: Colonialism, Environmental Damage, and the Nauru Case” 1993) 34:2 Harvard International Law Journal 445 at 462. See also, C.G. Weeramantry, “International Law and

developed countries of the West) interfered in the affairs of Nigeria, including the civil war.<sup>517</sup>

Globalization and its forces cannot be blamed for every aspect of the Nigerian Civil War of 1967-1970, but globalization made significant contributions to the prolongation and intensity of that conflict. Without outside interference, which was engineered by agents of globalization, the crisis that led to the civil war could have been averted. This was so because the leaders of the July 1966 counter-coup and their compatriots in Northern Nigeria were favourably disposed toward secession, about which a fratricidal war of unprecedented magnitude in Africa was waged against the Eastern region, particularly the Igbos. The statement of the then Nigerian Head of State, General Yakubu Gowon, after the counter-coup gives credence to this fact. He stated that: "Suffice it to say that putting all considerations to test, [sic] political, economic as well as social, the basis for unity is not there, or is so badly rocked not only once but several times. I therefore feel that we should review the issue of our national standing."<sup>518</sup>

But as a result of the pressures exerted by some MNCs on their home governments "to protect their interests",<sup>519</sup> Gowon and his colleagues were persuaded by

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the Developing World: A Millennial Analysis" (2000) 41:2 Harvard International Law Journal 277 at 284. See further, C.G. Weeramantry, "Opening Tribute To Hugo Grotius" (1999) 14 AJIL 1516 at 1517 & 1519.

<sup>517</sup> O. Nnoli, "The Nigeria-Biafra Conflict-A Political Analysis," *supra* note 418 at 143.

<sup>518</sup> An excerpt of General Gowon's speech to Nigerians on August 1<sup>st</sup> 1966 [as quoted in L.C. Buchheit, *Secession: The Legitimacy of Self-determination* (New Haven/London: Yale University Press, 1978) at 166].

<sup>519</sup> O. Nnoli, "The Nigeria-Biafra Conflict: A Political Analysis" in J. Okpaku, ed., *Nigeria: Dilemma of Nationhood* (Westport: Greenwood Publishing Company, 1972) 118 at 143.



the governments of some of these advanced countries to back out from their initial project, which was to pull out from the Nigerian federation.<sup>520</sup> According to Buchheit,

Lieutenant-Colonel Yakubu Gowon, a Northerner, whose intention it was that the coup result either in a reestablishment of Northern predominance over the country or, alternatively, in a secession of the North from the other regions... May have been dissuaded from declaring the separation of the North only at the last minute by American and British diplomatic pressure.<sup>521</sup>

In effect, the former proponents of secession suddenly became apostles and strong advocates of one Nigeria. The two most important MNCs that had significant interests in Nigeria and that prevailed on their home governments to back the “One Nigeria” project were the United African Company (UAC) and Shell B.P. UAC at that time controlled over 40 percent of the total import and export business in Nigeria, while Shell B.P. had a near monopoly of the exploration and exploitation of Nigerian oil resources, which were located mainly in the areas under the control of the government of Biafra.<sup>522</sup>

To protect their business interests in Nigeria, these MNCs encouraged the British government to intervene in the war effort on behalf of the Federal Government of

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<sup>520</sup> C. R. Nixon, “Self-Determination: The Nigeria/Biafra Case” (1972) 24:4 *World Politics* 473 at 485 & 495.

<sup>521</sup> L.C. Buchheit, *Secession: The Legitimacy of Self-Determination* (London/New Haven: Yale University Press, 1978) at 165. See also, A.G. Nwankwo & S.U. Ifejika, *The Making of a Nation: Biafra* (London: C. Hurst & Company, 1969) at 161, stating that Gowon was advised by British and American Diplomats that “the North, in the event of secession, would be the poorer, and the greater sufferer. It would become landlocked, having no access to the Southern ports and harbours.”

<sup>522</sup> O. Nnoli, *supra* note 418 at 134.

Nigeria, through the supply of arms and other instruments of war.<sup>523</sup> In addition, the unreliable nature of the Middle East oil prompted the British government to make “very great efforts and spend very large sums to develop alternative sources in Nigeria.”<sup>524</sup> Thus, Britain perceived the success of the Biafran secession as a threat to its vast economic interests in Nigeria. As Nnoli observed, “Since the British have always felt their oil and other interests would be better safeguarded under the control of the conservative leaders of Nigeria than under the more progressive and nationalistic Biafrans, it was to be expected that the British oil companies as well as the shipping lines and commercial companies would support Nigeria against Biafra.”<sup>525</sup> Consequently, money and credits used in the procurement of arms and ammunition mainly from Britain, and in the general prosecution of the war against Biafra came from oil resources located in Biafran territory.<sup>526</sup> The MNCs, notably the oil and trading companies, made significant contributions to the financing of that war. As the former Biafran leader observed, “Britain is only concerned with the preservation of that corrupt and rickety structure of a Nigeria in perpetual state of powerlessness to check foreign exploitation... We see why the oil and trading companies still finance this war and why they risk the life and limb of their staff in the war zone...”<sup>527</sup>

The MNCs also aided the Nigerian military in the planning and execution of its war strategies. For instance, the Biafran government claimed that it was Shell B.P. that

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<sup>523</sup> *Ibid.* at 139 & 141.

<sup>524</sup> *Ibid.* at 130.

<sup>525</sup> *ibid.*

<sup>526</sup> S. Cronje, *supra* note 513 at 152.

aided and facilitated the invasion of the oil-producing areas of Biafra through the provisions of maps, weather information, charts, and transportation for the Nigerian troops.<sup>528</sup> The external intervention in the prosecution of the Nigeria-Biafra War led to the prolongation of the war and the exacerbation of the intensity of that conflict.

Consequently, the genocidal war waged against Biafra not only led to the death of about two million Easterners, mostly Igbos, but also caused many Igbos to flee the country to seek refuge elsewhere.<sup>529</sup>

#### 4.6. CONCLUSION

It would be disingenuous to deny the damaging effects that globalization and its forces have had in Nigeria. The activities of MNCs in the country, especially in the Niger Delta, as well as the implementation of IMF/World Bank prescribed SAPs, have directly impacted the incidence of poverty, ethnic clashes and communal violence, the Nigeria-Biafra War, and brazen human rights violations by agents of the Nigerian government.

Various Nigerian governments have been encouraged and sometimes pressured by the agents of globalization, such as the IMF/World Bank and MNCs, to abrogate their constitutional, statutory, and treaty obligations to their citizens. Their violations have

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<sup>527</sup> E. Ojukwu, "The Ahiara Declaration" June 1 1969. See also S. Cronje *ibid.* at 152.

<sup>528</sup> O. Nnoli, *supra* note 418 at 141 & 142.

<sup>529</sup> K. A. Shettima "Nigeria Pro-democracy Movements in the Diaspora" on line: <http://webdata.soc.hawaii.edu/fredr/shet.htm> (visited: 10/12/2002). See also S. Cronje *supra* note 513 at 18, stating that about two million Easterners became refugees as a result of the civil war and the events surrounding it. See further, O. Nnoli, *supra* note 416 at 122. See again, P. L. Okoronkwo, "Self-Determination and the Legality of Biafra's Secession Under International Law" (2002) 25:1 Loyola of Los Angeles International & Comparative Law Review 63 at 110, stating that one of the consequences of the various abuses associated with the Nigeria-Biafra War was the flight of over two million Biafrans as refugees. See further, C.R. Nixon, "Self-Determination" *supra* note 520 at 475.

included arbitrary arrests, detentions, extra-judicial killings, the wanton destruction of lives and property, and even participation in communal conflicts by government security agents.

With their implementation of SAPs and their collusion with MNCs operating in the country, various Nigerian governments have not lived up to their constitutional responsibility of ensuring that “the security and welfare of the people shall be the primary purpose of the government.” Thus, both IFIs and MNCs seem little concerned with the political, economic and social consequences of their economic policies and activities in Nigeria. The environment that enables and powers refugee flows is thereby created. This failure of Nigerian governments also constitutes a breach of several treaties that Nigeria has acceded to, such as the *African Charter on Human and Peoples’ Rights*, *International Covenants*, and the *Charter of the United Nations*. The response of some emboldened Nigerians against abridgments of their constitutional, statutory, and treaty rights by various Nigeria governments has, in most cases, led to more repression and other persecution, which result in large scale refugee production.

Thus, it may be concluded that, in every historical epoch, international law has been deployed to give legitimacy to the operational paradigms of economic globalization. It was used to justify the amalgamation of different nations into one Nigeria by the former colonizer; the purpose was to enhance the exploitation of the country, its peoples, and resources. Presently, a similar justification is being offered for divesting the country of the power to make economic policies and decisions that impact the welfare of

Nigerians. The IFIs and MNCs are thereby empowered and projected as better suited to make economic policies and decisions for the country.

Unfortunately, the policies and activities of these agents of globalization are tailored to address and promote the interests of their powerful shareholders and the developed countries that support them at the expense of Nigerian citizens. A consequence is the creation of an environment that enables and creates refugees flows. This situation has further potential to explode into more disastrous consequences that will resonate across the whole African continent. There is no gainsaying to the eminent position occupied by Nigeria in the preservation and maintenance of peace and security in Africa. This has been exemplified in the role the country has played in the restoration of peace and security in Liberia and Sierra Leone, as well as in the assistance the country gives to its West African neighbours.<sup>530</sup> Therefore, to avert further disasters that might arise from the impact of globalization in Nigeria, “the international community has to stop playing commercial games. It must reserve its mercantile spirit and take the spirit of humanity. It must take strong action on behalf of this country or sooner or later it will have to pay a higher price.”<sup>531</sup>

The damaging impact of economic globalization is being felt not only in Nigeria; rather, it is spreading all over to most “third world,” decimating its citizens and

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<sup>530</sup> K. Lambrechts, *Transition to Democracy in Nigeria: How Can South Africa Assist?* (South Africa: The Foundation for Global Dialogue, 1998) at 10.

<sup>531</sup> Wole Soyinka (Nobel Laureate) as quoted in EarthAction Alert, Nigeria Crisis: Background Information” on line: <http://www.earthaction.org/en/archive/96-03nig/background.html> (visited: 25/01/2002).

provoking refugee flows. One of these other “third world” countries affected by globalization and its forces will be the subject of discussion in the next chapter.

## Chapter Five

### REFUGEE FLOWS IN THE GLOBALIZATION ERA: THE ROLE OF THE ACTIVITIES OF MULTINATIONAL OIL CORPORATIONS IN FUELLING THE WAR IN SUDAN.

#### 5.0. INTRODUCTION

In economies heavily dependent on extractive industries, multinational enterprises operating in this sector typically provide large revenues to governments in the form of taxes, royalties and other payments. In countries with severe public governance and fiscal control problems, these payments can contribute to both the means for violence - by providing funding for the organisational and material requirements of conflict - and the motive by providing financial stakes for conflict.<sup>532</sup>

This chapter examines the impact of oil exploration and exploitation on the prolongation and intensification of the civil war in Sudan.<sup>533</sup> Indeed, the central focus of this chapter will be the explication of the roles of multinational oil corporations (as agents of globalization) in the encouragement of the various Sudanese government policies that

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<sup>532</sup> OECD Secretariat, "Multinational Enterprises in Situations of Violent Conflict and Widespread Human Rights Abuses" Working Paper on International Investment NO. 2002/1 May 2002 at 3-4.

<sup>533</sup> It is important to note that the opposing parties to Sudan's civil war signed peace accords and a ceasefire agreements in 2002 and 2003. And on January 9, 2005, the Sudanese government and the Sudan People's Liberation Movement/Army signed a peace agreement which apparently seemed to have settled the conflict. However, it is not yet clear whether these peace accords will endure. Thus, cautious optimism is advised because in the past several similar peace accords have collapsed (for example, Angola before the death of Savimbi). Since, the war seems to have ended, and the SPLM incorporated into the government, however, I will use past tense in this chapter of the dissertation notwithstanding that; I am not so convince that the peace accord will endure. The peace accord provided that eight out of the thirty ministries should be allocated to the Sudan People's Liberation Movement (SPLM). One of these eight ministries is the ministry of energy and mining. Already, the Sudanese government is refusing to give the ministry to SPLM. And since, the Southern Sudanese believed that there development would be crippled if they are not in control of the energy ministry, the squabble over this and other serious issues contained in the peace agreement might jeopardy the whole peace process. See DPA, "Row Over Oil Threatens Sudan's North-South Peace Deal" on Line: <http://www.sudan.net/news/posted/12237.html> (visited: 09/28/05). See also, D. Alford, "Fragile Accord" online: <http://www.christianitytoday.com/ct/2005/003/2.22.html> (visited: 09/28/05). See further, J. Young, Analysts: Sudan Faces Challenges in Implementing Peace Accord" on line: [http://www.chinadaily.com.cn/english/doc/2005-01/14/content\\_409040.htm](http://www.chinadaily.com.cn/english/doc/2005-01/14/content_409040.htm) (visited: 09/28/05). See further, T. M. Price, "The Kimberley Process: Conflict Diamonds, WTO Obligations, and the University Debate" (2003) 12 Minnesota Journal of Global Trade 1 at 8-9. Again, see Human Rights Watch, "Targeting the Fur: Mass Killings in Darfur" on line: <http://hrw.org/backgrounder/Africa/darfur0105/2.htm> (visited:09/17/2005).

violate the human rights and humanitarian rights of the peoples of Southern Sudan and thereby promoting refugee production. The evidence that emerges in this chapter supports our position that the reason why globalization's negative impact on "third world" refugeehood remains unchecked is in part attributable to a colonial type of relationship underlying the conduct of international relations and the formation of international economic law. Again, my argument is not that globalization is solely or even largely responsible for large scale refugee production in Sudan and other "third world" countries, but only significantly responsible.

Many "third world" countries are currently experiencing an increase in the number of resource wars, that is, wars motivated and encouraged by the urge of the relevant actors to gain access to, and, where possible, monopolize control of a country's natural resources. Perhaps, the fundamental reason for this is that:

Natural resources provide easily 'lootable' assets for 'loot-seeking' rebel movements or convenient sources for sustaining 'justice-seeking' movements. However, extremely plentiful resources may also provide sufficient revenue that the government can use to fund its army and buy popular support.<sup>534</sup>

Resources such as oil, gas, and minerals constitute the largest sources of revenue in many "third world" countries. Nevertheless, instead of providing funds for economic growth and development, such resources have "all too often turned out to be a curse,

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<sup>534</sup> I. Elbadawi & N. Sambanis, "Why Are There So many Civil Wars in Africa?: Understanding and Preventing Violent Conflict" (2000) 9:3 *Journal of African Economics* 244 at 247. See also, P. Collier & A. Hoeffler, "Greed and Grievance in Civil War" October 21, 2001 on line: [www.worldbank.org/research/conflict/papers/greedandgrievance.htm](http://www.worldbank.org/research/conflict/papers/greedandgrievance.htm) (visited: 01/23/03).



leading to increased poverty...and civil conflict.”<sup>535</sup> Stephen Castles has observed that “...less directly, pressure on resources and economic systems may lead to economic competition, political conflict, and warfare, destroying productive assets and causing mass flights.”<sup>536</sup>

In the 1990s and up till 2001, there were at least fifty wars and conflicts around the world with strong resource dimensions.<sup>537</sup> Many parties to these conflicts, who have enjoyed access to such resources, have tended to use the revenue generated from their exploitation of these minerals to finance their war efforts. With the enhanced revenue obtained from the plundering of these resources, parties to these “resource” wars/conflicts are able to acquire even more sophisticated weapons to use in these conflicts. The consequences have been increases in the devastation of these countries and the perpetration of gross violations of human rights and humanitarian laws.

For instance, in the 1990s, about five million people were killed in “resource wars.” Six million others fled the affected countries seeking refuge, and another fifteen million were internally displaced.<sup>538</sup> As observed by Holger Jensen *vis-à-vis* the war in Angola:

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<sup>535</sup> S. Taylor, “Corporate Secrecy Oils the Wheels of Poverty” *International Herald Tribune* June 20, 2002 on line: <http://www.globalpolicy.org/security/natres/oil/2002/0620pov.htm> (visited: 01/17/03).

<sup>536</sup> S. Castles, “Globalization and Migration: Some Pressing Contradictions” (1998) 50 *International Social Science Journal* 179 at 183.

<sup>537</sup> D.R. Francis, “Fuelling War” *Christian Science Monitor*, December 5, 2002 on line: <http://www.globalpolicy.org/security/natres/oil/2002/1211nat.htm> (visited: 01/17/2003). See also, UNDP, *Human Development Report 1999* (New York: Oxford University Press) at 5, observing that, of 61 major armed conflicts fought between 1989 and 1998, only about three were international conflicts; the rest were civil.

<sup>538</sup> D.R. Francis, “Fuelling War” *ibid.*

How do you stop a war that not only profits generals on both sides, but also Belgian diamond dealers, multinational oil corporations, international arms merchants and Americans at the gas pump? You don't. Which is why one of Africa's [then] longest running wars, in Angola, ... killed a million people, created 3 million refugees and sucked up huge amounts of foreign aid, including \$1.5 billion for a failed United Nations peacekeeping mission.<sup>539</sup>

Sudan, a country of about 26 million people,<sup>540</sup> fought over a 20-year-old civil war with a key resource control dimension. Although, in the case of Sudan, oil was not the only factor responsible for the war, oil contributed in no small measure to the prolongation and exacerbation of the conflict. Thus, "Sudan's intractable civil war was fundamentally a struggle over resources and how the country's wealth should be shared."<sup>541</sup> The oil war in Sudan, as it was often called, brought disaster to the country, especially to the people of Southern Sudan, who are mainly Christians, traditional religious worshippers, and Black Africans.

The quest by the central government of Sudan to control the oil resources that lie in the South of the country led to its abrogation of the 1972 Addis Ababa Accord (that granted some level of autonomy to the South and recognized the secular nature of the country). With enhanced revenue from oil, the government of Sudan acquired even

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<sup>539</sup> H. Jensen, "Spoils of War" *Nando Times*, March 15, 2000 on line: <http://www.globalpolicy.org/soecon/tncs/angola1.htm> (visited: 01/17/03).

<sup>540</sup> D. Bouvean, "A Case Study of Sudan And The Organization of African Unity" (1998) 41 *Howard Law Journal* 413. See also, M.M. Gassis, "Sudan: Country of Terrorism, Religious Persecution, Slavery, Rape, Genocide, And Man-Made Starvation" (2001) 50 *Catholic University Law Review* 905 at 909. See further, *The Presbyterian Church of Sudan v. Talisman Energy, Inc. Class Action Complaint* at the United States District Court For The Southern District of New York (On file with the author).

<sup>541</sup> B. Bock, "Sudan: Mixing Oil and Blood" *Amnesty NOW Magazine*, Summer 2002 on line: [http://www.thirdworldtraveler.com/Africa/Sudan\\_Oil\\_Blood.html](http://www.thirdworldtraveler.com/Africa/Sudan_Oil_Blood.html) (visited: 01/17/03). See also, L. Sapienza, "Classifying the Killings in Sudan as Genocide" (2003) 19 *New York Law School Journal of Human Rights* 889 at 891. See further, J. Bennett, "Public Private Partnerships: The Role of The private Sector in Preventing Funding Conflict" (2002) 35 *Vand. J. Transnat'l L.* 711 at 713.

more sophisticated weapons and deployed these weapons in the prosecution of its war in the South.<sup>542</sup> With the acquisition of more sophisticated weapons by the Sudanese government, the scale of the war intensified to a level that was far greater than the dimensions of the first civil war of 1956-1972.

In all these instances, the MNCs played very significant roles, since the exploration and extraction of Sudanese oil was made possible only through the corporations' activities and operations in that country. In addition to the payment of royalties to Sudan's government, the multinational oil corporations also enhanced the government's war efforts by allowing the host state the use of its corporate facilities such as airstrips, roads, and helicopters in exchange for the provision of security for the companies' operations. On the other hand, the Sudanese government, in its bid to secure an environment conducive to the smooth operations of the oil companies, embarked on a course of action that resulted in gross violations of the human rights of the people of Southern Sudan.

Thus, one of the strategies employed by the Sudanese government was to motivate the populations of Southern Sudan inhabiting oil concession areas to move and vacate their land for the benefit of oil exploration and exploitation activities by the MNCs. To achieve this, the Sudanese government deliberately spread terror and created a general sense of insecurity in the oil rich areas by bombing and attacking

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<sup>542</sup> W.L. Saunders Jr. & Y. G. Mantilla, "Human Dignity Denied: Slavery, Genocide, and Crime Against Humanity in Sudan" (2002) 51 *Cath. U. L. Rev.* 715 at 724 & 725. A recent estimate put the revenue to be generated from oil at \$1.2 billion a year, and this would represent about 21 percent of the total government revenue. See Security Council, "Sudanese Squabble Over Oil Revenues" *Africa Analysis* July 2000, on line: <http://www.globalpolicy.org/security/docs/oil4.htm> (visited: 01/17/03).

civilians inhabiting these places. Such deliberate attacks on civilian targets prompted millions of Southern Sudanese to flee their homes as refugees and many others to become internally displaced (approximately four million).<sup>543</sup> Like the oil in the Niger Delta of Nigeria, oil in Southern Sudan has not brought development to the people; instead it has brought disaster to them. And the multinational oil corporations operating in that country were implicated in the production of this state of affairs.

At a point, the humanitarian crises and human rights abuses generated by the protracted and murderous war in Sudan reached an intolerable level. The war precipitated the destruction of people's means of livelihood, and increased their vulnerability and insecurity. Various forms of atrocities and human rights abuses such as rape, extra-judicial killings, unlawful detentions, attacks on civilian targets, and deliberate and forcible displacement of local populations, especially around the oil concession areas, were committed by both sides to the conflict. These abuses were aided either intentionally or inadvertently by the multinational oil corporations operating in that country. As observed by Berdal and Malone,

Whereas leading firms have mostly adopted a studiously 'neutral' stance on civil strife, disclaiming any political agenda at all, their actions on the ground and in global markets inevitably tend to favour some parties over the others. The situation of Shell Oil Company in Southeastern Nigeria and De Beers vis-à-vis Angola makes this clear.<sup>544</sup>

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<sup>543</sup> L. Sapienza, "U.N. Report: Classifying the Killings in Sudan As Genocide" *supra* note 541 at 890. To the extent that oil fuels the war (especially in later years) then oil companies bear responsibility for the ensuing refugee flows.

<sup>544</sup> M. Berdal, & D. Malone, "Introduction" in B. Mats & D. Malone (eds.) *Greed and Grievance: Economic Agendas in Civil Wars* (Boulders: Lynne Rienner Publishers, 2000) at 12-13.

Although oil was not the main or the only cause of the war in Sudan, it was a key factor. According to the Harker Report, “war in Sudan is not fundamentally about oil, but oil has become a key factor.”<sup>545</sup> This was because the greed for oil seems to be the main exacerbating influence of the war. Consequently, the atrocities committed by all the parties to the conflict, especially the government of Sudan, tend to increase in intensity as their capacity to acquire more weapons increase through taxes, royalties, and other revenues paid by the oil companies. The parties also benefited through the use of infrastructures put in place by these oil companies.

Similar to Nigeria’s situation, the foundation for Sudan’s crisis could be traced to the colonial legacy that brought about the amalgamation of different nations into one country without determining the will of the people as a whole. Again, as in Nigeria’s case, this colonial expansion was driven by the desire to exploit the territory and resources of Sudan economically. The flawed state structure that emerged and the continued desire by the agents of globalization to exploit the resources of the people of Sudan contributed to creating the environment that fuels the Sudanese crisis, with all its attendant consequences for large-scale refugee production. As was the case in all colonial expansion and exploitation, international law was instrumental in bringing about this state of affairs.

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<sup>545</sup> J. Harker, *Human Security in Sudan: The Report of a Canadian Assessment Mission* (Ottawa: Ministry of Foreign Affairs, 2000) at 14. See also, S. Pearce, *Fueling War: The Impact of Canadian Oil Investment on the Conflict in Colombia* (York University: Centre for Research On Latin America and The Caribbean, 2002) at 12.

## 5.1. BACKGROUND FACTS ABOUT THE SUDAN'S WAR

Sudan was a colonial creation of Britain and Egypt. It was created via the amalgamation of pre-existing independent polities that had very little in common. The northern part of Sudan is an “arid desert,” whereas the larger part of the South is made up of rain forests and swamp.<sup>546</sup> Most of those who live in the North are Sudanese who have been influenced by Arab culture (i.e., Arabized Sudanese). This region, which has Islam as the predominant religion, was under the control of Egypt. The South is populated mostly by darker skinned Africans who are either Christians or profess traditional religions, and was under British management as a result of a joint government arrangement forged between Britain and Egypt in 1898.<sup>547</sup> These two major parts of the Sudan were governed separately until 1947, when these two broad regions, with different dominant religions, and cultures, and different levels of political and economic development, were merged to create what we now refer to as the independent state of Sudan.<sup>548</sup> Because of the different approaches to governance adopted by the two colonizing powers, political and economic power came to be concentrated in the North. Most of the infrastructural development (such as railways, steamers, and port and agricultural facilities) that occurred in the country was concentrated in the North to the neglect of the South. This led to a widening of the gap that existed between the North

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<sup>546</sup> International Crisis Group, *God, and Oil & Country: Changing the Logic of War in Sudan* (Brussels: International Crisis Group Press, 2002) at 7.

<sup>547</sup> *Ibid.* at 8. See also, D.H. Johnson, *The Root Causes of Sudan's Civil Wars* (Bloomington: Indiana University Press, 2003) at 1.

<sup>548</sup> *Ibid.* at 8.

and South.<sup>549</sup> Similarly, government investments in education, health, and other kinds of development were concentrated in the North with little regard to the needs of the South.<sup>550</sup> This uneven development between the North and South benefited the elites of the North, who exploited the opportunity to acquire tremendous wealth, which they used in turn to entrench themselves and their cronies in power.<sup>551</sup>

There was no attempt made to encourage the development of the South in order to bring it at par with the North before self-government was granted to a unified Sudan. As such, the South was educationally backward in relation to the North.<sup>552</sup> The South was thus ill prepared for independence when a unified Sudan attained independence in 1956.<sup>553</sup> Thus, at independence, political power was in effect handed over to the North at the expense of the South. This imbalance sowed the bitter seeds that eventually grew into a civil war.<sup>554</sup> All these seeds of discord planted by the former colonizers received the seal of approval of international law. Thus, they were clothed with legitimacy.

Shortly before independence, the process of “Sudanization” of the southern region started with the replacement of British officers in the South with Northerners. The Northerners occupied almost all the government positions vacated by the British. This development created a general sense of frustration, hopelessness, desperation, and lack of

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<sup>549</sup> M.W. Daly, “Broken Bridge and Empty Basket: The Political and Economic Background of the Sudanese Civil War” in M.W. Daly & Ahmad Alawad Sikainga (eds.) *Civil War in the Sudan* (London, New York: British Academic Press, 1993) 1 at 5.

<sup>550</sup> *Ibid.* at 6.

<sup>551</sup> *Ibid.* at 7.

<sup>552</sup> *Ibid.* at 8.

<sup>553</sup> *Ibid.* D.H. Johnson, *The Root Causes of Sudan’s Civil Wars*, *supra* note 547 at 16 & 17.

<sup>554</sup> God and Oil and Country, *supra* note 546 at 8.

sense of belonging in the South. This state of affairs led just before independence to an army mutiny led and staffed by the Southerners in the army, and, in turn, to the outbreak of violence that culminated in the first Sudanese civil war of 1955-1972. As Yongo-Bure observes, "It is from such an environment that formidable rebel movements emerge and develop. Such movements do not spring merely from the ambitions of adventurous military officers or politicians."<sup>555</sup> However, in 1972, General Nimeiry signed the Addis Ababa Accord that brought the first civil war to an end.

Almost all the governments, both military and civilian, that have ruled Sudan since independence adopted the policy of Islamization and Arabization of the South at the expense of the non-Moslems and non-Arabs who inhabit the region as a majority.<sup>556</sup> The only exception was the period between 1972 and 1983, when General Nimeiry signed and partly implemented the Addis Ababa accord. In the Addis Ababa Accord, the Sudanese government accepted the enjoyment of some degree of autonomy by the South. The South was granted an autonomous regional government that had both legislative and executive arms of government.<sup>557</sup> The Southern Regional Government [SRG] was to exercise power and control over its resources, education, health and local government, while matters of currency, defence, and foreign affairs remained in the domain of the

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<sup>555</sup> Yongo-Bure, "The Underdevelopment of the Southern Sudan Since Independence" in M.W. Daly & A. A. Sikainga, eds., *Civil War in the Sudan* (London/New York: British Academic Press, 1993), 51.

<sup>556</sup> *Ibid.* at 53. See also, D.H. Johnson, *The Root Causes of Sudan's Civil Wars*, *supra* note 547 at 1.

<sup>557</sup> M.W. Daly, *supra* note 549 at 19.



central government.<sup>558</sup> This arrangement led to a truce between the government of Sudan and the rebels that had been fighting for self-determination on behalf of the Southerners.

However, in 1983 Nimeiry abrogated the Addis Abba accord and promulgated what have come to be known as *September laws* that imposed Shari'a law throughout the country.<sup>559</sup> He divided the South into three regions and attempted to redraw the map of the country by excising some parts of the South rich in oil resources and placing them under the jurisdiction of the North.<sup>560</sup> Nimeiry, like all the leaders of Sudan, past and present (including the colonial ones), had as his main motivation the exploitation of the resources in the South.<sup>561</sup> Thus the socio-economic development and the general interests and welfare of the South have never been the main considerations of any of the governments that have ruled or are ruling Sudan.

With the discovery of oil there, the stakes involved in controlling the heart and soul of the South increased, and was largely responsible for the exacerbation and prolongation of the civil war in the Sudan. The observation of Yongo Bure is pertinent: "Soon after the discovery of oil at Bentiu, Northern politicians decided to alter the boundary between North and South, cutting off the Bentiu area from the South and attaching it to the North."<sup>562</sup>

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<sup>558</sup> *Ibid.*

<sup>559</sup> D. Bouvean, "A Case Study of Sudan And The Organization of African Unity," *supra* note 540 at 417.

<sup>560</sup> African Watch Report, *Denying The Honor of Living: Sudan: A Human Rights Disaster* (New York/Washington D.C./London: The African Watch Committee, 1990) at 16.

<sup>561</sup> D. H. Johnson, *The Root Causes of Sudan's Civil Wars*, *supra* note 547 at 2-6.

<sup>562</sup> *Ibid.* at 58.

Nimeiry's imposition of the *September laws* and the subsequent attempt to transfer Southern soldiers to the North and replace them with Northerners led to another army mutiny by southern soldiers that culminated in the formation of the Sudanese Peoples Liberation Army (Movement) [SPLA (M)]. Ever since, all successive governments in Sudan have believed that force is the only way to achieve peace in the country. Consequently, they invested most of the resources of the country in prosecuting the war, especially the oil wealth, which increased their capacity to procure weapons and build factories for the production of arms and ammunition used in the war efforts.

One of the strategies employed by the government of Sudan in the prosecution of the war was the creation of tribal dissension and factionalism by raising local militias and pitching one ethnic group against the other. With its enhanced financial capacity arising from oil revenue, the government effectively exploited this strategy to increase the intensity of the war, with its attendant brutalities and devastation of the southern populations, especially civilians. This violence led to the flight of hundreds of thousands of refugees from Sudan, with four million others internally displaced.

## **5.2. GOVERNMENT STRATEGIES IN THE PROSECUTION OF THE WAR**

In 1983, General Nimeiry abrogated the Addis Ababa accord that gave southern Sudan some level of autonomy and divided the area into three regions; this action precluded the South from participating in the sharing of oil revenue and weakened its political base.<sup>563</sup> Since then, successive governments of Sudan adopted several measures

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<sup>563</sup> God, Oil and Country *supra* note 546 at 72.

that tighten their grip over the South and its resources. One of these was the scorched earth policy, which was intended to spread terror and fear among inhabitants living near oil rich regions of the country.

## 5.22. SCORCHED EARTH POLICY

The civil war in Sudan, which has killed 2 million people and displaced more than 4 million, is being fuelled by oil companies' drive to mine the country's resources. The government of Sudan is employing a deliberate scorched earth policy on southern villagers in order to make way for oil exploration in southern Sudan.<sup>564</sup>

One of the strategies adopted by the Sudanese government in the prosecution of the war against the southern freedom fighters and their people was a scorched earth policy. According to this policy, government forces deliberately terrorized southern civilian populations living around oil concession areas. The government of Sudan considers oil having very great and strategic importance in its war efforts against the SPLA and other southern freedom fighters.

Consequently, people living around or close to oil areas were targets of frequent Sudanese government attacks. For instance, the Nuba Mountains in Central Sudan,<sup>565</sup> where several villages have been displaced and the inhabitants either forced into exile or

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<sup>564</sup> Soul Searching, "Sudan: Oil Companies Fuel War" on line: <http://www.soulsearching.ie/sssudanoil.shtml> (visited: 01/27/03). See also, C. Forcese, "Globalizing Decency: Responsible Engagement In An Era of Economic Integration" (2002) 5 Yale Hum. Rts. & Dev. L. J. 1 at 14-16.

