

The Right to Compensation and Refugee Flows: A 'Preventative Mechanism' in International Law?

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1. Introduction

As the international community approaches the end of the twentieth century, 13,200,000 refugees are estimated to inhabit the globe. This only encompasses those who happen to fall within the 1951 Convention relating to the Status of Refugees which defines 'refugees' as persons fleeing from persecution on account of race, religion, nationality, membership of a particular social group, or political opinion who are physically outside their country of origin. The overall numbers are much higher — an estimated 22,729,000 — if account is also taken of those fleeing armed conflict, of returnees, of those who do not cross an international border, or who, although in fear of persecution, do not obtain recognition of their status.¹ Nonetheless, the large increase in the number of persons seeking asylum has caused government officials and academics to call for mechanisms to deal with the 'root causes' of refugee flows and for 'early warning systems'. 'Prevention' and 'avoidance' of refugee flows have become the key words in the discussion of new refugee policies in the international arena in the belief that 'it is time to apply treatment to the causes of the malady and not just its symptoms'.² According to this view, the problem in the past, was a primarily reactive focus. As a result, the response to refugees avoids the principal player and has become a 'regime focused almost exclusively on post-flow relief and humanitarian protection, [and] the current framework underwrites mass movement, thereby

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¹ Statistics are available from UNHCR's website: <http://www.unhcr.ch>.

² Lee, Luke T., 'The Right to Compensation: Refugees and Countries of Asylum,' 80 *AJIL* 566 (1986).

facilitating its occurrence'.³ The need now is for a balanced approach which deals with the 'ameliorative' and the 'preventative' simultaneously.⁴

Within this spirit of prevention and of dealing with root causes, an old concept has surfaced once again as a possible means of reversing the growing numbers of those seeking asylum. As early as 1939, Jennings addressed the notion that refugees and host States affected and injured by the State of origin are entitled to reparations. Proponents of this right today argue that it is founded in the Universal Declaration of Human Rights (UDHR48), article 8 of which calls for the right to a remedy, and that it receives further support from the theory of international burden sharing. Luke T. Lee argues that the right to compensation claimed by refugees and host States has long been recognised but has not been systematically or consistently enforced.⁵ Systematic enforcement of the right to compensation against the State of origin is therefore called for through a definition of 'what mechanisms or channels should be used' and 'what would be the sanctions, if any, against States for non-compliance with their "obligations"'.⁶ What is needed is to institutionalise State-of-origin responsibility specifically in 'substantive principles and procedures for compensation',⁷ for in this way the institution and consistent enforcement of compensation obligations against the State of origin will ultimately 'render justice' to refugees and 'avert' future refugee flows.⁸

2. The Right to Compensation in Civil Law

In assessing the value of the right to compensation as a preventative mechanism for refugee flows in international law, it is helpful to review its origin in the law of tort. This branch of the law is 'largely concerned in practice with the allocation of losses arising from the violation of the interest of one person by another, that is with loss-distribution'.⁹ The violation of interest constitutes a breach of duty or 'an illegal act or omission, an "injury" in the broad sense'.¹⁰ Within tort law, this breach is a tort or 'a wrongful act or omission for which damages can be obtained in a civil court by the person wronged, other than a wrong that is only

³ Garvey, J., 'The New Asylum Seekers: Addressing Their Origin,' in Martin, David A., ed., *The New Asylum Seekers: Refugee Law in the 1980s*, Martinus Nijhoff, 184 (1988).

⁴ 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 *BYIL* 317 (1986).

⁵ Lee, 'The Right to Compensation', above note 2, 533.

⁶ Lee, 'Toward a World', above note 4, 332-3.

⁷ Garvey, 'The New Asylum Seekers', above note 3, 190.

⁸ Lee, Luke T., 'The Declaration of Principles of International Law on Compensation to Refugees: Its Significance and Implications,' 6 *JRS* 65 (1993).

⁹ Clark and Lindsell, eds., *Clark and Lindsell on Torts*, 17th ed., London, Sweet and Maxwell, 1995, 3.

¹⁰ Brownlie, I., *Principles of Public International Law*, Clarendon Press, Oxford, 4th ed., 1990, 458.

a breach of contract.¹¹ Thus, in order to receive 'redress' for a violation of an interest, the plaintiff must find a 'breach of an obligation' that is owed by the one who commits a tort or the tortfeasor.¹² Relevant elements of wrongdoing include 'breach of duty'; 'wrongful conduct'; 'direct act'; 'acts and omissions'; 'malice'; 'negligence'; and 'intention'. In some cases, determination of 'the violation of the plaintiff's interest alone is sufficient to entitle him to a remedy in tort.' However, in most instances, a proof of damage must be shown, where '... the plaintiff must establish that he suffered some actual damage, that the damage was in fact caused by the defendant's tortious conduct, and that the damage is not, in law, too remote.'¹³ This breach of an obligation and consequent proof of damage then becomes the plaintiff's 'cause of action' against the defendant.

