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ARTICLE

Two Birds with One Stone: A Legal Obligation to Compensate Host States for the Burden Associated with a Mass Influx of Refugees

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As the refugee crisis continues to plague the international community and vulnerable lives continue to rely upon the altruistic nature of philanthropic States, one can only ask if we are approaching the issue from the right angle. This article seeks to address the issue from a proactive, as opposed to reactive, standpoint, focussing on a solution that aims to be both ameliorative and preventative—a solution to kill two birds with one stone. This article analyses whether a State hosting a mass influx of refugees can be deemed an injured State at international law, so as to oblige the State of origin to pay compensation for violating its international responsibilities. Ultimately, while compensation has the foundations of a possible solution to the refugee crisis, this article concludes that there remains significant barriers to its adoption and implemenation in the current legal framework.

I Introduction

> [F]ault creates the obligation to make good the loss.
>
> —Hugo Grotius[1]

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1 Hugonis Grotii *De Jure Belli ac Pacis Libri Tres, in quibus Jus Naturæ & Gentium, item Juris Publici præcipua explicantur* (Amsterdam, Iohannem Blaev, 1646) (translated ed: Francis W Kelsey (translator) Hugo Grotius *On the Law of War and Peace* (Clarendon Press, Oxford, 1925) vol 2 at 430).

Well into the 21st century, the problem of the growing number of refugees worldwide continues to beset us. The United Nations High Commissioner for Refugees (UNHCR) commented that we are currently in "an age of unprecedented mass displacement".[2]

This is not a new problem. History is littered with instances of States creating refugees through expulsion: the Jews from Spain in 1492, the Huguenots from France in 1685, the Armenians from the Ottoman Empire in 1915–1916, the Jews from Nazi Germany in the 1930s, and the Indochinese from Indochina in the 1970s to 1990s.[3] More recently, one need only to look at the Syrian crisis to appreciate the scale of the refugee problem that continues to plague our world today. As UNHCR Filippo Grandi described, it is "the biggest humanitarian and refugee crisis of our time".[4]

One might ask: how has the international community continuously failed to resolve such an obvious problem? The failure is not due to lack of awareness—indeed, the Internet and social media has ensured adequate coverage of the issue worldwide—rather, the failure appears to lie in the *reactive* as opposed to *proactive* focus of current solutions. As scholars have noted:[5]

> … 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 facilitating its occurrence'.[6] The need now is for a balanced approach which deals with the 'ameliorative' and the 'preventative' simultaneously.

To this end, government officials and academics alike have realised that we must focus on the root causes of refugee flows as opposed to merely the symptoms that follow.[7] This article explores the potential implementation of a proactive approach to the problem with a focus on amelioration and prevention.

While acknowledging that the ideas discussed in this article are not necessarily novel, this article humbly suggests that scholarly efforts to date have only gone as far as *recognising* a solution. This article aims to assist future implementation of a solution through analysing the substantive principles and procedures available to invoke the responsibility of a State of origin and provide adequate redress to host States.

It should be emphasised that implementation of the proposed solutions in this context is not without controversy, nor does it represent established practice in the international community. The discussion in this article is forward-looking, remaining optimistic that the solution may crystallise into established practice in the future.

Ultimately, the solution proposes treating host States in a manner similar to States which have sustained injuries due to another State's violation of its international

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2 Somini Sengupta "60 Million People Fleeing Chaotic Lands, U.N. Says" *The New York Times* (New York, 18 June 2015) at A1 as cited in Joseph Blocher and Mitu Gulati "Competing for Refugees: A Market-Based Solution to a Humanitarian Crisis" (2016) 48(1) Colum Hum Rts L Rev 53 at 54.

3 Luke T Lee "The Right to Compensation: Refugees and Countries of Asylum" (1986) 80 AJIL 532 at 552, n 87.

4 United Nations "Syria conflict at 5 years: the biggest refugee and displacement crisis of our time demands a huge surge in solidarity" (press release, 15 March 2016).

5 Hannah R Garry "The Right to Compensation and Refugee Flows: A 'Preventative Mechanism' in International Law?" (1998) 10 IJRL 97 at 97–98.

6 Jack I Garvey "The New Asylum Seekers: Addressing Their Origin" in David A Martin (ed) *The New Asylum Seekers: Refugee Law in the 1980s* (Kluwer Academic Publishers, the Netherlands, 1988) 181 at 184.

7 Garry, above n 5, at 97; and Lee, above n 3, at 566.

obligations. Should this approach be adopted, host States would be able to receive redress through compensation directly from the State of origin. Under this framework, there exists a theoretical basis upon which the international community can *kill two birds with one stone*: compensating the host State while disincentivising the State of origin.

Conceptually underpinning the proposed solution is a focus on incentives. Accepting refugees is an inherently altruistic act with a motivation to signal good citizenship.[8] However, in our imperfect world, States backed by the shield of sovereignty respond less to moral obligations and more to economic and political incentives.[9] Accordingly, this article proposes that the international community can use economic and political incentives to instigate behavioural change: encouraging host states' continued protection for refugees, while simultaneously discouraging the creation of refugees.

Given the complexity and breadth of issues addressed, Part II begins by clarifying the scope of the discussion and briefly outlining the basic principles within the international regime of protection offered to refugees. Part III offers a contextual understanding of the burden associated with hosting refugees as well as its impact on host States' attitudes towards refugees. Part IV considers the possible legal bases upon which a State of origin's obligation to compensate host States may be founded. Finally, Part V considers the potential barriers to implementing the proposed solution, as well as the likelihood of such practice emerging in the future.

II Preliminary Matters

A *Scope of the article*

This article is limited in scope in several ways.

(1) Requirement of refugee status

First, the discussion is limited to the movement of persons who qualify as "refugees" under the Convention relating to the Status of Refugees (Refugee Convention) and its Protocol relating to the Status of Refugees.[10] The terms "asylum seeker" and "refugee", while often used interchangeably, are not synonymous in the context of international refugee protection.[11] Asylum seekers comprise a much broader class of persons.[12]

Under art 1 of the Refugee Convention, "refugees" are strictly defined as persons fleeing persecution "for reasons of race, religion, nationality, membership of a particular

8 Joseph Blocher and Mitu Gulati "Competing for Refugees: A Market-Based Solution to a Humanitarian Crisis" (2016) 48(1) Colum Hum Rts L Rev 53 at 65–66.

