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TITLE

International law of State responsibility for refugee flows: is there a right to compensation?

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INTRODUCTION

In discussing the right of countries of asylum to compensation, this paper will deal principally with the mass expulsion of citizens by their own governments. Such expulsions occurred throughout history1 but should be brought to an end for their basic incompatibility with respect for international law and human rights.

The main approach to eliminate mass expulsion is via the "burdens" that the presence of large numbers of refugees inevitably imposes upon countries of asylum. This is not meant to condone individual refugees. Rather, intolerable as the creation of even a single refugee may be, it entails no serious injury to or "burden" on countries of asylum other than a shared outrage at man's inhumanity to man.

Does persecution by a country of its own citizens *en masse*, forcing them to flee abroad as refugees and thus to impose economical, social and other burdens upon other countries, constitute an international refugees discussed above? What are the legal bases for compensation to these other countries?

Since its inception back in the 1920s refugee law has considerably and invariably been perceived as a special branch of international law addressed almost exclusively to potential asylum countries. In particular, the Geneva Convention of 1951 on the Status of Refugees sets forth an elaborate regime of legal rules that create duties for States Parties having received refugees or being faced with demands for admission. Pursuant to the principle of *non-refoulement*[2] which have acquired the

[1] A few examples will suffice: the expulsions of Jews from Spain in 1492 and from bohemia in 1744; the expulsion of Huguenots from France in 1685; the expulsion of over 400,000 Jews from Nazi Germany by 1939.
[2] Article 33, U.N. Convention of 1951 Relating to the Status of Refugees.

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legal force of international customary law, these obligations go even so far as to prohibit States from expelling or returning ("*refouler*") a refugee to a country where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion.

The existing literature on the responsibility of states for the creation of refugees puts its focus almost solely on internalist reasos of refugee flows while remaining silent on the attachment of responsibility to externalist causes. The "source state" in refugee studies has come to mean the state of physical origin of the refugee. In the model of refugee production imagined in the literature, this source state violates the human rights of its own population to such an extent that it forces its residents to flee to receiving states that assume the burden of caring for these refugees. Toumschat writes: "the country of origin, which has set in motion the tragic sequence of events, is an essential – and even the most important – actor in a complex triangular relationship where the other elements are the refugee and the receiving State."[3]

Under the Geneva Convention, a refugee is a person who, because of well-founded fear of political persecution, finds himself outside his State of nationality, unable to obtain the protection of that State. Thus, the country of origin, which has set in motion the tragic sequence of events, is an essential – and even the most important – actor in the complex triangular relationship whose other elements are the refugee and the receiving States.[4] If it behaved in consonance with current human rights standards, the whole problem would simply disappear. Therefore, why should the burden be entirely on other States? Should it not in the last analysis fall back on the country of origin? This is the issue, which the present chapter will attempt to explore.

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[3] Christian Toumschat, "State Responsibility and the Country of Origin" in Vera Gowland-Debbas, ed, *The Problem of Refugees in the light of Contemporary International Law Issues* (The Hague: Martinus Nijhoff Publishers, 1996) at 59.

[4] Coles, G.J.L., State Responsibility in Relation to the Refugee Problem, with Particular Reference to the Origin, Geneva 1993, pp. 4-8.

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CHAPTER 1. INTRODUCTION TO STATE RESPONSIBILITY FOR CAUSING REFUGEE OUTFLOW: ESTABLISHING THE LEGAL FRAMEWORK FOR THE RIGHT TO COMPENSATION

As early as in 1646 Grotius stated the maxim in his work, *De Jure Belli ac Pacis,* that 'fault creates the obligation to make good the loss'.[5] According to Verdross, to deny the liability of a state for wrongs it has been committed would in effect abolish the duty of states to observe the rules of international law.[6] The most common remedy for the breach of an international obligation is adequate compensation, which may be defined as "payment of such a sum as will restore the claimant to the position the claimant would have enjoyed had not the breach occurred."[7] The duty to make reparation is based on the fact that "in international law, as in domestic law, rights without remedies are illusory, i.e., 'no rights' at all."[8]

Eagleton described state responsibility as follows: "Responsibility is simply the principle which establishes an obligation to make good any violation of international law producing injury, committed by the respondent state. … Whether reparation be made through diplomacy or in any other manner is a matter of procedure, and entirely distinct problem."[9] Over the centuries, this fundamental principle has been cornerstone of interstate relations. Article 1 of the Draft articles on Responsibility of States for internationally wrongful acts reflects the importance of this principle by providing: "Every internationally wrongful act of a State entails the international responsibility of that State."[10]

Such a rule applies not only in the international sphere, but also under municipal law

– whether in terms of civil wrong (tort), breach of contract or the illicit taking of property. As

[5] H. Grotius, De Jure Belli Ac Pacis, bk. II, ch. XVII, pt. 1, at 430 (2646 ed, Carnegie Endowment trans. 1925).
[6] A. Verdross, Verfassung Der Volkerrechtgemeinshaft 164 (1926). See Also S. Goldschidt, Legal Claims Against Germany 64 (1945)
[7] Oliver, Legal Remedies and Sanctions, in International Law Of State Responsibility For Injuries O Aliens, at 61, 71 (R. Lillich ed. 1983).
[8] Idem, at 61
[9] C. Eacgleton, The Responsibility Of States In International Law. Law 22-23 (1928).
[10] Draft articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third session (2001), Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp.IV.E.1)

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Professor Covey Oliver stated "In general, international applications of basic principle of compensatory damages follows the common usages of municipal legal systems in this regard."11

The base principles of respect for rights and obligations and of remedies, such as compensation, for breached rights tie municipal tort law to the international law. The result is that the practice of seeking compensation for damages in the international scene can be and has been applied for the same purpose of guaranteeing respect for legal rights and obligations. As Judge Huber said in the *Spanish Zone of Morocco Claims: 'responsibility is the necessary corollary of a right. All rights of an international character involve international responsibility. If the obligation in question is not met, responsibility entails the duty to make reparation'*.[12]

Responsibility for the results generated by the unacceptable behavior of States in international arena is a major focus of the international law. In the *Corfu Channel* case (merits), the InternationalCourt of Justice addressed that according to international practice, a State on whose territory or in whose waters an act contrary to international law has occurred, may be called upon to give an explanation and that such a State cannot evade such a request by limiting itself to a reply that it is ignorant of the circumstances of the act and its authors '. [13]

The issue of responsibility in this case emerged from the danger produced to navigation in the North Corfu Channel by the laying of mines of which no warning had been given. In the opinion of the Court, responsibility lay on the basis of knowledge on the part of Albania of the laying of mines. Professor Goodwin-Gill, assessing the case, has rightly made the analogy that responsibility may be attributed whenever a State, within whose territory substantial trans boundary harm is generated, has knowledge or means of knowledge of harm and the opportunity to act. [14]

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[11] Supra notce 7, at 71
[12] See Huber, M., Rapporteur, *Reports of Intemnational Arbitral Awards* (RIAA), United Nations, vol. II, 615, 641, (1927).
[13] *United Kingdom v Albania* I.C.J. Rep., 1949, p.4.
[14] Goodwin-Gill, *The Refugee In International Law* , p.228.