Upon establishing a cause of action and proof of liability, the issue of the types and amount of 'redress' for which the defaulter is liable may be questioned, because 'the directness of the nexus between act and injurious damage may affect the quantum of liability and counter fault on the part of the claimant may bar or mitigate recovery.'¹⁴ This nexus or causal link may be difficult to establish clearly, owing to several factors such as 'the vagaries of human conduct, the presence of multiple tortfeasors, and the uncertain aetiology of disease' or industrial negligence in products with pollutants causing disease.¹⁵ However, when directness of act and damage is determined, remedies can be claimed which are 'the specific changes in the legal relationship between complainant and respondent that are imposed by external authority for the breach of a legal duty determined in law and in fact to have been owed by respondent.'¹⁶ It is under this broad category of remedy that the right to compensation is found.

Various remedies exist in general international law other than a traditional claim for compensation, including 'an apology, the punishment of the individuals responsible, the taking of steps to prevent a recurrence of the breach of duty, and any other forms of satisfaction.'¹⁷ Compensation traditionally refers strictly to 'reparation in the narrow sense of the payment of money as a "valuation" of the wrong done.'¹⁸ As stated in *Livingstone v. Rawyards Coal Co.* (1880) by Lord Blackburn, compensation is 'that sum of money which will put the party who has been injured, or

¹¹ Martin, E.A., *A Dictionary of Law*, Clarendon Press, Oxford, 3rd ed., 1994, 401.

¹² Clark and Lindsell, *Torts*, above note 9, 3.

¹³ *Ibid.*, 36.

¹⁴ Oliver, C.T., 'Legal Remedies and Sanctions in International Law', in Lillich, R.B., ed., *International Law of State Responsibility for Injuries to Aliens*, Charlottesville, Virginia, University Press of Virginia, 1983, 71.

¹⁵ Clark and Lindsell, *Torts*, above note 9, 39.

¹⁶ Oliver, 'Legal Remedies', above note 14, 64.

¹⁷ Brownlie, *Principles*, above note 10, 458.

¹⁸ *Ibid.*

who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.¹⁹ This principle is commonly known as *restitutio in integrum*, or restoration to the original state. Thus, 'when property is illicitly taken, the measure is its normal (fair, just, open market and so on) replacement (or substitute) value.'²⁰ Yet, compensation does not necessarily apply to restoring material damage alone, but may be applied as 'solace for . . . misfortunes' as in a case of personal injury compensation where an individual loses a limb, for instance.²¹

Finally, enforcement of obligations of compensation in the law of tort serves specific functions within civil society. Largely, 'the law of torts sets standards of behaviour and operates as much to deter wrongful or injurious conduct as to remedy its consequences.'²² Therefore, compensation enforces normative rules, prevents future abrogation of those rules, and provides justice for those injured by the violation of the rules.

3. Compensation in International Law

How then can the notion of compensation in civil law be applied to the creation of refugee flows as an international phenomenon? First, both the civil law of tort and international law are grounded in respect for rights and responsibilities as stipulated within the law. Secondly, this principle of respect is enforceable in practice only with the use of remedies when a right or obligation is violated. Both municipal tort law and international law share the maxim stated in 1646 by Grotius in his work, *De Jure Belli ac Pacis*, 'fault creates the obligation to make good the loss'.²³ Therefore, as Oliver argues, 'in international law, as in domestic law, rights without remedies are illusory, i.e., no rights at all.'²⁴ The underlying principles of respect for rights and obligations and of remedies, such as compensation, for violated rights link municipal tort law to international law. As a result, the practice of seeking compensation for damages within the international arena can be and has been applied for the same purpose of ensuring 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

¹⁹ Clark and Lindsell, *Torts*, above note 9, 1432.

²⁰ Oliver, 'Legal Remedies', above note 14, 71.

²¹ Clark and Lindsell, *Torts*, above note 9, 1432.

²² *Ibid.*, 3.

²³ See Lee, 'The Right to Compensation,' above note 2, 536.