9 At 58. See also James Hathaway "Moving Beyond the Asylum Muddle" (14 September 2015) Blog of the European Journal of International Law <www.ejiltalk.org>; and Stephen H Legomsky "An Asylum Seeker's Bill of Rights in a Non-Utopian World" (2000) 14 Geo Immigr LJ 619 at 620.

10 Convention relating to the Status of Refugees 189 UNTS 137 (opened for signature 28 July 1951, entered into force 22 April 1954) [Refugee Convention]; and Protocol relating to the Status of Refugees 606 UNTS 267 (signed 31 January 1967, entered into force 4 October 1967).

11 Rebecca MM Wallace and Fraser AW Janeczko "The Concept of Asylum in International Law" in Rafiqul Islam and Jahid Hossain Bhuiyan (eds) *An Introduction to International Refugee Law* (Martinus Nijhoff, Leiden, 2013) 133 at 133.

12 Natalia Szablewska and Saiful Karim "Protection and International Cooperation in the International Refugee Regime" in Rafiqul Islam and Jahid Hossain Bhuiyan (eds) *An Introduction to International Refugee Law* (Martinus Nijhoff, Leiden, 2013) 189 at 195.

social group or political opinion" who are physically outside their country of origin. Luis Peral identified two primary concerns with the current approach to refugee qualification. The first is the difficulty in "determin[ing] whether there is an objective and serious risk" of persecution if an individual is forcibly returned to their country of origin.[13] The second concern is that the burden of proving this risk falls, in practice, on the vulnerable asylum seekers.[14] In this respect, Peral notes that there have been international recommendations to "[shift] this responsibility to the state examining the application if there are reasonable grounds to believe that persecution may occur upon return".[15] Jahid Bhuiyan suggested that persecution can include "any threat to human life or personal freedom for reasons of race, religion, nationality, membership of a particular social group or political opinion".[16] Additional forms of persecution may include:[17]

> … serious violations of non-derogable human rights such as the right to life, the right to be free from being tortured or cruel, inhuman or degrading treatment or punishment, the right to be free from slavery of servitude, the right not to be subjected to retroactive criminal penalties, the right to be recognised before the law, the right to freedom of thought, conscience and religion.

This definition does not include the broader class of asylum seekers fleeing armed conflict, those fearing other indiscriminate effects, or those fearing situations seriously disturbing public order.[18]

This article limits its definition of "refugees" to this Convention definition because it would only be appropriate to invoke State responsibility where the State is, in fact, responsible for a violation. In reality, asylum seekers may leave their country of origin for a variety of reasons that may not be attributable to State control, such as natural disasters, environmental crises, climatological conditions or situations of armed conflict.[19]

Further, the protection rights afforded to asylum seekers who do not qualify as refugees are less certain at international law. In the absence of a binding obligation to accept—and therefore assume the burden associated with—asylum seekers, it would be difficult for the host State to establish that it has involuntarily suffered an injury at the hands of another State. A discussion about the *legal* (as opposed to *moral*) right to compensation in those circumstances would be highly complex.

However, it is noted that international law requires States to ensure that all asylum seekers are allowed entry into a State's territory and are "given temporary right[s] to remain there until a final determination has been made on their application" to attain refugee status.[20] Accordingly, the article's proposed solution may be applicable to all

13 Luis Peral *Mass Exodus and the Responsibility to Protect under International and European Law: The Case of Libya* (European Union Institute for Security Studies, February 2011) at 2.

14 At 2–3.

15 At 3.

16 Jahid Hossain Bhuiyan "Refugee Status Determination: Analysis and Application" in Rafiqul Islam and Jahid Hossain Bhuiyan (eds) *An Introduction to International Refugee Law* (Martinus Nijhoff, Leiden, 2013) 37 at 52.

17 At 52.

18 Garry, above n 5, at 97; and Seshaiah Shasthri "Armed Conflicts and Protection of Refugees" in Rafiqul Islam and Jahid Hossain Bhuiyan (eds) *An Introduction to International Refugee Law* (Martinus Nijhoff, Leiden, 2013) 159 at 167–168.

19 Andrew E Shacknove "Who Is a Refugee?" in Hélène Lambert (ed) *International Refugee Law* (Ashgate, Surrey, 2010) 163 at 168.

20 Bhuiyan, above n 16, at 63.

asylum seekers, at least during the interim period where they create an unavoidable burden for the host State.

In this regard, Peral suggested that:[21]

> Even in cases where the primary cause of such a mass flow of people was a natural catastrophe or famine, the fact that the relevant government was not willing either to provide humanitarian assistance or, in the event that it was not able to provide it, to let the international community assume this responsibility, means that the plight of the victims should be equated with persecution.

B *Requirement of "mass influx"*

Additionally, this article is limited to cases where persecution causes a *mass influx* of refugees into a host State.

Karen Jacobsen has defined "mass influx" as a situation where, "within a relatively short period … large numbers … of people flee their places of residence for the asylum country".[22] This article intends to characterise a "mass influx" as a situation where the burden incurred is substantial relative to the capacity and resources of the host State. Bringing this type of claim may be inappropriate in the case of a much smaller influx:[23]

> This is not meant to condone the creation of *individual* refugees. Rather, deplorable as the creation of even a single refugee may be, it entails no serious injury to or "burden" on countries of asylum other than a shared outrage at man's inhumanity to man.

C *International protection of refugees*

As recognised by Bhuiyan, protecting refugees is not just a "matter of convenience" for the host State concerned.[24] The Refugee Convention *compels* States to provide such protection to all qualifying refugees.

Article 33 of the Refugee Convention provides the starting point—the principle of non-refoulement prohibits a State from expelling or returning a refugee where he or she may face a threat to life or liberty "on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion". The UNHCR Executive Committee determined that, even in situations of a mass influx of refugees, "the fundamental principle of non-refoulement—including non-rejection at the frontier—must be scrupulously observed".[25]

Having accepted a refugee, a host State must then comply with a variety of obligations in order to uphold minimum refugee rights, grounded in two primary sources—namely, general standards of international human rights law; and the Refugee Convention.[26] These rights include, by way of example: guaranteed basic human standards and "means of

21 Peral, above n 13, at 3.

22 Karen Jacobsen "Factors Influencing the Policy Responses of Host Governments to Mass Refugee Influxes" (1996) 30 International Migration Review 655 at 657.

