

CAUGHT BETWEEN TWO PERSECUTIONS:

THE CHALLENGES FACING AFRICAN REFUGEES IN AFRICA

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Abstract: This paper highlights the challenges experienced by African refugees in their asylum country in Africa. The 1951 UN Convention on Refugees and its 1967 Protocol, as well as the 1969 OAU Refugee Convention define a refugee as a person who is outside his/her country owing to fear of persecution on account of his/her race, religion, nationality, political opinion, or whose life, physical safety or freedom is threatened by political or regional instability.

The chronic political instability and interminable civil wars characterizing African countries since the mid 1950s causes heinous damage to both human beings and property alike. The vicious cycle of insecurity leads people to cross borders in order to escape persecution. Sadly, in running away from persecution in their home countries, African refugees sometimes encounter persecution along the way as well as in their asylum countries because their hosts are often facing similar socio-political circumstances. Thus, a dilemma is created for the refugees: the choice between facing persecution back home, or facing persecution abroad.

Keywords: Asylum-seeker, refugee, persecution, xenophobia

I. INTRODUCTION

The storm of political instability and interminable civil wars characterizing African countries since the mid 1950s has caused and is still causing serious damage to both human beings and property. This is the main reason that people are crossing borders in search for a safer haven.

Millions of people are crossing borders to escape “persecution” and other human rights violations inflicted upon them in their home countries. The recent updates of the UNHCR reveal that the African continent “generates” approximately 25% of the world’s refugees (See Table 1). [1]

In response to the increasing number of refugees in the continent and the need for states to find ways of

alleviating their suffering and providing them a better life, [2] most African countries ratified the 1951 United Nations Refugee Convention and its 1967 Protocol, including the 1969 Organization of African Unity Convention Governing the specific Aspect of Refugee Problems in Africa. These international instruments, which create *erga omnes* obligations, compel states to provide maximum protection and basic human rights to those who flee from their home countries seeking asylum on account of persecution relating to their race, religion, nationality, political opinion or membership in a particular social group. [3]

Despite the States’ aspirations to eliminate the refugees’ suffering, refugees still face several challenges. African refugees who are fleeing persecution from their home country sometimes encounter persecution along the way, as well as in their country of asylum. For instance, the intentional killing of Rwandan Hutu refugees during the First Congolese War in 1996, [4] the massacre of the Congolese Banyamulenge refugees inside the Gatumba refugee camp in Burundi in 2004, [5] the attack against Sudanese refugees in a refugee camp in Chad in 2006, [6] and the wave of xenophobic attacks in South Africa against non-nationals, most of them refugees from African countries. [7]

Yet, some of African countries hosting refugees are also experiencing socio-political instability or civil wars, such as countries that are members of the Great Lakes Region.

From this perspective, the questions posed are: should refugees go back home, or should they stay in the host country and face similar persecution? Can the situation of national emergency or socio-political instabilities derogate the host State from its international obligations of protecting refugees within its territory?

This paper will elucidate challenges that African refugees face in their asylum country in Africa.

Briefly, this paper is structured as follows: The conceptual understanding of the term “refugee” under international and domestic laws (Section 1), the overview of the notion of “persecution” (section 2), the obligations of States under Conventions on Refugees (section 3), the major causes of refugees in Africa (Section 4), and the problems facing African refugees in Africa (Section 5).

II. SECTION 1: CONCEPTUAL UNDERSTANDING OF THE TERM « REFUGEE » UNDER INTERNATIONAL AND DOMESTIC LAWS

1. Concept of refugees under the international law

Under Article 1 of the United Nations Convention relation to the Status of Refugee of 1951, the term “refugee” is defined as:

any person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

A similar definition is endorsed by other instruments such as the Organization of African Unity Convention Governing the specific Aspect of refugee Problems in Africa of 1969 (hereafter referred as the OAU Refugees Convention), [8] and the Cartagena Declaration on Refugees of 1984. [9]

It should be noted, however, that the UN Convention on Refugees was adopted following the Second World War so that its scope was geographically and temporally limited. [10] Initially, the Convention’s scope was limited to protecting European refugees, and the issue of refugee itself was perceived to be a temporary one. [11]

Considering the storm of struggle for independence in Africa and around world in the 1950s, the Convention exposed its limitations because it was impossible to insert new categories of refugees under the coverage of the Convention. [12] Accordingly, State members of the UN adopted a Protocol in 1967 which extended the Convention’s scope of coverage beyond the European continent, but without limiting the date. The Convention and its Protocol are the primary international standards established for the protection of refugees.