²⁴ Oliver, 'Legal Remedies', above note 14, 61.

character involve international responsibility. If the obligation in question is not met, responsibility entails the duty to make reparation.²⁵

Within the refugee context, those who have hitherto argued for compensation for refugee flows have done so on the basis that the 'burden' of caring for refugees has fallen onto the shoulders of refugees, donor States, and asylum States, but 'overlooked are the responsibilities of the countries of origin both toward their own citizens now turned refugees and toward the countries of asylum saddled with the burden of caring for refugees.'²⁶ As a result, the lack of respect for rights and responsibilities has led to the situation where 'some countries have resorted to mass expulsions of their own citizens, confident they could do so with impunity.'²⁷ These mass expulsions have then resulted in damage to other States and to refugees themselves. In this view, one way to correct the consequent violations of responsibility by the State of origin is to make compensation to refugees and host States obligatory for the State of origin's 'wrongful acts.' By enforcing the legal right to compensation for the host State as well as refugees, it is argued that States of origin will in the future be more careful to respect the rights of its own citizens and to prevent new refugee flows from its own borders.

While the argument for this right put forth by Lee, Jennings and van Boven, among others, seemingly follows a logical line of reasoning grounded in basic legal concepts, closer analysis reveals inherent difficulties and complexities. These include the difficulty in clearly establishing a cause of action and enforcing any compensation due. Also, the implications of a potential right to compensation from the State of origin must be assessed. Is it realistic to expect the right to compensation to serve as a preventative measure for future refugee flows? A greater understanding of these complexities may cast doubt upon the idealism of Lee and others. However, if such a right is to become truly effective in the matter of prevention of refugee flows and of bringing justice to refugees, these must be taken into consideration in order to achieve such goals in the future of international and refugee law.

4. Establishing a Cause of Action for Compensation

4.1 The lack of a legal framework

In order to claim compensation from the State of origin, it is essential to set forth a cause of action or 'the precise subject of the legal dispute'.²⁸

²⁵ See Huber, M., Rapporteur, *Reports of International Arbitral Awards* (RIAA), United Nations, vol. II, 615, 641, (1927).

²⁶ Lee, 'The Right to Compensation,' above note 2, 537.

²⁷ *Ibid.*

²⁸ Brownlie, above note 10, *Principles*, 474.

One problem arises from the relative lack of international legal statements on the 'right to compensation' and its practical implementation. The earliest General Assembly resolution to mention compensation was in 1948 in reference 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'.²⁹ In 1974, the United Nations also endorsed the right of Palestinians who did wish to return to reclaim their property, reaffirming 'the inalienable right of Palestinians to return to their homes and property from which they have been displaced and uprooted and [calling] for their return'.³⁰ In 1981, the General Assembly again emphasised 'the right of those [Palestinians] who do not wish to return to receive adequate compensation'.³¹

The 1986 *Report* of the Group of Governmental Experts on International Co-operation to Avert New Flows of Refugees also led to a resolution calling upon Member States to respect 'the rights of refugees to . . . receive adequate compensation'.³² Paragraph 66 of the *Report*, entitled 'Rights and Duties of States to avert New Massive Flows of Refugees', attempts to codify aspects of State responsibility. Although subsumed under the category of 'recommendations', the strength of paragraph 66 lies in the fact that it was adopted by the General Assembly. However, the official link between causing refugee flows being an international wrongful act is never made due to the Group's over concern for 'full observance of the principle of non-intervention in the internal affairs of sovereign States'.³³ In 1992, the International Law Association (ILA), a non-governmental body, adopted a Declaration of International Law on Compensation to Refugees having recognised the 'need to codify and progressively develop principles of international law governing compensation to refugees'.³⁴ 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'.³⁵ 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 it has been found liable for expelling its nationals.³⁶ 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

²⁹ See UNGA res. 194(III), 11 Dec. 1948.

³⁰ See UNGA res. 3236(XXIX), 22 Nov. 1974.

³¹ See UNGA res. 36/148, 16 Dec. 1981.

³² See UNGA res. 41/70, 3 Dec. 1986.

³³ Cited in Lee, 'Toward a World,' above note 4, 331.

³⁴ Lee, 'The Declaration of Principles,' above note 8, 66.

³⁵ See ILA, *Declaration of Principles*, 5-18 (1992); text in Lee, Luke T., 'The Cairo Declaration of Principles of International Law on Compensation to Refugees', 87 *AJIL* 157 (1993).

³⁶ *Ibid.*, *Principles*, 10, 15.

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.

4.2 The problem of establishing a nexus between act and damage

A second difficulty in establishing a cause of action is the need 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 law to be a wrongful act, it may become such by reason of the resulting damage. This may lead to a breach of customary international law and international human rights law. While the existence of refugees as 'damage' is not of itself a cause of action, liability may result when linked to a breach of an international obligation resulting in legal harm.³⁷ The problem lies in proving which customary international obligations have been breached resulting in legal damage, and what is their connection to the current refugee flow as the physical manifestation of that breach.

