REFUGEES-STATE RESPONSIBILITY, THE COUNTRY OF ORIGIN AND HUMAN RIGHTS

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REFUGEES: STATE RESPONSIBILITY, THE COUNTRY OF ORIGIN AND HUMAN RIGHTS

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1. AN EXORDIUM

The concept of State responsibility is as old as the human civilization. It has been the perennial responsibility of the State to protect the life and liberty of its citizenry. Today an individual has become central to the entire human rights discourse and is being regarded as a subject of International Law. Moreover, national boundaries are losing their meaning. Consequently a new world human order is being emplaced. The human rights of all individuals including that of refugees have become a polemical debate heralding a new premise whereat state concerns and individual rights are at loggerhead with each other. In this conspectus, it is incumbent upon the state to reconcile this paradox in an age of transnationalisation of human rights and civil liberties. Asylum countries are not as much responsible as country of origin. Thus, country of origin should squarely be held responsible for the refugees’ flows and it is the responsibility of the refugee generating state not to create problems of galling proportions for the other states as it is contrary to the notion of a civilized state. The responsibility of the country of origin is higher than the responsibility of state of reception under the International Law.

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 which may also have acquired the legal force of

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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 conduct of state and its agencies, which is reflected in the programmes, policies and practices thereof, resulted in the refugee exoduses. Moreover, flows of refugees have their causes in human conduct outside the destinations to which the persons involved are heading. 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. 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.

2. STATE RESPONSIBILITY

A. Responsibility towards Individuals

a) Refugee – Term and its Scope

An examination of possible rights of individuals against a State of origin cannot take as its starting point the refugee as defined by the 1951 Geneva Convention. Article

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1 of that instrument has created an extremely artful construct which, on the one hand, includes persons who may not have suffered any actual injury – because fear of persecution is sufficient to claim refugee status – and which, on the other hand, excludes persons whose human rights may have been seriously violated, for instance in a civil war.\(^4\) It would be extremely difficult for the purposes of the study undertaken here to follow strictly the borderlines of that definition. In order to simplify matters it would be considered whether an individual who has been coerced into leaving his or her country may have a claim against that country under general rules on State responsibility. Most refugees will fall within this category.

\textbf{b) Action Imputable to the State}

According to the draft articles on State responsibility, Part I, adopted by the International Law commission (ILC) in 1980\(^5\) an internationally wrongful act presupposes first and foremost that an act or omission has occurred which is imputable to the State concerned.\(^6\) This requirement excludes many scenarios from the scope of possible claims under the law of State responsibility.\(^7\) Natural disasters, famine and epidemics are not phenomena that can be directly imputed to human activity, although in many cases it might be found that preventive measures could have avoided the fatal consequences. Nor does civil war as such constitute a complex of occurrences wholly under the responsibility of a national government: it can only be made accountable for action carried out by its own troops.\(^8\) Lastly, it stands to reason that a State cannot be answerable if its citizens flee the country because it has become the victim of foreign aggression. However, what essentially remains as a pattern of actions susceptible of entailing responsibility is a policy that flagrantly violates human rights to the detriment of almost all citizens or a specific group of the population of the State of origin.


\(^6\) Article 3 (a) of Draft Articles on State Responsibility, Part-I Adopted by the International Law Commission (ILC) in 1980.


c) Violation of an International Obligation

An internationally wrongful act presupposes, second, a breach of an international obligation. On the reverse side, all international human rights constitute obligations for the State to which they are addressed. The most pertinent right in this connection is the right of every person to live without disturbance in his or her country.\(^9\) Today, there is no longer a need to rely in this respect solely on Article 13 of the Universal Declaration of Human Rights. The International Covenant on Civil and Political Rights, which guarantees the right of everyone not to be deprived of the right to enter his own country and thereby implicitly recognizes a right of abode\(^10\) has by now (31 March 1994) been ratified by not less than 126 States. Through that wide acceptance from countries all across the globe, it has become the relevant yardstick for State conduct in the field of human rights. In an event, one can safely assume that the right of a person to stay and live in his or her country constitutes, today, customary international law\(^11\) all the more so since it reflects the traditional position that the “natural” place for an individual is the territory of the State of nationality.