23 Lee, above n 3, at 552 (emphasis in original).

24 Bhuiyan, above n 16, at 47.

25 United Nations High Commissioner for Refugees [UNHCR] Executive Committee *Conclusion No 22 (XXXII) Protection of Asylum-Seekers in Situations of Large-Scale Influx* (1981) at [II(A)(2)] (emphasis in original).

26 James C Hathaway *The Rights of Refugees Under International Law* (Cambridge University Press, New York, 2005) at 93–94.

subsistence sufficient to maintain an adequate standard of living";[27] equal treatment with respect to public relief and assistance as is accorded to nationals;[28] freedom from discrimination based on race, religion or country of origin;[29] freedom of religion;[30] access to courts;[31] free movement;[32] right to engage in employment;[33] public education;[34] housing;[35] and property.[36] These examples provide some insight into the onerous obligations and burdens of host States in accommodating refugees.

III Effect on Host States

This section outlines the impact on host States as a result of receiving a mass influx of refugees, particularly the financial, economic, social, cultural and political effects. Taken together, these effects are identified as the *injury* that the host State suffers for the purposes of a legal claim to compensation. As Peter Schuck noted, "[t]o deny the burdens that refugees sometimes impose on first asylum States is to blink reality and put one's head in the sand."[37]

It is important to note that the way the burden is distributed among States is often unequal. As a result, certain States may suffer considerably more than others. The problem is that the burden is regularly distributed based not on fault or capacity, but rather on proximity or accessibility.[38] Hathaway and Alexander Neve have observed that:[39]

> States closest to countries of origin and those least able to afford systematic border controls or technologies of deterrence will inevitably receive the most refugees. Consequently, the poorest countries of the South are legally required to meet the needs of most of the world's refugees.

Schuck has similarly described the refugee distribution worldwide as "decidedly lumpy", observing that the concentration is certainly not in Europe.[40]

When refugees flee their own countries, most end up in the world's least developed nations, with Turkey, Iran and Pakistan hosting the largest numbers.[41] Alan Dowty and Gil

27 UNHCR "Summary Conclusions on the Concept of 'Effective Protection' in the Context of Secondary Movements of Refugees and Asylum-Seekers" (Lisbon Expert Roundtable, Lisbon, February 2003) at [15(g)]; and UNHCR Executive Committee *Conclusion No 58 (XL) Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection* (1989) at [(f)(ii)].

28 Refugee Convention, art 23.

29 Article 3.

30 Article 4.

31 Article 16.

32 Article 31.

33 Article 17.

34 Article 22.

35 Article 21.

36 Article 13.

37 Peter H Schuck "A Response to the Critics" (1999) 12 Harv Hum Rts J 385 at 387.

38 E Tendayi Achiume "Syria, Cost-sharing, and the Responsibility to Protect Refugees" (2015) 100 Minn L Rev 687 at 689; and James C Hathaway and R Alexander Neve "Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection" (1997) 10 Harv Hum Rts J 115 at 117.

39 Hathaway and Neve, above n 38, at 141.

40 Peter H Schuck "Refugee Burden-Sharing: A Modest Proposal" (1997) 22 Yale J Int'l L 243 at 252.

41 Sengupta, above n 2, at A1; and Hathaway, above n 9.

Loescher noted in 1996 that "the seventeen nations with the highest ratio of refugees to population [had] an annual average per capita income of about $920".[42] In respect of the latest Syrian refugee crisis, Hathaway noted that three nations bordering Syria—Lebanon, Turkey and Jordan—have faced an influx of "*more than ten times* as many Syrian refugees as the rest of the world combined".[43]

A *Financial or economic burden*

Accepting refugees typically involves obligations to provide basic needs such as food, clothing and shelter.[44] As national budgets do not usually set aside resources for such unexpected purposes, resources have to be reallocated and are often drawn from the needs of the domestic population.[45] The costs can be significant, and scholars warn of the depletion of resources that tends to occur when a State accumulates an increased population.[46] These risks are especially high for low-income, developing countries whose resources are already strained in providing for their domestic population.[47]

On top of the costs associated with meeting these basic needs, there are also the direct financial costs of schooling, healthcare and the refugee status determination process, which only imposes greater strains on a State's resources.[48]

Direct costs aside, Dowty and Loescher consider the wider economic effects:[49]

> When they compete for jobs, refugees drive wages down, and when they compete for scarce goods they create inflation. They require social services beyond those provided by international agencies, putting further strain on domestic structures that may already have been inadequate.

In the interest of presenting a fair overview, it is important to note that refugees may not always adversely affect the host State's economy. Dowty and Loescher have recognised that:[50]

> Refugees may make a positive contribution to the economy in areas where they settle. Refugees are survivors and often arrive in their new countries with skills, education, work practices, and personal resourcefulness that can have a highly positive impact on economic growth.

However, examples of a positive impact are "often the exception rather than the norm" given that refugees are generally forced to live in camps and rely on the host State's

42 US Committee for Refugees *World Refugee Survey 1994* (Washington DC, 1994) at 43 as cited in Alan Dowty and Gil Loescher "Refugee Flows as Grounds for International Action" (1996) 21 International Security 43 at 47.

43 Hathaway, above n 9 (emphasis in original).

44 Schuck, above n 40, at 252; and Blocher and Gulati, above n 8, at 56.

45 Blocher and Gulati, above n 8, at 56.

46 Garry, above n 5, at 105; and Eve B Burton "Leasing Rights: A New International Instrument for Protecting Refugees and Compensating Host Countries" (1988) 19 Colum Hum Rts L Rev 307 at 311.

47 UNHCR Executive Committee *Note on International Protection: International Protection in Mass Influx* A/AC96/850 (1995) at [18].

48 Eiko R Thielemann "Editorial Introduction" (2003) 16 Journal of Refugee Studies 225 at 227.

49 Alan Dowty and Gil Loescher "Refugee Flows as Grounds for International Action" (1996) 21 International Security 43 at 47.

50 At 47, n 11.

supplies rather than encouraged to contribute to the State's economy.[51] Where refugees are not contained in designated camps, the alternative may accentuate the social, cultural and political burden faced by the host State, as set out below.