4.3 The violation of State rights v. Human rights as a cause of action

A third difficulty in setting a cause of action is closely connected to the establishment of a nexus between legal damage and the refugee flow. It arises in ascertaining exactly which international obligation was actually violated thereby causing legal damage.

4.3.1 General principles of international law

The first school of thought emphasises '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 sources of international law.'³⁸ The purpose of the law of State

³⁷ 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).

³⁸ Beyani, C., 'State Responsibility for the Prevention and Resolution of Forced Population Displacements in International Law', *IJRL OAU/UNHCR Special Issue*, 130, 132 (1995).

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.'³⁹ 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.'⁴⁰ 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.'⁴¹ 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.'⁴² Thus, according to this school of thought, 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.'⁴³ 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.'⁴⁴ As the General Assembly declared in 1970:

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.⁴⁵

Thus, in order to have *locus standi*, the plaintiff/host State should 'invoke the violation of one of its substantive interests, namely, an interest

³⁹ Ibid., 131.

⁴⁰ As cited in Spinedi and Simma, *UN Codification of State Responsibility*, above note 37, 325.

⁴¹ Ibid., 328.

⁴² Ibid., 334.

⁴³ Brownlie, *Principles*, 287 (1990).

⁴⁴ Ibid., 287.

⁴⁵ 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.

protected by a legal right', especially those listed in the UN Declaration on Friendly Relations.⁴⁶

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.'⁴⁷ In the words of Benjamin Harrison, President of the United States in 1891, 'a decree to leave one country is, in the nature of things, an order to enter another — some other.'⁴⁸ Thus, it is held that arguing for a cause of action based upon general international law is more firmly established and realistic than human rights law, which focuses on the State of origin's responsibilities to its individual citizens. Individuals still lack a strong legal personality in international law in comparison to States.⁴⁹ Although no State has yet claimed against another for a violation of territorial integrity caused by a refugee flow, the *Trail Smelter* arbitration (1965), in which the United States sued Canada for damage to land, crops, and trees in the State of Washington that had been caused by sulphur dioxide fumes emitted by a Canadian ore-smelting company is an example of a cause of action based on a violation of territorial integrity.⁵⁰ The tribunal found Canada liable under international law for allowing fumes to cross international boundaries, thus causing damage. Lee argues that the particularities in this case apply to States which fail to prevent their citizens from crossing international borders thereby imposing 'burdens' on receiving States without their permission and violating basic international law principles regarding inter-State relations.⁵¹ Some of these 'burdens' may include depletion of resources; 'cultural differences' where a government is 'concerned about maintaining fragile ethnic balances'; and risks to internal security.⁵²

Another argument for the general principles of international law approach is that in recent years, host States have become increasingly more restrictive in their policies of admitting refugees, viewing them as a direct threat to their sovereignty and territorial integrity. As one Malaysian newspaper put it in regard to Vietnamese refugees, 'the crux of the issue is that the flow from Vietnam is no longer just a humanitarian problem. It has become as much a weapon of war as a softening-up raid by waves of bombers'.⁵³ In the United States, even Cubans have been

⁴⁶ Tanzi, above note 37, at 13.

⁴⁷ Garvey, J., 'Towards a Reformulation of International Refugee Law,' 26 *Harv. Int'l L. J.* 494 (1985).

⁴⁸ See Lee, 'The Right to Compensation,' above note 2, 555.

⁴⁹ Brownlie, *Principles*, 581.

⁵⁰ *Ibid.*, 553.

⁵¹ *Ibid.*, 554.

⁵² Burton, E.B., 'Leasing Rights: A New International Instrument for Protecting Refugees and Compensating Host Countries,' 19 *Columbia Human Rights Law Review* 311 (1988).

