The Application of the Doctrine of State Responsibility to Refugee Creating States

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I Introduction

The serious dimensions of the global refugee problem in the last fifty years have given the question of refugees considerable attention in international law. The emphasis has been on the question of states' obligations with respect to the admission of refugees and their treatment after entry. However, this area of international law should also invite consideration of the responsibility of those states whose conduct or omissions cause an outflow of refugees.[1] In other words, the ameliorative approach has been subject to far more emphasis than prevention. Of course, these two approaches are complementary in nature. Exclusive reliance on amelioration overlooks the root causes of the refugee problem, while preoccupation with prevention alone ignores the immediate needs of refugees.[2] Accordingly, the refugee problem can only be effectively addressed through a judicious and simultaneous combination of the two approaches.[3]

It is submitted that greater emphasis on the preventive aspects of the refugee problem may have useful consequences for averting conditions which "cause" refugees. In particular, because of the repercussions of massive refugee flows for recipient states, the doctrine of state responsibility should be invoked to declare state practice which creates refugees as an internationally wrongful act; at least where *mala fides* is established. Such a doctrine could function as a deterrent and also provide compensation for the political and socio-economic cost of the inflow to the recipient state.

This work will examine some of the recent attempts at developing such a principle as well as preemptory norms of international law which can provide analogues for the specific area of refugee law concerned. The various remedies which may be appropriate will be analyzed with particular emphasis on voluntary repatriation, orderly departure, reparation, *restitutio in integrum* and satisfaction.

It is further submitted that violations of international standards should be assessed on the basis of the contravention of international human rights standards. Thus, the interests of recipient states and that of the refugees need within the purview of such a doctrine not be mutually exclusive as is often the case.

Finally, the ubiquitous problem of auto-interpretation will be examined with respect to the problem of identifying and denigrating the responsible state and subsequently enforcing such a finding.

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II Justification for the Doctrine of State Responsibility with Respect to Refugees in International Law

Customary international law has had little to say explicitly concerning individual refugees as a distinct category. Within the framework of customary law, "[h]e is an anomaly for whom there is no appropriate niche".[4] It was primarily for this reason that the 1951 Convention Relating to the Status of Refugees came into being.

A. However, there is one aspect of the refugee problem to which customary international law may be relevant and which the 1951 Convention does not adequately address; that is the consideration of the legality of the conduct of the state which "creates" refugees. This aspect was included in the writings of authors such as *R. Yewdal Jennings* who posited liability on the consequences which a refugee exodus may have on the material interests of third states.[5] Writing in 1939, Jennings was restricted in so far as the treatment accorded by a state to its own subjects, including the conferment or deprivation of nationality, was considered a matter of purely domestic concern. With respect to the treatment accored by the Nazi government to certain classes of its subjects however, he maintained that there is some authority for the proposition that it comes within the purview of international law because the treatment in question "offends against those principles of justice and humanity which are recognized by civilized nations".[6] Presumably, this opinion was influenced considerably by the adoption of the Declaration concerning the International Rights of Man by the Institute of International Law in 1929. Moreover, the numerous treaties concerning the treatment of minorities entered into since the mid-nineteenth century were viewed by Jennings as "evidence of a consensus of opinion among states regarding a certain minimum standard of conduct to be observed by governments towards those individuals who come under their sway".[7]

McDonald concurred with this viewpoint. In a celebrated letter of 1935, intimating to the Secretary-General of the League of Nations his resignation from the office of High Commissioner for Refugees coming from Germany, he wrote: "It will not be enough to continue the activities on behalf of those who flee from the Reich. Efforts must be made to remove or mitigate the causes which create German refugees."[8] He admitted that apart from the Upper Silesian Convention of 1922, Germany did not herself undertake any obligations with respect to the treatment of its own subjects. However, he argued that "the principle of respect for the rights of minorities has been during the last three centuries hardening into an obligation of the public law of Europe".[9] Within that historical context, the doctrine of humanitarian intervention asserted both in writing and state practice indeed justified the view that there are such offences concerning principles of humanity. Nonetheless, Jennings concludes that the "sounder line of approach would appear to be one which has regard not so much to the ethics of domestic policy as to the repercussions of that policy on the material interests of third states".[10] He continues:

