

## **A Conceptual and Theoretical Study of Responsibility of State of Origin of Refugees Towards the Host Countries**

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### **Abstract**

*The thrust area of this research is to put some light on the right of refugee hosting countries as to regulate the refugee flow and to protect the right of refugees. Responsibility sharing is a core principle of International responses to refugee crises. There must be a holistic approach to international burden sharing that will enhance the protection of refugees as well as the host community. Right to compensation of the refugee hosting countries as a means of enforcing justice and of preventing future refugee flows is the prime concern of this study. The right and duty of compensation in the refugee context are justified and should be further developed. Refugees are people who have had to flee their country because of armed conflict, serious human rights abuses or persecution. A refugee is a person who cannot return to their own country because they are at risk of serious human rights abuses there. Because their own government cannot or will not protect them, they are forced to flee their country and seek international protection.*

**Key words:** Refugee, Right to compensation, host country, burden sharing, country of origin, state responsibility, right to return.

### **I. Background**

Just over 21 million people or 0.3% of the world's population are refugees right now. This includes 5.2 million Palestinians, many of whom have been refugees for decades.<sup>2</sup> The vast majority of refugees are hosted in low and middle income countries, with one quarter (about 4.2 million people) living in least developed

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<sup>2</sup> Because almost all Palestinian refugees fall under the mandate of the United Nations Relief and Works Agency for Palestine Refugees (UNWRA), while most other refugees fall under the mandate of UNHCR, data on refugees is often presented in different ways. This report covers all refugees.

countries.<sup>3</sup> Meanwhile many of the world's wealthiest nations host the fewest refugees, both in absolute numbers and relative to their size and wealth.

Around the world, new conflicts and crises are forcing more people to leave their countries. The crisis in Burundi, for example, has pushed over 265,000 people into neighbouring Rwanda, Tanzania, the Democratic Republic of the Congo (DRC), Uganda and Zambia.<sup>4</sup> Armed conflict in South Sudan has driven 1 million people to leave their country for Uganda, Ethiopia, Kenya and other countries in the region.<sup>5</sup> More than 1 million refugees worldwide are considered by UNHCR to be vulnerable and urgently in need of resettlement to other countries. Vulnerable refugees include survivors of violence and torture, women and girls at risk, and those with serious medical needs. Only around 30 countries offer resettlement places for vulnerable refugees, and the number of places offered (known as "resettlement places") annually falls far short of the needs identified by UNHCR.<sup>6</sup>

## II. International Burden Sharing

Amnesty international's proposals for responsibility sharing efforts to address the global refugee crisis have failed to address even a small fraction of the actual needs. Moreover, they are often based on measures to ensure that the wealthiest countries face the least disruption. Many of the world's wealthiest countries have devoted significant resources to ensure that refugee populations remain in less wealthy countries.

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<sup>3</sup> According to UNHCR, Global Trends, Forced Displacement in 2015, p.2 86% of refugees under its mandate live in developing regions.(Jan. 12,2022,09: 15 PM), <http://www.unhcr.org>. According to UNRWA Nearly one-third of the registered Palestine refugees, more than 1.5 million individuals, live in 58 recognized Palestine refugee camps in Jordan, Lebanon, the Syrian Arab Republic, the Gaza Strip and the West Bank, including East Jerusalem. (Jan. 15, 2022, 10: 15 PM), <http://www.unrwa.org/palestine-refugees>.

<sup>4</sup> Burundi Situation UNHCR Regional Update 1-31 May 2016 (Jan. 21, 2022,09:30 PM), <http://reporting.unhcr.org>.

<sup>5</sup> Theodor Meron, Human Rights and Humanitarian Norms as Customary Law 82-85 (Oxford, 1989).