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The theory of state responsibility relies on a rather simple but complex practical premise - it is that every State must be held responsible for the performance of its international obligations under the rules of international law, whether such rules derive from custom, treaty, or other source of international law. Deficiency to abide by international obligations incumbent upon a State constitutes an international wrong the consequences of which the deviating State is responsible.[15] In *Nicaragua v the United States* (merits), theInternational Court of Justice found that the United States acted wrongfully by committing a *prima facie* violation of the principle of the non-use of force and was in breach of the principles of sovereignty and non-intervention by organizing or encouraging the organization of irregular forces or armed bands for incursion into the territory of Nicaragua and participating in acts of civil strife in Nicaragua. [16]

The fundamental premise of State responsibility is presented in the Draft Articles on State Responsibility prepared by the International Law Commission - in particular Article 1 states as follows:

'Every Internationally wrongful act of a State entails the international responsibility of that State.'

Further, under Article 3,

'There is an internationally wrongful act of a State when:

(a) conduct consisting of an action or omission is attributable to the State under international law; and

(b) that conduct constitutes a breach of an international obligation of the State.'

The applicability of state responsibility to the problem of displacement was brought by Judge Jennings as early as 1938. Professor Jennings then wrote:

A sounder line of approach would appear to be one which has regard not so much to the ethics of domestic policy as to the repercussions of the policy on the material interests of third States. Even if the state whose conduct results in the flooding of other states with refugee populations be not guilty of an actual breach of law, there can be little doubt that states

[15] Mann, 'The Consequences of An International Wrong in International and National Law',B Y (1977)pp.1-65.
[16] I.C.J.Rep.,1986,p.14.

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suffering in consequence would be justified in resorting to measures of retorsion; which is justified by Oppenheim as 'retaliation for discourteous, or unkind, or unfair and inequitable acts by acts of the same or similar kind'. [17]

Thus, the power lying behind the concept of state responsibility in relation to a State whose behavior leads to the displacement of parts of its population is to address the State at stake with the reaction that such unacceptable conduct on its part invites some undoubtable legal consequences. Jennings was certainly far more sighted when he recognized the relevance of general and customary international law in considering the lawfulness of the behavior of the State, which makes a refugee population.

According to him and rightly so, the question which the lawyer has to ask is how far that conduct is in accord with or contrary to the recognized rules of international law.[18] The run of thought which he led in 1938 was lost temporarily and it has only regained currency in more recent times.[19] Since that time some developments that not only strengthen but also put Jennings's premise in perspective have taken place markedly in the field of human rights in international law.

In the area of state responsibility in order to demand compensation from the State of origin, it is important to put forward a cause of action or 'the precise subject of the legal dispute'.[20]

There are several problems in doing that and one of the problems arises from the fact that in the international sphere there is relatively few international legal statements on the 'right to compensation' and its implementation in practice. The earliest General Assembly resolution that referred to compensation was in 1948 in relation to the Palestinian refugees stating that 'compensation should be paid for the property of those [refugees] choosing not to return and for loss or damage to property'.[21] After that, in 1974, the United Nations also affirmed the right of Palestinians who wanted to return to reclaim their property, reaffirming 'the

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[17] Jennings , Some International Law Aspects of the Refugee Question , B.*Y* (1938)

[18] Ibid, p.110.
[19] Ibid, pp. 98-114
[20] Brownlie, *I., Prindples of Public International Law,* Clarendon Press, Oxford, 4th ed., 1990, 458.
[21] See UNGA res. 194(11), 11 Dec. 1948.

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inalienable right of Palestinians to return to their homes and property from which they have been displaced and uprooted and [calling] for their return'.[22] From that on, in 1981 again the General Assembly affirmed 'the right of those [Palestinians] who do not wish to return to receive adequate compensation.[23]

The 1986 *Report* of the Group of Governmental Experts on International Cooperation to Avert New Flows of Refugees also headed to a resolution which called upon Member States to respect 'the rights of refugees to ... receive adequate compensation.'[24] The 66th paragraph of the *Report,* named 'Rights and Duties of States to avert New Massive Flows of Refugees', tried to codify aspects of State responsibility. Although these can be regarded just under the category of 'recommendations', however the importance of paragraph 66 lies in the fact that the General Assembly of United Nations adopted it. At the same time, as a result the nexus between creating refugee flows being an international wrongful act is not put due to the Group's over concern for 'full observance of the principle of non-intervention in the internal affairs of sovereign States'.[25] In 1992, the International Law Association (ILA), a non-governmental body, adopted a Declaration of International Law on Compensation to Refugees having recognized the 'need to codify and progressively develop principles of international law governing compensation to refugees.' [26]

This Declaration is one of the first to propose basic legal principles supporting an obligation to compensate refugees, including 'adequate compensation', the 'right to choose home', and 'equal compensation for nationals and aliens for unlawful expulsion'.[27] As a declaration by a non-governmental body it is helpful in outlining practical means of implementation, by showing what the State of origin must do once

[22] See UNGA res. 3236(XXIX, 22 Nov. 1974.
[23] See UNGA res. 36/148, 16 Dec. 1981.
[24] See UNGA res. 41/70, 3 Dec. 1986.
[25] Lee, Luke T., 'Toward a World Without Refugees: The United Nations Group of Governmental Experts on International Cooperation to Avert New Flows of Refugees', 58 *B21L* 331 (1986).
[26] Lee, Luke T., 'The Declaration of Principles of International Law on Compensation to Refugees: Its Significance and Implications,' 6 *JRS* 65 (1993).
[27] See ILA, *Declaration of Pinciples,*5-18 (1992); text in Lee, Luke T., 'The Cairo 'Declaration of Principles of International Law on Compensation to Refugees', 87 *AJIL* 157 (1993).

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it has been found responsible for expelling its nationals.[28] However, it is not legally binding and provides only guidelines on compensating individual refugees, not the host State. To date, State support for compensation as an obligation of the State of origin consists solely in a few General Assembly resolutions which fail to prescribe how and when this compensation must be paid. Also, although the ILA's Declaration of Principles is much more comprehensive as to the actual implementation of the right to compensation, like the earlier General Assembly resolutions, it fails to address the issue of compensation to the State receiving refugees. The original ILA Draft included this dimension; it was accepted in principle in the 1990 ILA Australian Conference, but omitted when adopted at the 1992 Cairo Conference.