If an individual is not directly expelled, but is subjected instead to pressure and harassment affecting his other rights under the Covenant or customary law – his life and physical integrity, freedom from arbitrary arrest, freedom of expression etc.\(^12\) – so that eventually no other option remains open that to leave the country of residence in order to be able to lead a life in human dignity, there is still no escaping the conclusion that the right under Article 12 of the Covenant – or the corresponding right under general international law – has been violated. To be sure, Article 12 (4) is a right that may be restricted. Restrictions are permitted to the extent that they are not “arbitrary”. In order to interpret this term, a possible option is to have indirect recourse to the limitation

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10. Article 12 (4), UN Covenant on Civil and Political Rights, 1966


clause of paragraph 3, which as such does not apply to paragraph 4. However, although the scope of the notions set forth in paragraph 3 (in particular: “public order (order public)”) is fairly wide, governments cannot possibly rely thereon to expel on a mass scale their own citizens. In an individual case, to pronounce banishment against a person may be a more humane solution than to confine him or her to a place of detention. The tradition of ancient Greece in this respect should not be lightly discarded. But State power, which is always governmental power, lacks the legitimacy to push entire parts of a population out of their ancestral homes. A government that sees no other solution than to have recourse to this extreme remedy, or which puts its citizens under such unbearable pressure that they “voluntarily” choose to flee, acts contrary to the basic interests of its people and thereby breaches the covenant of trust from which it has received its authority.

d) The Legal Consequences Flowing from a Violation of Human Rights Obligations

The question is what legal consequences flow from a breach of human rights obligation? Does a person having suffered the fate of expulsion from his or her home country acquire an individual right of reparation?

(i) Individual Human Rights Entitlements under International Law

As a general premise of this question, it would be helpful to know whether human rights establish in general a juridical relationship at the level of international law between States and individuals under their jurisdiction. In spite of many general writings on the position of the individual in international law, to date this issue has not been sufficiently clarified. As far as treaties for the protection of human rights are concerned, they are generally implemented by and through national authorities and become applicable to the individual by virtue of acts of domestic legal systems, which can either

13. St. Jagerskiold, “The Freedom of Movement”, in Henlein, L. (ed.), The International Bill of Rights, New York 1981, p. 180, contends that “there was no intention here to address the claims of masses of people who have been displaced as by product of war or by political transfers of territory or population.
make those treaties part and parcel of the internal legal order by a national law of approval (continental system) or attempt to implement them on the basis of municipal legislation (British system).\(^{16}\) However that may be, as long as a human rights treaty is confined to substantive provisions, the individual lacks a right of action of his own within a juridical context outside the domestic legal order. It is only when such a treaty additionally provides for a remedy to be submitted to an international body that the legal relationship grows beyond the confines of national law.\(^{17}\) This is true of the European Convention of Human Rights, where the substantive guarantees and the individual application under Article 25 now form an integrated whole since acceptance of that remedy, although formally a distinct and separate act, is considered by the community of States associated in the Council of Europe a political obligation inextricably bound up with the ratification of the Convention itself. Under the International Covenant on Civil and Political Rights, too, the relationship has become a very close one in as much as States parties have submitted to the Optional Protocol providing for the remedy of individual communication; indeed, out of the 126 States parties, not less than 76 are at the same time bound by the Optional Protocol.

Furthermore, a relationship under international law comes into being whenever a State, through its agents, executes a policy of grave human rights violations, characterized by the international community as crimes which in no instance can be justified by domestic law and for which the authors involved incur penal liability under international law. Under such circumstances, as a necessary corollary of the absolute outlawing of the criminal action concerned, the potential victims must be deemed to enjoy a right of resistance, directly conferred upon them by the international legal order.\(^{18}\) With regard to genocide, this logic is particularly obvious. Nobody can be required by law passively to endure his or her assassination by a government that has turned into a murderous machine.


\(^{17}\) This is also the test applied by the ICJ in the Reparation for Injuries Case, ICJ Rep. 1949, pp. 174-179.

(ii) An Individual Right to Reparation

However, even if one proceeds from the assumption that human rights constitute individual entitlements under international law, at least to the extent that they are supported by an international mechanism of individual complaint or that core entitlements of the individual are arbitrarily impaired, it is by no means sure what consequences are entailed by the violation of such a right. The general proposition that a breach of an international engagement involves an obligation to make reparation, as it was formulated by the Permanent Court of International Justice in the Chorzow case, 19 is well known and need not be repeated here. Similarly, it should be noted that under Article 6 bis of the draft articles elaborated by the ILC on the form and contents of State responsibility the injured State is entitled to obtain from the State which has committed an internationally wrongful act full reparation. 20 However, the relevant rule has always been formulated as inter-State law governing legal relationships between States as subjects of international law. Indeed, it has never occurred to any of the Special Rapporteurs of the ILC on the topic of State responsibility that a State could incur responsibility vis-à-vis the individuals injured in case of a breach of a human rights obligation. 21 This finding carries all the more weight since violation of human rights is specifically mentioned in the available drafts. Article 19 of Part I, 22 which deals with “international crimes”, devotes an entire sub-paragraph (Para 3 (c)) to “serious” breaches” on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid”, and Article 5 of Part II, 23 which defines the “injured State”, refers explicitly to human rights treaties (Para 2 (e) (iii)). Thus, the existence of human rights law has by


22. Supra note 5.

no means been overlooked. But seemingly the legal position was assessed as not conferring any right of reparation directly on an individual victim of a violation.