<sup>565</sup> Note that under the British colonial rule, South Sudan was defined as the area of the country below the twelfth parallel. But the national Islamic Front (NIF) changed this to area of the country below eight parallel. The strategy was to exclude Nuba Mountains and Southern Blue Nile from Southern Sudan. See W.L. Saunders Jr. & Y. G. Mantilla, "Human Dignity Denied: Slavery, Genocide, and Crime Against Humanity in Sudan" (2002) 51 Catholic University Law Review 715 at 718.

internally displaced "...are of strategic importance, (to the government of Sudan) because of their proximity to oil fields and rich arable land."<sup>566</sup> In that area, government forces dropped bombs, using Antonov bombers on civilian targets, and razed villages with helicopter gunships.<sup>567</sup> The government forces usually proceed with ground attacks after each bombing raid, i.e., destroying houses, taking away cattle, and seizing women and children as war bounties. In some cases, the bombing raids on civilians follow closely after the United Nations World Food program has dropped food for the starving people inhabiting the areas where oil fields are located.<sup>568</sup> Schools and local hospitals were also often the targets of these raids by government forces and their allied militias.

Between May and July 2001, government forces carried out about 40 aerial bombings against civilian and humanitarian position in Southern Sudan.<sup>569</sup> Similarly, around March 2002, government forces bombed Ngop, an oil rich area of the Western Upper Nile region, with helicopter gunships, followed by a ground offensive by soldiers who came in and burned the town, and took away cows, children, and women.<sup>570</sup> In October 2001, the United Nations accused the Sudanese government of three days of

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<sup>566</sup>Concern, "Emergency Work: Sudan" on line: [http://www.concern.ie/devel\\_projects/sudan/sudan\\_context.html](http://www.concern.ie/devel_projects/sudan/sudan_context.html) , See also, L. Sapienza, "U.N. Report: Classifying The Killings In Sudan As Genocide" *supra* note 541 at 891. See further, A. Bixler, "Development: Private Enforcement of International Human Rights Laws: Could A Small Church Group Successfully Combat Slavery in the Sudan?" (2002) 3 Chi. J. Int'l L. 511 at 513.

<sup>567</sup> C. Forcese, "Globalizing Decency: Responsible Engagement in An Era of Economic Integration" *supra* note 564 at 11 &12. See also, D. Lewis, "Fight for Sudan's Oil is Killing Civilians: Canadian Company Part of Consortium Developing Fields Being Cleared by Force in Civil War" *Globe and Mail* (Toronto) October 5, 1999 on line: <http://www.globalpolicy.org/socecon/tncs/oil99.htm> (visited: 01/17/03).

<sup>568</sup> *Ibid.*

<sup>569</sup> USCR, "Current Country Update: Sudan" on line: [http://www.refugees.org/world/countryrpt/africa/Mid\\_countryrpt01/sudan.htm](http://www.refugees.org/world/countryrpt/africa/Mid_countryrpt01/sudan.htm) (visited: 01/27/03).

bombing raids of undefended and unarmed civilians in Southern Sudan during the time when U.N. relief workers were distributing food aid to some starving populations of the South.<sup>571</sup>

In addition, within the 12 months preceding March 2001, about 48 villages around the Eastern Upper Nile area were burned, 55,000 people displaced in order to provide a secure environment for a new consortium that was about to start operating there.<sup>572</sup> Between July and December 2000, government forces dropped about 850 bombs on hospitals, markets, churches, relief centres, NGOs' offices, and schools.<sup>573</sup> On April 22, 2001, government forces attacked Narus in Equatoria and dropped about 18 bombs in the market, church, and school grounds.<sup>574</sup> The oil exploration and exploitation in the Nuer towns and villages aggravated the conflict there, and about 40,000 to 50,000 Nuer were displaced from the oil fields within the first half of 2001.<sup>575</sup> The Sudanese government forces and their allied Nuer militias that fought the SPLA and other opposition forces carried out all these aggressive attacks on defenceless civilians as a way of terrorizing them into vacating the oil concession areas.

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<sup>570</sup> J. Flint, "Oil Fuels Flames of War in Sudan" *Guardian* (United Kingdom) March 7, 2002 on line: <http://www.guardian.co.uk/Archive/Article/0,4273,4369462,00.html> (visited: 01/17/03).

<sup>571</sup> W. L. Saunders Jr. & Y.G. Mantilla, "Human Dignity Denied" *supra* note 565 at 722.

<sup>572</sup> Christian Aid, "The Scorched Earth: Oil and War in Sudan" on line: <http://www.christian-aid.org.uk/indepth/0103suda/sudanoil.htm> (visited: 01/27/03).

<sup>573</sup> Soul Searching, *supra* note 564.

<sup>574</sup> *Ibid.*

<sup>575</sup> Human Rights Watch, "Sudan" World Report 2002 on line: <http://www.hrw.org/wr2k2/africa12.html> (visited: 01/17/03).

There were similar attacks on January 27, 2002, on Mankien, an oil town under the then control of Talisman, by government troops and allied forces, using helicopter gunships, rockets, and automatic weapons. The attackers burned houses, killed people, destroyed infrastructures and forcibly displaced people from the town.<sup>576</sup> There was a similar deliberate attack on the village of Bieh in Western Upper Nile at a time which the United Nations World Food Programme was distributing relief materials to the villagers.<sup>577</sup> The gunship fired on civilians waiting to collect relief materials from UN staff. These attacks were extended to all the villages around the oil fields in order to depopulate the area by forcing ordinary people living there to move. According to Philip Aguir, an officer with the SPLA's relief arm, "Khartoum is trying to create a buffer zone between the oil companies that are digging oil and SPLA, and this is by pushing the population very far away. We now have more than 300,000 among the civilian population that is on the move in the Western Upper Nile and they are not stable since two years ago."<sup>578</sup>

The aerial bombing of civilian targets and attacks by ground troops and helicopter gunships expanded and escalated the then war in the South.<sup>579</sup> This resulted in the worsening of the humanitarian crisis in the region. According to Christian Aid, a British charity, "...the legacy of oil beneath their feet has not been new schools and roads, but

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<sup>576</sup> G. W. Kenny, "Report of an Investigation Into Forced Displacement in the Town of Mankien, Western Upper Nile, Sudan" on line; <http://sudan.activist.ca/info/sudan-garykennyreport.html> (visited: 01/17/03).

<sup>577</sup> *Ibid.*

<sup>578</sup> Staff Reporter AfricanOnline.com, "Oil Fuels Sudan's Civil War" August 2, 2002.

displacement, destruction and death.”<sup>580</sup> A similar observation by the Christian Aid in early 2001 stated: “Across the oil-rich regions of Sudan, the government is pursuing a ‘scorched earth’ policy to clear the land of civilians and to make way for the exploration and exploitation of oil by foreign oil companies.”<sup>581</sup>

The irrefutable position that the Sudanese government used its scorched earth policy to depopulate the oil concession areas of southern Sudan was reinforced and affirmed by the Harker Report commissioned by the government of Canada. The report demonstrated this with the example of the displacement of villages around the Heglig oil concession area then under Talisman control. According to the report, this area, from 1996 until May 1999, came under continuous bombing, looting, killing, abductions, and the burning of houses by the government and its allied militia forces. The report concluded with the observation that “it is difficult to avoid Leonard Franco’s conclusion that a ‘swath of scorched earth/cleared territory’ is being created around the oilfields. Over the years, the series of attacks and displacements are leading to a gradual depopulation, as only a percentage of people who flee return after each displacement.”<sup>582</sup>

As part of its scorched earth policy, the government of Sudan employed starvation as a weapon of war by preventing relief materials from being delivered to starving

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<sup>579</sup> L. Sapienza, “U.N. Report: Classifying The Killings In Sudan As Genocide” *supra* note 541. See also, E. Reeves, “Capital Crime in Sudan” *The Washington Post*, August 20, 2001 on line: [http://www.centerforsecuritypolicy.org/index.jsp?section=papers&code=01-F\\_68](http://www.centerforsecuritypolicy.org/index.jsp?section=papers&code=01-F_68) (visited: 01/17/03).

<sup>580</sup> Christian Aid, as quoted in A. England, *The Associated Press*, “Does Oil Fuel Development in Sudan or Just Stoke the Fires of War?”

<sup>581</sup> Christian Aid, as quoted in USCR, “Current Country Update: Sudan” on line: [http://www.refugees.org/world/countryrpt/africa/Mid\\_countryrpt01/sudan.htm](http://www.refugees.org/world/countryrpt/africa/Mid_countryrpt01/sudan.htm) (visited: 01/27/03).

<sup>582</sup> J. Harker, “Human Security in Sudan: The Report of a Canadian Assessment Mission” *supra* note 545 at 11.

civilians in the areas controlled by SPLA or other groups opposed to government.<sup>583</sup> This strategy, coupled with deliberate destruction of crops, livestock, and other means of livelihood of the people of the Southern Sudan<sup>584</sup> and other marginalized areas, orchestrated famine and food crisis in those areas. The aim of this policy was, of course, to create fear and force the people to leave the area so that the oil companies could enjoy unhindered and unbridled operation. In the words of a local commissioner in the Nuba mountains area of Central Sudan, where such strategies were frequently employed: “They want to exploit the oil in this area without fear of local resistance, so they are clearing the area and removing all the people.”<sup>585</sup> Thus, the overall objective of the Sudanese government’s scorched earth policy was to spread terror and create general insecurity in the oil concession areas, so as to intimidate the indigenous owners of the land living there.

The apprehension of the Sudanese government was that the local populations living around oil regions will collaborate with opposition forces to make the exploration and exploitation activities by the MNCs difficult, if not impossible. The calculation of the government was that, with the policy of continuous, ceaseless terror caused by bombings, attacks with ground troops, destruction of the means of livelihood, and denial of access to

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<sup>583</sup> D.H. Johnson, *The Root Causes of Sudan's Civil Wars*, *supra* note 547 at 150.

<sup>584</sup> It is important to note that “under the British colonial rule, the definition of “South” Sudan was the area of the country below the twelfth parallel. This included the Nuba Mountains and Southern Blue Nile regions of Sudan. However, The National Islamic Front (NIF) government changed the definition of South Sudan. Southern Sudan now is the area below the eight parallel. This is an attempt to exclude the Nuba Mountains and Southern Blue Nile from Southern Sudan.” See, W. I. Saunders Jr., & Y.G. Mantilla, “Human Dignity Denied: Slavery, Genocide, and Crimes Against Humanity in Sudan, (2002) 51 *Catholic University Law Review* 715 at 718.



the region, by humanitarian organizations, people will be put into a constant state of fear, and thereby forced to leave the area. In this way the exploration and exploitation activities of the foreign oil companies can go unhindered and unchallenged. The complicity of the oil companies in all these despicable acts of terrorism against the southern Sudanese living in the oil concession areas was not in doubt, despite some feeble and unpersuasive attempts by them to state the contrary.

This section has examined the Sudanese government's scorched earth policy, which was aimed at removing people living around oil rich areas in the South in order to allow uninhibited oil exploitation by the multinational oil companies. In the next section, the focus will be on the role played by the MNCs themselves in enhancing their capacity to extract oil with minimal interference from the people living in the oil concession areas. The corporations' activities that help the government of Sudan to afford oil extractors effective protection in the course of their operations will also be examined. It will be shown how all these elements contribute to fuelling the war and producing refugees.

### **5.3. THE ROLE OF OIL AND MNCS IN THE EXACERBATION OF THE WAR.**

The lure of the oil rush is as powerful within Sudan as it has been for the international companies that have flocked to the country. Both the government and northern opposition see significant potential in oil exports.<sup>586</sup>

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<sup>585</sup> D. Lewis, "Fight for Sudan's Oil is Killing Civilians: Canadian Company Part of Consortium Developing Fields Being Cleared By Force in Civil War" *Globe and Mail* (Toronto) October 5, 1999.

<sup>586</sup> God, Oil and Country, *supra* note 546 at 23.

Admittedly, there might be other reasons for the war fought in Sudan, such as the right to self-determination, the separation of religion from the state, and discrimination based on race. Perhaps, that was why it has been described as “...one of the most complex wars in recent history.”<sup>587</sup> However, the discovery and exploitation of oil in that country raised the stakes in the war. Both the government and the freedom fighters based in the South wanted to have control over the oil fields.<sup>588</sup> As Scott Pearce points out in the case of Colombia, “...Oil development becomes a catalyst for conflict. Where you find oil you will find armed groups fighting for territorial control.”<sup>589</sup>

After the discovery of oil in Sudan in the 1980s, several multinational corporations lined up to invest in that country. The Sudan is reputed to have large reserves of the black gold. Approximately eight billion barrels of crude oil are estimated to be beneath the soil in the southern regions of the country.<sup>590</sup> Chevron, the first multinational oil company to explore oil in Sudan, pulled out in 1984 following the killing of three of its employees by the opposition forces.<sup>591</sup> In fact, the opposition forces, especially the SPLA, declared that all oil installations and

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<sup>587</sup> T. A. Baker, “Sudan’s Unseen War” (2002) 7:7 *Eat The State* on line: <http://eatthestate.org/07-07/SudansUnseenWar.htm> (Visited: 01/17/03). See also, L. Sapienza, “U.N. Report: Classifying the Killings in Sudan As Genocide” *supra* note 541 at 890.

<sup>588</sup> L. Sapienza, “UN Report: Classifying the Killings in Sudan As Genocide” *ibid.* at 890 &891. See also A. Bixler, “Development: Private Enforcement of International Human Rights Laws” *supra* note 566 at 513.

<sup>589</sup> S. Pearce, *supra* note 545 at 17.

<sup>590</sup> L. Sapienza, “UN Report: Classifying the Killings in Sudan As Genocide” *supra* note 541 at 891.

<sup>591</sup> K. Vick, “Oil Money Supercharges Sudan’s Civil War” *International Herald Tribune* June 13, 2001 on line: <http://www.globalpolicy.org/security/natres/oil/2001/0613suda.htm> (visited: 01/17/03). See also The

facilities, as well as their staff, were legitimate military targets. Samson Kwaje, a then spokesman for the SPLA, said in response to India's acquisition of Talisman's interest in Sudan's oil:

Morally it is wrong and the only solution that we can employ as the Sudanese people is to shut it down. To us, all oil installations in the country remain a legitimate military target. Let them [India] do what they can with Khartoum, whatever deal they can make, but they stand to lose at the end.<sup>592</sup>

Up until recently, oil exploration and exploitation in Sudan is being run and controlled by the Greater Nile Oil Petroleum Operating Company (GNPOC) – a consortium including China's National Petroleum Corporation, Talisman of Canada (note however, that Talisman sold its 25% share of the GNPOC to a subsidiary of an India's oil company on March 9, 2003, for \$771 million),<sup>593</sup> Malaysian Petronas, and Sudapet, which is owned by the Sudanese government.<sup>594</sup> These companies have invested billions of dollars to bring about the flow of Sudanese oil to both local and international markets.<sup>595</sup> They constructed a 16,000 kilometre pipeline through which oil is transported to the Northern part of the country and to the outside world.<sup>596</sup>

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Presbyterian Church of Sudan v. Talisman Energy, Inc. Class Action Complaint in the United States District Court for the Southern District of New York (on file with the author) at 5.

<sup>592</sup> A. Ninan, "India's See No Evil, Hear No Evil Policy in Sudan" CorpWatch India September 12, 2002, on line: <http://www.corpwatchindia.org/issues/PRT.jsp?articleid=2663> (visited: 01/17/03).

<sup>593</sup> S. J. Kobrin, "Oil and Politics: Talisman Energy and Sudan" (2004) 36 N.Y.U. J. Int'l. & Pol. 425.

<sup>594</sup> D. H. Johnson, *The Root Causes of Sudan's Civil Wars* *supra* note 547 at 162. It should be noted that Talisman sold its oil interest in Sudan in October 2002.

<sup>595</sup> A. England, "Does Oil Fuel Development in Sudan or Just Stoke the Fire of War?" The Associated Press on line: <http://news.theolympian.com/photosudan/stories/88505.shtml> (visited: 01/17/03).

<sup>596</sup> L. Sapienza, "U.N. Report: Classifying The Killings In Sudan As Genocide" *supra* note 541 at 890. J. Bennett, "Public Private Partnerships: The Role of the Private Sector in Preventing Funding Conflict"

Because of the war in Southern Sudan, where the oil fields are mostly located, these MNCs supported directly and indirectly the government of Sudan's scorched earth policy, which caused catastrophic human rights and humanitarian disasters. The companies requested and permitted government forces to clear new areas for their operations.<sup>597</sup> The companies also asked for protection and provision of security from government forces known for their gross and wanton human rights violations. A leaked Sudanese government document gives credence to this fact:

In accordance with directive of His Excellency the Minister of Energy and Mining and fulfilling the request of the Canadian Company...the armed forces will conduct cleaning up operations in all villages from Heglig to Pariang, southeast of Heglig.<sup>598</sup>

This directive was followed two days later by massive attacks by helicopter gunships and Antonov bombers. The action was taken by government forces and their allied militias against the villages mentioned in the document.<sup>599</sup> Writing in respect of a similar Canadian oil company's investment in Colombia, Scott Pearce observes that:

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(2002) 35 Vand. J. Transnat'l L. 711 at 713. The construction of a 1600 km pipeline from the oilfields to Port Sudan was largely financed by Talisman. See G. W. Kenny, "Report of an Investigation Into Forced Displacement in the Town of Mankien, Western Upper Nile, Sudan" April 2002, on line: <http://sudan.activist.ca/info/sudan-garykennyreport.html> (visited: 01/17/03). This oil pipeline was officially declared open by President al-Bashir on August 30, 1999. See Amnesty International, "Sudan: Oil in Sudan: Deteriorating Human Rights" 03/05/2000 on line: [http://www.web.amnesty.org/ai.nsf/Index/AFR540012000?OpenDocument&of=COUNTR...\(01/17/03\)](http://www.web.amnesty.org/ai.nsf/Index/AFR540012000?OpenDocument&of=COUNTR...(01/17/03)).

<sup>597</sup> Christian Aid, "The Scorched Earth: Oil and War in Sudan," *supra* note 572.

<sup>598</sup> As quoted in J. Flint, "Slaughter in The Name of Oil: New Evidence of Human Rights Abuses and a People on the Run from Big Business" *The Sunday Herald* March 24, 2002 on line: <http://www.commondreams.org/headlines02/0324-02.htm> (visited: 01/22/03).

<sup>599</sup> J. Flint, *ibid.* See also, B. Bock, "Sudan: Mixing Oil and Blood," *supra* note 541.

While Colombia may provide an attractive environment for Canadian investors, foreign investment is backed-up by a repressive military-paramilitary apparatus. The military and paramilitary not only protect companies from guerrilla attack, but they aggressively target opponents of foreign investment in order to create an attractive environment for foreign investors.<sup>600</sup>

Before the advent of Talisman in Sudan, its predecessor, Arakis, employed Arab militia and government forces to provide protection and security for its oil operations after it started exploration and extraction activities in the country.<sup>601</sup> The government's soldiers used roads and airstrips built by the oil companies, as well as aircraft belonging to them, to attack civilian targets and clear the area for unmolested operation of these companies.<sup>602</sup> Sudanese government officials as well as army personnel were transported by Talisman in its aircraft. In fact, Talisman admitted that the government troops have used its airstrips for what they describe as "non-defensive" purposes.<sup>603</sup>

Available documentary evidence confirmed that airstrips then in Talisman's oil concession areas were indeed used to undertake military operations against civilian targets.<sup>604</sup> For instance, in October 2001, government forces launched bombing attacks against United Nations relief sites, using helicopter gunships from Heglig

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<sup>600</sup> S. Pearce, *supra* note 545 at 20.

<sup>601</sup> *The Presbyterian Church of Sudan v. Talisman Energy, Inc.* Class Action Complaint in the United States District Court for the Southern District of New York (on file with the author) at 7 & 8.

<sup>602</sup> Staff Reporter, "Oil Fuels Sudan's Civil War" AfricanOnline.com

<sup>603</sup> G. W. Kenny, "Report Of an Investigation Into Forced Displacement in the Town of Mankien, Western Upper Nile, Sudan, *supra* note 576. Canadian Auto Workers Union, United Church of Canada & others, "Report of an Investigation into Oil Development, Conflict and Displacement in Western Upper Nile, Sudan" October 2001 (on file with the author) at 2 & 3.

airstrip, which was constructed and owned by Talisman. Similar bombing attacks were conducted against civilian targets such as Kaikang, using Talisman's operating airstrip at Unity in 2001.<sup>605</sup>

From 1999, following the successful exploitation of oil and the building and opening of a pipeline by the MNCs in Sudan, the war in that country assumed a new dimension since greater revenue available to the government enabled it to double its budget and to acquire more sophisticated weapons for the prosecution of the war.<sup>606</sup> For instance, in 2000, the Sudanese government's oil revenues were \$526 million, and its military expenditures were \$242 million.<sup>607</sup> But in 2001, the government's oil revenues were \$596 million while its military expenditures were \$362 million.<sup>608</sup> With the oil revenue, the government built factories for the production of small arms and purchased new helicopter gunships, MiG-29 fighter jets, and short-range tactical ballistic missiles.<sup>609</sup> Jane Lampman observed, "but these warplanes were financed in part by a new international joint oil venture that is channelling large sums into the Sudanese treasury- and may end up tilting one of

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<sup>604</sup> G. W. Kenny, *ibid.* .

<sup>605</sup> *The Presbyterian Church of Sudan V. Talisman Energy, Inc.*, *supra* note 540 at 9.

<sup>606</sup> J. Flint, "Oil Fuels Flames of War in Sudan" *Guardian* (United Kingdom) March 7, 2002

<sup>607</sup> *The Presbyterian Church of Sudan v. Talisman Energy, Inc.* *supra* note 540 at 11.

<sup>608</sup> *Ibid.* at 11.

<sup>609</sup> D.H. Johnson, *The Causes of Sudan's Civil Wars*, *supra* note 547 at 163. See also, J. Flint, "Oil Fuels Flames of War in Sudan" *Guardian* March 7, 2002. See also "Sudan War Forces Oil Company Pull-out" B.B.C. News March 20, 2002, on line: <http://news.bbc.co.uk/1/hi/business/1879863.stm> (visited: 01/17/03). See further G. Gagnon & J. Ryle, "Report of an Investigation into Oil Development, Conflict and Displacement in Western Upper Nile, Sudan" October 2001 (on file with the author) at 4.

the world's deadliest wars toward the regime in Khartoum."<sup>610</sup> Also according to a CBC news item,

A new and dangerous element has bubbled up from Sudan's killing fields: oil. Foreign companies like Canadian Talisman Energy have swooped in to tap the newly discovered reserves, paying more than a million dollars a day in royalties. Sudan's government, in turn, has used the money to buy arms, and fund brutal operations against rebel soldiers- and civilians -in the south.<sup>611</sup>

Hassan al-Turabi, a former influential member of the Sudanese government, boasted publicly that revenue obtained from oil extraction, which was made possible by MNCs, would be employed in developing the country's factories for missiles and tanks.<sup>612</sup> Human Rights Watch reinforced this prediction in its 2002 World Report in which it observed that "small arms and ammunition were produced by three new arms factories near Khartoum in partnership with Chinese companies, using government oil revenue."<sup>613</sup> Also the Presbyterian Church of Sudan, in its civil suit against Talisman and the Sudanese government in a New York District Court, alleges as follows:

From the beginning, the government's oil development policy and its violent campaign against ethnic and religious minorities were closely tied. The Sudanese government looked to its oil reserves as a potential source of capital

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<sup>610</sup> J. Lampman, "Battle Against Oppression Abroad Turns to Wall Street" March 3, 2000, on line: [http://www.vitrade.com/cnpc/000303\\_battle\\_against\\_abroad.htm](http://www.vitrade.com/cnpc/000303_battle_against_abroad.htm) (visited: 01/17/03).

<sup>611</sup> CBC Evening News, "Black Gold For Blood Money in Sudan" June 21, 2002, on line: <http://www.cbsnews.com/stories/2002/06/21/eveningnews/main513084.shtml> (visited: 01/17/03). See also, K. Vick, "Oil Money Supercharges Sudan's Civil War" *International Herald Tribune*, June 13, 2001 on line: <http://www.globalpolicy.org/security/natres/oil/2001/0613suda.htm> (visited: 01/17/03).

<sup>612</sup> C. Forcese, "Globalizing Decency: Responsible Engagement in an Era of Economic Integration," *supra* note 564 at 15 & 16. See also, L. Sapienza, U.N. Report: Classifying the killings In Sudan As Genocide," *supra* note 541 at 891-892.

<sup>613</sup> Human Rights Watch, "Sudan" World Report 2002, *supra* note 575.

to purchase the missiles, tanks, bombers, helicopters and other sophisticated armaments needed to intensify its jihad against the southern population.<sup>614</sup>

On January 15, 2002, Russia signed a \$200 million deal with the Sudanese government to develop an untapped oil field in Sudan. In the agreement, Russia's oil interest in Sudan will be overseen by the state owned Slavneft Oil Company. The deal enabled Russia to manufacture its battle tanks for Sudan, construct a factory for assembling of the Russian TU-72, and sell Russian arms to Sudan in "exchange for oil concessions."<sup>615</sup>

Thus, revenues accruing from exploitation of oil and Sudan's other enormous resources were invested in the development of infrastructure for the prosecution of the war by the government. This was done at the expense of other important services, such as health, education, and environmental protection, which deserve attention and which would have been more beneficial to the suffering Sudanese population, particularly the Southerners. The reason was perhaps because "the GNPOC sends all Sudan's portion of oil revenues directly to the government of Sudan, with no mechanism in place that governs the use or distribution of these revenues."<sup>616</sup> In their May 2002 report, "Multinational Enterprises in Situations of Violent Conflict and Widespread Human Rights Abuses," the Organization for Economic Co-operation and Development (OECD)

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<sup>614</sup> *The Presbyterian Church of Sudan v. Talisman Energy, Inc.* Class Action Complaint in the United States District Court for the Southern District of New York (on file with the author).

<sup>615</sup> Security Council, "Sudan and Russia Forging New Ties Around Oil and Arms" *Stratfor* January 22, 2002 on line: <http://www.globalpolicy.org/security/natres/oil/sudan/2002/0122arms.htm> (visited: 01/17/2003). See also, D. H. Johnson, *The Root Causes of Sudan's Civil Wars*, *supra* note 547 at 163.



explains that “multinational enterprises may inadvertently and indirectly help to provide both the means and the motive for violence by providing revenues that are channelled through weak fiscal institutions.”<sup>617</sup>

The revenues received by the Sudanese government from oil extraction were channelled toward the war, thereby increasing its intensity and made the chances of a peaceful resolution more difficult to achieve. According to Baum, an investigator appointed by the UN Commission on Human Rights, the drilling of Sudan’s oil by MNCs “has led to worsening of the conflict, which has also turned into a war for oil.”<sup>618</sup> By the same token, Christian Aid, a British charity organization observed that “without oil, the civil war being fought between the government of Sudan and the main opposition force, the Sudan People’s Liberation Army (SPLA) is at a stalemate; with oil, it can only escalate.”<sup>619</sup> Sharon Hutchinson echoed similar views when she observed that:

While the second construction phase of this oil development scheme has not yet begun, the massive oil revenue generated by the first phase dramatically strengthened the government’s economic viability and international credibility over the past two years. Moreover, a significant proportion of the government’s oil revenues was invested in the domestic production of sophisticated weaponry to bolster its seventeen year long assault on the citizens of the South.<sup>620</sup>

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<sup>616</sup> E. Reeves, Commentary on “Sudan’s Prolonged Second Civil War and the Militarization of Nuer and Dinka Ethnic Identities” and “Africans, Arabs, and Islamist: From the Conference Tables to the Battlefield in the Sudan” (1999) 42:2 *African Studies Review* 147 at 150.

<sup>617</sup> OECD, “Multinational Enterprises in Situations of Violent Conflict and Widespread Human Rights Abuses” Working Paper on International Investment Number 2002/1 May 2002 at 14.

<sup>618</sup> Security Council, “Sudan Civil War Becoming War over Oil –UN Report” *Reuters* October 10, 2001 on line:<http://www.globalpolicy.org/security/natres/oil/sudan/2001/1010sanc.htm> (visited: 01/17/03). See also, B. Christopher, “No Graceful Exit” *Rabble News* November 5, 2002 on line:[http://www.rabble.ca/news\\_full\\_story.shtml?x=16719](http://www.rabble.ca/news_full_story.shtml?x=16719) (visited: 01/17/03).

<sup>619</sup> Christian Aid, “The Scorched Earth: Oil and War in Sudan,” *supra* note 572.

<sup>620</sup> S. E. Hutchinson, “A Curse From God? Religious and Political Dimensions of the Post-1991 Rise of Ethnic Violence in south Sudan” (2001) 39:2 *The Journal of Modern African Studies* 307 at 324.

It should be acknowledged that not only the government of Sudan benefited from oil revenues; the MNCs operating in that country at times make payments to opposition forces, especially the SPLA, so that the forces will refrain from attacking their facilities at the various oil extraction sites.<sup>621</sup>

The Sudanese government used the extraction of oil located in the South as leverage to get close to many industrialized countries, especially in Europe. Many European Union members invested in Sudan's oil, either directly or indirectly, through MNCs that have their origin in these countries. Consequently, they were "willing to run political interference for Sudan's efforts to end its political isolation."<sup>622</sup> These European countries made investments in Sudan's oil industry despite their knowledge that the Sudanese government's proceeds from oil were been used to enhance its military capabilities.<sup>623</sup>

Secondly, notwithstanding the tyrannical and oppressive disposition of the Sudanese government toward its citizens, especially Southerners, and its poor human rights record, these MNCs that were exploiting the country's oil did not spare any effort in laundering the image of that government before the citizens of some of the western nations where they originate. In the process, some MNCs went to the ridiculous extent of denying the existence and commission of gross human rights abuses by the Sudanese

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<sup>621</sup> K. Bergmann, "Disputed Oil Production in Southern Sudan" *World Press Review* July 2001, on line: [http://www.thirdworldtraveler.com/Africa/Oil\\_Southern\\_Sudan.html](http://www.thirdworldtraveler.com/Africa/Oil_Southern_Sudan.html) (visited: 01/27/03).

<sup>622</sup> God, Oil and Country *supra* note 546 at 101

<sup>623</sup> Human Rights Watch, "Sudan" World Report 2001 on line: <http://www.hrw.org/wr2k1/Africa/sudan3.html> ( 01/17/03).

government.<sup>624</sup> For instance, despite the existence of an avalanche of documentary evidence of egregious violations of citizens' human rights, especially those of the Southerners, Jim Buckee, the CEO of Talisman, defended the government with regard to such charges from NGOs and some Western countries. He claimed that the Sudanese government assured him that the proceeds from the oil will be used in building roads and hospitals and toward securing peace, especially in the South, and that the allegation of genocide and other atrocities against the government was false. In his own words, Buckee declared: "I absolutely don't believe accusations of genocide and...think the accusations of slavery are grossly misrepresented."<sup>625</sup>

Talisman also then defended the fact that the Sudanese government has engaged in forceful displacement of people from oil concession areas in order to beef up security around the companies' operating region.<sup>626</sup> In this regard, the CEO of Talisman insisted that "the fields are almost completely covered by water in the rainy season and there are virtually no permanent towns or settlements. Certainly, we have seen no evidence of any removals of people...there are no people there."<sup>627</sup> Mr. Buckee also contended that Sudan was being "unfairly blackened" by critics. According to him, "there's a huge machine generating false things about Sudan and it's very hard to separate fact from

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<sup>624</sup> D.H. Johnson, *The Root Causes of Sudan's Civil Wars*, *supra* note 547 at 164.

<sup>625</sup> D. Lewis, *supra* note 565.

<sup>626</sup> A. England, "Does Oil Fuel Development in Sudan or Just Stoke the Fires of War?" *supra* note 580. See also I. Fisher, "Oil Flowing in Sudan, Raising the Stakes in its Civil War" *The New Times* October 17, 1999 on line: [http://www.vitrade.com/talisman/991017\\_tlm\\_pipeline\\_bomb\\_repairs.htm](http://www.vitrade.com/talisman/991017_tlm_pipeline_bomb_repairs.htm) (visited: 01/17/03), where the general manager of Talisman in Sudan Ralph R. Capeling, stated that the government of Sudan has constantly assured him that it will seek peace with the opposition forces and share oil money, and that he believed that it sincere.

fiction.”<sup>628</sup> Besides, the Talisman CEO even alleged that churches were fuelling the war in Sudan by giving support to the SPLA and other opposition forces against the government of Sudan.<sup>629</sup>

Despite the unsubstantiated and highly cynical defence made on behalf of Sudanese government by some MNCs operating in that country, a plethora of evidence existed in support of the fact that oil extraction in that country contributed to the escalation of the war and worsening of the human rights abuses in that country. One piece of such documented evidence was an investigation commissioned by former Canadian Foreign Affairs Minister Lloyd Axworthy, otherwise called the Harker Report.<sup>630</sup> One of the findings of this assessment mission was that the Heglig airstrip, which was then owned, controlled, and operated by Talisman, was used as a staging ground for launching attacks by the government of Sudan. The government’s helicopter gunships, and Antonov

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<sup>627</sup> G. Katsh, “Fueling Genocide: Talisman Energy and the Sudanese Slaughter” (2000) 21: 10 *Multinational Monitor* on line: <http://multinationalmonitor.org/mm2000/00october/corp2.html> (01/17/03).

<sup>628</sup> S. Chase “Talisman Plays With Fire in Sudan” *Globe & Mail* October 9, 1999 on line: [http://www.vitrade.com/talisman/991009\\_talisman\\_plays\\_with\\_fire\\_in\\_suda.htm](http://www.vitrade.com/talisman/991009_talisman_plays_with_fire_in_suda.htm) (visited:01/17/03).