⁵³ Cited in Garvey, 'Towards a Reformulation,' above note 47, at 486.

labelled as 'bombers aimed at (the) country'. Garvey argues that focusing on the law of State responsibility reflects the 'realities' of the times and that 'building on traditional principles of inter-State obligations ... accommodates the realities of domestic politics in asylum States where the problem of the refugee is perceived today as a clear and present danger.' Focusing on the responsibility of the State of origin to other States helps to alleviate the 'perception, based in fact, that major refugee flows in recent years have been encouraged or even instigated by governments of States of origin as premeditated acts of deliberate policy.' Emphasis on the State of origin as part of the international burden-sharing regime is needed to alleviate the receiving States who are growing increasingly reluctant with their views of refugees as 'social, economic, and political burdens.'⁵⁴

Finally, to stress the general principles of international law is more plausible because it does little good to label the State of origin as a persecutor of its own citizens; 'to censure these governments as persecutors is often the surest route to exacerbating a refugee crisis because it diminishes the opportunity to gain their necessary co-operation' by challenging their State sovereignty.⁵⁵ Co-operation with the State of origin and compensation is the ultimate goal, and this is likely to be achieved by touching on the sensitive issue of domestic policies for '*prima facie*, the treatment accorded by a State to its own subjects, including the conferment or deprivation of nationality, is a matter of purely domestic concern.'⁵⁶ Only when a domestic policy causes harm to another State's territory, may it be called an abuse of a right and illegal. This follows from the principle of *sic uteri tuo ut alienum non laedas*, that is, one should so use one's own property as not to injure other people's. 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.⁵⁷ 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.⁵⁸ Attainment of co-operation with the State of origin is the ultimate goal, not prohibition and condemnation.

⁵⁴ *Ibid.*, 484-6, 500.

⁵⁵ *Ibid.*, 484.

⁵⁶ Jennings, R.Y., 'Some International Law Aspects of the Refugee Question', 20 *BYIL* 110, 112 (1939).

⁵⁷ *Ibid.*

⁵⁸ Garvey, J., 'The New Asylum Seekers: Addressing Their Origin,' above note 3, at 187.

4.3.2 *General principles of international human rights law*

The second approach argues that the violation of international human rights is an important cause of action against the State of origin. 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.'⁵⁹ 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 are 'essentially within the domestic jurisdiction of any State' and hence insulated from international law.⁶⁰

This emphasis is grounded in international human rights treaties which allow for States, non-governmental organisations and even individuals to bring complaints against States before international or regional supervisory mechanisms.⁶¹ Thus, the notion of the responsibility of the State in international law has widened to include the 'duty to protect' by preventing 'human rights violations and to investigate and punish any violations, to restore violated rights, and to provide effective remedies to victims of violations.'⁶² Certain human rights in international law exist *erga omnes* and have such importance that all States have a legal interest in seeing that they are protected and/or fulfilled.⁶³ Thus, a third State or a refugee victim of gross human rights violations, in appropriate cases, may have a cause of action against the State of origin.⁶⁴

In arguing for a 'general obligation' of States of origin to compensate for gross human rights violations as a cause of action, the question arises, which human rights are considered to be customary and of 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 applied in this area. The first, article 8, states that each person has 'the

⁵⁹ See Coles, G.J.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.

⁶⁰ Reismann, W.M., 'Sovereignty and Human Rights in Contemporary International Law', 84 *AJIL* 869 (1990).

⁶¹ 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 v. 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.

⁶² Beyani, 'State Responsibility,' above note 38, at 138.

⁶³ *Barcelona Traction Case*, ICJ *Rep.*, (1974), 32.

⁶⁴ Cf. Kamminga, M.T., *Inter-State Accountability for Violations of Human Rights*, Philadelphia, University of Pennsylvania Press, (1992), 186.

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 ICCPR66, article 13 of ECHR50, and article 25 of ACHR69. However, as Lillich points out, this right does not enjoy customary law status because of the lack of resolve as to the 'scope' of the right; in other words, does it mean international or domestic implementation with collective or internal remedies?⁶⁵ Secondly, article 13 of UDHR48 provides that 'everyone has the right to leave any country, including his own, and to return to his country.'⁶⁶ Article 12 of the ICCPR66, article 2 of the Fourth Protocol to the European Convention, and article 22(1)–(5) of ACHR69 likewise support a 'right to return.' Whether the right of return is customarily binding is debatable. Lillich argues that States restricting the right of return have not been widely condemned and that therefore the right has yet to achieve customary law status.⁶⁷ On the other hand, Wee argues that it could be considered customary and cites article IV of the 1966 Bangkok Principles, adopted by the Asian-African Legal Consultative Committee in Bangkok, as one example of a resolution which 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.'⁶⁸ Additional support for a 'right to return' is found in article 35 of the 1951 Convention Relating to the Status of Refugees, requiring States to co-operate with UNHCR in fulfilling its functions, one of which, as mentioned in paragraph 9 of its Statute, is to facilitate voluntary repatriation. However, although these two rights might 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.'⁶⁹ *Erga omnes* rights, however, are defined more broadly. In the view of the International Law Commission,

erga omnes obligations in the field of human rights are not limited to rules of *jus cogens* and to international crimes. They include in effect all international obligations established for the protection of human rights and fundamental freedoms, whether they are based on treaty or custom.⁷⁰

⁶⁵ Lillich, R.B., 'Civil Rights,' in Meron, T., ed., *Human Rights in International Law: Legal and Policy Issues*, Oxford, Clarendon Press, 114, 134 (1985).