It is significant, in this connection that the relevant human rights treaties remain largely silent on the issue of the consequences deriving from non-compliance with its obligations by a State. The premise is always that a State must fulfil what it has formally pledged to do. Thus, to the extent that one may assume the existence of an individual entitlement under international law, there exists a right to specific performance. The individual has the right to claim that the governmental machinery he or she is confronted with behave as set forth in the relevant provisions. As far as violations of a continuing character are concerned, one may therefore speak of a right to cessation. Yet, it is less clear – or even totally obscure – whether a right to reparation proper comes into being, a right that would be designed to *wipe out* the consequences of the commission of the unlawful act.

The relevant stipulations of the European Convention of Human Rights are remarkably cautious. According to Article 50, the European court of Human Rights (Court) shall, “if necessary, afford just satisfaction to the injured party”, if the internal law of the State “allows only partial reparation to be made for the consequences” of the unlawful conduct complained of and found to exist.²⁴ First of all, the phrase “if necessary” grants the Court a wide margin of discretion. Second, domestic law, which ordinarily is considered from the viewpoint of international law as a pure factual element, is recognized as an obstacle justifying the Wrongdoing State to abstain from restitution in kind. Thirdly, one may note that the individual is not openly recognized as the holder of a right to “just satisfaction” in lieu of reparation in kind; what Article 50 does, instead, is authorize the Court to grant satisfaction as required under the circumstances. Lastly, in its jurisprudence the Court has constantly interpreted “just satisfaction” as being tantamount to financial compensation. Attempts by applicants to obtain a pronouncement requiring the Defendant State to make good in kind the consequences of its unlawful conduct have always been in vain. Thus, in the *Bozano* case,²⁵ the applicant had insisted

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on *restitutio in integrum*, namely re-surrender to French territory from which he had been removed in disregard of applicable French extradition procedures and therefore also in disregard of Article 5 of the Convention (right of individual freedom). But the Court did not accede to this demand; by avoiding to give a clear-cut-answer, it implicitly made clear that its competence was confined to granting financial compensation.

The legal position under the American Convention on Human Rights can be described in terms slightly more favourable to the individual. Article 63 (1) enjoins the Inter-American Court of Human Rights to rule, if it has made a finding of a violation, *that the injured party be ensured the enjoyment of his right or freedom that was violated.*

Thus, the Court is required to bring about cessation of the wrongful conduct complained of and found to exist. Additionally, however, it is incumbent on the Court to rule, “if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party”. Judgements, which fix compensatory damages, are enforceable under the laws of the country concerned (Article 68 (2)). Some language in the first judgement on the merits of a case, the decision of the Court in *Velasquez Rodriguez* of 29 July 1988, and in the subsequent judgement on compensatory damages in that case of 27 July 1989 which was incumbent on the defendant, the State of Honduras. In fact, one may harbour serious doubts as to whether the *if-appropriate* clause permits to affirm the existence of an individual right proper – which could hardly be committed to the discretion of the Court. It is significant, in this regard, that the compensation due in the *Velasquez Rodriguez* case was to be negotiated and agreed upon between the Inter-American Commission and the government of Honduras, not by the beneficiaries themselves.

The body that has consistently shown a bold approach to the issue of reparation is the Human Rights Committee under the International Covenant on Civil and Political

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26. Inter-American Court of Human Rights, Series C: Decisions and Judgements, No. 4, p. 91 (English version).

27. Ibid. No.7, p. 33 (English version).


29. Ibid.
Rights. The Covenant itself mentions a right to compensation in two places, each time in relation to personal freedom. Article 9(5) specifies that an individual who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation. Similarly, Article 14 (6) sets forth that a person who has been the victim of a miscarriage of justice shall be compensated according to law. Although these two provisions are primarily intended to enjoin States to establish individual rights under domestic law by enacting the requisite legislation, they shed nonetheless some light on the Covenant as to when a situation must be considered so serious as to warrant being remedied by some compensation in money – an assessment that would seem to permit appropriate conclusions.

Notwithstanding the restrictive conception enshrined in the Covenant itself, the Human Rights Committee has not felt prevented from expressing in its final views under Article 5 (4) of the Optional Protocol fairly far reaching suggestions as to the way in which a wrong committed is to be corrected. Already in its first views on the merits of a case, brought against Uruguay, it held that the Defendant State was under an obligation “to provide effective remedies to the victims.” In many instances, it has held that the victim of a violation was entitled to a remedy, including appropriate compensation.a culmination point of its jurisprudence was reached in a series of views addressing trials resulting in the imposition of the death penalty that had not been conducted in conformity with the procedural standards laid down in Article 14 of the Covenant. In view of the gravity of some of the procedural defects found by it, the Human Rights Committee pronounced itself for the immediate release of the convicted persons. These rulings are not understood by the Committee as the exercise of some jurisdiction ex aequo et bono. Rather, the Committee views its appeals for the liberation of the victims as a logical consequence of the breach of the obligations in issue. Indeed, one is confronted here with an ineluctable choice where questions concerning the true meaning of international