> Even if the state whose conduct rersults in the flooding of other states with refugee populations be bot guilty of an actual breach of law, there can be little doubt that states suffering in consequense would be justified in resorting to measures of *retorsion*...[11]

Oppenheim defines retorsion as "retaliation for discourteous, or unkind, or unfair and inequitable acts by acts of the same or of a similar kind".[12]

Furthermore, Jennings claims that there is good ground for asserting that "the wilful flooding of other states with refugees constitutes not merely an inequitable act, but an actual illegality" and "*a fortiori* where the refugees are compelled to enter the country of refugee in a destitute condition".[13] It was unequivocal at the time that the acknowledged aim of the Nazi persecution of "non-Aryans" was to compel their emigration to other countries.[14] The fact that the persecution of a minority resulted in a refugee movement which caused embarassment to other states, in Jennings' view, transformed the matter into one of international concern. He maintained that given such a result the intention of the state was irrelevant. This position was similar to that of the United States with respect to the influx of destitute Russian refugees in the latter part of the nineteenth century. In his message to Congress in 1891, President Harrison stated that:

> The banishment, whether by decree or by not less certain indirect methods, of so large a number of men and women is not a local question. A decree to leave one country is, in the nature of things, an order to enter another - some other. This consideration, as well as the suggestions of humanity, furnishes ample ground for remonstrations which we have presented to Russia.[15]

Thus, even if the treatment accorded by a state to its own subjects, including the conferment and deprivation of nationality, was a matter to be regulated by municipal law, "from the standpoint of international law", as the Permanent Court of International Justice asserted, "municipal laws are merely facts which express the will and constitute activities of states".[16] In other words, the operation of municipal law could result in a contravention of international law in precisely the same manner as any other form of state activity.[17] The illegality of the conduct of a state of origin of destitute refugees was premised generally on the doctrine of the abuse of rights; that is, domestic rights must be subject to the principle *sic utere tuo ut alienum non laedas.* On this basis, Jennings concluded that "for a state to employ these rights" of conferment and deprivation of nationality as well as the general treatment of subjects "with the avowed purpose of saddling other states with unwanted sections of its population is as clear an abuse of rights as can be imagined".[18]

Brownlie similarly maintains that it is possible to uphold the principle of abuse of rights as a general principle of law. However, he is quick to enter a *caveat:* "Whilst it is easy to sympathize with exponents of the doctrine, the delimination of its function is a matter of delicacy."[19] *Lauterpacht*, in his assessment of the decisions of the International Court with respect to this principle also observed that:

> These are but modest beginnings of a doctrine which is full of potentialities and which places a considerable power, not devoid of legislative character, in the hands of a judicial tribunal. There is no legal right, however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused. The doctrine of abuse of rights is therefore an instrument which ... must be wielded with studied restraint.[20]

B. This doctrine may explain the genesis of a rule *de lege lata.* A conspicuos instance is the Trail Smelter Arbitration[21] wherein "the principle that no state has a right to use or permit the use of its territority in such a manner as to cause injury by fumes to the territority of another"[22] was enunciated by the Ad-Hoc Tribunal. However, even if the doctrine is a useful agent in the progressive development of the law, it may, as a gereral principle, not exist in positive law. Brownlie maintains that it is doubtful that this doctrine is even an ambulatory doctrine, "since it would encourage doctrines as to the relativity of rights and result, outside the judicial forum, in instability".[23] It is submitted that despite this instability, the dictates of international comity should prevail in upholding the doctrine of abuse of rights especially with respect to damages incurred by other states as a result.

In this connection, and as a reaffirmation of the Trail Smelter Arbitration, it is important to mention the Stockholm Declaration of the Human Environment which stipulates that: "States have ... the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction".[24] While it may seem infidious to compare the flow of noxious fumes with the flow of refugees, it should be borne in mind that the basic issue is "the responsibility which derives from the fact of control over territory".[25]

There is nevertheless, one critical problem with the foregoing proposition. Given the multifarious nature of factors which cause refugee flows (as discussed in the following section), negligence as a standard of responsibility may be extraneously restrictive and unlikely to be accepted as a rule of international law within the refugee context, especially, if not exclusively, by refugee creating states themselves. Of course, it may also be posited that *male fides* or an express intention may be unduly lenient and practically ineffective given the difficulty or proving such an intention and the fact that a state actor will rarely, if at all, admit such an intention in its offical policy.

