3 The Duty to Compensate for Expenses Occurring as a Result of Mass Migration in International Law

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3.1 Introduction

The phenomenon of mass expulsion has nowadays become ubiquitous, when millions of people flee from their homes across entire continents to escape gross human rights violations and internal disturbances. Migration waves are now considered inevitable in order to escape inhuman consequences of current conflicts; still, thus far, only a marginal degree of discussion has been dedicated in the legal literature to the adverse effects of such events on the host State's environment, economy and resources. Emphatically, it is important to stress that the aim of the present research is not to enrage public opinion regarding mass migration flows, but to articulate the serious violations of international law committed by States, which generate mass outflows, and consequently, to draw attention to the need for compensating non-refouling States for the expenses borne.

Accordingly, this paper starts its analysis by first discussing the definition of mass migration under international law. Then it continues by addressing the question of standing of the host State to claim compensation as well as the responsibility and liability of the State of origin under international law. The paper finally elaborates on the concept of burden sharing for the costs incurred and the relevant practice of the United Nations Compensation Commission. As a conclusion, the paper will argue that in order to preserve the current normative system of the protection of refugees, international law ought to provide an effective remedy for legitimate concerns of host States.

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3.2 The Definition of Mass Migration

A movement of people qualifies as a mass influx if – compared to a particular nation's capacity – a significant number of individuals flee to the given State in a very short time.[1] In the policy of the United Nations High Commissioner for Refugees, mass influx is defined by the size and speed of the influx balanced against the size and capacity of the receiving country to process the cases in individual status determination procedures.[2] This more nuanced conception of mass influx does not require that the 'mass' be any more than a few people, so long as those few surpasses the host State's capacity to administer refugee status determinations.[3] This definition adjusts with the circumstances in which *prima facie* refugee determination is conducted.[4]

In situations of mass influx,[5] States are obliged to provide *prima facie* refugees with temporary protection.[6] Under the Geneva Convention, the receiving State has an obligation to provide the people arriving with temporary protection according to the principle of *non-refoulement*.[7] Even if not all migrants qualify as refugees, the non-refouling State still has to accommodate them as part of its obligation of international cooperation flowing from Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[8] The obligation to protect migrants, if the country of origin fails to provide even their basic needs, is strengthened by the Maastricht Principles,[9] scholarly opinions[10] and relevant case-law.[11] The present paper aims to analyze the legal possibilities of non-refouling States to seek compensation, when complying with this interna-

1 UN High Commissioner for Refugees (UNHCR), UNHCR Commentary on the Draft Directive on Temporary Protection in the Event of a Mass Influx, 15 September 2000, available at: <www.refworld.org/docid/437c5ca74.html> [accessed 28 August 2017]; The Wiley-Blackwell Encyclopedia of Globalization, Binh Pok, Mass Migration, 29 Feb. 2012.

2 UNHCR, Protection of refugees in mass influx situations: overall protection framework, EC/GC/01/4, 2001, para. 14.

3 J-F. Durieux & A. Hurwitz, 'How many is too many: African and European legal responses to mass influxes of refugees', 47 *German Yearbook of International Law*, 2004, p. 146.

4 <https://www.rsc.ox.ac.uk/files/files-1/wp55-prima-facie-determination-refugee-status-2010.pdf>, pp. 12-13.

5 UNGA Doc. A/AC.96/1003, 8 October 2004.

6 UNGA Doc. 12A (A/36/12/Add.1), 1981, para. IIA(1); Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status, 2011, p. 103; GA Res. 2312 (XXII), 14 December 1967, Article 3(1); J. A. R. Nafziger, 'The General Admission of Aliensunder International Law', 77 *AJIL*, 1983, pp. 805, 847.

7 1951 Geneva Convention Relating to the Status of Refugees, 189 UNTS 137, Article 33(1).

8 1966 International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 [ICESCR] Article 2(1).

9 Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, ETO Consortium, 28 September 2011 [Maastricht Principles] Principle 23.

10 K. Sykes, 'Hunger Without Frontiers: The Right to Food and State Obligations to Migrants, in *The International Law of Disaster Relief*, 2014, pp. 199-200.; M. Hesselman, 'Sharing International Responsibility for Poor Migrants?', *European Journal of Social Security*, vol. 15, 2013, pp. 200-203.

11 *Sufi and Elmi v. United Kingdom*, ECHR (Applications 8319/07 and 11449/07) paras. 280-282.; *D v. United Kingdom*, ECHR, 2 May 1997, Appl. No. 30240/96, para. 40.

tional law obligation emanating from the Refugee Convention place an unduly heavy burden on them.

3.3 Standing before the International Court of Justice to Claim Compensation from the State of Origin

In order for a State to demonstrate its ability to bring a particular issue before the International Court of Justice (ICJ), first it must substantiate its standing (*locus standi*). This requires a State to demonstrate that it has suffered direct or indirect injury resulting from a violation of an obligation owed to her by another State. The general requirements of standing in relation to breaches, where the underlying obligation was owed to the injured State, merit no further discussion here. Establishing standing, however, becomes more complex if the host State at hand would like to raise *erga omnes* violations, and therefore, this scenario will be examined in more detail.