30. Ibid.
human rights cannot be papered over anymore by some vague formulae. If an individual injured by a human rights obligation cannot obtain any redress for the loss suffered, the right at stake becomes almost meaningless. To buttress its line of reasoning, the committee has taken to invoking Article 2 (3) of the Covenant, which provides that an individual claiming that his or her rights under the Covenant have been violated must be given an effective remedy. The reading of the Committee, according to which remedy is equated with remedial action for the reparation of the wrong done, cannot be maintained in the light of the French and the Spanish texts, whose words do not have the same double connotation as the English word “remedy”. Thus, the only remaining explanation is an application of the general rules of State responsibility.\footnote{Ream Charan B.G., “State Responsibility for Violations of Human Rights Treaties”, in Contemporary Problems of International Law: Essays in Honour of George Schwarzenberger, London 1988, p.242.}

A leap forward in legal thinking was made by the Security Council when it determined in resolution 687 (1991) that Iraq is liable under international law for any direct loss, damage...Or injury to foreign Governments, nationals and corporations as a result of its unlawful invasion and occupation of Kuwait (para 16). Here, for the first time, it was unequivocally recognized that grave breaches of international law may entail direct responsibility towards the individuals’ injured.\footnote{UN Compensation Commission, Provisional Rules for Claims Procedure, Doc. S/AC.26/1992/INF.1, Article-5} However, resolution 687 (1991) remains an isolated precedent as yet. In no event could it be extended to any kind of human rights violation. It should also be observed that its philosophy is based on traditional concepts of the law of aliens. Only foreign nationals are mentioned as being entitled to claim reparation, whereas Iraqi citizens are not taken into account.

e) A Mass-Scale Problem – The Refugees

The ideas just developed rest on an analysis of configurations characterized by their individuality. Generally, however, refugees are not isolated individuals. When a tense political situation in a given country develops to the point of making departure an advisable option, many people will start leaving their homes at the same time. Mass migration sets in. the question is whether the large scale dimension of the phenomenon changes the terms under which it should be addressed. For the refugee himself, the best solution is normally to be able to return to his country, provided of course that the
circumstances prompting his or her departure have fundamentally changed. The right to return is nothing other than the original right guaranteed under Article 12 of the Covenant and at the same time anchored in customary law. It is not a “new” right brought into being by the wrongful measures taken by the State concerned. No valid legal defence can be perceived that might be adduced to justify restrictions aimed at preventing masses of people from regaining their country of origin. In fact, the General Assembly has often asserted a right of refugees to return back home. This was done for the first time in the famous Resolution 194 (III) of 11 December 1948 on Palestine. In that resolution, the General Assembly –

“Resolved that that the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible”.

Similar wording can be found in the relevant resolutions on Afghanistan and Cambodia. Recently, addressing the situation of human rights in the territory of the former Yugoslavia, the General Assembly reaffirmed –

“The right of all persons to return to their homes in safety and dignity”. And likewise the Human Rights commission stressed a few months ago – “the right of any victims (scil. of ethnic cleansing) to return to their homes”.

In all of these instances, apparently the right to return was highlighted precisely because a mass phenomenon was in issue. The General Assembly would not have pronounced itself on individual cases, and the same is true of the Human Rights Commission. Compensation for the losses suffered, by analogy to what would be regarded as the applicable rule in an inter-State relationship, may be different matter. It should first be noted that the resolutions referred to refrain generally – with the exception of the resolutions on Palestine – from dealing with this theme, confining themselves to


claiming that refugees should be able to return to their homes, which implies that they have a right to recover the properties owned by them at the time of their departure.\textsuperscript{38} To go further than that and claim a right of compensation for the benefit of those who are forced to stay abroad transcends the original logic of an inter-State system where entities that are essentially alien to one another maintain between themselves “foreign relations”. Refugees having left their country of origin and demanding compensation lay a claim against the remainder of the population which still lives under the regime responsible for giving rise to the mass departure for other countries.

However, those staying back home may be exposed to even greater suffering. More often than not, refugees eventually enjoy much better opportunities for personal development than those choosing or involuntarily having to endure the mismanagement of public affairs by a government not in compliance with its human rights obligations. The complexity of this situation cannot be dealt with in accordance with relatively simple recipes of international law which seem to require full reparation for any injury caused to another nation.\textsuperscript{39} Within a national community, one would first have to establish a comprehensive balance sheet of all the damage resulting from the activity of a criminal regime; thereafter, one would have to make a determination on the extent to which reparation may seem feasible in light of the potential of the national economy. Lastly, it would also have to be determined how the financial burden for the damage caused should be distributed among all of the members of the national community, taking into account basic principles of just taxation.