A happy median could be the culpa doctrine which was affirmed by the International Court in the Corfu Channel case.[26] Traditionally, the term *culpa* denotes types of blameworthiness based upon reasonable forseeability, or forsight without desire of consequences (recklessness, *culpa lata*).[27] It is culpa lata which may provide an equitable balance between strict liability and *mala fides.* It is important to note however, that in the Corfu Channel case, the Court was not concerned with *culpa* as such, but that it was nevertheless affirmed by Judge Krylov and Judge ad hoc Ecer.[28] In fact, the case concerned the particular question of responsibility for the creation of danger in the North Corfu Channel by the laying of mines, for which no warning was given. It is evident that the basis of responsibility was Albania's knowledge of the laying of mines. The Court considered:

> Whether it has been established by means of indirect evidence that Albania has knowledge of mine-laying in her territorial waters *independently of any connivance* on her part in this operation.[29]

It concluded that the laying of the minefield "could not have been accomplished without the knowledge of the Albanian Government" and referred to "every State's obligation not to allow knowingly its territority to be used for

acts contrary to the rights of other States''.[30] It is important to note therefore, that the establishment of Albania's knowledge on the basis of circumstantial evidence ''does not alter the fact that knowledge was a condition of responsibility''.[31]

The argument that, by virtue of international law, states may not create refugee outflows - with advertance at the least - is also supported by the unequivocal duty of a state to re-admit its nationals.[32] Of course, this duty is not to be construed so strictly as to deprive it of all real meaning. It cannot possibly mean that a state can evade such a duty by the simple process of denationalization. To use the foregoing language, it cannot evade a duty by abuse of right.[33] Nor can it mean that a state can evade the duty by creating internal conditions which are so intolerable that they make the insistence on the readmission of nationals by the recipient state impossible. If the conduct of the state of origin was illegal *ad initio,* it appears that it is under a duty *a fortiori* to assist resipient states in the resolution of the problem to which it has given rise.[34] This was the disposition of the report of the Committee on International Assistance to Refugees which was submitted to the Council of the League in 1936. It suggested that:

> In view of the heavy burden placed on the countries of refuge, the Committee considers it 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 refugees in the territory of other states.[35]

Similarly, the preamble to the resolution of the Evian Conference read:

> Considering that, if countries of refuge or settlement are to cooperate in finding an orderly solution of the problem before the Committee, they should have the collaboration of the country of origin and are therefore persuaded that it will make its contribution by enabling involuntary emigrants to take with them their property and possessions and emigrate in an orderly manner.[36]

C. There are two other grounds for developing a doctrine of state responsibility with respect to refugee flows which are not as well established as the foregoing norms but which are arguably a part of customary international law despite their limited history. It should be reiterated at this point that the question of the treatment of subjects by the sovereign during Jenning's time was virtually within the exclusive prerogative of domestic law. In contrast, the post Second World War era has armed the proponents of the state responsibility view with international instruments which mark a radical departure from traditional formulae. In particular, the field of international human rights has been quite prolific. As Goodwin-Gill states:

> With developments since 1939, the bases for the liability of source countries now lie not so much in the doctrine of abuse of rights, as in the breach of original obligations regarding human rights and fundamental freedoms.[37]

The Universal Declaration of Human Rights, the Covenant on Civil and Political Rights, as well as the Covenant on Social, Economic and Cultural Rights, evince a compelling argument in favour of the view that states now do owe to the international community the duty to accord to their nationals a certain

standard of treatment in the matter of human rights, even if it is at a somewhat high level of generality.[38] Of course, as Goodwin-Gill asserts, legal theory "remains incomplete in view of the lack of any clearly correlative right in favour of a subject of international law competent to exercise protection and of the uncertain legal consequences which follow where breach of the obligations in question leads to a refugee exodus".[39] However, within the ambit of state responsibility, this duty *erga omnes* has two important functions. Firstly, it establishes certain distinct rules which, if complied with, will significantly alleviate, and in some cases avert, the flow of refugees. One should not operate on the premises that all states are nefarious actors seeking to violate human rights at every given opportunity. The International Bill of Human Rights may provide an equitable standard against which states may assess their actions. It thus provides a clear preventive recipe for states with respect to conditions which cause an exodus.