Erga omnes obligations are owed to the international community, meaning that every State has a direct enough interest to invoke the violating State's responsibility. The ICJ noted the existence of such obligations as early as in the *Barcelona Traction* case.[12] Erga omnes obligations are considered so vital and important within the international legal system – usually appearing in the form of *jus cogens* norms – that any State may use it as a ground to bring a claim against another State in order to compel compliance, not only the directly affected State. As the ICJ has eloquently put it: "In view of the importance of the rights involved, all States can be held to ave legal interest in their protection; they are obligations erga omnes."[13]

Mass outflows are generated by State policies, which violate certain fundamental human rights of their citizens. Multilateral treaties have always been used for creating general standards of conduct in the achievement of a common purpose.[14] In this vein, fundamental human rights standards were codified in two main human rights covenants, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR). Generating mass migration flows argueably violates several fundamental human rights guarantees enshrined in the covenants, as will be addressed below in Section 3.4.3. in more detail. Receiving States can argue that the covenants are of an *erga omnes partes* character, for the following reasons.

Erga omnes partes obligations mean that Parties to a convention have a common

12 *Barcelona Traction, Light & Power Co., Ltd. (New Application) (Belgium v. Spain)*, Judgment of 5 February 1970, ICJ Rep 4, [Barcelona Traction] pp. 33-34.

13 Ibid.

14 K. Zemanek: 'New Trends in the Enforcement of ergaomnes Obligations', J.A. Frowein and R. Wolfrum (eds.), *Max Planck Yearbook of United Nations Law*, 1-52, 2000, p. 5.

interest in compliance with obligations set out therein.[15] In such cases, standing is, thus, granted to any party by the mere fact that they are party to the same convention. As a consequence, they all have a legal interest in enforcing compliance on part of other Parties.[16] In its General Comment No. 31, the Human Rights Committe pronounced the *erga omnes partes* nature of ICCPR obligations.[17] This therefore entitles the non-refouling State to make a claim in relation to such ICCPR breaches.

The most crucial relevance of *erga omnes* obligations is, therefore, their way of enforcement, which was expressed by *Bruno Simma*, former ICJ judge, who emphasized that

> "when human rights are violated there simply exists no directly injured State because international human rights law does not protect States but rather human beings or groups directly. Consequently, the substantive obligations flowing from international human rights law are to be performed above all within the State bound by it, and not vis-à-vis other States. In such instances to adhere to the traditional bilateral paradigm and not to give other States or the organized international community the capacity to react to violations would lead to the result that these obligations remain unenforceable under general international law."[18]

In cases of *erga omnes* obligations, a further criterion is necessary for being eligible for compensation under the regime of international state responsibility. Pursuant to Article 42 of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), only an injured State can claim compensation for a breach. This was elaborated on for the first time by the ICJ in its *Belgium v. Senegal* decision, where Belgium based its claims not only on its status as a party to the Convention Against Torture, but also on her special legal interest in that case.[19] Interestingly, the Court ruled out the relevance of such interest by stating that "if a special interest were required for that purpose, in many cases no State would be in the position to make such a claim."[20]

Notwithstanding the decision, non-refouling States would certainly have such a special interest, since a mass influx potentially disrupts their social and economic order, which distinguishes them from other ICCPR Parties not affected by the mass influx, and hence their injured State status cannot be questioned.

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15 ARSIWA, Article 48(1)(a); Case of the *S.S. Wimbledon, Britain et al. v. Germany*, 1923 PCIJ (Ser. A) No. 01, para. 68.

16 *Barcelona Traction*, para. 33.

17 UN Human Rights Committee, General Comment No. 31, *The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 2.

18 B. Simma, 'From Bilateralism to Community Interest in International Law', *RdC* 250, 1994, pp. 296-297.

19 *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, 2012, I.C.J. Reports 2012, Memorial of Belgium, para. 5.17.

20 Ibid., para. 69.

3.4 The Internationally Wrongful Act

In order for compensation to be received from a generating State, the non-refouling State must prove that she suffered an injury causal upon a breach that was attributable to the State of origin and for which full reparation is due.[21] This section explores and enumerates potential international obligations whose breach may result in large-scale mass influxes and a corresponding entitlement to claim compensation under state responsibility regime: (i) a general obligation not to generate refugee-flows, (ii) the violation of the principle of *sic utere tuo*, and (iii) breaches of obligations set out in human rights covenants, having an *erga omnes partes* character.