The compensation for massive human rights violations raises a delicate problem of distributive justice. If one would grant a right of compensation to everyone having lived under an arbitrary system of governance, everyone would become debtor and creditor at the same time. Here, the model of international responsibility must yield to more subtle regimes, which many countries have conceived of when trying to cope with a past that made victims of large numbers of the population.\textsuperscript{40} A good case in point is the situation in


\textsuperscript{39} Supra note. 28, p. 70.

\textsuperscript{40} Supra note 28, p. 70.
South Africa. During the last decades, many black South Africans were forced to leave their country because of the brutal strategies of repression resorted to by the white minority government. On the other hand, those who stayed behind lived under the daily harassment of blatant racial discrimination. Thus, both groups of the black population were victims of measures gravely violating universally accepted human rights standards. Yet, now to make the new democratic body politic accountable for the violations committed in the past would lead to an absurd result, since the victims would have to pay their own compensations.  

The case of Palestine was different. Here, a national community, the Jewish people, took possession of the properties and other assets of the Arab population that had fled to neighbouring countries. Consequently, the issue of reparation could be stated in the classical terms by analogy with inter-State law, where the simple maxim applies that a population organized as a State may not unjustly enrich itself to the detriment of another similar group so that harm done must be repaired. A similar assessment is justified in cases of *ethnic cleansing*, when a specific ethnic group is the target of persecution intended to bring about a definitive expulsion from the former community of residents.  

**B. Responsibility Towards States**

When looking into the issue of responsibility of a State of origin towards receiving States, one should from the very outset draw a distinction between States that have suffered tangible injury by being burdened with having to take care of a substantial group of people from the relevant country of origin, and other countries that are not directly affected but may make representations and raise claims as guardians of international legality.

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41. Article –V (1), Principles Concerning Treatment of Refugees, (A refugee shall have the right to receive compensation from the state or the country which he left or to which he was unable to return) adopted by the Asian-African Legal Consultative Committee in 1966, Report of the Eight Session held in Bangkok, p.211.  

a) States Directly Injured

As already pointed out, claims under the legal heading of State responsibility presuppose in the first place that a breach of an international obligation has occurred at the hands of the State. 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 country 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. 43

(i) Human Rights Obligations

Things are less clear when a government conducts a human rights policy contrary to generally recognized standards, not acting, however, with the avowed or hidden purpose of coercing the victims to flee. It may then be asked whether it in fact violates its obligations vis-à-vis another State so that it may become liable to make reparation towards any such other State. It can be demonstrated, though, that human rights obligations have manifold objectives. They are not only designed to protect their immediate beneficiaries, but have from the very outset been conceived of as important elements of a state of peace in the world. In the preambles of the UN Charter and the Universal Declaration of Human Rights, as well as the two International Covenants of 1966 44 the close relationship between peace and human rights is formally acknowledged. Thus, without distorting the finality of human rights, one may conclude in very general terms that respect for, and full observance of; human rights are also designed to prevent any spill over effects resulting for States from unrest and turmoil in another State.

(ii) Prohibitions Regarding Population

Lastly, reference may be made to rules, which prohibit specific conduct. According to the Charter of the Newberg International Military Tribunal, 45 “deportation” was considered a crime against humanity (Article 6 (2) (c)), and this rule was confirmed

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44. Supra note. 28, p. 72.
by the ILC in its codification project under the title *Principles of International Law Recognized in the Charter of the Newberg Tribunal and in the Judgement of the Tribunal*. However, deportation is the deliberate act of transferring human beings to a specific destination, generally to the territory of an occupying power, whereas a State generating a flow of refugees confines itself to driving people out of its territory, either coercing them to leave the country or putting them under such pressure that they *voluntarily* choose to go away, if possible. Thus, a prohibition of deportation does not squarely address the issue of a refugee-generating policy.

The Fourth Geneva Convention of 1949 relative to the Protection of Civilian Persons in Time of War goes one important step further in mentioning alongside with deportation unlawful *transfer* of a protected person (Articles 45, 49, 147). Transfer may be understood as being synonymous with removal, the connotation being that governmental authorities forcibly displace a person from his or her place of residence. Again, therefore, this definition of an unlawful act does not fully meet the specific characteristics of actions resulting in a flow of refugees. Mostly, refugees leave the country of persecution on their own initiative, although prompted to do so by strong pressure brought to bear upon them. Generally, they are neither deported nor transferred to a foreign country. In addition, the Convention only applies to armed conflict. This is also the weakness of Additional Protocol I to the Geneva Conventions (Article 84 (4) (a)).

Not even the draft Code of Crimes against the Peace and Security of Mankind, has established a clear rule enjoining States from pushing their citizens out of the national territory. Following the logic of Article 85 (4) (a) of Additional Protocol I to the Geneva Conventions, it characterizes as an unlawful systematic or mass violation of human rights *deportation or forcible transfer of population*, irrespective of the context of

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47. Supra note. 45.


49. Supra note. 28, p. 73.
such measures, be it an armed conflict of an international character or another situation of anarchy or disorder (Article 21). Even here, however, the causing of a refugee problem as such as not addressed.