[28] Ibid, Principles, 10, 15

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CHAPTER 2. ESTABLISHING CAUSE OF ACTION FOR COMPENSATION: VIOLATION OF STATE RIGHTS AS A CAUSE OF ACTION

In order to successfully establish a cause of action for compensation for refugee outflows it is needed to establish a nexus between the act of creating refugees and the 'legal damage' or international wrong allowing for a cause of action. Although the 'creation of refugee flows' is not in itself considered in international legal system to be a wrongful act, it nevertheless may become so as a result of the damage caused. This may lead to a breach of customary international law and international human rights law. Although the creation of refugees as 'damage' is not of itself a cause of action, responsibility may result when linked to a breach of an international obligation resulting in legal harm.[29] The difficulty lies in proving what kind of customary international obligations have been breached resulting in legal damage, and what is their nexus to the current refugee flow as the physical manifestation of that breach.

We start with one of the most basic norms of international law, namely, that every state has the *right* to exercise jurisdiction over its territory and over all persons and things within it.30 Since right and duty are two sides of the same coin, the corresponding duty is to avoid interfering with the exercise by other countries of their respective jurisdiction. Such a duty includes refraining from acts that would cause injury or damage to persons or property situated in the territory of other states.31 If a State violates, or is delinquent in its duty toward, the right of other states, international responsibility is incurred.

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[29] Tanzi, A., 'Is Damage a Distinct Condition for the Existence of an International Wrongful Act?' in Spinedi and Simma, eds., *UN Codification of State Responsibility,* New York, Oceana Pub., Inc., 1-33, at 8, (1987).
[30] See International Law Commission, Draft Declaration on Rights and Duties of States, Art. 2, (1949) Y.B. INT'L. L. COMM'N 287, adopted as Annex to GA Res. 375 (IV), 4 UN GAOR Res. at 67, UN Doc. A/1251 (1949). This norm is implicit in the principle of sovereign equality of states set forth in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of United Nations, Oct. 24, 1970, GA Res. 2625, 25 UN GAOR Supp. (No. 28) at 121, UN Doc. A/8028 (1970)
[31] "A State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction." C. Eagleton, The Responsibility of States in International Law, 22-23 (1928), Such a duty would apply a fortiori to the state itself and is inherent in the principle of sovereign equality of states.

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Here the *Trail Smelter* arbitration is instructive. In this case, the United States sued Canada for damages to land, crops and trees in the state of Washington that had been caused by sulfur dioxide fumes emitted by a Canadian ore-smelting company. The tribunal held Canada "responsible in international law for conduct of Trail Smelter" on the grounds that,

'under the principle of international law, as well as the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.'[32]

The tribunal concluded with the statement: "*It is, therefore, the duty of Government of the Dominion of Canada to see to it that this conduct should be in conformity with the obligation of the Dominion under international law as herein determined."*[33]

Analogizing refugees to air pollution has been described as "offensive and awkward" but nevertheless, references to this case reappear throughout the literature.[34] The arbitration is frequently referred to in support of the claim that "a state is obligated to avoid the generation across its borders of damage to other states."[35] This principle is invoked to ascribe international responsibility to domestic acts when the right of other states to freely exercise domestic sovereignty is abrogated as a result of receiving and caring for large numbers of

[32] 3 R. Int'l Arb. Awards at 1965
[33] Ibid, 1965-66
[34] Jack I. Garvey, "The New Asylum Seekers: Addressing their Origin" in David A. Martin, ed, *The New Asylum Seekers: Refugee Law in the 1980s,* (Dordrecht: Martinus Nijhoff Publishers, 1988) at 187.
[35] Ibid, at 187

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refugees.

Refugees, of course, are not "fumes."36 Nevertheless, certain legal similarities exist: both may cross international boundaries from countries of original; both such crossings are preventable by the countries of origin; both such crossings are not made with voluntary consent of the receiving states and both such crossings may impose economic and social burdens upon the receiving states, for which the countries of origin will be responsible.

A major difference lies in the fact that, while a state cannot prevent fumes from drifting into its air and over its land territories, it can, except perhaps in mass expulsion cases, prevent or deter the entry of refugees into its territories through such devices as barricades, imprisonment or internment ("humanitarian deterrence"), *refoulement,* rejection at the border and "push-offs." The exercise of such power, however, is increasingly being considered as inimical to respect for the minimum standards of humane treatment or human rights, which are epitomized in the Declaration on Territorial Asylum: "*No person…shall be subjected to measured such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution*."37

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[36] It has been pointed out that "to compare the flow of refugees with the flow of, for example, noxious fumes maw appear invidious; the basic issues, however, is the responsibility which derives from the fact of control over territory." See G. Goodwill-Gill, The Refugees in International law 228 n. 49 (1983). This, it has been held that the trail Smelter rule extends beyond ecological/pollution damage to other states. Garvey, Toward a Reformulation of International Refugee Law, 26 HARV. INT'L.J. 483, 495 (1985).

[37] Adopted by GA Res. 2312 (XXII), Art. 3(1) (Dec. 14, 1967). See also Nafziger, The General Admission of Aliens under International Law, 77 AJIL 805, 847 (1983), where he states that "a state has a qualified duty to admit aliens when they pose no serious danger to its public safety, security, general welfare, or essential institutions."

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Every State must be held responsible for the performance of its international obligations under the rules of international law, whether such rules derive from custom, treaty, or other sources of international law.'[38] The purpose of the law of State responsibility is 'to establish a legal regime of public international order prescribing permissible spheres of action by States' and 'accountability for consequences generated by the unacceptable conduct of States. ' According to article 3 of the United Nation's Draft Articles of State Responsibility, an international wrongful act occurs when '(a) conduct consisting of an action or omission is attributable to the State under international law; and (b) that conduct constitutes a breach of an international obligation of the State.'[39] Article 16 further provides that such an international wrongful act can be a proactive breach by the State or mere negligence whereby the act *'is* not in conformity with what is required of it by that obligation.'[40] When a State goes beyond its 'permissible sphere of action' often the result is the creation of an 'injured State' which according to Part II, article 5 of the UN Draft Articles of State Responsibility 'means any State a right of which is infringed by the act of another State.'[41] Thus, the host State receiving a refugee flow from the State of origin may claim such 'injured' status due to a breach of respect for the legal principle of equality of States, which includes State sovereignty and territorial integrity, as customary rights of the nation-State. Brownlie emphasises that the 'equality of States represents the basic constitutional doctrine of the law of nations, which governs a community consisting primarily of States having a uniform legal personality.'[42] This implies at least two important corollary rights of the State, namely, 'a jurisdiction, *prima facie* exclusive, over a territory and the permanent population living there; [and] a duty of non-intervention in the area of exclusive jurisdiction of other States.[43]