<sup>6</sup> Amnesty International, Tackling The Global Refugee Crisis, From Shirking To Sharing Responsibility 35 (Amnesty International Ltd Peter Benenson House, 2016) (Jan. 28,2022, 03: 15 PM) <https://www.amnesty.org>

The total refugee population of 21 million is just 0.3% of the population of the planet. Amnesty International believes that it is possible, if states will share the responsibility, to ensure that these people who have had to flee their homes and countries, though no fault of their own, can rebuild their lives in safety elsewhere.

Amnesty International is campaigning for much greater responsibility sharing amongst states and for greater protection of the rights of refugees around the world. The concept of responsibility sharing is rooted in international human rights and refugee law. States have obligations to assist each other to host refugees, and obligations to seek, and provide, international cooperation and assistance to ensure that refugees can enjoy international protection. The following sections set out Amnesty International's proposals.<sup>7</sup>

#### **A. Develop a Mechanism to Share Responsibility**

Amnesty International believes that states' respective contributions to refugee responsibility-sharing should be far more equitable, based on an objectively defined capacity of the state to host and assist refugees. However, this is not happening. While a small number of countries host millions of refugees, many countries provide nothing at all. Responsibility sharing will never be a reality until there is a proper basis and structure to guide states on what their fair share of responsibility looks like.

Amnesty International is proposing a fundamental reform to the way in which states share responsibility. The proposals of Amnesty International are simple:

- a. Introduce a system that uses relevant, objective criteria to show each state what their fair share looks like.
- b. Then use these criteria to address critical dimensions of the current global refugee crisis.
- c. The proposal focuses on two key dimensions of the global refugee problem: resettlement of vulnerable refugees and alleviating pressure on host states that receive very large numbers.

According to Amnesty International states' respective contributions to refugee responsibility-sharing should be proportionate to an objectively defined capacity to host and support refugees. National wealth (for example, GDP or GNI),

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<sup>7</sup> *Id.*

population size and unemployment rates are all factors that affect a country's ability to host and integrate refugees. While states might add to or modify these criteria, and assign different weighting to each one, they should focus on agreeing a relatively small number of relevant, broadly applicable, common-sense criteria that enable responsibility-sharing.<sup>8</sup>

**B. Guaranteed Full, Flexible and Predictable Funding For Refugee Protection and Meaningful Financial Support to Countries Hosting Large Numbers of Refugees**

Amnesty International is calling on states to increase their contributions to UN inter-agency humanitarian appeals for refugee crisis situations, and to publish annually the amounts they commit and disburse.

In the case of countries hosting large refugee populations, states should also provide bilateral assistance – both financial and technical support, depending on the host country's needs – to enable the host state to provide support to refugees and asylum-seekers, including ensuring access to adequate shelter, food, health care and education. The extent of such bilateral assistance should also be published annually.

Although a flexible approach to responsibility-sharing may allow states to contribute in different ways to a common response, financial support to the countries hosting large numbers of refugees and asylum-seekers in times of crisis should not be considered as a substitute for, or come at the expense of, programmes to accept people in need of protection, such as: contributions to resettlement; accepting the transfer of refugees from countries that have exceeded their ability to cope; or the admission of asylum-seekers at the border. Wealthy countries cannot avoid taking their share of the responsibility for hosting and assisting refugees by paying other countries to do so.<sup>9</sup>

Following Amnesty International, World Bank on December 17, 2019 announced upto \$2.2 Billion for refugees and host countries over next three years from July 2020 to June 2023. The World currently has more refugees that at any time since World War II. Around 85 percent of the 25.9 Million refugees globally are hosted by developing countries, and three quarters of refugees are still displaced, which

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

can deeply impact on the host countries. World Bank has taken this as long term investments that address the needs of both refugees and the communities that host them is a critical part of the long-term solution to this growing refugee challenge.<sup>10</sup>

### **III. Relevant Fields of International Law**

#### **A. State Responsibility**

In addition to a focus on the rights and duties of the host state, it is essential that such issues be linked to various fields of international law so as to make it possible to seek out specific legal rules that relate to the situation. The question of the origin of the refugee, for example, is related to the framework of state responsibility.<sup>11</sup>