3.4.1 Enacting Refugee-Generating Policies Resulting in Mass Influxes as an Internationally Wrongful Act

In order for a refugee-generating policy to be pronounced as an internationally wrongful act of the State of origin, it must be concluded that such policies constitute the breach of an international obligation, and that this breach is attributable to the State of origin, as enshrined in Article 2 of the ARSIWA.[22]

First, we examine the subjective criterion of an internationally wrongful act, namely, whether a certain conduct, *i.e.* generating refugees through repressive policies, is attributable to the State of origin.[23] Applicable grounds for attribution in such may be met if serious human rights violations amounting to persecution have been committed either by State organs,[24] or persons acting on behalf of that State,[25] or individuals exercising elements of governmental authority.[26]

Accordingly, situations when a large-scale influx occurs as a consequence of persecution by persons not acting on behalf of the territorial State, cannot give rise to the territorial State's responsibility. Nevertheless, as noted by *Hofmann* and *Wolf*, current changes of international law have increasingly call into question the general principle on the absence of State responsibility for private individuals' conduct.[27] Notwithstanding,

21 53 UN GAOR Supp. (No. 10) at 43, U.N. Doc. A/56/83 (2001) [ARSIWA] Article 31; *The Factory at Chorzow (Germany v. Poland)*, Judgment No. 8, 1927 P.C.I.J. Series A, No. 9., p. 44.; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)*, Judgment of 19 December 2005, ICJ Rep. 2005 [Armed Activities] para. 259; *Gabčikovo-Nagymaros Project case (Hungary v. Slovakia)* Judgment of 25 September, I.C.J. Reports 1997, para. 152. [Gabčikovo].

22 ARSIWA, Art. 2.

23 Ibid., Art. 2(a).

24 ARSIWA, Arts. 5-6.

25 Ibid., Art. 8.

26 Ibid.; R. Hofmann, 'Refugee-Generating Policies and the Law of State Responsibility', 1985, *Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht*, p. 700, [Hofmann].

27 Hofmann, 702; J. Wolf, 'Zurechnungs fragen bei Handlungen von Privatpersonen', *ZaöRV* Vol. 45 (1985), p. 232.

in our focus stands the scenario when State organs or persons acting in governmental capacity commit violations of human rights that amount to refugee-generating policies, which constitute an act attributable to the State of origin.

Secondly, with regard to the objective element of international wrongful acts, the question is whether such policies can be considered as a breach of an obligation under international law. In order to answer such question, a primary rule embodying the prohibition of enacting refugee-generating policies must be first established. As stated by *Hofmann*, such obligations are said to include the duty to accord a certain minimum standard of treatment to nationals as regards to human rights enshrined in human rights covenants, or more specifically, a duty "not to create refugees".[28] Such specific duty, we submit, has started to be embodied in international law through the practice of several international bodies. Such relevant practice is detailed as follows.

In 1992, following the Cairo Conference on Compensation to Refugees, the International Law Association in its Cairo Declaration made a distinction between compensation to refugees and compensation to countries that help absorb refugees, and dealt only with the latter issue.[29] The Declaration aimed at setting a standard of conduct for the State of origin in international law and stated that introducing policies of States resulting in the fleeing of people constitutes an internationally wrongful act.[30]

Furthermore, the United Nations General Assembly in its Resolutions 35/124 and 36/148 concerning international cooperation to avert new flows of refugees,[31] the UN Secretary-General in his letter informing the President of the Security Council about the situation of East-Pakistani refugees fleeing to India,[32] as well as the Security Council in Resolution 688 concerning the human rights situation of Iraqi civilians,[33] all condemned policies and repression resulting in the creation of refugee flows. These highly authoritative sources stressed that such influxes affect the domestic order and stability of the receiving States, and jeopardize the stability of entire regions, as they "threaten international peace and security."[34]

It can be argued that not to generate migration outflows can now be considered as an obligation existing under customary international law, given that the above mentioned Resolution 36/148 was accepted unanimously by the General Assembly, thereby reflecting a customary nature. Such elevation of customary nature was pronounced by the ICJ

28 Hofmann, p. 705.

29 L.T. Lee, 'Summary of the International Law Association (ILA) Cairo Conference (1992)', Declaration of Principles of International Law on Compensation to Refugees, p. 1.

30 Declaration of Principles of International Law on Compensation to Refugees, ILA 65th Conference, Cairo, 1992, Principle 2; L.T. Lee, 'The Declaration of Principles of International Law on Compensation to Refugees: Its Significance and Implications', *AJIL*, 1993, pp. 157-159.

31 UNGA Res. 36/148, UN Doc. A/RES/36/148, 16 December 1981.

32 EC/SCP/16/Add.1, Geneva, 21-24 April, 1981.

33 Security Council Resolution 688, U.N. Doc. S/RES/688, 5 April 1991, 1.

34 Ibid.

in the *North Sea Continental Shelf* case deviating from the traditional approach. This judgment has paved the way for official recognition of short-term state practice as binding custom, provided that sufficient evidence exists to demonstrate support within the international community.[35] Such support is arguably present in our case as it is clearly evidenced by the unanimous acceptance of the resolution.

It would be certainly laudable to have a direct pronounciation of such an international obligation in order for host States to be able to claim a right to compensation for mass influx, since refugee-generating States routinely hide behind the alleged absence of an underlying international obligation. Nevertheless, in case the prohibition of refugee-generating policies would not suffice under the current state of international law, a strong case still could be made for other legal grounds that can fill the legal loopholes and give rise to a breach.