B *Social, cultural and political burden*

Host States often face a combination of non-financial costs, most notably perceived threats to national security, cohesion and political stability.[52] As Dowty and Loescher explained, "refugee movements often threaten inter-communal harmony and undermine major societal values by altering the ethnic, cultural, religious, and linguistic composition of host populations".[53] This introduction of differences disturbs the "fragile ethnic balances" in a society.[54]

In the event of a "sudden, mass influx of refugees", the risks are heightened.[55] Jacobsen has suggested that a refugee influx may threaten the perceived security of a host State by either "creating new [problems] or aggravating existing ones", such as external aggression, internal disorder and conflict, and the balance between a State's population and its resource endowments.[56] Decreased national security can reduce formerly stable host States to a state of turmoil.

Most recently, as part of the Trump administration's executive order of 27 January 2017, the United States temporarily barred citizens of seven Muslim-majority nations from entering the country for 90 days, refugees from these nations for 120 days, and refugees from Syria indefinitely, in a move aimed to "keep radical Islamic terrorists out of the United States of America".[57] Such a move is an example of the weight attributed to the perceived danger of integrating refugees into a host State's society.

Scholars also recognise that refugee camps can "often become violent places with high rates of crime, especially those where long-term tenure has increased frustration levels" and refugees have developed resentment towards their hosts.[58] There is an additional risk that these refugee populations may spill into surrounding communities, as occurred when Palestinian refugees collaborated with invaders during the Iraqi invasion in 1990.[59]

Refugees also often "become a political force in their host country" and can "influenc[e] … policies and particularly [the host country's] relationship with the country of origin".[60] In Tanzania, in the face of refugees from Rwanda and Burundi, the perceived risk of destabilisation was so large that the Tanzanian government took steps to declare such a risk unacceptable.[61] This exemplifies the gravity of such a threat.

Fearing that uncontrolled migration may threaten cultural identity, and in the hopes of returning to their homeland, refugees tend to try to preserve their cultural heritage and national identity. However, this only serves to complicate integration into the host State's

51 At 47, n 11.
52 Legomsky, above n 9, at 620; and Hathaway and Neve, above n 38, at 138.
53 Dowty and Loescher, above n 49, at 48.
54 Garry, above n 5, at 105; and Burton, above n 46, at 311.
55 UNHCR Executive Committee, above n 47, at [18].
56 Jacobsen, above n 22, at 672.
57 Sabrina Siddiqui "Trump signs 'extreme vetting' executive order for people entering the US" *The Guardian* (online ed, Washington, 27 January 2017).
58 Jacobsen, above n 22, at 672–673.
59 At 673.
60 Dowty and Loescher, above n 49, at 48.
61 Augustine Mahiga "A Change of Direction for Tanzania" *Refugees* (online ed, Geneva, 1 December 1997).

society.[62] This is particularly prevalent in European host States because of the significant cultural differences, and is seen to cause an increase in xenophobic or racist attitudes as well as fuel anti-refugee sentiments.[63]

C *Resulting effect on States: compassion fatigue and the thickening of borders*

The financial and social costs can severely impact the incentives on host States to accept refugees, "[driving] a wedge between the goals of international refugee law and the reality of its enforcement".[64] As a result, States regularly try to prevent refugees from entering their territory and thereby seeking legal claims against the State, as refugees only obtain rights upon entering the State's jurisdiction.[65] States employ a variety of methods to intercept refugees in a process termed "thickening borders", usually defended as mechanisms for border control under a State's basic sovereign prerogative.[66] Such practice is particularly common among wealthier States.[67]

Methods such as interdiction allow a nation to intercept displaced persons before they enter that nation's territory.[68] This method has been used by States such as Vietnam, Cote d'Ivoire, Tanzania and Zaire.[69] More recently, the attempted temporary ban in the United States on refugees from certain nations demonstrates an extreme form of interdiction.

Another concerning practice is that of burden shifting, whereby States such as Hungary, Slovenia and Croatia have actively assisted refugees in reaching other, more attractive destinations, such as Austria, Sweden and Germany, in order to avoid incurring obligations themselves.[70] More subtle methods of thickening borders include altering visa requirements, implementing carrier sanctions, jurisdictional barriers and readmission agreements.[71] Scholars have condemned these sorts of practices as a "race-to-the-bottom in asylum standards".[72]

Overall, it is clear that while many States respect their legal obligations in the event of an influx of refugees, the perceived adverse effects of accepting these refugees provides a strong disincentive. As a result, States have made use of a variety of mechanisms to

62 Dowty and Loescher, above n 49, at 48.
63 At 48.
64 Blocher and Gulati, above n 8, at 57.
65 At 61–62; and Hathaway and Neve, above n 38, at 141.
66 Randall Hansen "State Controls: Borders, Refugees, and Citizenship" in Elena Fiddian-Qasmiyeh and others (eds) *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford University Press, New York, 2014) 253 at 260; Hathaway and Neve, above n 38, at 117; and Blocher and Gulati, above n 8, at 63.
67 Ryan Bubb, Michael Kremer and David I Levine "The Economics of International Refugee Law" (2011) 40 JLS 367 at 379.
68 Hathaway and Neve, above n 38, at 122 and 124.
69 At 122, 124 and 125.
70 William Booth and Michael Birnbaum "Asylum seekers confront repeated rejection as Europe puts up roadblocks" *The Washington Post* (Washington DC, 18 September 2015); and Blocher and Gulati, above n 8, at 62.
71 Blocher and Gulati, above n 8, at 62; Deborah Anker, Joan Fitzpatrick and Andrew Shacknove "Crisis and Cure: A Reply to Hathaway/Neve and Schuck" (1998) 11 Harv Hum Rts J 295 at 297; Alexander Betts "The political economy of extra-territorial processing: separating 'purchaser' from 'provider' in asylum policy" (UNHCR, Working Paper No 91, June 2003) at 2; and Ahilan T Arulanantham "Restructured Safe Havens: A Proposal for Reform of the Refugee Protection System" (2000) 22 Hum Rts Q 1 at 15.
72 Betts, above n 71, at 2.

reduce the likelihood of or avoid incurring the financial, economic, social, cultural and political burdens associated with hosting refugees.

IV A Legal Right to Compensation?

Professor Robert Jennings once argued:[73]

> If the conduct of the state of origin be in the first place illegal, it seems to follow that it is under a duty to assist settlement states in the solution of the problem to which it has given rise.

Were a host State able to recover financial compensation from State of origin, the burden associated with refugees would be shifted, to a degree, to the State at fault. Indeed, scholars argue that the appropriate solution to the refugee crisis is to impose responsibility on States of origin to pay for "their own harmful, negligent, or oppressive policies [that] cause refugees to flee to other countries".[74] While it may appear to be a logical solution, this approach would require identifying a legal footing upon which to base a claim for compensation.