The concept of State responsibility is as old as the human civilization. It has been the perennial responsibility of the State to protect the life and liberty of its citizenry. Today an individual has become central to the entire human rights discourse and is being regarded as a subject of International Law. Moreover, national boundaries are losing their meaning. Consequently, a new world human order is being emplaced. The human rights of all individuals including that of refugees have become a polemical debate heralding a new premise whereas state concerns and individual rights are at loggerhead with each other. In this conspectus, it is incumbent upon the state to reconcile this paradox in an age of transnationalisation of human rights and civil liberties. Asylum countries are not as much responsible as country of origin. Thus, country of origin should directly be held responsible for the refugee flows and it is the responsibility of the refugee generating state not to create problems of galling proportions for the other states as it is contrary to the notion of a civilized state. The responsibility of the country of origin is higher than the responsibility of state of reception under the International Law.<sup>12</sup>

#### **B. Responsibility of Origin States towards Host States**

When looking into the issue of responsibility of a State of origin towards receiving States, one should from the very outset draw a distinction between States that

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<sup>10</sup> World Bank Report 2019 (Mar. 12, 2022, 09: 15 AM) <https://www.worldbank.org>.

<sup>11</sup> *Id.*

<sup>12</sup> Nafees Ahmed, Refugees: State Responsibility, the Country Of Origin and Human Rights, 10(2). APJHRL, 1, 1-22 (2009).

have suffered tangible injury by being burdened with having to take care of a substantial group of people from the relevant country of origin, and other countries that are not directly affected but may make representations and raise claims as guardians of international legality.<sup>13</sup>

### ***States Directly Injured***

As already pointed out, claims under the legal heading of State responsibility presupposes in the first place that a breach of an international obligation has occurred at the hands of the State. Pursuant to the fundamental principle of sovereign equality, each State must respect the sovereign equality of its neighbours. If it pushes large groups of its own citizens out of its territory, fully knowing that the victims of such arbitrariness have no right of entry to another country but will eventually have to be admitted somewhere else on purely humanitarian grounds, it deliberately affects the sovereign rights of its neighbours to decide whom they choose to admit to their territories."<sup>14</sup>

### ***State Acting as Guardians of International Legality***

Even States that have not directly been affected by a flow of refugees may have legal claims against the State of origin. What matters is the fact that according to the authoritative pronouncement in the Barcelona Traction case<sup>15</sup> every State has legal standing to act - in some form - for the protection of basic human rights that have been breached. Generation of refugees is of course not an element of the indicative list given by the ICJ, and it would not fit therein. The criterion chosen by the ICJ is that of particular gravity. Hence, everything depends on the specific circumstances. If, for instance, a government engages in a policy of genocide, thereby terrorizing the members of the persecuted group and inducing them to flee abroad, every member of the international community may be considered affected.

According to Article 5 of Part II of the draft articles of the ILC on State responsibility, in case of a violation of a human rights obligation under customary international law or if the breach attains by its seriousness the quality of an

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<sup>13</sup> *Id* at p.14.

<sup>14</sup> Luke T. Lee, The Right to Compensation: Refugees and Countries of Asylum, 80 AJIL 532, 532-567 (1986).

<sup>15</sup> ICJ Report, 1970.

international crime, all other States are to be considered injured; in case of a human rights obligation based on treaty law, all other States parties. This gives them legal standing to participate in the enforcement process.<sup>16</sup>

***Responsibility of Origin State towards the International Community***

In more than one occasions the General Assembly has stressed that flows of refugees unleashed by one country affect the entire international community.<sup>17</sup> Indeed, this simple truth finds confirmation in the fact that persons having lost the protection of their home State must be given a place to stay, food, shelter and medical care. To assist national governments in performing this task, the UN has created the office of the UNHCR, which for its part requires to be financed by the members of the international community.