3.4.2 Violation of the sic utere tuo *Principle*

The principle of *sic utere tuo ut alienum non laedas* prohibits all States to use their territory in a manner causing harm or injury to other States.[36] The rule has been applied in the migration context for the first time by *Jennings* in 1939, who stated that the wilful flooding of other states with refugees "constitutes an actual illegality".[37] Further, its customary nature was noted in the *Corfu Channel* case[38] and was reaffirmed also in the *Island of Palmas* arbitration[39] and the *Trail Smelter* arbitration.[40] Many commentators argue that the *Trail Smelter* rule extends to any type of transboundary harm,[41] therefore, irrespective of whether it was caused by noxious fumes or migrants, injured States can rely on the *sic utere tuo* rule for claiming compensation also in case of a migrant influx.[42]

This view was more elaborately expressed by a recognised scholar of refugee law, *Luke T. Lee* in a series of his articles, in which he recognised certain similarities between refugees fleeing from one country to another, and fumes in the *Trail Smelter* case.

35 Katherine N. Guernsey, Comment, The North Continental Shelf Cases, 27 Ohio N. U. L. Rev. (2000), p. 153.
36 P. Birnie, A. Boyle: International Law and the Environment, 1992, 89; De Lupis, International Law and the Independent State, 1987, 92.
37 A.G. Hurwitz: The Collective Responsibility of States to Protect Refugees, 2009, 169; Jennings: International law and refugee question, BYIL 1939, 112-113.
38 *Corfu Channel* case *(United Kingdom v. Albania)*, Judgment of 15 December 1949, I.C.J. Reports, 1949, p. 22.
39 *Island of Palmas* case (*Netherlands v. USA*), II RIAA 839, 1928, p. 839.
40 *Trail Smelter* Arbitration (*United States v. Canada*), 3 U.N. Rep. *Int'l Arb. Awards* 1905, 1941, p. 3.
41 J. Garvey, 'Toward a Reformulation of International Refugee Law', 26 *HARv. INT'L L.J.*, 1985, [Garvey] p. 483, 495.
42 L.T. Lee, 'The Right to Compensation: Refugees and Countries of Asylum', *Am. J. Int'l L.*, 1986 [Lee], p. 552; H. Garry, 'The Right to Compensation and Refugee Flows: A Preventative Mechanism in International Law', 10 *Int'l J. Refugee L.*, 1998, p. 106.

> "[B]oth 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."[43]

In case of mass influxes, the situation is once again similar, as the receiving State has no option to prevent the influx of people, similarly to the situation when she is not able to prevent fumes from crossing her borders.

Due to the abstract nature of the *sic uteretuo* principle, its violation must be linked to a specific right of a State – such as sovereignty and territorial integrity – in order to hold enough legal specificity so as to States could rely on it for invoking the international responsibility of the State of origin.[44] This legal adaptation seems inevitable in the course of present-day development of international refugee law.

As noted by the Permanent Court of International Justice in the *Lotus* decision, sovereignty of States[45] entails that States "may not exercise power in any form" in the territory of other States.[46] Territorial integrity[47] grants a "complete and exclusive sovereignty of a State over its territory."[48] This principle is part of customary law as established in the *Nicaragua* decision of the ICJ[49] and was further preserved in the Friendly Relations Declaration.[50]

Both the UN GA,[51] along with most qualified publicists[52] applied the principle to cases of mass influx, holding that the State of origin violates the sovereignty of the host State by generating an outfow, which the host State has no possibility to decline. Although the non-refouling State fulfills an international obligation when accepting the people fleeing towards her country, this does not preclude that the State of origin, by triggering outflow through human rights violating policies, violates the receiving State's territorial sovereignty.[53]

43 Lee, p. 552.
44 Hofmann, pp. 707-708.
45 I. Brownlie, 'Principles of Public International Law', 2003, p. 287.
46 *S.S. Lotus* case (*France v. Turkey*), 1927 PCIJ (Ser. A) No. 10, p. 18.; Friendly Relations Declaration, A/RES/2625, Art. 1.
47 Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Article 2(4).
48 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986 [*Nicaragua*], paras. 209, 258; *Armed Activities*, para. 164.
49 *Nicaragua*, para. 80.
50 Friendly Relations Declaration, Principle 6(2)(d).
51 UNGA Doc.12A (A/32/12/Add.1), 1977, para. (c).
52 H. Kelsen, 'Principles of international law', 2003, p. 248; Lee, p. 555.
53 Garvey, p. 494.

3.4.3 *Violations of* erga omnes partes *Obligations*

As noted above, in case the internal policies of the State of origin engendered a mass influx, non-refouling States can invoke the *erga omnes partes* obligations of the State of origin. This may be realized in various forms of human rights violations, all of which being embodied into State policies.

The first group of infringements relates to the fundamental obligation of States to provide an adequate standard of living enshrined in Article 11 of the ICESCR to those falling under the scope of the Covenant. As elaborated on by the Human Rights Committee, the main interpretative body of the two human rights covenants,[54] Article 11 entails people's right to water, the right to food, and the obligation of States to mitigate hunger among those present on their territory.[55] These human rights are frequently infringed by restrictive state policies.

Alternatively or even additionally, restrictive policies that entail discrimination of certain groups of people based on either race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status – as listed in Articles 2(1) and 26 of both the ICCPR and the ICESCR – often result in mass outflow of individuals that suffer from discrimination.