⁶⁶ See art. 13 UDHR48.

⁶⁷ Lillich, 'Civil Rights,' above note 65.

⁶⁸ 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).

⁶⁹ Kamminga, *Inter-State Accountability*, above note 64, at 157.

⁷⁰ *Ibid.*, 188.

According to Kamminga, only four human rights in UDHR48 actually have *jus cogens* status: the right to life, freedom from torture, freedom from slavery, and freedom from *ex post facto* laws.⁷¹ Beyani would add the right to life, self determination, non-discrimination and prohibition of genocide as *jus cogens* rights. 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.'⁷² Dimitrijevic, suggests that 'gross' violations may also be linked to the notions 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. Thus, the determination of when a *jus cogens* or *erga omnes* right is grossly violated can be somewhat subjective. For instance, some focus only on the derogation of 'fundamental' and 'elementary' rights proclaimed 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.⁷³ Who decides the hierarchy of gross human rights violations and what are the criteria are problematic issues, as is the question of which human rights actually enjoy *jus cogens* and *erga omnes* status. In the end, both 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. For example, individuals might seek compensation for individual wrongs, and States for the losses suffered as a consequence of the violation of sovereign rights.⁷⁴

A third possibility, suggested by Wee, is that causing forced migration should be codified in international law as 'in itself an international wrongful act.'⁷⁵ 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 States (affirmation and application).⁷⁶

⁷¹ Ibid., 158.

⁷² 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).

⁷³ Ibid., 216, 217, 218.

⁷⁴ Both causes of action can be seen in use in the case of the Ugandan Asian population in Britain, some 23,000 of the 80,000 originally expelled by President Amin in 1972. Ugandan Asians have lobbied the British government to take issue with the Ugandan government for violating territorial sovereignty. Simultaneously, up to 14,000 individual Asians have filed claims directly with the Ugandan government through the Ugandan Expropriated Properties Act.

⁷⁵ Wee, 'International Responsibility,' above note 68, 11.

⁷⁶ Cited *ibid.*

By making the act of forced migration by the State of origin an international wrong, the complexities involved in linking the cause of action to damage could be eliminated, 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 expulsions existing today.

4.4 Liability and the State of origin

There are two possible types of coercion for which the State of origin may be held responsible. 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.'⁷⁷ 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.'⁷⁸ 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.'⁷⁹ In the 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.⁸⁰

As Zolberg points out, 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 normally entitled.'⁸¹ However, such indirect coercion can often be quite difficult to establish.

The problem of attributing responsibility is exacerbated where a completely 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"

⁷⁷ Wee, 'International Responsibility,' above note 68, 6.

⁷⁸ Ibid.

⁷⁹ Lee, 'The Declaration of Principles,' 4, (1993).

⁸⁰ 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).

⁸¹ 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).

State.⁸² 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.⁸³

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.'⁸⁴ He suggests the treatment of that third party State as the 'aggressor' State and 'source' State for the purposes of compensation in refugee flows. Article 27 of the UN Draft Articles on State Responsibility seems to support this argument:

aid or assistance by a State to another State, if it is established that it is rendered for the commission of an internationally wrongful act carried out by the latter, itself constitutes an internationally wrongful act.⁸⁵

Coles echoes 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.'⁸⁶ For example, 2,500,000 and 780,000 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.⁸⁷ According to article 28 of the Draft Articles on State Responsibility, an outside third party State can be solely responsible when

an internationally wrongful act committed by a State in a field of activity in which that State is subject to the power of direction or control of another State entails the international responsibility of that other State.⁸⁸

Finally, further difficulties may arise when no government effectively exists in the country of origin. As Beyani points out, 'a general, or even specific, rendition of State responsibility in the context of forcible flows of populations is unhelpful where the root causes lie in the collapse of normal political processes in given States.'⁸⁹ A recent example is provided by Somalia. Who then is responsible for providing compensation? Compensation could not be sought until a formal government is

⁸² Dimitrijevic, V. 'Dimension of State Responsibility', above note 72, at 219.

⁸³ Ibid., 222.

⁸⁴ Gilbert, G., 'Root Causes and International Law: Refugee Flows in the 1990s', 11 *Netherlands Quarterly of Human Rights* 433 (1993).