Secondly, it provides a standard against which the actions of a state may be measured if and when a flow of refugees results so as to determine the liability of the state of origin. *Mala fides* or *culpa lata* can now be assessed within the refugee context on the basis of definite and inviolable human rights standards in order to determine state responsibility.

D. The other ground in favour of the doctrine is the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.[40] By virtue of this declaration, states are under a duty to co-operate with one another in accordance with the United Nations Charter. In the refugee context, however, this principle should be applied with caution. For instance, the promotion of the previously mentioned "orderly departure programmes" as a form of co-operation "suppose a degree of recognition of the right to leave one's country *and* to enter another which is not generally and currently justified by state practice".[41]

III Recent Initiatives in the United Nations for Averting New Flows of Refugees

Since 1980, there have been two significant initiatives at the United Nations aimed at averting new flows of refugees. These are respectively, the so-called Canadian initiative in the Commission on Human Rights and the initiative of the Federal Republic of Germany in the General Assembly, As *Luke T. Lee* points out:

> Their preventive approach to the refugee problem stands in marked contrast to the traditional emphasis on caring for and maintaining refugees in countries of asylum or facilitating their resettlement in third countries, with the assistance of the UN High Commissioner for Refugees (UNHCR) and the UN Relief and Works Agency for Palestine Refugees in the Near East (UNRWA).[42]

The success of the Canadian initiative was limited for two critical reasons. Firstly, it was based on the UN Commission on Human Rights which is but one of numerous bodies reporting to the Economic and Social Council which in turn reports to the General Assembly.[43] Secondly, as Lee remarks, it "bore

the imprint of only one man – former UN High Commissioner for Refugees Sadruddin Aga Khan".[44] Lee goes on to emphasize that:

> In an area as politically sensitive as averting new flows of refugees, the centuries-old adage of "no representation, no taxation" found expression in "no representation, no commitment" by governments.[45]

Accorcingly:

> Despite high commendations given to the study for its innovative suggestions by a number of States and the Secretary-General, the Canadian initiative did not essentially survive the completion of the study in December 1981.[46]

The present analysis therefore, will concentrate on the FRG initiative which was grounded in the Special Political Committee of the General Assembly, which created the Group and oversaw its activities. In view of the continued involvement of member States in the work of the Group:

> The resultant report could not but reflect the sentiment and will of the entire membership of the UN, particularly in view of the consensus rule that governed the Group's deliberations and the composition of the Group's membership.[47]

The guiding principles of the Group emphasized "the right of refugees to return to their homes in their homelands" and reaffirmed the right "of those who do not wish to return to receive adequate compensation".[48] The Group was also required to undertake "a comprehensive review of the [refugee] problem in all its aspects", and to develop "recommendations on appropriate means of international co-operation in this field, having due regard to the principle of non-intervention in the internal affairs of sovereign States".[49]

The Group emphasized the need to improve "international co-operation" in the context of the Declaration of Principles of International Law concerning Friendly Relations and Co-operation among states in accordance with the Charter of the UN.[50] While valuing experiences derived from "past and present" flows of refugees, it underscored its future-oriented approach, indicated by the phrasing "to avert new flows of refugees".[51]

With respect to the term "refugee", it was deemed inadvisaable to define it except for providing a "working understanding ... on the phenomenon the Group would want to address".[52] This flexibility enabled the Group subsequently to adhere to or depart from the conventional definition of refugee where circumstances, in view of the Group, so warranted.[53] Moreover, the Group limited its mandate to the "coerced" and "massive" movements, which would preclude the consideration of traditional migrations and other voluntary movements of people, as well as the movements of individual refugees.[54]