In order to implement the responsibility of the State of origin, the international community can make use of the powers of the Security Council, provided that the requirements for action in accordance with Article 39 of the UN Charter - a threat to or a breach of the peace or an act of aggression - are met. Intervention by the Security Council can serve in particular to stop the actions that have set in motion a mass exodus. Almost unchallengeable in theory, this conclusion is hard to translate into concrete practice. Except in the case of the Kurds of Iraq, the Security Council has never taken the view that to generate a flow of refugees may constitute a threat to international peace and security.<sup>18</sup>

It goes without saying that the international community has additionally a vivid interest in recovering from a State of origin the costs it has defrayed for taking the requisite measures of protection. First of all, recovery would help refill the budget of UNHCR, which is constantly under threat in as much as it rests totally on voluntary contributions by interested States. On the other hand, if governments had to realize that money spent for the benefit of refugees were recoverable from them, this might act as deterrent in critical situations where fundamental policy

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<sup>16</sup> VERA GOWLLAND, DEBBAS (ED), *THE PROBLEMS OF REFUGEES IN THE LIGHT OF CONTEMPORARY INTERNATIONAL LAW* 66 (Martinus Nijhoff Publishers 1996).

<sup>17</sup> *Id.*

<sup>18</sup> UNGA Resolution, 688, (1991), Preamble para 3.

determinations are being made. In law, a good case can be made for a claim to reimbursement.<sup>19</sup>

Since its inception back in the 1920s refugee law has considerably and invariably been perceived as a special branch of international law addressed almost exclusively to potential asylum countries. In particular, the Geneva Convention of 1951 on the Status of Refugees sets forth an elaborate regime of legal rules that create duties for States Parties having received refugees are being faced with demands for admission. Thus, the country of origin, which has set in motion the tragic sequence of events, is an essential - and even the most important - actor in the complex triangular relationship whose other elements are the refugee and the receiving States" If it behaved in consonance with current human rights standards, the whole problem would simply disappear.<sup>20</sup>

In this context, it is necessary to determine whether in fact the origin of the refugee came about as a result of some kind of wrongful act on the part of the territory from which the refugee came. If so, the question can be looked at in terms of the framework of the Articles of State Responsibility. Furthermore, this framework not only requires that responsibility should be determined, but also that there be a consideration of the consequences of responsibility.

### ***Liability with Accountability***

The other side of state responsibility, which has also been explored in the refugee issue, is the aspect of liability. The liability question is complicated because responsibility, as such, does not arise from the initial wrongful act, or even the causes of the refugee flow, but rather from the damage caused to the host country. States have a duty to ensure that any developments on their territory do not affect or create damage to other states, hence the thin line between a wrongful act and liability. Nevertheless, if one takes such a perspective, the damage aspect becomes very important and, thus, the causal effect must be taken into consideration as well. This prompts the question of whether it is possible to link

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<sup>19</sup> Nafees Ahmed, Refugees: State Responsibility, the Country of Origin and Human Rights, 10(2). APJHRL, 1, 1-22 (2009).

<sup>20</sup> *Id.*

the damage (e.g. economic and political burdens, the host state's opening itself up to incursions, etc.) to the refugee flow itself.<sup>21</sup>

State responsibility is not the only possible basis for a legal claim to compensation. One could also resort to objective liability in the sense that a State of origin, whatever its human rights record, is duty-bound to repair the damage caused to other States by a massive influx of its nationals into, their territories. Some authors have suggested that the *Trial Smelter* case<sup>22</sup> could be used as the starting point for this approach.<sup>23</sup>

Of these two aspects of state responsibility, the liability aspect has been criticized by refugee lawyers as implying a conception of refugees as a type of pollution. Conversely, the damage aspect has been explored in international law from the perspective of the environment and environmental damage. Moreover, if the situation has involved conflict between the host state and the refugee-producing state, it is necessary to look more closely at a different field of international law, one that offers a framework for addressing the post-conflict situation, reparations, etc.: namely, the framework of humanitarian law.<sup>24</sup>