Were it so simple, one would expect to find a wide range of established State practice. However, it is not that simple, and there is *no* established State practice.

While recognising that such a strategy could be far more effective in targeting the root cause, scholars such as Schuck, remain doubtful that such a claim would fit within established international law principles:[75]

> The norm [of State sovereignty] also prevents a state that has borne the costs of another state's refugee-generating policies or practices from suing the source state to recover those costs. Establishing such a cause of action could—assuming that the source state's causal responsibility could be proved and the resulting judgment could be enforced—render a root cause strategy far more effective.

Using the invocation of State responsibility framework, this section considers the limits of potential grounds upon which a State may base a claim for compensation.

A *General framework for invoking State responsibility*

(1) Basic framework

Prepared by the International Law Commission, art 1 of the Draft articles on responsibility of States for internationally wrongful acts (Draft Articles on State Responsibility) provides

73 R Yewdall Jennings "Some International Law Aspects of the Refugee Question" (1939) 20 BYBIL 98 at 113.

74 Tally Kritzman-Amir "Not in My Backyard: On the Morality of Responsibility Sharing in Refugee Law" (2009) 34 Brook J Int'l L 355 at 374. See also Guy S Goodwin-Gill and Selim Can Sazak "Footing the Bill: Refugee-Creating States' Responsibility to Pay" *Foreign Affairs* (online ed, New York, 29 July 2015) at 307.

75 Schuck, above n 40, at 262.

that a State is internationally responsible for any internationally wrongful act of that State.[76]

Under art 2, an internationally wrongful act is an action or omission that:

(a) is attributable to the State under international law; and

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

B *Attribution towards the State of origin*

In order for the State of origin to be held responsible at international law, the wrongful conduct must be attributable to that State.

(1) Direct attribution

If refugees are fleeing from their States of origin out of fear of persecution, this implies that it is the acts or omissions of the State of origin that have caused the influx of refugees into the host State. Accordingly, the conduct will be attributable to the State under art 4 of the Draft Articles on State Responsibility. In these circumstances, establishing attribution of the conduct to the State of origin should not present any problems.

(2) Indirect attribution

In certain circumstances, a State may not be responsible for conduct causing a mass influx of its nationals into another State. As Lee notes, State A may be obligated to compensate State B for the costs of caring for State C's nationals where A has indirectly caused the mass movement of C's nationals.[77] Under arts 17 and 18 of the Draft Articles on State Responsibility, a State that directs, controls or coerces another State to commit an internationally wrongful act is internationally responsible for that act, provided that the former State knows of the circumstances of the internationally wrongful act. As an example, Lee notes that "actual or threatened military intervention in the internal affairs of [another] state resulting in the flight of the latter's citizens for fear of persecution" would be sufficient.[78]

C *Breach of an international obligation*

In respect of a host State's ability to claim compensation from the State of origin, the most difficult requirement to satisfy is a breach of an international obligation. In this regard, this section of the article now turns to consider potential bases upon which to ground a breach of an international obligation.

76 Draft articles on responsibility of States for internationally wrongful acts, art 1 in *Report of the International Law Commission on the work of its fifty-third session* [2001] vol 2, pt 2 YILC 26 at 26.

77 Lee, above n 3, at 558.

78 At 558.

(1) The Refugee Convention

The Refugee Convention was drafted out of a desire to "revise and consolidate previous international agreements relating to the status of refugees".[79] Consequently, it provides a comprehensive codification of the rights of refugees at the international level.

While the signatories recognised the unduly heavy burden associated with refugee protection,[80] the Refugee Convention does not itself provide for any recourse to enable host States to seek compensation from the State of origin. Accordingly, States would have to look elsewhere to base a claim for compensation.

(2) Transboundary harm

The most applicable ground is seeking to extend the application of the general obligation prohibiting transboundary harm. It is a fundamental norm of international law that "every State has the *right* to exercise jurisdiction over its own territory and over all the persons and things within it".[81] The corresponding duty is therefore to avoid interfering with another State's exercise of sovereignty over its own territory. States must act diligently to refrain from acts that would cause injury or damage to persons or property situated in the territory of other States.

In *Trail Smelter Arbitration (United States of America v Canada)*, the United States sued Canada for environmental damage caused by a Canadian smelting company emitting sulphur dioxide fumes.[82] The tribunal held Canada responsible at international law:[83]

> … 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.

These principles were affirmed in *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania)*, where the International Court of Justice (ICJ) recognised "every state's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states".[84] Consequently, a State that generates transboundary harm from its territory is responsible for that harm if it had knowledge of it and the opportunity to act. This principle was extended to cover environmental harm more generally in the *Gabčikovo-Nagymaros Project (Hungary v Slovakia)* case.[85]The ICJ demonstrated its increasing acceptance of the practice most recently in *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)*, where it summarised the key principles applicable to the general obligation to exercise due diligence in preventing transboundary

79 Refugee Convention, preamble.

80 Refugee Convention, preamble.

81 Lee, above n 3, at 553. See also *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica) (Judgment)* [2015] ICJ Rep 665 at [104]; and *Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment)* [2010] ICJ Rep 14 at [101]. The principle originates from the maxim *sic uteri tuo ut alienum non laedas* (use your own property in such a manner as not to injure that of another).

82 *Trail Smelter Arbitration (United States of America v Canada) (Award)* (1941) 3 RIAA 1905.

83 At 1965.

84 *Corfu Channel (United Kingdom v Albania) (Merits)* [1949] ICJ Rep 4 at 22.

85 *Gabčikovo-Nagymaros Project (Hungary v Slovakia) (Judgment)* [1997] ICJ Rep 7 at [140].

harm.[86] In that case, Nicaragua went so far as to argue for the extension of the transboundary harm principles to cover adverse impacts on tourism and on the health of communities within its territory following the construction of a road.[87] Notably, the Court only rejected these claims based on a lack of evidence.[88]

(a) Accommodating the current scenario within established principles

The primary difficulty in bringing a claim under conventional transboundary harm principles would be establishing that the host State has suffered harm that falls within the transboundary harm principle. While the principle has been applied in a variety of contexts, every successful example has involved some form of *physical* harm to another State. Here, the host State must either argue that the harm caused is the physical presence of refugees settling in its territory, or, alternatively, seek to extend the established transboundary harm principles to non-physical harm such as the financial, economic, social, cultural and political burdens identified in Part III.