The Group also reviewed the circumstances causing new massive flows of refugees. These circumstances were divided into "man-made" and "natural" causes, subdividing the former into "political causes" and "socio-economic factors".[55] In order to distinguish "factors" from "causes", the Group took the definition of "refugee" as one who is outside his own country and has a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership or a particular social group or political opinion".[56] Thus, the

definition was that of the 1951 Convention. Accordingly, "man-made" causes were equated with "political" causes which may be aggravated or compounded by "socio-economic factors".[57] Thus, there was a clear implication that "socio-economic" factors *per se*, do not cause refugee flows.[58]

Major "political causes" of refugee flows were identified as "wars and armed conflicts" resulting from "acts of aggression, alien domination, foreign armed intervention and occupation", as well as colonialism, oppressive regimes, *apartheid* and violations of human rights and fundamental freedoms.[59] The "socio-economic factors" included the "prolongation of the state of underdevelopment herited from colonialism" and the "world economic situation and its effects on the critical economic situation of most of the developing countries, as reflected particularly in economic recession, balance-of-payments problems, deterioration of the terms of trade, indebtedness, inflation, etc."[60] The Group has been criticized for not mentioning endogenous factors of the post-independence era, such as "deficiencies in institutional and physical infrastructures, economic strategies and policies that have fallen short of achieving their objectives, disparities in urban and rural development and income distribution, insufficient managerial/administrative capacities and lack of financial resources, the demographic factors and political instability manifested in a large and growing population of refugees".[61]

The characterization of natural disasters was considerably controversial. Since heavy floods, prolonged drought, soil erosion, earthquakes and desertification preclude the essential element of "persecution", it would seem that the same rationale for considering "socio-economic" conditions as "factors" rather than "cause" of refugee flows, should also apply to natural disasters. Nevertheless:

> given the Group's flexibility in defining "refugee", the fact that large numbers of people driven across national boundaries by drought or spreading deserts in Afrika have been treated as "refugees" apparantly influenced the Group's decision to include natural disasters as "causes" instead of "factors" in relation to refugee flows.[62]

In considering the "appropriate means" of averting new massive flows of refugees, the Group employed the twin criteria of "international instruments, norms and principles" and "international machinery and practices".[63] With respect to the former, the Group examined the relevance of the UN Charter, the Universal Declaration of Human Rights and the Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the UN, as well as twelve other international instruments and "norms of international custom".[64] These instruments and norms were regarded as:

> already adequate, incorporating as they do such principles as non-intervention in the internal affairs of States, non-use of force or the threat thereof in settling international disputes, respect for human rights, and the obligations of States to co-operate among themselves and with the UN in political, economic, social and humanitarian matters.[65]

According to the Group, it was effective implementation that was lacking and hence, the significance of "international machinery and practice".[66] Thus, al-

though developing a doctrine of state responsibility was not contemplated with any specificity, the Group did create certain vital criteria for developing such a doctrine. Moreover, it reflected the general opinion of the international community with respect to the task of averting new flows of refugees. It does not seem that the Group's consideration of norms of international custom explicitly or implicitly excluded the possibility of such a doctrine, as a bilateral or multilateral mode (as the case may be) of resolving disputes within the refugee context.

The attempt at extending the Group's recommendations beyond expressions of generality and the usual litany of paying due respect to the principles of the UN Charter to concrete measures or courses of action for States and international organs is noteworthy. In formulating recommendations to the General Assembly, two opposing schools of thought contended for superiority:

> One, advanced by East European and communist countries, called for a general statement of principle: that States should respect the Charter of the UN and the Declaration on Friendly Relations and Co-operation among States, particularly those principles concerning non-intervention in the internal affairs of any State and non-use of force or the threat thereof against the territorial integrity or political independence of any State, the violation of which would be prone to cause new massive flows of refugees. The other school, supported by Western and many third-world countries, insisted on more specific standards as a code of conduct to avert new massive flows of refugees. Included in such a code would be the right of refugees to voluntary repatriation and adequate compensation; regional and subregional co-operation among States to prevent future massive flows of refugees; and the promotion of civil, political, economic, social and cultural rights to ensure that no groups of population would be forced, directly or indirectly, to leave their own country on account of their nationality, ethnicity, race, religion or language. Of special interest was the proposed designation of a special representative of the Secretary-General on international co-operation to avert new massive flows of refugees, to mobilize States concerned and competent UN organs to deal with such flows, to establish an early warning system, and to review preventive measures taken and report thereon to the General Assembly or the Security Council.[67]

As is the case with all organs that reach decisions by consensus, the Group finally reached a compromise. More specific standards were added to the general statement of principles and the proposed designation of a special representative of the Secretary-General was given a modified role.