As the General Assembly declared in 1970:

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[38] Beyani, C., 'State Responsibility for the Prevention and Resolution of Forced Population Displacements in International *Law', IJRL OAU/UNVHCR Special Issue,* 130, 132 (1995).
[39] Ibid, 131.
[40] Supra note 29, p. 325.
[41] Ibid ,334
[42] Brownie, *Principles,* 287 (1990).
[43] Ibid., 287

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all States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community ... In particular, sovereign equality includes the following elements...(b) each State enjoys the rights inherent in full sovereignty; (c) each State has the duty to respect the personality of other States;(d) the territorial integrity **...** of the State [is] inviolable...(f) each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States.[44]

Thus, in order to have *locus standi,* the plaintiff/host State should 'invoke the violation of one of its substantive interests, namely, an interest protected by a legal right', especially those listed in the UN Declaration on Friendly Relations.'[45]

The phenomenon of refugees is a direct challenge to the State's 'right to exercise exclusive jurisdiction over its own territory and its legal obligation to prevent its subjects from committing acts which violate another State's sovereignty.'[46] Pursuant to the fundamental principle of sovereign equality, each State must respect the sovereign equality of its neighbours. If it pushes large groups of its own citizens out of its territory, fully knowing that the victims of such arbitrariness have no right of entry to another State but will eventually have to be admitted somewhere else on purely humanitarian grounds, it deliberately affects the sovereign rights of its neighbours to decide whom they choose to admit to their territories.[47]

A direct and immediate result of mass expulsion or persecution of nationals is to force them on the territories of other states as refugees regardless of the wishes of these states. As Benjamin Harrison underscored in his message to US Congress of December 9, 1891:

'The banishment, whether by direct decree or by not less certain indirect methods, of so large a number of men and women is not a local question. A decree to leave one country is, in the

[44]United Nations, *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations,* UNGA res. 2625 (XXV), 24 Oct. 1970.
[45] Supra note 29, at 13, (1987).
[46] Garvey, J., 'Towards a Reformulation of International Refugee Law,' 26 *Ham Int'l L J.* 494 (1985).
[47] Lee, L.T., The Right to Compensation: Refugees and Countries of Asylum, 80 AJIL (1986), pp. 532 & 535-554.

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nature of things, an order to enter another – some other'.[48]

Such an "order" to enter another state irrespective of the latter's wishes is clear violation of one of the basic tenets of international law: the sovereign equality of states.[49]

In addition, it constitutes an "abuse of rights"[50] since a natural consequence is to saddle the other state with an unwanted population. For even in the exercise of domestic rights, a state must not violate the principle *sic utere tuo ut alienum non laedas* (use your own property in such a manner as not to injure that of another). Thus, Sir John Fisher Williams stated succinctly: "*a state cannot, whether by banishment or by putting an end to status of nationality, compel any other state to receive one of its own nationals whom it wishes to expel from its own territory*."[51] Similarly, the Institute de Droit International, in its Projet de Reglamentation de l'Expulsion des Etrangers, reported at the September 1891 meeting in Hamburg:

'A state cannot, either by administrative or judicial procedure, expel its own nationals whatever may be their difference of religion, race or national origin. Such an act constitutes a grave violation of international law when its international result is to cast upon other territories individual suffering from such a condemnation or even placed merely under the pressure of judicial proscription'.[52]

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[48] Message of the President, 1891 Foreign Relations Of The United States, at xiii
[49] See UN Charter art. 2 (1); Declaration on Principles of International Law, concerning Friendly Relations
[50] Jennings, Some International Law Aspects of the Refugee Question, 20 BRIT. Y.B. INT'L.L. 98, 102 (1939)
[51] Fisher Williams, *Denatioanlization*, 8 BRIT. Y.B. INT'L. L. 45, 61 (1927)
[52] 11 Institure De Droit International, Annuaire 278-79, Art. XI (1891)

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When a state expels its own citizens, it undermines the very foundation on which relations among states and between states and their citizens are built. As early as 1758, Vattel defined nationality as "the bond which ties a state to each of its members."[53] Over the centuries, nationality has provided the link between the state and the individual, whether at home or abroad. Thus, in the Panavezys-Saldutiskis Railways Case, Permanent Court of International Justice observed: "in the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection."[54] In the Nottenbohm Case, the International Court of Justice defined nationality as "a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of *reciprocal rights and duties*"[55] The unilateral termination of such rights and duties would incur responsibility if, as Professor Brownlie emphasized, "it were shown that the withdrawal of nationality was itself a part of delictual conduct facilitating the result."[56] International law does permit denationalization in certain circumstances. However, states are prohibited from manipulating their competence in this regard so as to avoid their international obligations.[57]

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[53] E. De Vattel, Le Droit Des Gens, Preliminaires, Para. 1 (1758): R. Plender, International Migration Law 4 (1972)
[54] (Estonia v. Lithuania), 1939 PCIJ, ser. A/B, No. 76, at 16 (Judgment of Feb. 28). Earlier, the Court ruled in the Mavrommatis Palestine Concessions (Greece v. UK) case:
It is an elementary principle of international law that a State is entitled to protect its subjects. … By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right o ensure, in person of its subjects, respect for the rules of international law.
1924 PCIJ, ser. A, No. 2, at 12 (Judgment of Aug. 30).
[55] Nottenbohm Case (Liechtenstein v. Guat.), Second Phase, 1955 ICJ Rep. 4. 23 (Judgment of Apr. 6)
[56] I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 396 (3d ed. 1979).
[57] Goodwin-Gill, The limits of the Power of Expulsion in Public International law, 47 BRIT. Y. B. INT'L. 55, 57 (1974-75).

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However it is important to keep in mind the idea that the ultimate goal is cooperation with the State of origin and compensation, and this is likely to be achieved by touching on the sensitive issue of domestic policies for *'the* treatment accorded by a State to its own subjects, including the conferment or deprivation of nationality, is a matter of purely domestic concern.'[58] Only when a domestic policy causes harm to another State's territory, may it be called an abuse of a right and illegal. Violation of the doctrine of the abuse of rights by flooding another State with 'destitute' refugees without that State's consent allows for intervention in what would otherwise be a domestic policy issue.[59] However, the same does not apply when a State abuses the rights of its citizens without necessarily causing harm to another State's territory. Attempts to address the 'internal situation of the State of origin' may result in 'severe tension between examination of root causes and human rights in the State of origin and the dictates of principles of non-intervention', that is State sovereignty and territorial integrity.[60] Attainment of cooperation with the State of origin is the ultimate goal, not prohibition and condemnation.