Unlike the UN Refugee Convention, the OAU Convention on Refugees expands the definition of the term refugee, which will cover:

every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality. [13]

The reason for this extension was motivated by the need to protect freedom fighters and people fleeing from areas under colonial domination, such as the regime of Apartheid. [14]

Similarly, the Latin American Cartagena Declaration on Refugees further broadened the scope of refugee definition to include those fleeing massive human rights violations, internal conflicts and foreign aggression. [15]

2. Concept of refugee under domestic legislations

International standards on refugees compel contracting States to adopt locally regulations and laws to ensure the protection of refugees. In the context of Africa, a number of African States passed legislation that exclusively relates to refugees and the process of asylum, such as Botswana (Refugees Recognition and Control Act of 1967), Tanzania (Refugees Act of 1998), South Africa (Refugees Act 130 of 1998), DRC (*Loi 021/2002 portant statut des réfugiés*), and Burkina Faso (*Loi 2008-042 portant statut des réfugiés*).

One observation made is that most of African countries have transposed into their domestic legislations the definition of the “refugee” as stipulated by the UN Convention, as well by of the OAU Convention. For instance, the South African Refugees Act has duplicated the broadened definition of the OAU Convention; [16] but the benefit of the stipulation of article 1(2) of the OUA Convention, which relates to the protection of freedom fighters and people fleeing from areas under colonial domination, is however limited to refugees from African countries even if the provision of section 3(a) of the Act begins by using the term of “person”. [17] This means that a person fleeing colonial oppression from a non-African country would not be covered under the South African Refugees Act.

Nevertheless, international and national instruments on the protection of refugees have developed the political-based approach which limits the coverage of protection to those who run away from their countries of origin because of the fear of being persecuted for

political reasons. In other words, persons who leave their countries of origin for economic reasons, such as taking up employment or study, should not be qualified as refugees; rather they should be considered as “economic migrants.”

It is possible, however, that persecution may have prevented a person from holding a job or getting an education in his/her home country; under such circumstances, that person should not automatically be prevented from receiving refugee status because work and education are essential for livelihood and dignity. [18] As the Court ruled, in *Chan v MIEA case*,

The denial of access to employment, to the professions and to education or the imposition of restrictions on the freedoms traditionally guaranteed in a democratic society such as freedom of speech, assembly, worship or movement may constitute persecution if imposed for a Convention reason. [19]

In light of this Court’s ruling, the lack of getting an education or inability to take up employment is directly linked to their persecution, whereas the unemployment of an economic migrant is linked to an external factor other than persecution, such as scarce resources in his/her country of origin.

From this perspective, the fear of persecution seems to be a condition *sine qua non*, which entitles someone to be qualified as a refugee. [20] So, what does persecution really mean?

III. SECTION 2 : OVERVIEW OF THE NOTION OF PERSECUTION

There is no universally accepted definition of “persecution” under international law. The term “persecution” itself was defined neither by the 1951 UN Convention and its 1967 Protocol nor by the Regional instruments on Refugees such as the 1969 AOU Convention and the 1984 Cartagena Declaration. During the *travaux préparatoires* of the UN Convention, the United Kingdom Delegates had formally introduced for the first time the expression “persecution” in the draft definition of their proposition, but they did not define this term with exactness. [21]

The Oxford English Dictionary described persecution as an action of persecuting or pursuing with enmity and malignity. [22] It is the infliction of death, torture, or penalties for adherence to a religious belief or an opinion as such, with a view to the repression or extirpation. [23]

According to Ebenezer Q. Blavo, persecution is a serious threat to life directed against an individual personally or against the group to which he/she belongs. [24] Persecution can also be understood as a severe violation of basic human rights that threatens a person’s survival. [25]

Professor Hathaway noted that persecution may be defined “as the sustained or systematic violation of basic human rights, demonstrative of a failure of state protection.” [26]

The question posed is as to how to determine whether a certain act is persecutory. The persecutory nature of an act may be determined by testing if the activity in question is a violation of human rights [27] in regards with the Universal Declaration of Human Rights, International Covenant on Civil and Political (ICCPR), and other human rights instruments.