<sup>629</sup> The taskforce on Churches and Corporate responsibility, “Corporate Responsibility: Talisman-Sudan Project Phase One Report on Talisman and Sudan” 3<sup>rd</sup> June 1999, on line: [http://www.web.net/~tccr/CorpResp/talisman-PhaseOneRep\(Jn99\).htm](http://www.web.net/~tccr/CorpResp/talisman-PhaseOneRep(Jn99).htm) (visited: 01/17/03). However, it should be noted that in 2002, Talisman divested its interest in Sudan’s oil, which was acquired by India. See A. Ninan, “India’s See No Evil, Hear No Evil Policy in Sudan, September 12, 2002, on line: <http://www.corpwatchindia.org/issues/PRT.jsp?articleid=2663> (visited: 01/17/03).

<sup>630</sup> It should be reiterated however, that Talisman sold its oil interest in Sudan in October 2002 following intense pressure from human rights organizations around the world . See Security Council, “Mineral Wealth Fuels Africa’s Most Protracted Wars” *Agence France Presse*, November 27, 2002 on line: <http://www.globalpolicy.org/security/natres/oil/2002/1202nat.htm> (visited: 01/17/03). See also, “Sudan: Talisman Sells Controversial Oil Stake” *IRIN* (Nairobi) October 31, 2002 on line: [http://www.irinnews.org/report.asp? ReportID=30681&SelectRegion=East\\_Africa&Select...](http://www.irinnews.org/report.asp? ReportID=30681&SelectRegion=East_Africa&Select...) (Visited: 01/17/03). The Talisman oil stake, which was a 25 percent share in the Greater Nile Petroleum Operating Company (GNPOC), was sold to ONGC Videsh Ltd, a subsidiary of India’s national oil company, for about US \$758 million.

bombers shared this facility with the oil company.<sup>631</sup> In addition, the government of Sudan used the facility to arm its forces and to refuel the bombers and gunships used in attacking civilians inhabiting the oil concession areas.<sup>632</sup> According to the report,

The gunships and Antonovs, which attacked villages south of the rivers, flew to their targets from Heglig airstrip in the Talisman concession... It is a prominent perception of southern Sudanese that Talisman, “the Canadian oil firm”, is in active collaboration with the GOS, economically, politically & militarily; it is also the perception of these southerners that the government of Canada is either supportive of or indifferent to that collaboration. In short, they identify oil extraction not as a positive development but as a major grievance with a Canadian label...<sup>633</sup>

The Harker Report concluded thus: “...That our own observations and investigations only add to the growing body of evidence and information that identifies Sudan as a place of extraordinary suffering and continuing human rights violations, even though some forward progress can be recorded, and, significantly, that the oil operations in which a Canadian company is involved add more suffering.”<sup>634</sup>

The Canadian church leaders made similar observations after their assessment mission to some oil field regions of Sudan in April 2001. They noted:

We are outraged that a Canadian company is a major producer of oil located in southern Sudan and is paying huge royalties to the unaccountable northern military dictatorship led by General Omar al Bashir. We hold the Bashir government largely responsible for the atrocities committed against southern Sudanese peoples. It is also clear to us that a major factor in the suffering of millions of innocent people is the rapid exploration, development and production of oil located in the south. Oil development has killed and

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<sup>631</sup> J. Harker, *Human Security in Sudan: The Report of a Canadian Assessment Mission*, *supra* note 545 at 15.

<sup>632</sup> *Ibid.*

<sup>633</sup> *Ibid.* at 15-16.

<sup>634</sup> *Ibid.* at 66.

displaced untold numbers of people, forcing them to flee their homes and land for uncertain future.<sup>635</sup>

Furthermore, the observations of the U.S. Representative Frank Wolf of Virginia give further credence to other reports about the impact of oil and the activities of MNCs in the then Sudan's civil war. As Rep. Wolf puts it:

A new factor worsens the threat of genocide [in the Sudan]: oil. In 1999, the Khartoum government began earning hundreds of millions of dollars from oil exports. The hard currency is financing weapons for the war. The more oil produced, the more weapons purchased, the more innocent civilians killed. The Khartoum government has doubled its spending on arms since it began exporting oil. Helicopter gun ships are being used in a vicious scorched earth policy to wipe out ethnic groups such as the Dinka and Nuer from land under which the oil sits. The purchase of weapons like these will only cause increased suffering as the Khartoum government will be able to better target civilians, food and relief convoys, and outside relief organizations. It also will allow the government to project force even farther into the south.<sup>636</sup>

Despite all the overwhelming evidence about the negative impact of oil and the action or inaction of MNCs in the exacerbation of the conflict in Sudan, it is regrettable to observe that some oil companies, such as Talisman then, persisted for a long time in making an unsupported and unsubstantiated defence on behalf of the Sudanese government. Such support tended to give impetus and to galvanize the government of that country in the further oppression of its people.

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<sup>635</sup> Report of Canadian church leaders as quoted in G. W. Kenny, "Report Of an Investigation into Forced Displacement in the Town of Mankien, Western Upper Nile, Sudan," *supra* note 576.

<sup>636</sup> U.S. Rep. Frank R. Wolf, as quoted in Project Sudan, "Sudan and the USA" on line: <http://sudan.activist.ca/info/sudanandtheusa.html> (visited: 01/17/03). See also, "Sudan: Coming Out of the Cold" *Economist* October 4<sup>th</sup> 2001 on line: [http://www.economist.com/world/africa/displayStory.cfm?Story\\_ID=807792](http://www.economist.com/world/africa/displayStory.cfm?Story_ID=807792) (visited: 01/17/03).

For its part, the government of Sudan used oil extracted by the MNCs to garner the support and friendship of some of its African neighbours, such as Kenya, Ethiopia, and Uganda, which were otherwise sympathetic to the SPLA cause. For instance, the government of Sudan exported tariff free oil to Kenya and other neighbouring countries that provided support to the SPLA.<sup>637</sup> Even Zimbabwe, which was a strong supporter of the SPLA, bought oil from Sudan to augment its supplies.<sup>638</sup> This affected its support for the SPLA, and hampered its mediation role in achieving a peaceful resolution of the protracted civil war. Because most of the above named countries are faced with serious economic crisis and other internal security problems, they needed cheap oil devoid of taxes and tariffs to support their economy as part of the solution to these problems.

These cordial relations between the Sudanese government and its otherwise hostile neighbours undermined the capacity of the SPLA to withstand government fire power in the battlefield; and contributed in prolonging the peaceful resolution of conflict.<sup>639</sup> As noted by a Sudanese opposition commander, “Ethiopia has national security interest it is pursuing. It needs Sudan’s oil, its port, and the security arrangements that reduce any threats from the West. It needs a friendly government in

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<sup>637</sup> God, Oil and Country, *supra* note 546 at 61.

<sup>638</sup> Security Council, “Rebels Warn Against Blood Oil” *Financial Gazette (Harare)* September 6, 2001 on line: <http://www.globalpolicy.org/security/natres/oil/sudan/2001/0907zimb.htm> (visited: 01/17/03).

<sup>639</sup> Note that the parties to the conflict signed various peace accords and ceasefire agreements in 2002 and 2003, in Kenya. And on January, 2005, the government and the SPLM signed a peace agreement that apparently seemed to have ended the war. Since then, the SPLA has joined in the formation of government of national unity. See T.M. Price, “The Kimberley Process: Conflict Diamonds, WTO Obligations, and the University Debate” (2003) 12 *Minnesota Journal of Global Trade* 1 at 8-9. See also, Human Rights Watch, “Targeting the Fur: Mass Killings in Darfur” on line: <http://hrw.org/backgrounder/Africa/darfur0105/2.htm> ( visited: 09/17/2005).

Khartoum.”<sup>640</sup> Making similar observations in its 2002 world report, Human Rights

Watch stated as follows:

The Sudan government used its new oil resources- and more than U.S.\$400 million in extra revenue- to strengthen its position in the Horn of Africa. In June 2001, Sudan and Ethiopia announced a project to supply Ethiopia with Sudanese gasoline and kerosene equivalent to 85 percent of the country’s needs for the year 2002. Ethiopia, previously supportive of Sudanese rebels, had already cut relations with them.<sup>641</sup>

Multinational oil corporations operating in Sudan, together with the governments of their countries of origin, cannot claim ignorance or deny knowledge of the fact that “...oil development in Sudan was an engine of human destruction...”<sup>642</sup> but the lure of profits and control of vast oil reserves in the country blind them to the realities of this human tragedy. Thus, there was no gainsaying that “oil developed, exploited and financed by foreign oil companies-- was both the justification and the means for a larger, more brutal war.”<sup>643</sup> Expressing a similar view in October 2001, USAID administrator Andrew Natsios said: “As it stands today, oil has only helped to fuel tension, bitterness and war. The forced displacement of tens of thousands from around the pipelines has swelled. The abandoned and destroyed villages were readily apparent as we flew over the pipelines...the destruction of people lives could not be more apparent.”<sup>644</sup>

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<sup>640</sup> Sudan’s Opposition Commander as quoted in God, Oil and Country, *supra* note 546 at 57.

<sup>641</sup> Human Rights Watch, “Sudan” Country Report 2002 on line: <http://www.hrw.org/wr2k2/africa12.html> (visited: 01/17/03).

<sup>642</sup> E. Reeves, “Capital Crime in Sudan” *The Washington Post*, August 20,2001.

<sup>643</sup> Christian Aid, “The Scorched Earth: Oil and War in Sudan,” *supra* note 572.

<sup>644</sup> A. Natsios as quoted in A. Ninan, “India’s See No Evil, Hear No Evil Policy in Sudan” *CorpWatch India* on line: <http://www.corpwatchindia.org/issues/PRT.jsp?articleid=2663> (visited: 01/17/03). See also, U.S. Department of State, “African Oil Policy Initiative Group” (an interview given by U.S. House of



From the moment revenues from oil started accruing to the government of Sudan, its capacity to wage war against the southern opposition forces was enhanced, and it pursued the then war more aggressively. In the process, government forces committed untold atrocities against southern Sudanese civilian populations living around oil concession areas. The government forces and its allied militias burned and bombed villages, killed and raped women and children, and forcibly displaced people living in the oil regions. The human rights crisis in Sudan then got worse and escalated as a result of the war, which was fuelled largely by the activities of the MNCs. Oil helped to finance the atrocities committed against the Sudanese people by the government of that country. All human rights of the kinds recognized by the international community were violated with impunity by the government of Sudan and its allied militias forces.<sup>645</sup>

The then government of Sudan, more than ever before, was determined to maintain itself in power through the destruction of the opposition on the battlefield. The enhanced confidence of the government in achieving this was predicated on the revenues that accrue to it from oil earnings, and the support, both moral and logistical, of the MNCs. According to Brottem and Buffett, “the Sudanese coffers are filled with oil revenues from sources developed with foreign investment, and there is speculation that recent

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Representatives Subcommittee on Africa Statesmen) June 12, 2002 on line: <http://allafrica.com/stories/200206120501.html> (01/17/03).

<sup>645</sup> D. Bouvean, “A Case Study of Sudan and The Organization of African Unity,” *supra* note 540. *Human Rights Watch, Abuses by All Parties in The War in Southern Sudan* (New York: Human Rights Watch, 1994) at 68-77.

government campaigns are intended to assert control over new oil developments in the South.”<sup>646</sup> In a similar vein, Gabriel Katsh observed that:

The oil trade is pouring about \$450 million a year into desperately poor Sudan. Before oil exports took off, the government was heavily in debt, in serious risk of defaulting on its loans from the International Monetary Fund (IMF), and weakened further by U.S. economic sanctions. The oil exports keep the economy functioning and permit the government to fund its war efforts, which cost approximately \$400 million each year.<sup>647</sup>

Thus, it was difficult, to secure a negotiated solution to the crisis in Sudan, because of oil revenue that accrues to the then government of that country, as oil was about “the only asset that was keeping it from bankruptcy,”<sup>648</sup> and also sustained the tempo of the devastating war. In 2002, the parties to the conflict, i.e., (the Sudanese government and the SPLA), started peace talks in Nairobi, Kenya, and reached an agreement to organize a referendum to determine whether the Southern region could gain independence after a six year transitional period.<sup>649</sup> The peace talks received a boost in October 2002, when the United States signed into law the Sudan Peace Act, which threatens sanctions against the

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<sup>646</sup> L. Brottem and S. Buffett, “Shining Light on Investment-- The Sudan Peace Act,” *Policy Forum* November 6, 2001, on line: [http://www.nautilus.org/for\\_a/Special-Policy-Forum/36\\_Buffett.html](http://www.nautilus.org/for_a/Special-Policy-Forum/36_Buffett.html) (visited: 01/17/03). See also, A. Bixler, “Development: Private Enforcement of International Human Rights Laws,” *supra* note 566 at 513. See also, S. Shah, “Weir Group Stands Firm Over Sudan” *Independent* August 23, 2001, on line: <http://www.independent.co.uk/story.jsp?story=90140> (visited: 01/17/03).

<sup>647</sup> G. Katsh, “Fueling Genocide: Talisman Energy and the Sudanese Slaughter” (2000) 21:10 *Multinational Monitor*, on line: <http://multinationalmonitor.org/mm2000/00october/corp2.html> (visited: 01/17/03). See also, L. Sapienza, “U.N. Report: Classifying The Killings in Sudan As Genocide,” *supra* note 541 at 891.

<sup>648</sup> J. Johnson, “White House Accused of Blocking Sudan Peace Act” *CNSNews.com* June 06, 2002 on line: [http://calvarypo.org/ia/p/1\\_6602.htm](http://calvarypo.org/ia/p/1_6602.htm) (visited: 01/17/03). See also, J. Faaland, “Economic Disarray and Dependence: The Case of the Sudan” in Kjell J. Havnevik ,ed., *The IMF and the World Bank in Africa: Conditionality Impact and Alternatives* ( Uppsala: Scandinavia Institute of African Studies, 1987) 117 at 119 &120.

<sup>649</sup> L. Sapienza, “UN Report: Classifying the Killing in Sudan As Genocide,” *supra* note 541 at 893.

Khartoum government if it fails to negotiate with the opposition in good faith.<sup>650</sup> Again, the parties to the conflict reached agreement on the formula for sharing power and natural resources.<sup>651</sup>

But sometimes in late 2003 and beginning of 2004, these landmark agreements came under threat as the cease-fire agreement was violated and the intensity of the conflict increased particularly in Darfur area, where the government backed militia stepped up its attacks on the inhabitants of that area.<sup>652</sup> The turmoil has caused over one million people to flee their homes as refugees.<sup>653</sup> The near collapse of the landmark peace agreement between the then government of Sudan and the opposition gives credence to the position of this thesis, i.e., that it was difficult to secure a sustainable peace or cease-fire agreement between the parties to the Sudanese conflict because of oil extraction, that generated enormous amounts of revenue for the then government of Sudan used in the prosecution of its war effort.<sup>654</sup> Compelling evidence has showed that, without revenue that flowed from oil extracted by the MNCs, the Sudanese government would have been bankrupt, and its capacity to prosecute the war would have been

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<sup>650</sup> G. C. Hufbauer & B. Oegg, "Reconciling Political Sanctions With Globalization and Free Trade: Economic Sanctions: Public Goals and Private Compensation" (2003) 4 *Chicago Journal of International Law* 305 at 317. See also, F. Bok & E. Tivnan, *Escape From Slavery* (New York: Martin's Press, 2003) at 268-270. See further, L. Sapienza, *ibid.*

<sup>651</sup> UNHCR, *Global Report 2003: Sudan* (Geneva: UNHCR, 2003) at 206.

<sup>652</sup> W. Maclean, "Sudan Solution Distant As Rebels Take Hard line" *Toronto Star*, July 19, 2004, at A10. The main opposition in the conflict (i.e. SPLM) has already joined the unity government pursuant to the Kenya's peace accord. But whether, this peace will endure is left to be seen.

<sup>653</sup> C. Goar, "Miracles Amid Misery in Sudan" *Toronto Star*, July 26, 2004, at A16. See also, A. Zavis, "Sudan's Desert of No Hope" *Toronto Star*, July 5, 2004 at A3. See further, S. Nolen, "Civilians Set On Fire In Darfur" *The Globe And Mail*, July 29, 2004, at A1. See also, W. Maclean, "Sudan Solution Distant" *ibid.*

<sup>654</sup> Harker Report, *supra* note 545 at 16.

reduced at the early stage of the war. MNCs activities in Sudan contributed in enhancing the capacity of its government to perpetrate human rights abuses and other atrocities against its own people that contributed in generating massive refugee flows.

#### **5.4. The Consequences of the War**

The protracted war in Sudan brought about miseries of unimaginable proportions to the citizens of that country. It has created both humanitarian and human rights disasters in that country. Some of the victims of the war were women and children, who were abducted to serve as slaves or wives to government soldiers and their allied militia groups. Some of the children abducted were subsequently recruited as soldiers, while the women were “held in domestic slavery.”<sup>655</sup>

Both parties to the conflict engaged in these unwholesome practices, but the abuses of the Sudanese government were more pronounced. Norimitsu Onishi put it this way: “Both sides have been guilty of inflicting immeasurable devastation on civilian populations. But international monitors, including officials from the Canadian government, the United Nations, Amnesty International and Human Rights Watch, say government forces and their allies have led a brutal campaign against civilian populations near the oil fields.”<sup>656</sup> The war claimed over two million lives and caused large

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<sup>655</sup> Concern, “Emergency Work: Sudan” on line: [http://www.concern.ie/devel\\_projects/emerg\\_projects/sudan/sudan\\_context.html](http://www.concern.ie/devel_projects/emerg_projects/sudan/sudan_context.html)

<sup>656</sup> N. Onishi, “Sudan Government Tops List of Those Causing Agony for Oil” *New York Times*, October 13, 2001, on line: <http://www.globalpolicy.org/security/natres/oil/sudan/2001/1013sgov.htm> (Visited: 01/17/03). See also, W.L. Saunders Jr. & Y.G. Mantilla, “Human Dignity Denied,” *supra* note 542 at 721-730.

displacements of people both within and outside Sudan.<sup>657</sup> Indeed, about four million southern Sudanese were internally displaced, while over 500,000 fled to other countries as refugees.<sup>658</sup> Robert Collins observed that:

Many Sudanese have fled from the Islamists into exile. Some have attempted to cross from one culture and religion to another in order to escape from the labyrinth of the Islamists in the Sudan, but they are no nearer the end of their journey than they are to its beginning. Beguiled by rhetoric and cash, some have returned to the Southern Sudan as mercenaries for the Islamists and to prosper in the din and thunder of Sudanic war.<sup>659</sup>

Consequently, Sudan was regarded, and rightly so, as the world's leading producer of uprooted people because of the then civil war that started in the 1980s.<sup>660</sup> Thus, "investing in Sudan's oil is a known fiscal generator for the genocidal war, which now has a death toll exceeding two million and four million displaced."<sup>661</sup> In this

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<sup>657</sup> F. Bok, & E. Tivnan, *Escape From Slavery*, *supra* note 650 at 228, 232, 240 & 271.

<sup>658</sup> F. Bok, & E. Tivnan, *ibid.* See also, W. Saunders Jr., & Y.G. Mantilla, "Human Dignity Denied" *supra* note 542. See further, D. Bouvean, "A Case Study of Sudan and The Organization of African Unity," *supra* note 503 at 417 & 418. See also, UNHCR, "*UNHCR Global Report 2003: Sudan*," *supra* note 651 at 206 & 207. See also Global Concerns: "Sudan: Washington Debates While Oil Fuels War" on line: [http://www.maryknoll.org/GLOBAL/NEWSNOTES/xNEWSNOTES/newnote06\\_01/sud...](http://www.maryknoll.org/GLOBAL/NEWSNOTES/xNEWSNOTES/newnote06_01/sud...) (Visited: 01/17/03) This source gave the number of Sudanese sent into exile by the war as 600,000. See further, M. Duffield, "Aid and Complicity: The Case of War-Displaced Southerners in The Northern Sudan" (2002) 40:1 *Journal of Modern African Studies* 83 at 84 & 85. But Amnesty International in its publication "Sudan: Oil in Sudan: Deteriorating Human Rights," placed the number of Sudanese living in exile in other countries at more than one million. See Amnesty International, "Sudan: Oil In Sudan: Deteriorating Human Rights" 03/05/200 on line: <http://www.web.amnesty.org/ai.nsf/Index/AFR540012000?OpenDocument&of=COUNTR...>

(Visited: 01/17/03).

<sup>659</sup> R. O. Collins, "Africans, Arabs, and Islamists: From the Conference Tables to the Battlefields in the Sudan" (1999) 42:2 *African Studies Review* 105 at 111.

<sup>660</sup> U.S. Committee for Refugees, "Sudan" Country Report 2002 on line: <http://www.refugees.org/world/countryrpt/Africa/sudan.htm> (visited: 01/17/03).

<sup>661</sup> Drillbits & Tailings, "Hotspots: Sudan" (2002) 7:6 (July 31) on line: [http://www.moles.org/ProjectUnderground/drillbits/7\\_06/hotspots.html](http://www.moles.org/ProjectUnderground/drillbits/7_06/hotspots.html) (visited: 01/17/03). See also, W. L. Saunder Jr., & Y.G. Mantilla, *supra* note 542 at 724 & 725. See further, M.M. Gassis, "Sudan: Country of

respect, the U.S. President George W. Bush observed: “Sudan is a disaster for all human rights. We must turn the eyes of the world upon the atrocities in Sudan.”<sup>662</sup>

In 2001, about 600,000 southern Sudanese were threatened with starvation arising from the then conflict in that country.<sup>663</sup> The number of lives lost in the 20 -year-old civil war in Sudan surpassed the total number of deaths in any war fought since the end of the Second World War.<sup>664</sup> The people of Sudan suffered tremendous human rights abuses such as rape, forced displacement, abduction, looting, and mindless destruction of property. As the Harker Report observed: “Displacement is now, and has been for sometime, because of oil. This is a commodity which, its potential notwithstanding, is seen increasingly as, and may well be, the enemy of a people with nowhere to go where they can enjoy human security.”<sup>665</sup> According to the United States Committee for Refugees 2000 report,

Sudan hosts the largest displaced population in the world and has produced one of every nine of the world’s uprooted people. At the end of 1999, more than 4 million Sudanese remained internally displaced, and some 420,000 Sudanese refugees were living in neighbouring countries (Uganda, Ethiopia, Kenya, DR Congo, Central African Republic, Chad, and Egypt). Since 1983, more than 2 million Sudanese have died because of the country’s civil war...<sup>666</sup>

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Terrorism, Religious Persecution, Slavery, Rape, Genocide, And Man-Made Starvation” (2001) 50 Cath. U. L. Rev. 905 at 918.

<sup>662</sup> U.S. Committee for Refugees Country Report 2002 “Sudan” on line: <http://www.refugees.org/world/countryrpt/africa/sudan.htm> (visited: 01/17/03).

<sup>663</sup> K. Bergmann, “Disputed Oil Production in Southern Sudan” *World Press Review*, July 2001, on line: [http://www.thirdworldtraveler.com/Africa/Oil\\_Southern\\_Sudan.html](http://www.thirdworldtraveler.com/Africa/Oil_Southern_Sudan.html) (visited: 01/27/03).

<sup>664</sup> U.S. Committee for Refugees, “Crisis in Sudan,” April 2001.

<sup>665</sup> J. Harker Report, *supra* note 545 at 52.

<sup>666</sup> USCR Refugee Reports Spring/Summer 2000, as quoted in “Refugees From Sudan” Cultural Orientation Work Group September 2000, on line: [http://www.culturalorientation.net/fact\\_sudan.html](http://www.culturalorientation.net/fact_sudan.html)

In all these events the fingerprints of the forces of globalization, operating through the MNCs were well pronounced. There is no denying the fact that revenue accruing from oil extraction, which is made possible by the exploration and exploitation activities of the MNCs in Sudan, was pivotal in making the war more brutal and destructive. Most of the countries of the developed world that benefited from these activities were very indifferent to the plight of the peoples of Southern Sudan. Thus, international law did not only give legitimacy to the colonial exploitation of the Southern Sudan; it also helped to reinforce continuous domination of the political economy of Sudan in this age of globalization with, all its attendant consequences for refugees' production.

## **5.5.CONCLUSION**

Today, there is a widespread consensus that the insatiable appetites to control, explore, and exploit some resources, such as the oil located in some "third world" countries, is making significant contributions to the fuelling, exacerbation, and prolongation of wars and other conflicts in these countries. The majority view around the world concerning the U.S. threat and the actual waging of the war against Iraq is that the U.S. has been mainly motivated by the desire to protect its strategic oil interest.<sup>667</sup> According to Sean Gonsalves,

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(Visited: 01/17/03). See also, Lucy Jones, "Sudan's Forgotten Refugees" *BBC News* 28 March 2002, on line: <http://news.bbc.co.uk/1/hi/world/africa/1893179.stm> (visited: 01/17/03).

<sup>667</sup> G. Fraser, "War Support Hits New Low" *Saturday Star* (Toronto) February 22, 2003 at A14. A Similar allegation was made against the U.S. and its oil corporation with respect to a failed attempt to remove Venezuelan President Hugo Chavez in April 2002 through a coup. See Security Council, "Black Gold"

The Bush administration insists that the war on terrorism, with Iraq as the next target, is all about fighting evil and defending innocents, and that it doesn't have anything to do with commercial interests. Read energy industry publications and talk to industry insiders and you'll be able to mine more than a few fascinating facts that make it extremely difficult for a thinking person to believe that what's really wagging the dog is anything other than competing commercial interests... Connect the energy dots and it becomes obvious that emotional, nationalistic rhetoric shrouding the war on terrorism obscures more than it reveals.<sup>668</sup>

In the same vein, former U.S. presidential candidate Ralph Nader has observed that: "the United States currently consumes 19.5 million barrels a day, or 26 percent of daily global oil consumption... The U.S. has to import 9.8 million barrels a day, or more than half the oil we consume."<sup>669</sup> According to Nader, "The surest way for the U.S. to sustain its overwhelming dependence upon oil is to control the 67 percent of the world proven oil reserves that lie below the sands of the Persian Gulf."<sup>670</sup> Similarly, Thad Dunning and Leslie Wirpsa state that "an explicit policy link in advanced industrial countries, particularly the United States, between economic security and military strategy had led to the doctrine that military intervention may increasingly be used to protect the international flow of strategic resources like oil."<sup>671</sup> A similar observation was made by Haroon Siddiqui of the *Toronto Star*, who noted that: "From Europe to China, from India to the Arab world, the war is seen for what it is: an imperial march to advance American

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Economist October 24, 2002, on line: <http://www.globalpolicy.org/security/natres/oil/2002/1029africa.htm> (visited: 01/17/03).

<sup>668</sup> S. Gonsalves, "War on Terrorism Has Oily Undercurrent" *Seattle Post-Intelligencer* September 3, 2002, on line: <http://www.globalpolicy.org/wtc/analysis/2002/0903oil.htm> (visited: 01/17/03).

<sup>669</sup> R. Nader, as quoted in N. Mailer, "Oil and Water As a Reason For War" *Toronto Star* March 13, 2003 at A28.

<sup>670</sup> *Ibid.*

<sup>671</sup> T. Dunning and L. Wirpsa, "Andean Gulf?: Oil and the Political Economy of Conflict in Colombia and Beyond," quoted in S. Pearce, *supra* note 543 at 4.



geopolitical and oil interests under a new client state, a prelude perhaps to remaking the Middle East more in tune with American interests.”<sup>672</sup>

Sudan, Africa’s largest country, which was wracked by the longest civil war in history, is one of the victims of this inordinate quest for resource control, which is being fuelled by some globalizing forces, such as the MNCs.<sup>673</sup> Evidence presented in this chapter has shown that, from the time of the commencement of oil extraction in Sudan, the intensity of the war in that country increased. All the warring parties to the conflict, especially the government, deployed every weapon at their disposal in the war, with the intent to acquiring monopolistic control over the oil-producing areas of Southern Sudan.<sup>674</sup> This led to the adoption and application of such measures and strategies as a scorched earth policy, instigation of ethnic divisions among Southerners, and the use of starvation as an instrument of war by precluding humanitarian organizations from having access to places where people are in need.

To further their war efforts, the Sudanese government troops used roads and airstrips constructed by MNCs, and also aircraft belonging to these companies in their attacks against civilian targets. Equally important was the fact that royalties paid by these companies to the government of Sudan assisted the government in the acquisition

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<sup>672</sup> H. Siddiqui, “Hapless Iraqis are Caught Between Bush and Saddam” *Toronto Star* March 20, 2003.

<sup>673</sup> D.H. Johnson, *The Root Causes of Sudan’s Civil Wars*, *supra* note 547 at 167. See also, USCR, “Crisis in Sudan” April 2001, on line: <http://www.refugees.org/news/crisis/sudan.htm> (visited: 01/17/03). See further, J. Prendergast, “Sudan’s Last Fighting Season?” *Guardian Unlimited* May 12, 2002, on line: <http://www.observer.co.uk/worldview/story/0,11581,713943,00.html> (visited: 01/17/03).

<sup>674</sup> The evidence of the complicity of MNC oil companies in the gross violations of the human rights of the Sudanese is overwhelming. See W. Baue, “Talisman Leaves Sudan But Remains on Social Investment Nix List” November 19, 2002, on line: <http://www.socialfunds.com/news/article.cgi/971.html> (visited: 01/17/03). See also, W. L. Saunders Jr., & Y.G. Mantilla, *supra* note 542 at 722-724.

of more sophisticated weapons used in the prosecution of the war. All incentives for an earlier peaceful resolution of the conflict were thereby frustrated. Furthermore, the MNCs helped to launder the image of the Sudanese government in the eyes of the international community. This helped in the concealment of the deluge of atrocities committed against the populations living around the oil concession areas where the operations of the MNCs are taking place. Thus, the encouragement that the Sudanese government received from the MNCs gave it impetus to prosecute the war against Southerners with ferocity and without regard for the humanitarian and human rights disasters resulting from its action. With the complicity of MNCs, many people were killed, and millions of others were internally displaced or fled the country as refugees. In the process, there were gross violations of several international and regional treaties to which Sudan is a party member.

Evidently, the forces of globalization contributed to the prolongation and escalation of the war in Sudan, with all its implications for global peace and security. As the former U.S. Secretary of State Colin Powell observed before a U.S. Congressional hearing, “there is perhaps no greater tragedy on the face of the earth today than the tragedy unfolding in Sudan.”<sup>675</sup> To say that Sudan was one of the tragedies of our time is no overstatement because, for over five decades, that country was enmeshed in a bloody, senseless, brutal, and avoidable civil war. This took a great toll on both the human and material resources of the country. The unfortunate irony of the tragedy is that global economic forces operating under the cover of international law (i.e., international

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<sup>675</sup> Collin Powell, as quoted in F. Bok & E. Tivnan, *Escape From Slavery*, *supra* note 650 at 251.

economic law), which enthrone commercial interests above human values, contributed significantly in the aggravation of that war. Thus, the economic interests of the former colonizers, which were the driving forces behind the amalgamation of many different nations into one country, Sudan, are still very much at play today in that country. Their fingerprints were everywhere in the then civil war in that country, which has produced and is still producing many thousands or millions of refugees and other internally displaced persons. The discussion in the next chapter will focus on the contributions being made by economic globalization to the undermining of the refugee principle of *non-refoulement*.

## Chapter Six

### IS GLOBALIZATION UNDERMINING THE REFUGEE LAW PRINCIPLE OF NON-REFOULEMENT?

#### 6.0. INTRODUCTION

There is clear support in international human rights law, for example in article 3 of the Convention against Torture, and in the Jurisprudence of the European Court of Human Rights and the UN Human Rights Committee, for taking the Position that where people risk torture or other forms of cruel, inhuman or degrading treatment or punishment the prohibition of *refoulement* is absolute.<sup>676</sup>

This law of shielding the alien from all wrong is of vital significance...The alien was to be protected, not because he was a members of one's family, clan, religious community or people, but because he was a human being. In the alien, therefore, man discovered the idea of humanity.<sup>677</sup>

In chapter 4 and 5, using the case studies of Nigeria and Sudan, we explored how the negative impact of economic globalization contributed in the production of large scale refugees flows that originate from the two countries. In this chapter, we will examine how massive refugee flows in the "third world," brought about in part by economic

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<sup>676</sup> Amnesty International, "Security, Refugee Protection and the Human Rights Agenda After 11 September: Amnesty International's Concerns Regarding EU Policies" November 15, 2001, on line: <http://www.google.ca/search?q=cache:rZWpovZQvMIC:larc.info/acquis/docs/comment/Amn> (visited: 03/14/03). Some scholars are of the view that the principle of non-refoulement has attained the status of customary international law and as such is binding on all states, whether or not they are parties to the 1951 *Refugee Convention*. See G. Goodwin-Gill, *The Refugee In International Law* (Oxford: Clarendon Press, 1983) at 97. See also, WARIPNET & Lawyers Committee for Human Rights, "From Response to Solutions-Strengthening the Protection of Refugees Through Economic, Social and Cultural Rights" on line: [http://www.lchr.org/archives/arc\\_pubs/ResponseSolutions.htm](http://www.lchr.org/archives/arc_pubs/ResponseSolutions.htm) (visited: 03/16/03).