[58] Jennings, R.Y., 'Some International Law Aspects of the Refugee Question', 20 *BrIL* 110, 112 (1939).
[59] Ibid
[60] Garvey,J., 'The New Asylum Seekers: Addressing Their Origin', at 187.

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CHAPTER 3. GENERAL PRINCIPLES OF INTERNATIONAL HUMAN RIGHTS LAW

In contemporary times, the legal developments brought about by human rights leave no doubt that the conduct of a State in relation to the treatment of its own population is a matter of international law rather than solely of domestic jurisdiction . In any event domestic jurisdiction in international law is an important concept which depends upon developments in international relations. As such it lacks a fixed composition and its exercise must be in consistence with the performance of international obligations and legal interests of other States.

A substantial outcome of this development means that, without losing its initial form, the application of the theory of state responsibility has to vary and extend to the consequences of illegal conduct of a State in violation of human rights obligations. This point is underscored by the *Cairo Declaration of Principles of International Law on Compensation to Refugees* which was concluded by International Law Association in 1992. Principle of the Declaration states that: Since Refugees are forced directly or indirectly out of their homes in their homelands, they are deprived of full and effective enjoyment of all articles in the Universal Declaration of Human Rights that presuppose a person's ability to live in the place chosen as home. Accordingly, the State that makes a person into a refugee performs an internationally wrongful act, which creates the obligation to make good the wrong done.

This is based upon the assumption that, as Coles pointed out in 1981, mass exoduses are obviously caused by gross violations of human rights which include 'basic civil and political rights' as well as abrogation of 'economic, social, and cultural rights ... whether of individuals or of peoples.'[61] Reismann, has argued that although, the UN Charter replicates the 'domestic jurisdiction-international concern' dichotomy... no serious scholar still supports the contention that internal human rights

[61] See Coles, GJ.L., 'Problems Arising from Large Numbers of Asylum Seekers: A Study of Protection Aspects,' Working Paper presented at the 1981 San Remo Round Table Discussion, International Institute of Humanitarian Law, 5.

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are 'essentially within the domestic jurisdiction of any State' and therefore isolated from international law.[62]

In the legal doctrine it is argued that states pursuing coervice domestic policies that create refugees cannot protect their actions any longer from international view by affirming their legal right to do as they want in the domestic area:

... the focus fell on those relatively well-meaning countries that were considered responsible in some fashion for providing refuge, though they had not caused the problem. Meanwhile the real sources of the problem, the worst violators, hide behind Article 2(7) and similar non-interference doctrines. In the 1990s we badly need to outgrow those limitations if we are to deal effectively with impending and existing refugee flows. ... And in fact we should find ourselves in a reasonably good position to do so. As a result of patient, persistent human rights initiatives, by now the domain of matters "essentially within the domestic jurisdiction" has shrunk dramatically. International legal barriers to action directed at abuses in the home country have been considerably lowered.[63]

Bringing out an international interest in domestic refugee production depends on characterizing refugee flows as an outcome of violations of international human rights law and common human rights standards. This is accomplished in three ways. First, it is argued that the very existence of refugees constitutes proof that human rights enshrined in international human rights law and protected by domestic law have been breached:

'From the position of municipal law as well as international law, an act by a state that converts its own citizens into refugees is ipso facto illegal. The municipal law of virtually all countries guarantees the rights of their citizens to life, liberty, equality, property, due process etc. The mere existence of refugees, as defined by the 1951 convention relating to the status of refugees and the 1967 protocol, shows that their own governments have violated these rights.' [64]

Secondly, it is said that provisions connected to movements recognized in international human rights law are breached by states that make their citizens to

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[62] Reismann, W.M., 'Sovereignty and Human Rights in Contemporary International Law', 84 *AJIL* 869 (1990).
[63] David A. Martin, "Interdiction, Intervention, and the New Frontiers of Refugee Law and Policy" (1993) 33 *Virginia Journal of International Law* 473 at 478.
[64] Luke T. Lee, "The Right to Compensation: Refugees and Countries of Asylum" (1986) 80 *American Journal of International Law* 532 at 538.

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depart:

'*When a state forces its citizens into becoming refugees either directly or indirectly, it is violating such movement-related provisions of the Universal Declaration of Human Rights as: Article 9, 'No one shall be subjected to arbitrary arrest, detention or exile'; Article 13(1), 'Everyone has the right to freedom of movement and residence within the borders of each State' Article 13(2), 'Everyone has the right to leave any country, including his own, and to return to his country'; Article 15(1), 'Everyone has the right to a nationality'; and Article 15(2), 'No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.*'[65]

Third, the creation of refugees is argued to breach all human rights that depend "for their full and effective enjoyment on a person's ability to live in his own country" [66] regardless of their legal source. These include the rights enshrined in the Universal Declaration of Human Rights (UDHR)[67] to:

... 'life, liberty and security of person' (Article 3); employment (Article 23); education (Article 26); family (Article 17); property (Article 17); social security (Article 22); nondiscrimination (Article 2); dignity (Article 1); equality before the law (Article 7); freedom of opinion and expression (Article 19); freedom of peaceful assembly and association (Article 20); participation in government and public service (Article 21); and so forth.[68]

"Thus, the country that turns its *own* citizens into refugees is in violation of all the articles of the Universal Declaration of Human Rights."[69] There exists no discussion of how third state conducts that also result into the creation of refugees may also be characterized as abrogations of universal rights norms or violations of international human rights law.

Thus, in this context this emphasis is based in international human rights treaties that grant sights for States, non-governmental organizations and also

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[65] Luke T. Lee, "The Right to Compensation: Refugees and Countries of Asylum" (1986) 80 *American Journal of International Law* 532 at 538.
[66] Ibid at 538-539
[67] *Universal Declaration of Human Rights*, 10 December 1948, UNGA Res 217A (III) [*UDHR*].
[68] Supra note 65, 539
[69] Ibid

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individuals to bring cases against States before international or regional institutes.[70] Accordingly, the idea of the State responsibility in international law has been stretched and includes also the 'duty to protect' by averting 'human rights violations and to investigate and punish any violations, to restore violated rights, and to provide effective remedies to victims of violations.'[71] In international law some category of human rights are of *erga omnes* character, thus they have such significance that all States have a legal interest in securing their protection and fulfillment.[72] This means that a third State or a refugee victim of gross human rights violations, in relevant cases, might have a cause of action against the State of origin.[73]