### ***Humanitarian Law***

The framework of humanitarian law offers guidance with respect to situations in which conflict has occurred between the host state and the refugee-producing state. Apart from the original act that created the refugees, refugees can also be generated by the conflict itself so that the host state ends up having its own quota of refugees generated by the conflict, thus creating a set of duties for the host state. The refugee framework describes these duties and considers whether or not during negotiations refugees should be returned or only when conditions are stable. There are also additional duties under Human Rights Law relating to the mass expulsion of aliens. It becomes useful, then, to conceive of refugees as

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<sup>21</sup> Refugees and host countries in international law, report of a consultation workshop held in Minster Lovell on 7-8 Sep 2002, organized by the Royal Institute of International Affairs and The Centre for Lebanese Studies.

<sup>22</sup> *Arbitral Trib.*, 3 U.N. Rep. Int'l Arb. Awards 1905 (1941).

<sup>23</sup> Coles, G.J.L., *State Responsibility in Relation to the Refugee Problem, with Particular Reference to the State of Origin* 4-8 (Geneva 1993).

<sup>24</sup> Refugees and host countries in international law, report of a consultation workshop held in Minster Lovell on 7-8 Sep 2002, organized by the Royal Institute of International Affairs and The Centre for Lebanese Studies.

wearing many hats simultaneously: refugee individuals under human rights law and aliens under aliens law. Each set of laws entails its own set of duties. Aliens Law highlights the question of protection and whether the host state can pick up the claim of the refugees.<sup>25</sup>

### ***Treaty Law***

As part of the negotiation process, what role can host states play? How do they fit into the settlement of the dispute itself? Such questions call attention to the framework of treaty law. Because the position of the host state in the negotiations affects the situation, are they third party to an, eventually, bilateral agreement? To what extent can the negotiators affect the rights and obligations of third parties or the negotiating process? Do the rights of host states remain the same whether or not the refugees on their territories have been accepted? The host state can also be a party to the negotiations if a UN process has taken over, resulting in the number of negotiating partners being extended and the host state acting as a member of the international community. The international community also has its own rights and duties. What its position is in an eventual dispute settlement, either bilateral or multilateral, makes an important difference. It is also important to identify the constraints on the negotiators arising from the host state positions.

As to the particular forum used, different forum may be explored for different questions depending on whether the host state and the refugees are engaged in a set of bilateral negotiations or whether the host state remains part of a larger multilateral process. There are also judicial forum that could be utilized like the International Court of Justice (ICJ), a logical forum.<sup>26</sup>

### **IV. Right of Host State to be Compensated by Origin States**

Within the broader context of international law, the origins of a refugee situation – in particular in cases when these origins involve any breach in international law – affect the positions both of host states and of the states from which refugees are fleeing. It is within this framework of traditional international law that the issue of Palestinian refugees and host countries must be understood. With regard to the question of the rights of host states, it is helpful to take an indirect approach because the rights of host states are influenced by a consideration of the causes of

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

the refugee situation and the circumstances surrounding it. Not all refugee flows have the same sorts of origins (e.g. volcano, war, famine), and therefore the specific cause of the refugee flow may affect the legal rights and duties of both the states from which the refugees are fleeing and the states in which they are arriving.<sup>27</sup>

#### **A. Duty of the Host State to Receive the Refugees**

This question should be considered against the background of the traditional rules of international law concerning states' rights with respect to the reception of individuals. The general rule assumes that the state has a duty to receive on its territory those of its own nationals who have been excluded from other countries. Conversely, the state does not have a duty to receive aliens into its country – such a decision remains a matter of choice. This distinction has an effect not only on the initial duty of the state to receive the refugees but also on the consequences that follow a state's acceptance of refugees onto its territory.