<sup>677</sup> J.H.H. Weiler, "Thou Shalt Not Oppress A Stranger (Ex.23:9): On the Judicial Protection of the Human Rights of Non-EC National: A Critique" in H. G. Schermers *et. al. Free Movement of Persons in Europe* (The Netherlands: Martinus Nijhoff Publishers, 1993) 248 at 249. See also, K.E. McCarron, "The Schengen Convention as a Violation of International Law and the Need for Centralized Adjudication on the Validity of National and Multilateral Asylum Policies for Members of the United Nations" (1995) 18 *Boston College International and Comparative Law Review* 401.

globalization, impact the erosion of the fundamental refugee principle of *non-refoulement*.

One of the measures put in place by the international community to afford protection against persecution to any person who, for political, social, or religious reasons, or because of membership in a particular social group, can no longer enjoy the protections of his country of origin is the granting of refugee or asylum status. The undertaking of this obligation stemmed from the realization by the international community that, all- too- often, holders of authority around the world engage in gross human rights violations against those in their jurisdictions. One of the consequences of such human rights abuses is the involuntary flight to safety by some victims of the abuse. As Goodwin Gill has noted; “where ...life and liberty [are] threatened, the necessities of life denied, the institutions of stability destroyed.... Where there is lack of protection in the sense of broad rights and expectation, displacement soon takes place.”<sup>678</sup> As a further safeguard, members of the international community have accepted in a plethora of international instruments not to return refugees to a place where they will be subjected to persecution. This principle is referred to as *non-refoulement*.<sup>679</sup> The acceptance of this obligation of *non-refoulement* is perhaps premised on the fact that:

It is the right of every human-being to life, liberty and security which may be jeopardised by breach of the principle of refugee protection.... There is no essential difference between the claim of the potential victim of persecution and that of the potential victim of violence as in either case, the refusal of

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<sup>678</sup> G.S. Goodwin-Gill, Editorial (1993) IJRL 3. Refugees as human beings are entitled to the benefits of human rights protections enunciated in UDHR, and in all other international and regional human rights instruments.

<sup>679</sup> A.D. King, “Interdiction: The United States’ Continuing Violation of International Law” (1988) 68 B.U.L. Rev. 773 at 774.

refuge may be critical link in the causative chain leading to the loss of life, liberty and security.<sup>680</sup> Another important fact is that all human beings, refugees and asylum seekers included, “are guaranteed human rights.”<sup>681</sup>

However, this time honoured refugee principle of *non-refoulement* seems to be in serious jeopardy in this era of globalization, as states have clearly demonstrated their willingness to observe that obligation in the breach. This is because, in most times of large-scale refugee flows, the response of members of the international community has often tended toward contravening both the letter and spirit of their international obligations, which are stated in a myriad of asylum and human rights instruments.<sup>682</sup> An exploration of why this is the case will constitute the focal point of this chapter.

### **6.1. GLOBALIZATION AND STATES’ OBLIGATION OF NON-REFOULEMENT**

The principle of *non-refoulement* has been articulated and entrenched in a number of international and regional instruments. One of these is Article 33 of the *1951 Refugee Convention*, which prohibits the return of an asylum seeker to a place where she/he risks being subjected to persecution on the basis of his/her race, religion, political opinion, or nationality.<sup>683</sup> This bedrock refugee principle prohibits the return of asylum

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<sup>680</sup> G.S. Goodwin-Gill “The Language of Protection” (1989) IJRL at 15.

<sup>681</sup> T. Clark & F. Crepeau, “Human Rights in Asylum Sharing and Other Human Transfer Agreements” (2004) 22:2 Netherlands Quarterly of Human Rights 217 at 218.

<sup>682</sup> R. L. Newmark, “Non-refoulement Run Afoul: The Questionable Legality of Extraterritorial Repatriation Programs” (1993) 71 Washington University Law Quarterly 833.

<sup>683</sup> But Article 11(3) of the 1969 OAU Convention on the principle of *non-refoulement* is more forthright: It stipulates that: “No person shall be subjected by a member state to measures such as rejection at the frontier, return or expulsion, which would compel him to return or remain in territory where his life, physical integrity, or liberty would be threatened ...” See also, A. D. King, “Interdiction” *supra* note 679 at 804. See further K. M. Keller, “A Comparative and International Law Perspective on the United States

seekers/refugees to their countries of nationality or other places where they fear persecution.<sup>684</sup> The prohibition of article 33(1) against return to places where persecution is feared applies to all refugees “regardless of the place of location.”<sup>685</sup> It is therefore not the location of the refugees or asylum seekers that activates the obligation of *non-refoulement*; it is rather the conduct of the state towards the refugees.<sup>686</sup> Thus, the *non-refoulement* prohibition imposes a duty that all states must perform in their implementation of international refugee law and other norms that afford protection to refugees.<sup>687</sup> In addition, the duty of *non-refoulement* extends to all states, whether or not they are state parties to the *1951 Convention* or its *1967 Protocol*, especially if a person is being returned to a place where there are substantial grounds for believing that he/she would be at risk of being subjected to torture.<sup>688</sup>

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(Non) Compliance with its Duty of Non-refoulement” (1999) 2 Yale Human Rights and Development Law Journal 183 at 194.

<sup>684</sup> A.M. Wade, “A Dream Deferred: The United States-Haitian Interdiction Policy” (1993) 2 Howard Scroll Soc. J. Rev. 55 at 64. See also J. Fitzpatrick, “The International Dimension of U.S. Refugee Law” (1997) 15 Berkeley J. Int’l L. 1 at 4.

<sup>685</sup> *Ibid.* See also, *Haitian Center Council v. McNary*, 969 F. 2d 1350, 1361 (2<sup>nd</sup> Cir. 1992).

<sup>686</sup> C. Bostock, “The International Legal Obligations Owed To The Asylum Seekers On The Mv Tampa” (2002) 14 IJRL 279.

<sup>687</sup> S. Busby, “The Politics of Protection: Limits and Possibilities in the Implementation of International Refugee Norms in the United States, (1997) 15 Berkeley Journal of International Law 27 at 29.

<sup>688</sup> J. E. Crowe III, “Running Afoul of the Principle of Non-refoulement: Expedited Removal Under the illegal Immigration Reform and Immigrant Responsibility Act” (1999) 18 St.Louis U. Public. L. rev. 291 at 299-300. See also, Article 3 of CAT. See further, Executive Committee Conclusion No. 22 U.N. GAOR, 36<sup>th</sup> Session, Supp. No.12A at 18, U.N. Doc. A/36/12/Add.1 (1981), stating that: “The fundamental principle of *non-refoulement*-including non-rejection at the frontier- must be scrupulously observed” and that *non-refoulement* is “progressively acquiring the character of a peremptory rule of international law”. See further, UNHCR, “Cases and Comments” (2000) 12 IJRL 268, contending that: “in view of its general widespread acceptance at both the international and regional levels, and based on a consistent practice of States with the recognition that the principle has normative character, UNHCR considers that non-refoulement, as part of the international system for refugee protection, constitutes a rule of international customary law which is progressively acquiring the character of a peremptory rule of international law.”

However, the prescriptions of Article 33 of the *1951 Convention* are not absolute and admit exceptions that could permit lawful *refoulement* of an asylum seeker.<sup>689</sup> In *INS v. Cardoza-Fonseca*, the United States Supreme Court held that not all Convention refugees are *per se* entitled to *non-refoulement* protection under Article 33 and that, apart from those refugees disqualified under the exclusion clauses, other refugees who did not meet “more likely than not” proof could be forcibly returned to their persecutors.<sup>690</sup> This unfortunate position seems to have received further reinforcement following the horrible event of September 11, 2001. As part of the reaction to that tragic event, the Security Council of the United Nations passed Resolution 1373.<sup>691</sup> Paragraph 3 of the Resolution states *inter alia* that states should “ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organisers or facilitators of terrorist acts, and that claims of political motivation are not recognised as grounds for refusing requests for the extradition of alleged terrorists...”<sup>692</sup> The implication of this provision is that, even if a person has a well-founded fear of persecution on any of the Convention grounds, she/he could still be *refouled* to face torture, so long as she/he is alleged to be a

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<sup>689</sup> Article 33 (2): “The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particular serious crime, constitutes a danger to the community of that country.” In *Pushpanathan v Minister of Citizenship & Immigration* [1998] 1 S.C.R. 982 at 1024, the S.C. of Canada held that: “...the purpose of Article 33 of the Convention, by contrast, is not to define who is and who is not a refugee, but rather to allow for *refoulement* of a *bona fide* refugee to his or her native country where he or she poses a danger to the security of the country of refuge, or to the safety of the community...” See also J. C. Hathaway & C. J. Harvey “Framing Refugee Protection in the New World Disorder” (2001) 34 *Cornell International Law Journal* 257 at 288-290.

<sup>690</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421 at 440-441 (1987). See also, J. Fitzpatrick, “The International Dimension of U.S. Refugee Law” *supra* note 684 at 7. Fitzpatrick roundly and rightly too criticized this decision as not having basis either in the Convention or its Protocol, the interpretive UNHCR Handbook, or any other relevant sources of international refugee law.

<sup>691</sup> UN Security Council Resolution 1373, Sept. 28, 2001, UN Doc. S/RES/1373 (2001).



terrorist. This tends to expand the grounds for exclusion under Article 1(F) (b) of the *1951 Convention* by effectively removing the non-political element requirement of the article.<sup>693</sup>

But this is not the case with respect to the provisions of Article 3 of the *Convention Against Torture and Other Cruel, Inhuman Treatment or Degrading Treatment or Punishment* (CAT), which outlaw *refoulement*. The provision of Article 3 of CAT is absolute and embraces a situation where “there are substantial grounds for believing that a person would be in danger of being subjected to torture.”<sup>694</sup> Even where the presence of the asylum seeker in the host country constitutes a danger to the safety and security of that state, or where the asylum seeker is a fugitive from justice, the provision of Article 3, CAT, does not permit any derogation, so long as there exists ample evidence that the

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<sup>692</sup> Para 3(g) Security Council Resolution 1373.

<sup>693</sup> J. Allain, “The Jus Cogens Nature of Non-refoulement” (2001) 13 IJRL 533. Article 1(F)(b) of the 1951 Refugee Convention states as follows: “the provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee.”

<sup>694</sup> CAT Article 3. See also T. Clark & F. Crepeau, “Mainstreaming Refugee Rights: The 1951 Refugee Convention and International Human Rights Law (1997) 17:4 Netherlands Quarterly of Human Rights 389 at 397. See also, C. Bostock, “The International Legal Obligations Owed To The Asylum Seekers On The *Mv Tampa*” (2002) 14 IJRL 279. See further, P. L. Okoronkwo, “Immigration Controls and the Rights of Asylum Seekers Under the Law: The European Union Example” at 13. This is a paper submitted for partial fulfilment of the requirements of the immigration Law course at Osgoode Hall Law School. This part of the thesis benefited immensely from the paper. See further, Suresh v. Canada (Minister of Citizenship and Immigration) 2002 SCC 1 File No.: 27790 para 61-66. See also O.C. Okafor & P. L. Okoronkwo, “Re-configuring Non-refoulement? The Suresh Decision, “Security Relativism”, and the International Human Rights Imperative” (2003) 15:1 International Journal of Refugee law 30 at 64. Also article 22(8) of the American Convention on Human Rights (1978) 1144 UNTS 123 (July 18 1978), which stipulates that: “In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status or political opinions”

asylum seeker will be exposed to torture, if returned.<sup>695</sup> In *Paez v. Sweden*, the Committee Against Torture held that:

The text of article 3 of the Convention is absolute. Whenever substantial grounds exist for believing that an individual would be in danger of being subjected to torture upon expulsion to another State, the State party is under obligation not to return the person concerned to that state. The nature of the activities in which the person concerned engaged cannot be a material consideration when making a determination under article 3 of the Convention.<sup>696</sup>

It would seem that not even the serious nature of the alleged offence (i.e. terrorism) would be sufficient to permit derogation from the protection against *refoulement* under Article 3. In *Arana v. France*,<sup>697</sup> where a member of the Basque Separatist Movement ETA was to be sent back to Spain, the Committee against Torture stated that it: "...recognises the need for close co-operation between States in the fight against crime and for effective measures to be agreed upon for that purpose. It believes, however, that such measures must fully respect the rights and fundamental freedoms of individuals concerned."<sup>698</sup>

In a similar vein, Article 7 of the *International Covenant on Civil and Political Rights* (ICCPR) prohibits *non-refoulement* in much the same way as Article 3 of *CAT*. T.

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<sup>695</sup> *Tahir Hussain Khan v. Canada*, Committee against Torture, Communication No. 15/1994, U.N. Doc. A/50/44 at 46 (1995). Reprinted on line <http://www1.umn.edu/humanrts/cat/decisions/catD-Canada1.htm>. See also, T. Clark & F. Crepeau, "Human Rights In Asylum Sharing and Other Human Transfer Agreements" *supra* note 681 at 224.

<sup>696</sup> Committee Against Torture, No. 39/1996, at Para 14.5 (28 April 1997). See also R. Bruin & K. Wouters, "Terrorism and the Non-derogability of Non-refoulement" (2003) 15:5 IJRL

<sup>697</sup> Committee Against Torture, No. 63/1997, at Para 11.5 (5 June 2000). See also, R. Bruin, & K. Wouters, *ibid.*

<sup>698</sup> *Ibid.*

Clark and F. Crépeau have contended that the Human Rights Committee, in its general comment 20, clarified the fact that Article 7 should be construed to forestall the return of a person to a place where he/she will be exposed to the jeopardy of torture or cruel, inhuman or degrading treatment.<sup>699</sup> They observed that: "... clearly in the case of *Chahal v. UK*, the court points out that the prohibition of any return to a real risk of torture is absolute, removing the possibility of *refoulement* of refugees on the basis of security risk or serious crime and public danger."<sup>700</sup> This position has been reinforced by the Committee on International Covenant on Civil and Political Rights in the case of *Ahani v. Canada*, it was held that the prohibition against torture, "including as expressed in article 7 of the Covenant, is absolute one that is not subject to countervailing considerations."<sup>701</sup>

Unfortunately, this time honoured principle of refugee protection is always in danger of being breached by states, especially at times when massive groups of people are being dislocated because of wars, generalized conflicts, or other incidents that induce massive outflows of people from their countries of origin.<sup>702</sup> In fact, during times of low refugee flow, states are usually more disposed to allow asylum seekers into their countries. But during periods of exponential rise in the numbers of asylum seekers fleeing

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<sup>699</sup> T. Clark & F. Crépeau, "Mainstreaming Refugee Rights," *supra* note 694 at 397. Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedom provides that "no one shall be subjected to torture or inhuman or degrading treatment or punishment." See European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

<sup>700</sup> T. Clark & F. Crépeau, Mainstreaming, *ibid.* at 397.

<sup>701</sup> *Ahani v. Canada, Communication* No. CCPR/C/80/D/1051/2002 at 20 (decision delivered 25 May 2004). The decision of the Committee on the International Covenant on Civil and Political Rights was a response to the position of the Supreme Court of Canada in *Suresh v. Canada (Minister of Citizenship & Immigration)* [2002] 1 SCR, where the court held *inter alia*, that "barring extraordinary circumstances, deportation to torture will generally violate the principles of fundamental justice."

from wars, civil strife, ethnic cleansing, gross human rights violations, and other acts of persecution, states have demonstrated increased unwillingness to open their borders to asylum seekers. The policy of most states at times of huge influxes of refugees into their countries tends to be containment, as opposed to protection of refugees; in other words, states are protected from refugees instead of the other way round.<sup>703</sup> According to Gil Loescher, during periods of influxes of refugees, “states are always racing to close doors to asylum seekers.”<sup>704</sup> Thus, with globalization’s negative impact on human rights and the significant contributions it has made, and can make, to instigating wars, ethnic cleansing, civil strife, and other atrocities against humanity, all of which can induce large influxes of refugees, it is evident that this phenomenon can induce and contribute to the undermining of the principle of *non-refoulement*.

For instance, it has been argued that the civil war in the former Yugoslavia, with its attendant large refugee production, which flooded Germany, was one of the events that prompted the amendment of German immigration and refugee laws. The amendment was an effort to contain and checkmate the number of asylum seekers who can gain access into that country.<sup>705</sup> In Rwanda, between 1994 and 1996, following the large-scale

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<sup>702</sup> J. C. Hathaway, “The Evolution of Refugee Status in International Law: 1920-1950” (1984) 33 ICLQ 348.

<sup>703</sup> G. Okoth-Obbo, “Does Refugee Protection in Africa Need Mediation?” (2000) 9:3 *Track Two* on line: <http://www.queensu.ca/samp/migdocs/Documents/2000/1.htm> (visited: 17/04/03).

<sup>704</sup> G. Loescher, *Beyond Charity* (New York/Oxford: Oxford University Press, 1993) at 97.

<sup>705</sup> S. Blay & A. Zimmermann, “Recent Changes in German Refugee Law: A Critical Assessment” (1994) 88 AJIL 361. See also G.I. Coman, “European Union Policy on Asylum and its Inherent Human Rights Violations” (1998) 64 *BKNLR* 1217. See L. Vaughans, “Taming the Asylum Adjudication Process: An Agenda for the 21<sup>st</sup> Century” (1993) 30 *San Diego Law Review* 1 at 14. See also, T. Coonan, “America Adrift: Refoulement on the High Seas” (1995) *University of Cincinnati Law Review* 1241 at 1257, stating that over 2.5 million people were displaced at the height of Yugoslavia civil war and that this led to

civil war, genocide, and total breakdown of law and order, about 2.5 million people fled from that country into the neighbouring states of Tanzania, the Democratic Republic of Congo, Uganda, and Burundi as refugees.<sup>706</sup> At the height of the armed conflict, when the situation was not safe for anybody in that country, hundreds of thousands of Rwandans who fled to Tanzania, the Democratic Republic of Congo, Uganda, and Burundi were forcibly repatriated to Rwanda.<sup>707</sup> This embarrassing, insensitive, and inhuman act of forcible repatriation of these refugees was nothing short of *refoulement* in breach of the principle of *non-refoulement*. These despicable acts of repatriation forced Todd Howland to generalize that “there appears to be African precedents in which either a state, or state with the cooperation of HCR, forcibly repatriated refugees without any significant change having occurred in the home country.”<sup>708</sup> The most unfortunate aspect of this obvious act of *refoulement* was the seal of approval it received from the UNHCR, thereby legitimizing the undermining of the principle of *non-refoulement*.<sup>709</sup>

Before the infamous repatriations of 1996, Tanzania had in 1995 refused to let into its country about 50,000 Rwandan refugees who were fleeing from renewed fighting

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increased fortification of their borders by many European countries. See further, K. E. McCarron, “The Schengen Convention as a Violation of International Law and The Need for Centralized Adjudication on the Validity of National and Multilateral Asylum Policies for Members of the United Nations” (1993) 18 *Boston College International and Comparative Law Review* 401 at 405-407, stating that over a million asylum seekers arrived in Germany between 1989 and 1990.

<sup>706</sup> T. Howland, “Refoulement of Rwandan Refugees: The UNCHR’s Lost Opportunity to Ground Temporary Refuge in Human Rights Law” (1998) 4 *U.C. Davis Journal of International Law and Policy* 73 at 82.

<sup>707</sup> G. Okoth-Obbo, “Does Refugee Protection in Africa Need Mediation?” (2000) 9:3 *Track Two* on line: <http://www.queensu.ca/samp/migdocs/Documents/2000/1.htm> (visited: 17/04/03).

<sup>708</sup> T. Howland, *supra* note 706 at 86.

<sup>709</sup> *Ibid.* 85 & 86.

in the country.<sup>710</sup> Tanzania cited as its reason the overwhelming numbers of Rwandan refugees (500,000) it was already hosting, contending that any additional number would pose a serious threat to its national security and environment, and put its social services under enormous pressure.<sup>711</sup>

In August 2001, at the peak of the atrocious reign of the Taliban in Afghanistan, about 433 asylum seekers escaping from that regime were stranded on the Christmas Island, off the Australian coast, as the government of Australia refused them passage into the country, despite the international and domestic outcry against that decision.<sup>712</sup> The action of the Australian government, like governmental action by most developed countries, was informed by the desire to stem the influx of large numbers of refugees. This decision may not be unconnected with the often alleged disruptive effects of refugee flows into a country.

In Liberia in the 1990s, the debilitating civil war in that country led to the production of large numbers of refugees who fled into the neighbouring states. Cote d'Ivoire, Ghana, and Nigeria hosted large numbers of Liberian refugees. However, at the peak of the war, two ships, Bulk Challenge and Zolotitsa, carrying large numbers of

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<sup>710</sup> R. Boed, "State of Necessity as a Justification for Internationally Wrongful Conduct" (2000) 3 Yale Human Rights & Development Law Journal 1 at 2.

<sup>711</sup> J. Rodger, *Defining the Parameters of the Non-Refoulement Principle* (Wellington: Victoria University Wellington, 2001) on line: <http://www.refugee.org.nz/JessicaR.htm> (visited: 04/12/03).

<sup>712</sup> C. Bostock, "The International Legal Obligations Owed To The Asylum Seekers On The Mv Tampa" (2002) 14 IJRL 14. See also, *Minister for Immigration and Multicultural Affairs & or. V. Vadarlis & Anor.* [2001] FCA 1329 (Australia) reprinted on line: [http://www.austlii.edu.au/au/cases/cth/federal\\_ct/2001/1329.html](http://www.austlii.edu.au/au/cases/cth/federal_ct/2001/1329.html) (visited: 09/18/2001). In addition, between 1991 and 1992, many Cambodian refugees were sent away from Thailand in contravention of the principle of non-refoulement. See J.R. Tarwater, "Analysis and Case Studies of the 'Ceased Circumstances' Cessation Clause of the 1951 Convention" (2001) 15 *Geo. Immigration L.J.* 563 at 572 & 606.

Liberian refugees, were denied entry into the ports of Ghana, Togo, Nigeria, and Cote d'Ivoire for several weeks.<sup>713</sup> In the case of Bulk Challenge, the refugees on board were luckier since Ghana, after several weeks of refusal to allow the ship entry into its port, gave in to international pressure and accepted the refugees. On the other hand, the occupants of Zolotitsa were less lucky; their ship was forced to return to Liberia with the refugees, even in the heat of the crisis.

In 1991, over 24,561 Haitians refugees who sought to escape persecution and other forms of human rights abuses by going to the United States, were interdicted on the high seas and sent back to certain harm or death.<sup>714</sup> In 2003, the United States border patrol agents expeditiously deported about 43,000 asylum seekers to their various countries of origin without granting them the benefit of appearing before immigration judges to determine whether they qualify as refugees.<sup>715</sup> The United States was no doubt in breach of its obligation of *non-refoulement* in all these cases, contrary to a number of both regional and international instruments to which it is a state party.

At the height of the Gulf War in 1991, millions of Iraqi Kurds fleeing persecution from the Iraq government were forced by Turkey back to the very place in which they feared persecution.<sup>716</sup> This clear breach of the norm of *non-refoulement* by Turkey received somewhat tacit support from the United Nations, which failed to condemn the

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<sup>713</sup> P. Kuruk, "Asylum and The Non-Refoulement of Refugees: The Case of the Missing Shiplod of Liberian Refugees" (1999) 35 *Stanford Journal of International Law* 313.

<sup>714</sup> A. M. Wade, "A Dream Deferred: The United States-Haitian Interdiction Policy" *supra* note 684 at 69.

<sup>715</sup> R.L. Swarns, "US To Give Border Patrol Agents The Power To Deport Illegal Aliens," *New York Times*, August 11, 2004.

action of Turkey or to pressure it to meet its obligation of *non-refoulement*. Instead, what the United Nations did through the Security Council, which is controlled by the developed countries, was to authorize the creation of a Kurdish safe zone through Resolution 688.<sup>717</sup>

Another instance of a breach of the duty of *non-refoulement* occurred between March and April 1994, when officials of the Thai government forced over 25,000 Cambodians fleeing the regions of Khmer Rouge military operations back into that area.<sup>718</sup> There was no outrage expressed by members of international community over the breach of the norm of *non-refoulement*, nor did the international community take any decisive step to protect the populations of these countries. The developed countries, which have the capacity and influence to persuade other countries to comply with their obligations of *non-refoulement*, have not set a good example. The less developed countries seem to be taking their cues from the developed countries. Indeed, the developed countries are in the forefront of those taking measures to stem the flows of unwanted refugees into their countries.<sup>719</sup>

In almost all these instances of the breach of the principle of *non-refoulement*, the justification offered by the countries that failed to honour both their international and

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<sup>716</sup> J. Fitzpatrick, "Flight From Asylum: Trends Toward Temporary 'Refuge' and Local Responses to Forced Migrations" (1994-1995) 35 Va.J.Int'l L. 13 at 22.

<sup>717</sup> S/RES/0688(1991) (adopted by the Security Council at its 2982<sup>nd</sup> meeting 5 April 1991). See also J. Fitzpatrick, *ibid*.

<sup>718</sup> J. Fitzpatrick, *ibid*.

<sup>719</sup> J.Fitzpatrick, *ibid*.



regional obligations was one or more of the following: concern about national security;<sup>720</sup> huge pressure on their welfare system and other social services; pressure from their local populations; and the fact that they were already overburdened with large numbers of refugees. For instance, when Ghana and Cote d'Ivoire refused the Zolotitsa entry into their ports, they were hosting about 15,000 and 300,000 Liberian refugees respectively.<sup>721</sup> They also cited the unwillingness of the international community to engage in good faith burden sharing.

But what is the connection between globalization and states' breach of their obligations of *non-refoulement*? Although all the wars and gross human rights violations that took place in these countries cannot be traced to forces of globalization alone, globalization forces contributed to bringing about the situation that gave rise to the mass exodus of people from these countries. At the very least, the forces of globalization significantly contributed to the exacerbation of the conflicts that precipitated the mass flows of refugees that then led to the breaches of *non-refoulement*. For instance, the introduction of a SAP in Rwanda at the height of the war contributed to the exacerbation of the conflict, as all the governmental institutions collapsed or were rendered redundant by the impact of the austerity measures. The Rwandan government was unable to live up

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<sup>720</sup> At times, the fear that the presence of large numbers of refugees in a country constitutes a security threat and destabilizing influence is not totally unfounded. For instance, it was the presence of large number of refugees in the former Zaire that contributed to provoking the rebellion that ultimately led to the overthrow of the then government of the country and the subsequent change of its name to Democratic Republic of Congo. See M. Barutciski, "The Need for Pragmatic Approaches to Refugee Situations that Pose a Threat to National Security" (2000) 9:3 Track Two on line: [http://ccrweb.ccr.uct.ac.za/two/9\\_3/p36\\_pragmatic\\_approaches.html](http://ccrweb.ccr.uct.ac.za/two/9_3/p36_pragmatic_approaches.html) (visited: 17/04/03). See also, R. Boed, "State of Necessity as a Justification for Internationally Wrongful Conduct", *supra* note 710 at 2.

<sup>721</sup> P. Kuruk, *supra* note 713 at 319. See also, A. Aleinikoff, "Safe Haven: Pragmatics and Prospects" (1994-1995) 35 Va.J.Int'l L. 71 at 74.

to its social and security responsibilities to the Rwandan population. In the case of Afghanistan and Liberia, the wars in these countries were prolonged and sustained through the global trade in essential minerals that was engaged in by the various warlords. However, it is not being suggested that interest in the control of the mineral resources of these states was the only root cause of the wars. But it is obvious that, without engagement in the global trade in the resources of these countries, such as diamonds, emeralds, and other gems, it would be difficult, if not impossible, for the various warlords to sustain their war efforts, which have contributed significantly to the production of large refugee flows.

Similarly, the adverse impact of the austerity measures imposed on the former Yugoslavia was implicated as one of the causes of the war that produced huge numbers of refugees. This cause was cited notwithstanding the propaganda by the mainstream international media, which portrayed ethnic animosity, brutal, and atrocious abuses of human rights by the leaders of the country as the major and indeed the only cause of the war.<sup>722</sup> NATO painted this picture, with the active connivance of their mainstream media in order to justify the unlawful intervention as being necessitated by humanitarian catastrophes that developed in that country just then.<sup>723</sup>

The most plausible reason seems to be that the implementations of the austerity measures imposed on the country by the IFIs made it impossible for the central government to continue transferring revenues to the republics, since most revenues were

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<sup>722</sup> C. Off, *The Lion, the Fox and the Eagle* (Canada: Random House, 2000) at 347.

devoted to repayment of foreign debts. Thus, “by cutting the financial arteries between Belgrade and the republics, the economic reforms (by way of imposition of austerity measures) fuelled secessionist tendencies that fed on economic factors, as well as ethnic divisions, virtually ensuring the de facto secession of the republics.”<sup>724</sup> In addition, with galloping unemployment arising from the government disengagements from public enterprises, the biting impact of the wage freeze on the people, and the elimination of most social welfare services, more Yugoslavians became impoverished and disillusioned, and suffered a loss of faith in the state and its institutions.<sup>725</sup> This exacerbated the social and political tensions in the country and ultimately led to a civil war.

The argument being made here is that, given a large flood of refugees generated at one time, to which some forces of globalization have contributed, many states, especially in the developed countries, are reluctant to open their borders, in breach of their international obligation of *non-refoulement*. In other words, incidents of the *refoulement* of refugees in breach of the various international instruments that prohibit it would have been very rare, if people were not moving at one time in droves, in reaction to wars, ethnic cleansing, gross abuses of human rights, and civil strife, all of which the forces of globalization have been shown to make significant contributions to generating.

As Jessica Rodger notes:

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<sup>723</sup> M. Mandel, “NATO’s Bombing of Kosovo Under International Law: Politics and Human Rights in International Criminal Law: Our Case Against NATO and the Lessons to be Learned From It” (2001) 25 *Fordham International Law Journal* 95 at 101.

<sup>724</sup> M. Chossudovsky, “Dismantling Yugoslavia; Colonizing Bosnia” *Covert Action* No. 56 Spring 1996 on line: <http://www.hartford-hwp.com/archives/62/022.html> (visited: 02/06/03). See also M. Mandel, *Our Case Against NATO*, *ibid.* at 102 & 103.

<sup>725</sup> M. Chossudovsky, *Dismantling Yugoslavia... ibid.*

Previously, when the refugee numbers were fairly low and situations of mass influx less common, there was less pressure on states to press the limits of the rule. Today, however, with domestic and foreign policy factors forcing states to re-evaluate their asylum laws, the principle of non-refoulement is finding itself being reviewed and in some circumstances, eroded.<sup>726</sup>

In the circumvention of their international obligations regarding *non-refoulement*, several countries, mostly the developed ones, have devised a number of strategies aimed at the restriction of the number of asylum seekers who can access their countries. Notable among these measures are the imposition of visa requirements, interdiction of refugees at sea, and the adoption of the third safe country concept. These measures in the main have constrained and limited the ability of refugees to seek safe asylum. Consequently, the implementation of these measures, which circumscribe the ability of refugees to seek safe asylum, has led to both direct and indirect violations of the principle of *non-refoulement*. States that engage in this overt *refoulement* action have cited the security implications of allowing large numbers of refugees into their countries as the justification for their actions. In the invocation of security concerns as the basis for precluding the admission of refugees into their respective countries, most states seem to be concerned only with their own security from refugees, without consideration of security for refugees, in line with the international obligations entrenched in several regional and international instruments.<sup>727</sup>

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<sup>726</sup> J. Rodger, "Defining the Parameters of Non-refoulement" *supra* note 711 at paragraph 57.

<sup>727</sup> R. Freitas, "Human Security and Refugee Protection after September 11: A Reassessment" (2002) 20:4 *Refuge* 34 at 38.

Article 31 of the *1951 Convention* enjoins states not to penalize a refugee on the grounds that he/she entered their country illegally. The rationale behind this provision is that the circumstances under which asylum seekers fled their countries were such that they could not reasonably be expected to possess travel documents.<sup>728</sup> This provision is, in a way, a reinforcement of the principle of *non-refoulement*. Unfortunately, the practice among most states is to impose a visa requirement on nationals from countries producing large refugee flows. This imposition of a visa requirement has the tendency to preclude genuine asylum seekers from gaining access to their intended state of asylum. As the Canadian Council for Refugees has observed:

There is a correlation between the imposition of the visa requirement by Canada and the kinds of human rights abuses that causes refugees to flee. The worse the human rights abuses, the more likely the country is to have a visa requirement imposed on it. When refugee claimants start arriving in Canada from a country without a visa requirement, the government generally puts a visa requirement on the country, whether or not the claimants are in fact refugees. An example of this occurred in 1997, when there was an increase in arrivals of Roma claimants from Czech Republic, leading to the re-imposition of the visa requirement, despite the fact that there was ample evidence that Roma were suffering serious human rights abuses in Czech Republic. Canada uses the visa requirement to stop persecuted people from finding protection in Canada.<sup>729</sup>

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<sup>728</sup> S. Busby, "The Politics of Protection: Limits and Possibilities in the Implementation of International Refugee Norms in the United States," *supra* note 687 at 34. See also, J. Fitzpatrick, "Flight From Asylum," *supra* note 716 at 16.

<sup>729</sup> Gypsies escaping persecution in the Czech Republic will now find it almost impossible to seek asylum in Canada because of new visa requirement that went into effect. Canada Press, October 8, 1997 as quoted in Council for Refugees, "Interdicting Refugees" May 1998 at 3. See also O.C. Okafor & P. L. Okoronkwo "Re-configuring Non-refoulement?" *supra* note 694 at 57. See also J.C. Hathaway & R.A. Neve, "Fundamental Justice and the Deflection of Refugees From Canada," (1996) 34: 2 Osgoode Hall Law Journal 214 at 223-224.