Arguably, these are the most frequent and typical human rights violations triggering mass migration cases, and as argued above, these human rights all possess an *erga omnes partes* character. As a partial conclusion, such repressive policies may give rise to enacting State's responsibility under international law, as non-refouling States have an interest in the refugee generating State's compliance with its obligations set out in the Covenants in order not to suffer the humanitarian consequences of mass migration flows.

3.5 Sine delicto Liability under International Law for the Injurious Consequences Caused by Mass Influx

Alternatively, if an internationally wrongful act cannot be established based on any of the above grounds, compensation may still be sought for the injurious consequences of conduct not prohibited or even expressly permitted by international law[56] under the regime of international liability.

54 *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports 2010, p. 639, para. 66.

55 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 15: *The Right to Water* (Arts. 11 and 12 of the Covenant), 20 January 2003, E/C.12/2002/11, para. 2 and 8; UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 12: *The Right to Adequate Food* (Art. 11 of the Covenant), 12 May 1999, para. 6.

56 ARSIWA commentary, p. 31, (4)(c).

The concept of liability was evolved by the International Law Commission[57] and is further evidenced by conventions,[58] soft law documents[59] as well as a wide array of judicial decisions.[60] The concept of liability started to emerge as a response to the absence of international law norms in relation to the devastating potential risks of nuclear testing.[61] Its basic aim was to approach a situation where the injurious conduct of the territorial State has not been shown to be wrongful.[62] Analogically to that, in the absence of applicable primary rules regulating the creation of mass influxes and their effects on the non-refouling State, the concept of liability appear as an appropriate tool to face the unduly heavy burdens placed by the State of origin on host States.

However, experience has shown that global and comprehensive liability regimes have failed to attract State participation[63] and concepts of harm and damage are not uniformly defined and appreciated in national law and practice.[64]

Constructions similar to international liability may also be used in support of this concept and may be relied on in judicial proceedings as persuasive analogies. For instance, the situation of distress embodies a quasi-identical situation to international liability. Their similairities lies in the fact that in the absence of an internationally wrongful act, compensation is nonetheless expected to be paid.[65] Therefore, an innocent third State is not expected to bear alone any actual losses arising from the invocation of distress.[66]

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57 Report of the International Law Commission on the work of its fifty-third session, 23 ILC Yearbook 2001 Vol. 2 part 2, paras. 78-85, pp. 144-145.; Daniel Barstow Magraw, 'Transboundary Harm: The International Law Commission's Study of "International Liability', *The American Journal of International Law*, Vol. 80, No. 2, April 1986, pp. 306-309.

58 1972 Convention on International Liability for Damage Caused by Space Objects, 961 UNTS 187, Art. II.; Convention on the Regulation of Antarctic Mineral Resource Activities, 1988, Art. 8(3).

59 A/51/10, ILC Report of its forty-eighth session, 6 May – 26 July 1996, Official Records of the General Assembly, Fifty-first session, Supplement No. 10; Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, 2001, A/56/10; Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, with commentaries, 2006, A/61/10.

60 *Indian Council for Enviro-Legal Action v. Union of India*, Supreme Court of India, 1996, 3 Supreme Court Cases, p. 212; *M. C. Mehta v. Kamal Nath and others*, Supreme Court of India, 1996, 1 Supreme Court Cases p. 388.

61 ILC Yearbook, 1985, vol. II(1), addendum, Document A/CN.4/384, p. 6. para. 20.

62 ILC Yearbook 1982 Vol. II (Part One) p. 52, 59.

63 Proposal for a Directive of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage, *Official Journal of the European Communities*, No. C 151 E, vol. 45, 25 June 2002, p. 132.; Global liability regimes have less chance of success, see A. Cassese, *International Law*, Oxford University Press, 2001, pp. 379-393.

64 International liability for injurious consequences arising out of acts not prohibited by international law (International liability in case of loss from transboundary harm arising out of hazardous activities), International Law Commission Document A/CN.4/531.

65 *Gabcíkovo*, p. 63, para. 101; p. 38, para. 47.

66 James Crawford, Second Report on State Responsibility, 1999, A/CN.4./498, para. 344.

67 ILC Yearbook 1985 Vol. II(1) addendum, Document A/CN.4/384, p. 6, para. 20.

been shown to be wrongful.[68] Analogically to that, in the absence of applicable primary rules regulating the creation of mass influxes and their effects on the non-refouling State, the concept of liability is an appropriate tool to face the unduly heavy burdens caused by the State of origin.

Based on the ILC's work on state liability[69] and the opinion of scholars,[70] the objective liability of a State can be established if the following criteria are met.[71] First, objective liability can only be established if there is an actual harm.[72] Such harm is needed due to the absence of a breach of a primary obligation[73] as suggested by Special Rapporteur *Quintin-Baxter* in his work on liability.[74] Receiving States usually suffer such actual harm in the form of concrete damage caused by the fleeing people and in the form of costs arising out of hosting them.