However, not every threat of hurt to a person rights on the ground of his/her race, religion, nationality, membership of a particular social group or political opinion constitutes a “persecution”. [28] Accordingly, in *Chan v MIEA Case*, [29] the Court also ruled that,

The notion of persecution involves selective harassment. It is not necessary; however, that the conduct complained of should be directed against a person as an individual. She may be ‘persecuted’ because she is a member of a group which is the subject of systematic harassment: Nor is it a necessary element of ‘persecution’ that the individual should be the victim of a series of acts. A single act of oppression may suffice. As long as the person is threatened with harm and that harm can be seen as part of a course of systematic conduct directed for a Convention reason against that person as an individual or as a member of a class, she is ‘being persecuted’ for the purposes of the Convention.

Furthermore, the threat against a person’s rights does not need to be the result of any policy of the government of the person’s country of origin. [30] The failure of the government to take, for instance, all necessary and reasonable measures within its power to prevent violation of fundamental human rights against its population or to offer protection to those persons may be enough to amount persecution. Consequently, persecution caused by rebel groups under the zone occupied and/or administrated by them may also be considered as caused by the government. [31]

Good reasons should, however, be given for establishing that the government is somewhat involved or connected to the persecution that the person is suffering or is afraid of. [32] A person, who flees his/her country of origin because he/she is escaping a direct or indirect threat from another person unconnected with the government, should not be eligible for refugee status.

Persecution should be differentiated from punishment for a common law offence. [33] A person, who is escaping punishment for a crime he/she has committed, must not be qualified for refugee status.

IV. OBLIGATIONS OF STATES UNDER REFUGEES CONVENTIONS

A refugee person is different from an “internally displaced person” [34] to the extent that he/she is outside the boundaries of and no longer under the protection of his/her country of origin; [35] instead, he/she is under the protection and assistance of the host State and the international community. [36] From this viewpoint, the international law imposes three kinds of obligations to the host State, such as: the obligation to protect refugees against persecution (1), obligation to grant basic human rights (2), and obligation to co-operate with the monitoring body (3).

1. The State’s obligation to protect refugees against persecution

The obligation to protect refugees against persecution implies that the host State has to grant refugees protection against (the fear of) persecution that they have not obtained from the government in their home country. Therefore, the host country should refrain from returning refugees to places where they are coming from (which is the principle of “*non-refoulement*”) and applying discriminatory methods (which is the principle of non-discrimination).

A. Principles of “*non-refoulement*”

Article 33 of the UN Convention on Refugees prohibits expulsion or “*refoulement*” of refugees by stipulating:

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

A similar prohibition of expulsion is also reaffirmed by of the OAU Convention [37] and the Cartagena Declaration on Refugees. [38]

The principle *Non-refoulement* is not only a cornerstone of the international protection of refugees, [39] but it is also the state's most important obligation because it prevents the return of refugees to a situation of serious risk [40] in a country where they are likely to face persecution or torture. [41] As G.S. Goodwin-Gill illustrated, the government of State A is prevented from returning refugees from State B to State B where there is a legitimate concern that they could be in risk should they be returned. [42] The principle of *non-refoulement* also concerns “asylum-seekers” who are persons that seek recognition as refugees, but their claims of fear of persecution have not yet been examined by officials. Asylum-seekers should not be expelled while waiting a decision on their asylum’s application. [43]

In *Soering v. United Kingdom case*, [44] the European Court of Human Rights (ECHR) held that the expulsion of a person to a country “where it is certain or where there is a serious risk that the person will be subjected to torture or inhuman treatment the deportation or extradition would, in itself, under such circumstances constitute inhuman treatment.”