This imposition of visa requirements on states producing large volumes of refugees has effectively precluded asylum seekers from those countries from gaining access to other countries to seek refuge, especially the developed countries of the West.<sup>730</sup> As a result, Canada and other developed countries of the North are recording significant drops in the number of asylum claims being made in their countries.<sup>731</sup> For instance, in the first six months of 2004, Canada received 12,207 asylum claims (the lowest in a decade). This is a 30 percent decline from the corresponding period in 2003 and a 45 percent drop from the same period in 2002.<sup>732</sup> Thus, this measure constitutes at least an indirect contravention of Article 33 of the *1951 Refugee Convention* and other instruments that proscribe *refoulement* of refugees.<sup>733</sup>

As part of the exercise of their right of sovereignty, some states have engaged in the practice of intercepting refugees either at the airport, at land borders, or on the high seas before they can gain access to their countries. Often times, states use interdiction as a foreign policy weapon to preclude the admission into their countries of nationals from particular countries that are either not strategically important or not geo-politically relevant to the interdicting states. For instance, the United States has under its interdiction program stopped and boarded ships carrying Haitian asylum seekers to question them

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<sup>730</sup> See M. Fullerton, "Failing the Test: Germany Leads Europe in Dismantling Refugee Protection" (2001) 36 *Texas International Law Journal* 231 at 234. See also, UNHCR Executive Committee of the High Commissioner's Programme: Standing Committee, 18<sup>th</sup> Meeting: Interception of Asylum Seekers and Refugees: The International Framework and Recommendations for A Comprehensive Approach, UN doc. Ec/50/SC/CRP.17, June 9, 2000, reprinted in (2000) 12:1 *IJRL* 488 at 492 Para 17.

<sup>731</sup> M. Jimenez, "Tighter Security Cited in Refugee-Claims Decline: More Visa Restrictions, Foreign Interdiction Hindering Asylum Seekers," *Globe and Mail*, August 12, 2004, at A8.

<sup>732</sup> *Ibid.*

about their status and destination. In most cases, they have been returned to Haiti even when there is credible evidence that those asylum seekers would be persecuted upon their return.<sup>734</sup> In fact, between 1981 and August 1986, about 9, 000 asylum seekers were returned to Haiti, and only two were allowed to enter the United States.<sup>735</sup> Over 125,000 Cuban asylum seekers were admitted to the United States during approximately the same period.<sup>736</sup> The argument often put forward by countries engaged in this practice of interdiction as a means of avoiding their obligations of *non-refoulement* is that the principle applies only to refugees who are already in the territories of the host state and does not include those attempting to access the country.

However, Hathaway and Dent have identified three types of state practices that do constitute a violation of the principle of *non-refoulement*, as enunciated in Article 33 of the *1951 Convention*. According to these commentators, “the return of refugees physically present in the territory of the state, the return of refugees at or near the border, and the evolution of the arms length non-entrée policies”<sup>737</sup> lead to the abrogation of a state’s obligation of *non-refoulement*.

Admittedly, Article 33 of the *1951 Convention* at its face value is very vague as to where the refugee must be found before she/he will be entitled to the benefits of the *non-*

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<sup>733</sup> UNHCR Executive Committee of the High Commissioner’s Programme: *Interception of Asylum-Seekers and Refugees*, *supra* note 730. at 492, Para 18.

<sup>734</sup> A.D. King, “Interdiction: The United States’ Continuing Violation of International Law,” *supra* note 679 at 775.

<sup>735</sup> *Ibid.* at 778

<sup>736</sup> A.M. Wade, “A Dream Deferred: The United States-Haitian Interdiction Policy,” *supra* note 684 at 69.

<sup>737</sup> J.C. Hathaway & J.Dent, *Refugee Rights: Report on Comparative Survey* (Toronto: York Lanes Press Inc., 1995) at 5-6.

*refoulement* principle. Notwithstanding the vagueness of this provision, to return a person to a place where he/she faces persecution at least undermines the spirit of the law of *non-refoulement*. Incidentally, the provisions of Article 33 do not stipulate that a refugee must have entered the territory of the asylum state before being entitled to the protection of *non-refoulement*.<sup>738</sup> Once a person has left his/her country of origin by crossing international borders, the person becomes a refugee.<sup>739</sup> It is not the place where a person was found that has made him a refugee; instead, the circumstances of his inability or unwillingness to enjoy the protection of his state of origin have forced his/her escape to safety.<sup>740</sup> Besides, some other international and regional instruments are clear about the fact that a refugee, no matter where found, should not be returned to persecution or torture, or to where her/his life will be endangered.<sup>741</sup>

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<sup>738</sup> UNHCR, "The Haitian Interdiction Case 1993" (Brief of UNHCR as Amicus Curiae) (1994) 6:1 IJRL 85. See also, (1993) 32 I. L.M. 1215, observing that under no circumstances should a refugees be sent back to a place where their lives or freedom would be threatened regardless of whether the state first encounters the refugee inside or outside its own territory. See further, R. Boed, "State of Necessity as a Justification for Internationally Wrongful Conduct," *supra* note 710 at 20.

<sup>739</sup> R. L. Newmark, "Non-refoulement: The Questionable Legality of Extraterritorial Repatriation Programs" (1993) 71 Washington University Law Quarterly 833 at 840.

<sup>740</sup> Elie Wiesel, in a Nobel Prize acceptance speech in Oslo in 1986 said that "sometimes, we must interfere. When human lives are endangered, when human dignity is in jeopardy, national borders and sensitivities become irrelevant. Wherever men and women are persecuted because of their race, religion, or political views, that place must- at that moment- become the center of the Universe." (As quoted in A.D. King, "Interdiction: The United States' Continuing Violation of International Law" (1988) 68 B.U. L. Rev. 773. UNHCR, "Cases and Comments" (2000) 12 IJRL 268, noting that "recognition of refugee status under international law is essentially declaratory in nature-formal recognition of a person's refugee status does not make the person a refugee but only declares him or her to be one. The duty to observe the principle of non-refoulement therefore arises as soon as the individual concerned fulfils the criteria set out in Article 1 of the 1951 Convention, and this would necessarily occur prior to the time at which the person's refugee status is formally determined."

<sup>741</sup> See O.A.U. 1969 Refugee Convention Article II (3) stating that: "no person shall be subjected by a member state to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened ..."



In the 1970s, Thailand was engaged in the practice of intercepting and sending back to the high seas Vietnamese refugees fleeing from that country's oppressive regime. Some of these people might have had genuine cause to fear persecution; the oppressive nature of the regime in Vietnam was then common knowledge. Notwithstanding this, the practice continued for a long time until 1980, when the United Nations "brokered a resettlement plan" for the Vietnamese refugees.<sup>742</sup>

Similarly, in early 1991, when large numbers of Albanians started arriving in Italy seeking asylum, the Italian government instituted the policy of interdiction by stopping and searching ships carrying Albanian refugees on the high seas and sending them back to Albania, in defiance of its obligation of *non-refoulement*.<sup>743</sup> The Italian government adopted the policy of screening those physically present in the country in order to determine whether or not to accord them refugee status. Italy, according to its policy, considers the obligation of *non-refoulement* to exist only when the refugee is physically present within its territory. In other words, the principle, according to the Italian policy, has no extraterritorial application. The views of notable scholars like Grahl-Madsen<sup>744</sup> and Robinson favour this interpretation. According to Robinson, "Article 33 concerns

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<sup>742</sup> R. L. Newmark, "Non-refoulement: Questionable Legality of Extraterritorial Repatriation Programs" *supra* note 739 at 847.

<sup>743</sup> *Ibid.* at 849. In 1939, over 900 Jews boarded the St. Louis ship to escape persecution by Nazi Germany, but were rejected at one port of entry after another. Eventually, the ship sailed back to Germany where all the occupants met their untimely death. See Patricia Camp, "Jewish Union Plans National Drive to Resettle Indochinese Refugees" *Washington Post*, Sept. 8, 1979, at B3. See also, R. L. Newmark, *supra* note 739 at footnote 175.

<sup>744</sup> A. Grahl-Madsen, *The Status of Refugees in International Law* (Leyden: A.W. Sijthoff, 1972) at 94.

refugees who have gained entry into the territory of a contracting state, legally or illegally, but not to refugees who seek entrance into this territory.”<sup>745</sup>

In the same vein, this position found company in some decisions of U.S. courts. In *Haitian Refugee Centre v. Gracey*,<sup>746</sup> and *Haitian Refugee Centre v. Baker*,<sup>747</sup> both the District and the 11<sup>th</sup> Circuit courts were of the view that, for the principle of *non-refoulement* to apply, the refugee must be physically present in the territory of the host country, where he is seeking refuge. In *Sale v. Haitian Centers Council*,<sup>748</sup> the United States Supreme Court gave its support to this interpretation. The Supreme Court, in its controversial decision, held that both the negotiation history and the text of the 1951 *Convention* did not indicate that Article 33 should have extraterritorial application. The result was that Haitian asylum seekers were subjected to *refoulement* without the benefit of a determination about whether they could qualify as refugees under the *Convention*.<sup>749</sup>

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<sup>745</sup> N. Robinson, *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation* (New York: Institute of Jewish Affairs, 1953) at 163. But for a contrary position, see UNHCR Executive Committee of the High Commissioner’s Programme: Standing Committee, 18<sup>th</sup> meeting: Interception of Asylum-Seekers and Refugees: the International Framework and Recommendations for a Comprehensive Approach, UN doc. Ec/50/SC/CRP.17, June 9, 2000, Reprinted in (2000) 12:1 IJRL 488 at 491 Para 23.

<sup>746</sup> *Haitian Refugee Center v. Gracey*, 809 F.2d 794 (D.C. Cir. 1987).

<sup>747</sup> *Haitian Refugee Center v. Baker*, 949 F.2d 1109 (11<sup>th</sup> Cir. 1991). But for the view that the principle of *non-refoulement* has extraterritorial application, see *Haitian Centers Council v. McNary*, 96 F. 2d 1350 (2<sup>nd</sup> Cir.1992).

<sup>748</sup> 113 S.Ct. 2549 (1993) ( S.C. U.S.A.).

<sup>749</sup> J. Fitzpatrick, “The International Dimension of U.S. Refugee Law” *supra* note 684 at 10. In its response to the Supreme Court decision on Sale’s case, the UNHCR stated that “the obligation not to return refugees to persecution arises irrespective of whether governments are acting within or outside their borders. UNHCR bases its position on the language and structure of the treaties and on the treaties overriding humanitarian purpose, which is to protect especially vulnerable individuals from persecution. The UNHCR’s position is also based on the broader human rights of refugees to seek asylum from persecution as set out in the Universal Declaration of Human Rights.” See “UN High Commission For Refugees Responds To U.S. Supreme Court Decision in *Sale v. Haitian Centers Council*”, 32 I.L.M. 1215 (1993).

Elsewhere, I have argued that the majority decision in Sale's case was wrongly decided; this is so in light of the fact that a treaty must be construed in good faith and in its ordinary meaning, so as to give effect to the object and purpose of the treaty.<sup>750</sup> In addition, a treaty must be construed broadly and liberally, and, where two interpretations are possible, one that is restrictive of the rights protected by the treaty and the other favourable, the latter should be preferred.<sup>751</sup> The purpose of Article 33 of the *1951 Convention* is to afford protection to those who fear persecution so that they do not end up in the hands of their persecutors. Justice Blackmun showed a clear appreciation of this fact when, in his dissenting judgement in Sale's case, he held that Article 33 has no territorial limitations and that the intention of the article is to preclude the return of a refugee to his persecutor, no matter where he was encountered.<sup>752</sup> Even the majority in the Sale's case, in a somewhat contradictory position, supported this when they held that "the drafters of the Convention and the parties to the protocol... may not have contemplated that any nation would gather fleeing refugees and return them to the one country they had desperately sought to escape, such actions may even violate the spirit of Article 33."<sup>753</sup>

Understandably, states may have some legitimate and genuine concerns and interests in policing their borders so as to control immigration, but the exercise should not

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<sup>750</sup> P.L. Okoronkwo, *Immigration Control*, *supra* note 694. *Vienna Convention on Law of Treaty* May 23, 1969 1155 UNTS 331 (1980).

<sup>751</sup> *Asakura v. Seattle*, 265 U.S. 332, 342 (1924). See also, A. D. King, "Interdiction: The United States' Continuing Violation of International Law," *supra* note 679 at 787.

<sup>752</sup> Sales case, *supra* note 748 at 2568. See also T. Coonan, "America Adrift: Refoulement on the High Seas" *supra* note 705 at 1252.

be conducted in a manner that undermines their obligations under the various regional and international instruments that protect refugees.<sup>754</sup> *Non-refoulement* is not a threat to the territorial sovereignty of states; it is rather a protective mechanism for people who have lost the protection of their countries of origins.<sup>755</sup> It must be remembered that “today, the voices of millions of refugees in the world are being heard. Voices seeking belief in man, in human dignity, in basic human rights. Voices praying for justice, freedom and peace, pleading for love and generosity. Voices calling on the governments of the world to use reason rather than force.”<sup>756</sup> Unfortunately, this admonishment is not being heeded, especially in this era of globalization. Instead, states have intensified the adoption and implementation of various strategies to preclude refugees from gaining entry to their countries. One of the measures adopted by states in violation of their *non-refoulement* obligations is the “safe third country” rule.

The safe third country requirement means that asylum-seekers who came into the host state where they are seeking asylum through another transit country designated as safe country must apply for asylum in the transit state. Germany, for instance, considers a third country ‘safe’ if it guarantees the application of the *1951 Refugee Convention*, and

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<sup>753</sup> Sale’s case, *supra* note 748 at 2565.

<sup>754</sup> J. Ramji, “Legislating Away International Law: The Refugee Provisions of the Illegal Immigration Reform and Immigrant Responsibility Act” (2001) 37 STJIL 117 at 138.

<sup>755</sup> R. L. Newmark, “Non-refoulement Run Afoul: The Questionable Legality of Extraterritorial Repatriation Programs,” *supra* note 682 at 863.

<sup>756</sup> P. Hartling, “From Tragedy to Hope”(being a Nobel Peace Prize Lecture, December 1, 1981, on line; <http://www.nobel.se/peace/laureates/1981/refugees-lecture.html> (visited: 12/04/03).

the *European Convention on Human Rights*.<sup>757</sup> It must also be a state that would not persecute an asylum seeker or send him back to a place where he risks persecution.<sup>758</sup>

Following these criteria, Germany before Poland and Czech Republic became part of the EU designated Norway, Poland, Switzerland, the Czech Republic, and all the original 15 European Union members as safe third countries.<sup>759</sup> In that case, if a refugee entered Germany through any of these countries, such person(s) could be sent back to the transit state. Thus, the route of entry into a country of asylum (and not the reasons for flight) becomes the most important consideration in determining whether a person will be granted asylum.<sup>760</sup> The danger in the application of this principle is that it can lead to chain *refoulement* of refugees. Commenting on the new safe third state agreement between United States and Canada, Obiora Okafor affirms this view. He states that:

... The new safe third country regime could easily be criticized on the basis that, in some cases, it could have the effect of licensing the chain refoulement of refugee claimant to a place where she is at risk of persecution, torture or even death. Chain refoulement could result in this kind of case when Canada returns a refugee claimant to the USA to have her claim determined there (on the basis of the agreement), and the USA's refugee determination system

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<sup>757</sup> S. Blay & A. Zimmermann, *supra* note 705 14 at 365. The concept is problematic because, as Dr. Okafor has observed "... The real question for determination in refugee law, policy and practice is not really the nature of the country conditions as a whole, as much as the nature of the claimant's personal circumstances-does she face a serious risk on stated grounds in that country? Viewed from the perspective of the 'best practices' of refugee law/policy, evidence as to the general state of affairs within the relevant country is hardly a trump card. It borders on the ridiculous to suggest that any country in our world is safe for all of its citizens, and in particular for all the people who find themselves within its territory-even in terms of respecting the obligation not to return people to places where they face a serious possibility of persecution or a substantial risk of torture." See O.C. Okafor, "Of Nightmares and the Noble Dreams: The Canada -USA Safe Third Country Agreement," *infra* note 761 at 3.

<sup>758</sup> M. Fullerton, "Restricting the flow of Asylum Seekers in Belgium, the Federal Republic of Germany, and the Netherlands: New Challenges to the Geneva Convention Relating to the Status of Refugees and the European Convention on Human Rights" (1988) 29:1 *Virginia Journal of Int'l L.* 33 at 58.

<sup>759</sup> M. Fullerton, *Dismantling Refugee Protection*, *supra* note 730 at 243.

<sup>760</sup> United States Committee for Refugees, "At Fortress Europe's Moat: The 'Safe Third Country' Concept" (Washington D.C.: USCR, 1997) 232 at 233.

refuses to grant refugee status to the person either based on a narrower interpretation of their international obligations, or based on the exaction of a higher standard of proof, or based in some way on the infection of the refugee determination process by a higher level of anti-Muslim and anti-Arab sentiments post 9/11. The USA may then feel able to deport that person to the very place where they claim she is at risk.<sup>761</sup>

Thus a refugee risks being sent back to a place where he/she fears persecution. For example, some of the countries Germany has designated as safe third countries have readmission agreements with other countries that do not apply the European Convention on Human Rights and Fundamental Freedoms and with whom Germany has no agreement.<sup>762</sup> For example, Poland has readmission agreements with Ukraine, Slovakia, Hungary, and Moldova.<sup>763</sup> None of these countries is designated as safe third state by Germany; nor do any of them have readmission agreements with Germany. Thus, if an asylum seeker from Ukraine entered Germany through Poland to seek asylum, under the principle of safe third country, he/she may be returned to Poland by Germany. Poland, acting under the readmission agreement between it and Ukraine, can send the asylum seeker back to Ukraine where he feared persecution. The actions of Germany and Poland would constitute a violation of their international obligations of *non-refoulement*, which are protected under Article 33 of the *1951 Convention* and Article 3 of the CAT.<sup>764</sup> This

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<sup>761</sup> O.C. Okafor, "Of Nightmares and the Noble Dreams: The Canada-USA Safe Third Country Agreement" (on file with the author). See also, G. Borchelt, "The Safe Third Country Practice in the European Union: A Misguided Approach To Asylum Law and a Violation of International Human Rights Standards" (2002) 33 Colum. Human Rights L. Rev. 473 at 512.

<sup>762</sup> M. Fullerton, "Dismantling Refugee Protection," *supra* note 730 at 250.

<sup>763</sup> *Ibid.* at 250.

<sup>764</sup> UNHCR Executive Committee of the High Commissioner's Programme: "Interception of Asylum-Seekers and Refugees," *supra* note 730 at 493, para 22, stating that "the direct removal of a refugee, or asylum seeker to a country where he or she fears persecution is not the only manifestation of refoulement."

is so because the actions of both Germany and Poland would tend to deprive refugees of the legal protections afforded to them under these instruments as well as other regional instruments.<sup>765</sup> Moreover, “there is no requirement in the convention that a refugee seeks protection in the country nearest her home, or even in the first state to which she flees. Nor is it requisite that a claimant travel directly from her country of first asylum to the state in which she intends to seek durable protection.”<sup>766</sup>

The most worrisome factors about all these restrictive measures adopted by some members of the international community, especially the developed states, to stem the tide of refugees who can access their countries are the motivating forces behind these rules. These forces point to the decline in the political and strategic importance of granting asylum. Some of the motivating forces are the persistent economic recession and unemployment problems in some of these countries, the antagonistic disposition of some elements of the populations of these countries, the inciting and provocative utterances of some public officials about refugees, and the growing racist attacks against refugees.<sup>767</sup> The consequence is that “the traditional, legal right of individual to claim asylum, right

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The removal of a refugee from one country to a third country which will subsequently send the refugee onward to the place of feared persecution constitutes indirect refoulement, for which several countries may bear joint responsibility.” See also M. Fullerton, *Dismantling Refugee Protection*, *ibid.*

<sup>765</sup> S. Blay & A. Zimmermann, *supra* note 705 at 365. See also, UNHCR, *Cases and Comments*” (2000) 12 *IJRL* 268 at Paras 13 & 14.

<sup>766</sup> J.C. Hathaway, *The Law of Refugee Status* (Toronto/Vancouver: Butterworths Canada Ltd., 1991) at 46. See also, P. Kuruk, “Asylum and the Non-refoulement of Refugees,” *supra* note 713 at 328, stating that “a refugee who is expelled from a country and forced to return to a place where his life or freedom is threatened because no other state will grant him refuge should be entitled to Article 33 protection, even if his home country does not border the place of expulsion.”

<sup>767</sup> S. Ogata, “A Comprehensive European Strategy” An Address presented at the Forum of German UN Association and German Association for Foreign Policy Bonn on 21 June 1994, on line: <http://www.unhcr.ch/cgi-bin/texis/vtx/home/+5wwBmerCZ69wwwowwww...1opendoc.ht> (visited: 11/02/2001).

held sacred by the Geneva Convention, is currently under attack” in some countries, especially the developed countries.<sup>768</sup> It would appear that some members of the international community, particularly developed countries, are being selective in their embrace and application of international law. These developed countries would appear to pay lip service to international law when they reason that it does not advance their interests. It may be considered curious that in some other instances, the same developed countries do insist and at times coerce other countries especially those in the “third world” not only to embrace but also to implement international laws (for example, international trade laws), which all too often prove adverse to the interests of “third world” countries. These laws tend to legitimize the domination and exploitation of these “third world” countries, territories, peoples, and resources.

All these manipulations are taking place under the cover of economic globalization. Since states, especially the developed ones, have committed themselves to economic globalization, they must embrace all its core principles regarding free movement of goods, capital, and labour.<sup>769</sup> But the developed states are selective in their implementation of the core principles of economic globalization. Under the shadow of economic globalization, international economic law empowers the IFIs, MNCs, and the developed countries that control them to impose macro-economic policies on the “third world” countries (which have been implicated in the production of large scale refugee flows). These laws and policies permit the free movement of goods, capital, and some

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<sup>768</sup> G.I. Coman, “European Union Policy on Asylum and Its Inherent Human Rights Violations” (1998) 64 Brooklyn Law Review 1217 at 1223.



selected services but do not allow the free movement of peoples (especially those from the “third world”). Rather, under the cover of the sovereign power of the state to determine who can enter the country, the developed states have deployed various instruments such as interdiction, the imposition of a visa requirement, third safe country, and safe county of origin in order to monitor and restrict the number of refugees and asylum seekers who can enter their countries. In the process they often breach their *non-refoulement* obligation to refugees.

## 6.2. CONCLUSION

The principle of *non-refoulement* remains one of the most important weapons in the protection of asylum seekers and refugees who, for reasons outside their control, were unable to enjoy the protection of their countries of origins. Abridgement of this principle or any act that provokes or exacerbates its non-observance will not only expose refugees to the risk of expulsion, persecution, torture, or other forms of atrocities, but also will make refugee protection and other instruments furthering that goal into hollow rituals. This would be a defeat for the whole essence of the asylum law, which is the protection of individuals against gross abuses of their fundamental human rights and freedoms.<sup>770</sup> Such an outcome would dash the one last hope of this vulnerable group of persons. As the former High Commissioner for Refugees, Sadako Ogata, has observed, “Refugee protection is a set of legal instruments, operational activities and material contributions that can restore a sense of security in people whom flight has deprived of

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<sup>769</sup> B. Muller, “Globalization, Security, Paradox: Towards a Refugee Biopolitics” (2004) 22:1 Refugee 49 at 50.

everything...”<sup>771</sup> But unfortunately, “...the refugee protection regime has been increasingly undermined, especially in this era of globalization, by state policies that promote closure rather than openness and by lack of political will to keep their commitment to the *1951 Convention* on the status of refugees.”<sup>772</sup>

Thus, globalization poses a very serious threat to the principle of *non-refoulement*. Should states’ breach of their obligation of *non-refoulement* continue unrestrained, such a fundamental principle of refugee law may be facing more difficulties than it has already encountered.<sup>773</sup> This cannot in any way contribute to furthering the cause of international peace and security, which is crucially important to members of the international community. What are the possible explanations for the hypocritical attitudes of some members of the international community (especially the developed countries) toward refugees and the international refugee regime in this age of globalization? Development of an answer to this question will be the subject of our discussion in the next chapter.

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<sup>770</sup> R. Bruin, & K. Wouters, “Terrorism and The Non-derogability of Non-refoulement” (2003)15:1 IJRL 5.

<sup>771</sup> S. Ogata, “Human security: A refugee Perspective” Ministerial Meeting on Human Security Issues of the Lysoen Process Group of Governments, May 1999: at 5 (as quoted in R. Freitas, “Human Security and Refugee Protection after September 11: A Reassessment” supra note 727 at 35.

<sup>772</sup> R. Freitas, Human Security and Refugee Protection,” *ibid.* at 38. Emphasis supplied.

<sup>773</sup> In the contrary, it has been argued that narrow or restrictive interpretation of refugee law will protect it against public backlash. According to this school of thought, such interpretation will help to preclude loss of public confidence in the asylum system. This argument is not very persuasive; I think the more plausible reason why developed countries prefer the narrow interpretation of refugee law and other non-entrée measures was, according to James Hathaway, because: “Most refugees who seek entry to industrialized countries today are from the poorer countries of the South. Their different racial and social profile is seen to challenge the cultural cohesion of many developed states. The economies of industrialized states no longer require substantial and indiscriminate infusions of labour. Nor is there ideological or strategic value in the

## Chapter Seven

### **EXPLAINING THE NON-CURTAILMENT OF GLOBALIZATION'S EXACERBATION OF THIRD WORLD REFUGEEHOOD: A TWAIL PERSPECTIVE**

#### **7.0. INTRODUCTION**

As stated earlier, the continued unchecked nature of economic globalization's negative impact on refugeehood in the "third world" is in part attributable to the persistence of a colonial type under-current in the conduct of international relations and the formation of international economic law. In chapter two of this dissertation, I stated the main plank of TWAIL school of thought. In this chapter, I will use TWAIL analysis to attempt to explain the continued, uncurtailed, negative impact of economic globalization on the generation of refugeehood in the "third world", and thus on the continued effectiveness of international refugee law as well. This discussion will be grounded on the discussions undertaken in the previous chapters. Also relevant are: (1) TWAIL's insights on historical injustices to "third world" countries arising from colonialism, (2) the emaciated sovereignty being exercised by "third world" countries and the possible consequences arising from this reduced sovereignty in this era of economic globalization, and (3) the response of the developed countries to these developments as they affect refugeehood and international refugee law. This explanation is important because:

It seems reasonably clear that unless concrete measures are taken by the international community to deal decisively with the problem of forced displacement, one would not be surprised to see the current population of displaced persons

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admission of most refugees." See J.C. Hathaway, "The Meaning of Repatriation" (1997) 9: 4 *International Journal of Refugee Law* 551 at 553.

in Africa (indeed other parts of the third world) doubling in the next decade.<sup>774</sup>

One of the unfortunate consequences of the enhanced powers of the international governmental and non-governmental bodies (e.g. the IMF, World Bank, and WTO,) and other non-state actors (e.g., MNCs and NGOs) in taking control of and making decisions on matters that were hitherto seen as within the exclusive jurisdiction of states is the difficulty in locating and pinpointing where responsibilities lie *vis-à-vis* certain issues on the international agenda.<sup>775</sup> The situation is made even more complicated by the fact that certain actions/decisions that impact “third world” countries may seem to have been taken or made by a certain international governmental body/agency as well as by a non-state actor, in actual fact they have been driven by the influence of some powerful states in the developed world. Such policies or activities, which are apparently those of an international governmental organization (like IMF/World Bank) and non state actors (like MNC), really represent the interests of some powerful countries in the developed world. Thus, there is a sort of convergence of interests between these agents of globalization (e.g., the IMF/World Bank and the MNCs) and the major countries in the developed world. The levers of power in these institutions rest largely with some of the powerful countries in the developed world. In many cases, these institutions become little more than fronts for the powerful, developed countries.<sup>776</sup>

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<sup>774</sup> A. Dieng, “Addressing the Root Causes of Forced Population Displacements in Africa: A Theoretical Model” (1995) *IJRL* (special issue) 119 at 121. Emphasis added.

<sup>775</sup> B. Rajagopal, “From Resistance to Renewal: The Third World, Social Movements, and the Expansion of International Institutions” (2000) 41:2 *Harvard International Law Journal* 527 at 538.

<sup>776</sup> M. Mutua, “Savages, Victims, and Saviors: The Metaphor of Human Rights” (2001) 42:1 *Harvard International Law Journal* 201 at 204.

This kind of situation is more pronounced in this era of globalization (especially economic globalization), when policies prescribed and imposed on “third world” countries and the activities of MNCs in these countries have been implicated in the creation of the conditions that have caused gross human rights abuses, civil wars, ethnic conflicts, poverty, and unemployment.<sup>777</sup> The populations of the affected “third world” countries have often resorted to protest (and at times violence) in order to change the adverse conditions foisted on them. What often follows is government repression (at times with the active connivance and encouragement of some agents of globalization). Such repression has almost invariably led to the forced displacement of parts of the population of the affected “third world” countries. The preceding chapters of this dissertation have shown the complicity of international economic law in bringing about this state of affairs.<sup>778</sup>

## **7.1 THE REPLICATION OF COLONIAL INJUSTICES AGAINST THE THIRD WORLD IN CONTEMPORARY TIMES**

Even if the state protects its citizens from being bullied by physical violence (as it does, in principle, under the system of unrestrained capitalism), it may defeat our ends by its failure to protect them from the misuse of economic power. In such a state, the economically strong is still free to bully one who is economically weak, and to rob him of his freedom. Under these circumstances, unlimited economic freedom can be just as self-defeating as unlimited physical freedom, and economic power may be nearly as dangerous as physical violence, for those who possess a surplus of

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<sup>777</sup> The discussions in the previous chapters of this thesis gives credence to this fact. See also, “Forced Migration and Global Processes, Report of the Eighth Conference of the International Association for the Study of Forced Migration, Chiang Mai, Thailand, 5-9 January 2003” (2003) 16:4 *Journal of Refugee Studies*. 361 at 363.

<sup>778</sup> See especially Chapter Two.

food can force those who are starving into a “freely” accepted servitude without using violence.<sup>779</sup>

Almost all “third world” countries have gained political independence from their previous colonial masters, but many of the injustices that characterized the colonial period still persist even if in morphed forms. In this post-colonial era, many “third world” countries and their peoples are still being oppressed and subjugated by an international system that is hardly responsive to their needs and ambitions. The current international law (i.e. international economic law) is presented as neutral law to be applied in regulating the conduct of countries engaged in global economic activities, with the goal of engineering economic growth and development. In reality, there is nothing neutral about these economic laws, which tend to be framed and implemented in such a way as to advance the interests of the developed countries to the detriment (in most cases) of the “third world.” Put differently, some powerful developed states are exploiting the current international economic and monetary laws to further their selfish economic and political agendas.

Thus, international economic law gives legitimacy to the exploitative policies and practices of the IFIs and the MNCs and also to the policies of the developed countries that control them. For instance, one of the policy measures that is imposed on “third world” countries under IMF/World Bank SAPs is the privatization of public enterprises. Under this programme, as discussed in the preceding chapters of this thesis, governments of the “third world” countries are required to disengage from the operations of public

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<sup>779</sup> *Ferreira v. Levin NO & Others and Vryenhoek & ors v. Powell No & ors* (1996) 1 BCLR 1 (CC); 1999

enterprises and to relinquish the enterprises to private sector operators (which in most cases are MNCs). In most of “third world” countries, for example, Nigeria, the government is the most important employer of labour. Privatization of public enterprises, with the often accompanying massive retrenchment of workers, results in massive unemployment with its attendant grave social consequences and upheavals.<sup>780</sup> The international economic law deployed by the IFIs in regulating the administration of SAPs in “third world” countries precludes these countries from adopting some ameliorative measures that could cushion the effects of the SAPs on their peoples. The adoption and implementations of such measures are regarded as interference with the operation of the free market economy. Paradoxically, however, in the developed countries that control IFIs, such social safety nets are put in place to soften the harsh impact of government measures that orchestrate unemployment. One example is the payment of unemployment benefits to people without gainful employment.

Thus, despite decolonialization, the “third world” countries and their peoples are still being exploited. This time, exploitation occurs in the form of neo-colonialism, which is a situation where a state is<sup>781</sup>

In theory, independent and has all the outward trappings of international sovereignty. In reality, its economic system and thus its political policy is directed from outside... Neo-colonialism is also the worst form of imperialism. For those

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SACLR LEXIS 298.

<sup>780</sup> CESCR, Consideration of Report Submitted by States Parties Under Article 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Nigeria, UN ESCOR, [29], UN Doc E/C.12/1/Add.23 (1 May 1998).