Thus, over and above the general doctrine of state responsibility discussed in Section II, and notwithstanding its specific application in the refugee law context, it may be safely presumed that there is considerable international support in favour of averting new flows of refugees. Since the foregoing constitutes the proceedings of a world body, it should not be construed as a rejection of the doctrine of state responsibility which in practice is usually a bilateral means of regulating international conduct although it can best be formulated within a multilateral forum. Furthermore, as mentioned previously, many of the definitions and concepts employed with respect to factors and cause, are useful tools in formulating a doctrine of state responsibility within a refugee context.

IV The Formulation of a Doctrine of State Responsibility within a Refugee Context

Goodwin-Gill candidly acknowledges that while "[a] principle of responsibility for 'creating' refugees is easy to state, ... [the] more precise formulation of the underlying rights and duties remains problematic".[68] The following section attempts to examine in a cursory manner - and in view of the preceeding section - the elements of such a doctrine. In particular, the constituent elements of liability for refugee flows will be explored having regard to the specific instances in which a state of origin may be held responsible for what might otherwise be an "innocent" flow of refugees. Furthermore, the utilization of *mala fides, culpa lata* and *culpa* as a "standard of care" will be assessed on the basis of efficacy, in other words, the likelihood of their accptance by states - the *sine qua non* of any norm of international law. Throughout the discourse, the recommendations will be made with a view to balancing the interests of refugee creating states on the one hand, and recipient states on the other.

It is evident from the outset that it would be unfair and unacceptable to posit liability on a state for outflows of refugees from its territority without having regard to the conditions that caused such an outflow. For instance, natural disasters such as heavy floods, prolonged drought, soil erosion, earthquakes and desertification, could hardly be causes or factors for which a state could be held liable. It would be manifestly absurd to suggest that African states whose population was driven across national boundaries by drought or spreading deserts are liable simply because these people are treated as refugees. However, it may be that the respective state or states have omitted to take steps to alleviate the situation once it has occurred. Of course, this is a very wide if not inappropriate application of the "refugee" definition under the 1951 Convention. Accordingly, for the sake of clarity and stability, the flexibility that the UN Group adopted in the FRG initiative with respect to this definition may not be suitable in the formulation of a legal doctrine.

Furthermore, in providing latitude for circumstances which are beyond the control of states and for the sake of precision, socio-economic factors should also be ommitted as a cause although they are essential factors. It is unequivocal that in some cases socio-economic factors may be utilized as an effective tool for persecution. However, this should be strictly construed and limited to cases of systematic socio-economic deprivation. Any other application would cause numerous difficulties. For instance, it may be unconscionable for an underdeveloped state to be held responsible for its underdevelopment or to set about the quixotic task of determining who is responsible for adverse socio-economic conditions within a world economy with systematic deficiencies. Moreover, a developing state could maintain that refugee flows are a direct result of neo-colonialistic practices although it would be somewhat difficult to hold any state in particular liable.

This may also be a problem for political causes of refugee flows such as "wars and armed conflicts" resulting from "acts of aggression, alien domination, foreign armed intervention and occupation". Once again, determining liability may prove to be difficult. For instance, it may not be realistic to say that the aggressor would compensate a third state for the flow of refugees as a direct consequence of its own actions. Furthermore, it may be exceedingly difficult to denigrate one state as an aggressor since the use of armed force is

the product of many often indeterminable variables and considerations which have plagued international law from its very beginning. For example, an act of pre-emptive self-defence or even humanitarian intervention may easily take the form of aggression.

It is submitted that given the difficulty of precisely formulating such highly amorphous causes and factors, the general problem of auto-interpretation in international law, and the provisions of the 1951 Convention as a reflection of international law dealing with the duty of a recipient state to accomodate refugees, liability should be posited on states which *persecute their general populace or segments thereof for reasons of race, religion, nationality, membership of a particular social group or political opinion.* Adopting such criteria would foreclose the possibility of *culpa* or negligence as a standard of care.