In arguing for a 'general obligation' of States of origin to compensate for gross human rights violations as a cause of action, the question appears on what kind of human rights are considered to be customary and have an *erga omnes* or *jus cogens* character, the violation of which is considered 'gross'? Two rights in the 1948 Universal Declaration of Human Rights could be exercised in this sphere. One of them, article 8, states that each individual has 'the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted by the constitution or by law.' This right to a remedy also appears in article 2(3) of ICCPR, article 13 of ECHR, and article 25 of ACHR. Meanwhile, as Lillich argues, this right does not enjoy customary law status because of the lack of determination as to the 'scope' of the right; in other words, does it mean international or domestic implementation with collective or internal remedies?[74] Another, article 13 of UDHR states that 'everyone has the right to leave any country, including his own, and to

[70] See art. 41, 1966 International Covenant on Civil and Political Rights; art. 25, 1950 European Convention on Human Rights and Fundamental Freedoms; art. 44, 1969 American Convention on Human Rights; arts. 45, 47, 1981 African Charter on Human and People's Rights. In *Velasquez- Rodriguez a Honduras,* for example, the Inter-American Court of Human Rights held the Government of Honduras responsible for a case of torture and disappearance: 29 July 1988, Series C, No. 4 at
154.

[71] Beyani, C., 'State Responsibility for the Prevention and Resolution of Forced Population Displacements in International *Law', IJRL OAU/UNVHCR Special Issue,* 138 (1995).

[72] *Barcelona Traction Case, ICJ Rep.,* (1974), 32.

[73] Cf. Kamminga, M.T., *Inter-State Accountability for Volations of Human Rghts,* Philadelphia, University of Pennsylvania Press, (1992), 186.

[74] Lillich, R.B., 'Civil Rights,' in Meron, T., ed., *Hunan Rights in International Law: Legal and Policy Issues,* Oxford, Clarendon Press, 114, 134 (1985).

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return to his country.'[75] Article 12 of the ICCPR, article 2 of the Fourth Protocol to the European Convention, and article 22(l)-(5) of ACHR similarly support a 'right to return.' It is debatable whether the right of return is customarily mandatory. Lillich makes a point that States that limit the right to return are not usually extensively condemned and that it means that the right has not yet achieved the status of customary law.[76] From another standpoint, Wee argues that it might be regarded as customary and for that support brings article 4 of the 1966 Bangkok Principles, adopted by the Asian-African Legal Consultative Committee in Bangkok, as an example of a document that refers to the right of refugees 'to return to their country of nationality and for a duty of the State of origin to receive their nationals.'[77] Further support for a 'right to return' is found in article 35 of the 1951 Convention Relating to the Status of Refugees, requiring States to cooperate with UNHCR in fulfilling its functions, one of which is to facilitate voluntary repatriation. However, though these two rights could indirectly address matters relating to compensation, their status in international customary law is questionable.*Jus cogens,* as defined by article 53 of the 1969 Vienna Convention on the Law of Treaties, is a 'peremptory norm of general international law' which 'is a norm accepted and recognised by the international community of States as ... norm from which no derogation is permitted.'[78] Meanwhile, the *erga omnes* rights, are more broadly defined. According to the International Law Commission, *erga omnes* obligations in the area of human rights are not limited to rules *of jus* cogens and to international wrongful acts. They include in essence all international obligations established for the protection of human rights and fundamental freedoms, whether they are based on treaty or custom.[79]

As Kamminga points, only four human rights in UDHR actually have *jus cogens* status: the right to life, freedom from torture, freedom from slavery, and

[75] See art. 13 UDHR48.
[76] Supra note 74
[77] Wee, L.C.W., 'International Responsibility Causing Forced Migration,' Paper presented at Oxford Refugee Studies Programme's Hilary Term Seminar Series, 24 Jan. 1996, 11, (1996).
[78] Cf. Kamminga, M.T., *Inter-State Accountability for Violations of Human Rights,* Philadelphia, University of Pennsylvania Press, (1992), 186.
[79] Ibid, 188

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freedom from *ex post facto* laws.[80] Questions also exist as to what constitutes a 'gross' violation. According to one view, 'gross' violation of *erga omnes* or *jus cogens* rights is defined as 'out of all measure, flagrant ... not to be excused.[81] As Dimitrijevic proposes the 'gross' violations could similarly be tied to the concepts of 'systematic' and 'consistent'. Therefore 'a State violates international law grossly if it practices, encourages, or condones the enumerated violations of human rights 'as a matter of State policy' on a large-scale basis. Thus, the determination of when *a jus cogens or erga omnes* right is violated grossly or not can be somewhat subjective. For a reason, some point only on the derogation of 'fundamental' and 'elementary' rights affirmed in articles 3, 5, and 9 of UDHR48 (right to life, liberty, and security of person, prohibition of torture, or cruel, inhuman, and degrading treatment and punishment and of arbitrary arrest, detention, and exile). Others see a hierarchy of rights, categorising some as more 'atrocious' and 'serious violations of physical integrity' than others.[82] A problematic question is who decides the hierarchy of gross human rights violations and what are the criteria, as is the question of which human rights actually have jus *cogens and erga omnes* character. Eventually, both of the strategies, that is, resort to general principles of international law or to the violation of human rights, may be effective and need not be mutually exclusive. As an example, individuals might seek for compensation for individual wrongdoings, and States - for the suffered losses which are a consequence of the breach of sovereign rights.

A third possibility, suggested **by** Wee, is that causing forced migration should be codified in international law as 'in itself an international wrongful act.'[83] Sohn sets out a framework in which this might **be** achieved:

namely, an assertion of particular concern by a world organ (assertion of concern); a declaration in a universal instrument (declaration); an elaboration in an international document (elaboration); and finally, by application and reaffirmation as international law by

[80] Ibid, 158
[81] See Dimitrijevic, V., 'Dimensions of State Responsibility,' in van Boven, T., ed., *Seminar on the Right to Restitution,* Maastricht, Netherlands Institute of Human Rights, 214, 216 (1992).
[82] Ibid., 216, 217, 218.
[83] Supra note 77, at 11.

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States (affirmation and application).[84]

By making the act of involuntary migration by the State of origin materially an international wrongful act, the difficulties connected with linking the cause of action to damage might be canceled, because the act would itself constitute sufficient injury. Also, it might be argued that forced migration as an international wrong has potential for being a powerful preventative tool to the mass displacements existing today.