<sup>781</sup> D. Santos, *Human Rights and Migrant Domestic Work: A Comparative Analysis of the Social-Legal Status of Filipina Migrant Domestic Workers in Canada and Hong Kong*, (A Ph.D Thesis, York University, Toronto, Canada, March 2004) at 245.

who practice it, it means power without responsibility and for those who suffer from it, it means exploitation without redress.<sup>782</sup>

Thus, in reality, there still exist colonial types of relationships between “third world” countries and the developed world in this era of globalization. As a respected scholar, Ali Mazrui notes, “Decolonization needs no longer be equated with liberation.”<sup>783</sup> As in the colonial period, certain developed countries (especially through the instrumentalities of the IMF and the World Bank) continue to exploit the territories, peoples, and resources of “third world” countries. The “third world” countries and their peoples are still considered incapable of managing their own affairs. Hence, the MNCs and IFIs are empowered to prescribe and impose economic policies on these countries without regard to the grave consequences of such policies for the people. As in the colonial period, international law is being used to legitimize this continuous exploitation of “third world” countries and their peoples. Some developed countries of the North are using the cover of international law (i.e. international economic law) to justify their prescriptions and imposition of policies that undermine the interests and welfare of “third world” countries and their peoples, and advance the interests and well-being of the developed countries and their peoples. Again, as in the colonial era, some grave consequences, including massive refugee flows, ultimately result from this exploitative relationship. As shown in Chapters three and four of this thesis, SAPs, which is one of the contemporary instruments for

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<sup>782</sup> K. Nkrumah, *Neo-Colonialism: The Last Stage of Imperialism* (New York: International Publishers, 1965) at IX, XI.

<sup>783</sup> A.A. Muzrui, “The African State as a Political Refugee: Institutional Collapse and Human Displacement” (1995) *IJRL* (Special Issue) 21 at 22.



disempowering the “third world,” have contributed in no small way to the production of unemployment, ethnic conflicts, wars, *coups d’etats*, and other general social and political upheavals. All of these are circumstances that produce refugee flows in the “third world.”

The TWAIL optic allows us to appreciate the continued persistence of morphed forms of colonialism in the contemporary era of globalization, and its attendant injustices of fostering exploitation, oppression, and subjugation of “third world” countries and their peoples. It also allows us to understand that a partial explanation for the continued, unchecked, negative influence of globalization on “third world” refugeehood is this persistence of a colonist and exploitative undercurrent in international economic law and relations. In their need to foster a kind of globalization that allows them to exploit and gain from “third world” resources, the agents of globalization have tended to create the conditions that have led to the production of massive refugee flows from the “third world” and the consequent undermining of international refugee law.

## **7.2 THIRD WORLD SOVEREIGNTY: SOVEREIGNTY OF THE POWERLESS AND THE RESPONSE OF THE DEVELOPED COUNTRIES TO REFUGEE CRISIS IN THIS ERA OF GLOBALIZATION**

Traditional international law has helped to make independence a completely superficial phenomenon, beneath the surface of which the old forms of domination survive and the economic empires of multinational corporations, and the powers that protect them, prosper.<sup>784</sup>

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<sup>784</sup> M. Bedjaoui, *Toward A New International Economic Order* (New York: Holmes & Meier, 1979) at 81.

As shown in chapter two in the pre- decolonization era, sovereignty was regarded as sacrosanct - a right to be exercised by states only. In addition, Chapter two has shown that, at that time, only the developed countries of the North were allowed to exercise the powers of sovereignty, and, as a consequence, the participation of the vast majority of “third world” countries in the exercise of such powers was rejected.<sup>785</sup> At the outset of decolonization, respected scholars and publicists from the developed countries started propounding new theories that tended to redefine sovereignty.<sup>786</sup> This recasting of the meaning of sovereignty led to the vesting of powers and authorities hitherto exclusively enjoyed by states in non-state actors like MNCs and IFIs. This redefinition and expansion of the categories of persons who can exercise sovereign powers were deliberately and manipulatively crafted to whittle down the sovereignty of “third world” countries, which was granted to them at independence.

Consequently, MNCs and IFIs are able to exercise the rights and powers that impact “third world” countries and their citizens without assuming responsibility for any negative fallout from such an exercise. These enhanced powers of IFIs and MNCs “curb the right of governments to intervene in the economy for the benefit of their people while

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<sup>785</sup> See J.S. Mill, “A Few Words on Non-Intervention” in *Essays on Equality, Law and Education* (Toronto: University of Toronto, 1984) at 118, noting that “nations which are still barbarous have not got beyond the period during which it is likely to be for their benefit that they should be conquered and held in subjection by foreigners.” Further Jules notes that “the superior races have a right [to subjugate others] because they have a duty as well. The duty is to civilize the inferior races.” Jules Ferry, as quoted in D. Rieff, *A Bed For The Night: Humanitarianism in Crisis* (New York/Toronto: Schuster, 2002) at 64.

<sup>786</sup> For a more incisive and expansive explication of this view, see M. Soronarajah, “Economic Neo-Liberalism and the International Law on Foreign Investment” in A. Anghie *et. al.* (eds.), *The Third World and International Order: Law, Politics and Globalization* (Leiden: Martinus Nijhoff Publisher, 2003) 173 at 175.

enhancing the space for TNCs.”<sup>787</sup> What this means is that the effective power of decision making, which affects the interests of the peoples of the “third world,” rests largely with the IFIs and MNCs. Since the developed countries largely control these institutions, it can be argued that the developed countries are managing the affairs of the “third world” countries. This is not much different from the situation in the colonial era, when “third world” countries were dominated and exploited by the developed countries of the North.

As Chimni astutely notes, since the 1980s, the developed countries have sought to remove any national impediments to the entry and operations of transnational capital in the “third world” through the adoption of a number of international treaties, such as Bilateral Investment Treaties (BITs), Multilateral Investment Guarantee Agency (MIGA), etc.<sup>788</sup> These treaties, in addition to the IMF/World Bank SAP conditionalities, empower the developed countries to penetrate the markets of “third world” countries, without the latter enjoying similar advantages. More important and very troubling too is the fact that, while these treaties and SAPs vest the IFIs, MNCs, and the developed countries that

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<sup>787</sup> C. Raghavan, *Recolonization: GATT, The Uruguay Round and The Third World*, (London: N.J.: Zed Books, 1990) at 40.

<sup>788</sup> B.S. Chimni, “Globalization, Humanitarianism and the Erosion of Refugee Protection” (2000) 13:3 *Journal of Refugee Studies* 243 at 246. Note that MIGA was established in 1988 under the support of the World Bank. See *Convention Establishing the Multilateral Investment Guarantee Agency* (Washington, D.C.: International Bank for Reconstruction and Development, 1985). As a matter of fact, Article 11 of the Convention “insures foreign capital against non-commercial risks.” See B.S. Chimni, “International Institutions Today: An Imperial Global State in the Making” (2004) 15 *European Journal of International Law* 1 at 9.

control them with a number of rights, there is no corresponding duty to the peoples of the “third world” countries (their host [age] countries) imposed on these institutions.<sup>789</sup>

As shown in the previous chapters’ case studies, the impact of the activities of these international institutions and some non-state actors operating under the shield of international law often contributes to the creation and sustenance of the conditions that give rise to wars, ethnic conflicts, and other economic, social, and political problems from which refugee flows emanate. The O.A.U. (now the African Union) acknowledged this in its May 2000 report, in which it observed that “international financial institutions imposed programs that exacerbated inflation, land scarcity, and unemployment.”<sup>790</sup> Of course, these are some of the conditions that generate significant refugee flows in “third world” countries.

Unfortunately, however, in most cases, the response of many of the powerful states to the overwhelming refugee flows to which some agents of globalization under their control and influence contributed is to adopt measures that hamper or have the capacity to undermine international refugee law. It seems that, through these measures, the developed countries are dismantling the foundation of international refugee protection laid by the *1951 Convention* and its *1967 Protocol*.<sup>791</sup> As Chimni has observed:

In the post-1945 period the policy of Western states has moved from the neglect of refugees in the Third World to

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<sup>789</sup> *Ibid.* at 246.

<sup>790</sup> O.A.U., Rwanda- Preventable Genocide” Being Report of the International Panel of Eminent Personalities (Addis Ababa, May 29 2000).

<sup>791</sup> J. Fitzpatrick, “Revitalizing the 1951 Refugee Convention” (1996) 9 Harv. Hum. Rts. J. 229 at 233.

their use as pawns in Cold war politics to their containment  
now.<sup>792</sup>

The response of some powerful countries towards the “third world” refugees in particular and global refugee problems in general is a reflection of the existence of a colonial type relationship between the “third world” countries and the developed countries in the conduct of international relations in this era of economic globalization. By these responses to “third world” refugeehood (to be elaborated on below) the developed countries want the “third world” countries to bear the disproportionate burden of playing host to large numbers of refugees thereby avoiding their obligations through the adoption of *non-entrée* measures.<sup>793</sup> Through these responses the developed countries seek to strengthen their position *vis a vis* the “third world” countries by preserving an enormous amount of privileges for their citizens.<sup>794</sup> An outline of some of the policy measures adopted by the developed countries as a response to the current “third world” refugee crisis and global refugee problems (to which the continued unchecked nature of economic globalization has contributed and still contribute in bringing about) will help to put this issue in proper focus. This response is particularly exemplified in the apprehension and reluctance of some of these powerful developed states to accede to any suggestions for broadening the definition of refugee, as presently encapsulated in the *1951 Convention* and its *1967 Protocol*. Some of these developed countries (for example, France and

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<sup>792</sup> B.S. Chimni, “The Geopolitics of Refugee Studies: A View From the South” (1998) 11:4 *Journal of Refugee Studies* 350.

<sup>793</sup> B.S. Chimni, “Globalization, Humanitarianism and the Erosion of Refugee Protection,” *supra* note 788 at 251.

Germany) have refused to recognize and accord refugee status to persons fleeing from persecution emanating from non-state actors. Some refugees are thereby left without protection at the most critical moment of their lives.<sup>795</sup> As Freitas has noted: "...the refugee protection regime has been increasingly undermined by state policies that promote closure rather than openness and by lack of political will to keep their commitment to the *1951 Convention* on the status of refugees."<sup>796</sup> This is worrisome and unfortunate because the actions of some of these developed countries are happening at a time when it is likely that a very large number of refugees are fleeing from persecution emanating from the activities of non-state actors.<sup>797</sup> The argument often made by these developed countries is that, for an asylum seeker to establish a valid claim of persecution, such persecution must be by a state. According to the proponents of this viewpoint, persecution by non-state actors does not fall within the purview of the *1951 Convention*.<sup>798</sup> A German Federal Administrative Court upheld this position in the

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<sup>794</sup> *Ibid.*

<sup>795</sup> T. Einarsen, "Mass Flight: The Case for International Asylum" (1995) 7:4 IJRL 551 at 565. This policy of placing a very narrow restrictive interpretation on the Convention refugee definition by the developed countries is seen by many critics and refugee advocacy groups as barrier deliberately created by these countries to prevent third world asylum seekers from entering their countries. See also, E. Arboleda, & I. Hoy, "The Convention Refugee Definition in the West: Disharmony of Interpretation and Application" (1993) 5:1 IJRL 66 at 74. See further, J. Fitzpatrick, "Revitalizing the 1951 Refugee Convention," *supra* note 791 at 240.

<sup>796</sup> R. Freitas, "Human Security and Refugee Protection After September 11: A Reassessment," (2002) 20:4 *Refuge* 34 at 38.

<sup>797</sup> W. Kalin, "Non-State Agents of Persecution and The Ability of the State to Protect" (2001) 15:3 *Georgetown Imm. L. J.* 415. France, Germany, Italy, and Switzerland adopt the position that refugee status should not be conferred on persons fleeing persecution emanating from non-state actors. See, UNHCR, "Cases and Comments" (2000) 12 IJRL 268 at para 19.

<sup>798</sup> House of Lords, *Handling EU Asylum Claims: New Approaches Examined* (London: HL Paper 74, 2004) at 14. In its 1992 Handbook, the UNHCR declared that although: "Persecution is normally related to action by national authorities, it may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned." Continuing, the Handbook gave an instance of

*Bundesverwaltungsgericht*, when it stated that the drafter of the 1951 Convention only intended to accord recognition to persons fleeing from dangers emanating from states, and that this is very much in accord with the goal and purpose of the Convention “as an instrument protecting persons whose relationship of trust with the state of origin no longer exists.”<sup>799</sup> This is a very flawed interpretation, since the determining factor under the Convention for refugeehood is the absence of effective protection for a refugee in his/her country of origin “rather than the identity of the perpetrator.”<sup>800</sup>

These developed countries are prepared to spend a great deal of money in their refugee determination systems in ways that tend to prevent asylum seekers from receiving protection within their borders. This money is more than they are willing to contribute for provision of protection and welfare for refugees’ worldwide. For instance,

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a case of “...religious intolerance, amounting to persecution, in a country otherwise secular, but where sizeable fractions of the population do not respect the religious beliefs of their neighbours. Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if the are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.” See UNHCR, *Handbook on Procedure and Criteria for Determining Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (Geneva: UNHCR, 1992) at para 65. See further, B. Gorlick, “Human Rights and Refugee: Enhancing Protection Through International Human rights Law” (2000) 69 *Nordic Journal of International Law* 117 at 173. See also, UNHCR, “Cases and Comments,” *ibid.* at paras 16-19. See further, G. Borchelt, “The Safe Third Country Practice In The European Union: A Misguided Approach To Asylum Law and a Violation of International Human Rights Standards” (2002) 33 *Colum. Human Rights L. rev.* 473 at 509.

<sup>799</sup> *Bundesverwaltungsgericht*, Judgment of 18 January 1994, in E.Z.A.R. 230 Nr. 3, at 4-5 (as cited in W. Kalin, “Non-State Agents of Persecution and The Ability of the State to Protect,” *supra* note 797 at 417-418. Surprisingly, in *Canada (Attorney General) v. Ward* [1990] 2 F.C. 689-93, a Canadian court seems to support this absurd position taken by the German government as supported by the jurisprudence of its courts. It is surprising because, among the developed countries worldwide, Canada has the highest acceptance rates of refugees. See E. Arboleda & I. Hoy, “The Convention Refugee Definition in the West” *supra* note 795 at 86-87. Currently, among the developed countries, Australia has one of the most hostile asylum regimes. See A. Edwards, “Tampering With Refugee Protection: The Case of Australia” (2003) 15:2 *IJRL* 192 at 193. See further U. Davy, “Refugees From Bosnia and Herzegovina: Are They Genuine?” (1995) 18 *Suffolk Transnat’l L. Rev.* 53 at 100 &101.

<sup>800</sup> United Nations High Commissioner For Refugees, Executive Committee of The High Commissioner’s Programme, Note On International Protection: International Protection in Mass Influx (Submitted by the High Commissioner), at 11, U.N.Doc. A/AC.96/850(1995).

the developed countries of the West spend about \$10 billion annually on their various refugee determination processes and on the asylum seekers within their countries, while the UNHCR spends about \$900 million for the rest of the world's refugees who are in need of international protection.<sup>801</sup> The notion that this "lukewarm response" to "third world" refugee problems is rooted in racism (racism was one of the defining features of colonialism) could be inferred from the huge discrepancies in the amount of money spent on refugees escaping from other regions of the world.<sup>802</sup> In 1999, for example, the international community (read developed countries) spent \$0.11 per each day per refugee in Africa.<sup>803</sup> This should be contrasted with \$1.28, which was spent per refugee per day in the Balkans.<sup>804</sup> Further, in the same year the international community spent \$10 million a week on Kosovar refugees who escaped to Albania and Macedonia.<sup>805</sup> But they could only raise \$1.3 million out of the UNHCR's annual appeal for \$8 million for millions of refugees in West Africa.<sup>806</sup>

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<sup>801</sup> House of Lords, (Report) *Handling EU Asylum Claims* "supra note 798 at 16 &17, foot note 24. See also J. Sygro, "Canada's Refugee Program: Upholding Our Humanitarian Tradition Into the 21<sup>st</sup> Century" an address delivered at the Consultative Committee on Practices and Procedures of the Immigration and Refugee Board, Ottawa, Ontario, May 11, 2004) (on file with the author). The former Minister observed that "...Western developed countries in general are spending at least US\$10 billion annually responding to nearly 400,000 asylum claims while providing only US\$1 billion to respond to the needs of an estimated 11.5 million refugees of concern to UNHCR." Further, the minister states, "since 1988, for example, the amount of money spent on the refugee determination system has consistently gone up while the number of refugees given durable solutions each year in Canada has consistently gone down."

<sup>802</sup> Z. A. Lomo, "The Struggle for Protection of the Rights of Refugees and IDPs in Africa: Making the Existing International Regime Work" (2000) 18 Berkeley J. Int'l. L. 268 at 274. See also, J. Crisp, *A New Asylum Paradigm? Globalization, Migration and the Uncertain Future of International Refugee Regime* (Working Paper No. 100) (Geneva: UNHCR, 2003) at 9.

<sup>803</sup> Z.A. Lomo, *ibid.*

<sup>804</sup> *Ibid.*

<sup>805</sup> *Ibid.*

<sup>806</sup> *Ibid.*



Another key response of developed countries to large scale refugee flows from the “third world” which has the tendency of undermining international refugee law is the “extremely narrow interpretation” of principle of *non-refoulement*.<sup>807</sup> Some of these developed states argue that the right of *non-refoulement* (which is the cornerstone principle of international refugee protection) as espoused in the *1951 Convention* does not impose obligations on states to extend the right to non-Convention refugees fleeing from civil war, generalized conditions of unrest, or violence.<sup>808</sup> These developed countries are holding firm to this position even though there is nothing in the *1951 Convention* that precludes its application to such persons.<sup>809</sup> In fact, the only requirement under the *1951 Convention* is that the reason for persecution that forms the basis for the flight must be related to one of the grounds stipulated in the refugee definition.<sup>810</sup> When

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<sup>807</sup> B.S. Chimni, “Marxism and International Law: A Contemporary Analysis” (1999) *Economic and Political Weekly* 337 at 342.

<sup>808</sup> G.S. Goodwin-Gill, “Asylum: The Law and Politics of Change” (1995) 7:1 *IJRL* 1 at 6. U. Davy, “Refugees From Bosnia and Herzegovina: Are They Genuine?” (1995) 18 *Suffolk Transnat’l L. Rev.* 53 at 104, observing that “the understanding that a person fleeing general violence may qualify for refugeehood is corroborated by the history of the 1951 Refugee Convention. International refugee law was in fact triggered and, for decades, dominated by the problems of genuine war refugees.”

<sup>809</sup> E. Arboleda, & I. Hoy, “The Convention Refugee Definition” *supra* note 795 at 86.

<sup>810</sup> *Ibid.* As well, a restrictive interpretation has been placed on this cardinal principle of international refugee law through the decisions of some courts in the developed countries. Some of these courts have redefined the scope of *non-refoulement* by contending that the principle does not apply to persons intercepted on the high seas or at the border before they enter their intended host states. See *Sale v. Haitian Centers* (1993) 113 S.Ct. 2549. Even some esteemed scholars have lent their support to this redefinition by defending restrictive measures adopted by the developed countries that run a foul of the principle of *non-refoulement*. For instance, Martin has suggested that some asylum seekers from the third world are mere economic migrants looking for better economic prospects in the developed countries. According him: “... an important percentage of those who now move directly are people who would not have chosen to leave home, troublesome as their economic and political prospects might be there, if they thought they were moving to a camp in Honduras or the Sudan rather than to the greater benefits available in most Western countries. The motives of these new asylum seekers, whatever their deeper merit, do not carry the same connotation of special-ness that built and sustains the unique provisions for refugees, at least in the eyes of much of the public in the Western nations.” See D.A. Martin, “Introduction” in D.A. Martin (ed.), *The New Asylum Seekers: Refugee Law in 1980s*, (Dordrecht: Martinus Nijhoff Publishers, 1988) at 10-11.

these developed states allow the stay of such persons in their countries under some form of temporary protection arrangement, they want such action to be seen as a benevolent act of charity on their part, because they are not obligated by the *Convention* to grant such status. These powerful states believe they have done enough in the realm of refugee protection by accepting more refugees than those who come within the scope of the *1951 Convention*.<sup>811</sup> In making these claims, these powerful developed states usually make reference to the number of refugees accepted by them under the umbrella of temporary protection; the temporary refugee mechanism has no place within the *1951 Convention* or any other international refugee regime. However, it is important to note that, under the concept of temporary protection, the refugee receiving state provided temporary protection for asylum seekers, but he/she does not receive a determination about whether he/she qualifies as a *Convention* refugee. In that case, the host state is able to avoid extending to refugees' the rights afforded to them under the *1951 Refugee Convention*.<sup>812</sup> Besides, the receiving state is not required to provide permanent resettlement to the asylum seekers.<sup>813</sup> Consequently, since the asylum seeker is not granted any legally

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<sup>811</sup> G.S. Goodwin-Gill, "Asylum: The Law and Politics of Change" *supra* note 808 at 11.

<sup>812</sup> J. Fitzpatrick, "Flight From Asylum: Trends Toward Temporary "Refuge" and Local Responses to Forced Migrations" (1994-1995) *Va. J. Intl L.* 13 at 18, stating that "the sudden popularity and codification of temporary protection in western Europe is explained almost entirely by a shared impulse to avoid conferring asylum status on victims of events in the former Yugoslavia, even though many qualify for asylum." See also, Commission of the European Communities, Foreword to the Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policies, Com (94) 23 at 7, observing that "one of the most important developments since 1991 has been the introduction of the concept of "temporary protection." This has been developed to avoid an over-burdening of asylum procedures in cases of mass influxes. Responding primarily to developments in former Yugoslavia, many Members States have adopted special legislative provisions on temporary protection."

<sup>813</sup> M.E. MCGuinness, "Legal and Normative Dimensions of the Manipulation of Refugees" in S. J. Stedman & F. Tanner, (eds.) *Refugee Manipulation: War, Politics, and the Abuse of Human Suffering* (Washington, D.C.: Brookings Institution Press, 2003) 135 at 144.

recognizable status, the temporary protection can be terminated at any time, and the asylum seeker may be exposed to the risk of being sent back to the place he/she fled to escape persecution. This is an action that runs counter to the dictates of the *1951 Refugee Convention* and other international and regional instruments that afford protection to refugees and asylum seekers. Thus, it could be argued that the granting of temporary protection status to asylum seekers provides a convenient way for the developed countries to breach the fundamental refugee principle of *non-refoulement*. It is also important to note that these powerful, developed countries often resort to this practice at a time of massive influxes of refugees into their countries. For instance, in 1993, Germany and some other European countries adopted this measure as a response to large-scale influxes of asylum seekers into their countries from the former Yugoslavia.<sup>814</sup>

Furthermore, while countries in the less developed regions of the world (such as Africa and Central America) have adopted regional refugee instruments as a complement to the *1951 Convention* in order to deal effectively with refugee problems not envisaged in that regime, the powerful countries in the developed world have failed to do the same. In this way, they have denied themselves the capacity to deal effectively with today's more complicated refugee problems that are not covered in the *1951 Convention*. This deliberate refusal or neglect on the part of the developed countries to expand the scope of the *1951 Convention* can only be explained on the basis of the fact that these developed

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<sup>814</sup> T. Einarsen, "Mass Flight: The Case For International Asylum" *supra* note 795 at 556. See also, U. Davy, "Refugees From Bosnia and Herzegovina" *supra* note 799 at 63. See further, G. Borchelt, "The Safe Third Country Practice In The European Union: A Misguided Approach To Asylum Law and a Violation of International Human Rights Standards," *supra* note 798 at 491.

countries regard the current refugee crisis in the “third world” as being self-inflicted. Rather than formulating and adopting regional refugee instruments to complement the *1951 Refugee Convention*, these powerful countries have been devising strategies that enable them to circumvent their obligations and commitments to refugees under the 1951 international refugee regime. An instance of this is the current effort by the European Union members to harmonize their asylum systems. The piece of legislation agreed to by the EU Justice and Home Affairs Ministers in Luxembourg on April 29, 2004 will very probably in practice lead to breaches of international refugee law.<sup>815</sup> In the legislation, EU member states agreed to return a rejected asylum seeker to the place where she/he fears persecution before the conclusion of her/his appeal. As well, EU member states agreed to return asylum seekers that entered into any EU state en route a “safe third

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<sup>815</sup> See [www.unhcr.ch.press-releases](http://www.unhcr.ch.press-releases) (visited: 04/30/2004). Similarly, “the rules embodied in the Schengen Agreement and Convention are incompatible with the 1951 United Nations Convention on the Status of Refugees- to which all member states of the Schengen Agreement are parties- for it abandon(s) the principle that is incumbent on each state party to the Geneva Convention to determine autonomously whether an applicant for asylum is a refugee.” See B.S. Chimni, “Global Refugee Problem in the 21<sup>st</sup> Century and the Emerging Security Paradigm: A Disturbing Trend” in A. Anghie ed., *Legal Visions of the 21<sup>st</sup> Century: Essays in Honour of Christopher Weeramantry*, (Hague: Kluwer Law International, 1999) 283 at 294. Long before now, an eminent refugee scholar, J.C. Hathaway, has warned of the threat that the harmonization of asylum systems by members of the European Union poses to the international system of refugee protection. As he puts it, “the pursuit of enhanced integration within Europe poses a threat to both the substance and the processes of the international system of refugee protection. In substantive terms, European Community governments have seized upon the impending termination of immigration controls intra-Community borders to demand enhanced security at the Community’s external frontiers. Fearful that a continuing commitment to refugee protection threatens the viability of a union premised on external closure, states have taken the facile approach of elaborating policy of generalized deterrence: all persons seeking entry from less developed states-whether or not they have a valid claim to refugee status-will be stigmatized as potential threats to European communal well-being, and their prospects for ingress consequently constrained. Under the guise of ‘harmonization’, European governments have effectively renounced their commitment to an inter-regional system of asylum. Equally ominous is the decision-making process from which this common policy of deterrence has emerged, for it breaks with the tradition of elaborating norms of refugee law in an open and politically accountable context.” See J.C. Hathaway, “Harmonizing for Whom? The Devaluation of Refugee Protection in the Era of European Economic Integration” (1993) 26 *Cornell Int’l. L.J.* 719. See further, V. P. Nanda, “International Law and the Refugee Challenge: Mass Expulsion and Internally Displaced People” (1992) 28 *Willamette L. Rev.* 791 at 793. See

country” to the transit country. What is more, the EU states did all this without putting in place proper safeguards to ensure that asylum seekers are not returned to the same place where they feared persecution. This position of the EU, as reflected in the agreement of April 2004 and other previous, related legislation does not represent any known international principle for the protection of refugees, nor does it have precedent anywhere in international refugee law.<sup>816</sup> Rather, it goes against the provisions of Conclusion 15 adopted by the UNHCR Executive Committee, which state that “the intentions of the asylum seekers as regards the country in which he wishes to request asylum should as far as possible be taken into account.” Continuing, Conclusion 15; stipulates that “asylum should not be refused solely on the ground that it could be sought from another state.”<sup>817</sup>

Another approach articulated by the developed countries as a response to large scale refugee flows from the “third world” is best exemplified in the current emphasis placed by them on voluntary repatriation as the most viable solution to the refugee crisis. With the support of their highly esteemed scholars, the developed countries now see refugee status as not being a right to permanent residence, even though there is no such suggestion in the convention as clearly shown by the provisions of article 1C paragraph 5 of the *1951 Convention* (cessation clauses). They contend, that for international refugee law to retain its appeals and relevance, it must do away with its bias regarding exile, and allow host countries the liberty to repatriate refugees when they determine that the

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also, T. Clark & F. Crepeau, “Human Rights In Asylum Sharing and Other Human Transfer Agreements” (2004) 22:2 *Netherlands Quarterly of Human Rights* 217 at 218.

<sup>816</sup> USCR, *At Fortress Europe’s Moat: The “Safe Third Country” Concept* (Washington D.C.: USCR, 1997) at 239.

conditions that led to the flight have ceased to exist. According to Hathaway, an esteemed refugee law scholar, “Once a receiving state determines that protection in the country of origin is viable, it is entitled to withdraw refugee status.”<sup>818</sup> This has led to situations where forced and involuntary repatriations are being justified as voluntary decisions made by refugees themselves. This is a consequence of giving legitimacy to contravention of the cardinal principle of *non-refoulement*.<sup>819</sup> This change of attitude toward refugees and preference for repatriation as the most viable solution to refugee problems (and the relegation of local integration and resettlements to obscurity) came with the massive increase in the numbers of asylum seekers arriving at the borders of developed countries, mainly from the “third world.” The change also accompanied the loss of refugees’ ideological and strategic value following the end of the Cold War and the demise of Soviet Union.<sup>820</sup>

Thus, one of the convenient strategies adopted by some developed countries is to lock out asylum seekers from their countries and avoid legal and humanitarian responsibility towards these refugees and other asylum seekers who would have entered

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<sup>817</sup> UNHCR, *Conclusion 15, Conclusions on the International Protection of Refugees Adopted by UNHCR Executive Committee* (Geneva: UNHCR, 1996) 31 at 32 & 33.

<sup>818</sup> J.C. Hathaway, “The Meaning of Repatriation,” (1997) 9:4 *IJRL* 551.

<sup>819</sup> B.S. Chimni, “The Geopolitics of Refugee Studies” *supra* note 792 at 365.

<sup>820</sup> *Ibid.* at 351. See also, UNHCR, *The State of the World’s Refugees: The Challenge of Protection* (New York: Penguin Books, 1993) at 8-9, observing that, during the Cold War era, “in the receiving countries of the West, anyone arriving from the Soviet Union or one of its allies was automatically granted some form of asylum; no detailed scrutiny of their reasons for leaving was felt necessary. In the Third World too, it was almost impossible to address the causes of flight if the source country could call on the protection of one of the superpowers- and almost all could to some degree.” See further, C.P. Blum, “Heeding the Alarm: A Reaffirmation of the Principles of Refugee Protection” (1995) 8:3 *Journal of Refugee Studies* 295 at 297. See also, P. Alston, “The Downside of Post-Cold War Complexity: Comments on Hathaway”

their countries.<sup>821</sup> However, it is not being suggested that most states are not fulfilling their obligations to protect refugees. The point being made is that, in the face of massive influxes of refugees, some countries (particularly the developed states) are avoiding their responsibility to refugees, and giving threats to national security as one reason. Other reasons advanced are fear of domestic political backlash and fear of the arrival of larger numbers of refugees/ asylum seekers.<sup>822</sup> In forcing asylum seekers back to where they face danger, contrary to the provisions of the *1951 Convention*, these countries often take cover under the mask of international law. The principle of sovereignty is invoked to assert the countries sole prerogative to determine and control those who enter their countries. But what these countries' tend to forget is that "international refugee law has been viewed as a compromise between the exclusive power of the state over entry into and presence in its territory, the very essence of sovereignty, and the competing humanitarian impulse to aid strangers in necessitous circumstances."<sup>823</sup>

These attitudes of the developed countries that contravene the central norms of refugee protection can make sense only on the basis of the following assumptions: First, these developed countries believe that they are merely helping in the solution of a problem that they in no way contributed to creating. Second, as a consequence of the first

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(1995) 8:3 *Journal of Refugee Studies* 302. See further, Report of the United Nations High Commissioner for Refugees, 1992, A/47/12 of 28 August 1992, paras 147 & 148.

<sup>821</sup> T. Einarsen, "Mass Flight: The Case For International Asylum" *supra* note 795 at 554.

<sup>822</sup> M. Lynch, *Forced Back: International Refugee Protection in Theory and Practice* (Washington, D.C.: Refugee International, 2004) at 18. In fact, at the time of the MV Tampa crisis, the Australian Prime Minister stated that, "there are as many as up to five thousand people in Indonesia who are intent on moving from Indonesia to Australia. It is not an issue of a few hundred people." See C. Bostock, "The International Legal Obligations Owed To The Asylum Seekers On the MV Tampa" (2002) 14 *IJRL* 279.

assumption, there should be a limit to their involvement in helping to solve problems that other people brought upon themselves. But in making these assumptions, some of these powerful states fail to consider the fact that under the rubric of growth and development, some agents of globalization (the IMF, World Bank, and MNCs), operating for the most part under their influence and direction, do prescribe and impose policies that contribute significantly to the creation of the conditions from which refugee flows emerge. The case studies of Nigeria and Sudan give credence to this fact. So does the case of Yugoslavia, where the implementation of the IMF/World Bank imposed conditionalities was very directly implicated in the creation of the conditions that led to the implosion of the country and to the creation of refugee flows.<sup>824</sup> The actions of the developed countries toward refugee flows (particularly refugee flows from the “third world”) tend to suggest that they assume that local factors and actors are solely responsible for the creation of the conditions from which refugee flows emanate.<sup>825</sup> The case studies in this

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<sup>823</sup> J. Fitzpatrick, “Flight From Asylum: Trends Toward Temporary ‘Refuge’ and Local Responses To Forced Migrations,” *supra* note 812 at 34 -35.

<sup>824</sup> M. Chossudovsky, “Economic Reforms and Social Unrest in Developing Countries” (1997) *Economic and Political Weekly* (July 19) 1786 at 1788, noting that “the world community should recognize the failure of the dominant neoliberal system and take cognizance of the destructive impact of the economic reforms. While the international donor community cannot be held directly responsible for the outbreak of civil war in Yugoslavia, Somalia and Rwanda, the evidence nonetheless confirms that the macro-economic reforms imposed by international creditors in all three countries, played a crucial role in fostering the collapse of state institutions and creating a situation of social and political divisiveness.” See also, Report of The United Nations High Commissioner For Refugees, 1992, A/47/12 of 28 August 1992, Para 88, noting, that “the root causes of population movements and refugee flow in Africa continued to be both natural and man-made. In the case of refugees, some of the problems, which triggered movements, arose from the legacies of colonialism. The majority, however, were a result of internal conflict, ethnic strife, abuse of human rights...extreme poverty, structural adjustment, heavy debt-servicing...environmental degradation... have combined to undermine the collective self-reliance, confidence and security of African countries.”