To this end, Lee rightly notes that refugees are certainly not analogous to "fumes".[89] However, for the purposes of establishing transboundary harm, they do share certain legal similarities:[90]

> … both may cross international boundaries from countries of origin; both such crossings are preventable by the countries of origin; both such crossings are not made with the voluntary consent of the receiving States; and both such crossings may impose economic and social burdens upon the receiving States, for which the countries of origin will be responsible.

However, the key difference is that:[91]

> … while a state cannot prevent fumes from drifting into its air and over its land territories, it can, except in perhaps mass expulsion cases, prevent or deter the entry of refugees into its territories through such devices as barricades, imprisonment or internment ("humanitarian deterrence"), *refoulement*, rejection at the border and "push-offs."

Lee goes on to explain that the exercise of any such "devices" to prevent a refugee influx is "increasingly being considered as inimical to respect for the minimum standards of humane treatment or human rights" as canvassed in international instruments.[92]

While recognising that it "may appear invidious" to make such a comparison to fumes, Guy Goodwin-Gill and Jane McAdam emphasise that "the basic issue … is the responsibility which derives from the fact of control over territory".[93] This idea was reinforced by the ICJ in an advisory opinion, where it held that the physical control of the territory, rather than sovereignty or legitimacy of title, constituted the basis of liability for extraterritorial

86 *Construction of a Road*, above n 81, at [104].
87 At [214].
88 At [216].
89 Lee, above n 3, at 554.
90 At 554.
91 At 554.
92 At 554.
93 Guy S Goodwin-Gill and Jane McAdam *The Refugee in International Law* (3rd ed, Oxford University Press, New York, 2007) at 3, n 6.

injuries.[94] In this regard, Jack Garvey suggests that transboundary harm therefore extends beyond mere ecological or pollution-based damage to any damage to other States—although this is arguably taking the principle too far.[95] Even if the principle were to rely solely on the ability to control the harm, the State of origin may plead that it has no direct control over the free movement of its nationals, unlike its greater ability to control the amount of pollution produced in its territory.

Even if a state can establish that the burden amounts to harm, a further difficulty lies in reaching the threshold of *substantial* harm.[96] Scholars have noted that, although the standard depends on the circumstances of each case, the standard is a high one.[97] Given that host States worldwide already regularly bear significant burdens by accepting refugees, the burden needed to reach the requisite standard should be a burden over and above that which States ordinarily endure. Merely accepting refugees is not enough—it would need to be on the scale of a mass influx.

In summary, it is clear that a host State faces several challenges in establishing a claim based on transboundary harm principles. First, despite the similarities identified by Lee, all previous examples of transboundary harm have been explicitly *physical* harm. Secondly, even if the rationale was based on a State's actual ability to control the harm, rather than a strict requirement of proof of physical harm, a State lacks the ability to restrict the free movement of its nationals. Lastly, the requisite degree of harm remains ambiguous.

(3) Sovereign equality of States

The right of sovereign equality is well established and underlies the principle of State autonomy.[98] As subjects of international law, States are equal, such that "no State can be legally bound without or against its will".[99] That is, no State has jurisdiction over another without the latter's consent.[100] As early as the Moscow Conference of 1943, States have jointly recognised the necessity to establish an international organisation based on such a principle.[101] This is now codified in art 2(1) of the Charter of the United Nations.

More recently, the United Nations General Assembly issued a Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, stating that:[102]

94 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep 16 at [118].

95 Jack I Garvey "Toward a Reformulation of International Refugee Law" (1985) 26 Harv Int'l LJ 483 at 495.

96 Xue Hanqin *Transboundary Damage in International Law* (Cambridge University Press, Cambridge, 2003) at 158.

97 At 158.

98 Hans Kelsen "The Principle of Sovereign Equality of States as a Basis for International Organization" (1944) 53 Yale LJ 207 at 209.

99 At 209.

100 At 209.

101 At 207.

102 *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* GA Res 2625, A/Res/25/2625 (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.

Directly related to the sovereign equality of States is the principle prohibiting the abuse of rights. Integral to this principle is the general concept of neighbourliness, which constitutes "one of the basic elements of the international law of torts".[103] Günther Handl explains:[104]

> … the notion of "neighborliness" simply implies that the exercise of sovereign territorial rights, as indeed of any rights, cannot be separated from the social context in which the rights are being asserted and that it is only in the concrete circumstances of a specific situation that rights may find their exact delimitation. From this it follows logically that where, in the context of an international society based on the sovereign equality of states, the exercise of a sovereign right is bound to conflict with similar rights of an equal rank, insistence on individual rights must be considered unreasonable and reprehensible.

Essentially, the principle prohibiting the abuse of rights applies in situations where the exercise of sovereign rights by one State interferes with a neighbouring State's equivalent right to sovereignty over its own territory.

In relation to a mass influx of refugees, Lee recognises that "[a] direct and immediate result of the … persecution of nationals is to force them on the territories of other states … regardless of the wishes of these [receiving] states."[105] This is tantamount to an abuse of another State's right to sovereign equality because it "saddle[s] the other state with an unwanted population".[106] In short, a State's exercise of sovereignty within its own territory may lead to the expulsion of nationals. This, consequently, may encroach upon another State's sovereignty by forcing that state to accommodate refugees. Applying the principles discussed above, this would be tantamount to an abuse of rights.

While this ground may appear to be more direct than the previous ground, it will face the same difficulty of establishing causation. In essence, it must be shown that, notwithstanding the right to freedom of movement, a State has *actually* forced its nationals to leave. However, this would not be impossible to establish where, for example, legislative or executive action foreseeably leads a particular group of persons within the State to genuinely fear persecution.

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103 Günther Handl "Territorial Sovereignty and the Problem of Transnational Pollution" (1975) 69 AJIL 50 at 56.

104 At 56.

105 Lee, above n 3, at 555.

106 At 555.

(4) Principle of nationality

As recognised by the ICJ in the *Nottebohm Case (Liechtenstein v Guatemala)*, nationality gives rise to "reciprocal rights and duties" between a State and an individual.[107]

Ian Brownlie notes that a State would incur liability at international law for terminating such rights and duties where "withdrawal of nationality was itself a part of the delictual conduct, facilitating the result".[108] Similarly, Goodwin-Gill suggests that discretion, in the context of a State's competence to expel aliens, is limited: States must not abuse their competence in order to avoid their international obligations.[109]

Lee explains how a breach of the principle of nationality forms a valid legal basis for holding the State of origin responsible in the context of refugee flows. Essentially, through either direct (such as persecution) or indirect means (such as ignorance of basic human rights), a State may be responsible for the outflow of nationals into other States where its conduct constitutes a deliberate attempt to avoid obligations towards those nationals. The duties that the State of origin would otherwise owe would be effectively transferred to the host State.