At this point it is also important to return to the secondary norms of State responsibility. According to these, there are two possible types of coercion for which the State of origin may be held liable. The first is 'direct' coercion where the State directly uses 'threat or use of force, violations of human rights [and] removal or denial of the means of subsistence.'[85] The other is 'indirect' which implies 'actions that are applied through subsidiary means to coerce the victims. For example, 'where an entity - a State or other organisation - provides aid or arms to a regime that consistently violates human rights leading to forced migration.'[86] According to the Declaration on Principles of International Law on Compensation to Refugees, indirect coercion may also refer to 'deliberate creation or perpetuation of conditions that so violate basic human rights as to leave people with little choice but to flee their homelands.'[87] In this case of indirect coercion, the State of origin may still be responsible because, as stated in the *Velasquez-Rodriguez v. Honduras* case by the Inter-American Court of Human Rights, *an illegal act which violates human rights and which is initially not directly imputable to a State ... can lead to international, responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.*"[88]

As Zolberg stresses, the State may indirectly persecute when it 'tolerates the actions of unofficial persecutors and fails to provide their targets with the protection to which citizens or legally established foreign residents of law-abiding States are

[84] Ibid
[85] Supra note 77, at 6.
[86] Ibid
[87] See, 'The Declaration of Principles,' 4, (1993).
[88] See *Velasquez-Rodriguez* case, Inter-American Court of Human Rights, judgment of 29 July 1988 (Annual Report of the Inter-American Court of Human Rights (1988) 35).

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normally entitled.'[89] However, such indirect coercion can sometimes be quite hard to establish.

The difficulty of responsibility attribution is aggravated where a entirely new regime emerges after civil upheaval being 'mostly composed of former dissidents and victims of human rights violations [who] ... do not feel responsible for the deeds and misdeeds of the "old" State.'[90] The principle of the 'continuity of State' in international law recognises the constancy of the institution of the State, regardless of the changes in regime over time.[91]

Next, there is the problem of the involvement of a third party State in causing refugee flows. In this case, Gilbert argues that 'it would not be appropriate to affix liability where the flow is caused by the activities of a third party State during an invasion or occupation.'[92] He suggests the treatment of that third party State as the 'aggressor' State and 'source' State for the purposes of compensation in refugee flows.

Coles brings this point with the assertion that 'mass exoduses can be caused by the international violation of basic rights as well as at the domestic level. Responsibility for mass flow situations can lie with more than one State. For example, 2,5 millions and 780 thousands Afghan refugees in Pakistan and Iran respectively were indirectly caused by political and military intervention by the USSR and thus the two States of asylum might have claimed compensation from the USSR.[93]

Finally, another difficulty could arise in the case when no government exists in the country of origin effectively. As Beyani indicates, 'a general, or even specific, rendition of State responsibility in the context of forcible flows of populations is unhelpful where the core causes lie in the destruction of normal political processes in given States.'[94] A credible example is provided by Somalia. Who then is responsible for providing compensation? Compensation could not be sought until a formal

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[89] Zolberg, A.R., 'The Formation of New States as a Refugee-Generating Process,' *Annals of the American Academy of Political and Social Science,* Vol. 467, 26 (1983).
[90] Dimitrijevic, V. 'Dimension of State Responsibility', at 219.
[91] Ibid., 222
[92] Gilbert, G., 'Root Causes and International Law: Refugee Flows in the 1990s', 11 *Netherlands Quarterly of Human Rights*433 (1993).
[93] Lee, 'The Right,' 559 (1986).
[94] Supra note 71, at 130.

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government is established. Afterwards, the principle of 'State continuity' provides for the passage of time which is of no relevance; in compensation proceedings, 'claims should in principle not be subjected to any statute of limitations.'[95]

[95] Van Boven, T.,'Introduction,' in van Boven, T.,ed., *Seminar on the Right to Restitution, Compensation, and Rehabilitation,* Maastrict, Netherlands, Institute of Human Rights, 14, (1992).

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CHAPTER 4. THE IMPLICATIONS OF THE RIGHT TO COMPENSATION

Besides the difficulties in establishing a cause of action for compensation from the State of origin for refugee flows, there are also complexities in the provision and assessment of due compensation. Few precedents exist, but some, such as the German Jews, Palestinians, and the Ugandan Asians, provide some insights on solving the problem of enforcement through assessment and distribution of monetary payment for legal wrongs.In assessment, two problems may arise. The first deals with determining the amount, which provides 'adequate compensation.' As stated in the *Factory of Chorzow Case,* reparation must 'wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability have existed if that act had not been committed.'[96] In addition, in *The Temple Case* (1962) the International Court of Justice upheld the principle of *restitutio in integrum* when calling for 'payment of compensation to the victims for injury, loss, damage, or expropriation of property rights upon flight."[97] The Institute of Jewish Affairs tried to accomplish this when it attempted to estimate the private wealth of Jewish people living in countries invaded by the Nazis in order to claim indemnification or the 'undoing of damage done and losses suffered ... to restore every individual to the position he held before the damage occurred.[98] The methodology employed data kept by the Nazis, 'private sources' in the Allied and neutral countries, and 'data on the total wealth of the respective nations or national income figures.[99] From this total, the portion belonging to Jews [had] to be calculated on the basis of the ratio of the Jews to the total population, the occupational and social distribution of the total population, and the Jewish minority, and other relevant data.[100]

Problems in this regrd were the determination of a 'just equivalent', especially in considering the inflation of the value of property damaged; establishment of a

[96] *Chorzow Factory* (1928) Permanent Court of International justice (PCIJ), Series A., no. 17, 47.
[97] Supra note 77, at 15.
[98] Robinson, N., *Indemnifications and Reparations: Jewish Aspects,* New York, Institute of Jewish Affairs, 84, (1944).
[99] Ibid, 14
[100] Ibid

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'precise estimate' when 'the accounts and other documents [were] destroyed or falsified, witness[es] [were] lacking, and other proofs inaccessible'; and classification and compensation of damage as strictly personal damage or property damage.[101] In addition, assessments of the proper amounts of compensation 'consistently take less account of non-market values than market-generated values' and often fail 'to take account of the ordinary surplus of value attached to assets over their market prices by their owners.'[102] It is difficult for proper assessments of property value to include 'sentimental value.'[103] Thus, as the Jewish study demonstrates, not only is it difficult to obtain credible statistics and records as to the damaged property, but it is also a challenge to ascertain what is 'adequate'. This is hard especially when trying to determine payment for 'a breach of duty which is actionable without proof of a particular item of financial loss.'[104] This may include 'moral' or 'political' compensation where the, 'injury' is a breach of a legal duty in such cases and the only special feature is the absence of a neat method of quantifying loss as there is relatively speaking in the case of claims relating to death, personal injuries, and damage to property.'[105]Yet, as Dimitrijevic points our, maybe this difficulty is inevitable as no set standard of compensation can be set 'without familiarity with the social environment', and thus the standard of 'adequate compensation' must be flexible for each individual situation.[106]

The second problem in assessment of damages is to determine monetary compensation for non-material damages such as certain human rights violations. Compensation is the most ideal form of restitution in these cases because in cases of 'loss of income and capital, or life and health, or various skills ... [or] damage to rights' it is often impossible to restore the individual to the status he or she had before the damage occurred.[107]Lee argues that refugees claiming compensation for loss other

[101] Ibid., 93
[102] Knetsch, J.L., *Propery Rights and Compensation,* Canada, Butterworth and Co., (1983), 3.
[103] Ibid., 6
[104] Brownlie, *I., Prindples,*458.
[105] Ibid
[106] Dimitrijevic, 'Dimensions of State Responsibility,' at 224.
[107] Supra note 98, at 145.