<sup>825</sup> B.S. Chimni, “Post-conflict Peace-building and the Return of Refugees: Concepts, Practices, and Institutions” in E. Newman & J. Van Selm (eds.) *Refugees and Forced Displacement: International Security, Human Vulnerability, and the State* (New York: United Nations University Press, 2003) 195 at 213.



dissertation belie that suggestion. Local factors and actors cannot be completely exonerated in the creation of some of the crises in the “third world” from which refugee flows result. However, the unchecked impact of economic globalization as promoted by international economic law (that empowers IFIs and MNCs) is not blameless either. As demonstrated by our discussions in Chapter four, the implementation of IMF/World Bank imposed loan conditionalities in Nigeria has contributed significantly to the exacerbation of ethnic conflicts, war, the production of poverty and unemployment, *coup d’etat* and other intense social, economic, and political crises that generate refugee flows in that country. Similarly, the activities of MNCs operating in Sudan are contributing to the exacerbation of the civil war in that country. As shown in the discussion in Chapter five, millions of people have been uprooted and have fled to safety as refugees as a direct result of the war. In these cases, it can be argued that significant numbers of refugees/asylum seekers are escaping from persecution arising from circumstances shaped by external interests that are in some cases economic or political.<sup>826</sup> Or at least, it is a combination of internal, external and historical factors that have conspired to create instability in the “third world” countries from where large-scale refugee flows result.<sup>827</sup> As a result of economic globalization, there is much foreign involvement (mainly by the developed countries) in defining and shaping the economic policies of “third world” countries in ways that suit the foreign interests, much to the detriment of these “third world” countries. Thus, the developed countries by their response to large scale refugee

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<sup>826</sup> A.R. Zolberg, *et. al.*, *Escape From Violence: Conflict and the Refugee Crisis in the Developing World* (Oxford: Oxford University Press, 1989) at 264.

flows from the “third world” tend to deliberately overlook the negative impact of economic globalization as driven by IFIs and MNCs on the “third world” refugeehood. Instead, the developed countries almost always heap the blame on the “third world” countries, thus neglecting the contributions of external factors. It is difficult to defend the role of economic globalization in the exacerbation of “global economic disparities” and in the production of instability and conflict that are forcing people to flee their homes as refugees.<sup>828</sup> It is beyond question that IFIs, MNCs, and the developed countries that control them are implicated in the creation of this state of affairs, and that this is possible because of the colonial type relationship still existing between the developed countries and the “third world” states in the conduct of international relations and in the formation of current international economic law.

Thus, TWAIL optics offer the best analytical tool for explaining the reasons why the current form of economic globalization, despite its grave impact on “third world” refugeehood and undermining of international refugee law, remains unchecked. This is because TWAIL scholars review the history of international law and show how this law was used both as a medium and vehicle (during the colonial period) for the creation and perpetuation of the domination and exploitation of the “third world” countries and their peoples for the benefit of the developed countries. Furthermore, TWAIL analysis shows that these historical injustices are still being replicated in this contemporary era of economic globalization. One of the resultant consequences of this injustice is the

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<sup>827</sup> P. Mutharika, “Some Thoughts On Rebuilding African State Capability” (1998) 76 Wash. U. L. Q. 281 at 290.

production of large volumes of refugees that originate from the “third world.” Chimni is therefore right when he observed that: “...In the absence of historical critique the institutions which deserve indictment are allowed to play saviours, now touted as our best bet for resolving a crisis for which they have much to answer, be it the market or private decision making.”<sup>829</sup>

### 7.3. SUMMING UP THE ARGUMENTS

Using TWAIL optics, the discourse in this and previous chapters of the dissertation demonstrates how the unchecked nature of economic globalization leads to exacerbation of refugeehood in the “third world”; and in turn leads to undermining of international refugee law. The reason why economic globalization’s negative impact on the “third world” remained unchecked is because of the existence of the colonial type relationship between the “third world” and the developed world in the conduct of international relations and in the formation of international economic law. Economic globalization as promoted by international economic law has whittled down the sovereignty of most “third world” and vest same in IFIs and MNCs. The adverse impact of the activities and policy prescriptions of these bodies (made to advance the interests of the developed countries) are being borne by the “third world.”<sup>830</sup> As a result the capacity of the “third world” countries to effectively discharge their social and welfare functions to their citizens are being minimized. This is possible because “colonial relations (which,

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<sup>828</sup> C. Boswell & J. Crisp, *Poverty, International Migration and Asylum* (Helsinki: UNU-WIDER, 2004) at v.

<sup>829</sup> B.S. Chimni, “The Principle of Permanent Sovereignty Over Natural Resource: Toward A Radical Interpretation,”(1998) 38 *The Indian Journal of International Law* 208 at 215.

almost always work to the advantage of developed countries) may be furthered... through economic rather than purely political control.”<sup>831</sup> Thus, economic globalization has generated and exacerbated inequality, unemployment, poverty, ethnic conflicts and wars in some “third world” countries. And these are known conditions from where massive refugee flows in the “third world” originate. These facts are given credence by the case of Nigeria, Sudan, and other “third world” countries, which produce significant numbers of refugees/asylum seekers who are escaping from persecutions/perils arising from circumstances shaped by external interests. These interests in some cases are economic or political ones.

In a way that is reminiscent of the colonial era, the developed states who are reaping the benefits of economic globalization have refused and are still refusing to take responsibility for the negative consequences (such as large scale refugee generation) which this phenomenon has contributed to and is still contributing in bringing upon the “third world.” Instead, these developed states have adopted measures (such as narrow interpretation of the international refugee law, interception of refugees at their borders, imposition of visa requirements, third safe countries agreements and a host of other *non-entrée* measures) in order to limit the numbers of refugees/asylum seekers that can enter their countries or access their refugee determination systems. These measures have hampered or have the capacity to undermine international refugee law. This response of the developed countries to “third world” refugee crises tend to give the impression that

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<sup>830</sup> A. Anghie, *Time Present and Time Past: Globalization, International Financial Institutions, and The Third World*, (2000) 32:2 *New York University Journal of International Law and Politics* 243 at 269.

the crises originate only from internal factors as a result of the inability of the “third world” to govern themselves.

However, TWAIL optics have shown that all these developments are likely to keep “third world” countries in a state of perpetual subjugation and domination by the developed states. This will occur if the current trend of making the “third world” countries bear the disproportionate burden of the global refugee problem continues.<sup>832</sup> Thus, it can be argued that the current manipulation and redefinition of some important concepts and principles of international refugee law by the developed states are elements of that project of ensuring continuous domination and exploitation of the “third world” through the language of international law. Through these redefinitions and the manipulation of some principles of international refugee law, large numbers of refugees and other asylum seekers from the “third world” will be made to remain in their countries or regions of origin. Since massive flows of refugees can put “great political, economic and social burdens upon the international community as a whole, with dire effects on developing countries, particularly those with limited resources of their own,”<sup>833</sup> this will widen the gap between the developed and the “third world” countries with the consequence that the leverage of the former over the latter will be enhanced. This leverage enables the developed countries to exercise strong control over the “third world” states, thereby helping to sustain the colonial type relationship between the developed

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<sup>831</sup> Ibid. at 277.

<sup>832</sup> B.S.Chimni, “The Geopolitics of Refugee Studies,” *supra* note 792 at 366.

<sup>833</sup> Federal Republic of Germany Initiative For Averting New Massive Flows of Refugees, UN Doc. A/41/324 (13 May 1986), para 4. See L.T. Lee, “Toward A World Without Refugees: The United Nations

countries and the “third world.” As Chimni has observed: “international refugee policy... is principally articulated by the developed countries to contain and manage the global refugee problem in the light of their interests.”<sup>834</sup> However, the main problem lies with the persistence of colonial type relationship between the developed countries and the “third world” in the conduct of international relations and in the formation of international economic law. This relationship is making it difficult to check economic globalization’s negative impact on refugeehood in the “third world” and consequently contributing to the undermining of international refugee law. Suggestions about what might be done to address this anomaly will form the subject of the discourse in the following concluding chapter of this dissertation.

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Group of Governmental Experts on International Co-operation To Avert New Flows of Refugees” at 324 (on file with the author)

<sup>834</sup> B.S. Chimni, *The UNHCR’s Role in Voluntary Repatriation and the Meaning of the Words ‘Facilitation’, ‘Promotion’, and ‘Encouragement’* (Geneva: UNHCR Division of International Protection, 1993).

## Chapter Eight

### **CONCLUSION: TOWARD NEW TYPES OF REFUGEE AND GLOBALIZATION REGIMES**

#### **8.0. INTRODUCTION**

The foregoing chapters have explored in great detail the linkages among economic globalization, the major actors that propel it, its impact on the international legal order, and its negative effects on refugee flows in some “third world” countries, such as Nigeria and Sudan. The dissertation has demonstrated that the continued unchecked nature of economic globalization’s negative impact on refugeehood in the “third world” is in part attributable to the persistence (despite decolonization) of a colonial type undercurrent in the conduct of international relations and in the formation of international economic law.

Economic globalization, operating within its present organizing principle, does not have its costs and benefits evenly distributed. Developed countries define and frame their own rules of participation and engagement in global economic activities, and withhold their cooperation when global economic policies are not in congruence with their self-interest. Conversely, these same developed countries, through some powerful agents of globalization such as the IMF, the World Bank, and MNCs, advise and, where necessary, coerce “third world” countries into formulating, adopting, and implementing policies which all too often produce adverse consequences and contribute to the generation of massive refugee flows.

Thus, in the main, the benefits of globalization are largely cornered by the richer countries, while most “third world” states bear the burdens of this phenomenon. In other

words, the present operating paradigm of economic globalization is enmeshed in double standards and smacks of hypocrisy. Globalization is being achieved under the protective cover of international law (i.e., international economic law). For example, while “third world” countries are cajoled and even compelled into removing all forms of protection for their fledgling industries through liberalization and removal of subsidies, developed states still retain subsidies for some of their industries, especially agriculture, and thereby make products from “third world” countries uncompetitive in international markets.<sup>835</sup> Thus, globalization arguably has become a euphemism for re-colonization of some “third world” countries by depriving them of economic independence; refugee production is one of the attendant consequences.

Perhaps the way to surmount the problems stemming from the impact of economic globalization on the production of refugeehood is to put in place structures that can monitor, regulate and, where necessary, bring to account the forces of globalization, so as to minimize its adverse impacts, especially the production of refugees, on the “third world” countries. This is necessary principally because “globalization is too important to be left unmanaged as it is at present, because it has the capacity to do extraordinary harm as well as good.”<sup>836</sup> As Lee Tavis has written, “the potential for peace in today’s world depends on our ability to introduce social and environmental concerns into the market

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<sup>835</sup> K. Annan, *We The Peoples: The Role of the United Nations in the 21<sup>st</sup> Century* (New York, United Nations, 2000) at 35. See also R. Cook, *The Point of Departure* (London: Simon & Schuster, 2003) at 355.

<sup>836</sup> M. M. Brown, Foreword to Human Development Report 1999 (New York: Oxford University Press, 1999) at V. See also, J. Ferretti, “Innovations in Managing Globalization: Lessons From the North American Experience” (2003) 15 *Georgetown International Environmental Law Review*, 367, observing that “...far from dismissing concerns about globalization, policymakers are beginning to ask themselves how globalization can be better managed.”



place.”<sup>837</sup> It needs to be acknowledged that massive refugee flows can present a very serious threat to international peace.

Happily, some of the ideals and ideas being advocated in the remaining sections of this chapter have already received either explicit or implicit expression in some national, regional, and international instruments for the protection of human rights (and gross violations of human rights have been shown to contribute to massive refugee flows); however, the ideas and ideals still need to be translated into reality. And the global imperative of the 21<sup>st</sup> century demands that this should be done. Thus, steps should be taken to put into effect the visions and aspirations embodied in the *Charter of the UN* and other related and reinforcing international instruments, which advocate the maintenance of international peace and security through collective measures to prevent and remove threats to peace.

Essentially, the *UN Charter* was promulgated to meet the needs of the people, to turn their aspirations into realizable goals, and to secure peace and security for humankind everywhere. But can these lofty objectives be achieved in the midst of poverty, destitution, desperation, gross human rights abuses, wars, ethnic conflicts, and forced migration of peoples, all of which globalization contributes significantly to producing? What can be done to spread the benefits of globalization while containing its adverse impacts, especially with respect to refugee production? In this connection, the central concern will be people, that is, their human rights and well being, as opposed to

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<sup>837</sup> L. A. Tavis, “Corporate Governance and the Global Social Void” (2002) 35 *Vand. J. Transnational L.* 487 at 514.

capital and commercial interests.<sup>838</sup> Against this backdrop, this concluding chapter will be devoted to suggesting ways of managing globalization and its processes, so as to stem the tide of massive refugee flows and curb states' breaches of their obligations to refugees which are espoused in a number of international refugee norms.

## 8.1. GLOBAL IMPACT MONITORING COMMISSION

The *Charter of the UN* designated, through its various organs, the bodies that would have the roles of dealing with situations that constitute, or are likely to constitute, threats to international peace and security.<sup>839</sup> As the case studies examined above show, extreme poverty, egregious violations of human rights, and massive outflows of refugees are matters that threaten international peace and security. Thus, policies, activities, or actions, whether of governments, international organizations, or corporations, which produce or instigate these phenomena, are matters that the international community, through the United Nations, can legally take measures to avert.<sup>840</sup>

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<sup>838</sup> Human Development Report 1999, *supra* note 836, at 98.

<sup>839</sup> Articles 1, 11, 39 & 99 of the Charter. See also M. Stopford, "Locating the Balance: The United Nations and the New World Disorder" (1994) 34 *Virginia Journal of International Law* 685 at 687.

<sup>840</sup> M. Stopford, *Locating the Balance*, *ibid.* at 698. As the UN Secretary General, Kofi Annan, has observed, the United Nations, "when it was created more than half a century ago, in the convulsive aftermath of the world war...reflected humanity's greatest hopes for a just peaceful global community. It still embodies that dream. We remain the only global institution with the legitimacy and scope that derive from universal membership, and a mandate that encompasses development, security and human rights as well as the environment. .. The United Nations plays an equally important, but largely unsung, role in creating and sustaining the global rules without which modern societies simply could not function." K. Annan, *We the Peoples*, *supra* note 835 at 67-68. See further, J. B. Anderson, "Global Governments and Democratization" (2001) 5 *Wash. U. J. Law & Policy* 27 at 33, advocating that the UN should "exercise the voice, conscience, and abilities of the world community." See also, J. Delbruck, "The Role of the United Nations in Dealing With Global Problems" (1997) 4 *Global Legal Studies Journal* 277 at 284. See further, International Commission on Intervention and State Sovereignty, "The Responsibility to Protect" observing that "where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-

In principle, globalization bears noble objectives of stimulating growth, engineering development, and enhancing the general well being of humankind. But the outcome of its operations in the “third world,” through the agencies of the IMF/World Bank and the MNCs, belies this claim. Rather, SAPs and other policies of the IMF/World Bank, as well as the activities of the MNCs, seem to have become manipulating tools or instruments of oppression in the hands of these IFIs, some developed countries that engineered their activities, and their “third world” accomplices. It is imperative that, when these policies and activities produce both the intended and unintended, but often expected or at least envisaged, outcomes such as wars, poverty, ethnic strife, extreme poverty, and massive refugee flows, somebody must be held to account, and something must be done to stem the tide of this unpleasant result. As Baxi eloquently observed in his excellent article, “Voices of Suffering and the Future of Human Rights”:

The new paradigm reverses the notion that universal human rights are designed for the dignity and well being of human beings and insists, instead, upon the promotion and protection of the collective rights of global capital in ways that justify corporate well-being and dignity over that of human persons.<sup>841</sup>

However, it seems that the overall underlying objectives of the *UN Charter* and other reinforcing international instruments, such as the *UDHR*, *International Covenants* and the *1951 Refugee Convention* were largely motivated “by concern for people, not for

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intervention yields to the international responsibility to protect.” (As quoted in L. Axworthy, *Navigating A New World: Canada's Global Future* (Canada: Alfred A. Knopf, 2003) at 192.

<sup>841</sup> U. Baxi, “Voices of Suffering and the Future of Human Rights” (1998) 8 *Transnational Law & Contemporary Problems* 125 at 163-164.

capital.”<sup>842</sup> As a corollary, members of the international community considered as a desideratum “putting human concerns and human rights at the centre of international policy and action. Protecting human security and reducing vulnerability on worldwide scale, as well as narrowing the extremes of inequality between and within countries.”<sup>843</sup>

Thus, the setting up of a body by the United Nations on behalf of the international community to receive complaints; to investigate, monitor, and raise early warnings; and to make recommendations regarding their actual and potential adverse impacts of the forces of globalization in the “third world” (particularly as they pertain to refugee flows) will enable countries in this region to reap the positive aspect of the globalization phenomenon.<sup>844</sup> This kind of initiative falls within the purview of some of the overarching objectives of the *UN Charter*, and other reinforcing international instruments for ensuring respect for life, liberty, justice, equity, and mutual regard. Thus, efforts to relate those to the core objectives of globalization will tremendously benefit humanity, particularly in the realm of stemming the tide of massive refugee flows and states’ avoidance of their obligations towards refugees.<sup>845</sup>

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<sup>842</sup> UNDP, *Human Development Report 1999*, *supra* note 836 at 98.

<sup>843</sup> *Ibid.* Emphasis added.

<sup>844</sup> In making this suggestion, I am not unmindful of the caution of Learned Hand that “liberty lies in the hearts of men and women, when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it.” Hand Learned, *The Spirit of Liberty* (Irving Dillard ed., 1<sup>st</sup> ed. 1952) at 190.

<sup>845</sup> UNDP, *Human Development Report 1999*, *supra* note 836 at 8.

In this regard, therefore, the establishment of a Global Impact Monitoring Commission is being proposed.<sup>846</sup> But, why should a new bureaucracy be created while there are already in existence a number of organizations in the same or related field? This question has no easy answer. However, because globalization produces new challenges (even new crisis) it needs new structures to co-ordinate the response of the international community to this crisis.<sup>847</sup> This body will provide a framework for international co-operation necessary for tackling the new problem. The question could be asked as to why the UNHCR should not be assigned the responsibility of the Global Impact Monitoring Commission being proposed in this thesis? Already the UNHCR is exercising an expanded mandate of providing protections and material assistance to refugees.<sup>848</sup> As well, part of its mandates is to seek and secure durable solutions to the refugee problem, such as repatriation, local integration, and resettlement in a third country.<sup>849</sup> In addition, it is the responsibility of the UNHCR to develop and run refugees camps in any country or region where there are refugee crises. Above all the UNHCR has the sole authority of supervising the application of *1951 Refugee Convention* by the state parties.<sup>850</sup> Given the astronomical increase in the number of refugees and other people requiring UNHCR

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<sup>846</sup> There will be serious political obstacles in the way of the proposed Commission. It will therefore demand strong political will and commitment on the part of members of the international community, especially the developed countries to surmount them.

<sup>847</sup> N. Blokker, "Proliferation of International Organizations: An Exploratory Introduction" in N. M. Blokker, and H.G. Schermers, eds., *Proliferation of International Organization: Legal Issues*, (The Hague: Kluwer Law International, 2001) 1 at 4 &6.

<sup>848</sup> J. Dillman, "Refugees and Asylum in the United States: International Refugee and Asylum Law" (1991) 34 *How. L.J.* 51 at 54. See also, D. McNamara, "The Protection of Refugees and the Responsibility of States: Engagement or Abdication?" (1998) 11 *Harvard Human Rights Journal* 355.

<sup>849</sup> J. Dillman, "Refugees and Asylum in the United States: International Refugee and Asylum Law," *ibid.* at 54.

support worldwide, especially in the “third world,” the discharge of all these enormous responsibilities has already stretched thin both the human and material resources of the UNHCR, thereby seriously impeding its capability and effectiveness in the discharge of its statutory duties. Therefore, in order to retain and strengthen the effectiveness and ability of UNHCR in the discharge of its primary responsibilities, the task of tackling the root causes of refugee flows, which is proposed in this dissertation, should be assigned to another body.

Moreover, the simple fact that there are already in existence some international bodies that could perform similar functions as the proposed Impact Monitoring Commission is not sufficient to prevent its creation.<sup>851</sup> Otherwise, some important international bodies like the Convention against Torture (CAT), the Committee on the Rights of the Child, and the United Nations Committee on the Elimination of Discrimination against Women (CEDAW) would not have been created as most of their responsibilities were already covered under the mandate of Human Rights Committee.<sup>852</sup> Therefore, it can be argued that in some cases the creation of an additional body for a specific purpose helps to “enhance compliance and enforcement” of the provisions of a given international instrument.<sup>853</sup> Thus, the Impact Monitoring Committee will facilitate “quick and flexible response”<sup>854</sup> by the international community to globalization’s

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<sup>850</sup> D. McNamara, *supra* note 848 at 356 & 359.

<sup>851</sup> B. Rutinwa, “How Tense is the Tension Between the Refugee Concept and the IDP Debate?” (1999) Issue 4, 29 at 31.

<sup>852</sup> *Ibid.*

<sup>853</sup> *Ibid.*

<sup>854</sup> N. Blokker, “Proliferation of International Organizations” *supra* note 847 at 8.

negative impact on “third world” refugeehood. Like the Human Rights Committee before it, members of this Commission shall be appointed from people of proven high moral character, expertise, and proven competence in the areas of human rights, globalization, and refugee issues.<sup>855</sup> In addition, people to be appointed to the Commission shall be courageous and capable of exercising independent judgment in their decisions, and shall not be easily manipulated or influenced by states into compromising their positions in any shape or form.<sup>856</sup> In short, they must be people capable of inspiring the respect and confidence of all the parties before them.

The mandate of the Commission should be centred on scrutinizing the activities of MNCs and the policies of the IMF/World Bank in the “third world,” and how these are impacting refugee production. Equally important is the extent to which these activities and policies are responsive to and protective of the human rights and well being of the citizens of “third world” countries, who bear much of the burden of massive refugee generation. In the conduct of its proceedings, the Commission could *suo motu* investigate an issue or cause an investigation to be conducted based on a complaint filed before it; it would then reach its decisions and recommend appropriate remedies for redressing the issue. For instance, the Impact Monitoring Commission could, through its own motion or on the strength of a complaint filed before it by a state, NGO, or individual, determine whether the percentage of a country’s earnings deployed to servicing or repayment of its

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<sup>855</sup> Article 28 *ICCPR*, see also, H. J. Steiner, “Individual Claims in a World Of massive Violations: What Role For The Human Rights Committee” in Philip Alston & James Crawford (eds.) *The Future of UN Human Rights Treaty Monitoring* (Cambridge: Cambridge University Press, 2000) 15 at 21.

<sup>856</sup> H. Steiner, *Individual Claims*, *ibid.*

debts is onerous and excessive.<sup>857</sup> It could make or grant an order imposing a standstill on debt servicing or repayment for a given period of time, especially where the servicing and repayment of such debts seriously hampers the abilities of the country concerned to meet its social obligations to its citizens. Such action would be appropriate especially when repayment threatens the political and social stability of the country in a way that could lead to the production of large scale refugee flows. For instance, one of the factors that contributed or exacerbated the civil war in the former Yugoslavia (which produced large numbers of refugees) was the diversion of resources usually paid to the least developed regions of the country to debt servicing and repayments.

The Impact Monitoring Commission could, after its investigations and thorough evaluation, put all relevant indices into consideration, recommend debt relief in the form of debt forgiveness for a highly indebted poor country. The basis for a country's eligibility for debt forgiveness should be clearly stated. The Commission should also highlight the grave danger posed by continuing repayments of such debts to overall peace and security in that country and to the refugee situation in particular.<sup>858</sup> The diversion of large chunks of resources by some "third world" countries to payments of debts owed to

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<sup>857</sup> Article 33 of the *UN Charter* stipulates that "the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their choice." Section 30 of the *UDHR* states that nothing in it shall be construed to permit a state, group or person to engage in any activity or perform any act that undermines the rights protected by it.

<sup>858</sup> "The Third World War has already started. It is a silent war. Not for that reason, any less sinister. This war is tearing down Brazil, Latin America and practically all the "third world". Instead of soldiers dying, there are children. It is a war over the "third world" debt, one which has as its main weapon interest, a weapon more deadly than atomic bomb, more shattering than laser beam." (Luis Inacio Lula da Silva, Head of Brazil's Workers Party as quoted in K. Danaher (ed.) *50 Years Is Enough: The Case Against The World Bank and The IMF* (Boston: South End Press, 1994) at XIX.



IFIs and the developed countries that support them has been shown to weaken the abilities of these countries to discharge some of their basic responsibilities to their citizens. This weakness heats up the polity and often precipitates crises that produce massive refugee flows. In these cases and other, similar issues, such as whether a particular MNC might be held responsible for operations that negatively impact the citizens of the host community, the Commission can, as an interim measure, refer such matters to the International Court of Justice for adjudication or advisory opinions.<sup>859</sup> Pending the outcome of its reference, the Commission could indicate interim measures and specify steps to be taken in cushioning the impacts of such policies or activities. If the Commission maintains consistent decisions and findings that uphold the laws enunciated in the various constitutions, treaties, and conventions - domestic, regional and international - it could establish a body of precedents that would be binding on IFIs, MNCs, and the states that support these organization.<sup>860</sup> These decisions could be deployed creatively by some local popular forces within the “third world” to put pressure on the agents of globalization to take measures that could have some ameliorating effects, and help to avert massive refugee production.

The Impact Monitoring Commission should produce an annual report, analogous to the human development report being produced by the United Nations Development Programme(UNDP). The report should concentrate on the effects of the policies of the

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<sup>859</sup> It has even been suggested elsewhere that the newly constituted International Criminal Court will gain increased support and acceptance “if corporate actors could be brought before the court on crimes against humanity...” See J. Duke, “Enforcement of Human Rights on Multi-National Corporations: Global Climate, Strategies and Trends for Compliance” (2000) 28 *Denver J.Int’l L.& Policy* 339 at 360.

IMF/World Bank and the activities of the MNCs operating in the “third world,” especially on those organizations’ impacts on refugee flows. The report should point out the extent to which the MNCs are discharging or failing to discharge their responsibilities to respect human rights and contribute to the development of the citizens of their host countries or communities. The probable consequences of any negligent conduct should be explicated in the report. This report could be based on the result of investigations *suo motu* undertaken by the Commission or commissioned by it because of a complaint filed before it by a state, individual, or NGO.

In addition, over the years, the Commission could through these annual reports produce a body of well reasoned and important jurisprudence.<sup>861</sup> In the hand of NGOs, individuals, and even states, this report could be an immense resource in bringing pressure to bear on the main forces behind the policies of the IMF/World Bank and the activities of most MNCs in the world.<sup>862</sup> It has been widely acknowledged that, “only through uncompromising commitment to fundamental human rights and freedom will

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<sup>860</sup> R.D. Kelemen, “The Limits of Judicial Power: Trade-Environment Disputes in the GATT/WTO and the EU” (2001) 34:6 *Comparative Political Studies* 622 at 623.

<sup>861</sup> S. Leckie, “The Committee on Economic, Social and Cultural Rights: Catalyst for Change in a System Needing Reform” in P. Alston & James Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring* (Cambridge: Cambridge University Press, 2000) 129 at 134.

<sup>862</sup> That a well articulated and co-ordinated public pressure works was exemplified in the collapse of negotiations for the promulgation of a multilateral agreement on investment which would have prevented governments from favouring domestic investors and compelled them to remove barriers on MNCs investing in the “third world”. The collapse followed coordinated and sustained pressures from a coalition of NGOs, church groups, trade unions, and other popular social forces. See Human Development Report 1999, *supra* note 836 at 60. For a very incisive view on the use of decisions or findings of international institutions as resources by local popular forces, see O.C. Okafor, “Do International Human Rights Institutions Matter? The African System on Human and Peoples’ Rights, Quasi-Constructivism, and the Possibility of Peacebuilding Within African States” (2004) 8 *International Journal of Human Rights* 1 at 17, stating; “that IHIs like the African system can under certain conditions contribute meaningfully to the domestic social justice and legitimate governance struggles that rage within states, and that they can do so

governments deliver to all peoples the promise of true and sustainable security.”<sup>863</sup> Without this commitment, some disastrous situations might explode and precipitate large-scale refugee production.

This is not to suggest that mere setting up of another international institution will solve all the problems of massive refugee flows and frequent breaches of international refugee norms associated with the impact of economic globalization.<sup>864</sup> The suggestion is, however, that the creative use of the precedents and jurisprudence from this institution by local popular forces at the state level will go a long way in ameliorating the grave impacts of the globalization phenomenon in the generation of refugee flows.

As part of the expected benefits, some of “third world” countries will be less prone to the incidence of wars, gross human rights abuses, ethnic strife, and other generalized conflicts that contribute to undermining international peace and stability.<sup>865</sup> Only then will the conditions that give rise to refugee flows be minimized. The corollary will be fewer refugees and asylum seekers flooding to access the borders of the developed countries, which all too often are the countries of choice for most of these refugees. In effect, this will obviate the need for building fortresses around these countries.

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most effectively when they are deployed in creative ways by local popular forces within the domestic governance institutions of state actors.”

<sup>863</sup> Amnesty International Canada, *At Home And Abroad: Amnesty International's Human Rights Agenda For Canada* (Ottawa: Amnesty International Canada, 2003) at 1.

<sup>864</sup> O.C. Okafor, “Convention Refugeehood, Early Warning Signs, and the Structural Crisis of Legitimate Statehood in Contemporary Nigeria” (2003) 9 *Buff. Human Rights Law Review* 1 at 22.

<sup>865</sup> O.C. Okafor, “Do International Human Rights Institutions Matter? *supra* note 862 at 4, observing that “...after all, should not a good chunk of the peace building effort...be about removing or ameliorating the

As observed in the preamble of UNESCO's constitution, "since wars begin in the minds of men, it is in the minds of men that the defences of peace must be constructed."<sup>866</sup> It is further proposed that, to consolidate and fully appropriate these benefits, matters relating to the adverse impacts of IFIs' policies, and of the activities of MNCs in the "third world" (as they relate to refugee production) could be referred to the International Court of Justice for its advisory legal opinions.

## 8.2. GRANTING THE INTERNATIONAL COURT OF JUSTICE JURISDICTION OVER IFIs AND MNCs

An orientation toward law as a reference point and toward the courts as a provider of impartial hearings remains important...<sup>867</sup>

So, on balance, I have no hesitation in maintaining the position that the proliferation of international tribunals ought to and can be to the benefit of small states, and that in solving a dispute through third-party settlement, a small state is at much less of a disadvantage in relation to a large and powerful state in a court of law or an arbitral tribunal than in any other manner of dispute resolution...<sup>868</sup>

Moreover, not only is there no alternative to proliferation, we need not seek one because proliferation is in the best interest of the international system as a whole, as well as in the best interest of the international judicial system, we must keep pace with the growth of international relations or perish.<sup>869</sup>

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root causes of violence and offering credible alternatives to armed conflicts as a means of seeking political power and relevance."

<sup>866</sup> Constitution of UNESCO, adopted in London 16 November 1945, on line: [http://www.icomos.org/unesco\\_constitution.html](http://www.icomos.org/unesco_constitution.html) (visited: 24/10/2003).

<sup>867</sup> J. Widner, "Courts and Democracy in Post Conflict Transitions: A Social Scientist's Perspective on the African Case" (2001) 95 AJIL 64 at 66.

<sup>868</sup> A. A. Jacovides, "International Tribunals: Do They Really Work For Small States" (2001) 34 N.Y.U. J. Int'l L. & Pol. 253 at 261.

<sup>869</sup> S. Spelliscy, "The Proliferation of International Tribunals: A Chink in the Armor" (2001) 40 Colum. J. Transnat'l L. 143 at 150.

Generally, courts provide a forum for adjudications and resolution of disputes either between individual (s) and the state or other entities, or between states themselves, as well as between individuals themselves, so as to avert the disastrous consequences of resorting to self-help as the only means of pressing claims and settling differences.<sup>870</sup> As Merrills has observed, “it is a fundamental requirement of legal order that there be agreement on the procedures for resolving disputes, and the more complex a society, the more necessary its agreed procedures include some form of third-party adjudication.”<sup>871</sup> On the other hand, Widner has argued that the success of courts in this process depends largely on the substantive law, the persuasiveness and transparency of judges, reasoning, and the underlying situation.

Presently, there seems to be a growing awareness among domestic courts, mostly in the “third world,” “that they and their foreign counterparts as well as supranational courts are often engaged in a common effort to delimit the boundaries of individual rights in the face of apparently overriding public interest.”<sup>872</sup> Apart from the decisions of supranational courts such as the International Court of Justice, the European Court of Justice, and the African Court of Human and Peoples Rights, which serve as useful precedents for domestic courts, these courts could be a reference point for advisory opinions on a given international legal issue being adjudicated in the national courts.<sup>873</sup>

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<sup>870</sup> J. Widner, *supra* note 867. at 70.

<sup>871</sup> J.G. Merrills, “The Justiciability of International Disputes” (1969) 47 Canadian B. Rev. 241 at 260.

<sup>872</sup> A. Slaughter, “The Real New World Order” (1997) 76:5 Foreign Affairs 183 at 187. Emphasis added.