Determining persecution would have to be based on either *culpa lata* or *mala fides.* As mentioned priviously, *mala fides* is very difficult to prove because a state will rarely, if at all, manifest malice aforethought in its official policy. Furthermore, on the basis of past experience, it can easily deny any malicious intention on its part and justify its actions for a variety of reasons. But since there is a strong element of malice involved in the notion of persecution, *culpa lata* may be an appropriate standard. This may provide an equitable balance between the state of origin and the receiving state. On the one hand it may avoid fastidious claims or claims which seek compensation for acts which are not subject to easy control. On the other hand, it will provide the recipient state with a standard of proof which is not inordinately restrictive.

Another problem is determining whether, for instance, the state has *de facto* control over a part of its territority. If there is little or no control by state authorities of a region of its territory, it may not be sound policy to posit liability for acts perpetrated there. However, if it acquiesces to persecution perpetrated by segments of the ordinary civilian population, it would seem that the state in question should be held liable for consequential damages on the basis of *culpa lata.*

The foregoing is not intended as an exhaustive list. It merely touches upon some of the issues that have to be dealt with in formulating a doctrine of state responsibility within a refugee context. Evidently there are myriad considerations which are well beyond the scope of this paper. It is safe to assert, however, that mere negligence and the consideration of factors beyond outright persecution are not likely to be accepted by the international community, especially the refugee producing states. In order to make such a doctrine feasible in view of state practice, the foregoing should be the general framework within which it should be formulated.

V Remedies

Even with the provision of a precise formulation of the doctrine of state responsibility with respect to refugees, the question of an appropriate remedy must still be addressed. In particular, the function of such a doctrine should be deterrence for the state of origin and compensation for the recipient state and accordingly, a remedy should be suited for this purpose.

Voluntary repatriation is of course, the ideal solution to any refugee problem. Unfortunately, this is usually not possible. The fact that individuals or

groups have abandoned their homes is mute testimony to intolerable conditions which most probably cannot be alleviated immediately.

Orderly departure is also an important means of mitigating the potential embarassment and costs to a state of receiving refugees. At the least, it can allow the receiving state to prepare itself in advance and to summon international assistance.

Reparation and *restitutio in integrum,* although they are the most substantial remedies, may create certain undesirable consequences. In the case of reparation, it is forseeable that such a conventional practice may well develop into a convenient means of "buying" the right to denationalize in contravention of well-established international norms. Such a remedy may establish a justification for a calculated move which can balance the actual cost of denationalizing and creating refugees against the desired objective of eliminating an "undesirable" segment of the population. Notwithstanding such deficiencies, however, this form of remedy may be preferable when compared with *restitutio in integrum,* especially from the viewpoint of safeguarding the freedom of the refugees from persecution. Reparation may adequately compensate the recipient state and create at least some deterrence for the refugee generating state without actually averting already existing refugee flows. A remedy such as *restitutio in integrum,* which may have the effect of either preventing escape from persecution, or subsequent forced repatriation, is an apparent conflict with the avowed purpose of the law in this field. Accordingly, when it involves compensation on the basis of coercion, it may serve to undermine the haven that international law has painstakinly won for the refugee.

IV Concluding Remarks

In view of recent developments in international law, it would appear that the efficacy of the ameliorative approach as the sole response to the refugee problem is no longer sufficient. Although the immediate needs of refugees cannot be ignored, the root causes of refugee flows must be adequately adressed in order to prevent, on a long-term scale, the very predicaments that refugee law attempts to remedy. The interests of the principal actors in international law, namely states themselves, are perhaps the most efficacious means of providing greater human rights for refugees and potential refugees. Where persecution in one state results in substantial cost to the material interests of another state, there is no reason for evading responsibility. A doctrine of state responsibility within the refugee context may be the ideal convergence between *realpolitik* on the one hand, and humanitarian objectives on the other.