The ECHR also reaffirmed, in *N. v. Finland case*, [45] the prohibition of expelling an asylum-seeker to a country where he/she can face persecution. The Court ruled that:

The decision of a Contracting State to expel a person may give rise to an issue under Article 3 of the Convention, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the receiving country. In such circumstances Article 3 implies the obligation not to expel the person in question to that country.

Under the international law, the principle of *non-refoulement* is recognised a part of “*jus cogens*” of customary international law that is a norm from which no derogation is ever permitted. The UN Convention on Refugees, therefore, prevents contracting States from making reservations to article 33 relating to prohibition of expulsion. [46] The principle of *non-refoulement* is an “*erga omnes*” obligation, which binds all States whether they are or not party to the 1951 UN Convention. [47]

Non-refoulement is not, however, an absolute principle because there are two grounds on which a refugee can exceptionally be expelled. Firstly, in a case where a refugee is a threat to the national security of the host country and secondly, when

his/her proven criminal record constitutes a danger to the host country's community. [48]

As the article 33(2) of the UN Convention on Refugees stipulates:

Non-refoulement may not 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 particularly serious crime, constitutes a danger to the community of that country.

The reason for limiting the scope of the article 33 comes from the fact that, during the *travaux préparatoires* of the UN Convention on Refugees, the delegates of States deemed necessary to afford a safeguard to the receiving States in the way that they could rid themselves of common criminals or persons who had been convicted of particularly serious crimes in other countries. [49]

B. Principle of non-discrimination

Inspired from the provisions of the UDHR [50] and ICCPR, [51] the UN Convention on Refugees and its 1967 Protocol compel States not to apply discriminatory methods over refugees. Article 3 of the UN Convention on Refugees states that, "the contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin."

The OAU Convention on Refugees also reaffirms the State's obligation of non-discrimination against refugees. [52] Unlike the UN Convention, the OAU Convention extends the obligation of non-discrimination to membership of a particular social group or political opinions of the refugee. [53]

The principle of non-discrimination implies that the host country, when conferring refugee status, must refrain from making a preference between applicants, i.e. by taking into account subjective considerations as to their race, colour, sex, language, religion, political opinion, and nationality. Instead, the host country should objectively examine whether applicants' fear of persecution is well founded. Also, the principle of non-discrimination prohibits the host State from treating refugees as a "second class" of citizens compared to its national populace. Refugees, like other nationals of the host State, must enjoy the fundamental human rights given to all human beings.

2. The State's obligation to grant basic human rights to refugees

Beyond the obligation of providing protection against persecution, States should also provide to refugees basic human rights such as the right to healthcare

service, [54] right to education, [55] right to employment [56] right to housing, [57] and right to freedom of movement. [58] These rights are essential for the livelihood and dignity of refugees; and therefore they should be guaranteed to them no less favorable terms than those accorded to other aliens in the same circumstances, [59] as well as nationals of the host country. [60]

3. The State's obligation to co-operate with international bodies

National authorities are obliged to co-operate with international institutions regarding the implementation of Conventions on refugees. The UN Convention compels the host State to facilitate the United Nations High Commissioner for Refugees (UNHCR) or any other UN agency in supervising the implementation of the Convention. [61] The host State should also provide the UNHCR and its partners with statistics and information concerning the condition of refugees, as well as access to refugees. [62]

The OAU Convention also [63] requires the host State to co-operate with the Secretary of the Organisation by providing information about domestic legislations and regulations tending to implement the Convention. [64] Unlike the UN Convention, there is no monitoring body created under either the OAU Convention or the Cartagena Declaration. However, the OAU Convention states that it is a regional complement of the UN Convention, and thereby all of its Contracting States should co-operate with the UNHCR. [65] Recently, the African Commission on Human and Peoples' Rights has appointed a Special Rapporteur on Refugees, Asylum-seekers and Internally Displaced Persons, [66] whose mandate is similar to that of a monitoring agent, such as receiving reports on the situation of refugees, undertaking investigations, and developing and recommending strategies to better protect the rights of refugees, asylum-seekers and internally displaced persons in Africa. [67]

V. SECTION 4: MAJOR CAUSES OF REFUGEES IN AFRICA

As earlier said, a quarter of the world's refugees are from Africa, according to the recent statistics of the UNHCR (See Table 1).