Ultimately, the flaw with this argument is that the host State does not have jurisdictional standing to bring such a claim for reparation on behalf of the nationals of another State for the latter State's breach of a duty owed to those nationals. Rather, it would be up to those nationals themselves to bring a claim against the State of origin for terminating their nationality.

(5) Human rights obligations

Alternatively, a State may be able to substantiate a claim of a gross violation of international human rights, which may give rise to a cause of action as a "third State" against the State of origin.[110] As recognised by scholars such as GJL Coles, mass exoduses are often caused by States' gross abuses of human rights, from "basic civil and political rights" to "economic, social and cultural rights".[111]

Given the importance of State sovereignty under international law, a third party State would need to invoke a human rights obligation of such significance so as to outweigh the State of origin's sovereignty. At the peak of the hierarchy of international law rights are those classified as *jus cogens*, each universally recognised and accepted "as a norm from

107 *Nottebohm Case (Liechtenstein v Guatemala) (Second Phase, Judgment)* [1955] ICJ Rep 4 at 23.

108 Ian Brownlie *Principles of Public International Law* (3rd ed, Oxford University Press, New York, 1979) at 396. See also James Crawford *Brownlie's Principles of Public International Law* (8th ed, Oxford University Press, Oxford, 2012).

109 Guy S Goodwin-Gill "The Limits of the Power of Expulsion in Public International Law" (1976) 47 BYBIL 55 at 57.

110 Menno T Kamminga *Inter-State Accountability for Violations of Human Rights* (University of Pennsylvania Press, Philadelphia, 1992) at 186 as cited in Garry, above n 5, at 107.

111 GJL Coles *Problems Arising from Large Numbers of Asylum-Seekers: A Study of Protection Aspects* (International Institute of Humanitarian Law, San Remo, 1981) at 5 as cited in Garry, above n 5, at 107. This text was originally presented as a working paper at the Round Table Discussion on Problems arising from the Large Numbers of Asylum-Seekers, convened by the International Institute of Humanitarian Law in San Remo, 1981.

which no derogation is permitted".[112] They include, for example, a prohibition on genocide. The status of being a *jus cogens* right creates an *erga omnes* obligation to observe that right, owed by every State towards the international community as a whole—all States have a legal interest in their compliance.[113] Consequently, a breach of *jus cogens* rights may give rise to a cause of action against the offending State, by way of the third party State complying with their *erga omnes* obligations.

Additionally, in order to rely upon this ground, the injured State must establish a *gross* violation of a right. Vojin Dimitrijevic defines this as a violation "out of all measure", which is "flagrant … [and] not to be excused".[114] However, as discussed by Garry, the requirement is not without ambiguity and has been linked to systematic violations.[115] This standard would encompass the situation where a State "practices, encourages, or condones the enumerated violations of human rights as a matter of State policy on a large-scale".[116] For example, the stateless Rohingya in Myanmar currently face discriminatory, systematic persecution and are subject to ongoing human rights violations that may amount to crimes against humanity and ethnic cleansing.[117] Indeed, Dowty and Loescher argue that "there is little debate" that human rights violations causing specific loss to both victims and other States may provide adequate grounds for reparation claims.[118] However, having established such a gross violation of human rights obligations, a host State might still be unable to recover compensation for the resulting mass influx of refugees. This is because a successful action to enforce an *erga omnes* obligation would only entail reparation towards the victims, not the State taking action on behalf of them.

D *Circumstances precluding wrongfulness*

For completeness, it must be noted that even if a State has breached an obligation at international law, the wrongfulness of a State's conduct may nonetheless be precluded in certain circumstances. The most relevant circumstance here would be a state of necessity. However, the criteria for such a defence is extremely strict, having never been raised successfully as a defence before the ICJ. Further, Article 26 of the Draft Articles on State Responsibility provides that none of the circumstances precluding wrongfulness may be relied upon if to do so would conflict with a peremptory norm of international law, like many human rights obligations.

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112 Vienna Convention on the law of treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980), art 53.

113 See *Barcelona Traction, Light and Power Company Ltd (Judgment)* [1970] ICJ Rep 3 at 33 as cited in Garry, above n 5, at 107.

114 Vojin Dimitrijević "Dimensions of state responsibility for gross violations of human rights and fundamental freedoms following the introduction of democratic rule" in Theo van Boven and others (eds) *Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms* (Netherlands Institute of Human Rights, Utrecht, 1992) 214 at 216 as cited in Garry, above n 5, at 109.

115 Garry, above n 5, at 109.

116 At 109.

117 Blocher and Gulati, above n 8, at 108; and Global Centre for the Responsibility to Protect *Persecution of the Rohingya in Burma/Myanmar and the Responsibility to Protect* (Policy Brief, 5 March 2015).

118 Dowty and Loescher, above n 49, at 56.

E *Remedy*

From a theoretical perspective, Jennings recognised that:[119]

> If the conduct of the state of origin be in the first place illegal, it seems to follow that it is under a duty to assist settlement states in the solution of the problem to which it has given rise.

Article 31 of the Draft Articles on State Responsibility provides for the obligation of reparation by a State where there is injury caused by an internationally wrongful act for which that State is responsible. In *Factory at Chorzów (Germany v Poland)*, the Permanent Court of International Justice recognised that reparation must "wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed".[120]

Here, the appropriate form of reparation under arts 34 and 36 of the Draft Articles on State Responsibility would be compensation for the costs incurred by host States. Under art 36(2), the quantum of compensation will cover any financially assessable damage insofar as it is established. This, however, would indicate that while the financial burden the host State bears could be assessed and, therefore, compensated for, if the social burden discussed previously is incapable of being quantified, it may remain without a remedy. Accordingly, while the financial burden suffered by the host State may be assessed (and therefore compensable), any non-financial burden may remain without a remedy.