<sup>873</sup> Long ago some members of the UN observed that neither “the organ of the organization nor the individual members were making full use of the services that the Court might render to the promotion of international justice.” See (1947-1948) I.C.J. Y.B. at 15. See also, L. Gross, “Underutilization of the

Possibly, without the benefit of international precedents, some judges in “third world” countries may be intimidated into favouring the governments in their decisions at the expense of the rule of law and of the oppressed litigants or masses. In fact, in some “third world” countries, courts are often apprehensive about retaliatory measures from the executive branches of government in cases when the latter is not favourably disposed to its judgments or other decisions.<sup>874</sup>

However, since the governments of most countries seek legitimacy, they may be favourably disposed to enforcing the decisions of international courts or those of their domestic courts, when those decisions are based on the precedents of international adjudicating bodies. As Shane Spelliscy has noted, “... a large degree of deference ought to be paid to the decisions of the ICJ as the principal judicial body of the United Nations, and also the oldest of the existing tribunals.”<sup>875</sup>

Thus, it is proposed that, in the exercise of its mandate to ensure promotion and protection of human rights and freedom as well to secure and enthrone international peace and security-- the absence of which might give rise to circumstances from which

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International Court of Justice” (1986) 27:2 Harvard Int’l L.J. 571 at 572. See further, M. E. Adjami, “African Courts, International Law, and Comparative Case Law: Chimera Or Emerging Human Rights Jurisprudence?” (2002) 24 Michigan Journal of International Law 103 at 158. Again see, K. Jayasuriya, “Globalization, Law, and The Transformation of Sovereignty: The Emergence of Global Regulatory Governance” (1999) 6 Indiana Journal of Global Legal studies 425 at 442.

<sup>874</sup> Recently, the federal government of Nigeria ordered the withdrawal of police orderlies from most public officers, including judges. It has been suggested in some quarters that the withdrawal was a calculated plan to intimidate these officials including the judges, by exposing them to very high risk. It should be noted that the present administration in Nigeria was at that time still facing challenges to its re-election at the various Election Tribunals in Nigeria. See J. Ushigiale, “Police Orderlies: The Politics of Withdrawal” *ThisDay* Newspaper (Nigeria) September 3<sup>rd</sup> 2003, on line: <http://odili.net/news/source/2003/sep/2/213.html> (visited: 10/19/2003).

<sup>875</sup> S. Spelliscy, “The Proliferation of International Tribunals: A Chink in the Armor,” *supra* note 869 at 158. Emphasis added.

large scale refugee production could result-- the General Assembly, the Security Council, or any specialized agency of the UN may refer to the International Court of Justice, and request its advisory legal opinion<sup>876</sup> on issues such as whether a given activity of a particular MNC violates any of the rights protected under any of the international or regional instruments, or whether a policy of the IMF/World Bank being implemented in a "third world" country is contributing significantly to gross abuses of the human rights of the citizens of that country.<sup>877</sup> An opinion may also be sought about whether such violations, considering their extent, could threaten, or have the potential to threaten, international peace and security in a way that could lead to large scale refugee flows.

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<sup>876</sup> Article 96 of the *UN Charter*, states that "the General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question." Similar power of reference of matters to the ICJ for an advisory legal opinion is as well vested in all UN specialized agencies. And these matters include "all cases which the parties refer to it and all matters specially provided for in the Charter of the UN or treaties and conventions in force." See article 36(1) Statute of the ICJ. See also Article 11 of the *UN Charter*, which mandates the Assembly to discuss any questions relating to maintenance of international peace and security as well as to call the attention of the Security Council to situations likely to endanger international peace and security. Since the 1990s, the International Court of Justice has gained increased respectability as an international adjudicator and, as such, the forum should be utilized not only in providing advisory opinions in matters involving agents of globalization, but also should be used in mediating settlement and negotiations of disputes between these forces of globalization and the "third world" countries and their citizens who are at the receiving end of the adverse impacts of this phenomenon. In September 1993, the World Health Organization requested an advisory opinion from the World Court on the legality of the use of nuclear weapons by states in any armed conflict. See S. W. Tiefenbrun, "The Role of the World Court in Settling International Disputes: A Recent Assessment" (1997) 20 *Loy. L.A. Int'l & Comp. L.J.* 1 at 3 & 16. See also, Speech by Sir Robert Jennings, President of the International Court of Justice, to the UN General Assembly UN Doc. A/48/PV.31, at 2-4, reprinted in (1994) 88 *AJIL* 421 at 423, observing that "the new busyness of the International Court of Justice is at least in part connected with a more realistic appreciation of the place and function of a court of justice in a society governed by the rule of law." Again, it has been suggested elsewhere that the UN Secretary General be given the right to request advisory opinions from the Court "in certain circumstances and perhaps following certain procedures." See G. Guillaume, "The Future of International Judicial Institutions" (1995) 44 *ICLQ* 848 at 853. Moreover, "as states increasingly vest specialized international organizations with the power to create international legal standards, the transfer of the power to interpret and uphold those standards naturally follows." See C. P.R. Romano, "The Proliferation of International Judicial Bodies: The Pieces of the Puzzle" (1999) 31 *International Law and Politics* 709 at 729.

<sup>877</sup> Article 30 of the UDHR, prohibits any State, group or person from engaging in any activity or performing any act aimed at the destruction of any of the rights and freedom enunciated and protected under the instrument.

For instance, the case of the Ogonis, as well as the cases of other oil producing communities in the Niger Delta region of Nigeria, which have, on the one hand, put these communities and, on the other hand, the Shell Corporation and the Nigerian government on a war path-- oftentimes leading to the loss of many lives and the displacement of thousands of people-- could be referred to the International Court of Justice for its advisory legal opinion. The Court could be asked to determine whether Shell's operations contravene the rights of the peoples of these communities, rights that are recognized and protected in several regional and international instruments. It could also be asked whether the highhanded responses of the Nigerian government to the people's protest against near environmental genocide being committed against them are compatible with the government's obligations and responsibilities to its citizens, as they are enumerated in several regional and international instruments to which it is a state party. The local popular forces in Nigeria could make creative use of this decision by instituting action in a local Nigerian court, asking both Shell and the Nigerian government to respect the decision of the International Court of Justice. This has been demonstrated in the case of *Constitutional Rights Project (in respect of Zamani Lekwot and 6 others) v. Nigeria*<sup>878</sup> to be a very effective approach in securing the compliance of some "third world" countries to the decision of an international tribunal.<sup>879</sup> Commenting on the creative use of international institutions by local popular forces in waging their social justice struggle around the world, Professor Okafor argues that:

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<sup>878</sup> Communication No. 87/93, reproduced in (1996) 3 International Human Rights Reports 137.



...IHIs like the African system can under certain conditions contribute meaningfully to the domestic social justice and legitimate governance struggles that rage within states, and that they can do so most effectively when they are deployed in creative ways by local popular forces within the domestic governance institutions of state actors.<sup>880</sup>

Similar reference could be made with respect to the conduct of MNCs operating in Sudan, who are aiding the government of that country in the furtherance of its scorched earth policy, which has led to the death of hundreds of thousands of people and the displacement of many others in Southern Sudan. As well, the issue of whether a particular act of *non-entrée* imposed on a person or persons fleeing from persecution(s) constitutes a breach of the obligation of *non-refoulement*, which has been accepted by a given state under various international or regional instruments, could also be referred to the International Court of Justice for a legal opinion.<sup>881</sup>

In these cases, the Court may apportion responsibilities or blame, as well as recommend appropriate remedies for redressing the breach. Thus, the court “can provide time” for these parties in protracted disputes to reach amicable agreements that would be beneficial not only to the parties in court, but also to all humanity, and, in this way, very

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<sup>879</sup> See *Constitutional Rights Project v. President Ibrahim Babangida & 2 Others*, Suit No. M/102/93(High Court of Lagos) (unreported). Also, see, O.C. Okafor, Do International Human Rights Institutions Matter? *supra* note 862.

<sup>880</sup> O.C. Okafor, *ibid.* at 17.

<sup>881</sup> This reference to the International Court of Justice for an advisory legal opinion could be at the instance of the UNHCR as a specialized agency of the United Nations, pursuant to article 96(2) of the *UN Charter*. Also it could be at the instance of any of the state party to the *1951 Refugee Convention*, pursuant to article 38 of the *1951 Refugee Convention*. On the UN agencies and organs with the capacity to refer matters to International Court of Justice for advisory opinions, see L. Gross, “Underutilization of the International Court of Justice,” *supra* note 873 at 577. See also, D.L Houchins, “Extending the Application of the ICJ’s July 8, 1996, Advisory Opinion to Environment-Altering Weapons in General: What is the Role of International Environmental Law in Warfare?” (2002) 22 *J. Land Resources & Env’tl. L.* 463 at 467-468.

serious disputes between the agents of globalization and the citizens of their host communities in the “third world” could be depoliticized, thereby reinforcing “the rule of law.”<sup>882</sup>

Moreover, the opinions of the International Court of Justice could help in expounding the obligations of MNCs, IFIs, states, and other agents of globalization to individuals or groups with respect to the promotion and protection of human rights enunciated in the *UN Charter*, and in other reinforcing international, regional, and domestic instruments.<sup>883</sup> By interpreting and elaborating on the provisions of these instruments, the opinions of the court will provoke and stimulate debate on these issues, and thereby create a forum for the parties to engage in dialogue.<sup>884</sup> These opinions will also serve as a source of valuable education to all parties (i.e., the bearers and beneficiaries of the obligations prescribed under these instruments).<sup>885</sup> Besides, the reference and subsequent opinions by the Court may encourage and stimulate the search for a solution between the parties through diplomatic means.<sup>886</sup> Thus, “the international

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<sup>882</sup> S. W. Tiefenbrun, “The Role of the World Court in Settling International Disputes: A Recent Assessment,” *supra* note 876 at 25. See also, Speech by Sir Robert Jennings, President of the International Court of Justice, to the UN General Assembly UN Doc. A/48/PV.31, at 2-4 (1993), reprinted in (1994) 88 AJIL 421. Jennings gave an example of a case before the court where both parties requested a delay from the Court to see whether they could reach an amicable settlement. He contended that the intervention of the Court often not only made negotiation possible, “but made it possible for them to succeed.”

<sup>883</sup> H. Steiner, “Individual Claims in the World of Massive Violations: What Role For The Human Rights Committee,” *supra* note 855 at 41.

<sup>884</sup> *Ibid.*

<sup>885</sup> *Ibid.*

<sup>886</sup> L. Gross, “The Underutilization of the International Court of Justice,” *supra* note 873 at 591. As the Court observed in the American Hostages case: “It is for the court, the principal judicial organ of the United Nations, to resolve any legal questions that may be in issue between parties to a dispute; and the resolution of such legal questions by the Court may be an important, and sometimes decisive, factor in promoting the peaceful settlement of the dispute.” *The Hostages Case* (1980) I.C. J. 3 at 22.

community owes both the court and humanity a debt which it cannot afford to overlook nor should it lay itself open to the suspicion of possibly neglecting the judicial function.”<sup>887</sup>

Admittedly, however, one major constraint of the international bodies proposed here is the lack of authority to make binding decisions or the capacity to enforce their remedies or sanctions to an extent that would provide a sufficient deterrent to states, the IMF/World Bank, MNCs, or other bodies whose activities were adjudged as a threat to international peace and security or as in contributing to the production of large scale refugee flows. This borders on the question of enforcement or compliance with the decisions of international institutions. Obviously, there is no international police force to bring about compliance with the decisions of these international institutions.<sup>888</sup> All too often, states, especially developed ones, are selective in the enforcement of the decisions or remedies imposed by some international institutions.<sup>889</sup>

Thus, it would be naïve not to acknowledge the strong criticisms against the efficacy of international institutions, and the questioning of their relevance in the promotion, protection, and enforcement of human rights (including those of refugees). For instance, Shand Watson, in her book *Theory and Reality in the International*

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<sup>887</sup> Lachs, as quoted in L. Gross, “Underutilization of the International Court of Justice,” *ibid.* at 577. Emphasis added.

<sup>888</sup> B. Mulroney, “A New New World Order” *Globe and Mail*, October 21, 2003 at A25, describing the UN as a sheriff without a police force.

<sup>889</sup> M. Mutua, “Looking Past The Human Rights Committee: An Argument for De-Marginalizing Enforcement” (1998) 4 *Buffalo Human Rights Law Review* 211 at 244–245, observing that “...both UN-Charter and treaty based human rights bodies lack the will, authority, and consistency to enforce human rights norms impartially. As such, they leave a gaping lacunae of enforcement, which is often exploited by stronger states to use or abuse in the name of human rights.”

*Protection of Human Rights*,<sup>890</sup> argued forcefully that international institutions are irrelevant in the struggle to enthrone human rights observance. She buttressed her arguments by reference to the Rwandan genocide, when the international community and all its institutions remained indifferent as long as the horror, second only to the genocide in the Second World War, lasted.

Thus, this brings home the pertinent question: whether the utility of the decisions or findings of international institutions rests only on compliance or enforcement. Put differently, does a body lose its relevance because its decisions or findings cannot be enforced? Scholars like Shand Watson and Henry Steiner consider as irrelevant any international institutions without the capacity to secure compliance or enforcement of their decisions. Professor Okafor has referred to this approach as “enforcement centric” and “compliance centric.”<sup>891</sup> According to Shand Watson, “What human rights advocates are seeking is a supranational order of the hierarchical, coercive type, prevalent in domestic systems to act as a check on governmental malfeasance.”<sup>892</sup> In his critique, Henry Steiner declared: “Institutions make rights more effective by threatening or taking actions that may lead a state to comply. Institutions with real power cut to the bone of sovereignty.”<sup>893</sup>

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<sup>890</sup> J.S. Watson, *Theory and Reality in the International Protection of Human Rights* (New York: Transnational Publishers, 1999).

<sup>891</sup> O.C. Okafor, “Do International Human rights Institutions Matter? *supra* note 862 at 10.

<sup>892</sup> J.S. Watson, “Legal Theory, Efficacy and Validity in the Development of Human Rights Norms in International Law” (1979) *University of Illinois Law Forum* 609.

<sup>893</sup> H.J. Steiner, “Individual Claims in a World of Massive Violations: What Role for Human Rights Committees,” *supra* note 855 at 15.

But Okafor, in his article, “Do International Human Rights Institutions matter? The African System on Human and Peoples’ Rights, Quasi-Constructivism, and the Possibility of Peace building within African States,”<sup>894</sup> has argued forcefully (and supported by hard evidence) that the relevance of international institutions goes beyond their ability to secure compliance (voluntary or coerced) to their decisions. He opines that the relevance of international institutions rests largely on the creative and imaginative use of their decisions as resources by what he described as local popular forces. He illustrated this by reference to the use of the decisions of the African Commission on Human and Peoples’ Rights by local popular forces in some African countries to secure remedies that would otherwise not be available to the citizens of these countries under their domestic laws and jurisprudence. (The cases of *The Registered Trustees of the Constitutional Rights Project (in Zamani Lekwot & 6 others) v. Nigeria (Merits)*,<sup>895</sup> and *Attorney General of Botswana v. Unity Dow*<sup>896</sup> were cited to buttress this point.) Professor Craig Scott’s view, in his article, “The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights”<sup>897</sup> amply supports Okafor’s position. He declared:

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<sup>894</sup> O.C. Okafor, “Do International Human Rights Institutions Matter?” *supra* note 862.

<sup>895</sup> Communication No. 87/93, see O.C. Okafor, *ibid.* at 19

<sup>896</sup> C.A. Civil Appeal No. 4/91 (Unreported), see Do International Institutions Matter, *ibid.* at 31. See also, O.C. Okafor & S.C. Agbakwa, “On Legalism, Popular Agency and “Voices of Suffering: The Nigerian National Human Rights Commission in Context” (2002) 24:3 Human Rights Quarterly 662 at 663, contending that international institutions, as important as they are, “cannot in themselves suffice as the primary sites of struggles for human rights.” See further J. Donnelly, “Post-Cold War Reflections on the Study of International Human Rights” in J.H. Rosenthal (ed.), *Ethics and International Affairs: A Reader* (Washington D.C.: Georgetown University Press, 1995) 236 at 252, observing that “the struggle for human rights will be won or lost at the national level.”

<sup>897</sup> (1989) 27:4 Osgoode Hall Law Journal 769.

Some states will directly apply views decided against them even though they are under no direct legal obligation to do so, but for those that do not or that only partially do, progress depends on domestic courts treating the committees views as authoritative or persuasive, as well as on political campaigners invoking the Committees considered opinions.<sup>898</sup>

It is in this sense that the relevance of international bodies proposed in this study is envisaged as contributing to the minimization and moderation of the adverse impacts of globalization in “third world” countries, especially in the area of refugees production.

As the discourse in this chapter has shown, one of the possible approaches, and perhaps the most effective approach to ensuring, preserving, and entrenching international peace and security is for the international community to be proactive and to embrace preventive interventions. As suggested above, this approach will involve active engagement by members of the international community through the UN in the timely diffusing and containing of a trend or situation (such as massive refugee flows) that poses a threat or is likely to pose a threat to international peace and security.

Evidently, the gigantic human catastrophes and suffering (such as massive refugees production) that economic globalization has been shown to help produce are avoidable. But this is a matter no single country can tackle; the vulnerabilities and risks associated with globalization go beyond what national governments can handle.<sup>899</sup> Certainly, action is required in the global arena. Thus, political will is needed to institute and support appropriate mechanisms for monitoring, regulating, sounding early warnings, apportioning blame, and holding accountable the various agents of globalization. As

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<sup>898</sup> *Ibid.* at 777.

Canadian Prime Minister Paul Martin has observed: "...The failure of the world to put in place the structures (especially structures that will help in stemming the tide of refugee production) by which it will govern itself really is substantially reducing the capacity of sovereign states to govern effectively."<sup>900</sup>

Admittedly, the UN and of its bodies can hardly function effectively without the support of states, especially the major world powers, and this support does not demand the ceding of their sovereignty to these international bodies.<sup>901</sup> Consequently, developed countries must show leadership in this regard by giving strong support to these bodies so that they can succeed. Action taken to promote human rights and avert the catastrophic consequences of their abridgment should be seen by the developed countries as a means of protecting their investments worldwide. In the midst of catastrophes (such as large scale refugees production) brought about or partially caused by globalization, no business can thrive.

Clearly, nothing in the foregoing suggests moving the U.S. or any other country, for that matter, into "...the New World Order, where the World Court decides quarrels between nations; the WTO writes the rules for trade and settles all disputes; the IMF and World Bank order wealth transfers from continent to continent and country to country;

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<sup>899</sup> Human Development Report 1999, *supra* note 836 at 30.

<sup>900</sup> As quoted in C. Goar, "Can Globalization Be Tamed?" *Toronto Star*, September 8, 2004 at A22. Emphasis added.

<sup>901</sup> A. Slaughter, "The Real New World Order," *supra* note 872 at 183. See also, D. W. Drezner, *Who Rules?: The Regulation of Globalization* (Chicago: University of Chicago, 2002) ( a paper presented at the 2001 American Political Science Association and 2002 Midwestern Political Science Association Annual Meetings) (on file with the author), observing that "...great powers are the key actors in determining the pattern of global regulatory regimes. If they can agree among themselves, coordination will occur regardless of NGO, IGO, and peripheral state preferences."

the Law of the Sea Treaty tells us what we may and may not do on the high seas and ocean floor, and the United Nations decides where the U.S. military forces may or may not intervene.”<sup>902</sup> This is what former U.S. presidential candidate Pat Buchanan feared the U.S. foreign policy establishment intended to do.

Instead, this is an effort to apply some measure of control over the forces of globalization and to minimize its grave consequences for humanity. The initiative emanates from the various international bodies’ activities and assistance to states in upholding their international obligations, especially in the area of refugee protection. This strategy has been characterized as “new government for new century,”<sup>903</sup> a sort of global governance (not government) where there will be convergence of interests toward arresting and dismantling threats to international peace and security, thereby enthroning “... a new world order, a world where the rule of law, not the law of the jungle, governs the conduct of nations and their businesses.”<sup>904</sup> Perhaps it is only this way that the challenge thrown down by the former president of the World Bank, James Wolfensohn,

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<sup>902</sup> Pat Buchanan, as quoted in A. Slaughter, “The Real World Order” *ibid.* at 193. Emphasis added.

<sup>903</sup> President Bill Clinton as cited in A. Slaughter, *ibid.* at 192. See also, L. Axworthy, *Navigating A New World: Canada’s Global Future*, *supra* note 840 at 5.

<sup>904</sup> Speech by President George Bush in 1991, announcing the commencement of Operation Desert Storm, as quoted in A. Rosenthal, “No Ground Fighting Yet: Call to Arms by Hussein”, *N.Y. Times*, Jan. 17, 1991, at A8. Emphasis added. The institution of global governance structure has become more imperative now because “states today confront a new geography of power”- economic globalization. See S. Sassen, “The State and Economic Globalization: Any Implications for International Law?” (2000) 1 *Chicago Journal of International Law* 109. See also, A. C. O’Neil, “What Globalization Means for Ecotourism: Managing Globalization’s Impacts on Ecotourism in Developing Countries” (2002) 9 *Indiana Journal of Global Legal studies* 501 at 525. See further, L. Axworthy, *Navigating a New World: Canada’s Global Future*, *supra* note 840 at 5.



that is to make “globalization an instrument of opportunity and inclusion-not fear and insecurity,”<sup>905</sup> can be realized.

Building fortresses and embarking on other reactionary measures to contain refugee flows, which are some of the negative impacts of globalization, cannot be very helpful strategies. Globalization is too sophisticated and complex and its negative effects too huge to admit of such a simplistic and easy approach to addressing its challenges. This approach at best is tantamount to treating a symptom rather than the disease. The fortress approach all too often contravenes obligations that most countries have voluntarily accepted under various regional and international instruments. If these suggested institutions are made to function effectively in monitoring, regulating, raising early warnings, apportioning blame, and holding to account the various agents of globalization, then one can confidently talk about a better future for refugees and refugee law; otherwise, globalization will “constitute a dance of death” for both international refugee law and refugeehood.<sup>906</sup> This development would reinforce the belief in some quarters that international refugee law is “the unwanted child of states, which have been unwilling to provide the resources or to make the commitment to international human rights necessary for proper eligibility procedures to be developed.”<sup>907</sup> As Fitzpatrick has rightly observed, the challenge before members of the international community should be

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<sup>905</sup> J. D. Wolfensohn, “Building an Equitable World” Address to the IMF and World bank Boards of Governors on September 26,2000, on line: <http://www.worldbank.org/html/extdr/am00/jdwsp/jdwsp-en.pdf> see also, A. A. Jacovides, “Symposium Issue: The Effects of Globalization on Small States: International Tribunals: Do They Really Work For Small States?” *supra* note 34 at 253

<sup>906</sup> U. Baxi, “Voices of Suffering and the Future of Human Rights,” *supra* note 841 at 149.

<sup>907</sup> R. Byrne & A. Shacknove, “The Safe Third Country Notion in European Asylum Law” (1996) 9 Harv. Hum. Rts. J. 185 at 187.

how to enhance international refugee law as an instrument for the protection of refugees rather than as a cover for developed countries to retreat from their international obligations.<sup>908</sup>

This is an unthinkable prospect for humanity. Should the members of the international community accept the challenges and tasks of effecting changes in the ways globalization is being currently organized in order to benefit humanity, then the foregoing suggestions would represent some of the approaches that can be taken. What is obvious is that humankind, represented by the international community, can no longer remain passive, detached, and disinterested while globalization unleashes “unspeakably horrific conditions”<sup>909</sup> on humanity in terms of globalization’s contributions to massive refugee production and its aid to states’ breaches of their international obligations to refugees. The agents of globalization have given their own definitions of how things should be done, irrespective of their implications for humanity. Do we accept those definitions as inviolable? Perhaps it will be best to conclude by calling on the advice of Karl Marx in *Theses on Feuerbach*, where he observed that “the philosophers have only interpreted the world. The thing, however, is to change it.”<sup>910</sup> This change is imperative now more than ever before, as General Romeo Dallaire has admonished:

We have lived through centuries of enlightenment, reason, revolution, industrialization, and globalization. No matter how idealistic the aim sounds, this new century must become the century of humanity, when we as human

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<sup>908</sup> J. Fitzpatrick, “Flight From Asylum: Trends Toward Temporary ‘Refuge’ and Local Responses to Forced Migrations” (1994-1995) 35 Va. J. Int’l L. 13 at 70.

<sup>909</sup> D. A. Ihenacho, “Obasanjo, Labour and Voodoo Economics” *Nigeriaworld* October 13, 2003, on line: <http://nigeriaworld.com/columnist/ihenacho/101303.html> (visited: 10/14/2003).

<sup>910</sup> K. Marx, *Theses on Feuerbach* as quoted in S. Lynd, *Living Inside Our Hope* (Ithaca/ London: Cornell University Press, 1997) at 2.

beings rise above race, creed, colour, religion and national self-interest and put the good of humanity above the good of our own tribe. For the sake of the children and our future.<sup>911</sup>

### 8.3.CONCLUSION

...A correct appreciation of the plight of third world states generally is dependent upon an understanding of the historical presumptions inherent in international law and also upon an appreciation of the challenges of the transformations of the state through disintegration into subnational and privatised entities which occurs simultaneously with an integration of macro state functions into transnational entities.<sup>912</sup>

...Will lead to an “enlightened self-interest” that recognizes, for example, that refugees in the first world are the consequences of poverty and other adverse circumstances in the third world...<sup>913</sup>

As the discourse in the foregoing chapters of this dissertation has shown, the imperial invasion of the “third world” by the developed countries enjoyed the approval of international law which gave legitimacy to the colonial domination, subjugation, and exploitation of “third world” territories, peoples, and resources during colonialism. This justification was predicated on that ground that the “third world” countries, which were seen as uncivilized and incapable of governing and managing their affairs, could not

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<sup>911</sup> R. Dallaire, *Shake Hands with the Devil: The Failure of Humanity in Rwanda* (Canada: Random House, 2003) at 522.

<sup>912</sup> E. A. Engle, “The Failure of the Nation State and the New International Economic Order: Multiple Converging Crises Present an Opportunity to Elaborate A New Jus Gentium” (2003) 16 St. Thomas L. Rev. 187 at 205.

<sup>913</sup> *Ibid.* at 204. Emphasis added.

exercise the sovereign powers of states, which were then the exclusive reserve of the developed states.

However, this imperial invasion of the “third world” was driven by the economic exploitation of the “third world” for the benefit of the developed countries. As a result, corporations came to play an enormous role in the colonial exploitation and domination of the “third world” countries.

Unfortunately, the post-colonial era, which was brought about by the achievement of political independence by almost all “third world” states, does not seem to have made any significant changes in this state of affairs. This is because, even in this contemporary period of economic globalization, the sovereignty of “third world” countries is still being eroded by the MNCs, IFIs and the developed countries that support and control them, particularly in the arena of economic decision making and policies. The dissertation has shown this through the use of TWAIL optics. As was the case during the colonial period, the intrusion on and usurpation of the economic decision making powers of the “third world” by the agents of globalization operating under the shadow of international law (i.e., international economic law) are advancing the interests of the developed countries at the expense of the “third world.” As demonstrated in the dissertation, some of the economic policies and activities of these agents of globalization contribute to and encourage the incidence of gross human rights abuses, undemocratic changes of government through *coups d’etat*, unemployment, and ethnic conflicts and wars in “third world” countries. All these are circumstances known to have contributed to and still contributing to significant refugee flows in the “third world”. One of the consequences of

these activities is a large outflow of refugees from “third world” countries to the developed states.

As shown in the dissertation, these developed states, constrained often by the pressure of their local populations and limited resources, have often resorted to framing, adopting, and implementing policies and other measures that are designed to limit and restrict the number of refugees that can access their countries. Prominent among these measures are: interdiction on the high seas, visa imposition, and the third safe country concept.

This study has shown that the adoption and implementation of most of these measures were prevalent and more pronounced during the periods of massive influxes of refugees/asylum seekers into some of these developed countries. These influxes arose from wars, ethnic conflicts, extreme poverty, and egregious human rights abuses. Through these measures, the developed countries ran afoul of their international obligations (especially the obligation of *non-refoulement*) to refugees, which are espoused in a number of international instruments. These developed states tend to shift the blame for their unwillingness to support the international refugee system they were instrumental in creating to the poor policy choices, corruption, and incompetence on the part of the “third world” countries and their leaders.

It would appear that the developed countries tend to overlook the contributions being made by some external forces (such as IFIs and MNCs) operating under the cover of international law to exacerbating ethnic conflicts, wars, unemployment, *coups d'etat*, and other social upheavals that produce massive refugee flows. The dissertation

illustrated this statement with the cases of Nigeria, Sudan, and other “third world” countries where large-scale refugee flows have resulted from circumstances shaped by the activities of some of these agents of globalization.

Thus, the securing and enhancing of states’ respect for their international obligations to refugees (especially the principle of *non-refoulement*) under the relevant regional and international instrument, will require addressing the root causes of refugee production,<sup>914</sup> including globalization. Ignoring globalization and refusing to participate in its processes is not one of the viable options open to “third world” countries currently impoverished by the phenomenon. Hence, there is a need to give serious attention to the proposals made in this dissertation. Attention is needed to the contributions being made by economic globalization (operating under the shadow of international law) to the generation of large-scale refugee flows in the “third world” and to the attendant threats that this phenomenon poses to the international refugee system and refugee protection. Seriously addressing the root causes of refugee flows in the “third world” would probably constitute one of the better new approaches to tackling the present day, never ending worldwide refugee crises.

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<sup>914</sup> S. Ogata, *The Right of Asylum Must Be Strongly Upheld* (Berlin: UNHCR, 1996) at 12, advising that “rather than concentrating on reacting to the tragic consequences of conflicts and human rights violations, the international community must address their root causes.” See also, A. Suhrke, “Burden-Sharing During Refugee Emergencies: The Logic of Collective Versus National Action” (1998) 11: 4 *Journal of Refugee Studies* 396 at 402. Again, “today’s human rights abuses are tomorrow’s refugee movements. While most of the major population displacements of the 1990s have taken place in the context of armed conflicts, the immediate causes of flight are almost invariably to be found in actual or anticipated human rights violations” (UNHCR 1995) as quoted in C. Apodaca, “Human Rights: Precursor to Refugee Flight?” (1998) 11:1 *Journal of Refugee Studies* 80.

#### 8.4. CONTRIBUTIONS OF THE DISSERTATION TO EXTANT SCHOLARSHIP

This dissertation has demonstrated how globalization impacts lead to the exacerbation of refugeehood in the “third world,” which in turn undermines international refugee law. It exposes the reason why globalization’s negative impact on “third world” refugeehood continues unchecked as being in part because of the persistence of the colonial type undercurrent in the conduct of international relations and in the formation of international economic law.

Further, this dissertation has demonstrated (as no other work to my knowledge has done) the role of economic globalization --operating through the agency of the IMF/World Bank and the developed countries that control them-- in undermining the fundamental refugee principle of *non-refoulement*. Thus, this dissertation has shown through hard evidence the nexus between the grave impact of economic globalization and the increase in the developed states’ breach of their obligation of *non-refoulement* under the various refugee regimes. The analysis in the dissertation, especially in Chapter six, has made it obvious that, when there have been massive outflows of refugees from “third world” countries, to which the forces of globalization have contributed, developed countries usually increased the fortification of their borders in order to prevent asylum seekers from having access to their asylum systems. States have accomplished this through the adoption and implementation of various *non-entrée* measures during periods of massive refugee flows into their countries. This is the case, notwithstanding their roles in creating the situations that generated these massive refugee flows. These developed countries have taken these measures without regard for their obligations

toward refugees, as clearly articulated and espoused under the various international refugee regimes.

In the case of Nigeria, the dissertation has helped in exposing, in a way that no other work to my knowledge has done, the “gathering momentum” that has arisen from the harmful effects of globalization. This momentum might lead to implosion of the country and to the generation of unprecedented massive refugee flows. The analysis in the dissertation makes it clear that scant attention is being paid to the harmful impact of economic globalization as one of the root causes of refugee production in Nigeria. This is particularly troubling, given the eminent position of the country as a regional power that has contributed immensely to providing peace, security, and stability to the West African region in particular and to Africa in general.<sup>915</sup>

It is possibly true, as has been argued by some eminent scholars, that the growing unwillingness on the part of many developed countries to open their borders and admit refugees into their countries has occurred because of the failure of the present international refugee law to “reconcile refugee need for protection to national interests.”<sup>916</sup> However, the most pertinent considerations are the failure of the international refugee system and the unwillingness of the international community to

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<sup>915</sup> For a very incisive analysis of the pre-eminent role of Nigeria as a regional power, see I. Mgbeoji, *Collective Insecurity: The Liberian Crisis, Unilateralism, and Global Order* (Vancouver: UBC Press, 2003) at 21-26.

<sup>916</sup> J.C. Hathaway, “The Need for A New Vision of International Refugee Law” in Canadian Council on International Law (ed.), *Globalism and Regionalism: Options for the 21<sup>st</sup> Century* (Ottawa: Canadian Council of International Law, 1995) 177 at 180-181. See also, A. Nadig, “Forced Migration and Global Processes: Report of the Eighth Conference of the International Association for the Study of Forced Migration, Chiang Mai, Thailand, 5-9 January 2003” (2003) 16:4 *Journal of Refugee Studies* 361 at 372, noting that “states (often industrialized states) don’t always live up to their international obligations...”



provide effective mechanisms that could be deployed in addressing problems and containing situations likely to give rise to massive refugee flows. The current refugee law is relevant only after the fact, when refugee flows have already occurred. The issue of tackling the root causes of refugee flows is never given any place in the law. Thus, the dissertation made some suggestions as to what might be done to address this anomaly.

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