Thus, each situation requires careful consideration on its own merits. *There exists no international legal rule, which in explicit terms puts States under an obligation not to turn themselves into a source of refugee flows.* On the other hand, receiving States can rely on non-observance by a State of origin of its basic human rights obligations; they can claim, additionally, that such conduct necessarily affects their sovereign right of territorial integrity.

(iii) Causality

It might be argued that, as far as States as injured parties are concerned, a causal link was missing since every State had the sovereign right to close its borders to persons requesting admission. However, such objection would have to be dismissed. As far as refugees under the 1951 Convention are concerned, the prohibition of *refoulement* applies. With regard to *de facto* refugees, on the other hand, who attempt to escape from the horrors of civil war, in particular, States are at least under a moral obligation to demonstrate human solidarity vis-à-vis the victims. Within a civilized community, it is only natural that even those who cannot invoke an international legal instrument to their benefit should find refuge in some other country. If the dignity of the human being is proclaimed time and again as the supreme element in a hierarchy of values to be protected, a policy of shutting all doors to undesired arrivals would mean a deadly blow to the very idea of international protection of human rights.\(^{50}\) Therefore, a State refusing to bear the costs incurred by other States as a consequence of its refugee generating policies must be deemed to be stopped from claiming that to receive its citizens was an independent decision that interrupted the original chain of events. In order to set the record straight, it should be made absolutely clear that the arrival of human beings cannot as such be considered to constitute injury. It is the expenditure incurred in taking care of the refugees that is susceptible of being taken into account as a financial loss relevant under the rules on State responsibility.

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(iv) Cessation and Reparation

Many consequences may derive from the commission of an internationally wrongful etc. Here, the main consequences would be twofold. First of all, there is a general obligation to cease unlawful conduct.\(^{51}\) Second, however, to the extent that restitution in kind is impossible because the refugees concerned cannot be expected to return to conditions as bad as those prevailing when they left, a right to financial compensation comes into being.\(^{52}\) Here, the complexities of the internal situation in State of origin are without any legal relevance. The burden of internal unrest and strife cannot legally be shifted to other nations.

(v) Precept and Practice

Although the legal reasoning may be developed to this point without any apparent flows, one cannot ignore the fact that there is little practice confirming the existence of a duty to pay financial compensation.\(^{53}\) The international community has established the office of the UNHCR precisely because of its experience that source States are normally in such dire condition that any effort to squeeze the least amount of money out of them would be doomed beforehand. Germany is the one great exception to this lesson of the past,\(^{54}\) but it should not be overlooked that payments were made only by the new democratic regime after the fall of the Hitler dictatorship.

The same holds true with regard to the duty of cessation. It is logically most satisfactory to conclude that a government, which submits its people to such abuses of power that large groups start leaving the country is under duty to modify its conduct, returning to the path of legality. In a realistic perspective, however, one must acknowledge that to enforce such a duty belongs to the most challenging tasks ever imaginable. In a chaotic situation like the one currently prevailing in Rwanda all legal considerations have lost any real impact on the motivation of the feuding political

\(^{51}\) Supra note. 6.

\(^{52}\) Supra note. 6.


\(^{54}\) Supra note. 28, p. 75.
leaders. Nothing can stop the murderous fighting other than sheer military might. In one instance only has the international community intervened with some success to stop merciless persecution of a minority. As is well known, in order to allay the plight of the Kurds in Northern Iraq the Security Council established a security zone (Resolution 688 of 5 April 1991).\textsuperscript{55} Presently, same situation is prevailing in Congo, Iraq and Liberia. Given the many doubts concerning the role it can and should play within a new world order, the Security Council will certainly not repeat this experimental strategy in the near future.

In any event, a hard look at realities shows again that there exists a wide discrepancy between theory and practice. It is precisely in recognition of the powerlessness of the international community vis-à-vis the collapse of civilized standards of conduct in a given society that refugee law has emerged. Because of the obvious lack of effectiveness of the ordinary rules of international law in such a situation, other States step in, motivated by considerations of human solidarity for the benefit of the victims. Still, the basic parameters have changed. While 70 years ago R.Y. Jennings had to rely, in a somewhat strained fashion, on the doctrine of abuse of rights to show that States did not enjoy sovereign freedom to shove parts of their population out of their territories,\textsuperscript{56} well-established principles of human rights law now restrict the powers inherent in sovereign Statehood.