Second, there must be a causal link between the harm and the activity complained of.[75] Since the outflow of people from the State of origin is primarily triggered by unfavourable national legislations, human rights violations or internal political disturbances involving state authorities, a causal link clearly exists. If, the State of origin were to argue that other factors were also relevant in generating the outflow, the causality would still be established with the State of origin based on concurring factors. This causal requirement is supported by the *Tehran Hostages*[76] and *Corfu Channel*[77] cases, by a good number of scholars[78] and has been also embraced by the United States in the *Aerial Incident* case.[79] The irrelevance of concurring natural events in establishing requisite causality was also reaffirmed by the ILC.[80]

68 ILC Yearbook 1982 Vol. II (Part One) pp. 52, 59.

69 A/51/10 Report of the International Law Commission on the work of its forty-eighth session, 6 May-26 July 1996, Official Records of the General Assembly, Fifty-first session, Supplement No. 10 Extract from the Yearbook of the International Law Commission: 1996, vol. II(2) pp. 103-107. paras. 3-27.

70 D. Barstow Magraw, 'Transboundary Harm: The International Law Commission's Study of "International Liability", *The American Journal of International Law* Vol. 80, No. 2, April 1986, p. 310; D. Freestone & E. Hey, 'The Precautionary Principle and International Law', *International environmental law and policy series*, vol. 31, 1996, p. 67.

71 Michel Montjoie, The concept of liability in the absence of an internationally wrongful act, *in* J. Crawford & A. Pellet & S. Olleson (Eds.), *The Law of International Responsibility*, Oxford University Press, 2010 [Crawford commentary] p. 508.

72 Ibid.

73 Ibid.

74 RO. Quintin-Baxter, Second Report on International Liability, *ILC Yearbook* 1981, Vol II(1), 103, 123, para. 93; and Third Report on International Liability, *ILC Yearbook* 1982, Vol II(1), 51, 59, para. 35.

75 Crawford commentary, p. 509.

76 United States Diplomatic and Consular Staff in Tehran (United States v. Iran), Merits, Judment of 24 May 1980, ICJ Rep. 198, pp. 29-33.

77 *Corfu*, pp. 17-18 and 22-23.

78 T.Weir, Complex liabilities, *in* A. Tunc (Ed.), *International Encyclopedia of Comparative Law*, 1971, Volume IX, Chapter 12, p. 43.

79 *Aerial Incident of 27 July 1955*, I.C.J. Pleadings, p. 229. <www.icj-cij.org/files/case-related/36/10995.pdf>.

80 ARSIWA commentary, p. 93. para. 12.

Third, the harm must be attributable to the originating State, meaning that the activity causing the harm should fall within the jurisdiction or under the (effective) control of the State of origin.[81] There is no automatic attribution; rather the harm ought to be assigned to the State on a case-by-case basis.[82] Since the outflow of people from the State of origin is tipically triggered by national legislations or human rights violations, as well as internal political disturbances within the jurisdiction of that State, the third criteria to establish the liability of the State of origin is also satisfied.

Although there is no case practice supporting the application of a general liability regime under international law, the current need for the concept of liability is arguably more intense than ever before. It is submitted here that in order to enforce human rights standards, the denial of which results in severe economic and social distrubances outside the State of origin, progressive development of the liability regime seems to be desirable and may even be inevitable.

3.6 Compensation Due to Host States under the Principle of Burden-Sharing

There is ample discussion regarding the principles according to which the burdens of sudden, massive refugee flows imposed on receiving States should be distributed among members of the international community. This urgent need flows from the fact that at present these burdens are borne unequally. The lack of any international rule on a more balanced sharing of these burdens ultimately jeopardizes the regime of international human rights law.

As an early response to humanitarian challenges, the concept of burden-sharing emerged in the 1950s as a principle of international solidarity among States receiving refugees.[83] It was *Hathaway* and *Neve* who first proposed the introduction of this principle into the international human rights law regime.[84] In its current form, this concept mainly warrants financial assistance[85] to countries of asylum in situations of mass movements.[86]

81 A/CN.4/423 and Corr.1 & 2, Fifth report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Julio Barboza, Special Rapporteur; Extract from the *Yearbook of the International Law Commission*: 1989, vol. II(1) pp. 135-136 paras. 18-21.

82 ILC Yearbook 1996, Vol II(2), Annex I, p. 111.

83 Christina Boswell, Burden-sharing in the New Age of Immigration. Migration Policy Insitute, November 1, 2003. <www.migrationpolicy.org/article/burden-sharing-new-age-immigration>.

84 Hathaway-Neve, p. 115.

85 There exists another form of burden-sharing, i.e. physical burden-sharing, realised in the dispersal of asylum seekers and refugees among States. However, this resettlement approach on one hand is not as frequently adopted as the financial one, and on the other hand it does not answer all the questions raised by the present paper. Physical burden-sharing practices often result in unequal distribution of people, and furthermore do not resolve the question of responsibility of the generating State vis-à-vis States forcibly accepting fleeing refugees. Consequently, in our paper, we focus on financial burden-sharing.