Once a host state has accepted refugees onto its territory, it becomes privy to a bundle of assorted rights. First, the host state has the right to require that the state from which the refugees came accept the return of the refugees. This 'right of return' consists of two specific elements: (1) the right against the expelling state that it should take the refugees; and (2) the right against the individual to expel him/her back to the state from which they came. Thus, the right of return can be exercised at the state level as well as in relation to the individual.<sup>28</sup>

Besides having the right to return refugees to the countries they came from, the host state has the right to require compensation for (a) the damage incurred by the individual refugees, who have suffered the upheaval of displacement and individual losses; and (b) losses incurred by the state itself, such as the operation of refugee camps, infrastructure costs, and other such costs that the presence of the refugees has caused. In this context, it is possible to see the link between such compensation and the initial legality or illegality of the movement of the refugees in the first place.

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<sup>27</sup> Refugees and host countries in international law, report of a consultation workshop held in Minster Lovell on 7-8 Sep 2002, organized by the Royal Institute of International Affairs and The Centre for Lebanese Studies.

<sup>28</sup> *Id.*

In addition, there are two complicating factors to be considered:

1. 'Rule of nationality of claims': For a state to put forward a claim in respect of damage to an individual, the individual must have the nationality of the state putting forward the claim. In addition, the Rule is usually regarded as requiring not only that the claimant state is the state of nationality at the time it put forward the claim but also that it was the state of nationality at the time the loss was suffered.
2. Voluntary acceptance of refugees: Another issue to take into consideration is whether or not the host state's rights remain the same if the host state has voluntarily accepted the refugees into its territory (as opposed to doing so in pursuance of a duty). Or, in other words, if one allows someone into one's house, can the host be said to be voluntarily accepting responsibility for what the guest may do in his house?

The final set of questions for which the international legal framework provides a necessary perspective relates to the modalities of pursuing whatever remedies one might want to pursue. We must draw a distinction between states that have concluded treaties relevant to that question and others for which no relevant treaties exist. For example, there is a provision in the Jordanian/Israeli treaty providing for the establishment of a Claims Commission to deal with financial claims. Even when there is a treaty, however, unless the treaty states that only its own procedures apply, there are a number of other procedures available in international law that one must examine to determine which, if any, could produce results or would be appropriate channels through which to seek results. Such procedures vary widely from negotiation up to the International Court of Human Justice.

This is not to say that only one procedure should be considered to deal with the entire problem. It would be reasonable to deal with certain aspects by way of negotiation (i.e. political problems) and others through arbitration. All issues need not be solved in the same way. Lastly, any procedure trying to seek remedy must also take into account the question of a timetable. Not all procedures available in the international legal framework are expeditious and such variations should be taken into account when determining how to proceed.<sup>29</sup>

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<sup>29</sup> *Id.*

## **B. 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.'

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

## **V. Conclusion**

The thrust area of this research is to put some light on the right of refugee hosting countries as to regulate the refugee flow and to protect the right of refugees. Responsibility sharing is a core principle of International responses to refugee crises. There must be a holistic approach to international burden sharing that will enhance the protection of refugees as well as the host community. It is very significant to guarantee full, flexible and predictable funding for refugees protection and meaningful financial support to countries hosting large numbers of refugees.

Right to compensation of the refugee hosting countries as a means of enforcing justice and of preventing future refugee flows is the prime concern of this study. Looking at the gigantic complexities in legal implementation, evaluation, and application of the right on behalf of refugees and host States, it is difficult to be hopeful about this approach as a new, effective weapon for large scale prevention of mass refugee flows. However, this does not mean 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 developed. The enforcement of the right to compensation would be strengthened if the act of producing refugees were to be formally declared as an international wrong. The right to compensation itself will not be able to deal with the root causes of refugee flows which are political and responsible largely to fundamental abuses of human rights by the States of origin. 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.