The lack of trust in the effectiveness of the traditional rules of international law is most conspicuously reflected in the relevant resolutions of the competent political bodies, the General Assembly and the Human Rights Commission. Regarding the situation in Bosnia-Herzegovina, in particular, although \textit{ethnic cleansing} and other human rights violations are constantly deplored and unambiguously condemned, one does not find a single line that would suggest that the aggressor country involved could be under an


obligation to defray at least part of the costs entailed by providing adequate care to the 
refugees expelled from their native towns and villages.\textsuperscript{57}

\textbf{b) State Acting as Guardians of International Legality}

Even States that have not directly been affected by a flow of refugees may have legal 
claims against the State of origin. The jurisprudence of the ICI on obligations \textit{erga omnes} 
is too well known to have to be described here in any detail. What matters is the fact that 
according to the authoritative pronouncement in the \textit{Barcelona Traction case}\textsuperscript{58} every 
State has legal standing to act – in some form – for the protection of basic human rights 
that have been breached. Generation of refugees is of course not an element of the 
indicative list given by the ICJ, and it would not fit therein. The criterion chosen by the 
ICJ is that of particular gravity. Hence, everything depends on the specific circumstances. 
If, for instance, a government engages in a policy of genocide, thereby terrorizing the 
members of the persecuted group and inducing them to flee abroad, every member of the 
international community may be considered affected. The same is true with regard to a 
policy of \textit{apartheid}, as explicitly emphasized by the ICJ in its advisory opinion on 
Namibia.\textsuperscript{59} In the case of more subtle harassment; however, the threshold of gravity may 
not have been crossed.

The dictum of the ICJ has not remained an isolated incident. According to Article 
5 of Part II of the draft articles of the ILC on State responsibility, in case of a violation of 
a human rights obligation under customary international law or if the breach attains by its 
seriousness the quality of an international crime, all other States are to be considered 
injured; in case of a human rights obligation based on treaty law, all other States parties. 
This gives them legal standing to participate in the enforcement process.\textsuperscript{60}

Unfortunately, the precise legal meaning of the position as \textit{defensor legis} 
recognized for every State has not been fully clarified as yet. The articles adopted by the

\textsuperscript{57}. UN General Assembly Resolution 48/ 153 of December 1993 recognizes “the right of victims of “ethnic 
cleansing” to receive just reparation for their losses”, Para 13.

\textsuperscript{58}. ICJ Report, 1970, p.3 at 32.

\textsuperscript{59}. Supra note 28

\textsuperscript{60}. Supra note. 28.
ILC grant most generously all the rights to which an internationally wrongful act may give rise to the “injured State” tout court, without drawing any distinction as to whether the State concerned has suffered tangible injury itself or whether its standing is solely justified. It is in this sense also that the special Rapporteur on the topic, Gaetano Arangio Ruiz, has suggested a new article 5 bis\(^{61}\) intended to do away with any legal differentiation between the two groups of States. However, while nobody would have any doubt that the minimum content of a right of response to injury caused must include the right to make representations, it is a different matter altogether to acknowledge for any injured state a right to obtain compensation, as suggested by draft article 8, already adopted by the ILC.\(^{62}\) This enlargement of the circle of right-holders is simply wrong and would necessarily lead to utter confusion.\(^{63}\)

C. Responsibility Towards the International Community

One more than one occasion the General Assembly has stressed that flows of refugees unleashed by one country affect the entire international community.\(^{64}\) Indeed, this simple truth finds confirmation in the fact that persons having lost the protection of their home State must be given a place to stay, food, shelter and medical care. To assist national governments in performing this task, the UN has created the office of the UNHCR, which for its part requires to be financed by the members of the international community.

In order to implement the responsibility of the State of origin, the international community can make use of the powers of the Security Council, provided that the requirements for action in accordance with Article 39 of the UN Charter – a threat to or a breach of the peace or an act of aggression - are met. Intervention by the Security Council can serve in particular to stop the actions that have set in motion a mass exodus. Almost unchallengeable in theory, this conclusion is hard to translate into concrete practice. Except in the case of the Kurds of Iraq, the Security Council has never taken the view

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62. Supra note. 6.
64. Supra note. 28.
that to generate a flow of refugees may constitute a threat to international peace and security. The guarded language of Resolution 918 (1994) of 17 May 1994 on Rwanda is most revealing. It is certainly not be sheer oversight that the Security Council confines itself to pointing out that the massive exodus of refugees to neighbouring countries constitutes a humanitarian crisis of enormous proportions.

It goes without saying that the international community has additionally a vivid interest in recovering from a State of origin the costs it has defrayed for taking the requisite measures of protection. First of all, recovery would help replenish the budget of UNHCR, which is constantly under threat in as much as it rests totally on voluntary contributions by interested States. On the other hand, if governments had to realize that money spent for the benefit of refugees were recoverable from them, this might act as deterrent in critical situations where fundamental policy determinations are being made. In law, a good case can be made for a claim to reimbursement. If, in accordance with the judgement of the ICJ in Barcelona Traction, generation of large-scale flows of refugees in a given situation can be evaluated as a violation of an obligation erga omnes, then the international community as such must first and foremost be considered as the injured party.