Notes

1 Goodwin-Gill, *The Refugee In International Law,* p. 226.

2 See Luke T. Lee, *Towards a World Without Refugees: The United Nations Group of Governmental Experts on International Co-operation to avert New Flows of Refugees,* 67 B.Y.I.L. 317 (1986).

3 *Idem.*

4 R. Yewdal Jennings, *some International Law Aspects of the Refugee Questions,* 20. B.Y.I.L. 98 (1939), p. 110.

5 *Supra,* note 1, p. 227.

6 *Supra,* note 4, p. 110.
7 *Idem.*
8 League document C. 13, M. 12, 1936 Annex, cited in *supra,* note 4, p. 110.
9 *Idem.*
10 *Supra,* note 4, p. 111.
11 *Idem.*
12 Oppenheim, *International Law,* 5th edition, Volume II, p. 112.
13 *Supra,* note 4, p. 111.
14 *Ibid.,* pp. 110-111.
15 British and Foreign State Papers, Volume 83, pp. 436-437.
16 P.C.I.J. Series A, No. 7, p. 19, cited in *supra,* note 4, p. 112.
17 *Supra,* note 4, p. 112.
18 *Idem.*
19 Ian Brownlie, *Principles of International Law,* p. 36.
20 Lauterpacht, *The Development of International Law by the International Court,* p. 164.
21 (1941), III U.N.R.I.A.A., 1905.
22 *Supra,* note 19, p. 366.
23 *Ibid.,* p. 367.
24 Report of the U.N. Conference on the Human Environment: UN Doc. A/Conf. 48/14/Rev. 1 and Corr. 1, Principle 21, p. 5, cited in *supra,* note 1, p. 228.
25 *Supra,* note 1, p. 228.
26 I.C.J. Reports (1949).
27 *Supra,* note 19, p. 361.
28 *Supra,* note 26, pp. 127-128.
29 *Ibid.,* p. 18, our emphasis.
30 *Ibid.,* p. 22.
31 *Supra,* note 19, p. 360.
32 See *supra,* note 12, p. 154. It is interesting to note that Brownlie suggested that expulsion of aliens "which causes specific loss to the national state receiving groups without adequate notice would ground a claim for indemnity as for Incomplete privilege". As Goodwin-Gill points out: "Such a claim would in principle be stronger where the expulsion is unlawful *ad initio* as in the case of nationals". *Supra,* note 1, p. 228.
33 *Supra*, note 4, p. 112.
34 *Ibid.,* p.113.
35 See C. 2, M. 2, 1936, XII, cited in *idem.*
36 Cited in *supra,* note 4, p. 113.
37 *Supra,* note 1, p. 227.
38 *Ibid.,* p. 228.
39 *Ibid.,* p. 227.
40 Annex to G.A. Res. 2625, (XXV), 24 Oct. 1970.
41 *Supra,* note 1, p. 227.
42 *Supra,* note 2, pp. 317-318.
43 *Ibid.,* p. 323.
44 *Idem.*
45 *Idem.*
46 *Idem.*
47 *Idem.*
48 G.A. Res. 36/148 (1981), para. 3.
49 *Ibid.,* para. 5.
50 *Supra,* note 40.
51 G.A. Res. 2625 (XXV). See UN Doc. A/41/324 (13 May 1986), para. 20.
52 Lee, *The UN Group of Governmental Experts On International Co-operation to*

Avert New Flows of Refugees, A.J.I.L. 78 (1984), p. 482.

53 *Supra,* note 2, p. 320.

54 *Idem.*

55 UN Doc. A/41/324 (13 May 1986), Section III.

56 See *Convention Relating to the Status of Refugees,* 1951, United Nations Treaty Series, Vol. 189, p. 150, Article I (A) (2).

57 *Supra,* note 3, p. 320.

58 *Ibid.*

59 UN Doc. A/41/324 (13 May 1986), Section III-A-1, cited in *supra,* note 2, p. 321.

60 *Ibid.,* Section III-A-2.

61 Cited in *supra,* note 2, p. 321.

62 *Idem.*

63 UN Doc. A/41/324 (13 May 1986), Section IV.

64 *Supra,* note 2, p. 321.

65 *Idem.*

66 *Idem.*

67 *Supra,* note 2, p. 332.

68 *Supra,* note 1, p. 226.