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than property may be at a disadvantage due to the number of General Assembly resolutions dealing only with such loss, and because property losses are easier to compensate adequately.[108] However, the underlying principles of the right to compensation apply towards other injuries; the German Jews, for example, were compensated for 'the infringement of personal liberty resulting from internment in concentration camps, the interruption of education, and even the humiliation of wearing the yellow star.'[109] However, it must be recognised that a State may not be able to provide compensation since 'the capacity of many States of origin to make reparation is [dependent on] the nature of their economic and political condition in the aftermath of internal conflicts.'[110] Garvey does concede that 'in some situations of refugee flow, particularly the flow that is all too common from poor third world countries, actual compensation will not be practicable.'[111] However, he argues that 'the symbolism of financial responsibility may provide a modicum of deterrence.'[112]

In case that the State of origin is not willing to pay compensation, there are several possible means to apply pressure on behalf of refugees as outlined by Lee and the ILA Declaration of Principles of International Law on Compensation to Refugees. The first is 'granting or withholding' of 'technical, economic, and other development assistance to the developing countries upon request' by the UN.[113] However, this must not apply towards 'disaster-relief assistance as stated in Principle Eight of the Declaration of Principles.[114] A second means is through UNHCR's role as international 'protector' and 'provider of assistance' 'to bring claim on their [the refugees'] behalf against the source country for failure to compensate them for their losses.'[115] The UN's right in this connection was upheld by a decision by the International Court of Justice in its *Advisory Opinion on Injuries Suffered in the Seoice of the* UN according to which 'the United Nations had the capacity to bring an

[108] Lee, 'The Right to Compensation,' at 546.
[109] Ibid
[110] Beyani, 'State Responsibility for Prevention,' at 16.
[111] Garvey, 'The New Asylum Seekers,' at 194.
[112] Ibid., 194.
[113] Lee, 'The Right to Compensation,' at 548.
[114] International Law Association, *Declaration of Principles,* 18, (1992).
[115] Lee, 'The Right to Compensation,' at 550.

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international claim against a State with a view to obtaining reparation for damage caused to its agent, although the latter was a national of the defendant State.' This opinion made it clear that this capacity applies as well to 'the interests of which it [the UN] is the guardian.' Principle Seven of the Declaration of Principles affirms that the United Nations can 'claim and administer' compensation as it is the 'guardian' for refugees and can also bring claims against nation-States. A third potential means of influence is the creation of a new United Nations body with 'the procedural capacity to institute proceedings against their own governments.' This body's purpose would be 'to collect, process, and distribute compensation funds due to refugees worldwide, or assign this task to an existing body.[116] All these options stay hypothetical, however, and increasingly questionable as to their potential effectiveness on behalf of refugees.

Additionlly, the circumstance that there are millions of refugees may lead one to think whether an individual right to file claims for compensation would be available only to the few wealthy enough to obtain legal counsel and pay for the costs. Even if the costs were minimal, there might well be too few courts to handle all the cases. More importantly, the practice of compensation might jeopardise the fundamental right to asylum through its emphasis on State of origin responsibility. Garvey writes that 'freedom of emigration from one's own nation is a fundamental human right and a norm of customary international law', and 'any inhibition of refugee flow at the source suggests violation of the refugees' right to seek and enjoy asylum.' [117]

Enactment of the right to compensation could lead to the situation when the State of origin might want try to contain those it was persecuting, rather than to a fundamental change in the behaviour of the State of origin and to greater respect for human rights.

In the end, there is the problem of whether compensation in any way affects or changes the deeper rooted systematic problems in society which gave effect to refugee

[116] Ibid., 551-552
[117] Garvey, J., 'Towards a Reformulation of International Refugee Law,' 26 *Ham Int'l L J.* 494 (1985).

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flows. Assuming that refugee flows are the result of human rights abuses, would the enforcement of compensation obligations only reinforce the status quo of fundamental injustice, instead of changing the root cause of the problem? Perhaps the enforcement of the right to compensation is in itself only a temporary solution for a much complex and difficult problems, that require fundamental political change and punishment of the perpetrators on the part of the State of origin. For example, in Chile, the Rettig Commission was established by Pinochet's new government to establish 'reconciliation, truth, and justice' by investigation of human rights abuses, publishing them, and giving reparation to those wronged. In this instance, 'the question of financial compensation ... is considered by many to be insulting'.[118] In Chile, monetary compensation for gross human rights violations 'is humiliating and too easy a way for the State to dispose of its responsibility.[119] Rather than bringing justice to the victims in this case, compensation serves to merely 'cover up' the State's wrongs and to reinforce the status quo.

[118] Bamber, Helen, 'Impunity and Reparation,' a paper presented at the Seminar on Rehabilitation of Ex-Political Prisoners, Gaza Community Health Programme, April 17-18, 1994, Medical Foundation for the Care of Victims of Torture, 7, (1994).
[119] Ibid., 12

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CONCLUSION

This paper has attempted to review the problem over the right to compensation as a means of enforcing justice and of preventing future refugee flows.

Given the enormous complexities in legal implementation, assessment, and enforcement of the right on behalf of refugees and host States, it is difficult to be optimistic about this approach as a new, effective weapon for large scale prevention of mass refugee flows. More emphasis has to be laid on strengthening the domestic capacity of States to protect human rights, including the rights of minorities and indigenous groups whose relationship with the State is tenuous in many cases.

However, this does not imply that the right should not be developed. On the contrary, in principle and theory, the right and duty of compensation in the refugee context are justified and should be further advocated, even if this may remain largely symbolic at present. The enforcement of the right to compensation would be strengthened if the act of producing refugees were to be formally characterised as an international wrong. In the end, however, the right to compensation itself will not serve to deal with the root causes of refugee flows which are political and due largely to fundamental abuses of human rights by the States of origin, for 'the application of legal principles cannot in itself settle the underlying issues.'[120] Yet, institution of the right to compensation as a legal norm in the context of the current refugee movements is one safeguard, and may serve as a political 'check' against future injustices committed by nation-States against their own citizens. The pressing need for preventative measures to be applied towards refugee flows calls for the implementation of the right to compensation in international law and for the political will to enforce it.

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