The problem of refugees in Africa is not recent, and its causes, as Ebenezer Q. Blavo [68] and Rogge [69] noted, are attributable to successive conflicts during the period of transition from colonialism to independence, as well as in the post-independence period.

Indeed, the period of transition from colonialism to independence was characterised by strong anti-colonial resistance in the mid-1950s, [70] which created approximately half a million of refugees between 1960 and 1970s. [71] Whereas, the post-independence conflicts are typically internal, and in most cases they have their genesis from the political situation inherited from colonial administrations. [72] Countries that experienced internal conflicts include Angola, Burundi, Rwanda, Uganda, Sierra Leone, Somalia, Liberia, Sudan and the Democratic Republic of Congo (DRC). The DRC's conflict, from 1998 to 2003, was one of the bloodiest wars, registering approximately 5 million deaths, 1.25 million internally displaced persons, and around 370,000 refugees. [73] Along with the Congolese conflict, there are also other internal conflicts such as the Sudanese inter-ethnic struggles that listed about 145,540 refugees, [74] the 1988 Somali persecution of the Isaaqs clan-families, the bombardment of Hargeisa causing the displacement of some 300,000 civilians in Ethiopia, [75] and the 1994 Rwandese genocide against Tutsi and moderate Hutu listing approximately 800,000 killings [76] and several refugees and displaced persons.

In addition to the inter-ethnic conflicts, there is also 'internal oppression' due to racial or dictatorial regimes that force people to exodus. [77] Examples of this include the racial regime of Apartheid in South Africa and the dictatorial regimes in former Zaire and Zimbabwe.

VI. SECTION 5: OVERVIEW OF AFRICAN REFUGEES' CHALLENGES IN THEIR AFRICAN COUNTRIES OF ASYLUM

1. Background

In terms of the international law, refugees are under the protection of the host country and international community rather than the government of their country of origin. Statistics reveal that out of 51 African countries, 20 of them hosted more than 20,000 refugees in their respective territories in 1997, [78] such as South Africa, Uganda, Burundi, Rwanda, Democratic Republic of Congo, Kenya, and Tanzania (See Table 2). The same statistics also indicate that some of the refugees' hosting countries are concurrently sending countries, because they are all concerned about the analogous scourge of civil wars or socio-economic and political instabilities, such as in the Great Lakes Region. Consequently, many refugees feel that they are in a similar situation in both their host country and country of origin and are therefore in a dilemma.

2. Problems of African refugees in the host country

As Professor K. Jacobsen identified, one of the major problems that refugees are facing in their host country is related to their physical security and safety, [79] which concerns those who are living inside and outside of refugee camps.

A. Safety of refugees inside of camps

The physical safety of refugees inside the camps is often compromised by external military attacks on the camps performed by militia or rebel groups or the national army of the host country. For example, the 1996 killing of Rwandan Hutu refugees in former Zaire, [80] the 2004 massacre of approximately 152 Congolese Banyamulenge refugees by the Burundian Hutu rebels group in the Gatumba refugee camp in Burundi, [81] the 2006 attack against Sudanese refugees in a refugee camp in Chad by the Chadian rebel groups, [82] and the 2002 attack on the Acholi-Pili refugee camp in northern Uganda by rebels of the Lord's Resistance Army (LRA). [83]