Indeed, the ICJ introduced the omnes only as a subsidiary construction to fill in the gap caused by the international community’s lack of operative institutions. The Office of the UNHCR, however, is a fully effective institution. It has been entrusted by all States with discharging the charitable functions which in a civilized world are owed to those having lost their homes. Thus, the international community is not a hollow word precisely in this connection. It has established appropriate mechanisms, and it continually spends important financial sums to counter-balance the wrongs inflicted on it by States that violate basic human rights of their citizens. Therefore, one is on safe ground in concluding that the UN, as the legal person to which UNHCR belongs, has a right to

recover the costs disbursed by it from a State of origin that has wilfully caused massive departures of its citizens through a policy of systematic human rights violations.  

The same result may also be obtained through a different line of reasoning. It is arguable that the international community, by taking care of the elementary vital needs of the citizens of a given country, engages in *negotiorum gestio*, an institution found in all major systems of law and whose rules can therefore be characterized as general principles of law. Normally, whoever supplies necessities to an indigent person who should have been taken care of by the principal, has a right to be compensated for his expenditure. this is precisely the situation at issue here where the international community through UNHCR provides shelter, food and medical care to refugees in order to save their lives and protect their physical integrity.

### 3. LIABILITY WITH ACCOUNTABILITY

State responsibility is not the only possible basis for a legal claim to compensation. One could also resort to objective liability in the sense that a State of origin, whatever its human rights record, is duty-bound to repair the damage caused to other States by a massive influx of its nationals into their territories. Some authors have suggested that the Trial Smelter case could be used as the starting point for this approach.

The famous dictum by the arbitration tribunal to the effect that:

> 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,

Could with some hesitation be applied to refugees as well. Quite obviously, it is rather embarrassing to compare refugees with toxic fumes, and the authors concerned

66. Supra note 43.


68. Supra note 3.

have not failed to notice the qualitative difference, presenting their apologies for the equation. But even if one accepts that, viewed from the angle of the receiving State, the effect may have some similarity, one must note that to date the notion of objective liability, which does not require as one of its constitutive elements a breach of an international obligation, has not yet been generally accepted in international law. There is not a consistent practice, nor does the researcher succeed in identifying a clear and unambiguous opinio juris. Ample proof for this lack of general consensus is provided by the ILC’s inability to agree on a set of principles to deal with the issue of liability. The topic was put on the ILC’s agenda back in 1978. To date, after 16 years, no more has been produced than a set of fairly innocuous principles of prevention with regard to activities involving risk. The general feeling of uneasiness with the topic results precisely from the fact that the ILC, instead of codifying time-honoured rules, would engage in progressive development in a highly sensitive field, the available practice of State failing to furnish any consolidated guiding criteria. It would be more than hazardous, therefore, to try to derive any rule concerning refugees from the Trial Smelter precedent.

4. CONCLUSION

The consequences of the individualisation of international responsibility for the law on state responsibility have not been addressed by the recent restatements of the law of individual responsibility and the law of state responsibility. Traditionally, international law attributes acts of individuals who act as state organs exclusively to the state. Although in factual terms states act through individuals, in legal terms state responsibility is born not out of an act of an individual but out of an act of the state. State responsibility neither depends on nor implies the legal responsibility of individuals. Responsibility of individuals is a matter of national, not international law. In this respect, the dualities between state and individual and between international law and national law are mutually supportive. Thus, the duality between state and individual is reflected in several key principles of the law of state responsibility. The invisibility of the


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individual in the traditional law of state responsibility did have drawback. Shielding the individual from responsibility undermined the efficacy of international law.

But the limited number of acts can lead both to state responsibility and individual responsibility resulting in the human displacement of galling and appalling proportions. These acts include planning, preparing, or ordering wars of aggression, genocide, crimes against humanity, killing of protected persons in arm conflict, Terrorism, and Torture. These acts can be attributed both to the state and the individual. Although traditional law of state responsibility makes no distinction between attribution of acts of heads of states or other high officials, on the one hand, and attribution of acts of lower ranking officials, on the other. Acts of all state organs are attributed to the state. In respect to a limited number of breaches of international law, the international community may proceed along to paths – the path of individual responsibility and the path of state responsibility. It may be possible to speak of a law of international responsibility, of which the law of individual responsibility and the law of state responsibility are component parts and which in particular cases are interrelated.

International refugee law is largely indifferent to the question as to whether refugees return to their original homes or relocate to another place within their country of origin. Both return and relocation are considered to be “durable solutions”, which in UNHCR terminology is the threshold beyond which an individual ceases to be defined as a refugee, and therefore no longer requires the protection of the 1951 Convention. Because international refugee law is humanitarian in purpose, and the mandate of UNHCR is one of protection, the responsibility of the international community ceases once the refugee settles in a place of safety. A purely localised risk of persecution is not in general sufficient to ground refugee status, provided that flight to another part of the country is reasonable and safe. The courts of a number of States, including Germany, use this principle of the “international flight alternative” in their interpretation of the 1951 Convention, according to which refugees not considered to be refouled contrary to the Convention if here if there is any place within their country of origin where they can go without risk of persecution.