⁸⁵ See Spinedi and Simma, eds. *UN Codification of State Responsibility*, New York, Oceana Pub., Inc., 331 (1987).

⁸⁶ Coles, G.J.L. 'Problems Arising from Large Numbers of Asylum-Seekers,' Working paper presented at the 1981 San Remo Round Table Discussion, International Institute of Humanitarian Law, 5 (1981).

⁸⁷ Lee, 'The Right,' 559 (1986).

⁸⁸ Text in Spinedi and Simma, eds., *UN Codification of State Responsibility*, 331 (1987).

⁸⁹ Beyani, 'State Responsibility', above note 38, 130.

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.'⁹⁰

4.5 The problem of jurisdiction of claims

Finally, an additional complexity lies in determining the jurisdiction for bringing claims when the State of origin causes a refugee flow, where jurisdiction in compensation claims refers to the 'choice of law to be applied.'⁹¹ When claiming redress from the State of origin for causing refugee flows, should the claims be brought under the law of the sovereign State where the wrong occurred (*lex loci delicti commissi*), international customary law, or the domestic law of another sovereign State? Also, should the claims be brought before national tribunals where the wrong occurred, which may help to 'restore confidence' in the State, through an international tribunal, which may be more objective in assessing claims, or through the 'transnational enforcement of claims through domestic courts?'⁹²

The last mentioned method was used in one of the most well-known cases, and demonstrates some of the problems. In *Filartiga v. Pena-Irala*, \$10,385,364.00 was awarded to the sister and father of a young Paraguayan boy tortured to death by the Inspector General of Police in Asuncion, Paraguay.⁹³ The case was brought before the Eastern District Court of New York (when both the plaintiffs and the defendants were residing in the United States), under the 1789 Alien Tort Statute, which provides that 'the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the U.S.'⁹⁴ The Court held that the 1789 Statute allowed for the Federal Courts to have jurisdiction 'to effectuate the purposes of the international law incorporated into US common law'.⁹⁵ It ruled that torture undoubtedly falls under the 'law of nations' and is forbidden in customary law which is binding upon all States.⁹⁶ Thus, the judgment was effected through the law of nations as incorporated into US common law and in the question of remedy by the defendant, it was decided 'to look first to Paraguayan law in determining the remedy for the violation of international law.'⁹⁷ However, with respect to punitive

⁹⁰ Van Boven, T., 'Introduction,' in van Boven, T., ed., *Seminar on the Right to Restitution, Compensation, and Rehabilitation*, Maastricht, Netherlands, Institute of Human Rights, 14, (1992).

⁹¹ Lillich, R.B., 'Damages for Gross Violations of International Human Rights Awarded by U.S. Courts,' in van Boven, T., ed., *Seminar on the Right to Restitution, Compensation, and Rehabilitation*, above note 90, 225.

⁹² Van Boven, 'Introduction,' above note 90, (1992).

⁹³ 630 F. 2d 876 (2d Cir. 1980).

⁹⁴ See Lillich, 'Damages for Gross Violations,' above note 91, 226.

⁹⁵ *Ibid.*, 230.

⁹⁶ *Filartiga v. Pena-Irala*, above note 93.

⁹⁷ Lillich, 'Damages for Gross Violations,' above note 91, 234.

damages, which admittedly were not recoverable under the Paraguayan Civil Code, the court scarcely heeded its own injunction that it 'look first to Paraguayan Law'; instead it looked directly to international law and then awarded damages based upon precedents in US law.⁹⁸ Other cases which have fallen under the 1789 Alien Tort Statute include *Martinez-Baca v. Suarez-Mason* (1988), where claims of torture and prolonged arbitrary detention were raised and the plaintiffs damages were based almost solely on international law; *Forti v. Suarez-Mason* (1990), in which claims of torture, arbitrary detention, and execution were upheld and compensatory damages awarded which were not specifically linked to US or Argentine law; and *Trajano v. Marcos* (1991), in which claims of torture and death were upheld 'upon various articles of the Philippine Civil Code.'⁹⁹ These cases illustrate some of the jurisdictional and interpretational problems, even under one tort act.

5. Assessing, Providing, and Enforcing 'Adequate Compensation'

Besides the complexities in determining a cause of action for compensation from the State of origin for refugee flows, there are also difficulties in the assessment and provision of adequate compensation. Few precedents exist, but some, such as the German Jews, Palestinians, and the Ugandan Asians, provide instructive insights on solving the problem of enforcement through assessment and distribution of monetary payment for legal wrongs.