V Future Outlook and Problems

While the possible legal bases discussed in Part IV are each attractive in providing a solution to the ongoing refugee problem, each face significant hurdles. Ultimately, whether any ground would have standing in international law will require a test case. Given that many States have endured the burdens associated with hosting refugees, yet no State has pursued a claim for compensation, it is easy to be sceptical about the likelihood of such practice emerging in the future. Along with the practical and legal difficulties in formulating a claim, many States may, for a variety of reasons, choose not to pursue a claim.

For example, in response to the substantial fiscal cost of hosting refugees, the World Bank is preparing to talk to member countries about the possibility of compensating Syria's neighbours to relieve the burden.[121] While this may not amount to a legal claim to compensation, if this sets a precedent for injured States receiving compensation from international organisations such as the World Bank, it is unlikely that a State will bother pursuing a novel legal claim before the ICJ.

Additionally, there are good reasons why demanding compensation from a State of origin may be inappropriate. Blocher and Gulati note the a risk of further destabilising the State of origin:[122]

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119 Jennings, above n 73, at 113.

120 *Factory at Chorzów (Germany v Poland) (Claim for Indemnity) (Merits)* (1928) PCIJ (series A) No 17 at 47.

121 Tom Miles "World Bank may compensate Syria's neighbours for refugee costs" *Reuters* (online ed, Geneva, 15 October 2015).

122 Blocher and Gulati, above n 8, at 100.

> Efforts to impose financial damages can contribute to radicalisation or further systematic costs—one need look no further than inter-war Germany or present day Greece. Moreover, it might simply be unfair to saddle the nation with a debt because of the oppressive behaviour of its government, particularly if that government is undemocratic in the first place. Doing so would put the remaining citizens of the country—who might themselves have been victims of oppression—on the hook for payments to the refugees created by the prior malefactor government.

Imposing an obligation to compensate may also create undesirable incentives for States of origin, host States and refugees. First, the threat of paying compensation may encourage States of origin to restrict the free movement of people, best exemplified by the state of Myanmar in respect of the Rohingya.[123] Secondly, while compensation may encourage more States to accept refugees, those host States could engage in harmful commodification by simply claiming compensation and neglecting to properly care for the refugees.[124] Lastly, Blocher and Gulati warn that if more wealthy nations are prepared to accept refugees, refugees may act opportunistically by exaggerating the degree of their persecution in order to move to a State with a higher standard of living.[125]

The question then arises: what remedies should be available, if not compensation? Alongside compensation, scholars have proposed "market-based approaches to the refugee problem, including proportional sharing of burdens among host nations … and tradable quotas held by those nations".[126] However, other scholars argue that these approaches may be impractical as host States have little reason to willingly share the burden.[127]

Nevertheless, burden-sharing proposals have gained some traction. Schuck identifies notable examples, including the "Comprehensive Plan of Action" in response to refugee flows in Southeast Asia in the 1970s.[128] The European Union also considered a burden-sharing proposal.[129] Unfortunately, neither the UNHCR nor States have moved to drive the project in the international context.[130]

LCW Wee proposes the possibility of codifying forced migration itself as an internationally wrongful act.[131] While this may simplify matters in theory, it is unlikely to generate enough support in practice, particularly from developing States. In reality, States will be hesitant to agree to be liable at international law for the voluntary movement of nations.

Lee suggests that where a State of origin forces nationals to leave, and consequently shifts the burden of those persons' care to a host State, this creates a relationship that is

123 At 102.
124 At 103.
125 At 105.
126 At 58; Hathaway and Neve, above n 38, at 118; and Schuck, above n 40, at 246.
127 Blocher and Gulati, above n 8, at 58.
128 Schuck, above n 40, at 254–259. See "Comprehensive Plan of Action" in Office of the United Nations High Commissioner for Refugees *International Conference on Indo-Chinese Refugees: Report of the Secretary-General* A/44/523 (1989), annex II.
129 Karoline Kerber "Temporary Protection: An Assessment of the Harmonisation Policies of European Union Member States" (1997) 9 IJRL 453 at 454.
130 Hathaway, above n 9.
131 LCW Wee "International Responsibility Causing Forced Migration" (paper presented at Oxford Refugee Studies Programme's Hilary Term Seminar Series, 24 January 1966) at 11 as cited in Garry, above n 5, at 108.

"quasi-contractual".[132] The State of origin must therefore reimburse the host State for the costs incurred. Similarly, the Committee on International Assistance to Refugees considers that, given the heavy burden associated with hosting refugees, there exists:[133]

> ... an international duty for the countries of origin of the refugees at least to alleviate, to some extent, the burdens imposed by the presence of the refugees in the territory of other States.

While this recommendation suggests that a State of origin should alleviate the burdens, the precise scope of what such an obligation would entail remains unclear. In particular, the phrase "alleviate, to some extent" does not indicate that the Committee had in mind compensation for all costs incurred.

Blocher and Gulati propose the following method:[134]

> The international community would give persecuted refugee groups financial claims enforceable against the countries that expelled them. The groups could trade those claims to other countries as a way of offsetting the costs of acceptance. The new host nations could then seek to enforce the claims directly, use them to offset any debts that they have against the refugee-creating nation, or sell the debt to a third party ...

This idea certainly has some merit in respect of its theoretical effect on incentives, but it would be difficult and complex to translate into a functioning system in practice. In comparison, bringing a claim before the ICJ appears to be a much more viable option at international law as it currently stands.

VI Conclusion

One of the most topical questions of international law concerns how to manage the refugee crises that continue to plague our world. This article outlined the current international law framework of protection available to refugees as well as the financial, social, cultural and political burdens faced by host States in caring for refugees. This highlighted the unsatisfactory position we are currently in: where States of origin go unpunished while host States bear an overwhelming burden. It is clear that the incentives to protect refugees and the disincentives to create refugees need to be revisited. This article has argued for a reactive approach rather than merely trying to solve the symptoms of the problem: the State of origin paying compensation to the host state.

Most importantly, this article addressed the substantive principles and the process required to hold a State of origin responsible at international law. The hope is that this process may provide a framework to allow the international community to continue to develop solutions that address the root of the problem. While there are significant barriers to a host State's claim for compensation in the present state of international law, there may be changes over time that allow for such a claim to be made, given its ability to incentivise refugee protection and discourage refugee creation.

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132 Lee, above n 3, at 557.

133 Committee on International Assistance to Refugees *Report by the Committee submitted to the Council of the League of Nations* (C2M2 1936 XII, January 1936) at 18 as cited in Jennings, above n 73, at 113.

134 Blocher and Gulati, above n 8, at 59.