86 UNGA Doc. A/AC.96/1003, 2004. paras. (f)(j)(i)(m), UNGA Doc. 12A (A/36/12/Add.1), 1981, para. IV(4).

The core of burden-sharing is well-established in international practice[87] and derives from three fundamental documents of international law, all embodying the overarching norm of international cooperation. Article 1(3) of the United Nations Charter, setting the achievement of international cooperation as a problem solving method as its central purpose,[88] the preamble of the 1951 Refugee Convention reflecting the obligation of all States to alleviate the unduly heavy burden placed on receiving States,[89] and thirdly, Article 2(1) ICESCR, highlighting the obligation of cooperation between signatory States.[90]

The 'unduly heavy' nature of the burden placed on States facing mass influx can hardly be contested. Not only accomodating migrants and refugees require costly measures, but also their integration into the given society. These burdens are often coupled with long-term challenges with regard to adverse impacts on the host State's economic and social systems.

Perhaps a major role in the current crisis of the international system of refugee protection, as stated by *Hathaway* and *Neve*, stems from the individualized attitude of States towards their own responsibility:

> "[The] distribution of the responsibility […] is not offset by any mechanism to ensure adequate compensation to those governments that take on a disproportionate share of protective responsibilities. To the contrary, any fiscal assistance received from other countries or the UNHCR is a matter of charity, not of obligation, and is not distributed solely on the basis of relative need."[91]

However, our present proposal does not aim to mandate a burden-sharing obligation for all instances of mass influxes, where the State responsible for the influx can be directly, or indirectly, based on a chain of causation, identified. In our proposal, burden-sharing obligations would only step in when the absolute and exclusive responsibility of the refugee-generating State cannot be established.

87 P. Schuck, 'Refugee Burden-Sharing: A Modest Proposal', 22 *Yale J. Int'l L.* 243, 1997 [Schuck], p. 86.

88 "To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." See also Article 55 of the UN Charter.

89 "Considering that the grant of asylum may place unduly heavy burdens oncertain countries, and that a satisfactory solution of a problem of which theUnited Nations has recognized the international scope and nature cannottherefore be achieved without international co-operation" 1951 Refugee Convention, Preamble No. 4.

90 "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

91 J. C. Hathaway & R. A. Neve, 'Making Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection', 10 *Harvard Human Rights Journal*, 1997 [Hathaway-Neve] p. 141.

Such a solution is a combination of the 'root cause strategy' described by *Peter H. Schuck* in 1997[92] and the method of financial burden-sharing described above.[93] After identifying the root cause of the outflow, the sharing of such financial burdens is shifted to the generating State. Therefore, even if no international obligation of preventing refugee generation can be identified, States could be ordered to bear the consequences of their internal policies affecting neighbouring or other States.

The need for at least such a burden-sharing principle is manifest within the international community, which witnesses an increasing number of States raising concerns against accepting heavy responsibilities due to refugees arriving to their territories, while the real catalizators of the problem are hiding behind impunity. The noble vision of such a burden-sharing obligation,[94] is neither a new idea, nor is impossible. It is therefore up to the international community to set up a practice to prevent unresponsibly acting States from forcing their own nationals to leave their homeland.

3.7 Evidentiary Requirements and the Practise of the United Nations Compensation Commission

Although the lack of state practice concerning compensation for expenses incurred as a result of mass influxes is a commonly used argument against any such international claim, in fact, there us a notable precedential practice in this respect, namely, the functioning of the United Nations Compensation Commission (UNCC).

The UNCC was created in 1991 as a subsidiary organ of the UN Security Council with a mandate to process claims of compensation for losses and damage suffered as a direct result of Iraq's unlawful invasion and occupation of Kuwait.[95] The Council has pronounced the international responsibility of Iraq for the invasion in Security Council Re-

92 Schuck, p. 261.

93 There already exist a few examples of large-scale financial burden sharing arrangements – although not in such a concrete way as decribed in our proposal, and not by the State causing the influx in the first place. The Comprehensive Plan of Action in Asia funded mainly by the UNHCR by sums from other countries, or at the global level, countries' voluntary contributions to UNHCR to help the organization run assistance programmes in those refugee hosting countries that face disproportionate burdens, can be regarded as one, albeit limited, form of such financial burden-sharing arrangements. In the European Union, fiscal burden-sharing in the asylum field has been applied since the establishment of the European Refugee Fund (*E-R. Thielemann: Towards A Common EU Asylum Policy: The Political Economy of Refugee Burden-Sharing*, paper prepared for the conference '*Immigration Policy after 9/11: US and European Perspectives*', University of Texas, Austin, 2-3 March, 2006, p. 16). Furthermore, the United States Government, for example, provided financial assistance to the Jordanian Ministries of Education and Health to help preserve Jordan's willingness to admit Iraqi refugee children to its public schools and refugees to its public health facilities and Brazil has a Memorandum of Understanding with UNHCR that allows it to fund projects in other countries (*K. Newland: Cooperative Arrangements to Share Burdens and Responsibilities in Refugee Situations Short of Mass Influx*, Migration Policy Institute, 2011, p. 7).

94 Schuck, p. 297.

95 SC Res 687, 8 April 1991, Operative clause No. 16.

solution 687, which established the existence of an internationally wrongful act.[96] Therefore, the UNCC ought only to establish requisite causality and the quantum of losses.