K. Jacobsen noted that there are three reasons why refugee camps are often targeted by military attacks. Firstly, camps contain some refugees who are ex-combatants, so antagonistic forces, based either in the country of origin or in the host country, consider camps as providing assistance and safeguard to their enemies. [84] Secondly, camps are considered by military groups as warehouses of resources, including food, vehicles, and people who can be forcibly recruited for the military, sex, labor, or to be taken hostage. [85] In the same context, the host country also recruits and militarizes from refugee camps those combatants who are hostile to the ruling power in their country of origin. One such example was when the Tanzanian government tolerated and supported FRELIMO forces use of refugee camps as resources of recruitment of combatants during their battle with the Portuguese colonial authorities in Mozambique in the early 1970s. [86] Thirdly, States involved in internal or regional conflicts would attack camps and refugees as a part of military strategy in order to weaken and demoralise opponents and promote ethnic cleansing. [87] This occurred, for instance, during the war in the African Great Lakes Region and in Sudan, where the Congolese-Tutsi refugees (also known as Banyamulenge) were massacred by the rebel groups of National Forces of Liberation (Hutu rebel groups of Burundi) and Interahamwe (Hutu rebel groups of Rwanda) inside the Gatumba refugee camp in Burundi in 2004. [88] A similar tragedy also happened in Sudan, where Sudanese troops attacked and killed people inside a Darfur refugee camp. [89]

B. Safety of refugees outside of camps

Although refugees outside of refugee camps are not always safe from being targeted by military attacks;

their safety is also likely to be threatened by the local population in their host country. The influx of refugees in an environment where the socio-economic context is fragile constitutes a source of insecurity. Many poorer populations in host countries perceive refugees as a threat to scarce resources, and, therefore, refugees are targeted. This means, refugees are made scapegoats for social ills and are subjected to harassment, xenophobia, human rights abuses, and negative portrayal by political leaders, media and society at large. [90] A recent example of this is South Africa, where in 2008 there was a wave of generalized xenophobic attacks around the country against foreigners, most of whom were African refugees and asylum-seekers. They were blamed by the local population for stealing jobs and being involved in criminal activities. Approximately, 62 people died, hundreds were wounded and thousands were displaced persons. [91]

VII. CONCLUSION

The purpose of this paper was to analyze the challenges facing African refugees in Africa. The challenges endured by African refugees are numerous, and some of them were not mentioned here because it would be presumptuous to pretend to evaluate and examine all problems facing African refugees in each African hosting country.

As earlier said, the major problem facing African refugees is the insecurity that they experience in their African host countries, which exposes them to the same persecution that they ran away from their country of origin.

Under the international law, the host country has a non-derogating obligation to protect refugees within its territory and jurisdiction; and that obligation abides it even in the times of national emergency.

The willingness of some African host countries to comply efficiently with their international obligation to protect refugees is sometimes limited by their lack of capacities, including material, logistic, and security. This is because they are, themselves, also suffering from socio-political instabilities. Thus, the international community, through UNHCR and other agencies, should assist more actively in order to offer additional protection to refugees hosted in unstable countries.

Annexes:

TABLE 1: REFUGEES, ASYLUM-SEEKERS AND OTHERS OF CONCERN TO UNHCR BY REGION, END-2008

Region	Refugees	People in refugee-like situation	Asylum-seekers
World	9,050,398	1,428,223	827,323
Africa	2,078,505	27,823	296,370
Central and great lakes Africa	978,159	27,823	17,185
East and horn of Africa	763,857	-	35,344
Southern Africa	161,140	-	243,841
Asia	4,855,918	1,091,141	75,224
Europe	1,616,015	5,738	273,070
America	499,960	303,513	173,429

TABLE 2: MAIN REFUGEES-HOSTING COUNTRIES IN AFRICA, END-2008

Countries of asylum	Refugees and people in refugee-like situation	Asylum-seekers	Countries of asylum
Chad	330,510	54	Chad
Tanzania	321,909	254	Tanzania
Kenya	320,605	8,760	Kenya
Sudan	181,605	5,870	Sudan
Uganda	162,132	9,243	Uganda
Democratic Republic of Congo	155,162	10	Democratic Republic of Congo
Algeria	94,093	898	Algeria
Ethiopia	83,583	1,667	Ethiopia
South Africa	43,546	227,125	South Africa

TABLE3: COUNTRIES WITH THE MOST REFUGEES AND ASYLUM-SEEKERS IN AFRICA, START-2008

Countries of origin	Refugees and people in refugee-like situation
Sudan	523,118
Burundi	375,425
Democratic Republic of Congo	370,241
Eritrea	208,758
Angola	185,989
Central African republic	98,104
Rwanda	81,086
Uganda	22,074
Zimbabwe	14,362

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