In assessment, two separate problems may arise. The first deals with determining the amount which provides 'adequate compensation.' As stated in the *Chorzow Factory 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.'¹⁰⁰ Similarly, 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.'¹⁰¹ The Institute of Jewish Affairs tried to do 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.'¹⁰² The

⁹⁸ Ibid.

⁹⁹ Ibid., 235.

¹⁰⁰ *Chorzow Factory* (1928) Permanent Court of International Justice (PCIJ), Series A., no. 17, 47.

¹⁰¹ Beyani, 'State Responsibility', above note 38, 15.

¹⁰² Robinson, N., *Indemnifications and Reparations: Jewish Aspects*, New York, Institute of Jewish Affairs, 84, (1944).

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.'¹⁰³

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.¹⁰⁴

Problems in this estimate were the determination of a 'just equivalent', especially in considering inflation of the value of property damaged; establishment of a '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 property damage or personal damage.¹⁰⁵ Additionally, 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.'¹⁰⁶ It is difficult for proper assessments of property value to include 'sentimental value.'¹⁰⁷ 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 especially difficult when attempting to determine payment for 'a breach of duty which is actionable without proof of a particular item of financial loss.'¹⁰⁸ 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.¹⁰⁹

Yet, as Dimitrijevic argues, perhaps 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.¹¹⁰

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,

¹⁰³ Ibid., 14.

¹⁰⁴ Ibid., 14.

¹⁰⁵ Ibid., 93.

¹⁰⁶ Knetsch, J.L., *Property Rights and Compensation*, Canada, Butterworth and Co., (1983), 3.

¹⁰⁷ Ibid., 6.

¹⁰⁸ Brownlie, I., *Principles*, 458.

¹⁰⁹ Ibid.

¹¹⁰ Dimitrijevic, 'Dimensions of State Responsibility,' above note 72, 224.

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.¹¹¹ Lee argues that refugees claiming compensation for loss other 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.¹¹² 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.'¹¹³ However, it must be recognised that a State may be unable 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.'¹¹⁴ 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.'¹¹⁵ However, he argues that 'the symbolism of financial responsibility may provide a modicum of deterrence.'¹¹⁶

In the event that the State of origin is unwilling 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.¹¹⁷ However, this must not apply towards 'disaster-relief' assistance as stated in Principle Eight of the Declaration of Principles.¹¹⁸ 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.'¹¹⁹ The UN's right in this regard was upheld by a decision by the International Court of Justice in its *Advisory Opinion on Injuries Suffered in the Service of the UN* which held that 'the United Nations had the capacity to bring an international claim against a State with a view to obtaining reparation for damage caused to its agent, even though 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

¹¹¹ Robinson, N., *Indemnifications and Reparations*, above note 101, 145.

¹¹² Lee, 'The Right to Compensation,' above note 2, 546.

¹¹³ *Ibid.*

¹¹⁴ Beyani, 'State Responsibility for Prevention,' above note 38, 16.

¹¹⁵ Garvey, 'The New Asylum Seekers,' above note 3, 194.

¹¹⁶ *Ibid.*, 194.

¹¹⁷ Lee, 'The Right to Compensation,' above note 2, 548.

¹¹⁸ International Law Association, *Declaration of Principles*, 18, (1992).

¹¹⁹ Lee, 'The Right to Compensation,' above note 2, 550.

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 leverage 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 world-wide, or assign this task to an existing body.'¹²⁰ All these options remain hypothetical, however, and highly questionable as to their potential effectiveness on behalf of refugees.

6. The Implications of the Right to Compensation

The fact that there are millions of refugees may lead one to wonder 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, compensation practice 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.'¹²¹ Enforcement of the right to compensation could lead to the State of origin attempting 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.

Finally, there is the question whether compensation in any way affects or changes the deeper systematic flaws in society which gave rise to refugee 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 an ameliorative solution for a much deeper problem which requires 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', because many of the perpetrators and former torturers are still

¹²⁰ *Ibid.*, 551-2.

¹²¹ Garvey, J., 'Towards a Reformulation,' above note 47, 492.

in power and unpunished.¹²² In Chile, monetary compensation for gross human rights violations 'is humiliating and too easy a way for the State to dispose of its responsibility.'¹²³ 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.

Conclusion

This analysis has attempted to review and continue the debate 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. 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.'¹²⁴ 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.

¹²² 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).

¹²³ *Ibid.*, 12.

¹²⁴ Dowty, A., 'Return or Compensation: the Legal and Political Context of the Palestinian Refugee Issue,' in *World Refugee Survey 1994*, Washington D.C., U.S. Committee for Refugees, 30, (1994).