In the framework of category "F" claims, governments were allowed to file claims for losses incurred on account of evacuating citizens, providing relief to citizens, damage to other government property, and damage to the environment.[97] Claimants alleged that the presence of refugees in their territories was a direct result of the internationally wrongful act of Iraq, and caused adverse impacts on their environment and depleted their natural resources.

The UNCC's precedent is all the more noteworthy if one considers the astronomical amount of compensation that has been awarded. Notably, approximately 14.4 billion US dollars were awarded in compensation by the Governing Council to host States.[98] Although it was not a direct State-to-State procedure where the non-refouling State sued the State of origin, it is still a glaring example of the possibility to obtain monetary compensation for expenses occuring as a result of accepting people by host States.

The evidentiary requirements of the UNCC may also be informative for similar future claims. Instead of a solely explanatory statement of the claimant, the Governing Council required documentary evidence to demonstrate that the alleged losses or expenses were a direct result of Iraq's unlawful invasion, and thus, the internationally wrongful act. As to the causal requirements, no intervening or supervening acts having broken the chain of causation were allowed for compensable claims.[99]

International courts and tribunal, including the International Court of Justice may apply different standards of proof.[100] As Riddel emphasizes, the applicable standard may vary dependeing on the gravity of the case,[101] as the Court decides upon their usage on a case-by-case basis and "adjusts the level of proof required for a particular fact with ease."[102]

In cases involving international responsibility of States, the Court often applied a standard, which was higher than the mere balance of probabilities, but lower than the beyond reasonable doubt standard. The standard created by the Court in each and every case was a creative one: linking the standard to a specific element of a particular case, thereby creating a special, case-specific burden, the requirement of clear and convincing

96 Ibid.

97 See <www.uncc.ch/claims>.

98 See <www.uncc.ch/category-f>.

99 Report and Recommendations made by the Panel of Commissioners Concerning Part One of the Fourth Installment of "F4" Claims, Governing Council, United Nations Compensation Commission, S/AC.26/2004/16, 9 December 2004, p. 15, para. 48.

100 A. Riddel & B. Plant, *Evidence Before the International Court of Justice*, British Institute of International and Comparative Law, 2009, p. 126.

101 Ibid. p. 132: "It would seem that three categories can be discerned: first, competing claims not attributing international responsibility, such as boundary disputes; second, cases where the international responsibility of the State is involved; and third, charges of exceptional gravity against a State."

102 Ibid.

evidence.[103] Since our present issue involves cases of international responsibility, and are so sensitive and fact specific, having no previous practice of international tribunals, such a case-by-case determination of the fulfillment of the standard is needed and would arguably suffice.

3.8 Conclusion

This paper is devoted to draw up a scheme for possible solutions for alleviating the humanitarian burdens imposed on States as a result of forcibly receiving large-scale migrant influxes. The article first explored the issue of standing of host States to claim compensation for their burdens and later it enumerated all possible legal grounds for establishing the responsibility of the generating State for an internationally wrongful act – either through a direct obligation of States, or an indirect one through the violation of sovereignty or *erga omnes partes* obligations –, progressed by elaborating on the possibility of applying a special regime for solving the problem, and concludes by considering the principle of burden sharing as a fallback option of mitigating the burdens and the practice of the United Nations Compensation Commission.

One may argue that requiring the refugee-creating State to compensate non-refouling States might perpetuate the very instability, which has triggered the refugee crisis in the first place.[104] However, we firmly believe that providing legal possibilities for claiming compensation does not equal to a general obligation to sue other States, and therefore, would not aggrevate the difficulties involved in the migrant crisis.

This article sought to stress that if the international community as a whole perceives the current situation as an unduly heavy burden, the current system of international refugee law will fall apart, which will further deteriorate the situation of the migrants and refugees. Accordingly, for the sake of creating a sustainable migration regime, where States remain willing to accommodate people fleeing grave human rights violation, there is a striking need to allow the claims of States to charge the State of origin with the costs of accommodating. In that event, the host State will decide whether she deems it necessary to bring a claim against the State of origin. Nevertheless, not having a general rule providing States with such a possibility at all endangers the very foundations of the current system, and herewith the situation of those people most in need.

To conclude, in order to sustain the current normative system of the protection of refugees, international law ought to provide an effective solution for the legitimate concerns of host States. If the burdens borne by host States go unrectified, the willingness of

103 Ibid. p. 133; Armed Activities, para. 173; R. Teitelbaum: 'Recent Fact-Finding Developments at the International Court of Justice', *The Law and Practice of International Tribunals*, 2007, p. 127.

104 J. Peavey-Joanis: 'A Pyrrhic Victory: Applying the Trail Smelter Principle to State Creation of Refugees', In R. Bratspies & R. Miller (Eds.), *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration* (pp. 254-267), Cambridge University Press, 2006, p. 264.

the most adversely affected members of the international community will dramatically decline, further deteriorating the situation of the refugees. In fact, the central dilemma of the future of international migration law itself focuses upon the question whether sovereign States are willing to integrate themselves in the system of migration law as is equal components, and to accept a new international approach regarding the consequences of their policies.